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PAPER CHARTER: SELF-DEFENSE AND THE FAILURE OF THE UNITED NATIONS COLLECTIVE SECURITY SYSTEM

Robert J. Delahunty⁺

The inherent right of individual and collective self-defense, recognized in Article 51 of the United Nations Charter,¹ has come under sustained scrutiny in recent years. Two interpretative tendencies—moving in opposite directions—can be observed. On the one hand, the United States government has argued for a broadened understanding of the Article 51 right, contending, for example, that it should be construed to permit “self-defense” in a range of circumstances in which an armed attack neither has occurred nor is imminent. On the other hand, the International Court of Justice (ICJ) has taken an increasingly restrictive view of Article 51 and the customary norms associated with it, for example, by construing it to prohibit self-defense against attacks that do not reach a certain level of gravity or whose source is not identified by convincing evidence. The former trend gives great weight to the risk of attack by rogue states or terrorist groups sponsored by them; the latter trend emphasizes the risk that in the absence of substantial legal constraints, powerful states will be too prone to take recourse to violence.

This Article argues that the choice between these conflicting interpretative trends must take greater account of the fact that the United Nations Charter is an integrated whole: Article 51 is not a freestanding provision, and cannot be read in isolation from the other clauses and overall structure of the Charter. Rather, Article 51 is a carve-out from a broader scheme of peace maintenance through the collective security system that the Charter was designed to embody. Although the original intent of Article 51 was, and remains, vigorously disputed, it is plausible to construe it as imposing fairly severe restrictions on the “right” of self-defense previously recognized by international law. States that accepted those and other limitations on their traditional prerogatives with respect to war

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1. U.N. Charter art. 51.

and peace when they ratified the Charter acted in reliance on the belief that the Charter's scheme of collective security would afford them at least as much protection for their national security as they had agreed to relinquish. In the event, however, that belief has proven to be badly mistaken: the Charter's collective security system has hardly ever worked (Korea and the First Gulf War being the main—though arguable—exceptions), and the post-Charter world has been marked by the persistence of war.

Given that the nations of the world cannot rely on the Charter's collective security system to protect them from attack, they should be relieved of any legal obligation to accept the limits prescribed by Article 51, as construed by the ICJ, when considering the legality of proposed measures of self-defense. Instead, they should be entitled to resume their pre-Charter right of self-defense and even, in light of changed circumstances, to seek to develop more permissive customary norms.

If the Charter's use of force regime is rejected, however, there remains the question of how collective action against threats to, or breaches of, the peace can be organized, and what legal rules should regulate such interventions. The question is ultimately one of designing international institutions that combine both "legitimacy" and "effectiveness." None of the currently favored mechanisms for stabilization through the use of force manage to combine legitimacy and effectiveness in satisfactory ways. These defective mechanisms include the Charter system itself, the use of regional security alliances such as NATO, and ad hoc "coalitions of the willing" led by the United States. Pending a satisfactory solution to the problem of designing an acceptable international regime governing the use of force, the United States' policy of acting "multilaterally if possible, [but] unilaterally if necessary"² will and should continue to be followed.

Introduction

Few treaty clauses have given rise to as much controversy as Article 51 of the United Nations Charter, which states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the

2. *E.g.*, U.S. Pac. Command, U.S. Pacific Command Goals, <http://www.pacom.mil/about/goals.shtml> (last visited Mar. 31, 2007); *see also* U.S. NAT'L SEC. COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6 (2002), <http://www.whitehouse.gov/nsc/nss.pdf>.

Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.³

In recent years, with the rise of mass terrorism and the threat of the proliferation of weapons of mass destruction, controversy over the scope and limits of the Article 51 right of self-defense has sharpened.⁴ Two distinct and opposing trends in the law and state practice can be distinguished: one trend promoted by the United States, the other contrary trend promoted by the ICJ.

To begin with, the United States government, in something of a reversal of its earlier position,⁵ has begun to insist that the right of self-defense enables it to preempt certain emerging threats:

3. U.N. Charter art. 51.

4. Much of the recent controversy has focused on the question of preemptive or preventive war. One should, however, take account of the "empirical finding . . . that preemptive wars almost never happen. Of all interstate wars since 1816, only three are preemptive: World War I, Chinese intervention in the Korean War, and the 1967 Arab-Israeli War." Dan Reiter, *Exploding the Powder Keg Myth: Preemptive Wars Almost Never Happen*, INT'L SECURITY, Fall 1995, at 5, 6. Israel's 1956 Sinai War arguably provides another example of preemptive interstate war. See Jack S. Levy & Joseph R. Gochal, *Democracy and Preventive War: Israel and the 1956 Sinai War* (1999) (unpublished paper presented at the International Studies Association) (on file with Catholic University Law Review). To these may now be added the Second Gulf War of 2003.

There are at least two ways to read the historical record. One is that preemptive or preventative interstate wars are likely to remain rare, not so much because of the constraints of international law, but the states that initiate such wars often pay substantial *political* costs for doing so (e.g., by causing neutral states to ally with the target state against the state that made the first strike), Reiter, *supra*, at 25-28, or because the very fear of preemption can facilitate a peaceful resolution of the crisis, *id.* at 28-32.

The other inference that might be drawn from the record is that the Second Gulf War is the harbinger of an era in which the risk of preemptive war becomes greater. This might be so because of the confluence, particularly noticeable after September 11, 2001, of three developments: the rise of mass terrorism by both state and non-state actors; the proliferation of weapons of mass destruction (or at least of the knowledge and capability needed to create them); and the appearance of "rogue" states or "failed" states willing to host terrorists (or unable to repel them) and perhaps ready to furnish them with weapons of mass destruction.

5. On June 7, 1981, Israel launched a preemptive air attack against an Iraqi atomic reactor called "Osirak," which was in the final stages of its construction. Iraq complained to the Security Council, and Israel defended its action as lawful self-defense under Article 51. See Security Council Consideration of a Complaint by Iraq, June 8, 1981, 36 UN SCOR 228-2288 mtgs (1981). In Security Resolution 487, the Security Council "[s]trongly condemn[ed] Israel's action for being] in clear violation of the Charter of the United Nations and the norms of international conduct." S.C. Res. 487, ¶ 1, U.N. Doc. S/RES/487 (June 19, 1981) (emphasis omitted). The United States voted in favor of the resolution, which passed unanimously. However, the U.S. delegate to the Security Council, Ms. Jeanne Kirkpatrick, did not indicate a position on the claimed right; and the U.S. State Department later made it clear in testimony to Congress that the United States had not reached any conclusion regarding the legality of Israel's actions. TIMOTHY L.H. MCCOR-

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. . . .

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. . . . Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.

. . . .

The 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.⁶

MACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR 32-34 (1996); Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599, 601 (2003).

On other occasions, the United States has taken the position in the United Nations that Article 51 of the Charter permits "anticipatory" self-defense (as distinct from the kind of preventative action at issue more recently). See D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 189 (1958) (citing U.S. position in 1952 meeting of the General Assembly's Sixth Committee discussing definition of aggression). However, on one momentous occasion when it might have sought to justify its actions as anticipatory self-defense—the Cuban "quarantine" of 1962—the United States consciously (if mistakenly) chose *not* to rely on that argument. See ABRAM CHAYES, THE CUBAN MISSILE CRISIS 65 (1974). But see Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL'Y 51, 59 (2001) (recharacterizing "quarantine" claim as anticipatory-self defense); Brunson MacChesney, Editorial Comment, *Some Comments on the "Quarantine" of Cuba*, 57 AM. J. INT'L L. 592 (1963) (defending quarantine as legitimate self-defense); Myres S. McDougal, Editorial Comment, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963) (same); Eugene V. Rostow, *Until What? Enforcement Action or Collective Self-Defense?*, 85 AM. J. INT'L L. 506, 515 (1991) ("Although President Kennedy spoke of the United States action as one of self-defense, his State Department, in presenting the case to the Security Council, the OAS, and the public, sought to justify the American use of force in Cuba primarily under the Rio Treaty and the action of the Organization of American States pursuant to that Treaty. This legal argument is untenable. . . . The only possible legal basis for the action taken by the United States in the Cuban missile crisis was therefore its 'inherent' right of self-defense, reaffirmed by Article 51 of the Charter.").

6. U.S. NAT'L SEC. COUNCIL, *supra* note 2, at 15; see also U.S. DEP'T OF STATE, NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION 1 (2002), <http://www.state.gov/documents/organization/16092.htm>.

Moreover, in the Authorization for Use of Military Force Against Iraq Resolution of 2002,⁷ Congress joined the executive branch in affirming that preemptive measures against rogue states (there, Iraq) that were capable of producing and willing to use weapons of mass destruction were lawful and justifiable forms of self-defense, even when no attack by such a state had occurred or was imminent.⁸

Plainly, the United States has taken an expansive view of its Article 51 rights.⁹ Moreover, although the assertion of a right of preemptive self-defense in this emphatic form is usually associated with the Bush administration, it was also made, if sometimes more mutedly, by both the Reagan and Clinton administrations in the context of actions against terrorism.¹⁰ Other democratic states, including Israel and Australia, hold similar views.¹¹ Even the European Council's *A Secure Europe in a Better World: European Security Strategy* asserts:

Our traditional concept of self-defence—up to and including the Cold War—was based on the threat of invasion. With the new threats, the first line of defence will often be abroad. . . . [W]e

7. Pub. L. No. 107-243, 116 Stat. 1498.

8. The joint resolution stated:

Whereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself . . .

Id.; see also REPORT IN CONNECTION WITH PRESIDENTIAL DETERMINATION UNDER PUBLIC LAW 107-243, reprinted in 149 CONG. REC. H1958, H1958-59 (daily ed. Mar. 19, 2003).

9. "Preemptive" self-defense (or "preventative" self-defense) is usually, and rightly, distinguished from "anticipatory self-defense," although it is also often acknowledged that the different doctrines lie along the same spectrum. In one recent formulation, it is noted:

The claim to preemptive self-defense is a claim to entitlement to use unilaterally, without prior international authorization, high levels of violence to arrest an incipient development that is not yet operational or directly threatening, but that, if permitted to mature, could be seen by the potential preemptor as susceptible to neutralization only at a higher and possibly unacceptable cost to itself. Preemptive self-defense differs from anticipatory self-defense in that those contemplating the latter can point to a palpable and imminent threat.

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

10. *Id.* at 527-30.

11. See ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS 211 (2006); Reisman & Armstrong, *supra* note 9, at 538-45; see also Timothy Kearley, *Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent*, 3 WYO. L. REV. 663, 664 n.2 (2003).

should be ready to act before a crisis occurs. Conflict prevention and threat prevention cannot start too early.¹²

In the countertrend, the ICJ, in a series of decisions originating with *Nicaragua v. United States*,¹³ and continuing through *Oil Platforms*¹⁴ and the *Wall Case*,¹⁵ has addressed, in a variety of contexts, the scope of the Article 51 (as well as the customary) right of self-defense.¹⁶ Although the ICJ has reserved the specific question whether Article 51 permits anticipatory self-defense,¹⁷ most recently in its December 2005 decision in *Armed Activities on Territory of the Congo (Democratic Republic of Congo v. Uganda)*,¹⁸ the ICJ appears to be attempting to impose substantial limitations on the right of self-defense.¹⁹ In one scholar's view, the overall effect of the ICJ's opinions

appears to be that under the UN Charter, (1) a state may provide weapons, logistical support, and safe haven to a terrorist group; (2) that group may then inflict violence of any level of gravity on another state, even with weapons of mass destruction; (3) the second state has no right to respond in self-defense against the first state because the first state's provision of such assistance is not an "armed attack" within the meaning of Article 51; and (4) the second state has no right to respond in self-defense against the terrorist group because its conduct cannot be imputed to the first state, absent a showing that the first state "sent" the terrorist group on its mission.²⁰

12. COUNCIL OF THE EUROPEAN UNION, A SECURE EUROPE IN A BETTER WORLD: EUROPEAN SECURITY STRATEGY 7 (2003), available at <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>.

13. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

14. Oil Platforms (Iran v. U.S.) (Nov. 6, 2003), 42 I.L.M. 1334.

15. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion (July 9, 2004), 43 I.L.M. 1009.

16. These ICJ opinions are surveyed and criticized in Gregory E. Maggs, *The Campaign to Restrict the Right to Respond to Terrorist Attacks in Self-Defense Under Article 51 of the U.N. Charter and What the United States Can Do About It*, 4 REGENT J. INT'L L. 149 (2006).

17. See *Nicaragua*, 1986 I.C.J. at 103; see also Sean D. Murphy, *The Doctrine of Pre-emptive Self-Defense*, 50 VILL. L. REV. 699, 702 (2005); Leo Van den hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L L. REV. 69, 93-94 (2003-2004).

18. *Armed Activities on Territory of the Congo (Dem. Rep. Congo v. Uganda)* (Dec. 19, 2005), 45 I.L.M. 271.

19. See *id.* at 306. Indeed, one could argue that *Oil Platforms* effectively answers "no" to the question whether anticipatory self-defense is lawful under the Charter. If a state must meet *Oil Platforms'* demanding proof standard before it can exercise legitimate self-defense in response to *known* uses of force against it, it will often be insuperably difficult (given the inevitable imperfections of intelligence information) to satisfy that standard *before* the attacker strikes. See *infra* notes 248-253 and accompanying text.

20. Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit From the ICJ?*, 99 AM. J. INT'L L. 62, 66 (2005).

Even those who would find that characterization overstated must acknowledge that the ICJ jurisprudence of self-defense is at odds with recent state practice—including that of the UN Security Council. For instance, the ICJ continues to regard it as an open question “whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces”²¹ such as al Qaeda, when the attacks cannot be “imputed” to a state, even though the Security Council had clearly indicated in Resolution 1368, and in later actions, that the right of self-defense *does* indeed exist against such an attacker.²² Indeed, the distinguished German legal scholar Bruno Simma, now an ICJ judge, took the court to task in his separate opinion in *Democratic Republic of Congo v. Uganda* for ignoring the fact that “Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as ‘armed attacks’ within the meaning of Article 51.”²³

The United States has repeatedly and emphatically disagreed with the ICJ’s emerging jurisprudence of self-defense. In *Nicaragua*, the United States initially objected to the ICJ’s jurisdiction.²⁴ Nonetheless, the ICJ, in the jurisdictional phase of the case, rejected that claim.²⁵ Thereupon the United States announced that it had “decided not to participate in further proceedings in this case”²⁶ and, about a year later, it withdrew its consent to the ICJ’s compulsory jurisdiction.²⁷ The ICJ ultimately ruled on the merits of *Nicaragua* in 1986, deciding (over dissents from the American, British, and Japanese judges) that the United States had violated its obligations under customary international law not to use force against another state or to intervene in its affairs, and rejecting the argu-

21. *Dem Rep. Congo v. Uganda*, 45 I.L.M. at 306.

22. Michael N. Schmitt, *U.S. Security Strategies: A Legal Assessment*, 27 HARV. J.L. & PUB. POL’Y 737, 748 (2004); Michael C. Wood, *Towards New Circumstances in Which the Use of Force May Be Authorized? The Cases of Humanitarian Intervention, Counter-Terrorism, and Weapons of Mass Destruction*, in THE SECURITY COUNCIL AND THE USE OF FORCE 75, 86-87 (Niels Blokker & Nico Schrijver eds., 2005); see also Thomas Franck, *Comments on Chapters 7 and 8*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 264, 270 (Michael Byers & Georg Nolte eds., 2003). Franck makes the (surely unanswerable) argument that the Security Council itself took Chapter VII measures against al Qaeda, and that if the Council is competent to act in that manner against a non-state attacker, member states must be competent to exercise self-defense against one as well. Franck, *supra*, at 270.

23. *Dem. Rep. Congo v. Uganda*, 45 I.L.M. at 370 (Simma, J., separate opinion).

24. *Military and Paramilitary Activities (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 I.C.J. 392, 395 (Nov. 26).

25. *See id.* at 442.

26. Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, Jan. 18, 1985, reprinted in 24 I.L.M. 246 (1985).

27. *See* Letter from George P. Shultz, U.S. Sec’y of State, to Javier Perez de Cuellar, Sec’y-Gen. of the United Nations (Oct. 7, 1985), in 24 I.L.M. 1742 (1985).

ment that the United States' military and paramilitary activities were justifiable acts of collective self-defense undertaken in conjunction with the government of El Salvador.²⁸ The United States then pointedly rebuffed the ICJ: "It announced that it would not abide by the judgment, vetoed subsequent proposed Security Council resolutions seeking to enforce the judgment, and appropriated additional funds for the actions in question it had taken against Nicaragua."²⁹

The United States also strongly disagreed with the ICJ's adverse decision in *Oil Platforms*, where the scope of the right of self-defense was at issue again.³⁰ As the United States State Department Legal Adviser read the *Oil Platforms* opinion, it implied several unfounded and erroneous propositions of international law, including the view "that an attack involving the use of deadly force by a State's regular armed forces on civilian or military targets is not an 'armed attack' [within the meaning of Article 51] triggering the right of self-defense unless the attack reaches some unspecified level of gravity."³¹ The Legal Adviser sharply criticized this view, arguing that it was "inconsistent with well-settled principles of international law," that it "would make the use of force more rather than less likely, because it would encourage States to engage in a series of small-scale military attacks, in the hope that they could do so without being subject to defensive responses," and that it had "no support in international law or practice."³² Speaking for the government, the Legal Adviser stated that "[f]or its part, if the United States is attacked with deadly force by the military personnel of another State, it reserves its inherent right preserved by the U.N. Charter to defend itself and its citizens."³³

Occupying a position somewhere between that of the United States and the ICJ (although appreciably closer to the latter), the 2004 report of the Secretary-General's High-level Panel on Threats, Challenges and Change, entitled *A More Secure World: Our Shared Responsibility*,³⁴ took the position that

notwithstanding the language of . . . article [51] referring only to the right arising "if an armed attack occurs," . . . [p]rovided there

28. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 146-47 (June 27).

29. JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 263 (2004) (footnote omitted).

30. William H. Taft, IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 295 (2004).

31. *Id.* at 299.

32. *Id.* at 300-02.

33. *Id.* at 302.

34. U.N. High-level Panel on Threats, Challenges & Changes, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *A More Secure World*].

is credible evidence of . . . an imminent threat, and the threatened state has no obvious alternative recourse available, there is no problem—and never has been—with that state, without first seeking Security Council approval, using military force “preemptively.”³⁵

“The problem arises,” says the High-level Panel, “where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability.”³⁶ In that situation, the panel says:

The short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. . . .

. . . [I]n a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action.³⁷

Adopting the panel’s views on this issue,³⁸ Secretary General Kofi Annan’s 2005 report, *In Larger Freedom*,³⁹ also took the position that, while anticipatory self-defense against an imminent threat was lawful under the Charter, the preventive use of force (as in the Second Gulf War) required Council authorization.⁴⁰

How is the deepening disagreement over the scope and limits of Article 51 to be decided—or, more modestly, how ought the discussion even be conducted? Many examinations of the question, including the opinions of the ICJ, consider the question of Article 51’s meaning in isolation from

35. Gareth Evans, President, Int’l Crisis Group, Keynote Address to the Heinrich Boll Foundation’s Fifth Annual Foreign Policy Conference: The Role of International Law and the United Nations in a Globalizing World (June 24, 2004), available at <http://www.crisisgroup.org/home/index.cfm?id=2832&1=1>.

36. *A More Secure World*, *supra* note 34, ¶ 188.

37. *Id.* ¶¶ 190-91.

38. Professor O’Connell takes the reports of the Secretary General and the High-level Panel and the actions that followed them to express a reaffirmation of the “classic” interpretation of the Charter’s use of force rules by both the Secretary General and the majority of member states. See Mary Ellen O’Connell, *The Counter-Reformation of the Security Council*, 2 J. INT’L L. & INT’L REL. 107, 107 (2005).

39. The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *In Larger Freedom*].

40. *Id.* ¶¶ 124-25 (“Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened. . . . Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security.”).

the remainder of the United Nations Charter, treating Article 51 as though it were a separate, freestanding norm, essentially unrelated to the document in which it is embedded. The result has been myopic concentration on the text of the Article, or on its negotiating history, or on state practice relating to "self-defense" before and after the adoption of the Article, or on the ICJ opinions glossing its meaning, and inattention to the place of Article 51 within the overall structure, logic, and design of the Charter system. The closely woven, organic interconnections between the use of force rules in Chapter II, the military powers of the Security Council in Chapter VII, and the preservation of a limited right of self-defense in Article 51, thus tend to be overlooked or discounted. In particular, insufficient consideration is given to the nature of the collective security system that was a paramount purpose of the Charter, and the roles of individual and collective self-defense within that security system.

Because this tendency to view Article 51 in isolation neglects the Article's integral relationship with other Charter provisions, the legal consequences of the decades-long failure of the Charter's collective security regime have characteristically been disregarded. Yet the failure of the Charter's collective security regime is unquestionably relevant to the questions of whether or how far Article 51 retains normative force. Under commonly accepted legal principles, the failure of the Charter system to achieve such an essential objective could readily be held to relieve parties to the Charter from any legal obligation they would otherwise have to observe pursuant to Article 51 (or, for that matter, by Chapter II). The persistent inability of the United Nations to provide and maintain a functioning collective security system can reasonably be viewed as a massive, multilateral breach; a radical failure of consideration; or a fundamental and unforeseen change of circumstances that entitles the parties, if they choose, to suspend or even terminate their performance of the restrictions encapsulated in Article 51. To be sure, the Charter's rules of force, including aspects of Article 51, may have wholly or partly acquired the status of *customary* law, and be independently binding on those grounds.⁴¹ But the Charter *itself* has been a powerful influence (to say no more) in shaping that custom (if it exists). Indeed, the ICJ's claim in *Nicaragua*, for example, that it was applying "customary" rules for the use of armed force rather than construing Article 51 was a transparent legal fiction⁴²: the ICJ managed to find just *enough* (notional) difference between Article 51 and customary use of force rules to give itself jurisdic-

41. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 94, 96-97 (June 27).

42. See David K. Linnan, *Self-Defense, Necessity and U.N. Collective Security: United States and Other Views*, 1 DUKE J. COMP. & INT'L L. 57, 100 (1991).

tion to decide the case on the basis of customary law (after accepting the United States' claim that it lacked jurisdiction to decide it on the basis of a multilateral treaty like the Charter),⁴³ but *not* enough difference between conventional and customary use of force rules to make its decision under customary law "academic" and "ineffective" as to Charter parties.⁴⁴ In any event, if the Charter's use of force rules were no longer seen as legally binding, state practices and normative beliefs might well evolve in new directions.

The central theses of this Article are that Article 51 fits organically within a broader Charter scheme for regulating interstate armed conflict and forms an integral part of the collective security system that the framers of the Charter intended to establish; that the limitations on sovereignty to which member states consented in accepting Article 51 were reciprocal to, and predicated on, the promise of collective security; and that the persisting and incurable failure of the Charter's collective security system can reasonably be held to relieve member states of their legal obligations to use self-defensive force within the limitations of Article 51, especially as construed by the ICJ.

To be sure, the failure of the Charter's collective security system has been widely acknowledged. But the legal consequences of that failure remain under-appreciated. Even while acknowledging the system's failure, many leading legal scholars have regarded it as irrelevant to the continuing normativity of Article 51. Indeed, this has been an ever-fresh theme in scholarly apologetics for the United Nations. Thus, David Kennedy's 2006 book *Of War and Law*⁴⁵ bolts together a concession of failure and an apology for it by saying "[o]ver the years, what began as an effort to monopolize force has become a constitutional regime of legitimate justifications for warfare."⁴⁶ More fully, despite acknowledging that "the great hope placed by the framers in the role of the Council as 'enforcer of the collective will' has never fully materialized," Carsten Stahn, writing in 2003 in the *American Journal of International Law*, nonetheless maintained "that the Security Council is needed more urgently than ever in

43. See *Nicaragua*, 1986 I.C.J. at 121 ("The Court[s]' . . . decision has to be made on the basis of customary international law . . .").

44. See *id.* at 96-97; see also D.W. Greig, *Self-Defence and the Security Council: What Does Article 51 Require?*, 40 INT'L & COMP. L.Q. 366, 381-82 (1991). In its later cases, the ICJ has spoken generically of "international law on self-defence," see *Oil Platforms (Iran v. U.S.)* (Nov. 6, 2003), 42 I.L.M. 1334, 1361, indicating that it sees little or no substantive difference between conventional rules and (what it takes to be) customary rules. Indeed, the ICJ has even treated the failure to follow the reporting requirement in Article 51, which is concededly conventional law alone, as evidence of a violation of customary law. See *Nicaragua*, 1986 I.C.J. at 121-22.

45. DAVID KENNEDY, *OF WAR AND LAW* (2006).

46. *Id.* at 79.

the aftermath of the Iraqi conflict.”⁴⁷ Thomas Franck observed in 2001 that the Charter’s “fundamental promise to provide an effective system to protect states against violators of the peace . . . has not been kept,” but nonetheless warns against viewing the Charter as “a static instrument”;⁴⁸ the Charter is still legally effective because “the system has adapted There is no realistic alternative to the Council and Assembly as the global juries.”⁴⁹ In other words, it does not matter that the founders of the United Nations expected a police force but got a jury instead.

Earlier writers had cleared this apologetic path. In the mid-1990s, then-Professor Rosalyn Higgins (currently the President of the ICJ) wrote that “[o]ne cannot understand the post-war debates about the legal limits to the use of force without appreciating that the contemporary norms were predicated upon a Charter system that until now [1994] has been impossible to operate.”⁵⁰ But her ensuing discussion of use of force rules in the chapter in which this statement appeared virtually ignored the consequences of the failure of that system.⁵¹ And Louis Henkin, after acknowledging that (then) forty years of practice had demonstrated that the United Nations organization was “different from that [originally] contemplated: in particular, the Security Council has not been effective in enforcing the principles of the Charter outlawing the use of force, and efforts to have the General Assembly substitute for the Security Council have not been notably successful,” proceeded only one sentence later to deny that these failures have or should have any legal effect: “[N]o responsible voice, surely no government, has suggested that the failures of the organization vitiated the agreement and nullified or modified the Charter’s norms.”⁵²

Henkin was, in fact, quite wrong even when he wrote those statements. For one thing, Judge Jennings of the ICJ, dissenting in the 1986 *Nicaragua* case, had already pointed out that “[t]he original scheme of the United Nations Charter, whereby force would be deployed by the United

47. Carsten Stahn, *Enforcement of the Collective Will After Iraq*, 97 AM. J. INT’L L. 804, 806, 810 (2003). Stahn contends that despite its challenge “as an organ of enforcement,” the Council remains authoritative as the “framer of the collective will” of the international community. *Id.* at 808; *see also id.* at 806.

48. Franck, *supra* note 5, at 51, 53.

49. *Id.* at 53, 68.

50. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 238 (1994).

51. In fairness, Higgins does later ask: “Are the shortcomings of the international system (*the failures of the United Nations, the violations of the Charter, the massive violations of human rights, the frequent absence of democracy*) such that the limits on the use of force contained in Article 2(4) and Article 51 should be set aside?” *Id.* at 252 (emphasis added). But she does not dwell on the legal effects of the failure of collective security.

52. Louis Henkin, *Use of Force: Law and U.S. Policy*, in LOUIS HENKIN ET AL., RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 38 (1989).

Nations itself, in accordance with the provisions of Chapter VII . . . has never come into effect.”⁵³ Therefore, reasoned Judge Jennings:

[A]n essential element in the Charter design is totally missing. *In this situation it seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent.*⁵⁴

Surely Judge Jennings was saying exactly what Henkin asserted “no responsible voice” could even suggest—that the failures of the organization justified modifying one of the Charter’s central norms.⁵⁵

Furthermore, in an important article written three years before Henkin’s, Oscar Schachter had given fair, if also critical, consideration to a line of reasoning similar to that of Judge Jennings.⁵⁶ Schachter traced back what he called this “revisionist” argument to Julius Stone’s *Aggression and World Order* (1958);⁵⁷ and whether one agreed with him or not, Julius Stone (like Judge Jennings) was surely a “responsible voice.” In more recent years, latter-day revisionists, led by Michael Glennon, have again urged that the Charter is “dead.”⁵⁸

This Article attempts to pursue and develop Stone’s and Glennon’s “revisionist” claims still further. Part I seeks to explain the basic design of the Charter’s collective security system, compare it to the paradigm of collective security favored by political scientists, and show how it was intended to improve on the inadequate collective security arrangements created by the League of Nations Covenant. Part II then addresses some

53. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 543-44 (June 27) (Jennings, J., dissenting).

54. *Id.* at 544 (emphasis added).

55. Some legal scholars have followed Judge Jennings’ lead, arguing, for example, “that Article 51 should be interpreted so as to facilitate the fulfillment of the purposes of the Organi[z]ation in the light of the Security Council failure to operate as intended.” MCCORMACK, *supra* note 5, at 187.

56. *See generally* Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986).

57. *Id.* at 125 (“As argued by Julius Stone, one of the earliest and most forceful revisionists, the Charter’s renunciation of unilateral force was intended to be ‘organic[ally] dependen[t] . . . on the effective establishment of collective institutions and methods.’ Since the U.N. collective security system has failed (as shown by the continued frequency of violent international acts), states should be released from their unilateral commitments to eschew force.” (alterations and omission in original) (footnote omitted)).

58. *See, e.g.*, MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* (2001); Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 540-41 (2002) [hereinafter Glennon, *The Fog of Law*]; Michael J. Glennon, *The UN Security Council in a Unipolar World*, 44 VA. J. INT’L L. 91, 100 (2003) [hereinafter Glennon, *Unipolar World*]; Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFF., May/June 2003, at 16, 16.

of the limitations that Articles 2(4) and 51, as construed by the ICJ and many legal scholars, impose on the exercise of the right of self-defense or other uses of force. These limitations should be viewed as concessions of traditional prerogatives of state sovereignty that were exchanged for the promise of a viable collective security system. Part III analyzes the failure of the Charter's collective security system, contending that that failure was not merely a facet of international politics in the cold war period but was wired into the original design. Finally, Part IV explores the legal and policy consequences that can be drawn from the failure of the Charter system.

I. THE DESIGN OF UN CHARTER'S COLLECTIVE SECURITY SYSTEM

Foremost among the original purposes of the United Nations Charter was the maintenance and enforcement of global peace through the creation of an effective system of collective security. The preamble to the Charter declares the document's primary purpose to be the determination "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind," and to that end, it affirms that "the Peoples of the United Nations" will "unite our strength to maintain international peace and security, and . . . ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest."⁵⁹ Likewise, the very first article of the first Chapter (entitled "Purposes and Principles") of the Charter, states that "[t]he [p]urposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace."⁶⁰ The Charter's central purpose of achieving peace through "collective measures" is also reflected throughout the wartime planning that culminated in the establishment of the United Nations in 1945.⁶¹ As

59. U.N. Charter pmbi.

60. *Id.* art. 1. The International Court of Justice has also affirmed that "[t]he purpose pervading the whole of the Charter and dominating it is that of maintaining international peace and security and to that end the taking of effective collective measures for the prevention and removal of threats to the peace." *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 186 (July 20) (Spender, J., separate opinion).

61. Scholarly accounts of the origins and antecedents of the United Nations include BOWETT, *supra* note 5, at 117-55, 182-84 (1958); INIS L. CLAUDE, JR., *POWER AND INTERNATIONAL RELATIONS* 155-72 (1962); F.H. HINSLEY, *POWER AND THE PURSUIT OF PEACE* (1967); PAUL KENNEDY, *THE PARLIAMENT OF MAN: THE PAST, PRESENT, AND FUTURE OF THE UNITED NATIONS* (2006); 1 EVAN LUARD, *A HISTORY OF THE UNITED NATIONS: THE YEARS OF WESTERN DOMINATION, 1945-1955* (1982); RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS' CHARTER: THE ROLE OF THE UNITED STATES 1940-1945* (1958); STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS* (2003). The classic account of the League of Na-

early as the Atlantic Charter of August 14, 1941, President Franklin Roosevelt and Prime Minister Winston Churchill had proclaimed their belief that

all of the nations of the world . . . must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, *pending the establishment of a wider and permanent system of general security*, that the disarmament of such nations is essential.⁶²

In his address of June 26, 1945 to the final plenary session of the United Nations Conference at San Francisco,⁶³ President Harry Truman, applauded the conference's achievement in creating the Charter, looking both backward to the successes of the wartime alliances against the Axis powers and forward to the prolonged peace that he hoped the victors of the conflict would use their collective force to maintain:

We have tested the principle of cooperation in this war and have found that it works. Through the pooling of resources, through joint and combined military command, through constant staff meetings, we have shown what united strength can do in war. That united strength forced Germany to surrender. United strength will force Japan to surrender.

. . . .

Out of this conflict have come powerful military nations, now fully trained and equipped for war. But they have no right to dominate the world. It is rather the duty of these powerful nations to assume the responsibility for leadership toward a world of peace. That is why we have here resolved that power and strength shall be used not to wage war, but to keep the world at peace, and free from the fear of war.⁶⁴

The destructiveness and horrors of the world war from which they had still not fully emerged (the San Francisco Conference took place before the surrender of Japan, and indeed before the use of atomic weapons against that nation), coupled with those of the world war that had preceded it only a generation earlier, undoubtedly convinced the members

tions has long been F.P. WALTERS, *A HISTORY OF THE LEAGUE OF NATIONS* (1960). For an overview of "the Settlement of 1945," of which the United Nations Charter was but one (if also a major) component, see G. JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS* 163-214 (2001).

62. Atlantic Charter, U.S.-U.K., Aug. 14, 1941, 55 Stat. 1603 (emphasis added).

63. Address in San Francisco at the Closing Session of the United Nations Conference, PUB. PAPERS 138 (June 26, 1945).

64. *Id.* at 140-41.

of the international community of the paramount importance of *peace*.⁶⁵ Moreover, the framers of the Charter believed that they had found a viable method of ensuring that the peace would be maintained: the construction of a system of collective security. Indeed, Secretary of State Stettinius, in explaining the proposed Charter, stated that “[t]he whole scheme of the Charter is based on this conception of collective force made available to the Organization for the maintenance of international peace and security.”⁶⁶ In reaching the conclusion that collective security was the best, perhaps the only, method of structuring international relations so as to preserve the peace, the Charter’s framers consciously built on a tradition of thinking that reached back to the preceding generation of statesmen, most notably Woodrow Wilson.⁶⁷

65. The historian Niall Ferguson has recently shown that:

The hundred years after 1900 were without question the bloodiest century in modern history, far more violent in relative as well as absolute terms than any previous era. Significantly larger percentages of the world’s population were killed in the two world wars that dominated the century than had been killed in any previous conflict of comparable geopolitical magnitude. Although wars between ‘great powers’ were more frequent in earlier centuries, the world wars were unparalleled in their severity (battle deaths per year) and concentration (battle deaths per nation-year). By any measure, the Second World War was the greatest man-made catastrophe of all time.

NIALL FERGUSON, *THE WAR OF THE WORLD: TWENTIETH-CENTURY CONFLICT AND THE DESCENT OF THE WEST*, at xxxiv (2006); *see also id.* app. at 647-54.

Likewise, military historian John Keegan has pointed out that humanity’s experience of war in the twentieth century was unprecedented in history, and that the fear of war began, for the first time, to rival the fear of famine or the fear of disease: “Only in the twentieth century did the fear of war finally overtake in force the primordial anxieties associated with deprivation and sickness.” JOHN KEEGAN, *WAR AND OUR WORLD* 14 (1998).

66. EDWARD R. STETTINIUS, JR., U.S. DEP’T OF STATE, *CHARTER OF THE UNITED NATIONS: REPORT TO THE PRESIDENT ON THE RESULTS OF THE SAN FRANCISCO CONFERENCE* 41 (1945) [hereinafter *REPORT ON SAN FRANCISCO CONFERENCE*].

67. CLAUDE, *supra* note 61, at 96-98. Thus, Wilson had argued:

“Mere agreements may not make peace secure. It will be absolutely necessary that a force be created . . . so much greater than the force of any nation now engaged or any alliance hitherto formed or projected that no nation, no probable combination of nations could face or withstand it.”

Id. at 96-97 (alteration in original) (citation omitted).

Or again:

“There must now be, not a balance of power, not one powerful group of nations set off against another, but a single overwhelming, powerful group of nations who shall be the trustee of the peace of the world.”

Id. at 97 (citation omitted).

Or again:

“[I]n the last analysis the military and naval strength of the Great Powers will be the final guarantee of the peace of the world.”

Id. at 98 (citation omitted). As Claude later goes on to observe, “[t]here can be no doubt that the new system-building enterprise [of the United Nations] was broadly conceived as a repetition of the Wilsonian effort to devise an operative collective security arrangement.” *Id.* at 155.

What is “collective security”? As a first, rough approximation, “collective security” can be understood as “the principle of each for all and all for each: the rule that, wherever an act of ‘aggression’ occurred, the whole international community would combine to defend the victim. In so doing, it would defend not only the particular country concerned, but peace itself.”⁶⁸ Under a collective security system, the object of maintaining the peace of nations is considered to be overriding, taking priority even over the protection of human rights, for example, if such protection would entail the otherwise forbidden use of armed force to intervene in the “essentially . . . domestic” affairs of another member state.⁶⁹ Global peace, moreover, is conceived to be seamless or “indivisible”: should a breach of the peace occur *anywhere, every* member state should be willing to render assistance to the victim of the breach, however little interest it might otherwise have in the affairs of the region or country affected, because each member had a compelling interest in the maintenance of peace *as such*. Finally, at least in a paradigmatic collective security system, every member state is expected to rally to the side of the “victim” against the “aggressor,” regardless of any friendly ties that might exist between the member state and the aggressor, or any hostility between that member state and the victim. Thus, had a NATO member (say, Greece) attacked a Warsaw Pact member (say, Bulgaria) during the cold war, it would have been the duty of the United States to join in collective action with the Communist bloc against Greece, however close the ties of friendship between the United States and Greece were, and however damaging to Western security the defeat of the Greek offensive would have been.⁷⁰

68. 1 LUARD, *supra* note 61, at 4.

69. U.N. Charter art. 2, para. 7. As Louis Henkin has observed, for the Charter’s framers,

[p]eace was the paramount value. The Charter and the organization were dedicated to realizing other values as well—self-determination, respect for human rights, economic and social development, justice, and a just international order. But those purposes could not justify the use of force between states to achieve them; they would have to be pursued by other means. Peace was more important than progress and more important than justice. The purposes of the United Nations could not in fact be achieved by war. . . . Nations would be assured independence, the undisturbed enjoyment of autonomy within their territory, and their right to be let alone. Change—other than internal change through internal forces—would have to be achieved peacefully by international agreement.

Henkin, *supra* note 52, at 38-39.

70. See ARNOLD WOLFERS, *DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS 176-77* (1962). This kind of situation was nearly realized during the Suez campaign of 1956, in which Britain, France, and Israel, all close and important U.S. allies in the cold war, arguably were the “aggressors” against Egypt. *Id.* at 176 n.2, 198. As it happened, the United States *did* denounce their campaign, and all three Western allies *did* recede. *Id.* at 198. However, it is readily imaginable that they might not have heeded the United States, and thus have posed for this country the choice between keep-

Collective security, thus envisaged, was intended to supplant traditional methods, such as defensive military alliances⁷¹ or reliance on a self-adjusting "balance of powers"⁷² that had signally failed to prevent the catastrophe of world war.⁷³ Further, the Charter scheme was intended to cure the critical flaws that practical experience had brought to light in the collective security systems of the League of Nations Covenant⁷⁴ or, later, of the 1928 Kellogg-Briand Pact.⁷⁵

Broadly, the architecture of the Charter system rested on three main pillars. First, member states pledged themselves in Article 2(4) to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."⁷⁶ In substantial part, this amounted to a commitment (as earlier in the Kellogg-Briand Pact) to renounce recourse to offensive war as an instrument of national policy,

ing its Charter pledge to maintain international peace and stability against aggression, and losing the support of crucial allies in its struggle with Soviet communism. *See id.* at 176-77, 198-99.

71. On the differences between collective security and mutual defense agreements (or "collective defense"), *see id.* at 182-204.

72. INIS L. CLAUDE, JR., *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION 17-50* (3d rev. ed. 1964) (analyzing and evaluating the balance of power concept); Randall L. Schweller, *The Problem of International Order Revisited*, *INT'L SECURITY*, Summer 2001, at 161, 169-73 (arguing that balance-of-power systems may produce more predictability and stability than "constitutional systems" that "require actors to voluntarily choose to subordinate their immediate interests to communal or remote ones"). *See generally* LUDWIG DEHIO, *THE PRECARIOUS BALANCE: FOUR CENTURIES OF THE EUROPEAN POWER STRUGGLE* (Charles Fullman trans., 1962) (discussing workings of balance of power in modern European history).

73. *See* CLAUDE, *supra* note 72, at 51-52. Professor Claude perhaps did more to clarify the concept of collective security than any other political scientist:

[C]ollective security is a specialized concept, a technical term in the vocabulary of international relations. Its definition may be approached by the process of elimination: it represents the means for achieving national security and world order which remain when security through isolation is discarded as an anachronism, security through self-help is abandoned as a practical impossibility, security through alliance is renounced as a snare and a delusion, and security through world government is brushed aside as a dream irrelevant to reality. The concept of collective security may be stated in deceptively simple terms: it is the principle that, in the relations of states, everyone is his brother's keeper; it is an international translation of the slogan, "one for all and all for one"; it is the proposition that aggressive and unlawful use of force by any nation against any nation will be met by the combined force of all other nations.

Id. at 224 (footnote omitted); *see also* MICHAEL W. DOYLE, *WAYS OF WAR AND PEACE: REALISM, LIBERALISM, AND SOCIALISM* 168 (1997). *See generally* CLAUDE, *supra* note 72, at 94-204.

74. League of Nations Covenant arts. 10-12, 16.

75. General Treaty for the Renunciation of War as an Instrument of National Policy arts. I-II, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact].

76. U.N. Charter art. 2, para. 4.

although it cut more broadly.⁷⁷ Second, in Article 51, the Charter imposed restrictions on the purely *defensive* use of force: “the inherent right of individual or collective self-defence” could be exercised “if an armed attack occurs against a Member [state]”—but apparently not otherwise.⁷⁸ Moreover, even if a member state had been the victim of “an armed attack,” it was bound by Article 51 to report the measures it had taken in self-defense to the Security Council, and its right to take such defensive measures appeared to be suspended or terminated once “the Security Council has taken measures necessary to maintain international peace and security.”⁷⁹ Further, under Article 39, which vested in the Security Council the duty to “determine the existence of any threat to the peace, breach of the peace, or act of aggression,”⁸⁰ it appeared that the Council could override a member state’s judgment that it had been using force only in legitimate self-defense, hold it to have been the aggressor, and sanction it accordingly. Third and finally, Chapter VII endowed the Council with the power to recommend *or take* a variety of measures, including “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”⁸¹ In order to enable the Council to enforce its decisions militarily (should that prove necessary), each member state undertook “to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage.”⁸² Apart from the right (now of course moot) of a member state to wage war against the Axis powers⁸³ and the plainly transitional arrangements set forth in Article 106,⁸⁴ each member state thus committed itself not to use armed force, except as authorized by the Council under Article 42, or as part of a Chapter VIII “regional” organization acting under the Security Council’s authorization under Article 53(1),⁸⁵ or in the restricted

77. *Id.* Article 2(4) goes beyond the Kellogg-Briand Pact in several ways, among them the renunciation of even the “threat” to use force in a forbidden manner.

78. *Id.* art. 51.

79. *Id.* To be sure, the exact meaning and application of the quoted language—as of much else in Article 51—is disputed. For a review of different interpretations, see Malvina Halberstam, *The Right to Self-Defense Once the Security Council Takes Action*, 17 MICH. J. INT’L L. 229 (1996); Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT’L L. 452, 459 (1991) (noting that during debates over Iraqi invasion of Kuwait, no government denied that the Council could prohibit even self-defensive military action by a state).

80. U.N. Charter art. 39.

81. *Id.* art. 42.

82. *Id.* art. 43.

83. *Id.* art. 53, para. 2; art. 107.

84. *Id.* art. 106.

85. For an explanation and illustrations of Chapter VIII enforcement actions, see Mary Ellen O’Connell, *The UN, NATO, and International Law After Kosovo*, 22 HUM. RTS. Q. 57, 62-67 (2000).

circumstances that Article 51 allowed for the exercise of self-defense. In return for those commitments, each other member state agreed to furnish the Council with forces and assistance sufficient to enable the Council to suppress acts of aggression or other breaches of (or threats to) the peace against that state.

It is illuminating to measure the Charter scheme against a prominent political science model of a collective security system. According to political scientist John J. Mearsheimer, the core premises of a paradigmatic collective security system are three. "First, states must renounce the use of military force to alter the status quo. They must not launch wars of aggression, but instead must agree to settle all disputes peaceably."⁸⁶ Second:

[S]tates must believe that their national interest is inextricably bound up with the national interest of other states, so that an attack on any state is considered an attack on every state. Thus, when a troublemaker appears in the system, all of the responsible states must automatically and collectively confront the aggressor with overwhelming military power. The aim is "to create automatic obligations of a collective character."⁸⁷

Third (and for Mearsheimer most important), "states must trust each other. States must not only act in accordance with the first two norms, but they must trust that other states will do likewise."⁸⁸

The original design of the Charter system broadly matches Mearsheimer's construct, albeit imperfectly. First, by accepting Article 2 (especially paragraphs 3 and 4), member states agreed to renounce the use (or threat) of military force to change the territorial boundaries or political independence of other member states, and undertook instead to "settle their . . . disputes by peaceful means."⁸⁹ Second, by vesting the Security Council with the powers to determine whether a "threat to the peace, breach of the peace, or act of aggression" has arisen or occurred, and enabling it to take actions—including the deployment of military force—to maintain or restore the peace,⁹⁰ and by requiring all member states to give the Council "every assistance in any action it takes,"⁹¹ the Charter at least approximates the paradigmatic requirement for an automatic, collective military response to any aggressor. True, the allocation to each of the Council's five permanent members of the power to "veto"

86. John J. Mearsheimer, *The False Promise of International Institutions*, in THEORIES OF WAR AND PEACE 329, 357 (Michael E. Brown et al. eds., 1998).

87. *Id.* at 358 (footnote omitted).

88. *Id.* at 359.

89. U.N. Charter art. 2, paras. 3-4.

90. *Id.* art. 39.

91. *Id.* art. 2, para. 5.

any proposed collective enforcement action⁹² represents—and was from the beginning acknowledged to represent—a very significant departure from the model of *automatic* responsiveness. But the Charter’s framers rightly judged that the League of Nations’ collective security arrangement had failed in part because of the nonmembership of several of the great powers,⁹³ and they realistically understood that no great power would accept the Charter unless it had the ability to block enforcement (or indeed other) measures,⁹⁴ particularly in cases where it was a party to the dispute. Further, they believed that if one of the great powers embarked on a course of aggression, it would not be dissuaded merely by the decision of the Council to invoke force against it over its contrary vote, and “[a]nother world war [would] come, vote or no vote.”⁹⁵ So, although the veto of a permanent member could function as a kind of circuit-breaker, interrupting the flow of collective power against an aggressor, that design feature was considered necessary in order to create any form of collective security.⁹⁶ Third, the Charter’s framers also acknowledged that the system they had created would not work unless the members of the United Nations—especially the great powers—had the

92. See *id.* art. 27, para. 3.

93. Owing to the refusal of the U.S. Senate to ratify the Versailles Treaty in 1919, the United States had never become a member of the League of Nations. Germany, although a League member for a time (1926-1933), withdrew soon after Hitler came to power. 1 LUARD, *supra* note 61, at 10. Japan likewise withdrew in 1933, and Italy withdrew in 1937. The Soviet Union, although also briefly a member (1934-1939), was incensed because of what Stalin interpreted as the League’s decision to eject it.

The Charter’s framers believed that on this occasion, the global collective security required accommodating the great powers, especially the United States and the Soviet Union. *Id.* at 10-11. As Secretary of State Stettinius explained at the time:

The five permanent members of the Security Council have at their disposal an overwhelming proportion of the men and material necessary to enforce peace. Their permanent membership in the Security Council therefore becomes essential, for without their strength and their unanimous will to peace the Council would be helpless to enforce its decisions.

Press Release, U.S. Sec’y of State, Report on the San Francisco Conference (May 28, 1945), in DEP’T ST. BULL., June 1945, at 1010.

94. Claude notes:

The truth is that the [San Francisco] Conference paid its glowing respects to the principle of collective security and then announced its firm conviction that it would be impossible to create a collective security system which could cope with threats to the peace posed by great powers. This is the central meaning of the famous *veto* power granted to the permanent members of the Security Council.

CLAUDE, *supra* note 72, at 158.

95. Press Release, U.S. Sec’y of State, *supra* note 93, at 1010.

96. See CLAUDE, *supra* note 72, at 160. Claude notes that this circuit-breaking function was of particular value to the small states, because it ensured that they would not, as a result of Council action, have to support one group of great powers against another. See *id.* at 160-61.

will to make it succeed, and cooperated to build up the trust that was an essential element for its success.⁹⁷

Despite the inclusion of a veto power for the five permanent members, the Charter represented as close an approximation to the model of a pure collective security system as was realistically attainable. Moreover, in at least three key respects, it seemed to mark a clear improvement over the collective security arrangements in League of Nations Covenant. First, *all* of the five remaining great powers of the post-war world (even if the war had sadly reduced the standing of some of them) were to be members of the United Nations. In particular, the United States' decision, not only to join to United Nations, but also to support it enthusiastically, gave the Charter much fairer prospects at its birth.⁹⁸ Second, under the League Covenant, each member state retained the discretion, in the last resort, whether to respond to a clear call from the League Council to join collective action against an aggressor.⁹⁹ Under the Charter, however, member states placed themselves under a binding legal obligation to furnish assistance against aggression whenever the Council required their support.¹⁰⁰ Third, the Charter incorporated "the basic principle of mak-

97. See Ernest A. Gross, *International Organization and Collective Security: Changing Values and Priorities*, 138 RECUEIL DES COURS 413, 431-34 (1973); see also RUSSELL, *supra* note 61, at 456.

98. See WALTERS, *supra* note 61, at 72-73 ("The abandonment of the League by the United States was a blow whose effects can hardly be over-estimated. . . . The immediate loss in the power and influence of the [League] Council and Assembly, due to the absence of the United States, was great; it was destined to show itself in a hundred ways as the years went by.").

99. See League of Nations Covenant arts. 10, 16. Article 10 of the Covenant provided that in the event of aggression or the threat or danger of it, "the Council shall advise upon the means by which" the obligation to counter aggression "shall be fulfilled." *Id.* art. 10. Article 16 provided that if a League member "resort[ed] to war in" violation of its Covenant obligations, "it shall ipso facto be deemed to have committed an act of war against all other Members of the League," which thereby committed to subject the aggressor to various nonmilitary sanctions. *Id.* art. 16. Further, under the same Article, the Council was ascribed the duty of "recommend[ing] to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League." *Id.* But the Council had no authority to *order* such military contributions. Niels Blokker, *The Security Council and the Use of Force: On Recent Practice*, in THE SECURITY COUNCIL AND THE USE OF FORCE, *supra* note 22, at 1, 5-6.

100. Interestingly, however, one influential observer of the Charter's founding—the British international law scholar J.L. Brierly—argued in 1946 that the League system was *better* than the Charter insofar as it had based collective security on the principles of unanimity and voluntarism. J.L. Brierly, *The Covenant and the Charter*, 23 BRIT. Y.B. INT'L L. 83 (1946). Thus, Brierly wrote that "before international institutions can be raised from the co-operative to the organic type . . . we need a society far more closely integrated than the society of states is to-day." *Id.* at 92.

ing contingents of national armed forces available to the Security Council for enforcement purposes.”¹⁰¹

This third feature perhaps deserves some attention, if only because its history illustrates how rapidly the Charter’s collective security system began to disintegrate. Article 43(1) provided that all member states undertook “to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.”¹⁰² Article 47 envisaged the creation of a “Military Staff Committee” consisting in part “of the Chiefs of Staff of the permanent members of the” Council, which would be responsible, in subordination to the Council, “for the strategic direction of any armed forces placed at the disposal of the Security Council.”¹⁰³ Knowing that the mobilization of military forces from different member states ordinarily would take considerable time and effort, and that an act of aggression could present a *fait accompli* even while the forces to combat it were being mustered, the framers of the Charter intended to create a standby force, put it at the disposal of the Council, and place it under the command of the Military Staff Committee that could deploy it, even in advance of the outbreak of a crisis, into international trouble spots. These forces were intended to “represent the ‘teeth’ which the League had so conspicuously lacked and which the UN, it was believed, would require if it were to be an effective agent for peace-enforcement.”¹⁰⁴

The scheme soon ran aground. Some of the original plans for the proposed military force were quite ambitious: the United States envisaged a “force of twenty divisions, nearly 4000 aircraft, three battleships, fifteen cruisers, six carriers and eighty-four destroyers.”¹⁰⁵ Owing chiefly to intractable differences between Western and Eastern blocs over the size, composition, equipment, supply, and stationing of such a force, however, the Council was unable to reach agreement, “and the Security Council force, which was to have been the centre-piece of the new UN system, never came into existence at all.”¹⁰⁶ Interest in the idea of implementing Article 43 was briefly rekindled after the United Nations’ forces’ initial

101. RUSSELL, *supra* note 61, at 467. A similar idea had been proposed during the creation of the League, and was occasionally raised in later years, but had come to nothing. See WALTERS, *supra* note 61, at 62-63.

102. U.N. Charter art. 43, para. 1.

103. *Id.* art. 47, paras. 2-3.

104. 1 LUARD, *supra* note 61, at 98. Likewise, the *Report of the Secretary of State to the President on the Results of the San Francisco Conference* declared that the national air forces to be held in reserve for international enforcement action would provide the “edge of the sword which will ultimately be placed in the hands of the Security Council.” REPORT ON SAN FRANCISCO CONFERENCE, *supra* note 66, at 96.

105. See 1 LUARD, *supra* note 61, at 101.

106. *Id.* at 103.

successes in the Korean War—an interest reflected in the celebrated Uniting for Peace Resolution of the General Assembly in 1950.¹⁰⁷ But as the Korean War proved more difficult, the Assembly's recommendation "was quietly discarded."¹⁰⁸ After the end of the cold war, the Secretary General again revived the proposal—which once more fell on deaf ears.¹⁰⁹

II. ARTICLE 51 AND THE LIMITS OF SELF-DEFENSE

Enjoyment of the benefits of the Charter's collective security system entailed, for member states, a willingness to accept the burdens of sustaining that system. But it also involved other important, and more immediate, costs to member states, particularly in the form of concessions of some of their "traditional" prerogatives with respect to war and self-defense. Article 2(4) of the Charter made aggressive war, and indeed other uses or threats of force against another state, a delict. And Article 51 circumscribed lawful self-defense. In order to measure the extent of these concessions, we will need to compare the extent of state "sovereign" prerogatives with regard to war and self-defense before the Charter with what remains to member states after it. To do that, it is helpful to identify at least an approximate pre-Charter baseline. After first outlining the "traditional" idea of sovereign war prerogatives, this Part will examine in some detail what seems to be the most relevant and useful pre-Charter "baseline," the Kellogg-Briand Pact. (This is not to deny that many other elements of pre-Charter international law are also highly relevant in determining the pre-Charter Law of War.) Thereafter, this Part will consider how Articles 2(4) and 51 of the Charter represent departures from that baseline—in the direction, of course, of establishing

107. G.A. Res. 377 (V), ¶ 8, U.N. Doc. A/1775 (Nov. 3, 1950). In attempting to reassign Security Council functions to the General Assembly, the Uniting for Peace Resolution is of doubtful legality. See *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 164-65.

108. CLAUDE, *supra* note 61, at 171; see also Keith S. Petersen, *The Uses of the Uniting for Peace Resolution Since 1950*, 13 INT'L ORG. 219, 220 (1959) (noting that recommendation had "become moribund"; only four of sixty nations circularized with requests for how they intended to implement recommendation responded, and total offers of contingents came to only 6,000 personnel).

109. See The Secretary General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, ¶ 43, delivered to the Members of the United Nations, U.N. Doc. A/47/277-S/24111 (June 17, 1992). There, the Secretary General opined—quite incorrectly—that "[u]nder the political circumstances that now exist for the first time since the Charter was adopted, the long-standing obstacles to the conclusion of such special agreements [pursuant to Article 43] should no longer prevail." *Id.*

Most recently, Secretary General Annan has called on member states to "creat[e] strategic reserves that can be deployed rapidly, within the framework of United Nations arrangements," for peacekeeping operations. *In Larger Freedom*, *supra* note 39, ¶ 112. This appeal does, however, fall far short of the original conception of Article 43.

far more demanding *jus ad bellum* requirements, and correspondingly, diminishing state power drastically.

The "Classic" Theory of Sovereign Prerogatives with Regard to War

There would be no reason for international law to ban war if states were not drawn to it. States are usually drawn to it "not from any irrational and emotive drives, but from almost a superabundance of analytic rationality."¹¹⁰ For modern states, war has been "preeminently a function of *Staatspolitik*,"¹¹¹ and has usually been undertaken because of the "rational apprehension of future evil" from another state.¹¹² To persuade a state to renounce its right to make war at the times and in the circumstances of its own choosing is, therefore, to extract from it something of great value.

The classic law of war of the modern period implicitly recognized the value of warmaking to states by taking it to be integral to their sovereignty to be free to make war or not as they chose. The decision to wage war simply could not be appraised in the dimension of legality.¹¹³ By the "classic" international law of sovereign war powers is meant, of course, the theory that prevailed from at least the latter part of the nineteenth century to at least the end of the First World War.¹¹⁴ Robert Jackson, the chief prosecutor for the United States at the Nuremberg Trial of the major Nazi war criminals and an Associate Justice of the U.S. Supreme Court, explained the theory in his opening statement at the trial as follows:

110. MICHAEL HOWARD, *The Causes of Wars*, in *THE CAUSES OF WAR: AND OTHER ESSAYS* 7, 14 (1983).

111. *Id.* at 13.

112. MARTIN WIGHT, *POWER POLITICS* 139 (Hedley Bull & Carsten Holbraad eds., 1978). For an evaluation and critique of "rationalist" and "neorealist" theories of war, and an attempt to solve the problem why rational political leaders might choose war rather than a negotiated settlement, see James D. Fearon, *Rationalist Explanations for War*, 49 *INT'L ORG.* 379 (1995).

113. Thus, William Hall opined that international law has "no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose." WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* § 16, at 62 (A. Pearce Higgins ed., 7th ed. 1917). In a similar vein, Henry Wheaton described war merely as "[a] contest by force between independent sovereign States." HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 212 (Da Capo Press 1972) (Carey, Lea & Blanchard 1836).

114. See MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 135 (1994); STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS* 161 (2005) ("In the nineteenth century, war reached its pinnacle of legal prestige To a degree unequalled any time before or since, it was frankly recogni[z]ed by international lawyers as an accepted and routine means of conducting everyday international business.").

There was a time, in fact I think the time of the first World War, when it could not have been said that war inciting or war making was a crime in law, however reprehensible in morals.

. . . The age of imperialistic expansion during the eighteenth and nineteenth centuries added the foul doctrine . . . that all wars are to be regarded as legitimate wars.¹¹⁵

In holding that the waging, planning, and preparing of an aggressive war were international crimes for which the political and military leadership of the aggressor state could be held personally criminally liable, the International Military Tribunal at Nuremberg contributed significantly to the demise of the "foul doctrine." Reflecting the new spirit of international legal scholarship in the immediate aftermath of the Second World War, Philip Jessup observed in 1948 that "[s]overeignty, in its meaning of an absolute, uncontrolled state will, ultimately free to resort to the final arbitrament of war, is the quicksand upon which the foundations of traditional international law are built."¹¹⁶ Nonetheless, even pre-Charter international law had discarded the "classic" conception that states had the *unfettered* discretion to decide on war or peace; it was also the case that their discretion was only *relatively* limited. To see that, we must turn to the chief legal development in the law of war during inter-war years.

The Kellogg-Briand Pact as Pre-Charter Baseline

In order to establish some baseline for determining what sovereign prerogatives with respect to war and self-defense were yielded or abridged in the Charter, we must start by considering the most relevant and important treaty on the subject before the Charter itself: the General Treaty for

115. ROBERT H. JACKSON, THE NÜRNBERG CASE 82-83 (1947); *see also* C.A. POMPE, AGGRESSIVE WAR: AN INTERNATIONAL CRIME 301-02 (1953) ("War was a fact, an international phenomenon, and classic international law was indifferent towards it A 'legality' of war supposed distinction between just and unjust wars, which may have lingered on in public opinion and may have been defended by some authors, but was not, according to the majority of them, part of international positive law."); Hans Wehberg, *L'Interdiction Du Recours A La Force, Le Principe et Les Problemes Qui Se Posent*, 78 RECUEIL DES COURS 1, 27-28 (1951); *cf.* 2 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 189 (1922); Robert H. Jackson, Associate Justice, U.S. Supreme Court, Nürnberg in Retrospect, Address to the Thirty-First Annual Meeting of the Canadian Bar Association (Sept 1, 1999), in 27 CANADIAN BAR REV. 761, 762 (1949) (stating that international law at start of twentieth century had taught that "each state is sovereign, its right absolute, its will unrestrained, and free to resort to war at any time, for any purpose").

116. PHILIP C. JESSUP, A MODERN LAW OF NATIONS 2 (1948); *see also id.* at 157 ("The most dramatic weakness of traditional international law has been its admission that a state may use force to compel compliance with its will."). *See generally* Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1 (1999) (discussing post-war diminution of sovereignty).

the Renunciation of War of August 27, 1928,¹¹⁷ more generally referred to as the “Pact of Paris” or the “Kellogg-Briand Pact” (Kellogg and Briand being the American and French diplomats who had drafted it). The importance of the Kellogg-Briand Pact in determining the pre-Charter state of international law is underscored by the fact that it served as the lynchpin of the judgments of the Nuremberg Tribunal—the other main source of pre-Charter war law—with regard to aggressive war.¹¹⁸ Accordingly, we must consider the pact in some detail.

The operative clauses of the pact were Articles I and II:

Article I.

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II.

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.¹¹⁹

How was the pledge to renounce war “as an instrument of national policy” to be enforced? The preamble declared “that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty.”¹²⁰ Apart from that enigmatic language, the treaty made no provision whatsoever for enforcement mechanisms. The preambulatory language was apparently intended to operative effect, however. It states that “the benefits furnished by” the pact “should be denied” to those in breach of it.¹²¹ The language can be read to mean that in the event of a breach by one party, the other parties might or “should” take recourse to war against the offender. In other words, the pact’s enforcement mechanism was a (very weak) type of collective security: in the event of a breach, the offending party would expose itself to *the risk* of forceful countermeasures by any other party willing to take them.

That interpretation of the pact is confirmed by the remarks of one of its two co-authors, the French Foreign Minister Aristide Briand, in his address on the occasion of the signing of the pact. Briand stated to the assembled dignitaries:

117. Kellogg-Briand Pact, *supra* note 75.

118. See JACKSON, *supra* note 115, at 779 (“Most important of all, of course, was . . . the Pact of Paris or the Kellogg-Briand Pact . . .”).

119. Kellogg-Briand Pact, *supra* note 75, arts. I-II.

120. *Id.* pmb1.

121. *Id.*

“But, you say, there is no true realism in this Pact. And where are [the] sanctions? Well, is that realism which excludes from the realm of facts all moral forces, among them that of public opinion? Indeed, any state which would so act as to incur the reprobation of all its co-signatories would run the positive risk of seeing them gradually and freely unite against it, with results which very soon it would have reason to fear. And where is the country, a signatory to this Pact, whose leaders would on their own responsibility expose it to such danger?”¹²²

Likewise, Secretary of State Henry L. Stimson, in a 1932 address stated: “The [Kellogg-Briand] Pact provides for no sanction of force. It does not require any signatory to intervene with measures of force in case the Pact is violated. Instead, it rests upon the sanction of public opinion, which can be made one of the most potent sanctions of the world.”¹²³

Significantly, the main parties to the pact construed it to preserve their ability to wage *defensive* wars.¹²⁴ Furthermore, they understood the concept of “self-defense” very capaciously. And they insisted that each party had the right to determine *for itself* when the occasions for legitimate self-defense arose.¹²⁵

Although the United States did not take a formal reservation to the treaty, the actions and statements of both the Senate and the executive branch made plain that the United States did not regard the pact as precluding a war of self-defense.¹²⁶ The Senate Foreign Relations Committee reported the “‘treaty with the understanding that the right of self-defense is in no way curtailed or impaired by [its] terms or conditions,’” that “[e]ach nation . . . is the sole judge of what constitutes the right of self-defense and the necessity and extent of the same,” and that “[t]he United States regards the Monroe Doctrine as part of its national security

122. JAMES T. SHOTWELL, *WAR AS AN INSTRUMENT OF NATIONAL POLICY: AND ITS RENUNCIATION IN THE PACT OF PARIS 185* (1929) (quoting Aristide Briand).

123. SHELDON GLUECK, *THE NUREMBERG TRIAL AND AGGRESSIVE WAR 17-18* (1946) (quoting Henry L. Stimson, *The Pact of Paris, Three Years of Development* (Dep't of State Pub. 357, 1932)). Stimson's remarks in 1932 corresponded to remarks he had made in 1929, after succeeding Frank Kellogg as Secretary of State. On that earlier occasion, he had said that “‘the Pact contains no covenant similar to that in the Covenant of the League of Nations providing for joint forceful action by the various signatories against an aggressor. Its efficacy depends solely upon the public opinion of the world and upon the conscience of those nations who sign it.’” George A. Finch, *The Nuremberg Trial and International Law*, 41 *AM. J. INT'L L.* 20, 31 (1947) (citation omitted) (quoting Henry L. Stimson).

124. See DENYS P. MYERS, *ORIGIN AND CONCLUSION OF THE PARIS PACT: THE RENUNCIATION OF WAR AS AN INSTRUMENT OF NATIONAL POLICY 50-56* (1929).

125. See *id.*

126. *Id.* at 50-51 (“[T]he right of self-defense is . . . implicit in every treaty.” (omission in original) (citation omitted)).

and defense.”¹²⁷ The executive branch’s position was essentially the same as the Senate’s position. In remarks to the American Society of International Law on April 28, 1928, Secretary of State Frank Kellogg, who like Briand had given his name to the pact, emphasized that the right of national self-defense was “inherent,” “inalienable,” and “implicit in every treaty,” and that each state “alone is competent to decide whether circumstances require recourse to war in self defense.”¹²⁸ Kellogg’s speech “was ultimately made a part of the official record and [was to] stand alongside the treaty . . . as an authoritative commentary.”¹²⁹

Other major powers put forward similar interpretations. The French government was unwilling to accept the treaty without an understanding that it alone could determine what was necessary for its self-defense.¹³⁰ The British government went even further—so far indeed as to provoke an objection from the Soviet Union, another treaty party.¹³¹ The British made a reservation,¹³² stating that there were certain unspecified “regions of the world” that “constitute[d] a special and vital interest for [the] peace and safety” of the British Empire, “that interference with these regions can not be suffered,” and that Britain accordingly retained its “freedom of action” to protect those regions against attack.¹³³

Not only was the pact construed to preserve a broad (and unilaterally determined) right of self-defense, but it was further weakened by the absence of any definition of, or test for, “aggression.” Both flaws were widely perceived; indeed, on the theory that “self-defense” and “aggression” are the reciprocals of each other, the flaws are, in fact, but one.¹³⁴ Secretary of State Kellogg, in an address to the Council on Foreign Rela-

127. *Id.* at 68-69 (quoting Exec. Report No. 1 (1929), reprinted in 70 CONG. REC. 1730, 1730 (1929)); see also *id.* at 89 (noting that the State Department was in accord with the Senate regarding the Monroe Doctrine).

128. Frank B. Kellogg, U.S. Sec’y of State, The French Draft of the Multilateral Treaty for the Renunciation of War, Address Before the American Society of International Law, in 1 SELECTED ARTICLES ON THE PACT OF PARIS 112, 113 (James Thayer Gerould compiler, 1929); see also SAMUEL FLAGG BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 726 (5th ed. 1965); MYERS, *supra* note 124, at 135-36 (citing a diplomatic note of the United States government from June 23, 1928).

129. SHOTWELL, *supra* note 122, at 157.

130. MYERS, *supra* note 124, at 45-46.

131. Letter from M. Litvinov, to the French Ambassador in Moscow (Aug. 31, 1928), reprinted in MYERS, *supra* note 124, at 167, 171.

132. Some viewed the British statement as less than a formal “reservation,” seeing it instead as an interpretation or explanation of the Pact. See SHOTWELL, *supra* note 122, at 167, 194-95, 200-08. But see Edwin M. Borchard, Editorial Comment, *The Multilateral Treaty for the Renunciation of War*, 23 AM. J. INT’L L. 116, 116-17 (1929).

133. Letter from Austen Chamberlain, Sec’y of State for Foreign Affairs of Gr. Brit., to Alanson B. Houghton, Am. Ambassador in London (May 19, 1928), reprinted in MYERS, *supra* note 124, at 124, 126; see also BEMIS, *supra* note 128, at 727.

134. On some accounts, a definition of aggression would, of necessity, set a limit to what counted as lawful self-defense. Cf. Linnan, *supra* note 42, at 70.

tions on March 15, 1928, acknowledged "the absence of any satisfactory definition of the word 'aggressor' or the phrase 'wars of aggression,'" but found it "difficult . . . to see how a definition could be agreed upon which would not be open to abuse."¹³⁵ Legal scholars of the period argued that the parties' sweeping understanding of self-defense, coupled with the absence of any definition of "aggression" in the pact, rendered it all but a nullity.¹³⁶ Diplomats and international lawyers throughout the 1930s also faulted the Pact of Paris for lacking a definition of "aggressive war."¹³⁷

Even apart from those difficulties, the scope of the legal commitments that the parties had made remained extremely uncertain. They had renounced "war" as "an instrument of national policy"; but what was "war" and when was it used as "an instrument of national policy"?¹³⁸ In the classic international law jurisprudence of the late nineteenth and early twentieth centuries, war had been considered a *legal* condition as

135. Frank B. Kellogg, U.S. Sec'y of State, *The War Prevention Policy of the United States, Address Before the Council on Foreign Relations* (Mar. 15, 1928), in 1 *SELECTED ARTICLES ON THE PACT OF PARIS*, *supra* note 128, at 98, 108.

136. *See, e.g.*, C.G. Fenwick, Editorial Comment, *War as an Instrument of National Policy*, 22 *AM. J. INT'L L.* 826, 827-28 (1928). Fenwick argued:

[I]t is the very lack of a definition of self-defense that makes the renunciation of war as an instrument of national policy so vague as to be almost misleading. . . .

. . . It is the remoter aspects of national defense which create the real difficulty. Due to the lack of an effective organization for preventing resort to force, international law developed during the eighteenth and nineteenth centuries a tradition of national defense which included practically the whole range of the causes of war. . . .

. . . .
 . . . In each case [of the contemporary defensive policies of the United States, Britain, France, Italy, and even Japan in Manchuria] the principle of national defense is given an interpretation extending far beyond the conception of resistance to actual armed invasion. There is ever present the necessity of anticipating conditions which, if allowed to come about, might ultimately embarrass the resistance of the state to direct attack. By a very simple manipulation of the circumstances leading to a crisis all wars can be made out to be defensive wars. . . .

Id. Likewise, Professor Edwin M. Borchard of Yale Law School, writing in 1929 in the *American Journal of International Law*, found that the Pact of Paris "will have constituted, instead of an outlawry of war, a solemn and practically universal declaration that wars of self-defense, League wars and the others provided for in the Pact, are lawful. It is not believed that any conceivable wars have been excluded from the list of permitted wars." Borchard, *supra* note 132, at 117-18.

137. *See, e.g.*, JULIUS STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION* 33 (1958) (noting that the First Committee of the Assembly of the League of Nations reported in 1931 that the Pact (like the Covenant of the League of Nations before it) did not exclude the belligerent exercise of "the right of 'legitimate self-defence'" (citation omitted)). Moreover, the Committee found "that 'the satisfactory enumeration of the distinctive characteristics either of aggression or of legitimate self-defence appears difficult and even impossible.'" *Id.* (citation omitted).

138. Fenwick, *supra* note 136, at 826. The Soviet Union called attention to these and related questions in a diplomatic note of August 31, 1928, responding to the invitation to adhere to the Pact. *See* Wehberg, *supra* note 115, at 49-50.

well as a factual one.¹³⁹ Aggressors might therefore attempt to circumvent the pact by arguing that their use of armed force against another nation lacked the legal quality of war, and hence was not a violation.¹⁴⁰ Furthermore, the traditional law of war recognized measures *short of* war—for example, “reprisals” or “interventions”—that arguably did not fall within the pact’s proscriptions.¹⁴¹ And when was a party using war “*as an instrument of national policy*”? Suppose that a nation went to war to recover a lost province that had wrongfully been taken from it by an aggressor. If the lapse of time between the loss of the province and the attempt at recovering it were long enough, the war might no longer appear to be “defensive.” And the lapse might well be long, if the victim had to wait until the aggressor was weakened or distracted by another conflict. But if the goal of the war were simply to undo a past injustice, would it be fair to say that the erstwhile victim had used war “*as an instrument of national policy*”? More generally, if a nation waged war to vindicate its clear and unambiguous legal rights (as determined, for example, by an international arbitration panel), would the pact forbid that war?¹⁴²

If the Kellogg-Briand Pact can serve as the main, or at least an approximate, baseline of the pre-Charter war rights of sovereign states, then, those states will have retained some, or perhaps a substantial, measure of their traditional prerogatives. To be sure, the pact, as powerfully reinforced by the Nuremberg judgment, denied states the right to wage *aggressive* war. And that decision, undoubtedly, constituted a very significant reduction of sovereign prerogatives. But the pact (at least arguably) did not annul states’ rights to wage *offensive* wars in at least some circumstances or for at least some purposes. Further, as discussed below, even if the pact did ban *all* offensive wars, it may not have forbidden all measures *short of* war, such as reprisals. And more clearly still, the pact did not negate states’ (rather generously conceived) right of self-defense; nor (accepting statements like Secretary Kellogg’s at face value) did it diminish their second-order rights to determine for themselves what *was* permissible self-defense. In all these respects, therefore, acceptance

139. On the doctrine of war (or *de jure* war) as a “legal status,” see IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 26-28 (1963).

140. See *id.* at 84 (finding the question whether the Pact prohibited the use of force in the absence of “war” in the formal sense to be “extremely difficult to resolve”). Efforts in the 1930s to extend the Pact’s condemnation of war to *all* recourses to force met with some success, but were ultimately inconclusive. See Wehberg, *supra* note 115, at 54-56.

141. See BOWETT, *supra* note 5, at 136.

142. See BROWNLIE, *supra* note 139, at 89 (noting, but disagreeing with, the view of Hans Kelsen that the Pact considered war waged against a violation of international law not to be use of war “*as an instrument of national policy*”); see also YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 84 (4th ed. 2005) (noting the thesis of J.H.W. Verzijl that League Members could resort to war if necessary to enforce an arbitral award or judgment).

of the Charter scheme arguably involved concessions, of varying degrees of significance, of states' pre-existing sovereign rights and powers.

Pre- and Post-Charter Rules Regarding "Armed Reprisals"

The pre-Charter law of war (or, strictly, law of peace) recognized various uses of force that were considered to fall short of war. These included "reprisals" and "interventions." The overwhelming consensus of opinion is that both reprisals and at least some forms of interventions are illegal after the Charter.¹⁴³ On the other hand, both statesmen and publicists maintained before the First World War that these measures, like war itself, could be taken at the unfettered discretion of states.¹⁴⁴ Were these measures illegal in the period immediately before the Charter? If their illegality in that period was uncertain, then the surrender of any claim to retain such "rights" can be said to represent a form of consideration that was exchanged for the Charter's promise of collective security. I consider here only the question of "armed reprisals."

Under pre-Charter law, the prevailing definition of reprisal was drawn from the *Naulilaa Case (Portugal v. Germany)*.¹⁴⁵ That 1928 opinion stated:

*A reprisal is an act of self-help (Selbsthilfehandlung) on the part of the injured state—after an unsatisfied demand—responding to an act contrary to the law of nations on the part of the offending state. [The reprisal] has the effect of momentarily suspending, in the relations of the two states, the observance of one or another rule of international law. . . . It would be illegal if a prior act, contrary to international law, had not furnished the reason for it.*¹⁴⁶

Reprisals, so understood, involved a prior delict under international law, a prior demand for redress, and proportionality in an otherwise illegal response.

Were peacetime armed reprisals unlawful before the Charter? Nothing in the language of the Kellogg-Briand Pact expressly forbade them, although the undertaking in Article II of the pact not to seek "the settlement or solution of [any inter-Party] disputes or conflicts of whatever nature or of whatever origin . . . except by pacific means" could reasonably be read to imply such a proscription.¹⁴⁷ The *Institut de Droit International* opined in 1934 that armed reprisals in peacetime were forbidden

143. On the illegality of interventions, see, for example, *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 106-10 (June 27); *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 34 (Apr. 9). The legality of reprisals will be considered below.

144. See ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 216 (1986).

145. *Naulilaa (Port. v. Ger.)*, 2 R.I.A.A. 1012 (Special Arb. Panel 1949).

146. *Id.* at 1025-26 (translation provided by author).

147. Kellogg-Briand Pact, *supra* note 75, art. III.

on the same conditions as recourse to war.¹⁴⁸ J.L. Brierly thought it “clear” that the pact rendered armed reprisals illegal.¹⁴⁹ Ian Brownlie, however, is far more doubtful, finding that “the question was not effectively settled by the coming into being of the Kellogg-Briand Pact.”¹⁵⁰ Roberto Ago, the special rapporteur for the International Law Commission’s 1980 *Report on State Responsibility*, also concluded that it would “be straining the meaning of [the pact] to infer from it that the prohibition it contained was to extend also to recourse to force other than war.”¹⁵¹ And six years after the pact, Hans Lauterpacht was convinced that it had not forbidden reprisals.¹⁵²

The Charter eliminated any persisting uncertainty: there is a clear consensus that Chapter II, and especially Article 2(4), makes peacetime armed reprisals illegal.¹⁵³ Various organs of the United Nations have de-

148. Régime des représailles en temp de paix art. 4, Oct. 19, 1934, *reprinted in* RÉSOLUTIONS DE L’INSTITUT DE DROIT INTERNATIONAL 1873-1956, at 169 (Hans Wehberg ed., 1957).

149. See J.L. BRIERLY, *THE LAW OF NATIONS* 421 (6th ed. 1963); accord Quincy Wright, Editorial Comment, *United States Intervention in the Lebanon*, 53 AM. J. INT’L L. 112, 115 (1959).

150. BROWNLIE, *supra* note 139, at 222; see also Michael J. Kelly, *Time Warp to 1945—Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSNAT’L L. & POL’Y 1, 10 (2003).

151. Roberto Ago, Int’l Law Comm’n, *Addendum to the Eighth Report on State Responsibility*, [1980] 2 Y.B. Int’l L. Comm’n 13, 59, U.N. Doc. A/CN.4/318/Add.5-7.

152. See Hans Lauterpacht, *The Pact of Paris and the Budapest Articles of Interpretation*, 20 TRANS. GROTIUS SOC’Y 178, 178-80 (1934) (criticizing interpretation of pact that construed its obligations “as extending not only to war in its technical meaning, but also to armed force in general,” and that read pact to prohibit not only “war,” but also “resort to force short of war, like reprisals or pacific blockade”).

153. See, e.g., HIGGINS, *supra* note 50, at 240; Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT’L L. 1, 1 (1972); Robert W. Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT’L L. 586, 594 (1972). There are, however, plausible arguments that the distinction between (illegal) armed reprisal and (legal) armed self-defense is tenuous insofar as both involve a purpose to deter, and that even if the Charter prohibits reprisals under Article 2, it nonetheless permits substantively similar actions as lawful self-defense under Article 51. See Bowett, *supra*, at 2-4; Tucker, *supra*, at 594.

United States practice lends support to that conclusion. In recent years, the United States has undertaken military actions that, although characterized as self-defense, could also be viewed as armed reprisals. These actions include the 1986 U.S. bombardment of targets in Libya in response to the bombing of a Berlin nightclub frequented by U.S. military personnel, see Address to the Nation on the United States Air Strike Against Libya, 1 PUB. PAPERS 468 (Apr. 14, 1986); the 1993 firing of U.S. Navy missiles at Iraqi intelligence headquarters in response to a thwarted Iraqi attempt to assassinate former President George W. Bush; and the retaliatory air strikes launched in 1998 against Osama bin Laden’s base in Afghanistan and a factory in Sudan in response to al Qaeda attacks on two U.S. embassies in Africa. See Franck, *supra* note 5, at 61-62 (noting that “there was scarcely any criticism and no recourse to the UN” in response to the 1998 air strikes);

nounced armed reprisals as Charter violations. For example, in Resolution 188, the Security Council “[c]ondemn[ed] reprisals as incompatible with the purposes and principles of the United Nations.”¹⁵⁴ The General Assembly’s 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations¹⁵⁵ affirmed that “States have a duty to refrain from acts of reprisal involving the use of force.”¹⁵⁶ The ICJ stated in its advisory opinion in *Legality of Threat or Use of Nuclear Weapons*¹⁵⁷ that “armed reprisals in time of peace . . . are considered to be unlawful.”¹⁵⁸ Likewise, the U.S. missile strikes at issue in *Oil Platforms*, which the ICJ refused to countenance as valid acts of self-defense, might alternatively have been characterized as illegal armed reprisals.¹⁵⁹ Accordingly, by agreeing to renounce any legal claim (however debatable) to be able to engage in peacetime armed reprisals, the parties to the Charter were indeed conceding some measure of their pre-Charter sovereignty.

The condemnation by United Nations organs of armed reprisals as Charter violations presupposes the functioning of the collective security system envisaged by the Charter: without that presupposition, the distinction between illegal acts of armed reprisal and lawful acts of self-defense is unrealistic.¹⁶⁰ Especially when a nation acts in the context of continuing (if intermittent) conflict with adversaries (as is the case with Israel and some of its Arab neighbors), armed reprisals may be a necessary or useful measure to counter small-scale but damaging attacks and to deter their repetition.¹⁶¹ Some commentators, pointing to the yawning “credibility

Kelly, *supra* note 150, at 16-18; W. Hays Parks, *Lessons from the 1986 Libya Airstrike*, 36 NEW ENG. L. REV. 755, 760 (2002).

154. S.C. Res. 188, ¶ 1, U.N. Doc. S/RES/188 (Apr. 9, 1964).

155. G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8028 (Oct. 24, 1970).

156. *Id.* pmb1.

157. *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

158. *Id.* at 246; *see also* Mary Ellen O’Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 894 (2002).

159. *See* William V. O’Brien, *Reprisals, Deterrence and Self-Defense in Counterterrorism Operations*, 30 VA. J. INT’L L. 421, 474 (1990) (characterizing U.S. actions as “reasonable reprisals”).

160. *See id.* at 470 (“The systemic model reflected in the Security Council’s handling of reprisals is a pristine 1945 U.N. Charter model. It is assumed that effective collective security and machinery for peaceful resolution of disputes exist. Recourse to force or the threat of force is strictly limited by article 2(4), the enforcement provisions of chapter VII and article 51. Self-help measures of armed coercion are strictly limited to immediate defense against an armed attack.”); *see also id.* at 475-76.

161. *See* Bowett, *supra* note 153, at 4.

gap”¹⁶² between the legal norm promulgated by the United Nations organs and the actual practice of states, have urged the adoption of a doctrine of “reasonable” reprisal.¹⁶³ If, as argued in this Article, the failure of the Charter’s collective security system entitles member states to resume at least some of their pre-Charter *jus ad bellum* rights, then states should indeed be free to develop a new customary norm of “reasonable” reprisal.

*Pre- and Post-Charter Rules Regarding Self-Defense:
The Competence to Decide*

As noted above, in joining the Kellogg-Briand Pact, the United States, among others, insisted that it had the *sole* competence to decide whether its actions constituted legitimate self-defense. If this position represented prevailing pre-Charter law, then the Charter was close to a complete repudiation of it. Article 51 seems to give member states only the right to determine what is legitimate self-defense *in the first instance*, until such time as “the Security Council has taken measures necessary to maintain international peace and security.”¹⁶⁴ Moreover, Article 39 vests in the Council the sole authority to “determine the existence of any threat to the peace, breach of the peace, or act of aggression.”¹⁶⁵ It appears to follow that the Security Council has the authority to review and override a Member State’s claim (even if made in good faith) to have exercised its right of self-defense, and to find instead that such action was itself a breach of the peace, a threat to the peace, or an act of aggression.

Intervening between the Kellogg-Briand Pact and the Charter, however, the Nuremberg judgment provided a more coherent and more authoritative formulation of pre-Charter customary law. Counsel for some of the Nuremberg defendants sought to argue that Germany’s 1940 invasion of Norway was not an act of aggressive war, but rather anticipatory self-defense against an expected British invasion of the same country.¹⁶⁶ Further, relying on the statements made at the time of the adoption of the Kellogg-Briand Pact, they contended that Germany’s determination that it was acting defensively in invading Norway was conclusive on all other nations.¹⁶⁷ The International Military Tribunal (IMT) accepted the possibility of a defense of anticipatory self defense, but denied that each nation had the sole and unreviewable discretion to decide unilaterally whether its actions were lawful self-defense:

162. *Id.* at 1.

163. *See id.*; O’Brien, *supra* note 159.

164. U.N. Charter art. 51.

165. *Id.* art. 39.

166. The Nurnberg Trial, 6 F.R.D. 69, 99 (Int’l Military Trib. 1946).

167. *Id.* at 100.

It was further argued that Germany alone could decide, in accordance with the reservations made by many of the Signatory Powers at the time of the conclusion of the Briand-Kellogg Pact, 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.¹⁶⁸

The IMT's ruling was surely sound: if no other nations could assay Germany's claim to be acting in lawful self-defense, then there would have been no need for Germany even to have entered such a claim. The very fact of raising a defense of lawful self-defense, and of attempting to sustain it by argument, proved that international review of that defense was possible.

The difference between pre-Charter and Charter law on the issue of competence to decide was, therefore, not as great as might at first appear. Still, there was a gap. The Nuremberg judgment had merely indicated that any claim of self-defense "must ultimately be subject to investigation and adjudication,"¹⁶⁹ without specifying what international agency or agencies were to perform those functions or how their determinations were to be enforced. Further, the judgment's formulation was consistent with the position that each nation's claim of self-defense, at least if made in good faith, should be considered *presumptively* correct or was entitled to substantial deference.¹⁷⁰ Article 39 of the Charter does, however, appoint an international agency to investigate and adjudicate claims of self-defense and to enforce sanctions if those claims prove unsound: the Security Council.¹⁷¹ Moreover, the Charter indicates no bias in favor of the validity of the claim of self-defense. Under the Charter scheme, nations may act under a claim of self-defense, but they do so at their peril; and if the Security Council hears and rejects their claims, they are subject to any of the sanctions in the Council's repertoire, including an enforcement action.

Furthermore, as the Charter has been interpreted, a nation's claim of self-defense has been held to be subject to investigation and adjudication, not only by the Security Council, but also by the ICJ. Implicit in each of the ICJ's decisions in *Nicaragua*, *Oil Platforms*, the *Wall Case*, and *De-*

168. *Id.* Previously, the League of Nations' Lytton Commission had rejected a similar Japanese claim, also rooted in the Kellogg-Briand Pact, that Japan had the sole and unreviewable competence to determine whether its 1931 invasion of Manchuria was justifiable self-defense. See BOWETT, *supra* note 5, at 32-33. A League committee also rejected a Japanese claim to be acting in self-defense in 1937. See BROWNLIE, *supra* note 139, at 78.

169. *Nurnberg*, 6 F.R.D. at 100.

170. See BROWNLIE, *supra* note 139, at 237-38.

171. U.N. Charter art. 39.

mocratic Republic of Congo v. Uganda is the assumption that the ICJ can, in proper cases, review and reject a defense of self-defense. In *Nicaragua*, the ICJ went so far as to reject the United States' claim that it could not review the validity of such claims *in the context of an ongoing conflict*.¹⁷² The ICJ assumed the same stance in the *Wall Case*, where again the claim of self-defense was raised in connection with actions taken in a conflict that was still active during the adjudication.¹⁷³ Although one might naturally read Article 39 of the Charter to provide for a political rather than a legal determination of the validity of claims of self-defense, along the lines of the "political question" doctrine in constitutional law,¹⁷⁴ the ICJ has added a layer of judicial review to the political review for which the Charter expressly provided. Indeed, Judge Simma's separate opinion in *Democratic Republic of Congo v. Uganda* appears to read the Charter as vesting the ICJ with the *primary* role in deciding such questions, and seems to consider the Security Council's determinations as less significant precisely because they *are* political; this, he says, is the very

172. *Military and Paramilitary Activities (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 I.C.J. 392, 436-38 (Nov. 26).

173. *Legal Consequences of Construction of Wall in Occupied Palestinian Territory*, Advisory Opinion (July 9, 2004), 43 I.L.M. 1009, 1026-27.

174. Frederic Kirgis has noted:

It was recognized at San Francisco that the Security Council . . . would interpret Charter provisions relating to its own functions. . . .

The Security Council was clearly empowered from the outset to make some other determinations that could be seen as quasi-judicial. Thus, it could expressly, or by necessary implication, brand a state as a potential or actual violator of international law. The obvious example is the Article 39 authority to determine the existence of a threat to the peace, breach of the peace or act of aggression.

Frederic L. Kirgis, Jr., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 527 (1995). The Council's authority to brand a state as an aggressor—or to withhold that determination—is undercut if the ICJ has a parallel authority and might reach the opposite conclusion. Thus, for instance, the Council has consciously refrained from condemning Turkey's cross-border incursions against Iraq against the bases of Kurdish separatists operating in the latter country, despite Iraq's repeated protests. The Council's inaction might be seen as an implicit acceptance of the argument that Turkey was acting in lawful self-defense under Article 51. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 115-17 (2d ed. 2004). But if the ICJ had jurisdiction to review the Turkish incursions, it might come to a different conclusion. For a very different view, see Karl Doe-hring, *Unlawful Resolutions of the Security Council and their Legal Consequences*, 1 MAX PLANCK Y.B. UNITED NATIONS L. 91, 100 (1997) (arguing that individual states should be able to sue United Nations before the ICJ for allegedly illegal Security Council decisions, and recommending referrals by Council to ICJ when states complain of illegality of Council decisions before Council acts on them).

Applying the "political question" doctrine to Article 51 would not, of course, preclude the ICJ from ruling upon *other* clauses of the Charter—a function of the ICJ that is well-established. See, e.g., *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 155-56 (July 20).

“division of labour between” political and judicial organs that the Charter envisaged.¹⁷⁵

Giving the ICJ rather than the Council the lead role in deciding whether actions are unlawful “aggression” or valid “self-defense” may well be standing the Charter on its head. Moreover, *pace* Judge Simma, the ICJ’s performance in cases involving the Charter’s use of force rules hardly shows it to be “apolitical.” Thus, the ICJ was unwilling, ostensibly for jurisdictional reasons, to decide Serbia’s case that NATO had violated the Charter by waging a “humanitarian” war against it in 1999 in Kosovo.¹⁷⁶ Given its expansive reading of its jurisdiction elsewhere, as in *Nicaragua*, the ICJ’s reluctance to decide the merits of Serbia’s case suggests that it was more preoccupied with protecting its own image than with neutrally enforcing Charter rules: no matter how valid Serbia’s reading of Charter rules was,¹⁷⁷ Serbia’s then ruler, Slobodan Milosevic, was

175. *Armed Activities on Territory of the Congo (Dem Rep. Congo v. Uganda)* (Dec. 19, 2005), 45 I.L.M. 271, 369 (Simma, J., separate opinion).

176. *See* Press Release, Int’l Court of Justice, *Legality of Use of Force (Yugoslavia v. Belgium): The Court Rejects the Request for the Indication of Provisional Measures Submitted by Yugoslavia, but Remains Seised of the Case* (June 2, 1999). On March 24, 1999, NATO forces began an air war over Serbia without a pre-existing Security Council resolution authorizing such use of force. Joseph C. Sweeney, *The Just War Ethic in International Law*, 27 *FORDHAM INT’L L.J.* 1865, 1890 (2004). No claim was made that NATO forces were acting in self-defense under Article 51. NATO forces struck Serbian targets unremittingly for the following seventy-eight days. *See* Timothy William Waters, *Unexploded Bomb: Voice, Silence, and Consequence at the Hague Tribunals: A Legal and Rhetorical Critique*, 35 *N.Y.U. J. INT’L L. & POL.* 1015, 1022 (2003). The question of the legality of NATO’s air war became the subject of litigation in the ICJ when the government of Serbia, then under Slobodan Milosevic, sought an interim ruling on April 29, 1999 to enjoin the NATO defendants’ campaign. *See* *Legality of Use of Force (Yugo. v. Belg.)*, *Provisional Measures*, 1999 I.C.J. 124, 124-28 (June 2). This was the first occasion on which the ICJ had dismissed a request for such interim relief on the basis of lack of *prima facie* jurisdiction. Christine Gray, *Legality of Use of Force (Yugoslavia v. Belgium)* (*Yugoslavia v. Canada*) (*Yugoslavia v. France*) (*Yugoslavia v. Germany*) (*Yugoslavia v. Italy*) (*Yugoslavia v. Netherlands*) (*Yugoslavia v. Portugal*) (*Yugoslavia v. Spain*) (*Yugoslavia v. United Kingdom*) (*Yugoslavia v. United States of America*): *Provisional Measures*, 49 *INT’L & COMP. L.Q.* 730, 732 (Malcolm D. Evans ed., 2000). Later efforts by Yugoslavia to persuade the ICJ to take jurisdiction and decide its suit on the merits have also been unsuccessful. *Id.*; Peter H.F. Bekker, *Legality of Use of Force (Yugoslavia v. Belgium)* (*Yugoslavia v. Canada*) (*Yugoslavia v. France*) (*Yugoslavia v. Germany*) (*Yugoslavia v. Italy*) (*Yugoslavia v. The Netherlands*) (*Yugoslavia v. Portugal*) (*Yugoslavia v. Spain*) (*Yugoslavia v. United Kingdom*) (*Yugoslavia v. United States*), 93 *AM. J. INT’L L.* 928, 928-30 (Bernard H. Oxman ed., 1999).

177. *See* Eric A. Posner, Op-Ed., *All Justice, Too, Is Local*, *N.Y. TIMES*, Dec. 30, 2004, at N (“[T]here is no doubt that, in strictly legal terms, NATO’s intervention [in Kosovo] violated international standards. What was unclear was whether the [ICJ] had jurisdiction to act against it. In this, the court was in an unenviable position: if it had held against the NATO states, they would surely have ignored the judgment. By holding in favor of these states, the court showed its irrelevance.”). *See generally* Abraham D. Sofaer, *International Law and Kosovo*, 36 *STAN. J. INT’L L.* 1, 3-4 (2000).

simply too repulsive a plaintiff.¹⁷⁸ Whether the ICJ is entitled to priority over the Council in interpreting Charter use of force rules is not, however, the present question; if the ICJ has usurped the Council's prerogatives, the Council seems to have acquiesced. What matters here is that the Charter is now authoritatively understood to have superimposed two different layers of international review over a nation's claim to be acting in self-defense—one political, the other judicial. And by no account can that result be considered to have been pre-Charter law.

Pre- and Post-Charter Rules Regarding Anticipatory Self-Defense

The question whether Article 51 negates the customary law doctrine of anticipatory self-defense has long stirred controversy. This is not the place in which to try to untangle that question. Rather, we need only consider the scope of the pre-Charter right, and how far Article 51 *may have contracted it*.

Three leading legal precedents contributed to the general pre-Charter understanding of anticipatory self-defense: the *Caroline* incident, the Nuremberg judgment, and the judgment of the Tokyo trials. In addition, state practice during the Second World War, including the United States' assistance to Great Britain in its conflict with Nazi Germany *before* the United States officially entered the Second World War, furnishes important guidance as to pre-Charter law relating to anticipatory self-defense.

Legal Precedents: The Caroline Incident

The *Caroline* incident occurred during the Canadian Rebellion of 1837.¹⁷⁹ Some U.S. nationals along the border sympathized with the Canadian rebels and sought to assist them.¹⁸⁰ The United States government attempted to suppress these activities by its own nationals, but was un-

178. In oral arguments in *Yugoslavia*, the NATO defendants had urged the ICJ to use its discretion to deny interim relief because Serbia had come before the court without "clean hands." Aaron Schwabach, *Yugoslavia v. NATO, Security Council Resolution 1244, and the Law of Humanitarian Intervention*, 27 SYRACUSE J. INT'L L. & COM. 77, 89-90 (2000). In other cases as well, the ICJ has adroitly avoided having to decide the merits in favor of unpopular plaintiffs such as Antonio Salazar's Portugal. See *Right of Passage Over Indian Territory* (Port. v. India), 1960 I.C.J. 6, 30-31 (Apr. 12) (declining to decide whether India had violated international law by tolerating the presence on its soil of "subversive elements" who were to overthrow part of Portugal's authority in its Indian territories).

179. See generally R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938) (providing the standard account of the factual background of the *Caroline* incident); see also Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton, British Special Minister (July 27, 1842), available at <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm> [hereinafter Webster Letter] (providing this letter and other important primary materials of the *Caroline* case).

180. Jennings, *supra* note 179, at 82.

successful.¹⁸¹ In December 1837, a group of armed men, many of them U.S. nationals, seized Navy Island on the Canadian side of the Niagara River, and used it as a base for attacking the Canadian mainland.¹⁸² The *Caroline*, a steamer bearing the U.S. flag, was used to make trips between New York and Navy Island and convoy men and material to the Canadian rebels.¹⁸³ The British commander, observing this activity, resolved to destroy the *Caroline* while it was in Canadian territory at Navy Island.¹⁸⁴ As it happened, however, the *Caroline* had returned to U.S. territory, carrying twenty-three U.S. nationals on board, when the British fell upon it and destroyed it.¹⁸⁵ American diplomatic protests, originally made in 1838, were renewed by Secretary of State Daniel Webster beginning in 1841.¹⁸⁶ Webster's letter of July 27, 1842, to the British Special Minister Lord Ashburton is the now-classic statement of the *Caroline* doctrine. In that letter, Webster maintained that under the circumstances, "[i]t will be for [the British government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."¹⁸⁷

Timothy Kearley has reexamined the development of the *Caroline* doctrine and shown that it was reformulated and misstated by many legal writers in the post-Charter period.¹⁸⁸ As Kearley has demonstrated, the prevailing pre-Charter understanding limited the doctrine's restrictions on self-defense only "to extra-territorial uses of force by a state in peacetime against another state which was unable or unwilling to prevent its territory from being used as a base of operations for hostile activities against the state taking action."¹⁸⁹ The doctrine was originally *not* conceived to impose requirements applying to *every* occasion of lawful self-defense. For example, a state could properly use armed force to defend its own sparsely inhabited territory from forcible incursions by another state's military even if the need for such counter-force was "neither 'instant' nor 'overwhelming.'"¹⁹⁰ The common post-Charter view "that the narrow restrictions of the *Caroline* doctrine apply to *all* uses of force by a

181. *Id.*

182. *Id.* at 83.

183. *Id.*

184. *Id.* at 83-84.

185. *Id.* at 84.

186. *Id.* at 85.

187. Webster Letter, *supra* note 179.

188. See Timothy Kearley, *Raising the Caroline*, 17 WIS. INT'L L.J. 325 (1999).

189. *Id.* at 325; see also *id.* at 336-38.

190. *Id.* at 326.

state in self-defense under customary international law”¹⁹¹ is, therefore, mistaken.¹⁹²

The Nuremberg Judgment: The Invasion of Norway

The second major pre-Charter legal precedent is the Nuremberg judgment’s ruling on whether the German invasion and conquest of Norway in March, 1940 was a criminal act of aggressive war or, as the German defendants argued, a lawful defensive measure against an anticipated British intervention to secure Norway as a base for operations against Germany. The Nuremberg judgment is, unfortunately, somewhat confused. The IMT misstated the *Caroline* doctrine, formulating it as the view “that preventive action in foreign territory is justified only in case of ‘an instant and over-whelming necessity for self-defense, leaving no choice of means, and no moment of deliberation.’”¹⁹³ But the *Caroline* doctrine was framed for *peacetime* conditions; and although Germany and Norway were at peace, the fact that a general European war was raging may have argued for a relaxation of the doctrine’s highly restrictive conditions. More importantly, as the IMT was aware, Britain *had* indeed been planning an occupation of harbors and airports in Norway, and there was evidence that a convoy would have left Britain in early April to begin mining Norwegian harbors.¹⁹⁴ Such British action, at least in the absence of Norway’s consent, would itself have been a case of anticipatory self-defense against Germany had the German invasion of Norway not occurred first,¹⁹⁵ and the IMT’s opinion says nothing to indicate that that British action would have been unlawful. Rather, the IMT went to some pains to demonstrate that the German invasion of Norway had been contemplated “long in advance of the Allied plans” to occupy that country, and was therefore “not made for the purpose of forestalling an imminent Allied landing” in it.¹⁹⁶

Although the Nuremberg judgment does not say so, one may reasonably infer from it that anticipatory self-defense would be lawful in circumstances *other* than those found in the *Caroline* incident. For example, if state *A* and state *B* are or are about to be at war, and *B* knows that *A*’s

191. *Id.* at 330.

192. For the common post-Charter reading, see, for example, Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT’L L. 227, 231 (2003).

193. The Nurnberg Trial, 6 F.R.D. 69, 99 (Int’l Military Trib. 1946) (citing the *Caroline* case).

194. *Id.* at 100.

195. There was evidence that the Germans believed that the Norwegian government would have tacitly consented to a British occupation. Had it been established that Norway did consent or would have consented, the German defendants could have argued that their actions constituted lawful, anticipatory self-defense against *both* Norway and Britain.

196. *Id.*

armed forces are on the verge of occupying the territory of neutral state *C* for use as a base against *B*, then *B* may preempt *A*'s action and occupy *C* itself. Here, *B* would be acting to forestall an attack from *A* that is twice removed: *A* would *first* have occupied *C*, *then* used *C* as a base from which to attack *B*. Although an "imminence" requirement would have to be satisfied in this situation (as in the *Caroline* incident), an attack by *A* on *B* would not have to be imminent for *B* to be justified in acting preemptively; rather, only an attack by *A* on *C* would have to be "imminent."

The Tokyo Judgment: The Dutch Declaration of War Against Japan

The judgment of the International Military Tribunal for the Far East (IMTFE) in the post-World War II Tokyo trials of the major Japanese war criminals also upheld the right of anticipatory self-defense. The defense was made that the Netherlands, then a major colonial power in Southeast Asia, had declared war on Japan on December 8, 1941, in advance of a Japanese declaration of war on it or attack upon its possessions in Asia.¹⁹⁷ However, the Japanese government, having already attacked the United States at Pearl Harbor one day before, was known to be planning to attack the Dutch East Indies.¹⁹⁸ The IMTFE upheld the anticipatory action of the Dutch government, stating:

"The fact that the Netherlands, being fully apprised of the imminence of the attack, in self-defence declared war against Japan on the 8th December and thus officially recognized the existence of a state of war which had been begun by Japan cannot change that war from a war of aggression . . . into something other than that."¹⁹⁹

State Practice in the Second World War:

*U.S. Aid to Great Britain in
Violation of Neutral Obligations*

In addition to the *Caroline* doctrine and the Nuremberg and Tokyo decisions, pre-Charter state practice also sheds light on the customary understanding of anticipatory self-defense. Three episodes from the Second World War are particularly pertinent. First, the United States provided substantial assistance to Great Britain in its struggle with Germany *before* the United States officially entered the war. The United States, although formally neutral, aided Britain in a variety of ways, including supplying

197. See MCCORMACK, *supra* note 5, at 258-59.

198. See *id.* at 259.

199. BOWETT, *supra* note 5, at 144 (citation omitted) (quoting from the IMTFE judgment).

war material, furnishing military escorts to the convoys that carried such supplies to Britain, training British air force personnel, and engaging in an “undeclared” naval war against German naval vessels in the North Atlantic.²⁰⁰ The United States also occupied Iceland so as to secure it against German invasion and to provide a forward defense perimeter against an anticipated war with Germany.²⁰¹ All of these measures, which presumably the United States and Britain considered lawful under the pre-Charter regime,²⁰² can properly have been regarded as forms of anticipatory self-defense by the United States.²⁰³ The upshot is that in a case in which state *A* has begun an aggressive war on state *B*, state *C*, which is not a party to the conflict, may legitimately (under pre-Charter law) furnish *B* with military assistance, training, and war material of various kinds, and even engage in low-level combat with the forces of *A*, if *C* anticipates that *B* will eventually be at war with *C*. In these circumstances, the “imminence” test for lawful anticipatory self-defense is even weaker than before.

The British Destruction of the French Fleet

Another example of state practice in the immediate prelude to the Charter is relevant: the British Royal Navy’s destruction on July 3, 1940, on the orders of Prime Minister Winston Churchill, of the French war fleet at Mers-el-Kéber and Oran in French North Africa, to prevent that fleet from falling into the hands of Germany.²⁰⁴ Only shortly before, on June 22, 1940, France had concluded an armistice with Germany,²⁰⁵ under

200. See, e.g., Training of British Flying Students in the United States, 40 Op. Att’y Gen. 58, 58-60 (1941).

201. See JAMES GRAFTON ROGERS, WORLD POLICING AND THE CONSTITUTION 70-71 (1945). This was done with the consent of Iceland’s prime minister. *Id.* at 70.

202. During the Anglo-American discussions at the San Francisco Conference over the drafting of Article 51, British Foreign Minister Sir Anthony Eden posited the case “of an attack on Turkey by Bulgaria . . . at the instigation of the Soviet Union.” United Nations Conference, Minutes of the Third Five-Power Informal Consultative Meeting on Proposed Amendments (Part I) (May 12, 1945), in 1 U.S. DEP’T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1945, at 691, 700 (1967). In that scenario, Eden said, “Great Britain, as a matter of self-defense of the Empire, wished to have the opportunity to act at once.” *Id.* That is fundamentally the same situation of anticipatory self-defense as the one discussed in the text above.

203. Cf. George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT’L L.J. 321, 346-47 (1998).

204. See MCDUGAL & FELICIANO, *supra* note 114, at 211. The episode had a memorable precedent in British naval history. In 1807, the Royal Navy seized the Danish fleet, following a severe bombardment of Copenhagen, in order to prevent Napoléon from capturing that fleet. See Carl J. Kulsrud, *The Seizure of the Danish Fleet, 1807*, 32 AM. J. INT’L L. 280, 280 (1938).

205. See Armistice Agreement Between the German High Command of the Armed Forces and French Plenipotentiaries, Fr.-Ger., June 22, 1940, available at <http://www.yale.edu/lawweb/avalon/wwii/frgearm.htm>.

Article VIII of which France had agreed to collect its fleet in ports to be designated by the Germans and, except for units needed to protect the French colonial empire, demobilize it and lay it up.²⁰⁶ Churchill, fearing that once the French fleet had come under German control, it might be used against Britain, issued an ultimatum to French Admiral Gensoul, offering him the opportunity to surrender the parts of the fleet under his command or risk their destruction.²⁰⁷ Gensoul did not give way.²⁰⁸ In the ensuing conflict, the French lost one battleship and saw several other battleships damaged; more than 1,000 persons lost their lives.²⁰⁹ At the time of the event, Britain and France were not, of course, at war. This episode too would presumably have been considered a lawful act of anticipatory self-defense before the Charter's adoption. It is, so to say, the converse case to the United States' 1940-1941 aid to Britain: if *A* and *B* are at war, then *B* may lawfully attack and destroy weaponry and other military equipment belonging to state *C*, which pursuant to an armistice has suspended hostilities against *A* and is thus effectively a neutral, if *B* believes that those means of war will fall into the hands of *A*. Here again, the imminence test would be applied quite flexibly.

The Anglo-Soviet Invasion of Iran

The third relevant example of state practice in the period shortly before the Charter is the Anglo-Soviet invasion of neutral (but Axis-leaning) Iran in August, 1941.²¹⁰ Britain, which had significant oil interests in Iran, was concerned about Nazi activities in that country, and feared that Germany's armies, then surging toward Soviet Caucasia in Operation Barbarossa, would soon reach the Iranian border.²¹¹ Further, without being able to use the Trans-Iranian Railway to transport supplies from the Persian Gulf, the British would have been hard pressed to deliver desperately needed aid to their Soviet ally.²¹² Iran did not comply with British and Soviet ultimatums to expel resident Germans.²¹³ A British force from the south and a Soviet force from the north invaded Iran on August 25, 1941.²¹⁴ Iran's ruler, Reza Shah Pahlavi, appealed person-

206. *Id.* art. VIII.

207. BBC, WW2 People's War, Fact File: Mers-el-Kébir, <http://www.bbc.co.uk/ww2peopleswar/timeline/index.shtml?1144973> (last visited Mar. 31, 2007).

208. *Id.*

209. *Id.*

210. See generally RICHARD A. STEWART, *SUNRISE AT ABADAN: THE BRITISH AND SOVIET INVASION OF IRAN, 1941* (1988) (providing an account of the Anglo-Soviet invasion of Iran).

211. See *id.* at 30-31.

212. See *id.* at 77.

213. *Id.* at 107.

214. *Id.* at 109, 131.

ally on the same day to President Franklin Roosevelt, the leader of another neutral nation, to use his good offices “to take efficacious and urgent humanitarian steps to put an end to these acts of aggression.”²¹⁵ Relying on the principles of the Atlantic Charter, the Shah wrote that “this incident . . . brings into war a neutral and pacific country which has had no other care than the safeguarding of tranquility and the reform of the country.”²¹⁶ Roosevelt declined the Shah’s request for assistance, replying on September 2, 1941 that:

[M]ovements of conquest by Germany will continue and will extend beyond Europe to Asia, Africa, and even to the Americas, unless they are stopped by military force. It is equally certain that those countries which desire to maintain their independence must engage in a great common effort if they are not to be engulfed one by one as has already happened to a large number of countries in Europe.²¹⁷

Within a week of President Roosevelt’s reply, Reza Shah was deposed by the occupying powers in favor of his more pliant twenty-one-year-old son, Mohammed.²¹⁸

Prime Minister Winston Churchill considered the Anglo-Soviet invasion to have been a “technical infringement of international law,” but defended it in terms of a higher legality:

Acting in the name of the [League of Nations] Covenant, and as virtual mandatories of the League and all it stands for, we have a right, and indeed are bound in duty, to abrogate for a space some of the conventions of the very laws we seek to consolidate and reaffirm. Small nations must not tie our hands The letter of the law must not in supreme emergency obstruct those who are charged with its protection and enforcement.²¹⁹

Alternatively, the intervention might have been justified as lawful preventative or anticipatory self-defense.²²⁰ In any case, it seems reasonable to assume that the United States, Great Britain, and the Soviet Union all would have considered the Anglo-Soviet invasion of Iran to have been lawful at the time of the event. If so, the Anglo-Soviet invasion of Iran

215. Letter from Reza Pahlavi, Shah of Iran, to Franklin D. Roosevelt, U.S. President (Aug. 25, 1941), *reprinted in* THE UNITED STATES AND IRAN: A DOCUMENTARY HISTORY 77, 78 (Yonah Alexander & Allan Nanes eds., 1980).

216. *Id.* at 77-78.

217. Letter from Franklin D. Roosevelt, U.S. President, to Reza Pahlavi, Shah of Iran (Sept. 2, 1941), *reprinted in* THE UNITED STATES AND IRAN, *supra* note 215, at 79, 80.

218. *Cf.* Letter from Mohammad Reza Pahlavi, Shahansah of Iran, to Franklin D. Roosevelt, U.S. President (Jan. 31, 1942), *reprinted in* THE UNITED STATES AND IRAN, *supra* note 215, at 81, 81-82.

219. STEWART, *supra* note 210, at 3 (quoting WINSTON S. CHURCHILL, THE SECOND WORLD WAR: THE GATHERING STORM 547 (1948)).

220. *See* MCDUGAL & FELICIANO, *supra* note 114, at 211-12.

would carry to a further stage the defensive principle at work in the destruction of the French fleet in 1940. The imminence test, as before, would be very undemanding. Indeed, if it were not for the fact that the Nuremberg tribunal found Germany to have been waging a war of criminal aggression, it would be difficult to see any principled distinction between the 1941 Anglo-Soviet invasion of Iran and Germany's 1940 invasion of Norway.²²¹

This survey of the leading pre-Charter precedents indicates that customary law before the Charter left substantial latitude for various forms of anticipatory self-defense. If the pre-Charter regime was preserved intact by Article 51, then the right of anticipatory self-defense goes *well* beyond many current interpretations of it—among them, those interpretations that would require that armed counter-measures are lawful in response to a threat of attack only if the threat is “instant” and “overwhelming.”

How, if at all, did Article 51 alter this pre-Charter regime? The question does not permit a straightforward answer. There have been persisting, and perhaps irresolvable, problems in interpreting Article 51, largely posed by the phrase “*inherent* right of . . . self-defence.”²²² The use of the word “inherent” seems to indicate that the Article merely codifies pre-existing customary law which, as just demonstrated, included a rather flexible right of anticipatory self-defense. But since Article 51 also goes on to say that the right of self-defense arises “*if an armed attack occurs*,”²²³ it seems almost ineluctable to conclude that self-defense is now legitimate only *after* an actual attack, and not in response to the mere *threat* of one—even if an attack is known to be imminent.²²⁴

221. Indeed, the British ambassador to the Soviet Union, Sir Stafford Cripps, noted the resemblance between the Anglo-Soviet invasion of Iran and the German invasion of “Norway, where we were prepared to abandon our traditional policy [of respecting neutrality], . . . [but] were not quick enough off the mark.” STEWART, *supra* note 210, at 61 (first alteration in original) (citation omitted).

222. U.N. Charter art. 51 (emphasis added).

223. *Id.* (emphasis added).

224. There is a second, less frequently discussed question that also arises out of the use of the term “inherent.” To call the “right” of self-defense inherent (or, in equally authoritative French text, “*le droit naturel*”) seems to imply that the right preexists any conventional legal system. An inherent or (still more) “natural” right is one that is logically antecedent to any system of treaty law, or indeed, of customary law. On the other hand, legal scholars have contended that the concept of self-defense only makes sense within the structure of a legal system, where it functions (as in criminal law or torts) as a legal defense to a charge, for example, of assault and battery (or, in international law, of aggression). See, e.g., Josef L. Kunz, Editorial Comment, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT’L L. 872, 875-76 (1947) (arguing that Article 51’s reference to an “inherent right” can “only serve to obscure the legal meaning”). In *Nicaragua*, the ICJ slid over this question, assuming without analysis that Article 51 was referring only to customary, rather than to natural, law. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 102-03 (June 27).

Legal scholars of great weight and authority have long been divided over which of these interpretations is correct,²²⁵ and the controversy shows no sign of ending.²²⁶ Representative of the “restrictive” view of Article 51 is Ian Brownlie, who has argued “that even as a matter of ‘plain’ interpretation the permission in Article 51 is exceptional in the context of the Charter and exclusive of any customary right of self-defence.”²²⁷ In Louis Henkin’s opinion, “Article 51 permits measures in self-defense ‘if an armed attack occurs’; it does not permit use of force in self-defense on the ground that an armed attack might occur, or is feared, however reasonable the fear.”²²⁸ Likewise, Michael Bothe finds it “clear [that] ‘armed attack’ in the sense of Article 51 is an actual armed attack, which happens (‘occurs’), not one which is only threatened.”²²⁹ Yoram Dinstein maintains:

When a country feels menaced by the threat of an armed attack, all that it is free to do—in keeping with the Charter—is make the necessary military preparations for repulsing the hostile action should it materialize, as well as bring the matter forthwith to the attention of the Security Council²³⁰

Occasionally the restrictive view is supported by reference to the negotiating history, as for example, when Thomas Franck argues that “[i]n San Francisco, the founders [of the United Nations] deliberately closed the door to any claim of ‘anticipatory self-defense.’”²³¹

Critics of the restrictionist view, on the other hand, have urged a variety of textual and non-textual arguments against it. First, many scholars have argued that the use of the term “inherent” in Article 51 is a plain textual signal of the incorporation into the Charter of the views of self-defense “expressed in connection with the Kellogg-Briand Pact, and as further developed in customary law during the remainder of the” pre-

225. For an objective and well-informed survey of earlier statements of the different positions, see S.M. Schwebel, *Aggression, Intervention and Self-Defence in Modern International Law*, 136 RECUEIL DES COURS 411, 478-83 (1972). A full and careful recent review of opinions on the question is given by Sean D. Murphy. See Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 706-19 (2005); see also Kearley, *supra* note 11, at 670-71 (outlining different interpretative positions).

226. For a recent opinion, see generally Reisman & Armstrong, *supra* note 9.

227. BROWNLIE, *supra* note 139, at 273.

228. Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 817, 825 (2005).

229. Bothe, *supra* note 192, at 229. Bothe does, however, concede that it is “at least defensible” to consider the *Caroline* doctrine—or rather, the mistaken post-Charter interpretation of it—as surviving the Charter, although he also thinks that this would be “as far as pre-emptive self-defence possibly goes under current international law.” *Id.* at 231.

230. DINSTEIN, *supra* note 142, at 187.

231. Franck, *supra* note 5, at 59.

Charter period.²³² A further textual argument against the restrictive view is that “if an armed attack occurs” need not “mean ‘after an armed attack has occurred’”; and the French text is cited in support.²³³ Yet another textual move has been to claim that “where there is convincing evidence [that] an [armed attack has] been actually mounted, [that] attack may be said to have begun to occur,” even if the target’s territory has not yet been penetrated.²³⁴ The anti-restrictionist case has also included more pragmatic arguments: thus, it has been said that “it would be a travesty of the purposes of the Charter to compel a defending State to allow its assailant to deliver the first and perhaps fatal blow.”²³⁵ Finally, the anti-restrictionists contend that, at a minimum, the term “inherent” creates an ambiguity in the Article, forcing recourse (under general rules of treaty interpretation)²³⁶ to the *travaux préparatoires*.²³⁷

Scholars who have sought to resolve the textual ambiguity of Article 51 by recourse to the negotiating record have, however, also reached inconclusive results.²³⁸ Timothy Kearley’s massive and probing recent study of

232. Linnan, *supra* note 42, at 81; *see also* MCCORMACK, *supra* note 5, at 178-79 (“[T]he word ‘inherent’ can have no other meaning. . . . Apart from restricting self-defense to an interim measure until the Security Council has acted to maintain international peace and security, . . . the drafters did not intend to restrict the [customary] right to use force in self-defense.”); Greig, *supra* note 44, at 370 (“[T]he use of the word ‘inherent’ provided a ground for incorporating into the law of the Charter pre-existing customary international law with regard to self-defence in general”); Murphy, *supra* note 20, at 64 (“Article 51 did not create a right of self-defense; rather, it preserved an *inherent* right of self-defense, one that existed in customary international law prior to enactment of the Charter in 1945”); Rostow, *supra* note 5, at 513 (“Article 51 says that the historic conception of the right of self-defense is not impaired by the Charter”); Schmitt, *supra* note 22, at 750 (referring to “Article 51, and the customary law it codifies”). On the other side, one scholar argues that because “[t]he UN Charter was adopted for the very purpose of creating a far wider prohibition on force than existed under treaty or custom in 1945,” the idea that Article 51’s use of the term “inherent” incorporates pre-Charter customary law “requires privileging the word ‘inherent’ over the plain terms of Article 2(4) and the words ‘armed attack’ in Article 51. Indeed, it requires privileging one word over the whole structure and purpose of the UN Charter.” Mary Ellen O’Connell, *The Myth of Preemptive Self-Defense* 13 (Am. Soc’y of Int’l Law: Task Force on Terrorism, 2002), available at <http://www.asil.org/taskforce/oconnell.pdf>.

233. *See* C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 450, 497 (1952). Dinstein also argues “that an armed attack may precede the firing of the first shot. The crucial question is who embarks upon an irreversible course of action, thereby crossing the Rubicon.” YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 172 (3d ed. 2001).

234. Waldock, *supra* note 233, at 498.

235. *Id.*

236. *See* Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 184 (July 20) (Spender, J., separate opinion).

237. *See* Linnan, *supra* note 42, at 80-81; *see also* Kearley, *supra* note 11, at 727.

238. For an earlier study concluding that “it was made quite clear at San Francisco that the traditional permission of [anticipatory] self-defense was not intended to be abridged

the history of the Article's drafting found that little attention was in fact paid to the question of anticipatory (as distinct from collective) self-defense;²³⁹ instead, the key consideration was the United States' desire to integrate its pre-existing hemispheric defense arrangements under the then-recent Act of Chapultepec²⁴⁰ into the global security system envisaged by the Charter.²⁴¹ Even when the issue of anticipatory or preventative self-defense was directly broached within the U.S. delegation, it was considered merely as an aspect of the problem of *regional* self-defense.²⁴² The negotiating record leaves obscure what purpose was served by introducing the term "inherent" to qualify "right of self-defense";²⁴³ although the intention *may* have been to incorporate pre-Charter customary law, we cannot be certain of that.²⁴⁴

and attenuated but, on the contrary, to be reserved and maintained," see MCDUGAL AND FELICIANO, *supra* note 114, at 235.

239. Kearley, *supra* note 11, at 669 ("[T]he drafters did not intend to address the right of individual *preemptive* self-defense, but they did intend to eliminate *preventive* self-defense . . ."); see also *id.* at 724-29 (substantiating those conclusions).

240. Final Act of the Inter-American Conference on Problems of War and Peace, Mar. 8, 1945, 60 Stat. 1831. For an explanation of the relevance of this Act to the Charter, see Kearley, *supra* note 11, at 679-84.

241. See MCCORMACK, *supra* note 5, at 176; RUSSELL, *supra* note 61, at 699; Kearley, *supra* note 11, at 683-700. The American delegate Harold Stassen stated the problem to his colleagues in this way: "what was involved here was a basic question as to whether we were setting up a regional system or a world-wide system. It was essential to permit the Security Council to authorize enforcement action; otherwise, we would find ourselves with a regional system only. On the other hand, we retained the essential right of self-defense." United Nations Conference, Minutes of the Twenty-Ninth Meeting of the U.S. Delegation (May 4, 1945), in 1 U.S. DEP'T OF STATE, *supra* note 202, at 588, 592.

The two objectives were eventually to be reconciled chiefly through Article 51's reference to a right of *collective* self-defense, the concept of which was then unfamiliar to international law. See United Nations Conference, Minutes of the Thirty-Sixth Meeting of the U.S. Delegation (May 12, 1945), in 1 U.S. DEP'T OF STATE, *supra* note 202, at 674, 677. American delegate Pasvolsky noted that "the British were shocked by the American concept of [collective] self-defense. It was to them a new thought that self-defense can operate outside of a nation's territorial limits." *Id.*; see also Greig, *supra* note 44, at 370-71; Kearley, *supra* note 11, at 697-700, 711-12.

242. See Kearley, *supra* note 11, at 706-07, 710-11. Kearley suggests that the intent of the American delegation, or at least some of its members, was to negate the possibility of anticipatory *collective* self-defense, but to preserve the right of anticipatory *individual* self-defense. See *id.* at 711.

243. See *id.* at 694-95, 706.

244. One problem in supposing that the use of the term "inherent" was intended to incorporate pre-Charter customary law into Article 51 arises from the fact that the concept of "collective" self-defense was not known to that body of law. See *supra* note 241. Yet "inherent" seems to qualify *both* the individual and the collective right of self-defense in Article 51. The ICJ has failed to notice this issue. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103 (June 27) ("[T]he existence of the right of collective self-defence is established in customary international law . . .").

There are scattered references to the right of self-defense in the negotiating history of Article 2(4). For example, in reporting on the wording of a draft of what is now Article 2(4), the subcommittee at the San Francisco Conference charged with drafting an acceptable proposal rejected the idea that no force at all should be used unless approved by the Security Council, and stated: “[I]t was clear to the subcommittee that the right of self-defense against aggression should not be impaired or diminished.”²⁴⁵ It would be wrong to read too much into that brief statement: even if “the right of self-defense against aggression” was supposed to have been left unaffected, there was no discussion of criteria for evaluating a purported exercise of that right.²⁴⁶ Nor does the statement explicitly address the question of *anticipatory* self-defense. In short, the negotiating history does not resolve the impasse over Article 51’s meaning.

While scholars continue to debate whether Article 51 incorporates the pre-Charter right of anticipatory self-defense, organs of the United Nations have been addressing the issue. As pointed out above, then Secretary General Kofi Annan recently endorsed the view that Article 51 does indeed preserve pre-Charter law in that respect.²⁴⁷ In practical terms, Annan’s statement might seem to settle the matter. Unfortunately, however, it does not. The ICJ has persistently reserved the question, and until the United Nations organs speak with a single voice, one cannot be sure how Article 51 should be construed.

Worse still, the ICJ’s decisions can be read to imply an answer *different from* the Secretary General’s. The court’s opinions thus far have tilted heavily in favor of the restrictive view of anticipatory self-defense—or, at least, in favor of what might be called a “restrictive plus” view, in which the right of anticipatory self-defense, even if “preserved,” is only vestigial. First, the “gravity” test for determining whether an armed attack has occurred, laid down in *Nicaragua*²⁴⁸ and affirmed in *Oil Platforms*,²⁴⁹ may often make it difficult to characterize an anticipatory measure in response to an imminent threat as lawful “self-defense,” because until the threat actually materializes, it can be hard to demonstrate its likely scale and

245. MCCORMACK, *supra* note 5, at 163 (quoting the report of United Nations Subcommittee I/1/A).

246. *Id.* at 163-64.

247. *See In Larger Freedom*, *supra* note 39, ¶ 124 (“Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.”). The Secretary General’s report also firmly rules out the preventive use of armed force against what it calls “not imminent but latent” threats. *See id.* ¶ 125.

248. *Nicaragua*, 1986 I.C.J. at 103.

249. *Oil Platforms (Iran v. U.S.)* (Nov. 6, 2003), 42 I.L.M. 1334, 1358.

effects.²⁵⁰ Second, *Oil Platforms*' requirement for clear and convincing proof of an armed attack²⁵¹—even in the context of actual, repetitive military operations against a defending state—also makes it difficult to demonstrate that an anticipatory measure is lawful self-defense. Characterizing an attack as “imminent” requires a determination of the threatening actor’s intent, a determination that is nearly always extremely difficult to make, because an aggressor’s war plans are usually heavily concealed.²⁵² By both placing the burden of proof on the defending state and making the evidentiary standard very high, the ICJ has effectively precluded much anticipatory self-defense. Third, if the ICJ were really open to finding that Article 51 preserved the customary right of self-defense (at least to the extent of the *Caroline* doctrine), it would not be taking the position that self-defense can only be exercised against an attack by (or imputable to) another state.²⁵³ For in the *Caroline* incident, the claim was made to a right of anticipatory self-defense against an armed band of private irregulars whose violence was in no way sanctioned, supported, or even acquiesced to by another state. The Article 51 “state action” requirement for lawful self-defense thus logically precludes the continuing vitality of the *Caroline* doctrine. The ICJ seems, in substance, to have answered negatively the question of the legality of anticipatory self-defense, even while purporting to leave the question open. Very little, if any, of the pre-Charter right of anticipatory self-defense can remain if even the *Caroline* doctrine is not preserved in Article 51.²⁵⁴

250. Although some scholars believe that *Nicaragua* set “the threshold for an armed attack . . . very low,” this is not at all clear. See Schmitt, *supra* note 22, at 751. Other scholars consider that “the Court set the legal bar for the initiation of actions in self-defense at a rather high notch and, in effect, asked targeted populations simply to endure the consequences of protracted low-level conflict.” W. Michael Reisman, Editorial Comment, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 82, 89 (2003). The ICJ has declined to “exclude the possibility that the mining of a single military vessel might” count as an armed attack, see *Oil Platforms*, 42 I.L.M. at 1360. The mining of a military vessel does not seem to the author to be a “very low” threshold.

251. See *Oil Platforms*, 42 I.L.M. at 1356-57, 1361; see also *Nicaragua*, 1986 I.C.J. at 62; O’Connell, *supra* note 158, at 895 (“[A]ny state engaging in [anticipatory] self-defense . . . must show by clear and convincing evidence that future attacks are planned.”).

252. See BROWNIE, *supra* note 139, at 259.

253. See, e.g., *Armed Activities on Territory of the Congo (Dem. Rep. Congo v. Uganda)* (Dec. 19, 2005), 45 I.L.M. 271, 306; *Legal Consequences of Construction of Wall in Occupied Palestinian Territory*, Advisory Opinion (July 9, 2004), 43 I.L.M. 1009, 1049-50; *Nicaragua*, 1986 I.C.J. at 103.

254. The effect of the ICJ’s understanding of Article 51 on other UN organs may conceivably be seen in the Security Council’s Resolution 1701, calling for the cessation of the hostilities that began last summer along the Lebanese-Israeli border. S.C. Res. 1701, ¶ 1, U.N. Doc. S/RES/1701 (Aug. 11, 2006). The language of operative paragraph one of that Resolution bears careful reading. In it, the Council “[c]alls for a full cessation of hostilities based upon, in particular, the immediate cessation by Hizbollah of all attacks and the immediate cessation by Israel of all offensive military operations.” *Id.* Neither in the param-

In sum, the right of anticipatory self-defense “preserved” in Article 51 seems to be at best a vestige of that right as understood in pre-Charter law. To begin with, even those readings of Article 51 that interpret an incorporation of the *Caroline* doctrine generally differ in their understanding of it from the prevailing pre-Charter view: they attach to *all* forms of anticipatory self-defense the constraints that the pre-Charter *Caroline* doctrine imposed only on *some* forms of anticipatory self-defense. Further, the usual post-Charter view of anticipatory self-defense would seem to rule out various kinds of state practice, such as the destruction of the French fleet at Mers el Kéber, which would probably have been considered lawful anticipatory self-defense in the pre-Charter period. Finally, although there is a continuing scholarly controversy over whether Article 51 preserves at least some form of the pre-Charter customary law of anticipatory self-defense, the ICJ’s construction of Article 51 effectively bars nearly all kinds of anticipatory self-defense, except in highly unusual circumstances. It follows, then, that the difference between the pre-Charter baseline and the post-Charter rules relating to anticipatory self-defense is, indeed, very substantial.

bulatory paragraphs nor in the operative ones did the Council say or imply that Israel’s actions in response to what the Secretary General called Hezbollah’s “unprovoked attack on Israel” on July 12, 2006 was an exercise of the right of self-defense (even if perhaps a disproportionate one). See Press Release, Security Council, Security Council Calls for End to Hostilities Between Hizbollah, Israel, Unanimously Adopting Resolution 1701 (2006), U.N. Doc. SC/8808 (Aug. 11, 2006) (statement of the Secretary General). Further, operative paragraph one calls for the cessation of Hezbollah’s “attacks,” but not its “armed attacks.” See S.C. Res. 1701, *supra*, ¶ 1. This might reflect the Council’s judgment that Hezbollah’s July 12 border incursion, though causing eight Israeli military deaths and the abduction of two Israeli soldiers, see Press Release, Security Council, *supra*, did not satisfy the ICJ’s “gravity” test in *Nicaragua* for an “armed attack.” Moreover, the Council’s unwillingness to acknowledge any right to self-defense on Israel’s part against Hezbollah might signal the Council’s support for the ICJ’s “state action” requirement in *Nicaragua* and the *Wall Case*. Certainly, the Council’s unwillingness to refer to Israel’s right of self-defense is in sharp contrast with its earlier reference in Resolution 1368 to the United States’ right of self-defense against al Qaeda—like Hezbollah, another non-state terrorist actor. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001). The Council’s silence on the point contrasts also with the statements of the G-8 leaders gathered in their 2006 summit, which had spoken of Israel’s “exercising the right to defend itself” against Hezbollah. See Press Release, G-8 Summit Leaders, Statement by Group of Eight Leaders—G-8 Summit 2006 (July 16, 2006), available at http://www.mfa.gov.il/mfa/mfaarchive/2000_2009/2006/ (follow “Statement by Group of Eight Leaders—G-8 Summit 2006” hyperlink). Finally, operative paragraph one of Resolution 1701 implicitly views Israel as *an aggressor*, at least to some degree. Israel’s “offensive military operations” must cease. S.C. Res. 1701, *supra*, ¶ 1 (emphasis added). The ambiguity in the language seems intended: were *all* of Israel’s operations “offensive,” or were some offensive and others defensive? In either case, Israel must have been considered to have acted outside the scope of lawful self-defense. In short, Council practice, in at least this recent instance, appears to be conforming to the very restrictive view of Article 51 found in the ICJ’s opinions.

Pre- and Post-Charter Rules Regarding "Armed" Attacks

Article 51 specifies that for an "attack" to give rise to the right to exercise self-defense, the attack must be "armed." As reflected in Article 3 of the General Assembly's definition of "aggression,"²⁵⁵ an attack should probably not be considered to be armed under Article 51 if it consists solely of economic, psychological, or ideological modes of warfare, despite the severity of the hardship such measures might cause. Indeed, in the view of some scholars, some significant uses of armed force, such as naval blockades, even if unlawful under Article 2(4) of the Charter, do not rise to the level of armed attacks for purposes of Article 51.²⁵⁶ As warfare has evolved, however, the distinction between armed attacks and other kinds of aggression has come under increasing strain. In particular, contemporary warfare relies critically on information and communications technologies that reflect the truly revolutionary changes in those areas in recent decades. Given this dependency, it makes sense to ask whether information operations can constitute armed attacks on an adversary:

Should the term include state-sponsored or conducted hacker attacks on a country's banks, communications networks, or stock exchange? Does it make a difference if the operations are conducted to "prepare the battlefield" in anticipation of an actual conflict by, for instance, destroying military deployment plans and reserve force records, corrupting intelligence systems, or sending satellites off-course?²⁵⁷

Alternatively, consider the potential that the accumulation of foreign currency reserves could cause financial havoc in a country targeted by their possessor. China was recently reported to hold over one trillion dollars in foreign currencies and securities, most of it consisting in U.S. dollar-denominated debt, including U.S. Treasury bonds.²⁵⁸ A decision suddenly to flood world currency exchanges with these Chinese holdings could wreck the United States' economy in short order. Would such a decision count as an armed attack under Article 51?

It seems most unlikely that actions such as these could count as armed attacks on any fair reading of Article 51.²⁵⁹ The framers of the Charter

255. See G.A. Res. 3314 (XXIX), Annex art. 3, U.N. Doc. A/9631 (Dec. 14, 1974).

256. See BROWNIE, *supra* note 139, at 365-66.

257. Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1070 (1998).

258. See Andrew Browne, *China's Reserves Near Milestone, Underscoring Its Financial Clout*, WALL ST. J., Oct. 17, 2006, at A1.

259. See Wright, *supra* note 149, at 117 (stating that the scope of "armed attack" cannot extend "to attacks upon a state by propaganda, infiltration, subversion or other acts sometimes called 'indirect aggression'"); cf. DINSTEIN, *supra* note 142, at 196. *But see*

were well aware that economic, psychological, or other nonforcible measures could injure, indeed devastate, a targeted nation, yet seem consciously to have chosen *not* to permit armed force to be used in response to these measures.²⁶⁰ Indeed, the negotiating record suggests that that was precisely *why* the qualifier “armed” was introduced.²⁶¹ Moreover, in referring to armed attacks, Article 51 is plausibly construed to mean only attacks “*upon the territory*” of a state—as distinct from its political independence, ideological system, or influence over a particular region.²⁶² War in cyberspace or on a state’s financial architecture would not be *territorial* attacks.

Whether responses to such “attacks” would also have been considered legitimate self-defense in the immediate pre-Charter period is, however, more uncertain. The 1933 Convention Defining Aggression, signed by the U.S.S.R. and several of its neighbors,²⁶³ after expressing the signatories’ belief that the Kellogg-Briand Pact “forbids all aggression,” defined “the aggressor in an international conflict” as the first state to have committed any of certain proscribed acts, none of which could be considered purely economic, psychological, or ideological warfare.²⁶⁴ Further, the Convention *excluded* from the definition of aggression such “international conduct of [a] state” as the “infringement or a threat of infringing the material or moral rights or interests of a foreign state or its citizens,”

MCDUGAL & FELICIANO, *supra* note 114, at 240-41 (“To say, however, that Article 51 limits the appropriate precipitating event for lawful self-defense to an ‘armed attack’ is in effect to suppose that in no possible context can applications of nonmilitary types of coercion (where armed force is kept to a background role) take on efficacy, intensity, and proportions comparable to those of an ‘armed attack’ and thus present an analogous condition of necessity. Apart from the extreme difficulty of establishing realistic factual bases for that supposition, the conclusion places too great a strain upon the single secondary factor of modality—military violence.”).

260. Thus, the League of Nations’ Lytton Commission found in 1932 that China’s boycott of Japanese-made goods was an act of hostility but not an act of armed force. See Wehberg, *supra* note 115, at 69.

261. See United Nations Conference, Minutes of the Thirty-Sixth Meeting of the U.S. Delegation (May 11, 1945), in 1 U.S. DEP’T OF STATE, *supra* note 202, at 663, 667. American delegate John Foster Dulles explained that the term “armed” was introduced with an eye on the Monroe Doctrine, so as to exclude “political efforts from outside the continent to overthrow the political institutions of the American Republics.” *Id.*

262. See Wright, *supra* note 149, 116; see also Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209, 212 (2003) (stating that “[m]ost international lawyers construe” Article 51 to permit self-defense only “in response to attacks *on the territory* of a member state” (emphasis added)).

263. See Convention Defining Aggression, July 3, 1933, *reprinted in* 27 AM. J. INT’L L. supp. at 192 (1933) [hereinafter Convention Defining Aggression I]. Virtually identical Conventions were concluded between the U.S.S.R. and Czechoslovakia, Yugoslavia, and Lithuania. See, e.g., Convention Defining Aggression, July 4, 1933, *reprinted in* 27 AM. J. INT’L L. supp. at 194 (1933).

264. See Convention Defining Aggression I, *supra* note 263, at 192-93.

the “rupture of . . . economic relations,” “measures of economic or financial boycott,” and “conflicts in the sphere of economic, financial or other obligations in connection with foreign governments.”²⁶⁵ If this Convention could be taken to represent the international community’s general understanding of the limits of legitimate self-defense after the Kellogg-Briand Pact, then the parties to the Charter would not have foregone a significant diminution of their right of self-defense in undertaking to limit its exercise to responses to armed attacks in a restricted sense.

It seems unlikely, however, that this was the prevailing view. The Convention followed the path of a Soviet policy marked out in a diplomatic note of August 31, 1928, in which the Soviets responded to the invitation to adhere to the Kellogg-Briand Pact by objecting that the pact did not proscribe *all* wars.²⁶⁶ Joined by Germany and by several of the states that later signed the 1933 Conventions, the Soviets urged the proscription “of all mutual aggression and of all armed conflict whatsoever.”²⁶⁷ The Soviet note pointed out that “other Governments passed this proposal over in silence,” and “still others declined it.”²⁶⁸ It would seem, then, that the understanding of aggression embodied in the 1933 Conventions, and the correlative limitation of the occasions on which legitimate self-defense might be exercised, was not generally accepted. Moreover, the Soviet note was apparently alluding to the position of Great Britain in relation to the Kellogg-Briand Pact. The British government’s reservation to the pact stated:

There are certain regions [referring to India, Egypt, and the Persian Gulf] . . . the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty’s Government have been at pains to make it clear in the past that *interference with these regions can not be suffered.*²⁶⁹

The pre-Charter British view would therefore seem to have permitted self-defense against external attempts to subvert or destabilize a region of “special and vital interest” to the British Empire. Such attempts would, of course, not necessarily have been armed attacks upon British territory. Likewise, as we have seen, the United States did not interpret the pact to preclude it from resisting, in the name of self-defense, violations of the Monroe Doctrine. In the Anglo-American view of the pact, therefore, it seems that some measures other than strictly “armed” attacks (especially “interference” in regions of special sensitivity) could trigger the right to self-defense.

265. *Id.* at 194.

266. Letter from M. Litvinov, to the French Ambassador in Moscow, *supra* note 131, at 170.

267. *Id.* at 169.

268. *Id.*

269. Chamberlain Letter, *supra* note 133, at 126 (emphasis added).

In any event, the fact that the matter cannot be considered to have been conclusively *settled* at the time of the Charter's adoption indicates that states accepted a restriction on their self-defense rights that *may* not have existed before.

Summary

The adoption of the Charter unquestionably marked a massive change in the international legal order respecting *jus ad bellum*. Even taking the widely disregarded Kellogg-Briand Pact as the benchmark of prevailing pre-Charter law, acceptance of the Charter required member states to make enormous concessions of their national sovereignty with regard to the all-important questions of war and peace. As our review has indicated, states that accepted the Charter yielded important prerogatives (or at least colorable claims to possess them), including the right to engage in armed reprisals; the competence to decide, at least without intrusive external review, whether action in self-defense was lawful and justified; most, if not all, of the right to anticipatory self-defense; and the right, or the claim to the right, to respond with defensive force to external threats to subvert or destabilize regions of vital national interest. These were indeed sweeping concessions, which, if put into practice, would have significantly disenabled states from protecting themselves against outside aggression. In exchange for making these concessions, and thus assuming the risk of much greater vulnerability to outside threats, member states received the Charter's promise of a viable, functioning collective security system. The unqualified failure of that system relieves member states of any legal obligation to respect the limits that the Charter fixes for valid self-defense.

III. THE RADICAL FAILURE OF THE CHARTER'S COLLECTIVE SECURITY SYSTEM

It has long seemed obvious to informed commentators that the Charter system of collective security has failed.²⁷⁰ Indeed, this failure was becom-

270. See, e.g., Anthony Clark Arend, *International Law and Rogue States: The Failure of the Charter Framework*, 36 *NEW ENG. L. REV.* 735, 751-53 (2002); Jean Combacau, *The Exception of Self-Defence in U.N. Practice*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 9, 32 (A. Cassese ed., 1986); Franck, *supra* note 5, at 51-53; Thomas M. Franck, *Who Killed Article 2(4)?*, 64 *AM. J. INT'L L.* 809, 809-10 (1970); Glennon, *Unipolar World*, *supra* note 58, at 98; W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 *YALE J. INT'L L.* 279, 280 (1985); Eugene V. Rostow, *The Legality of the International Use of Force by and from States*, 10 *YALE J. INT'L L.* 286, 286-88 (1985); Sofaer, *supra* note 177, at 2-6; John C. Yoo & Will Trachman, *Less Than Bargained For: The Use of Force and the Declining Relevance of the United Nations*, 5 *CHI. J. INT'L L.* 379, 381-82 (2005). But see Louis Henkin, *Conceptualizing Violence: Present and Future Developments in International Law*, 60 *ALB. L. REV.* 571, 574 (1997) ("In my view, the health of the U.N. Charter is good. The Charter has had important deterrent influence. The Secu-

ing obvious almost as soon as the Charter was ratified: the emergence of *selective* security systems like the North Atlantic Treaty Organization (NATO) in 1949—in effect, traditional defensive military and political alliances—attests to the swiftness with which the Charter system broke down.²⁷¹

The record of six decades proves that collective security has *not* kept the peace: in the post-Charter world, war and aggression have been only too common.²⁷² Major wars in which the Security Council had not in terms authorized the use of force include: the Second Gulf War and ensuing conflicts in Iraq (2003-); the Arab-Israeli conflict (1948-); the Iran-Iraq war (1980-1988); the civil wars in Sudan (1983-), Congo (1998-), Rwanda and Burundi (1963-1995), Mozambique (1975-1993), Ethiopia (1962-1992), and Nigeria (1966-1970); the post-colonial and civil wars in Indo-China (1960-1975); and the Bangladeshi war of independence (1971). Writing in 1986, the British scholar Evan Luard found that since 1945, there had been 144 “wars,” of which he classified 29 as “international wars . . . in which at least two sovereign states were in direct conflict,” 16 as wars of decolonization, and 66 as civil wars.²⁷³ In 1997, A. Mark Weisburd found that “states used force so frequently in the period 1945 through 1991 (over 110 times) that it seems impossible to say that, in

ity Council has been revived and has worked.”); Louis Henkin, Editorial Comment, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT’L L. 544, 544 (1971).

271. See, e.g., Marten Zwanenburg, *NATO, Its Member States, and the Security Council*, in *THE SECURITY COUNCIL AND THE USE OF FORCE*, *supra* note 22, at 189, 190 (“NATO was established as a result of the perceived failure of the UN Security Council, as part of the Charter’s collective security system, to function as originally envisaged.”). There is evidence, however, that when founding NATO, American leaders continued to believe that the Charter system *might* yet work. Indeed, some of them even argued that NATO would enhance the ability of the Charter system to deliver on its promises. But as Senator Tom Connally, one of the most influential members of the U.S. delegation to the San Francisco Conference of 1945, said in a speech of July 5, 1949 on the subject of the new NATO alliance:

[N]o sincere and realistic person can blind himself to the fact that peace is still remote and the security we long for is yet to be attained. The long catalog of 30 Soviet vetoes and the frustrated efforts to write a peace treaty with Germany bear eloquent witness of how effectively the peace and security machinery of the world has been hampered. 95 CONG. REC. 8816-17 (1949) (statement of Sen. Connally). See generally E.P. Braucher, *The Original United States Concept of NATO*, 17 AIR U. REV. (1966), available at <http://www.airpower.maxwell.af.mil/airchronicles/aureview/1966/sep-oct/braucher.html>.

272. But see JOHN MUELLER, *THE REMNANTS OF WAR* 1-3 (2004) (arguing that war, at least between developed countries, is in decline and will eventually disappear as an institution, like slavery or dueling); cf. Carl Kaysen, *Is War Obsolete?* in *THEORIES OF WAR AND PEACE*, *supra* note 86, at 441 (critiquing the Mueller thesis).

273. EVAN LUARD, *WAR IN INTERNATIONAL SOCIETY* 69 (1986).

practice, states do not use force against one another.”²⁷⁴ Michael Glennon wrote in 2002:

Between 1945 and 1999, two-thirds of the members of the United Nations—126 states out of 189—fought 291 interstate conflicts in which over 22 million people were killed. This series of conflicts was capped by the Kosovo campaign in which nineteen NATO democracies representing 780 million people flagrantly violated the Charter.²⁷⁵

Not only has the Charter’s collective security system failed to *prevent* war, it has apparently not even reduced the *rate* of war. John Yoo recently noted:

According to the Correlates of War database, from 1816 to 1945, fifty-six interstate wars occurred, a rate of 0.43 per year. From 1945 to 1997, that rate is 0.44 per year. A different study found that from 1715 to 1814 there were thirty-six interstate wars, from 1815 to 1914 there were twenty-nine wars, from 1918 to 1941 there were twenty-five interstate wars, and then from 1945 to 1995 there were thirty-eight wars. According to these figures, the rate of interstate wars either roughly remained the same or increased during the period of the UN Charter and the League of Nations.²⁷⁶

True, it might be argued that these facts and statistics alone do not prove that the Charter’s collective security system has failed. At least two arguments in defense of the effectiveness of the Charter system might be offered.

First, many or most of the conflicts in question are civil wars,²⁷⁷ which

274. A. MARK WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II* 308 (1997).

275. Glennon, *The Fog of Law*, *supra* note 58, at 540 (footnote omitted). More recent statistics are collected by the Center for Systemic Peace. See Monty G. Marshall, Ctr. for Systemic Peace, Major Episodes of Political Violence 1946-2006, <http://members.aol.com/cspm/mgm/warlist.htm> (last visited Mar. 31, 2007).

276. John C. Yoo, *Force Rules: UN Reform and Intervention*, 6 CHI. J. INT’L L. 641, 645 (2006) (footnote omitted). Yoo points out, however, that when corrected for the number of states, the frequency of interstate war has dropped in the post-Charter period. *Id.*

277. See RAMESH THAKUR, *THE UNITED NATIONS, PEACE AND SECURITY* 18 fig.2 (2006) (chart entitled “Number of armed conflicts by type, 1946-2003”); LUARD, *supra* note 273, at 69 (“Since 1945, wars have overwhelmingly been civil wars, fought between the adherents of different political philosophies.”). In 2001, Peter Wallensteen and Margareta Sollenberg found that of the 111 conflicts recorded for the period 1989-2000, only 7 were interstate. See Peter Wallensteen & Margareta Sollenberg, *Armed Conflict, 1990-2000*, 38 J. PEACE RES. 629, 632 tbl.II (2001). Ninety-five were intrastate, but nine of these were accompanied by foreign intervention. *Id.*

the Charter system was not designed to forestall or suppress.²⁷⁸ Measured only in terms of the incidence of *interstate* conflict, the Charter system does not seem to have worked nearly as badly. However, even excluding civil wars from the calculations, the amount of post-Charter interstate conflict remains high. Moreover, post-Charter civil wars often served as means of carrying on superpower conflicts indirectly, as with the civil wars in Afghanistan in the 1980s and in Vietnam in the 1960s.²⁷⁹ At least some civil wars could, therefore, be regarded as *de facto* interstate wars.²⁸⁰

278. See U.N. Charter art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . .”).

To be sure, the Security Council, at least on a broad interpretation of its powers, has found the spillover effects of civil war to constitute a “threat to the [international] peace,” *id.* art 39, and thus a basis for authorized external intervention. See THAKUR, *supra* note 277, at 16 (“[F]ew modern conflicts are purely internal. The networks that sustain them can involve a range of ancillary problems like trafficking in arms, drugs and children; terrorism; and refugee flows. Whole regions can be quickly destabiliz[ed].”). Moreover, it is fair to say that whether or not it has jurisdiction to intervene in civil wars, the Council’s interventions in such conflicts, which have included enforcement actions under Chapter VII, have had some success. See Michael J. Matheson, *The Twelfth Waldemar A. Solf Lecture in International Law*, 161 MIL. L. REV. 181, 182-83, 187-89 (1999); cf. Martti Koskeniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT’L L. 455, 458-59 (1996).

279. See LUARD, *supra* note 273, at 317 (“The super-powers . . . have almost invariably been committed to the success of opposite sides in the [civil] war[s] under discussion.”).

280. Furthermore, there are signs that interstate conflict may again be on the rise, and reliance on the Charter’s collective security system seems most unlikely to suppress it. See DANIEL S. GELLER & J. DAVID SINGER, *NATIONS AT WAR: A SCIENTIFIC STUDY OF INTERNATIONAL CONFLICT* 110-11 (1998). Geller and Singer note:

In the post-World War II period . . . newer regional subsystems of Asia, the Middle East, and Africa now account for roughly half of all militarized interstate disputes. Since capabilities appear to be strongly related to war behavior, it may be projected that as the capacity of these new states to conduct military operations increases, their frequencies of war will also increase.

Id. See generally COLIN S. GRAY, *ANOTHER BLOODY CENTURY* (2007) (arguing that significant interstate conflict will recur).

Further, the rising level of discontent with the “unipolar” world of post-cold war American hegemony may also presage a future in which interstate conflicts occur with greater frequency. For example, there is an increasing European dissatisfaction with U.S. leadership and rivalrous challenges to it, while “rogue” states attempt to acquire nuclear and other weapons of mass destruction. Cf. William R. Thompson, *Principal Rivalries*, 39 J. CONFLICT RESOL. 195, 200-03 (1995) (explicating concept of interstate “rivalry”); *id.* at 205-06 (arguing that “[p]ositional rivalries” between incumbents and challengers for global or regional leadership “can take on life or death qualities” and “provide the conflict armatures of the world’s regional and global systems”); John Vasquez & Christopher S. Leskiw, *The Origins and War Proneness of Interstate Rivalries*, 4 ANN. REV. POL. SCI., 2001, at 306-13 (citing evidence that “enduring” rivals are highly war-prone). Worse, an “apolar” world might generate a still higher level of conflict, both interstate and other, than was seen in the period from 1945 to the present. See Niall Ferguson, *A World Without Power*, HOOVER DIG., Fall 2004, available at <http://www.hooverdigest.org/044/ferguson.html>.

The second defense of the Charter system relies on the observation that post-Charter Europe enjoyed (at least until the outbreak of war in the Balkans) what some have called “[t]he Long Peace.”²⁸¹ But it seems most implausible to attribute Europe’s long peace primarily to the Charter’s collective security arrangements. To begin with, pre-Charter long peaces were not rare; Peter Wallensteen found four major periods of peace (or what he called periods of “major power universalism”) between 1815 and 1976.²⁸² Moreover, the post-Charter peace in Europe can be explained more readily by reference to other factors. Thus, some scholars argue that the bipolar system of the cold war was an important force in maintaining the peace, finding such a system to be intrinsically more stable than a multipolar, or apolar, system.²⁸³ Relatedly, the threat that a conventional war in Europe might lead to a nuclear exchange may also have deterred recourse to armed force.²⁸⁴ Since war is often caused by imperfect information regarding rivals capabilities and intentions, the

And some writers foresee the rise of interstate competition and conflict caused by a growing scarcity of oil, water, and other essential natural resources. See, e.g., Michael T. Klare, *RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT* (2001).

Some analysts forecast that intrastate conflict may also become more frequent. Wallensteen and Sollenberg, noting that “more than 300 actors have been involved in armed conflict since the end of the Cold War,” foresee “a bleak future,” because “[t]he proliferation of actors probably accounts for the difficulties in ending conflicts.” Wallensteen & Sollenberg, *supra* note 277, at 634. But others consider the prevalence of intrastate war in the 1990s to have been an effect of the dissolution of great empires and federations, and envisage a world in which intrastate warfare is less common. Colin S. Gray, *How Has War Changed Since the End of the Cold War?*, *PARAMETERS*, Spring 2005, at 14, 19.

281. See JOHN LEWIS GADDIS, *THE LONG PEACE: INQUIRIES INTO THE HISTORY OF THE COLD WAR* 215-45 (1987).

282. See Peter Wallensteen, *Universalism vs. Particularism: On the Limits of Major Power Order*, 21 *J. PEACE RES.* 243, 243-46 (1984); see also Jeffery J. Schahczenski, *Explaining Relative Peace: Major Power Order, 1816-1976*, 28 *J. PEACE RES.* 295, 305-06 (1991) (finding empirical support for hypothesis that “universalistic” periods are relatively more peaceful); Randolph M. Siverson & Michael D. Ward, *The Long Peace: A Reconsideration*, 56 *INT’L ORG.* 679 (2002) (finding that long peaces comprise about thirty percent of all non-war periods among major powers).

283. See GADDIS, *supra* note 281, at 221-23; John J. Mearsheimer, *Back to the Future: Instability in Europe after the Cold War*, in *THEORIES OF WAR AND PEACE*, *supra* note 86, at 3, 24-25; see also Eyal Benvenisti, *The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies*, 15 *EUR. J. INT’L L.* 677, 687 (2004). But see GELLER & SINGER, *supra* note 280, at 115-17 (surveying empirical studies of relationships between “polarity” and warfare, and reporting that some findings show “high numbers of crises during bipolar periods” but also “lower war magnitudes than with multipolar systems,” and that other findings indicate “the lack of a substantive linear relationship between the number of great powers and warfare”).

284. GADDIS, *supra* note 281, at 230-31; Mearsheimer, *supra* note 283, at 25-26; see also EVAN LUARD, *THE BLUNTED SWORD: THE EROSION OF MILITARY POWER IN MODERN WORLD POLITICS* 31-32 (1988); Kenneth Waltz, *The Spread of Nuclear Weapons: More May Better* (Int’l Inst. for Strategic Studies, Adelphi Papers No. 171, 1981), available at <http://www.mtholyoke.edu/acad/intrel/waltz1.htm>.

incentives to go to war may well have been reduced by the development of photo-reconnaissance and other technologies, or by the arms inspections regimes fostered by disarmament treaties that made the superpowers more transparent to each other.²⁸⁵ Other analysts see the U.S.-Soviet conflict, which pitted a large land power against a commercial maritime republic, as “an elephant-whale” confrontation in which the specific power-projection capabilities of the antagonists made full-scale conflict unlikely.²⁸⁶ The greater political stability of European states,²⁸⁷ the persisting memories of the devastation of the two great twentieth century wars fought largely on the European continent, and the power of the two cold war hegemonies (the United States and the Soviet Union) to maintain the peace *within* their European spheres of influence²⁸⁸ were also likely to have been important contributory factors.²⁸⁹

Perhaps the most compelling arguments for concluding that the Charter’s collective security system has failed, however, come from the fact that the system has been invoked so rarely over the Charter’s sixty years of existence to maintain or restore international peace and stability. The two main occasions on which the Charter system might be considered to have “worked”—Korea in 1950²⁹⁰ and Iraq in 1991²⁹¹—were the products of quite exceptional circumstances.²⁹²

In the first case, the Security Council was able to authorize collective action to repel the North Korean invasion of South Korea only because

285. See GADDIS, *supra* note 281, at 232-33; STEPHEN VAN EVERA, *CAUSES OF WAR* 24-33, 137-42 (1999).

286. See Thompson, *supra* note 280, at 209-10.

287. LUARD, *supra* note 273, at 68.

288. Thus, the NATO Alliance might be viewed, not only as a means of deterring attack by Soviet forces, but also as a device by which American hegemony over Western Europe was subtly enforced. See Christopher Layne, *America as European Hegemon*, *NAT’L INT.*, Summer 2003, at 17, 19.

289. Other factors coloring recent Western attitudes to war, including cultural changes, are surveyed in JEREMY BLACK, *WHY WARS HAPPEN* 222-26, 229-32 (1998); see also MICHAEL HOWARD, *THE INVENTION OF PEACE* 98-113 (2000).

290. See S.C. Res. 83, U.N. Doc. S/1511 (June 27, 1950) (recommending that member states assist South Korea as might be necessary to repel the attack and restore peace); S.C. Res. 82, U.N. Doc. S/1501 (June 25, 1950) (determining that the North Korea invasion of South Korea constituted “a breach of the peace”). Resolution 83 passed only by a narrow majority of seven of eleven members, and merely “recommend[ed]” that the necessary “assistance” be furnished. S.C. Res. 83, *supra*.

291. See S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

292. The Council did occasionally authorize the use of force in other instances in the period between 1945 and 1990, but these occasions were not of major significance. They included S.C. Res. 161, U.N. Doc. S/RES/161 (Feb. 21, 1961), and S.C. Res. 169, U.N. Doc. S/RES/169 (Nov. 24, 1961), authorizing the United Nations itself to use force, if necessary, to prevent the occurrence of civil war in Congo, and S.C. Res. 221, U.N. Doc. S/RES/221 (Apr. 9, 1966), calling on the United Kingdom to prevent, by force if necessary, oil shipments from reaching Southern Rhodesia.

of the absence of the Soviet Union from the critical Security Council votes.²⁹³ Furthermore, the United Nations-sanctioned military response to North Korea's aggression was hardly "collective": "[f]or all their symbolic panoply of the United Nations flag and other emblems, the forces which finally prevailed in Korea were national forces carrying out a mission of collective self-defense under American direction, not a Security Council enforcement action."²⁹⁴

The second main case of Council-authorized collective action against interstate aggression occurred during the brief interlude between the end of the two superpowers' cold war struggle and the more recent emergence of rivalrous challenges to American global hegemony.²⁹⁵ Only in those unusual and likely unrepeatable circumstances was the United States able to gather sufficient votes within the Security Council to obtain authorization to use force to address what it and its coalition allies considered to be a serious breach of the peace in the Middle East. Moreover, like the Korean intervention, the First Gulf War was the handiwork of U.S. diplomatic resourcefulness and military strength, rather than a genuine example of "collective security." Although the presence in the U.S.-led coalition of military forces from thirty-three countries contributed significantly to the political success of the endeavor, "militarily all aspects of this war were dominated by U.S. forces."²⁹⁶ Rather than considering the First Gulf War as evidence that the Charter's collective security system can work, it is more realistic to view the episode as a he-

293. See THOMAS M. FRANCK, *NATION AGAINST NATION* 34-38, 164 (1985); 1 LUARD, *supra* note 61, at 272 ("If [the Soviet Union] had been [occupying its seat in the Security Council at the time the attack on South Korea occurred], it is beyond doubt that [it] would have vetoed almost all the Council's resolutions on the subject, especially that calling on members to come to the aid of South Korea."). The Truman administration was prepared to defend South Korea even without Security Council authorization. See CHAE-JIN LEE, *A TROUBLED PEACE: U.S. POLICY AND THE TWO KOREAS* 27 (2006).

294. Rostow, *supra* note 5, at 508; see also 1 LUARD, *supra* note 61, at 272 ("[P]articipation in that action was limited to a certain group of politically interested states. Only a quarter of the [United Nations'] membership sent military assistance to South Korea. And the sixteen nations which did so were all Western countries, which had a common national interest in securing the defeat of communist aggression wherever it occurred. The episode was thus more an example of alliance strategy than of enforcement action by an international organi[z]ation; of collective defen[s]e rather than collective security."); WOLFERS, *supra* note 70, at 176 ("Instead of being a case of nations' fighting 'any aggressor anywhere' and for no other purpose than to punish aggression and deter potential aggressors, intervention in Korea was an act of collective military defense against the recognized number-one enemy of the United States . . .").

295. It was during this brief interlude that President George H.W. Bush delivered an address to Congress, ironically on September 11, 1990, in which he first envisaged "a new world order." See Adam Roberts, *A New Age in International Relations?*, 67 *INT'L AFF.* 509, 519 (1991) (citation omitted).

296. Trevor N. Dupuy, *How the War Was Won*, *NAT'L REV.*, Apr. 1, 1991, at 29, 29.

gemon's intervention to stabilize a troubled region.²⁹⁷ If it was true that the Iraqi invasion of Kuwait presented an extraordinary opportunity to revitalize the Charter's collective security arrangements, then why was the opportunity not taken in the early 1990s to conclude special agreements under Article 43 to provide national military contingents as standby forces for the Council's future use?²⁹⁸

The failure of the Charter's collective security system is also shown by those cases in which it *should* have been invoked to deter or punish breaches of the peace, but was not. Three cases can illustrate the point: the Indian invasion and occupation of Portuguese Goa in 1961; India's intervention in the civil war between East and West Pakistan in 1971, resulting in the creation of the state of Bangladesh; and the July-August 2006 conflict between Israel and the Hezbollah militia in Lebanon.

Goa (1961)

On December 11, 1961, faced with the massive build-up of Indian forces surrounding its colony of Goa, which Portugal had possessed for some 450 years, Portugal appealed to the Security Council.²⁹⁹ The Secretary General, U Thant, wrote to Indian Prime Minister Nehru to urge him not to use force.³⁰⁰ Thereafter, on December 18, Portugal complained to the Council "of 'a full-scale unprovoked armed attack'" by India.³⁰¹ A Council debate ensued at which the U.S. Ambassador, Adlai Stevenson, condemned India's action in terms that restated the basic assumptions of the Charter system. Stevenson argued:

"The fabric of peace is fragile If it is to survive, if the United Nations is not to die as ignoble a death as the League of Nations, we cannot condone the use of force in this instance In a world as interdependent as ours, the possible results of such a trend are too grievous to contemplate."³⁰²

Stevenson's appeal to the idea that peace is indivisible and that all the member states of the United Nations have an overriding interest in preserving it—a basic postulate of collective security—fell on deaf ears. A U.S.-sponsored resolution calling for the immediate cessation of hostili-

297. See Koskenniemi, *supra* note 278, at 460-61 (noting arguments that the Council's action "has not reflected the collective interests of United Nations members as a whole, but only the special interests and factual predominance of the United States and its Western allies within the Council").

298. See *id.* at 461.

299. FRANCK, *supra* note 293, at 53.

300. *Id.* at 54.

301. *Id.*

302. *Id.* (quoting U.N. SCOR, 16th Sess., 987th mtg. at 15-18 (Dec. 18, 1961)).

ties and the withdrawal of Indian forces was vetoed by the Soviet Union, and the Council took no further action.³⁰³

Bangladesh (1971)

A second leading case of Council inaction in the face of international breaches of the peace occurred ten years later, when India intervened in the civil war that had broken out between East and West Pakistan.³⁰⁴ India had long hoped to weaken its traditional adversary Pakistan, and the Pakistani civil war afforded it an irresistible opportunity to break that country up. Despite several attempts by the Secretary General to interest the Council in the question, the Council took no action, even after India's armed intervention on November 29, 1971.³⁰⁵ In default of Council action, the General Assembly passed a resolution calling on India and Pakistan to return to their former boundaries;³⁰⁶ but the Resolution went unheeded. The Council met to reconsider the question on December 12, but by the next day, Indian forces had taken Dacca, East Pakistan's capital.³⁰⁷ Commenting on the episode, Thomas Franck has written that the Council's "performance must have shattered whatever hopeful illusions were still cherished by small and middle-sized states—that the U.N. could guarantee their safety, either by imposing pacific settlement procedures at an early stage of a dispute or by providing collective security once the dispute had ripened into an armed attack."³⁰⁸

Lebanon (2006)

Much more recently, in July-August 2006, the Security Council failed to act for over a month while a devastating conflict was being fought out between Israeli armed forces and the Hezbollah militia in Lebanon. The conflict broke out on July 12, 2006, when Hezbollah crossed Lebanon's border with Israel, killed eight Israeli soldiers and kidnapped another two, and simultaneously launched Katyusha rockets against Israeli communities near the border.³⁰⁹

303. *Id.* at 56.

304. *See generally id.* at 166-68.

305. *Id.* at 166-67.

306. G.A. Res. 2793 (XXVI), ¶ 1, U.N. Doc. A/8429 (Dec. 7, 1971).

307. FRANCK, *supra* note 293, at 167.

308. *Id.*

309. Israel's Ambassador to the UN, Dan Gillerman, reported on the hostilities to the Security Council on July 14, 2006, describing the events of July 12 and stating that "Israel had no choice but to react . . . Having shown unparalleled restraint for six years . . . Israel had to respond to this absolutely unprovoked assault whose scale and depth was unprecedented in recent years." *See* Statement from Dan Gillerman, Israeli Ambassador, to the UN Security Council (July 14, 2006), *available at* <http://www.mfa.gov.il/mfa/foreign%20relations/israel%20and%20the%20un/speeches%20-%20statements/> (follow "Statement by Israeli Amb Gillerman to the UN Security Council" hyperlink).

According to a spokesman for the United Nations Development Programme (UNDP), the damage done in the month-long conflict “‘annihilated’” fifteen years’ work of reconstruction in Lebanon.³¹⁰ UNDP estimated overall economic loss in Lebanon to have amounted to “‘at least 15 billion dollars, if not more.’”³¹¹ Over 35,000 Lebanese homes and businesses and “‘a quarter of the country’s road bridges or flyovers were [destroyed].”³¹² A report by four UN experts to the UN Human Rights Council found that the “Israel[i] Air Force attacked more than 7,000 targets in Lebanon, [while the Israeli] Navy conducted 2,500 bombardments.”³¹³ As a result of Israeli operations, 1,191 persons were killed, 4,405 persons were wounded, and over a million persons were displaced.³¹⁴ Israel’s losses were also severe. According to the Israel Ministry of Foreign Affairs, more than 3,970 rockets landed on Israel from the outbreak of the fighting, 901 of which struck urban areas.³¹⁵ Some 4,262 Israeli civilians were hospitalized for injuries.³¹⁶ Hezbollah’s bombardments hit 6,000 Israeli homes, causing the displacement of 300,000 residents and forcing one million people to live in shelters.³¹⁷ Lost Israeli revenues amounted to approximately \$1,400,000,000.³¹⁸

From the very outset of this obviously significant conflict, leading figures in the international community urged what was variously called an

Some commentators were skeptical of Israel’s claim that the attacks were “unprovoked.” See, e.g., George Monbiot, Comment, *Israel Responded to an Unprovoked Attack by Hizbullah, Right? Wrong*, GUARDIAN UNLIMITED, Aug. 8, 2006, <http://www.guardian.co.uk/Columnists/Column/0,,1839282,00.html>. Other commentators doubted whether Hezbollah’s incursions amounted to an “armed attack” sufficient to trigger the right of self-defense under Article 51 of the Charter. See, e.g., Anthony D’Amato, *The UN Mideast Ceasefire Resolution Paragraph-by-Paragraph*, JURIST, Aug. 13, 2006, <http://jurist.law.pitt.edu/forumy/2006/08/un-mideast-ceasefire-resolution.php> (“Hezbollah’s attack on 12 July 2006 was a border incident that under international law does not amount to an armed attack against a nation. Violent border incidents occur between India and Pakistan almost on a daily basis. If either side regarded these as armed attacks, the two sides right now would be engaged in total war, perhaps even using nuclear weapons. . . . Israel’s immediate and massive retaliation, however, was arguably an act of aggression.”).

310. See UN: *Israel “Annihilated” Lebanon’s Development*, ALJAZEERA, Aug. 22, 2006, http://www.aljazeera.com/me.asp?service_ID=12192.

311. *Id.*

312. *Id.*

313. Press Release, United Nations Office at Geneva, Major Violations on Both Sides in Israel-Lebanon Conflict, Say UN Experts (Oct. 4, 2006), [http://www.unog.ch/80256EEDD006B9C2E/\(httpNewsByYear_en\)/79475F7031032363C12571FD00568CA9](http://www.unog.ch/80256EEDD006B9C2E/(httpNewsByYear_en)/79475F7031032363C12571FD00568CA9).

314. *Id.*

315. News Release, Isr. Ministry of Foreign Affairs, Hizbullah Attacks Northern Israel and Israel’s Response (July 12, 2006), available at <http://www.mfa.gov.il/MFA> (follow “Terror from Lebanon” hyperlink; then follow “Hizbullah Attacks Northern Israel and Israel’s Response” hyperlink).

316. *Id.*

317. *Id.*

318. *Id.*

“immediate cessation of hostilities” or (more ambitiously) a “ceasefire.” These included Secretary General Kofi Annan (on July 13³¹⁹ and again on July 20³²⁰), the eight leaders of the G-8 Summit (July 16),³²¹ and the Council of the European Union on the Middle East (July 17).³²² Indeed, the Security Council itself managed to issue a unanimous policy statement on July 30 condemning the Israeli attack on the Lebanese village of Qana.³²³ Nonetheless, largely because of United States resistance,³²⁴ complicated by French and Russian disagreements with the United States’ policy, the Council was unable to take effective action until August 11, 2006, when it adopted Resolution 1701, calling “for a full cessation of hostilities based upon, in particular, the immediate cessation by Hizbollah of all attacks and the immediate cessation by Israel of all offensive military operations.”³²⁵

Resolution 1701 was a compromise measure whose intractable ambiguities reflected the inconclusive nature of the conflict between Israel and Hezbollah, the exhaustion of both combatants, and the desire of all the interested parties to bring hostilities to at least a temporary halt. The point to be stressed here, however, is that the Council, as in the Goa and Bangladesh situations, was unable to act until a military outcome satisfactory to one of the belligerents had been achieved. In 1961 and 1971, India was able to act decisively to achieve its military goals because it could shelter under the Soviet veto. In 2006, Israel, though apparently falling short of its original goals, was able to pursue its campaign against Hezbollah without outside interference because it enjoyed the cover of the U.S. veto. In all three cases, to the great detriment of the Charter’s collective

319. See *Secretary General Sends Top Advisers to Middle East to Defuse Crisis; Calls Key Leaders*, UN DAILY NEWS, July 13, 2006, at 1, available at <http://www.un.org/news/dh/pdf/english/2006/13072006.pdf>.

320. Press Release, Security Council, ‘Immediate Cessation of Hostilities’ Urgently Needed in Lebanon, Says Secretary-General, As He Briefs Security Council, U.N. Doc. SC/8780 (July 20, 2006).

321. See Press Release, G-8 Summit Leaders, *supra* note 254.

322. See Press Release, Council of the European Union, Statement by the Council of the European Union on the Middle East (July 17, 2006), available at http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2006/ (follow “Statement by the Council of the European Union on the Middle East” hyperlink).

323. See Press Release, Security Council, Security Council Expresses ‘Shock and Distress’ at Israeli Shelling in Qana; Strongly Deplores Loss of Innocent Lives in Present Conflict, U.N. Doc. SC/8791 (July 30, 2004).

324. See, e.g., Evelyn Leopold, *US Resists UN Calls to Stop Mideast Fighting*, REUTERS, July 21, 2006, available at <http://www.globalpolicy.org/security/issues/lebanon/2006/0721resists.htm>. It was widely suspected that the United States had been aware in advance of Israel’s plan before the July 12 incident to attack Hezbollah, and had approved of them. See Seymour M. Hersh, *Watching Lebanon: Washington’s Interests in Israel’s War*, NEW YORKER, Aug. 21, 2006, at 28.

325. S.C. Res. 1701, *supra* note 254, ¶ 1 (emphasis omitted).

security system, a great power was able to use its position on the Council to protect an allied, or at least friendly, state, even though that state was arguably the aggressor. In order to function, that system demands that all member states make an overriding commitment to the maintenance of peace as such, whether the state that threatens or breaches the peace is perceived as friendly or hostile, sympathetic, or unsympathetic.³²⁶ The failure of collective security again in 2006 merely reinforces the lessons of six decades that the system has failed. Even worse, the system is inherently unworkable.

Many influential commentators have disagreed, even while acknowledging the Charter's failures. The failures, they once said, were chiefly due to the vicissitudes of cold war international politics.³²⁷ Even if we are now much too far into the post-cold war period for that explanation to seem plausible any longer, the Charter's defenders nonetheless continue to propose "reforms" of one kind or other to reinvigorate the Charter security system.³²⁸ But it seems mistaken to think that a sixty-year record of unbroken failure can be attributed simply to unfavorable historical contingencies or the happenstances of ill will. *Any* collective security system, as even defenders of the concept have admitted, is *intrinsicly* liable to fall prey to the common problems of collective action, including free-ridership.³²⁹ Thus, in exposing the inherent design flaws in collective security theory, John Mearsheimer noted that "even if states agree to act automatically and collectively to meet aggression, there would surely be difficulty determining how to distribute the burden. States will have strong incentives to pass the buck and get other states to pay the heavy price of confronting an aggressor."³³⁰ More generally, states will have incentives to enjoy their share of the public global goods—peace and order—produced by a collective security system, while avoiding the costs of providing those goods. Since enforcement costs can be high, while the national interests of particular great powers in addressing a particular threat to the peace may be marginal, the incentives to be a free rider may be irresistible. Moreover, if a hegemonic power like the United States is

326. See *supra* note 70 and accompanying text.

327. See, e.g., HIGGINS, *supra* note 50, at 238 ("And the immediate replacement of wartime co-operation with the Cold War made the collective security system envisaged by the Charter impossible to achieve."). Likewise, surveying the state of opinion about the prospects of collective security in the immediate aftermath of the First Gulf War, two analysts concluded that "the requirements for collective security are better satisfied today than ever before. Most important, prospects are good for a major-power concert able to respond collectively to aggression." Andrew Bennett & Joseph Leggold, *Reinventing Collective Security after the Cold War and Gulf Conflict*, 108 POL. SCI. Q. 213, 233 (1993).

328. See *infra* text accompanying notes 358-65.

329. See Eric A. Posner & Alan O. Sykes, *Optimal War and Jus Ad Bellum*, 93 GEO. L.J. 993, 1011-12, 1019 (2005).

330. Mearsheimer, *supra* note 86, at 361.

willing to assume most of the burden of providing the relevant public global goods (as, one might argue, it sought to do in the Second Gulf War), its challengers might have incentives to exploit their positions within the system in order to weaken the hegemon's power (as, one might also argue, France and Russia did in the Security Council debates preceding that war),³³¹ even if the result might be to reduce the overall supply of public goods. On the other hand, a collective security system also demands that great powers refrain from unilateral use of force even when their vital interests are threatened—which seems an unlikely outcome.³³² Considerations like these strongly suggest that the failure of the Charter's collective security system was inherent in its design and is therefore irreparable.

The failure of the collective security system has undermined, and will continue to undermine, the claim that the Security Council is and should be “a normative framer of the collective will.”³³³ As discussed further below, the “legitimacy” of the United Nations depends in great measure on its “effectiveness.” If the United Nations is no more effective than the League of Nations was in maintaining world peace, then it will eventually become no more legitimate than the League. Yet, it has long been obvious that the threat of United Nations collective action against “aggression” is not a credible deterrent. If state *A* perceives state *B*'s nuclear weapons program as an impending—if not yet “imminent”—threat to its existence or security, then *A* will have strong reason to bypass the Security Council altogether and to act (either unilaterally or with its allies) to preempt the threat from *B*. Given the chronic failure of the Council to mobilize in collective defense against threats to the peace, *A* will know that the Council is unlikely to come to its assistance against *B*. *A*'s assessment will be still more plausible if, as is often the case, *B* enjoys the support of a permanent member of the Council, which can be counted on

331. France, Russia, China, and even Germany have all avowed, with greater or less explicitness, their challenges to the United States' hegemony. See Glennon, *Unipolar World*, *supra* note 58, at 946. See generally ROBERT J. LIEBER, *THE AMERICAN ERA* (2005); Norman Bowen, *Multilateralism, Multipolarity, and Regionalism: The French Foreign Policy Discourse*, 16 *MEDITERRANEAN Q.* 94, 106-08 (2005); Irwin M. Wall, *The French-American War Over Iraq*, *BROWN J. WORLD AFF.*, Winter/Spring 2004, at 123, 137 (“The British project is to make Europe the junior partner of the United States. The German project seeks to make of Europe a Switzerland. The French are alone in their project to make Europe a superpower . . .”).

332. For precisely these reasons, Winston Churchill originally advocated, as an alternative to what was to become the centralized collective security system of the Charter, a much more decentralized group of regional councils, including a council for Europe, one for the Far East, and one for the American hemisphere. See RUSSELL, *supra* note 61, at 105-07. Churchill argued that such a system would accommodate the great powers' regional interests but not require them to concern themselves with distant, out-of-region states. *Id.* at 107.

333. Stahn, *supra* note 47, at 806.

to veto or weaken collective action against it. On the other hand, given the existence of great power rivalries on the Council, *A* will know that the Council is most unlikely to sanction *it* by measures of collective defense should it attack *B* preemptively to eliminate the threat. Again, *A*'s assessment will normally be confirmed if *A* is aligned with a permanent member of the Council. The retort of the Secretary General's High-level Panel—"that if there are good arguments for preventive military action, with good evidence to support them, [state *A*] should . . . put [them] to the Security Council,"³³⁴ will hardly seem sufficient to *A* when it is faced with such an existential threat. Rather than expecting states to submit to the Council's "normative" authority in such situations, we would expect to find—and we do find—states pressing for a more expansive understanding of "self-defense."

None of this is meant to deny that the United Nations has had its share of success in areas other than providing collective security.³³⁵ Over six decades, the organization has acquired unforeseen but useful functions, including "peacekeeping" of different kinds.³³⁶ Thomas Franck wrote in 1985 that:

To the extent that the Council has succeeded, it has not been in the two areas assigned to it by the Charter: pacific settlement of disputes, and collective measures to deal with threats to the peace. Instead, it has been in truce observation and in policing the disengagement of warring armies, two "peace-keeping" functions not visualized by the Charter.³³⁷

Beginning in the mid-1990s, moreover, the Security Council began undertaking much more complex "peacekeeping" operations in countries such as Haiti (1994), Bosnia (1995), East Timor (1999), and Kosovo (1999). Unlike the earlier, consensual peacekeeping operations, these new, multidimensional operations were chiefly aimed at creating "stable, tolerant, more liberal and democratic regimes out of the wreckage of war-torn societies."³³⁸ As the Secretary General pointed out in 1995, this novel

334. *A More Secure World*, *supra* note 34, at 63.

335. The United Nations' most recent historian, Paul Kennedy, finds that "as the United Nations moved into the twenty-first century, not even its most ardent supporters could claim that its performance in the areas of peacekeeping and enforcement since 1945 constituted a great success story." KENNEDY, *supra* note 61, at 110.

336. Also not to be discounted is the United Nations' record in other areas, including the promotion of human rights. For a survey of these accomplishments, see generally *id.*

337. FRANCK, *supra* note 293, at 168.

338. KIMBERLEY ZISK MARTEN, ENFORCING THE PEACE: LEARNING FROM THE IMPERIAL PAST 5 (2004); see also THAKUR, *supra* note 277, at 19 ("The system of collective security proved illusory from the start and the procedures for resolving disputes peacefully have also proven to be generally elusive. The major UN contribution to peace and security during the Cold War took the form of consensual peacekeeping operations. After

kind of peacekeeping was proving to be “far more complex and more expensive than when its tasks were mainly to monitor cease-fires and control buffer zones with the consent of the States involved in the conflict.”³³⁹ Chapter VII enforcement operations, sometimes coupled with peacekeeping operations, have also become more frequent.³⁴⁰ One example is the enlarged responsibilities of the United Nations Interim Force in Lebanon (UNIFIL) in the aftermath of the 2006 conflict in Lebanon under Resolution 1701.³⁴¹ The general verdict on the United Nations’ recent peacekeeping efforts is mixed but acknowledges important successes.³⁴² Nonetheless, the central point remains: the Charter has not, and cannot, achieve its primary purpose—protection of world peace from interstate violence through the system of collective security.

IV. THE CONSEQUENCES OF THE FAILURE OF COLLECTIVE SECURITY

The Legal Consequences

Assuming, then, that the Charter’s collective security system, as originally designed, has proven to be a failure, what *legal* consequences follow? In particular, what consequences follow as to the obligations of member states to adhere to the restrictions on self-defense imposed by Article 51, together with the interpretations of Article 51 by the ICJ?

The starting point must be the recognition that the Charter’s restrictions on self-defense are the reciprocal of its promise of collective security. As Secretary of State Stettinius said at the time of the Charter’s framing, “[t]he whole scheme of the Charter” rested on that promise.³⁴³ The Charter’s use of force rules are not a random collection of unrelated norms. They form a unified and coherent scheme, the various parts of

the Cold War, this expanded to multidimensional peace operations to reflect the more demanding complex humanitarian emergencies.”).

339. The Secretary-General, *Report of the Secretary-General on the Work of the Organization*, ¶ 15, delivered to the Security Council and the General Assembly, U.N. Doc. S/1995/1, A/50/60 (Jan. 25, 1995).

340. See SIMON CHESTERMAN, *JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* 121-23 (2001).

341. Although Resolution 1701 was not in terms framed under Chapter VII, it contemplates an enforcement action. See S.C. Res. 1701, *supra* note 254, ¶¶ 11-13.

342. See MICHAEL W. DOYLE & NICHOLAS SAMBANIS, *MAKING WAR AND BUILDING PEACE 2* (2006) (“[T]he United Nations has proven to be a very ineffective peace enforcer, or war-maker, in the many intrastate, civil conflicts that emerged in the post-Cold War world. But that is only half the story. . . . [T]he UN [has] succeeded in fostering peace through consent, building on an enhancement of Chapter VI-based peace-making negotiations and a creative, multidimensional implementation of the transitional authority that the peace agreements provided.”).

343. REPORT ON SAN FRANCISCO CONFERENCE, *supra* note 66, at 41.

which are organically connected with and dependent on each other.³⁴⁴ Not being protected by the Charter's use of force rules, states are also not bound by them.

These legal consequences can be drawn under both pre- and post-Charter rules governing treaty law. Consider the position of Alfred von Verdross, the distinguished Austrian jurist who reintroduced the concept of *ius cogens* into international law.³⁴⁵ According to von Verdross, treaties are void if they are *contra bonos mores*. Specifically, von Verdross maintained that "treaties are regarded as being *contra bonos mores* which restrict the liberty of one contracting party in an excessive or unworthy manner or which endanger its most important rights."³⁴⁶ Von Verdross then examined the functions that "most certainly devolve upon a state recognized by the modern international community," and argued that any treaty that prevented a state from performing any of these functions "must be regarded as immoral," contrary to *ius cogens*, and void.³⁴⁷ These functions were, he said, "maintenance of law and order within the state[],

344. Oscar Schachter is perhaps alone among the Charter's principal defenders to attempt to rebut this argument. But Schachter's arguments rest upon several mistakes. For one thing, he assumes that the Charter's framers "preserved the right of self-defense to respond to armed attack" precisely because they envisaged the failure of collective security and wanted to guard against it. Schachter, *supra* note 56, at 126. But this argument seems to assume that Article 51 preserves the pre-Charter right of self-defense in its entirety—an assumption that has been shown above to be false. Schachter's analysis fails to explain why, if the framers *expected* collective security to break down, they also *truncated* the pre-Charter right of self-defense. Those limitations do, however, make sense on the expectation that collective security *would* work.

Schachter also contends that "[t]he legislative history of article 2 of the Charter does not support the notion that effective enforcement of collective security was a prerequisite to renouncing the use of force." *Id.* at 125. But Schachter cites only one secondary source to underpin that claim. *Id.* at 125 n.56. Moreover, the legislative history of Article 2(4) does indeed show that some states wanted a guarantee of a collective response by the United Nations in order to uphold and enforce that clause. See MCCORMACK, *supra* note 5, at 158-59 (noting that New Zealand, Ecuador, and Uruguay argued for such a guarantee).

Finally, Schachter misstates the position that he is attacking, claiming that "[i]t is hardly plausible to infer . . . that the failure to prevent illegal force now allows an individual state to use force freely." Schachter, *supra* note 56, at 126. But that is a straw man. The consequence that is said to follow from the failure of the Charter system to provide collective defense is that states *may resume their pre-Charter rights to use force*, subject, of course, to the relevant customary law limitations on such use. That is by no means to say that States may use force "freely."

345. See Bruno Simma, *The Contribution of Alfred Verdross to the Theory of International Law*, 6 EUR. J. INT'L L. 1 (1995) (offering a fine appreciation of Verdross, including both his reconceptualization of *ius cogens* and his influence on the conception of the Charter as "constitutional" law).

346. Alfred von Verdross, *Forbidden Treaties in International Law: Comments on Professor Garner's Report on "The Law of Treaties,"* 31 AM. J. INT'L L. 571, 574 (1937) (emphasis omitted).

347. *Id.*

defense against external attacks, care for the bodily and spiritual welfare of citizens at home, [and] protection of citizens abroad.”³⁴⁸ Of these, the second is of chief interest here. Von Verdross illustrates the principle by the example of “[a]n international treaty binding a state to reduce its army in such a way as to render it defenseless against external attacks. It is immoral to keep a state as a sovereign community and to forbid it at the same time to defend its existence.”³⁴⁹ From this perspective, a treaty that deprives a state of the means to protect itself against external threats to its existence is immoral and void.³⁵⁰

Accepting that pre-Charter account of treaty law, one should conclude that Article 51 is now void.³⁵¹ Strict adherence to the constraints that this Article imposes upon self-defense could, in many contemporary circumstances, prevent a state from protecting the lives of its people, the integrity of its territory, or the independence of its political institutions. Granted, compliance with those constraints might not entail such consequences if the Charter’s collective security system were in working order, for then the community of nations might be counted on to cover the defensive deficit that compliance produced. But with the radical, incurable failure of collective security, compliance is no longer obligatory; if anything, *non*compliance is.

Post-Charter treaty doctrine also permits the conclusion that Article 51’s constraints are no longer binding. Although the United States has not ratified the 1969 Vienna Convention on the Law of Treaties, that Convention can be regarded as setting forth customary international law.³⁵² Moreover, the Vienna Convention, although not generally applicable to treaties concluded before 1969, *does* apply “to any treaty which is the constituent instrument of an international organization,”³⁵³ and thus to the Charter. Article 48(1) of the Vienna Convention is among the provisions of that treaty that might be cited in support of the conclusion that Article 51 of the Charter is not binding. Article 48(1) states:

A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation

348. *Id.* (emphasis omitted).

349. *Id.* at 575.

350. *Cf.* Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK Y.B. UNITED NATIONS L. 1, 8 n.17 (1997) (finding that Article 51’s reference to the “inherent” right of self-defense suggests that that right may be non-derogable by treaty).

351. As discussed in Part III, *supra*, the correctness of the restrictionist (or restrictionist-plus) account of Article 51 is assumed.

352. *See* Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 921 n.275 (2007).

353. Vienna Convention on the Law of Treaties arts. 4-5, *opened for signature* May 23, 1969, S. EXEC. DOC. L, 92-1 (1970), 1155 U.N.T.S. 331.

which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.³⁵⁴

The emergence of a functioning, effective collective security system was “a fact or situation” erroneously assumed by every state that consented to the Charter, and particularly to Article 51, in 1945; moreover, that mistaken belief was surely “an essential basis of” each state’s consent.³⁵⁵ Likewise, Article 62(1) of the Vienna Convention, which permits termination of or withdrawal from a treaty in the event of “[a] fundamental change of circumstances” since the treaty’s conclusion,³⁵⁶ is also available as a legal basis for regarding the Charter as nonbinding, assuming again that the belief that a functioning collective security system would emerge was “an essential basis of the consent of the parties to be bound by the [Charter].”³⁵⁷

Policy Options for the Future

Even apart from the decades-long record of failure, many observers agree that the United Nations is facing a crisis. In both the Kosovo War and the Second Gulf War, the Security Council proved unable either to sanction a massive military intervention by outside forces or to prevent one. These episodes of Council failure were too dramatic, too large-scale, and too bitterly contentious to be ignored. Forced by these recent episodes to reevaluate the Charter system, legal scholars and United Nations administrators have suggested at least four distinct options.

First, scholars such as Professors Richard Falk and Mary Ellen O’Connell argue that the Charter system needs little or no change; change must instead come from greater compliance with Charter norms by states that have acted in breach of them, especially the United States.³⁵⁸ Thus, Richard Falk proposes that member states should “take more seriously their own obligations to uphold the Charter” and offers

354. *Id.* art. 48(1).

355. *See id.* Ironically, it might be argued that Article 48(2) barred the permanent members of the Security Council from invoking “error” under Article 48(1) to avoid their Charter obligations, if it could be said that each of those states had “contributed by its own conduct to the error.” *Id.* art. 48(2). But if the failure of collective security is inherent in the flawed design of the Charter, and not the result of the permanent members’ “bad conduct,” then Article 48(2) is no barrier.

356. *Id.* art. 62(1).

357. *Id.* art. 48(1).

358. *See* O’Connell, *supra* note 38, at 107-08 (welcoming the fact that “[t]he Secretary General, his experts, and the vast majority of UN members have endorsed a return to orthodoxy,” stating that “recommitting to the Charter is a start toward repairing the damage to the international legal system generally wrought by the 1999 Kosovo intervention and the 2003 Iraq invasion,” and chastising the United States for displaying “an even stronger sense of its own exceptionalism”).

that “it may be appropriate in this spirit to revive attention to the so-called Uniting for Peace Resolution 337A that confers a residual responsibility on the General Assembly to act when the Security Council fails to do so.”³⁵⁹ Falk does nothing to explain how the members could be persuaded to take their Charter obligations more seriously, or why the Uniting for Peace Resolution of 1950 should be any more efficacious fifty-six years later than it was when originally adopted, or what reason there is to think that the General Assembly would make a more effective custodian of international peace than the Security Council. In an earlier article, Falk further argued that the United States “would benefit from a self-imposed discipline of adherence to the UN Charter system governing the use of force” because such a policy “would overcome the absence of geopolitical limits associated with countervailing power in a unipolar world,” correct “tendencies of the United States and others to rely too much on military superiority,” and enable the United States to “avoid[] the worst policy failures, including that of Vietnam,” which Falk associates with “[d]eviations from the Charter system.”³⁶⁰ But most of these asserted benefits could accrue to the United States even if it did *not* adhere to the Charter system. For example, the United States could mitigate resentment of its dominant global position by playing a less interventionist role in world affairs and reverting to its traditional role of “offshore balancer.”³⁶¹ Or again, if the United States is indeed overreliant on military superiority, it could simply reduce its military budget and scale down its military presence abroad, or perhaps emphasize foreign aid and free trade programs more heavily. Moreover, Falk provides little reason to think that adherence to the Charter regime would produce a more peaceful, less violent world overall. A world in which the United States and its allies were fully compliant with Charter rules, but their adversaries opportunistically exploited such compliance and disregarded the same use of force rules would create asymmetric vulnerabilities for the United States that would become increasingly hard to tolerate. Strict legality, far

359. Richard Falk, *Assessing the United Nations After the Lebanon War of 2006*, NUCLEAR AGE PEACE FOUND., Aug. 16, 2006, http://www.wagingpeace.org/articles/2006/08/16_falk_after-lebanon.htm. Nigel White advocates similar disinterestedness, urging that “each permanent member [should] tak[e] its Council responsibility for international peace and security seriously, rather than each being primarily concerned with threats to its own security.” Nigel D. White, *The Will and Authority of the Security Council After Iraq*, 17 LEIDEN J. INT’L L. 645, 672 (2004).

360. Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT’L L. 590, 598 (2003). Professor O’Connell advances a subtler and more persuasive formulation of these arguments. See Mary Ellen O’Connell, *The United Nations Security Council and the Authorization of Force: Renewing the Council Through Law Reform*, in THE SECURITY COUNCIL AND THE USE OF FORCE, *supra* note 22, at 47, 55-56, 62-63.

361. See CHRISTOPHER LAYNE, *THE PEACE OF ILLUSIONS: AMERICAN GRAND STRATEGY FROM 1940 TO THE PRESENT* 159-92 (2006).

from creating favorable conditions for global peace, is likely to mean that because of the rival interests of the Council's permanent members, the dangers posed by states like North Korea or Iran will grow unattended. Still less does Falk show that a world of stricter Charter compliance by the United States would be a world in which human rights were better protected or democratic institutions more prevalent. Greater compliance with the Charter would mean that the United States would be less likely to participate in collective humanitarian efforts, such as in Kosovo, or to seek to democratize regimes that brutally oppressed their populations, as in Iraq. Finally, Falk is on weak grounds in claiming that American infractions of the Charter have coincided with policy failures. The 1962 Cuban "quarantine" was a Charter infraction, but it protected a vital national security interest. Nearer in time, the U.S.-led intervention in Kosovo—another clear Charter infraction³⁶²—helped suppress ethnic conflict in the area and led eventually to the collapse of the Milosevic government.

Second, at the opposite extreme, some legal scholars—most notably Michael Glennon—argue that the Charter is "dead," with the apparent implication that United States should henceforth ignore its use of force rules.³⁶³ While this Article has defended the central insights of that school of thought, it remains that the legal *availability* of noncompliance does not entail the *necessity* of noncompliance. Whether, and to what extent, the United States should impose on itself the restrictions of the Charter's use of force rules is a significant *policy* decision, even if (as argued here) the United States has a legal right to suspend or terminate performance of its Charter obligations.

A third perspective is held by those who advocate substantive "reforms" of the United Nations, in the shape, for example, of new "guidelines" to govern the deliberations of the Security Council. Secretary General Annan's 2005 Report *In Larger Freedom* illustrates this tendency. Annan recommends that the Council should adopt a resolution setting forth agreed-upon guidelines for authorizing or endorsing the use of military force, and then declare its intention to be bound by those guidelines.³⁶⁴ The contemplated guidelines would, in substance, incorpo-

362. Professor Falk himself served as a member of the Independent International Commission on Kosovo, whose lengthy report concluded "that the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council." INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT (2001), available at http://www.reliefweb.int/library/documents/the_kosovoreport.htm.

363. See, e.g., Glennon, *Unipolar World*, *supra* note 58, at 98-100. It should be noted that Professor Glennon also calls for the creation of new collective, international mechanisms to deal with problems of global disorder. *Id.* at 111.

364. See *In Larger Freedom*, *supra* note 39, ¶ 126.

rate principles derived from just war theory: proper purpose; grave threat; the availability of non-forcible measures; proportionality; and a reasonable prospect of success. But to be effective, Annan's guidelines require good faith from the Council members, and how is that to be guaranteed in a world of self-interested state actors? Moreover, even if Council members could be relied upon to act in perfect good faith, reasonable disagreements about the application of the guidelines' elements might nonetheless arise among them. Annan seems to assume that if such good faith disagreements arose, the states calling for the Council's authorization of a proposed intervention would be bound to remain inactive, even in the face of what they saw as an urgent and intolerable threat. But that normative belief is questionable; and as a predictive matter, it is unlikely to be accepted in state practice.

Fourth, some legal scholars recommend that the United States, although remaining within the general legal framework of the Charter, nonetheless seek gradually to alter it by making episodic international "common law" at variance with written Charter norms.³⁶⁵ While as a practical matter there is much to recommend this policy, it does not provide a reason to remain *within* the broad Charter framework, rather than abandoning it entirely in favor of an explicit return to purely customary use of force rules. Further, even assuming that the Charter use of force system *could* over time be supplanted by a better set of customary rules, the very effort to construct an alternative system would postpone a fundamental reexamination of the Charter system for the indefinite future. Finally, the proposed policy would seem to require more than a little disingenuousness, in that it calls for working *within* the Charter scheme in order to *displace* it.

Accordingly, each of the four approaches has flaws. Contrary to the first view, the Charter's problems are too deeply embedded, too significant, and too likely to cause future harm to be ignored. Contrary to the second view, the United States should not simply walk away from the United Nations. The organization still performs useful functions, even if collective security is not one of them, and even a more limited disengagement confined to the Charter's use of force rules alone would require defense and explanation. The modest, piecemeal "reforms" suggested by the third view do not begin to reach the structural problems in the Charter system. And the fourth view also hews too closely to current practice to be a truly effective remedy.

Political scientists and historians may have seen more deeply into the sources of the Charter's failure than legal scholars and United Nations

365. See Sofaer, *supra* note 177, at 8-15; see also Peter van Walsum, *The Security Council and the Use of Force: The Cases of Kosovo, East Timor, and Iraq*, in *THE SECURITY COUNCIL AND THE USE OF FORCE*, *supra* note 22, at 65, 73-74.

administrators. Accordingly, their insights into that failure, and their prescriptions for its cure, deserve respectful consideration. Among the political scientists in question are Francis Fukuyama³⁶⁶ and Robert Keohane,³⁶⁷ among the historians is Harold James.³⁶⁸ Fukuyama correctly sees the problem as one of enabling collective action through designing international institutions that will combine a high degree of *legitimacy* with a high degree of *effectiveness*.³⁶⁹ The United Nations (at least in the judgment of Secretary General Annan) possesses “the unique legitimacy” needed by states if they propose to use force beyond self-defense in order to deal with “threats to international peace and security.”³⁷⁰ But assuming that the United Nations can provide *legitimacy*, it has certainly proven itself to be *ineffective* in addressing those same threats to peace and security. Rather, action by states, either unilaterally or in coalition with other states, has alone been effective in that regard. Indeed, it appears that the United States deliberately sought to keep the United Nations at arm’s length during its 2002 military campaign in Afghanistan, fearing that the organization’s “assistance” would only compromise American effectiveness.

Both the United Nations’ legitimacy and its ineffectiveness spring from a common source: its *multilateralism*. Even though the Security Council does not represent nearly as many peoples or governments as the General Assembly, it is nonetheless able to express a fair variety of viewpoints and interests. Moreover, the Council serves as a forum for expressing a greater range of viewpoints and interests than the United States’ political process can accommodate by itself.³⁷¹ This kind of multilateralism arguably gives the Council’s deliberations a higher quality and a greater epistemic reliability than our domestic process alone can achieve.³⁷² These considerations give the Council a comparative advan-

366. See FRANCIS FUKUYAMA, *AMERICA AT THE CROSSROADS: DEMOCRACY, POWER, AND THE NEOCONSERVATIVE LEGACY* 157-62 (2006).

367. See Robert O. Keohane, *The Contingent Legitimacy of Multilateralism* 17-23 (Garnet Working Paper No. 09/06, 2006), available at http://www.garnet-eu.org/fileadmin/documents/working_papers/0906.pdf.

368. See generally HAROLD JAMES, *THE ROMAN PREDICAMENT: HOW THE RULES OF INTERNATIONAL ORDER CREATE THE POLITICS OF EMPIRE* (2006).

369. See FUKUYAMA, *supra* note 366, at 155-80.

370. Kofi Annan, Sec’y-Gen. of the United Nations, Address to the General Assembly (Sept. 23, 2003), available at <http://www.un.org/webcast/ga/58/statements/sg2eng030923>.

371. This is not to discount the influence of foreign governmental and public opinion on the American domestic political process. Indeed, the open and consultative nature of the United States political process has historically been one of the main reasons why many foreign nations have accepted its outcomes.

372. See Keohane, *supra* note 367, at 5. Indeed, it has been suggested that the American public relies on the Council’s validation of a proposed United States armed intervention as a means of reducing the agency costs of monitoring its own political leaders. See

tage over the United States in terms of “legitimacy.” At the same time, however, the multilateral nature of the Council tends to create paralyzing conflicts of national interests within it, limiting its effectiveness. Time and again, Council intervention has either come too late or not at all: in Rwanda; in Bosnia; in Kosovo; in Sudan; and even, at least arguably, in Iraq.³⁷³ The persisting ineffectiveness of the Security Council in addressing these crises has done much to undercut any claim it might have to “unique legitimacy.”³⁷⁴

The situation for the United States is the photographic negative of the United Nations’ situation. Legitimacy depends critically upon *process*—upon the participation of a broad group of nations, interests, and perspectives in the formulation of policy. The United States, however, is but one nation among others, with interests and perspectives that are peculiarly its own. However benign its intentions (in its own judgment) may be, its conduct is likely to be perceived as threatening, aggressive, or even “imperialistic” by other governments and peoples.³⁷⁵ When it uses force unilaterally or even together with coalition partners, its actions are apt to seem arbitrary and tyrannical, and thus, it suffers from a serious legitimacy deficit. Worse still, the existence of such perceptions tends to undercut the United States’ effectiveness: in contemporary warfare, action in conformity (or perceived conformity) with *jus ad bellum* and *jus in bello* norms is a force multiplier—a strategic asset that weakens the enemy, attracts neutral sympathy, and strengthens the domestic population’s support for the war.³⁷⁶ Putting the matter crudely (but not too much so), American unilateralism may well be effective, but it lacks legitimacy. Compare the First Gulf War of 1991, the Kosovo intervention of 1999, and the Second Gulf War of 2003 in both dimensions—effectiveness and legitimacy. It might seem that the First Gulf War, which the Security Council authorized, combined maximum effectiveness with maximum legitimacy. Next, the Kosovo intervention, which involved NATO, an established multilateral organization, but which lacked Council authorization, exhibited a high degree of effectiveness, but also

Terrence L. Chapman & Dan Reiter, *The United Nations Security Council and the Rally ‘Round the Flag Effect*, 48 J. CONFLICT RESOL. 886, 887-88 (2004).

373. See Keohane, *supra* note 367, at 6; see also Benvenisti, *supra* note 283, at 682-83 (explaining difficulties in obtaining coordination of collective action among the United States and other key actors, including other permanent members of the Council).

374. For a scathing but deserved critique of the performance of the United Nations bureaucracy in Bosnia and Rwanda, see ADAM LEBOR, “COMPLICITY WITH EVIL”: THE UNITED NATIONS IN THE AGE OF MODERN GENOCIDE (2006).

375. See JAMES, *supra* note 368, at 24-38.

376. See generally KENNEDY, *supra* note 61. Equally, however, compliance with the laws of war, especially perhaps in asymmetric conflict with a lawless enemy, can create severe, even intolerable, vulnerabilities. See ROGER W. BARNETT, ASYMMETRICAL WARFARE: TODAY’S CHALLENGE TO U.S. MILITARY POWER 61-81 (2003).

less legitimacy. Lastly, the Second Gulf War, which the Security Council did not authorize and which prominent NATO members opposed, demonstrated substantially reduced effectiveness, arguably owing in part to its having significantly less legitimacy. Decreasing legitimacy may, indeed, impede effectiveness.

Fukuyama's insight that the design of international institutions must trade off "legitimacy" against "effectiveness" is thus a powerful one. It permits the Charter system's use of force regime to be evaluated more carefully against the leading alternatives to it. The Charter system incorporates (arguably) a comparatively high degree of legitimacy but a comparatively low degree of effectiveness.³⁷⁷ How do the leading alternatives fare by comparison?

The two most obvious alternatives are: (1) a network of *regional* security alliances, along the lines of the system originally advocated by Winston Churchill in opposition to the centralized, *global* security system that emerged in the Charter; and (2) the creation of ad hoc "coalitions of the willing" to maintain international security—coalitions that at least for now would usually emerge from the United States' domestic political process, coupled with coalitional diplomacy.

Fukuyama himself leans toward the alternative of reconfiguring the search for global security around a system of regional organizations like NATO. (Other regional security alliances could include the Organization of American States, the African Union, and the European Union.) He argues that NATO in particular "has fewer legitimacy problems than the United Nations," because, unlike the Security Council, all of its members are liberal democracies and also because, like the Security Council, it operates by multilateral consensus.³⁷⁸ Furthermore, NATO includes many friends of the United States (especially since the accession of new Eastern European democracies), largely excludes France, and is not subject to Russian or Chinese vetoes—all valuable characteristics from the United States' perspective.³⁷⁹ Fukuyama acknowledges that

377. *But see* Keohane, *supra* note 367, at 5-7 (noting objections to the "legitimacy" of the Charter system, including the facts that the permanent membership of the Security Council does not reflect any principled set of criteria for representation but is merely the product of the power politics of 1945, that the Council does not include several large, affluent, or powerful states as permanent members but does include two powers of only middling size, and that several of the Council's permanent members cannot be considered "democratic"). Further, even if responsibility for protecting global security could somehow be reallocated from the Security Council to the General Assembly, the "legitimacy" of the United Nations would still be clouded. The General Assembly, though more numerous and representative than the Council, also includes many states that are highly undemocratic, routinely abuse the human rights of their populations, and serve only the interests of ruling families or tyrannical cliques.

378. FUKUYAMA, *supra* note 366, at 173.

379. *Id.*

precisely because NATO is consultative and consensual, it sacrifices a large amount of effectiveness; but he contends both that this sacrifice is a necessary and tolerable prerequisite to legitimacy, and that NATO has proven its usefulness to the United States in recent operations including Afghanistan and Darfur.³⁸⁰

If NATO arguably brings a legitimacy generated by democratic multilateralism,³⁸¹ however, Fukuyama may overestimate its effectiveness, and hence its serviceability as a model, most of all perhaps in alliance actions outside Europe. The Second Gulf War has brought to light deep rifts in the Western alliance—rifts that existed even before that war, and that are likely only to worsen in the future.³⁸² Although Kosovo was a paradigm of successful collective action by NATO members to eradicate a threat to regional peace and security, Kosovo may well be uncharacteristic of future interventions: Western Europe had substantial equities in addressing the violence of the Milosevic regime, and the United States, though lacking the vital national interests of its European partners, was nonetheless willing to spearhead the common effort. But when the reverse situation emerged in 2003 in Iraq—a perceived threat of great magnitude to crucial United States interests, but one felt to be of little concern to Europe—the older European members of NATO either failed to support the United States, or else actively opposed it. Moreover, NATO's performance thus far in Afghanistan³⁸³—a matter, assumedly, of concern to *all* members of

380. *Id.*

381. Fukuyama likely understates the extent to which NATO operations would resemble, or be perceived by local populations as resembling, a form of neo-colonization. See Gerald Knaus & Felix Martin, *Travails of the European Raj*, J. DEMOCRACY, July 2003, at 60, 61-63; Yaroslav Trofimov, *Occupational Hazard: In Postwar Bosnia, Overruling Voters To Save Democracy*, WALL ST. J., Oct. 1, 2004, at A1; Ian Traynor, *Ashdown 'Running Bosnia Like a Raj'*, GUARDIAN UNLIMITED, July 5, 2003, <http://www.guardian.co.uk/international/story/0,3604,991947,00.html>. See generally MARTEN, *supra* note 338, at 123-33.

382. See Robert J. Delahunty, *The Battle of Mars and Venus: Why Do American and European Attitudes Toward International Law Differ?*, 4 Loy. U. Chi. Int'l L. Rev. 11 (2006). Earlier clashes included differences over the International Criminal Court and the Kyoto Protocol.

383. See generally PAUL GALLIS, CONG. RESEARCH SERV., No. RL33627, NATO IN AFGHANISTAN: A TEST OF THE TRANSATLANTIC ALLIANCE (2006), <http://www.fas.org/sgp/crs/row/RL33627.pdf>. The International Security Assistance Force (ISAF) in Afghanistan was authorized as a Chapter VII operation by Security Council Resolution 1386 (2001), see S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001), and was extended by Security Council Resolutions 1510, see S.C. Res. 1510, U.N. Doc. S/RES/1510 (Oct. 13, 2003), 1623, see S.C. Res. 1623, U.N. Doc. S/RES/1623 (Sept. 13, 2005), and 1707, see S.C. Res. 1707, U.N. Doc. S/RES/1707 (Sept. 12, 2006). NATO assumed responsibility for leading ISAF in 2003. ISAF is one of two Western military operations seeking to stabilize Afghanistan; the other is Operation Enduring Freedom (OEF), which is led by the United States.

the alliance³⁸⁴—casts doubt on the assumption of NATO's effectiveness.³⁸⁵ Indeed, the German news magazine *Der Spiegel* recently reported that "NATO, which sees itself as the world's most powerful military alliance, faces the real possibility of political and possibly even military defeat in its bloody war of attrition with the Taliban."³⁸⁶ Further, the burdens of the campaign in Afghanistan have been shared very unequally between the English-speaking coalition members and their continental European counterparts, at least when measured in terms of casualties.³⁸⁷ In short, NATO may well be unsuited to play the lead role that Fukuyama envisages for it.³⁸⁸

That leaves the third possibility—reliance on the United States' domestic political process, coupled with its coalition-building diplomacy, for countermeasures to threats to international stability and peace. The current United States national security strategy assumes that this approach will couple effectiveness with at least a fair degree of legitimacy. Moreover, whatever one's final assessment of that strategy, it represents a reasonable attempt to adapt to an international environment that is both highly threatening to the United States and yet full of promise for it.

Two main characteristics of this post-cold war international environment have helped determine the United States' strategy. First, deterrence has become much harder than it was in the cold war, when the

384. See INT'L CRISIS GROUP, COUNTERING AFGHANISTAN'S INSURGENCY 15 (2006), http://www.crisisgroup.org/library/documents/asia/south_asia/123_countering_afghanistans_insurgency/pdf ("If NATO fails in Afghanistan, NATO fails," reckons a senior Western diplomat.')

385. See *id.* at 14-15.

386. Konstantin von Hammerstein et al., "The Germans Have to Learn How to Kill," SPIEGEL ONLINE, Nov. 20, 2006), <http://www.spiegel.de/international/spiegel/0,1518,449479,00.html>.

387. See Paul Koring, *Bearing the Burden in Afghanistan*, GLOBE & MAIL, Nov. 17, 2006, at A12. According to recent reports, the armed forces of just three countries (the United States, Canada, and Great Britain) have accounted for ninety percent of all NATO combat casualties in the NATO's Afghanistan campaign. *Id.* Germany, France, Italy, and Spain, while providing significant numbers of troops to the campaign, have kept them out of combat in the relatively peaceful north and west of the country. *Id.*

The problem of unequal burden sharing (or of "free ridership") has been a recurring one in the history of NATO—as is to be expected on the economic theory of military alliances. See Keith Hartley & Todd Sandler, *NATO Burden-Sharing: Past and Future*, 36 J. PEACE RES. 665, 666-68 (1999); see also Jyoti Khanna, Todd Sandler & Hirofumi Shimizu, *Sharing the Financial Burden for U.N. and NATO Peacekeeping, 1976-1996*, 42 J. CONFLICT RESOL. 176, 181-82 (1998). See generally Mancur Olson, Jr. & Richard Zeckhauser, *An Economic Theory of Alliances*, 48 REV. ECON. & STAT. 266 (1966).

388. See Zwanenburg, *supra* note 271, at 210 ("At least part of the reason why the United States appears to have lost interest in the [NATO] Alliance is that there are major differences of opinion between partners on the role of the Security Council in collective security. These differences . . . exploded during the Iraq crisis. It is not likely that these differences will disappear soon.').

United States and the Soviet Union arrived at a nuclear stalemate that, in the end, protected the peace. But the United States' ability to deter, or even to identify and trace, the sources of terrorist threats to use weapons of mass destruction is considerably less. Second, the United States' cold war victory appeared to leave it with an extraordinary, and likely unrepeatable, opportunity to mold the international order more closely to its own image. This combination of motive with opportunity led directly to the two key components of the United States security strategy: first, the emergence of a very robust doctrine of preventative self-defense because the traditional Cold War reliance on the threat of massive retaliation would not work against elusive terrorist enemies; and second, the willingness to act unilaterally because the support of other nations was deemed not worth the cost of securing their consent. Both of these American strategic doctrines have put the Charter system under severe strain: the first, because it requires a reconsideration of the limits of anticipatory self-defense that had taken hold under the sway of the Charter; the second, because it encouraged the United States and at least some of its allies to bypass the Charter's procedural requirements for authorizing collective action under Article 42.

With the benefit of more than four years' hindsight after the U.S.-led intervention in Iraq in the Second Gulf War, many have come to the conclusion that the American strategic approach is neither legitimate nor, for that matter, effective. But even accepting that the Second Gulf War has brought out the drastic limitations of the American strategy, it would be wrong to draw the lesson that the United States should hereafter remain strictly within the legal parameters of the Charter. To begin with, it is questionable whether even explicit authorization by the Security Council would have added much "legitimacy" to the Iraq intervention—at least in the minds of the Iraqis, if not of Western Europeans.³⁸⁹ Given Iraq's disastrous but deeply entrenched domestic political culture,³⁹⁰ Security Council authorization would likely have made no difference whatever to the post-war difficulties that the occupying coalition encountered in that country.³⁹¹ The Council's post-war Resolution 1483, which recognized the

389. See ANATOL LIEVEN & JOHN HULSMAN, *ETHICAL REALISM: A VISION FOR AMERICA'S ROLE IN THE WORLD* 145-46 (2006) (arguing that it "misses the point almost completely" to attribute U.S. difficulties in Iraq to the fact that "the United States lacked a mandate from the United Nations" rather than to the existence of a "regional consensus" among Iraq's neighbors against U.S. intervention).

390. See FOUAD AJAMI, *THE FOREIGNER'S GIFT* (2006).

391. See Jacques de Lisle, *Illegal? Yes. Lawless? Not So Fast: The United States, International Law, and the War in Iraq*, FOREIGN POL'Y RES. INST., Mar. 28, 2003, <http://www.fpri.org/enotes/20030328.americawar.delisle.intllawwariraq.html>.

Moreover, why attribute those post-war difficulties to the absence of a Security Council resolution, rather than to the United States' unsuccessful strategy of seeking to obtain a fresh authorization? The United States might have been better advised not to have sought

occupation of Iraq, vested interim powers in the Coalition Provisional Authority, and carved out a significant role for the United Nations in the occupation,³⁹² conferred little “legitimacy” on the occupying forces, which remained targets of the insurgency. Indeed, the Iraqi resistance demonstrated how little esteem it had for the United Nations by destroying the UN headquarters at the Canal Hotel in Baghdad on August 19, 2003—an attack in which Sergio Vieira de Mello, the Secretary General’s Special Representative for Iraq, was killed.³⁹³ Iraqis had suffered an estimated 400,000 “excess” deaths and had seen their standard of living collapse during twelve years of United Nations economic sanctions, and while these sanctions were the consequence of Saddam Hussein’s 1990 invasion of Kuwait, Iraqis felt that they had no control over Hussein’s decisions and should not have been held responsible for them.³⁹⁴ The UN thus had no more legitimacy in Iraqi eyes than the coalition forces did.³⁹⁵

authorization at all, and to have gone forward without taking account of the Council’s wishes. Hans Morgenthau argued long ago for such a “pragmatic and instrumental approach to the United Nations,” observing that “the issue of whether or not to submit a certain problem to the United Nations or even whether or not to remain a member of the organization must be determined exclusively by the usefulness of the United Nations for the protection and promotion of the interests of the nations concerned.” Hans J. Morgenthau, *The Yardstick of National Interest*, 296 ANNALS AM. ACAD. POL. & SOC. SCI. 77, 77 (1954).

392. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

393. See Press Release, United Nations, Bomb Blast Rips Through UN Headquarters in Baghdad (Aug. 19, 2003), <http://www.un.org/av/photo/subjects/unhqbombing.htm>.

394. See AHMED S. HASHIM, *INSURGENCY AND COUNTER-INSURGENCY IN IRAQ* 31-32 (2006) (citing Gwynne Dyer, *A Guerilla War Takes Root*, TORONTO STAR, Aug. 20, 2003, at A21); David Chandler, *The UN—Just There To Help?*, SPIKED-POLITICS, Aug. 22, 2003, <http://www.spiked-online.com/Articles/00000006DEDF.htm>.

395. The failure of the Secretary General’s special emissary to Iraq, Lakhdar Brahimi, also testifies the lack of regard in which the United Nations is held in that country. Brahimi, a former Algerian Foreign Minister and Arab League functionary, “hailed from the same political class that had wrecked the Arab world. He partook of the ways of that class: populism, anti-Americanism, anti-Zionism.” AJAMI, *supra* note 390, at 222. Brahimi had demonstrated an extraordinary lack of sympathy for both Iraq’s Shi’ite and Kurdish populations:

As undersecretary of the Arab League between 1984 and 1991, Brahimi stood silent as Saddam massacred more than 100,000 Iraqi Kurds, and then perhaps 400,000 Iraqi Shia. . . . Visiting Baghdad on U.N. business in 1997, Brahimi added insult to injury, as Iraqi television showed Brahimi embracing Saddam’s Deputy Prime Minister Tariq Aziz.

Michael Rubin, “*Betrayal*,” NAT’L REV. ONLINE, Apr. 19, 2004, <http://www.nationalreview.com/rubin/rubin200404190843.asp>. After a brief visit to Iraq in 2004, Brahimi proposed an interim government composed mostly of “technocrats” including Adnan Pachachi, a former Iraqi Foreign Minister in the 1960s. To both Iraq’s Sunnis and Shi’ites, Pachachi “was a man of the old order . . . [who] offered the reassuring [for Sunnis] prospect of Sunni primacy but without the violence and cruelty of [Saddam Hussein].” AJAMI, *supra* note 390, at 220-21. Shi’ite leaders, sensing that Brahimi’s “technocratic scheme . . . was [but] a thinly veiled attack on the gains that the Shia and the Kurds had made after

More importantly, to revert to Charter rules because of the coalition's unhappy experience in Iraq would hardly solve contemporary problems of international security. As Robert Keohane has argued, such an approach

assumes that the *status quo* is sufficiently acceptable that deadlock will not generate disaster. In a world of weapons of mass destruction, actively sought by governments and potential terrorist groups, this assumption is not realistic. It is based not on the world as we know it, but on a more benign, imaginary world.³⁹⁶

Those who advocate strict compliance with the Charter's use of force regime are offering a formula, not for peace and security, but for inaction in the face of danger. Are we really safer in a world in which the Security Council routinely issues resolutions condemning Iraq's or North Korea's weapons programs, while Iraq and North Korea routinely and with impunity defy them?

Still, even if American unilateralism might promise a safer and more peaceful world order than the Charter security system—or even a security system based on regional defense organizations—it would suffer from severe weaknesses. There is, again, the incurable problem of legitimacy. To quote Keohane once more:

Organizations, from hegemonic states to “coalitions of the willing” or alliances, that exclude large numbers of people from representation, cannot be legitimate on a global basis. No claim that a given state or organization has superior morality or superior knowledge (for instance, because of its political history or religious faith) can provide a valid basis for people who do not share such beliefs to accept their authority.³⁹⁷

Worse still (from an American perspective), there is the danger that the United States, in a hegemonic attempt to underwrite the costs of providing international security and other global public goods, will enmesh itself in unending peripheral conflicts, inflame rivalries with other powers, exhaust its wealth and substance, wither in the face of emerging challengers, and go the way of empires and hegemonies of the past.³⁹⁸

[Saddam's] fall,” moved quickly to denounce the proposal, saying that the U.N. envoy had attempted “to ‘bypass the Iraqi reality and to leave out those political forces’” hostile to the restoration of Sunni dominance. *Id.* at 222-23. In their view, Brahimi's proposals “‘opened the door for the return to power of men of the old regime . . . and . . . would guarantee instability.’” *Id.* at 223. Lacking Iraqi support, Brahimi's proposed candidates to head the interim Iraqi government were rejected.

396. Keohane, *supra* note 367, at 13-14; *see also* Benvenisti, *supra* note 283, at 688 (“[R]elegating risk assessment to the Security Council—the solution preferred by many scholars as well as states—has become a rather precarious policy” (footnote omitted)).

397. Keohane, *supra* note 367, at 14.

398. *Cf.* JAMES, *supra* note 368, at 99-117; LAYNE, *supra* note 361, at 152-58. For the idea that a hegemonic system is self-stabilizing insofar as it produces collective global

In truth, then, none of the three options considered—the Charter security system, regional organizations, and American-led coalitional activity—offers a plausible solution to the problem of global peace and security. All three suffer from substantial deficits in legitimacy, effectiveness, or (since the two are intertwined) both. Yet, the problem of providing international security and peace is arguably worse than it has been for several decades, possibly even for generations. The confluence of three distinct trends—the rise of mass terrorism, the proliferation or readier availability of weapons of mass destruction, and the presence of many failed or dysfunctional states that may serve to incubate terrorism—has created a singularly dangerous period in world affairs.³⁹⁹

What, then, is to be done? For the longer term, it will be necessary for legal scholars, international relations experts, government advisors, political scientists, and others to attempt to design international institutions that combine effectiveness and legitimacy more successfully than existing institutions do. This would enable collective security measures against the threats of terrorism, weapons of mass destruction, and failed states. These institutions may not completely displace the United Nations, but they will likely overshadow it as a provider of international security. This is not the place to consider and evaluate some of the proposed designs for such institutions,⁴⁰⁰ which may well include regional organizations like NATO or the Economic Community of West African States (ECOWAS),⁴⁰¹ or more informal groups consisting primarily of regional stakeholders. But in the near term, the global system will probably remain obliged to look to the United States and its allies, whether in NATO or in ad hoc coalitions, for stabilization efforts requiring the use of force.

goods, see Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 39 INT'L ORG. 579 (1985) (providing a technical analysis); Michael C. Webb & Stephen D. Krasner, *Hegemonic Stability Theory: An Empirical Assessment*, 15 REV. INT'L STUD. 183, 184 (1989) (distinguishing "collective goods" version from "security" version of hegemonic stability thesis).

399. See Benvenisti, *supra* note 283, at 681-83 (explaining how the dynamics of providing global security underwent transformation in post-cold war period).

400. See, e.g., Allen Buchanan & Robert O. Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, ETHICS & INT'L AFF., Winter 2004, at 1; see also Benvenisti, *supra* note 283, at 697-99.

401. NATO's 1999 strategic concept envisaged the possibility of collective enforcement actions not authorized by the Security Council, and NATO military doctrine likewise keeps that option open. See Zwanenburg, *supra* note 271, at 201-03. Likewise, ECOWAS, which has intervened in Liberia and Sierra Leone without clear authorization from the Council, has adopted a Protocol permitting it to take such measures without the Council's approval. See N.D. White, *On the Brink of Lawlessness: The State of Collective Security Law*, Hilaire McCoubrey Memorial Lecture at the University of Hull (May 15, 2002), available at <http://www.hull.ac.uk/law/downloads/mcccoubreylecture02.pdf>.

In these circumstances, the United States should not consider itself bound to follow the Charter's prescriptions and to seek authorization from the Security Council before taking the security measures it considers necessary. As argued at length in this Article, the sixty-year long failure of the Charter system to provide collective security absolves the United States from any legal obligation to comply with the Charter's use of force rules. But the United States is not forced to the binary choice of either remaining within the United Nations system or withdrawing from it. Nor, if it rejects those false alternatives, is it committed to a policy of seeking to modify or subvert the Charter rules from within.

American policymakers should instead consider looking for an opportune occasion on which to announce that the United States will consider future Security Council action—or inaction—with respect to Article 42 of the Charter to be merely *advisory*. On this proposal, the United States would make clear that although it might seek Council “authorization” under Article 42 for the use of force by itself or its coalition to suppress threats to or breaches of the peace, it would not consider the failure to obtain such an authorization binding. Consistently with that approach, the United States would also make clear that although it might continue to participate in Council deliberations regarding authorizations for the use of force under Article 42, it would not use its veto to block such enforcement measures when sponsored by other member states against third parties. Equally, however, it would not consider itself obliged either to provide assistance to carry out such enforcement measures, or even not to resist them, if they were adopted by the rest of the Council. In other words, its failure to veto an enforcement proposal should not be construed to constrain in any way how it would respond to that measure, if the Council adopted it.

This interim proposal, if adopted, might serve to quiet some of the criticism that the United States is an international “scofflaw” for not complying with Charter use of force rules: the policy would have a reasoned legal justification, based on the persistent and incurable failure of the Charter collective security system to work. More, the policy could force the pace of innovation, serving as a catalyst for the introduction of well-designed institutional alternatives to the currently available international security systems. Further, it is a fairer and more candid approach than that of working within the overall Charter framework for the very purpose of undoing it: just as the United States would not consider itself bound by the votes or vetoes of other Council members, neither would it attempt to hold them bound by *its* votes or vetoes. Surely the logic and the equities of renouncing the constraints of the Charter security system necessitate a renunciation of its use to constrain others. Finally, the proposal would not represent a radical departure from established American policy, except as to the renunciation of the use of the veto. Rather, it would clarify and formalize what has, in effect, been the position of

American policymakers for several decades. That is, it would merely carry a stage further the policy that led then U.N. Ambassador (later Secretary of State) Madeleine Albright to declare during the Clinton administration that the United States would “act ‘multilaterally when we can and unilaterally as we must’” with regard to Iraq.⁴⁰² That prompted Secretary of Defense William Cohen, also during the Clinton administration, to say that NATO would not need Security Council authorization to intervene in Kosovo and Deputy Secretary of State Strobe Talbot to affirm that “[w]e must be careful not to subordinate NATO to any other international body [T]he Alliance must reserve the right and the freedom to act when its members, by consensus, deem it necessary.”⁴⁰³ And that caused Secretary of State Colin Powell in the present administration to say that while the “Council could ‘decide whether or not action is required,’ . . . the United States would ‘reserve our option of acting’ and is ‘not bound’ by” the Council’s determinations.⁴⁰⁴ Even more telling than our leaders’ speeches, the United States’ actions in Kosovo and Iraq demonstrate the consistency of this policy and the tenacity with which it has been pursued. It seems time to place the policy on a sounder legal footing.

402. Elias Davidsson, *The U.N. Security Council’s Obligations of Good Faith*, 15 FLA. J. INT’L L. 541, 563 (2003) (quoting Noam Chomsky, *U.S. Policy: Rogue States*, ZMAGAZINE, Apr. 1988, <http://www.zmag.org/chomsky/articles/z9804-rogue.html>).

403. See O’Connell, *supra* note 85, at 76 (quoting Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 2, 15 (1999)).

404. Glennon, *Unipolar World*, *supra* note 58, at 102 (quoting *Face the Nation: Colin Powell Discusses the UN Resolution Telling Iraq to Disarm* (CBS television broadcast Nov. 10, 2003)).

