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# The Illegality of the U.S. Policy of Preemptive Self-Defense Under International Law

Chris Bordelon\*

## I. INTRODUCTION

In the aftermath of the September 11, 2001 attacks in the United States, domestic and foreign political actors who might otherwise have balked if the world's lone superpower claimed a broad right to use force abroad instead offered the U.S. a strong showing of goodwill and support.<sup>1</sup> Perhaps interpreting this solidarity as willingness to support American uses of force abroad regardless of their permissibility under international law, the Bush administration articulated a provocative interpretation of the right of self-defense recognized in the United Nations Charter. In a formal policy statement, the administration claimed that this right, which is an exception to the general prohibition of the use of force in international relations, justified the use of preemptive force against "enemies" of the United States.<sup>2</sup>

The Bush administration's assertion of a right of preemptive self-defense, along with its reliance on this purported right to justify its use of force against Iraq, has drawn considerable criticism on international law grounds.<sup>3</sup> It is debatable whether

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<sup>1</sup> See George K. Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 VAL. U. L. REV. 489, 494-95, 498-505 (2002-2003) (describing Congressional and foreign reactions to September 11, 2001 terrorist attacks and global support against terrorism); JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 167 (2004) [hereinafter J. MURPHY] ("The international reaction to the attacks was swift and almost universally one of outrage and support for the United States.").

<sup>2</sup> National Security Council, *The National Security Strategy of the United States of America*, at 15 (September 2002), available at <http://www.whitehouse.gov/nsc/nss.html> [hereinafter *NSS*].

<sup>3</sup> See, e.g., Major Joshua E. Kastenberg, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption*, 55 A.F. L. REV. 87, 88 (2004) ("[A] pressing question that has emerged on the world stage is whether and anticipatory self-

anticipatory self-defense is permissible under international law. However, the Bush administration's preemption strategy calls for the use of force beyond the scope of the right of self-defense, even if the right is broadly construed.

The Bush administration released its formal policy statement, "The National Security Strategy of the United States of America" ("NSS"), in September 2002.<sup>4</sup> This document outlines various considerations that are said to guide the administration's foreign policy decisions.<sup>5</sup> Of particular interest is the document's treatment of two categories of "enemies:" "terrorists" and "rogue states." The NSS contains no specific definition of the term "terrorists." However, the term includes states that "knowingly harbor or . . . aid" terrorists.<sup>6</sup> The NSS defines "rogue states" as those states with characteristics that match certain enumerated criteria and explicitly includes Iraq and North Korea in this category.<sup>7</sup> The document argues that the emergence of these "new deadly challenges" has effected a "profound transformation" in the "security environment,"<sup>8</sup> and has brought about a "new world" in which "the only path to peace and security is the path of action."<sup>9</sup> In the context of the NSS, the noun "action," the verb "act," and various derivations of these words were used euphemistically to refer to the use of military force by the U.S. against its "enemies."<sup>10</sup>

The "action" contemplated against terrorists and rogue state is not limited to deterrence of and response to the use or threat of force by these groups, but includes action "against such emerging threats before they are fully formed."<sup>11</sup> The U.S. will "not hesitate to act alone" to prevent terrorists and rogue states from attacking or threatening to attack, and will "exercise [its] right of self-defense," as the administration understands it, "by acting preemptively."<sup>12</sup> The U.S. will "no longer solely rely on a reactive posture as [it did] in the past," nor will it "let . . . enemies strike first," or "remain idle while dangers gather."<sup>13</sup> Thus, under the NSS, military force is to be used preemptively to "forestall or

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defense and preemption are legitimate international law concepts.").

<sup>4</sup> NSS, *supra* note 2.

<sup>5</sup> NSS, *supra* note 2.

<sup>6</sup> NSS, *supra* note 2, at 5.

<sup>7</sup> NSS, *supra* note 2, at 13-14.

<sup>8</sup> NSS, *supra* note 2, at 13.

<sup>9</sup> George W. Bush, *Introduction to The National Security Strategy of the United States of America*, para. 5 (September 2002), available at <http://www.whitehouse.gov/nsc/nss.html> [hereinafter Bush].

<sup>10</sup> See NSS, *supra* note 2, at 15.

<sup>11</sup> Bush, *supra* note 9, at para. 5.

<sup>12</sup> NSS, *supra* note 2, at 6.

<sup>13</sup> NSS, *supra* note 2, at 15.

prevent . . . hostile acts by our adversaries.”<sup>14</sup> While the administration suggested at least one other justification for using force against Iraq,<sup>15</sup> it relied in part on its asserted right to preemptive self-defense.<sup>16</sup> The commencement of U.S. efforts to put its theory of preemptive self-defense into practice warrants an examination of whether self-defense is a valid justification for using force in these circumstances.

The authors of the NSS believe that the preemptive use of force is compatible with international law.<sup>17</sup> The NSS states that, “[f]or centuries, international law [has] recognized that nations need not suffer an attack” before using force in self-defense “against forces that present an imminent danger of attack.”<sup>18</sup> Preemption, the document asserts, has been regarded as legitimate under international law when undertaken with respect to an “imminent threat—most often a visible mobilization” of military forces.<sup>19</sup> Without further explanation of what “imminent threat” means, the NSS asserts that “[w]e must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”<sup>20</sup> “The greater the threat” posed by these adversaries, the “more compelling the case for taking anticipatory action . . . even if uncertainty remains as to

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<sup>14</sup> NSS, *supra* note 2, at 15.

<sup>15</sup> The U.S. also justified its use of force against Iraq by citing several Security Council resolutions authorizing force. See CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 192-93 (2000) [hereinafter GRAY, USE OF FORCE] (describing the lack of acceptance by other states of earlier U.S. claims that authorization to use force against Iraq could be implied from past Council Resolutions); see also Amy E. Eckert & Manooher Mofidi, *Doctrine or Doctrinaire—The First Strike Doctrine and Preemptive Self-Defense Under International Law*, 12 TUL. J. INT’L & COMP. L. 117, 125-27 (2004) (noting the failed attempt by the U.S. to obtain a Council resolution explicitly authorizing the use of force in 2003 and describing U.S. efforts to obtain such a resolution); Ian Johnstone, *US-UN Relations After Iraq: The End of the World (Order) as We Know It?*, 15 EUR. J. INT’L L. 813, 831 (2004) (briefly summarizing the arguments for and against the purported Council authorization).

<sup>16</sup> Eckert & Mofidi, *supra* note 15, at 123, 128; Lucy Martinez, *September 11th, Iraq and the Doctrine of Anticipatory Self-Defense*, 72 UMKC L. REV. 123, 123 (2003-2004); see also World Press Review Online, *The United Nations, International Law, and the War in Iraq*, <http://www.worldpress.org/specials/iraq> (describing speeches by President Bush and Secretary of State Colin Powell that suggested self-defense as a justification for the use of force against Iraq) (last visited Nov. 12, 2005).

<sup>17</sup> See NSS, *supra* note 2, at 15; John B. Bellinger III, *Authority for the Use of Force by the United States Against Iraq Under International Law* (Apr. 10, 2003), at <http://www.cfr.org/publication.php?id=5862> (statements by the United Nations Secretary General, phrased similarly to language in the NSS, to the effect that the proliferation of highly destructive weapons justify the conclusion that “states cannot be required to wait for an attack before they can lawfully use force to defend themselves”); see also J. MURPHY, *supra* note 1, at 176 (noting that the NSS asserts a right of preemptive self-defense, and adding that “it is by no means clear . . . that the [2002] attack against Iraq can be justified as an act of self-defense).

<sup>18</sup> NSS, *supra* note 2, at 15.

<sup>19</sup> NSS, *supra* note 2, at 15.

<sup>20</sup> NSS, *supra* note 2, at 15.

the time and place of the enemy's attack."<sup>21</sup>

The NSS's brief mention of the legality of the new U.S. strategy provides an incomplete analysis of the relevant norms. The NSS treats the permissible temporal scope of self-defense as a matter of settled law. It thus ignores an ongoing scholarly and international debate concerning when force may first be used.<sup>22</sup> The document also fails to fully consider the application of two customary international law principles, necessity and proportionality, to uses of force called for by the preemption strategy.<sup>23</sup> Moreover, the NSS does not indicate the source of the authority of the U.S. to unilaterally "adapt the concept of imminent threat" to suit its present needs.<sup>24</sup> Analysis of these gaps in the NSS's consideration of relevant international law suggests that the administration's confidence in the legality of preemptive self-defense is misplaced.

## II. THE UNITED NATIONS CHARTER AND A STATE'S RIGHT OF SELF-DEFENSE

Scholars regard the United Nations Charter (Charter) as the "starting point" for analyzing the relevant norms restricting the ability of states to threaten or use force.<sup>25</sup> The Charter's text amply demonstrates its drafters' fundamental concern with limiting instances in which the use of force in international relations would be considered legally permissible. The preamble begins with an expression of the signatories' determination "to save succeeding generations from the scourge of war," and describes the "principles and . . . methods" contained in the substantive portion of the Charter as being aimed at "ensur[ing] . . . that armed force shall not be used, save in the common interest."<sup>26</sup> The first of the "Purposes of the United Nations" listed in Article 1 is "[t]o maintain international peace and security."<sup>27</sup> The second Purpose commits the U.N. to

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<sup>21</sup> NSS, *supra* note 2, at 15.

<sup>22</sup> See, e.g., GRAY, USE OF FORCE, *supra* note 15 at 86, 112; Leo Van den hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L. L. REV. 69, 80-82 (2003-2004) (noting a division of opinion on when self-defense may first be used).

<sup>23</sup> See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 98 (June 27) (discussing customary rules of international law).

<sup>24</sup> See Hugh Thirlway, *The Sources of International Law*, in INTERNATIONAL LAW 117, 125 (Malcolm Evans ed., Oxford University Press 2003) (explaining how customary rules are formed).

<sup>25</sup> Christine Gray, *The Use of Force and the International Legal Order*, in INTERNATIONAL LAW 589, 590 (Malcolm Evans ed., Oxford University Press 2003) [hereinafter Gray, in INTERNATIONAL LAW].

<sup>26</sup> U.N. Charter pmb.

<sup>27</sup> *Id.* at art. 1, para 1.

“take . . . appropriate measures to strengthen universal peace.”<sup>28</sup>

#### A. Article 2(4)’s Prohibition on the Use of Force

Article 2(4) sets forth a principle that has been described as “the heart” of the Charter,<sup>29</sup> requiring member states to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>30</sup> Other provisions of the Charter require states that become parties to international disputes to “resolve all their disputes by peaceful means.”<sup>31</sup> However, Chapter VII of the Charter contains two exceptions to the general prohibition of the use of force.<sup>32</sup> The first exception allows for the use of force after the Security Council has “determine[d] the existence of any threat, breach of the peace, or act of aggression”<sup>33</sup> and “decide[d]” that “measures shall be taken in accordance with Article . . . 42.”<sup>34</sup> Article 42 empowers the Security Council to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”<sup>35</sup> The second and more frequently invoked exception is the reservation to states of a right of self-defense contained within Article 51.<sup>36</sup> The second exception establishes that “[n]othing in the . . . Charter . . . impair[s] the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.”<sup>37</sup> When the “Security Council has taken measures necessary to maintain international peace and

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<sup>28</sup> *Id.* at art. 1, para 2.

<sup>29</sup> THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 117 (Bruno Simma ed., 2d ed. 2002) [hereinafter Simma] (quoting Louis Henkin, *The Reports of the Death of Article 2(4) are Greatly Exaggerated*, 65 AM. J. INT’L L. 544 (1971)).

<sup>30</sup> U.N. Charter art. 2, para. 4.

<sup>31</sup> *Id.* at art. 2, para. 3; *see also id.* at art. 33, para. 1 (“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall . . . seek a solution by . . . resort to . . . peaceful means . . .”); Simma, *supra* note 29, at 584 (describing the relationship between Article 2(3) and Article 33 provisions).

<sup>32</sup> The title of Chapter VII of the Charter is “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.” U.N. Charter.

<sup>33</sup> *Id.* at art. 39.

<sup>34</sup> *Id.*; *see also id.* at art. 41 (The Council may also decide to take measures not involving the use of force.).

<sup>35</sup> *Id.* at art. 42; *see also id.* at art. 43, para. 1 (noting that the Security Council may call upon other states to contribute forces to a military action authorized pursuant to Articles 39 and 42, and those states are obliged to make such forces available).

<sup>36</sup> *Id.* at art. 51; *see also* Richard N. Gardner, *Commentary on the Law of Self-Defense*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 52 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) [hereinafter Gardner, in LAW AND FORCE]; GRAY, USE OF FORCE, *supra* note 15, at 84.

<sup>37</sup> U.N. Charter art. 51.

security,”<sup>38</sup> however, the right to self-defense terminates.<sup>39</sup> Moreover, a procedural limitation applies: any measure undertaken in self-defense must “be immediately reported to the Security Council.”<sup>40</sup>

The characterization of the Charter’s text as the starting point for analysis of the legality of the use of force is an apt one, in part because the relevant text is fairly brief and the rules it sets forth do not always provide clear answers when applied to particular facts. Throughout the Charter’s history, states that have used force have seized upon potential gaps in the Charter’s prohibition of the use of force in order to justify their actions.<sup>41</sup> For example, states have urged that particular uses of force fell outside the parameters of the prohibition because the force was not used “in the international relations between States.”<sup>42</sup> States have also argued that their particular use of force was not “against the territorial integrity or political independence” of another state,<sup>43</sup> or was not “inconsistent with the Purposes of the United Nations.”<sup>44</sup> States that have used force have sometimes claimed that these phrases give rise to implied exceptions to the prohibition of the use of force, and therefore provide legal justification for intervention in other states to achieve objectives such as the fulfillment of humanitarian need,<sup>45</sup> the attainment of self-determination,<sup>46</sup> the installation of democratic regimes,<sup>47</sup> or

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<sup>38</sup> *Id.*

<sup>39</sup> *See id.* (“Nothing . . . shall impair the inherent right of . . . self-defence if an armed attack occurs . . . until the Security Council has taken measures necessary to maintain international peace and security.”) (emphasis added); *see also* J.N. SINGH, USE OF FORCE UNDER INTERNATIONAL LAW 31 (1984) (acknowledging that “[u]nder Article 51 . . . the defending state has to stop its defence” when the Security Council has taken the specified “measures”); Gideon A. Moor, Note, *The Republic of Bosnia-Herzegovina and Article 51: Inherent Rights and Unmet Responsibilities*, 18 FORDHAM INT’L L.J. 870, 882 (1995) (same interpretation). Some scholars assert that, for practical reasons, the language italicized above is inoperative to terminate the right of self-defense if the “measures” taken by the Security Council are only “economic” or “legal” in nature. *See* Thomas M. Franck, Comment, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT’L L. 839, 841-42 (2001).

<sup>40</sup> U.N. Charter art. 51.

<sup>41</sup> *See* Jon E. Fink, *From Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security*, 19 MD. J. INT’L L. & TRADE 1, 7 (1995).

<sup>42</sup> Simma, *supra* note 29, at 121-22.

<sup>43</sup> Simma, *supra* note 29, at 123; *see also* GRAY, USE OF FORCE, *supra* note 15, at 49-50 (China claims the right to use force against Taiwan on the basis of territorial integrity).

<sup>44</sup> IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 268 (1963) (rejecting such arguments).

<sup>45</sup> James P. Terry, *Rethinking Humanitarian Intervention After Kosovo: Legal Reality and Political Pragmatism*, 2004 ARMY LAW. 36, 38 (2004) (arguing that humanitarian intervention is permissible under the Charter as one of the Charter’s purposes is protecting human rights; therefore, using force for humanitarian purposes is permissible and not inconsistent with the purposes of the U.N.).

<sup>46</sup> ANTONIO CASSESE, INTERNATIONAL LAW 322 (2001) (suggesting that the prohibition on force applies only to states in this context and not to “peoples subjected to

the preservation of socialism.<sup>48</sup>

Questions have also arisen regarding what actions constitute “force” for the purposes of Article 2(4).<sup>49</sup> Some argue that that economic or physical actions not involving military action should be treated as involving the use of force,<sup>50</sup> as should indirect support for military action by groups other than the armed forces of the supporting state.<sup>51</sup> Moreover, the Security Council’s authorization of enforcement actions pursuant to Chapter VII is accomplished by passing resolutions that may not clearly define the exact scope of the authorization,<sup>52</sup> providing states with opportunities to justify uses of force that may or may not be authorized depending on how one interprets the resolutions at issue.<sup>53</sup> Similarly, it has also been claimed that Security Council resolutions which authorized force in the past have a continuous and cumulative effect, with the result that the use of force may be resumed at concerned states’ discretion without renewed Security Council authorization.<sup>54</sup>

Notwithstanding the ambiguities and possible loopholes found in Article 2(4), its prohibition on the use of force is widely regarded as barring, as a general rule, the nonconsensual use of force by one state against another.<sup>55</sup> The preemptive measures contemplated by the NSS are not consensual in nature.<sup>56</sup> Moreover, the Bush administration has not sought to justify U.S. action under the NSS by reference to the questionable exceptions

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colonial domination or foreign occupation, as well as racial groups not represented in government, [who] are forcibly denied the right to self-determination”).

<sup>47</sup> Anthony S. Winer, *The Reagan Doctrine, the 2003 Invasion of Iraq, and the Role of a Sole Superpower*, 22 LAW & INEQ. 169, 181 (2004) (explaining the “Reagan Doctrine” as the use of military force to preserve democracy).

<sup>48</sup> *Id.* at 181 (explaining that the “Brezhnev Doctrine” was the Soviet leader’s philosophy that “the Soviet Union had the inherent authority to maintain communism in any existing communist state when that system became threatened”).

<sup>49</sup> Simma, *supra* note 29, at 117-21.

<sup>50</sup> MALCOLM N. SHAW, INTERNATIONAL LAW 687-88 (3d ed. 1991).

<sup>51</sup> See Military and Paramilitary Activities, (Nicar. v. U.S.) 1986 I.C.J. 14, paras. 191-92, 195 (June 27) (citing favorably resolutions of the United Nations General Assembly and the General Assembly of the Organization of American States suggesting that force can include actions of irregulars, and assuming that states can be responsible for force and armed attacks undertaken by irregulars); Simma, *supra* note 29, at 119.

<sup>52</sup> See Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT’L L. 124, 126 (1999).

<sup>53</sup> See Gray, in INTERNATIONAL LAW, *supra* note 25, at 610 (discussing Security Council resolutions that purportedly justified NATO’s 1998 air campaign against Yugoslavia).

<sup>54</sup> See, e.g., GRAY, USE OF FORCE, *supra* note 15, at 192-93.

<sup>55</sup> See, e.g., Simma, *supra* note 29, at 120-21; CASSESE, *supra* note 46, at 281; SHAW, *supra* note 50, at 688.

<sup>56</sup> See NSS, *supra* note 2, at 15-16 (implying that preemptive actions aim to strike at adversaries and eliminate the threat they pose).



to Article 2(4) just described; rather, the administration argues that the unquestionably valid right of self-defense is expansive enough to permit states invoking it to employ preemptive force.<sup>57</sup> Although disagreement exists as to whether non-military action can constitute force, it is widely held that non-consensual armed action by one state against the territory of another— such as that called for by the NSS— constitutes a use of force for purposes of the Charter's rules.<sup>58</sup> The point at which a state's support for proxies fighting another state will be deemed a use of force by the supporting state is not entirely clear.<sup>59</sup> There can be no doubt, however, that because the use of force called for by the U.S. strategy consists of action by the American military, the U.S. is responsible for using such force.<sup>60</sup>

#### B. The Right of Self-Defense Under Article 51

As the preceding discussion suggests, when the U.S. undertakes military action under its NSS strategy, it is likely making use of force within the meaning of Article 2(4).<sup>61</sup> In the future, no prior Security Council authorizations to use force are likely to be available to provide justification when the NSS strategy is applied. However, the argument will be advanced, as it has been in the case of the Iraq war,<sup>62</sup> that the force used by the U.S. is a legitimate exercise of the right of self-defense recognized in Article 51. The text of Article 51, like that of other Charter provisions dealing with the use of force, has given rise to important issues of interpretation. The meaning of the term

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<sup>57</sup> NSS, *supra* note 2, at 15.

<sup>58</sup> See Simma, *supra* note 29, at 117-18 (The "correct and prevailing view" is that armed force is prohibited; beyond that, arguments have been advanced that economic or political pressure may constitute force within the meaning of Article 2(4).); see also BROWNLEE, *supra* note 44, at 268.

<sup>59</sup> See Simma, *supra* note 29, at 120-21 (noting ambiguities of state responsibility for the actions of irregular forces that were addressed in *Military and Paramilitary Activities, (Nicar. v. U.S.)* 1986 I.C.J. 14 (June 27), and pointing out that "not every act of assistance" given by a state to irregulars "is to be qualified as a use of force"). It is uncontroversial, however, that actions undertaken by irregular forces should at least sometimes be treated as uses of force by states with which the irregulars are in some way connected. Simma, *supra* note 29, at 119 n.40 (characterizing this proposition as "virtually undisputed"); see also *Military and Paramilitary Activities, (Nicar. v. U.S.)* 1986 I.C.J. 14, paras. 191-92, 195 (June 27) (indicating what force states can be responsible for and when armed attacks undertaken by irregulars are considered force).

<sup>60</sup> Simma, *supra* note 29, at 119 (viewing as uncontroversial the proposition that force under Article 2(4) includes "the open incursion of regular military forces into the territory of another State"); cf. *Military and Paramilitary Activities, (Nicar. v. U.S.)* 1986 I.C.J. 14, para. 195 (June 27) (stating that an "armed attack" under Article 51 "includ[es] . . . action by regular armed forces across an international border"); Gray, *in INTERNATIONAL LAW*, *supra* note 25, at 602 (same).

<sup>61</sup> See NSS, *supra* note 2, at 15-16.

<sup>62</sup> See *supra* note 16 and accompanying text (noting that the U.S. has proffered self-defense as one justification for the Iraq invasion).

“armed attack” in Article 51, and the relationship of that term to the “use of force” prohibited by Article 2(4), have been called into question. In particular, controversy exists as to whether or not the two terms are synonymous.<sup>63</sup> The International Court of Justice (ICJ) has suggested that the terms have different meanings because some state actions properly characterized as uses of force are not of sufficient “gravity” to qualify as armed attacks.<sup>64</sup> Thus, according to the ICJ, not every “use of force” is sufficiently serious to be treated as an “armed attack” that would permit a forcible response to be justified as self-defense.<sup>65</sup> With respect to the Iraq war, however, there has been no showing that Iraq used or threatened any force at all in advance of the 2002 U.S. invasion, much less engaged in an armed attack.<sup>66</sup>

It may be argued that the September 11, 2001 attacks constituted an armed attack which ultimately gave the U.S. a right to exercise self-defense against Iraq. Prior to that date, it was not clear whether a terrorist act could be treated as an armed attack;<sup>67</sup> however, the Security Council’s response implied that the September 11 attacks gave rise to an affirmative right to use force in self-defense.<sup>68</sup> While the Security Council did not declare Afghanistan responsible for the attacks, the U.S. justified the war against Afghanistan as an act of self-defense.<sup>69</sup> Most states were receptive to the notion that Afghanistan was sufficiently responsible for supporting the September 11th attackers to permit responsibility for the attacks to be imputed to Afghanistan.<sup>70</sup> The attacks appeared to rise to the level of armed attacks within the meaning of Article 51, so U.S. claims of a right to use force in self-defense against Afghanistan were widely

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<sup>63</sup> Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 136 (1986) [hereinafter Schachter, *In Defense of International Rules*].

<sup>64</sup> *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103-04 (June 27).

<sup>65</sup> See Sean D. Murphy, *Terrorism and the Concept of ‘Armed Attack’ in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 44 (2002) [hereinafter S. Murphy].

<sup>66</sup> J. MURPHY, *supra* note 1, at 176 (noting that “[t]here is no evidence that Iraq was part of an armed attack against the United States”); see also Gray, in *INTERNATIONAL LAW*, *supra* note 25, at 605 (concluding that if Iraq were not shown to have been involved in planning or undertaking armed attacks against the U.S., then use of force by the U.S. against Iraq would be “stretching pre-emptive self-defence to an extreme”).

<sup>67</sup> See Schachter, *In Defense of International Rules*, *supra* note 63, at 139-41 (describing this as a “controversial question”).

<sup>68</sup> See Johnstone, *supra* note 15, at 828.

<sup>69</sup> See Johnstone, *supra* note 15, at 828; Jonathan I. Charney, *The Use of Force against Terrorism and International Law*, 95 AM. J. INT’L L. 835, 835-36 (2001) (noting that self-defense was asserted as the justification for the use of force by the U.S. against Afghanistan, and suggesting that the justification may have been valid, but criticizing the failure of the U.S. to provide the international community with adequate information or to obtain the approval of the Security Council before invading Afghanistan).

<sup>70</sup> See Johnstone, *supra* note 15, at 828; J. MURPHY, *supra* note 1, at 167.

perceived as unobjectionable.<sup>71</sup> While the U.S. made efforts to connect Iraq to the September 11 attacks, the U.S. government could not produce the evidence needed to impute responsibility for those acts to Iraq.<sup>72</sup> Thus, the distinction between the use of force and more substantial armed attacks is inapposite,<sup>73</sup> because Iraq did not use force at all, much less use it in a manner substantial enough to give rise to an armed attack.

Given that Iraq was apparently not responsible for any armed attacks against the U.S., one might think that the U.S. claim that its use of force against Iraq was undertaken in self-defense necessarily fails. The text of Article 51, after all, seems to indicate that the right of self-defense arises only when “an armed attack occurs.”<sup>74</sup> However, in this instance, the text obscures an interpretive dispute that hinges directly on the U.S. claim. States and scholars disagree as to the time at which the right of self-defense becomes available for exercise.<sup>75</sup> Determining the legitimacy of the U.S.’s claim of a right to use preemptive force to defend itself depends upon the extent to which self-defense may be exercised in advance of an armed attack.

### C. Permissive and Restrictive Interpretations of the Right of Self-Defense

Article 51 must be interpreted in order to determine if the right of self-defense can permit the use of preemptive force. The Vienna Convention on the Law of Treaties, which the U.S. has signed but not ratified, provides a useful guide to the interpretation of the treaty provisions such as Article 51.<sup>76</sup> The Vienna Convention requires that treaties “be interpreted in good faith in accordance with the ordinary meaning to be given to [their] terms . . . in their context and in the light of [their] object

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<sup>71</sup> See Johnstone, *supra* note 15, at 828-29; J. MURPHY, *supra* note 1, at 167.

<sup>72</sup> Mahmoud Hmoud, *The Use of Force Against Iraq: Occupation and Security Council Resolution 1483*, 36 CORNELL INT’L L.J. 435, 443 (2004); Martinez, *supra* note 16, at 190.

<sup>73</sup> See *supra* notes 63-65 and accompanying text (describing this distinction).

<sup>74</sup> U.N. Charter art. 51.

<sup>75</sup> See, e.g., GRAY, USE OF FORCE, *supra* note 15, at 86, 112 (noting division of opinion on the interpretation of the Article 51 text); Van den hole, *supra* note 22, at 80-83 (also noting division of opinion).

<sup>76</sup> United Nations Conference on the Law of Treaties art. 31, May 22, 1969, 1155 U.N.T.S. 331 [hereinafter U.N. Conference]; Charles Lipson, *Why Are Some International Agreements Informal?*, in INTERNATIONAL LAW NORMS, ACTORS, PROCESS, A PROBLEM-ORIENTED APPROACH 39 (Jeffrey L. Dunoff et al. eds., 2002) (The U.S. has indicated that the Convention is “the authoritative guide to current treaty law and practice.”). See United Nations, *Treaty Series*, available at <http://untreaty.un.org/sample/EnglishInternetBible/partI/chapterXXIII/treaty1.htm> (last visited Nov. 1, 2005) (while the U.S. has signed the treaty, it has not ratified it).

and purpose.”<sup>77</sup> The relevant “context” includes, “in addition to the text, including its preamble and annexes[,]” any agreements or instruments agreed to or accepted by “all the parties in connexion [sic] with the conclusion of the treaty.”<sup>78</sup> In addition to context, the primary guideposts to interpretation are: (1) “subsequent agreement[s]” regarding the treaty’s “interpretation” or “application;” (2) “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;” and (3) “any relevant rules of international law.”<sup>79</sup> The commentary indicates that some dispute exists as to the relative weight to be given to each of the guideposts to interpretation, but concludes that most jurists recognize “the primacy of the text as the basis for the interpretation.”<sup>80</sup>

Scholars endeavoring to interpret Article 51 to determine when the right of self-defense arises have employed methods of interpretation similar to those endorsed by the Vienna Convention, but have drawn different conclusions. The more restrictive position holds that Article 51 forecloses a state’s ability to use force in self-defense before an armed attack occurs. The more permissive position holds that an armed attack need not occur before force may be used in self-defense.<sup>81</sup> Instead, force may be used in anticipation of an attack, in a manner that has been dubbed “anticipatory self-defence.”<sup>82</sup> Force used in an anticipatory act of self-defense must still meet the necessity and proportionality requirements of customary international law, and in the context of anticipatory self-defense, the former requirement demands a showing that the threat is imminent.<sup>83</sup> The Bush administration asserted that this second, permissive viewpoint represents a centuries-old consensus as to the scope of the right.<sup>84</sup> Furthermore, the administration regards the preemptive strategy enunciated in the NSS as an allowable

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<sup>77</sup> U.N. Conference, *supra* note 76.

<sup>78</sup> U.N. Conference, *supra* note 76, at art. 31.

<sup>79</sup> U.N. Conference, *supra* note 76, at art. 31.

<sup>80</sup> Lipson, *supra* note 76, at 58 (“[S]upplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”). The preparatory work of the treaty is thus not referenced here.

<sup>81</sup> See Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 600 (summarizing the restrictive and permissive positions).

<sup>82</sup> See Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 600.

<sup>83</sup> See Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 600; Simma, *supra* note 29, at 803 (while rejecting the permissibility of anticipatory self-defense under Article 51, noting that scholars who believe that anticipatory self-defense can be lawful nevertheless require it to be a necessary and proportional response to an imminent threat).

<sup>84</sup> NSS, *supra* note 2, at 15.

application of the right of self-defense as understood pursuant to the permissive position.<sup>85</sup>

### 1. Treaty Text

Analysis of Article 51 in light of the Vienna Convention sheds light on the disagreement between the restrictive and permissive schools of thought. The text of Article 51 uses the phrase “if an armed attack occurs” to describe the situation in which the Charter’s operation will not “impair” the right of self-defense.<sup>86</sup> Those advocating the restrictive view may argue compellingly that this language indicates that an actual—rather than a potential—armed attack is needed to trigger the right to use force in self-defense.<sup>87</sup> An armed attack is an event capable of being perceived and identified as such, and like any other event, “occurs” when it “come[s] into existence” or “happen[s],” and not before.<sup>88</sup> Thus, an armed attack must actually happen before it can truly be said that “[n]othing in the . . . Charter” will “impair the inherent right of . . . self-defence.”<sup>89</sup> Accordingly, only an armed attack that is happening or has happened can satisfy Article 51’s armed attack requirement.<sup>90</sup>

Moreover, the structure of the language used in Article 51 bolsters the restrictive position. Article 51 impliedly recognizes a general rule of impairment of the right of self-defense when it states that nothing in the Charter will “impair” the right “if an armed attack occurs.”<sup>91</sup> The Article would arguably be devoid of meaning if special provisions did not have to be made in order to preserve a right of self-defense.<sup>92</sup> Thus, the Charter must generally operate to impair the right of self-defense; only in exceptional cases will it be deemed unimpaired. The occurrence of an armed attack gives rise to the only situation in which the Charter states that the right of self-defense is not impaired, however “inherent” it may be.<sup>93</sup> A familiar canon of construction holds that the mention of one thing implies the exclusion of other things; as applied to Article 51, this suggests that explicit

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<sup>85</sup> NSS, *supra* note 2, at 15.

<sup>86</sup> U.N. Charter art. 51.

<sup>87</sup> Eckert & Mofidi, *supra* note 15, at 137-38.

<sup>88</sup> WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 817 (1991).

<sup>89</sup> U.N. Charter art. 51.

<sup>90</sup> See, e.g., S. Murphy, *supra* note 65, at 44; Quincy Wright, *The Prevention of Aggression*, 50 AM. J. INT’L L. 514, 529 (1956); Simma, *supra* note 29, at 803.

<sup>91</sup> Eckert & Mofidi, *supra* note 15, at 137 (quoting U.N. Charter art. 51).

<sup>92</sup> See BROWNLEE, *supra* note 44, at 273 (making this point, and stating that “where the Charter has a specific provision relating to a particular legal category, to assert that this does not restrict the wider ambit of the customary law relating to that category or problem is to go beyond the bounds of logic. Why have treaty provisions at all?”).

<sup>93</sup> Simma, *supra* note 29, at 790.

exceptions to the general rule of impairment of the right of self-defense should be deemed exclusive.<sup>94</sup> Thus, the language should be read to mean that the Charter has rendered the right of self-defense unavailable prior to the occurrence of an armed attack.

On the other hand, advocates of a permissive interpretation contend that the text of Article 51 does not purport to grant a right of self-defense to states.<sup>95</sup> The language of Article 51 assumes that such a right already existed when the Charter was signed; indeed, the right is said to be an “inherent” aspect of the sovereignty of states.<sup>96</sup> Article 51’s recognition that states’ self-defense rights are “inherent,” which is defined as “involved in [states’] constitution[s] or essential character” and “belonging by nature” to states, suggests that the argument for a restrictive approach should be turned on its head.<sup>97</sup> The Charter’s drafters described the right of self-defense as “inherent” because they deemed it a fundamental attribute of state sovereignty.<sup>98</sup> Therefore, Article 51 should not be read as restricting the right of self-defense, but as clarifying the right’s continued existence, because the drafters would have been explicit if they wished to place limitations on a right they considered so important.<sup>99</sup>

Scholars adopting a permissive approach endeavor to interpret the phrase “an armed attack” in a manner consistent with their position.<sup>100</sup> Some view the armed attack requirement as a reference not only to actual interstate violence, but also to actions taken in preparation for the attack.<sup>101</sup> Thus, an armed

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<sup>94</sup> See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (referencing this canon); *BROWNLIE*, *supra* note 44, at 273 (applying the canon).

<sup>95</sup> See, e.g., Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 92-93 (1989); John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PACE INT’L L. REV. 283, 316 (2003).

<sup>96</sup> See U.N. Charter art. 51 (“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.”).

<sup>97</sup> See WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 622 (1991).

<sup>98</sup> U.N. Charter art. 51; see JULIUS STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION* 43-44, 44 n.13 (1958) (referring to the “continued vigour” of the concept of self-defense and assumption on the part of states that treaty provisions would not and could not eliminate this “natural right”); Sofaer, *supra* note 95, at 94.

<sup>99</sup> STONE, *supra* note 98, at 43-44; see Sofaer, *supra* note 95, at 94.

<sup>100</sup> U.N. Charter art. 51.

<sup>101</sup> See, e.g., Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT’L L. 375, 425 n.212 (2004) (quoting Sir Humphrey Waldoock); American Soc’y of Int’l Law, *Self-Defense in an Age of Terrorism*, 97 AM. SOC’Y INT’L L. PROC. 141, 148 (2003) (suggesting the permissibility of “nipping an armed attack in the bud”). To the extent that the latter position rejects the concept of preemptive self-defense, it allows a state to exercise self-defense when it is positive an imminent attack will occur. It is reactionary rather than anticipatory self-defense, and is

attack may be said to have occurred when some state of preparation is reached, even before one state actually strikes another.<sup>102</sup> The definition of “armed attack” must encompass more than the ultimate act of interstate violence; otherwise, the right would be deprived of the broad scope seemingly appropriate to a right inherent in statehood.<sup>103</sup> An alternative explanation is that Article 51 does not require an armed attack, but merely states one instance in which the customary right of self-defense is preserved.<sup>104</sup> This second understanding is difficult to square with the structure of Article 51. However, the recognized inherent and fundamental need for self-defense against imminent attack,<sup>105</sup> in addition to states’ interpretation of the provision,<sup>106</sup> may be viewed as justifications for the second reading of Article 51.

The Vienna Convention’s “General Rule of Interpretation” does not limit the scope of the “text” considered by an interpreter to the specific portion under scrutiny, but instead calls for examination of the whole “text, including its preamble and annexes,” to aid in interpretation.<sup>107</sup> The restrictive school of thought points to numerous aspects of the Charter that suggest that the avenues left open for the legitimate use of force were meant to be narrow. According to the restrictive view, the scope of the right to self-defense recognized in Article 51 is diminished by the temporal limitation in the armed attack requirement and the Article’s command that the exercise of the right by the states is “immediately reported to the Security Council.”<sup>108</sup> Moreover, the text explains that force used in self-defense must cease when the Council “take[s] measures necessary to maintain international peace and security.”<sup>109</sup> If the “inherent” quality of the right of self-defense is as important to interpreting Article 51 as the permissive position posits — supposedly relaxing or eliminating the text’s requirement of an armed attack — it seems unusual that the right of self-defense would be made contingent

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included in this part of the discussion because, although it involves reaction, using force in self-defense in instances suggested by this view still precedes the occurrence of any interstate violence.

<sup>102</sup> See Nagan & Hammer, *supra* note 101.

<sup>103</sup> See BROWNIE, *supra* note 44, at 273 (suggesting the need for a broad interpretation of inherent right); U.N. Charter art. 51 (outlining the inherent right of the states).

<sup>104</sup> See Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 600.

<sup>105</sup> Martinez, *supra* note 16, at 162-63 (making this argument and referencing numerous sources in accord).

<sup>106</sup> THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 50 (2002).

<sup>107</sup> U.N. Conference, *supra* note 76.

<sup>108</sup> U.N. Charter art. 51.

<sup>109</sup> *Id.*

upon notification, and subject to limitation by action of a body beyond the state's control.

With respect to Article 51's interaction with Article 2(4), those urging a restrictive interpretation of the temporal scope of the self-defense right can again invoke the canon that explicit exceptions are deemed exclusive. The general prohibition on the use of force yields only to a limited number of explicit exceptions, including the occurrence of an armed attack.<sup>110</sup> If an armed attack "occurs" when interstate violence actually "happen[s]" and not before, the argument that another, different right of self-defense may be relied upon before interstate violence actually occurs runs afoul of sound textual interpretation.<sup>111</sup>

The right of self-defense recognized in Article 51 is merely an exception to the general prohibition on the use of force contained in Article 2(4).<sup>112</sup> This suggests that "[t]he use of force in self-defense is limited to situations where the state is truly required to defend itself from serious attack. In such situations, the state must carry the burden of presenting evidence to support its actions, normally before these irreversible and irreparable measures are taken."<sup>113</sup> Thus, the Charter affirmatively requires U.N. members to rely on alternatives to force to resolve their disputes,<sup>114</sup> and suggests a number of peaceful means by which this obligation may be discharged.<sup>115</sup> An annex to the Charter was included to give concrete form to one vehicle for peaceful dispute resolution, the International Court of Justice, the "function [of which] is to decide in accordance with international law such disputes as are submitted to it."<sup>116</sup> Also relevant in this context is the Charter's preamble, which explains a central focus of the Charter: the common interest in keeping forcible

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<sup>110</sup> See, e.g., S. Murphy, *supra* note 65, at 44.

<sup>111</sup> See THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 941 (1995) (defining "occur").

<sup>112</sup> See Simma, *supra* note 29, at 117, 128, 789 (referring to the prohibition of the use of force found in Article 2(4) as the "general" rule and self-defense as an "exception" to that rule). Adherents of a restrictive view of the self-defense right may argue that the exceptional status of self-defense warrants a narrow construction of the right. See Gray, USE OF FORCE, *supra* note 15, at 86-87, 600 (reciting this argument).

<sup>113</sup> Charney, *supra* note 69, at 835-36 (criticizing a broad interpretation of the right of self-defense on the ground that it would conflict with "core" objectives specified in the Charter, including the 'prevent[ion of] states from using force in international relations to promote their policy agendas no matter how just,' as well as with the objectives of self-defense itself).

<sup>114</sup> U.N. Charter art. 2, para. 3.

<sup>115</sup> U.N. Charter art. 2, para. 33 ("[States] shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means.").

<sup>116</sup> See Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060.



exchanges between states to a minimum.<sup>117</sup> A restrictive interpretation of Article 51 thus suggests that so long as an “armed attack” remains a possibility rather than an actuality, the Charter’s commands to settle disputes peacefully and to avoid the use of force preclude a state from resorting to arms.<sup>118</sup>

Lastly, the Charter’s other significant exception to the prohibition of the use of force allows for its use pursuant to Security Council decisions.<sup>119</sup> Article 1(1) expresses a preference for the use of “collective measures” as a means of “maintain[ing] international peace and security.”<sup>120</sup> Article 24 reflects the same preference for collective over unilateral action in that it established that United Nations “[m]embers confer on the Security Council primary responsibility for the maintenance of international peace and security.”<sup>121</sup> This preference is further reinforced by the textually subordinate status of self-defense under Article 51, as noted above, in relation to Security Council action.<sup>122</sup> Arguably, these aspects of the text are incompatible with an interpretation of Article 51 that leaves a state free to use force against another state before the Security Council has an opportunity to consider the situation.<sup>123</sup>

Those favoring a permissive approach to interpretation of the right of self-defense are likely to view the same portions of the text differently. First, with respect to the provisions for Security Council involvement found in Article 51, they regard the notification requirement as no more than an administrative or procedural matter, imposing no limits on the substantive scope of the right enjoyed by the state acting in self-defense.<sup>124</sup> As such, the fact that a party exercising the right must give notice to the Security Council should not be read to suggest that the right ought to be narrowly construed.<sup>125</sup> The Council’s apparent ability

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<sup>117</sup> See U.N. Charter pmbl. (listing reasons why the United Nations was founded; the first reason listed is “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”).

<sup>118</sup> Eckert & Mofidi, *supra* note 15, at 137-38.

<sup>119</sup> U.N. Charter arts. 39, 42 (permitting the Security Council to authorize force “necessary to maintain or restore international peace and security” if it “determine[s] the existence of any threat to the peace, breach of the peace or act of aggression”).

<sup>120</sup> U.N. Charter art. 1, para. 1.

<sup>121</sup> U.N. Charter art. 24.

<sup>122</sup> See U.N. Charter, *supra* notes 114-15 and accompanying text.

<sup>123</sup> See Charney, *supra* note 69, at 837 (condemning unilateral uses of force in self-defense in situations where a state could instead resort to the Security Council’s enforcement procedures, on the ground that “the Council, and the United Nations as a whole, should be the primary vehicle to respond to threats and to breaches of the peace”).

<sup>124</sup> See generally Gray, in INTERNATIONAL LAW, *supra* note 25, at 90-91 (noting, however, that failure to follow the notification procedure will have a deleterious impact on a state’s claim to have acted in self-defense).

<sup>125</sup> Simma, *supra* note 29, at 804 n.152 (noting that the “reporting duty” is “rarely complied with” and has been “devoid of practical significance” because of the frequent

to terminate a properly-exercised right of self-defense is of little importance to the issue that divides the restrictive and permissive schools of thought — the time when the right may first be asserted.<sup>126</sup> By the terms of the Charter, the right of self-defense can be limited only when the Council acts, and then only when it takes “measures necessary to maintain international peace and security.”<sup>127</sup> Moreover, in practice, this limitation has little effectiveness, as states have exercised what amounts to “concurrent power” with the Council in continuing to defend themselves even after taking “measures,” and possess a wide degree of discretion in deciding when the Council’s action has superseded their right to use force in self-defense.<sup>128</sup> For these reasons, the Council’s ability to terminate the exercise of a state’s right to self-defense should not significantly detract from Article 51’s recognition of self-defense as an inherent right worthy of the liberal interpretation given to it by the permissive school. Additionally, the preference for collective over individual action to “maintain international peace and security” should not be interpreted to imply that the collectivism favored by the Charter is at odds with a broad interpretation of the right of self-defense, because the self-defense right recognized in Article 51 is itself capable of being exercised in a “collective” fashion.<sup>129</sup>

Permissive writers claim that the aforementioned canon of construction should not exclude anticipatory self-defense unless Article 51’s reference to an armed attack intends to foreclose anticipatory action.<sup>130</sup> In their view, the canon is inapplicable because the language requiring an “armed attack” applies only when “the Security Council is acting” and takes “measures

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inefficacy of the Security Council”). *But see* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para. 235 (June 27) (suggesting that the fact that a state failed to report to the Security Council is significant to analysis of the state’s claim of a right to use force in self-defense under the Charter).

<sup>126</sup> The issue of whether preemptive self-defense is permissible relates to the availability, not the termination, of the self-defense right. To the extent that it is argued that the Security Council’s ability to terminate a state’s recourse to the right is relevant to interpreting the right as it relates to preemptive force, it should be noted that the ability of the Security Council to terminate the right has had very little practical impact. *See* FRANCK, *supra* note 106, at 50 (noting that while Article 51 as drafted grants the Security Council the ability to terminate a state’s use of force in self-defense, the “coexistence of collective measures with the continued measures in self-defense has become accepted practice”).

<sup>127</sup> U.N. Charter art. 51.

<sup>128</sup> *See* FRANCK, *supra* note 106, at 49.

<sup>129</sup> U.N. Charter art. 51; Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1639 (1984) [hereinafter Schachter, *The Right of States*].

<sup>130</sup> *See* STONE, *supra* note 98, at 44 n.14. (“Any reference based on *inclusio unius exclusio alterius* is neutralized by the clear reference of what is included to the situation where the Security Council is acting.”).

necessary to maintain international peace and security.”<sup>131</sup> States’ obligation to settle disputes peacefully is inapposite, because it has already been breached by the time a state exercises its right of self-defense.<sup>132</sup> If the right to use force in self-defense extends to situations preceding the armed attack, a permissive understanding of the right suggests that at some point in a potential attacker’s preparations, the potential defender’s obligation to settle disputes peacefully must yield by reason of the potential attacker’s decision to resort to force.<sup>133</sup>

## 2. Context and Subsequent Agreements

The text of a treaty, although perceived by many scholars to be of primary importance to the task of interpretation, is not the only relevant consideration. According to the Vienna Convention, the treaty’s “context” should be considered, and certain other items should be “taken into account.”<sup>134</sup> Aside from its own text, the Charter lacks a relevant “context” as defined by the Vienna Convention.<sup>135</sup> The Vienna Convention also calls for consideration of “subsequent agreement[s] between the parties” pertaining to the treaty.<sup>136</sup> Unlike agreements and instruments entered “in connexion [sic] with the conclusion of the treaty to be interpreted,” which form part of the treaty’s “context” and must receive the backing of all other parties to the treaty, subsequent agreements may be relevant to interpretation of a treaty even if they have not been assented to by “all” the parties to the treaty under scrutiny.<sup>137</sup> Therefore, agreements postdating the Charter that are not backed by all parties to it may still be relevant to the Charter’s interpretation. As a result, a number of widely supported General Assembly resolutions may provide insight into

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<sup>131</sup> See U.N. Charter art. 51; STONE, *supra* note 98, at 44 (asserting that “where the Security Council is not acting, the broader license of self-defence and self-redress under customary international law must surely continue to exist,” and that Article 51 should not be read to eliminate states’ “license” to justify uses of force based on customary rules so long as the “Council is not acting, [and] there is no inconsistency with the purposes of the United Nations”).

<sup>132</sup> Schachter, *The Right of States*, *supra* note 129, at 1635.

<sup>133</sup> See Simma, *supra* note 29, at 108-09 (stating that, in principle, this obligation “presupposes a right to existence for the party concerned and thus a right to respect for its integrity” and adding that “[t]o the extent that the use of force is permissible, an obligation to settle a dispute peacefully cannot exist”).

<sup>134</sup> U.N. Conference, *supra* note 76.

<sup>135</sup> U.N. Conference, *supra* note 76 (To the author’s knowledge, there were no formal agreements or understandings made both at the time of and in connection with the conclusion of the Charter to which all the parties to the treaty assented that bore directly on the issue of the legitimate timing of force used in self-defense.)

<sup>136</sup> U.N. Conference, *supra* note 76, at art. 31; see Simma, *supra* note 29, at 108-09 (stating that this obligation “presupposes a right to existence for the party concerned and thus a right to respect for its integrity[,]” and adding that “[t]o the extent that the use of force is permissible, an obligation to settle a dispute peacefully cannot exist”).

<sup>137</sup> U.N. Conference, *supra* note 76.

Article 51's interpretation. Although none of these resolutions go directly to the scope of permissible self-defense, what they have to say about the use of force as a general matter may still be relevant to interpreting the scope of permissible self-defense.<sup>138</sup>

The 1965 U.N. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (Declaration on the Inadmissibility of Intervention) rejects the use of force in international relations. It declares that “[n]o State may use or encourage the use of . . . measures to coerce another State . . . to secure from it advantages of any kind,” and further enjoins States from engaging in “activities directed towards the violent overthrow of the régime of another State.”<sup>139</sup> This language may be understood to condemn acts of self-defense undertaken before, or too far in advance of, the occurrence of an armed attack. However, the Declaration on the Inadmissibility of Intervention goes on to disavow any intention that its language is meant to “affect[] in any manner the relevant provisions of the Charter.”<sup>140</sup>

The 1970 U.N. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States In Accordance with the Charter of the United Nations (Declaration on Friendly Relations) demands that states “refrain from the threat or use of force . . . as a means of solving international disputes,” and affirms that “[a] war of aggression constitutes a crime against the peace” which gives rise to criminal “responsibility.”<sup>141</sup> The Declaration on Friendly Relations provides support for the notion that the right of self-defense is limited rather than open-ended by declaring that forcible “acts of reprisal” are impermissible.<sup>142</sup> Additionally, the Declaration on Friendly Relations indicates that the obligation to settle disputes peacefully continues even after initial attempts to do so have failed.<sup>143</sup> It is hard to reconcile a process in which all parties earnestly endeavor to peacefully settle a dispute with the

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<sup>138</sup> GRAY, USE OF FORCE, *supra* note 15, at 112; Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 601.

<sup>139</sup> Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131 (XX), ¶ 1, U.N. Doc. A/2131 (Dec. 21, 1965).

<sup>140</sup> *Id.* at ¶ 8.

<sup>141</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), ¶ 1, U.N. Doc. A/2625 (Oct. 24, 1970) [hereinafter Declaration on Friendly Relations].

<sup>142</sup> *Id.*; *see, e.g.*, CASSESE, *supra* note 46, at 217 (stating that the principles the Declaration on Friendly Relations articulates are often treated as a reflection of customary international law).

<sup>143</sup> Declaration on Friendly Relations, *supra* note 141. *But see* CASSESE, *supra* note 46, at 217 (noting that states are “not duty bound to settle those disputes at any cost”).

use of force in advance — or too far in advance — of an armed attack by another disputant, the occurrence of which remains speculative before violence is brought to bear.<sup>144</sup>

An overhasty act of self-defense might well run afoul of a third Assembly resolution, the Definition of Aggression, which states, “[t]he first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression.”<sup>145</sup> The resolution’s definition of “[a]ggression” may be rebutted only pursuant to a Council determination.<sup>146</sup> No justifications for aggression are identified.<sup>147</sup> Like the Declaration on the Inadmissibility of Intervention, however, both the Declaration of Friendly Relations and the Definition of Aggression contain language indicating that they are not intended to change the Charter’s scope or meaning.<sup>148</sup>

Those favoring a restrictive interpretation of the self-defense right can argue that the aforementioned resolutions are consistent with their view. Specifically, their view is a narrow reading of the right that limits its assertion to situations in which the Charter clearly recognizes its existence—namely, when one state is then undertaking or has already undertaken an “armed attack” against the defender.<sup>149</sup> Adherents of the permissive position may counter that none of the resolutions cited explicitly purports to construe the right of self-defense.<sup>150</sup> Furthermore, those favoring a permissive interpretation may argue that no inferences about the scope of the rules found in the Charter should be drawn. They can ground this argument on traditional reservations about the ability of General Assembly resolutions to produce binding legal effects, and the caveats expressly included in the resolutions that appear to foreclose treatment of the resolutions as authoritative interpretations of

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<sup>144</sup> Martinez, *supra* note 16, at 170.

<sup>145</sup> Definition of Aggression, G.A. Res. 3314 (XXIX), art. 2, U.N. Doc. A/3314 (Dec. 14, 1974) [hereinafter Definition of Aggression] (like the Declaration on Friendly Relations, the Definition of Aggression has been cited as a reflection, at least in part, of customary international law); see *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103 (June 27).

<sup>146</sup> Definition of Aggression, *supra* note 145, at art. 2.

<sup>147</sup> Definition of Aggression, *supra* note 145, at art. 5.

<sup>148</sup> See Declaration on Friendly Relations, *supra* note 141, at ¶ 1 (“Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.”); Definition of Aggression, *supra* note 145, at art. 6 (“Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.”).

<sup>149</sup> U.N. Charter art. 51; Schachter, *In Defense of International Rules*, *supra* note 63, at 120.

<sup>150</sup> GRAY, USE OF FORCE, *supra* note 15, at 112; GRAY, *in* INTERNATIONAL LAW, *supra* note 25, at 601.

the Charter.<sup>151</sup> Those preferring a restrictive approach could respond that the limiting clauses of the resolutions are better understood, not as impediments to the use of the resolutions in construing the Charter, but as indications that the resolutions are intended to restate the Charter's meaning rather than to modify it.<sup>152</sup> Moreover, resolutions such as the Declaration on Friendly Relations, which received overwhelming support in the General Assembly, may be relevant both to interpreting Article 51 and to independently determining the legality of the use of force by contributing to the development of customary international law.<sup>153</sup>

### 3. State Practice

The Vienna Convention also calls for consideration of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."<sup>154</sup> On several occasions since the founding of the United Nations, states have used force in a manner seemingly akin to anticipatory self-defense.<sup>155</sup> The U.S. naval blockade of

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<sup>151</sup> See CASSESE, *supra* note 46, at 160-61 (characterizing General Assembly resolutions as 'soft law' capable of indicating new trends and concerns but unable to impose legally binding obligations); Simma, *supra* note 29, at 269 (acknowledging that Assembly resolutions are nonbinding and that it has been "controversial" to ascribe legal effect to them).

<sup>152</sup> The language used in the resolutions seem to express an intention that the resolutions be viewed as efforts to restate rather than to develop the law. See, e.g., Declaration on Friendly Relations, *supra* note 141, at ¶ 1 (declaring only that the resolution shall not "be construed as enlarging or diminishing in any way the scope of the provisions of the Charter"). Arguments that the Assembly included these clauses to express its intent that these resolutions should be regarded as having no legal import even though international law was the subject matter of the resolutions leads to the absurd conclusion that the Assembly acted for no reason.

<sup>153</sup> CASSESE, *supra* note 46, at 292-93 (noting that significant resolutions may "gradually generate[] the possible crystallization of general binding rules or principles"); Simma, *supra* note 29, at 268-73 (describing different theories of the extent to which General Assembly resolutions can produce legal effects, and adding that "[i]t is widely acknowledged that [Assembly] resolutions may under certain circumstances constitute evidence of existing customary law"); see also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 101, 103 (June 27) (noting that states' adoption of the Declaration on Friendly Relations was an indication of their *opinio juris* as to customary international law, and that the Definition of Aggression could be "taken to reflect customary international law").

<sup>154</sup> U.N. Conference, *supra* note 76.

<sup>155</sup> Other examples have also been cited as instances of the assertion of a right of anticipatory self-defense, but are not discussed here at length because the force used in each – whether lawful or not – is better described as responsive. See Martinez, *supra* note 16, at 140-43 (citing U.S. air strikes against Libya in 1986 after the bombing of a German nightclub frequented by Americans, U.S. missile strikes against Iraq in 1993 after its attempts to assassinate former President Bush, and U.S. missile strikes against Sudan and Afghanistan in 1998 after bombings of American embassies). To the extent that these instances were ones in which states argued for anticipatory self-defense, none can be said to have resulted in the unequivocal acceptance or rejection of the doctrine. See GRAY, *USE OF FORCE*, *supra* note 15, at 116-18.

Cuba during the Cuban missile crisis has been cited as an example of a case in which preemptive or anticipatory self-defense was used with international approval.<sup>156</sup> The blockade should properly be regarded as a use of force<sup>157</sup> and was apparently undertaken to forestall the installation and possible future use of Soviet nuclear-armed missiles in Cuba.<sup>158</sup> However, while commentators debated the applicability of the right of self-defense, the official U.S. position did not attempt to justify the blockade on that ground.<sup>159</sup> Instead, it sought to justify it as a measure taken by a regional organization, the Organization of American States, pursuant to Article 52.<sup>160</sup> The American unwillingness to rely on the right of self-defense, especially in view of the strong tendency of states to advance self-defense to legitimize their uses of force,<sup>161</sup> suggests that the U.S. believed that self-defense would have been heavily contested as a justification.<sup>162</sup> Even to the extent that self-defense was raised in discussions in the Council, it cannot be said that the Council recognized the Cuban blockade as legitimate, as opinion was sharply divided, and it is uncertain whether supporters of the U.S. position were motivated by Cold War alliance considerations or by the U.S.'s proffered justifications.<sup>163</sup> Thus, the Cuban blockade provides no real support for a permissive interpretation of the Charter.

A second oft-cited example is the Israeli air-strike against Egypt at the start of the Six-Day War in 1967. Prior to the air strike, the objective of was to destroy Egypt's Air Force. Egypt had taken a number of provocative actions in short succession that made the onset of hostilities appear imminent, including closing the Straits of Tiran to Israeli traffic.<sup>164</sup> The Israeli strike

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<sup>156</sup> See Van den hole, *supra* note 22, at 101.

<sup>157</sup> BROWNLIE, *supra* note 44, at 365-66.

<sup>158</sup> WILLIAM R. KEYLOR, *THE TWENTIETH-CENTURY WORLD: AN INTERNATIONAL HISTORY* 315 (4th ed. 2001).

<sup>159</sup> Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 554, 560 (1963) [hereinafter Wright, *The Cuban Quarantine*] (noting that the U.S.'s "main argument" was that the quarantine was justified by "Articles 6 and 8 of the Rio Treaty of 1947," implemented by a branch of the Organization of American States).

<sup>160</sup> *Id.* at 557-59 (setting out the U.S. argument). The claim that the Cuban blockade could be justified as an enforcement action by a regional organization is belied by Article 52. See U.N. Charter, art. 52, para. 1 ("[N]o enforcement action shall be taken under regional arrangements . . . without the authorization of the Security Council . . .").

<sup>161</sup> Gardner, in *LAW AND FORCE*, *supra* note 36, at 52.

<sup>162</sup> GRAY, *USE OF FORCE*, *supra* note 15, at 112.

<sup>163</sup> See Sean M. Condon, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MIL. L. REV. 115, 136 (1999) (noting the split of opinion, which reflected Cold War divisions, but erroneously suggesting that the split reflected no ideological divide).

<sup>164</sup> KEYLOR, *supra* note 158, at 341-42.

preceded any interstate violence undertaken by Egypt.<sup>165</sup> Israel sought to justify its action on grounds of self-defense, arguing that the actions taken by Egypt amounted to an armed attack.<sup>166</sup> The Council again split along ideological lines, with the Western bloc supporting the Israeli action and the Soviet bloc opposed to it.<sup>167</sup> However, unlike the example of the Cuban blockade, Israel justified its 1967 air raid on the basis of self-defense.<sup>168</sup> However, Israel's justification was one of ordinary rather than anticipatory self-defense: it argued that the closing of the Straits was not merely preparation for war, but was tantamount to an armed attack.<sup>169</sup> In any event, the U.N. institutions did not explicitly accept or reject the Israeli claim.<sup>170</sup>

A third historical example appears to have received more attention from commentators than the two previously discussed, probably because it presented facts most implicative of the debate over anticipatory self-defense. In 1981, Israel launched another air-raid, this time against an Iraqi nuclear facility under construction near Baghdad.<sup>171</sup> While the facility was not yet operable, and speculative arguments could have been made as to its potential future use as a means of producing nuclear weapons, it was clear that at the time of the strike, the unfinished and inoperative reactor posed no threat to other states.<sup>172</sup> Reliance on a right of preemptive self-defense was unavoidable: Israel aimed to justify its use of force by claiming that force was used to defend against a threat that would become imminent only in the

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<sup>165</sup> KEYLOR, *supra* note 158, at 341-42.

<sup>166</sup> Quincy Wright, *Legal Aspects of the Middle East Situation*, 33 L. & CONTEMP. PROBLEMS 5, 26-27 (1968) [hereinafter Wright, *Middle East Situation*] (noting the Israeli justification was accompanied by an admission that its air raid was preceded by any Egyptian attack); Martinez, *supra* note 16, at 138-39.

<sup>167</sup> See Condrón, *supra* note 163, at 137.

<sup>168</sup> Beth M. Polebaum, Note, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 191 (1984).

<sup>169</sup> Wright, *Middle East Situation*, *supra* note 166, at 26 (noting that Israel claimed that Egypt's closing of the Straits of Tiran was an "armed attack"); see also Condrón, *supra* note 163, at 136 (discussing the United Arab Republic's closing of the Straits of Tiran and Israel's previously issued statement that such closing "would constitute an act of war"); Martinez, *supra* note 16, at 138-39 (stating that Israel claimed the "totality of the actions of Egypt, Jordan and Syria in fact amounted to a prior armed attack." Therefore, Israel, as such, relied in part on "traditional self-defense.").

<sup>170</sup> Wright, *Middle East Situation*, *supra* note 166, at 9-11, 27 (describing U.N. discussions and resolutions that were inconclusive as to the Israel's claim to have acted in self defense, and noting in the context of a discussion of responsibility for aggression that substantial arguments existed to support viewing either side as having acted aggressively rather than defensively); Shabtai Rosenne, *Directions for a Middle East Settlement—Some Underlying Legal Problems*, 33 L. & CONTEMP. PROBS. 44, 55 (1968) (noting that efforts in the U.N. bodies to "attribute responsibility for the breakdown of peace to one side or another" had been unsuccessful).

<sup>171</sup> Martinez, *supra* note 16, at 139.

<sup>172</sup> Martinez, *supra* note 16, at 139; SINGH, *supra* note 39, at 46.



future.<sup>173</sup> The action was met with widespread disapproval, but for different reasons. Some states took a position consistent with the restrictive view and argued that no action of the kind taken could ever be consistent with the Charter.<sup>174</sup> Specifically, Article 51 had limited the scope of the right, making it exercisable only “if an armed attack occurs.”<sup>175</sup> Conversely, other states based their objection to the Israeli action on customary law grounds, arguing that the Israeli strike did not comport with the requirements of necessity and proportionality.<sup>176</sup> The U.S. condemned Israel only for its failure to exhaust peaceful means of resolving the dispute.<sup>177</sup> The U.N. political organs thus condemned the attack without reaching a consensus as to the scope of the right of self-defense.<sup>178</sup>

The historical practice of U.N. members in dealing with claims of anticipatory self-defense suggests that states are not in agreement as to the propriety under Article 51 of actions taken in self-defense prior to the onset of an armed attack. While some states agree that the right of self-defense includes the right of states to deploy force before military force is deployed against them, this is not the majority viewpoint.<sup>179</sup> States rely infrequently on anticipatory self-defense to justify the use of force; instead, they attempt when possible to characterize their actions as supported by the less controversial right of states to use force defensively in response to an armed attack that has occurred or is occurring.<sup>180</sup>

#### 4. Relevant Rules of International Law: Customary Principles of Necessity and Proportionality

Customary international law has an important role to play in an analysis of the legality of the use of force in self-defense. First, according to the interpretive framework set forth in the Vienna Convention, “relevant rules of international law applicable in the relations between the parties” to the Charter must be considered as an aspect of the Charter’s “context” to arrive at a proper understanding of the scope of the right of self-defense recognized therein.<sup>181</sup> General rules of customary

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<sup>173</sup> See Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 601.

<sup>174</sup> Martinez, *supra* note 16, at 133-34.

<sup>175</sup> U.N. Charter art. 51.

<sup>176</sup> See Martinez, *supra* note 16, at 139-40.

<sup>177</sup> See Martinez, *supra* note 16, at 139-40 (stating that the U.N. Security Council and the United States condemned Israel’s actions and the U.S. specifically admonished Israel for its failure to exhaust peaceful means of dispute resolution).

<sup>178</sup> Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 601.

<sup>179</sup> GRAY, USE OF FORCE, *supra* note 15, at 111-12, 115.

<sup>180</sup> *Id.* at 115; see also S. Murphy, *supra* note 65, at 44.

<sup>181</sup> U.N. Conference, *supra* note 76.

international law are as valid and applicable in relations between the parties to the Charter as are the provisions of the Charter itself.<sup>182</sup> The obligations imposed by customary rules exist independently of any treaty provision.<sup>183</sup>

The customary rules factor significantly in the analysis of the availability, timing, and permissible scope of the use of force in self-defense. Many writers cite the early formulation of these rules found in a diplomatic note from U.S. Secretary of State Daniel Webster to the British ambassador in 1842.<sup>184</sup> The note concerned the sinking of an American ship, the *Caroline*, by the British, which was done in order to prevent the ship from being used to support rebels opposed to the British colonial government.<sup>185</sup> The U.S. demanded that the British justify their action by showing that the “necessity of that self-defense [wa]s instant and overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>186</sup> The American note also demanded a showing that the force used involved nothing “unreasonable or excessive.”<sup>187</sup> Although this note long predated the Charter, and was thus the product of a time when resorting to force was not unlawful in the sense of the prohibition in Article 2(4),<sup>188</sup> it contains a useful elaboration of the customary constraints on self-defense.<sup>189</sup> As the letter indicates, use of force in lawful self-defense must always be both necessary and proportionate.<sup>190</sup>

The concept of necessity limits the use of force to situations in which forcible “measures . . . are . . . necessary to respond to” the armed attack<sup>191</sup> or to otherwise repel aggression.<sup>192</sup> Peaceful

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<sup>182</sup> See Statute of the International Court of Justice, *supra* note 118, at art. 38(1)(a)-(d) (identifying sources of international law). The United States has argued in the past that the doctrines of necessity and proportionality have been “supervene[d] and subsume[d]” by the prohibition on force in the Charter, and the International Court has rejected this argument. See *Military and Paramilitary Activities, (Nicar. v. U.S.)* 1986 I.C.J. 14, at 93 (June 27) (“Principles such as those of the non-use of force . . . continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated . . . .”) (citation and internal quotations omitted).

<sup>183</sup> See Thirlway, *supra* note 24, at 124-25.

<sup>184</sup> Schachter, *The Right of States*, *supra* note 129, at 1634.

<sup>185</sup> Schachter, *The Right of States*, *supra* note 129, at 1634-35; Eckert & Mofidi, *supra* note 15, at 129.

<sup>186</sup> Eckert & Mofidi, *supra* note 15, at 130 (quoting BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 1222 (1991)).

<sup>187</sup> Eckert & Mofidi, *supra* note 15, at 130 (quoting BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 1222 (1991)).

<sup>188</sup> SHAW, *supra* note 50, at 682-85 (providing a brief summary of law governing the use of force in international relations).

<sup>189</sup> Eckert & Mofidi, *supra* note 15, at 129-30.

<sup>190</sup> *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103 (June 27).

<sup>191</sup> See *id.* (explaining that Article 51 does not itself require acts taken in self-defense to be “proportional” and “necessary;” Article 51 does not purport to supersede these

alternatives must not have been readily available to the state invoking self-defense.<sup>193</sup> The law recognizes that the use of force in self-defense may be necessary for a variety of reasons, such as “to hold the aggressor in check and prevent him from continuing the aggression,” “to recover territory” recently lost to the attacker, or to “repel an attack.”<sup>194</sup> The aim of force used in self-defense cannot be “retaliatory or punitive.”<sup>195</sup> When states rely upon anticipatory self-defense, scholars who accept that doctrine as a valid justification for the use of force generally accept that the requirement of necessity demands a showing that the threat was imminent.<sup>196</sup>

The proportionality requirement, on the other hand, limits the amount and scope of the force that may be used to fulfill the need to defend.<sup>197</sup> The concept that forcible “measures . . . [must be] proportional to the armed attack”<sup>198</sup> does not demand that the defending state limit the size or sophistication of its forces;<sup>199</sup> nor does it categorically compel a state fighting off an invasion to stop its use of force as soon as the invaders are pushed back beyond the border.<sup>200</sup> However, the force used in self-defense must be “proportional to the offense in its extent, manner, and goal.”<sup>201</sup> The proportionality requirement’s prohibition of “unreasonable or excessive” conduct is, in a sense, similar to the necessity requirement’s prohibition of “forbidden” conduct because in both instances, the conduct that is not permitted will vary with the circumstances.<sup>202</sup> Sufficient force may be used to respond to armed attacks to ensure decisive results, even if to achieve them would require modest increases in the force used or spatial expansions of the conflict.<sup>203</sup> In general, to be

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requirements of customary international law).

<sup>192</sup> Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 600; *see also* CASSESE, *supra* note 46, at 305 (arguing that the use of self-defense must be limited to “rejecting the armed attack”).

<sup>193</sup> Schachter, *The Right of States*, *supra* note 129, at 1635 (agreeing with this proposition but recognizing its limits).

<sup>194</sup> CASSESE, *supra* note 46, at 305; Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 600.

<sup>195</sup> *See* Declaration on Friendly Relations, *supra* note 141 (“States have a duty to refrain from acts of reprisal involving the use of force.”).

<sup>196</sup> *See, e.g.*, SINGH, *supra* note 39, at 16 (accepting anticipatory self-defense doctrine, but acknowledging that the state invoking it must be able to show that the threat against it was imminent or that there was a “strong probability of armed attack”); *see also* Condron, *supra* note 163, at 130-31.

<sup>197</sup> Schachter, *The Right of States*, *supra* note 129, at 1637.

<sup>198</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (June 27).

<sup>199</sup> *See, e.g.*, Van den hole, *supra* note 22, at 103-04.

<sup>200</sup> Schachter, *The Right of States*, *supra* note 129, at 1637-38.

<sup>201</sup> Schachter, *In Defense of International Rules*, *supra* note 63, at 120.

<sup>202</sup> GRAY, USE OF FORCE, *supra* note 15, at 107.

<sup>203</sup> *See, e.g.*, Schachter, *The Right of States*, *supra* note 129, at 1637-38; Van den hole, *supra* note 22, at 103-04.

proportional to the attack, “the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.”<sup>204</sup>

Those favoring a restrictive approach to anticipatory self-defense may argue that these customary doctrines, although understood by some writers to permit anticipatory self-defense, cannot properly be applied when anticipatory force is used.<sup>205</sup> Determinations of necessity and proportionality, after all, “are dependent on the facts of the particular case.”<sup>206</sup> The facts of a case cannot be meaningfully analyzed before they actually exist; analysis before that time is merely speculation. Thus, one who engages in anticipatory self-defense may thwart the application of these rules because the need for force and the necessary amount cannot be ascertained.<sup>207</sup> Before the commencement of an armed attack, the use of force in self-defense can only be based on a guess as to the hostile intentions of the potential attacker. If the guess is incorrect and the attack never would have occurred or could have been peacefully prevented, then there was no need for the use of defensive force in any proportion.<sup>208</sup> Indeed, according to some supporters of the restrictive position, force used in anticipatory self-defense cannot comply with the rules imposed by customary doctrines.<sup>209</sup>

Supporters of the permissive view contend that many writers consider the customary rules to permit the use of anticipatory self-defense.<sup>210</sup> They seek to dispel fears about the potential for anticipatory self-defense to encourage reckless uses of force by reading the requirement of necessity as incorporating a requirement of imminence.<sup>211</sup> The requirement of imminence is theoretically measurable even in the absence of an armed attack; from an objective standpoint, the legality of the anticipatory action can be assessed by considering the relevant facts at the time defensive force was used.<sup>212</sup> The burden of being subject to the use of force initially falls upon the potential attacker, but in

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<sup>204</sup> See John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 740 (2004) (footnote omitted).

<sup>205</sup> See BROWNLIE, *supra* note 44, at 257 (noting that many writers believe that customary law permits anticipatory self-defense as a general matter, although apparently disagreeing on the ground that anticipatory self-defense in fact subverts the application of these rules).

<sup>206</sup> GRAY, *USE OF FORCE*, *supra* note 15, at 107.

<sup>207</sup> See BROWNLIE, *supra* note 44, at 259.

<sup>208</sup> See MARY ELLEN O'CONNELL, THE AMERICAN SOCIETY OF INTERNATIONAL LAW TASK FORCE ON TERRORISM, *The Myth of Preemptive Self-Defense* 19 (2002), <http://www.asil.org/taskforce/oconnell.pdf>.

<sup>209</sup> See, e.g., BROWNLIE, *supra* note 44, at 259, 261-62 (arguing that anticipatory force cannot be used consistently with the proportionality requirement).

<sup>210</sup> See, e.g., Van den hole, *supra* note 22, at 97.

<sup>211</sup> See, e.g., SINGH, *supra* note 39, at 16.

<sup>212</sup> Martinez, *supra* note 16, at 166, 191.

light of the rule permitting those subject to attack to take defensive measures, this allocation of risk might be entirely appropriate.<sup>213</sup>

### 5. Object and Purpose of the Treaty

Under the interpretive approach of the Vienna Convention, a treaty should be considered “in the light of its object of purpose.”<sup>214</sup> The purpose to be examined is not merely the purpose of the individual rule under consideration, but that of the treaty as a whole.<sup>215</sup> Here, both sides of the debate over the permissibility of anticipatory self-defense can marshal compelling arguments. Those favoring a restrictive approach are aided by the Charter’s manifest focus on keeping interstate violence to a minimum.<sup>216</sup> An interpretation of the right of self-defense that unnecessarily increases the likelihood that force will be used, such as the interpretation articulated by the permissive school, is inconsistent with this overriding goal.<sup>217</sup> Their interpretation allows the self-defense exception to override the prohibition on using force.<sup>218</sup> The permissive interpretation gives rise to circumstances in which creative argument might justify any use of force by connecting its use to speculation about some future threat that might reasonably—whether rightly or wrongly—be perceived as imminent.<sup>219</sup> In an era where deadly weapons are capable of widespread and serious harm, the dangers of resorting to force are compounded.<sup>220</sup>

Similarly, the Charter is designed to ensure the operation of mechanisms guided toward the peaceful settlement of international disputes.<sup>221</sup> Achievement of this purpose may be thwarted if the right of self-defense is construed too broadly. If states can anticipate potential attacks and respond with force before they occur, the underlying disputes that engendered hostility between the states may give rise to interstate violence before mechanisms that promote peaceful settlements of

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<sup>213</sup> Sofaer, *supra* note 95, at 97-98.

<sup>214</sup> U.N. Conference, *supra* note 76, at art. 31, para. 1.

<sup>215</sup> U.N. Conference, *supra* note 76, at art. 31, para. 1 (stating that “[a] treaty shall be interpreted . . . in the light of its object and purpose”) (emphasis added).

<sup>216</sup> See Charney, *supra* note 69, at 836 (calling this focus “the primary goal of the United Nations Charter”).

<sup>217</sup> See, e.g., BROWNLIE, *supra* note 44, at 259 (noting situations in which the use of anticipatory self-defense may be open to objections).

<sup>218</sup> See O’CONNELL, *supra* note 208, at 5, 16.

<sup>219</sup> O’CONNELL, *supra* note 208, at 16; see also Jorge Alberto Ramirez, *Iraq War: Anticipatory Self-Defense or Unlawful Unilateralism?* 34 CAL. W. INT’L L.J. 1, 23-24 (2003) (discussing the dangers of broadening the use of anticipatory self-defense).

<sup>220</sup> See Schachter, *The Right of States*, *supra* note 129, at 1634.

<sup>221</sup> U.N. Charter art. 2, para. 3; Simma, *supra* note 29, at 105-07.

international disputes have a chance to work.<sup>222</sup> The time available for peaceful dispute resolution to function is reduced, possibly by a significant amount, depending upon the accuracy of the estimation as to the imminence of the attack by the state exercising its right of self-defense.

Additionally, the Charter's language was meant to be functional in nature and capable of practical application.<sup>223</sup> The restrictionist school of thought believes that Article 51 imposes such a rule in the context of self-defense: the use of force is justified if an armed attack occurs, and is not if an armed attack has yet to occur.<sup>224</sup> Those advancing a permissive interpretation of the right of self-defense favor a considerably less certain analysis based only upon the customary standard rather than the objectively determinable criteria of the occurrence of an armed attack.<sup>225</sup> The rule as permissively interpreted is more difficult to apply, and the risk of error is increased.<sup>226</sup> The benefits of a clear rule are lost. Requiring an armed attack before using force in self-defense clearly informs states of the activity they must avoid in order to prevent force being used against them. The permissive approach also leaves states less certain as to what preventive measures they can take to avoid the permissible use of force against them.

Those favoring the permissive approach can agree that the Charter was meant to produce a soundly-functioning international system, but need not accept the restrictive approach's viewpoint of what such a system entails. Under this view, the Charter established a framework within which international peace and security can be maintained with the states themselves as primary beneficiaries. States, and their sovereignty and integrity, were to be preserved by the U.N. rather than subsumed into a world government.<sup>227</sup> Diminution of the scope of the "inherent" right of self-defense would amount to an unwarranted intrusion into a fundamental aspect of

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<sup>222</sup> See CASSESE, *supra* note 46, at 217 (noting scope of obligation to peacefully settle disputes).

<sup>223</sup> See FRANCK, *supra* note 106, at 6-7.

<sup>224</sup> See O'CONNELL, *supra* note 208, at 19 ("An attack must be underway or must have already occurred in order to trigger the right of unilateral self-defense.").

<sup>225</sup> Eckert & Mofidi, *supra* note 15, at 149; see also CASSESE, *supra* note 46, at 309 (discussing historical examples of customary standards).

<sup>226</sup> CASSESE, *supra* note 46, at 309; BROWNLIE, *supra* note 44, at 259; O'CONNELL, *supra* note 208, at 19.

<sup>227</sup> See U.N. Charter art. 2 (distinguishing between "[t]he Organization and its Members," acknowledging by implication that its Members are "sovereign," and clarifying that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state").

sovereignty.<sup>228</sup> Self-defense is too fundamental to this sovereignty to have artificial time limits placed upon it by the Charter or customary law.

In addition, the Council has been only modestly successful in performing its primary function of achieving sustained peace.<sup>229</sup> The Charter was intended to be a holistic scheme for ensuring international peace, safeguarding states from aggression and preserving the right of self-defense as a supplement to the collective mechanism embodied in the Council.<sup>230</sup> The Council's limited success thus far suggests that the purpose of maintaining international peace and security may not be fulfilled unless force in self-defense may be exercised in more than the narrowest of circumstances.<sup>231</sup>

Furthermore, as a practical matter, the permissive school can argue that the Charter should not be interpreted as a suicide pact that illegalizes defensive actions necessary for a state to preserve itself.<sup>232</sup> Since the Charter was signed in June 1945, the weapons available to states have become even more destructive. Such weapons may enable an attacker to strike a decisive blow against its victim in one stroke. By the time an attack is underway, it may simply be too late to take measures in self-defense.<sup>233</sup> If the law guarantees that the attacker may strike first, it has effectively rewarded that state's violence with military advantage.<sup>234</sup> The purpose of the Charter was certainly not to encourage violence or to deprive states of the ability to take reasonable steps to defend themselves. The restrictive view impedes resort to the right of self-defense, potentially making resort to violence acceptable and advantageous to states in a position to take advantage of others that scrupulously follow the law.<sup>235</sup>

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<sup>228</sup> U.N. Charter art. 51.

<sup>229</sup> See, e.g., Patrick McLain, *Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force against Iraq*, 13 DUKE J. COMP. & INT'L L. 233, 258 (2003); see also Gray, in INTERNATIONAL LAW, *supra* note 25, at 590 (indicating that Chapter VII enforcement by the Security Council did not proceed as originally planned).

<sup>230</sup> See FRANCK, *supra* note 106, at 3.

<sup>231</sup> See McLain, *supra* note 229, at 258-59 (suggesting this notion, but ultimately rejecting the argument that current law allows for unilateral action based on the Security Council's ineffectiveness).

<sup>232</sup> See Martinez, *supra* note 16, at 162-63.

<sup>233</sup> See Martinez, *supra* note 16, at 162-63.

<sup>234</sup> See BROWNLIE, *supra* note 44, at 276 (suggesting but disagreeing with this argument).

<sup>235</sup> See FRANCK, *supra* note 106, at 178 (noting that "[l]aw . . . does not thrive . . . when it grossly offends most persons' common moral sense of what is right").

### III. EVALUATION OF THE ASSERTED RIGHT TO USE PREEMPTIVE FORCE IN SELF-DEFENSE

The divide between the interpretive approaches to the right of self-defense runs deep, and the state of the law with respect to the availability of anticipatory self-defense is likely to remain unclear. However, fairly widespread agreement exists as to the substance of the customary rules limiting the exercise of self-defense.<sup>236</sup> Even those who assert the validity of anticipatory self-defense generally agree that customary rules limit its exercise.<sup>237</sup> Regardless of one's position on the interpretation of Article 51, using force in self-defense in contravention of this minimal customary standard will assuredly violate international law.

The preemptive use of force in self-defense, which was enunciated as the U.S. strategy in the NSS and was suggested as a possible justification for the Iraq war, must be evaluated in light of these standards. Initially, the NSS's suggestion that agreement on the permissibility of anticipatory self-defense has existed "[f]or centuries" must be a reference to the period before recourse to force was prohibited as a general matter by the Charter, subject to a carefully-worded recognition of the right to self-defense.<sup>238</sup> Since the Charter's adoption, two schools of thought on anticipatory self-defense have existed. The restrictive position, far from viewing such action as capable of being taken "lawfully" or with "legitimacy," categorically bars using force in self-defense before an armed attack occurs.<sup>239</sup> The NSS's preemptive strategy does not comport with this position because the U.S. plans to use defensive force long before potential attackers are prepared to act.<sup>240</sup>

Moreover, even if the NSS is considered in light of the permissive approach to the right of self-defense, the preemptive strategy does not pass muster. First, even a permissive interpretation of Article 51 cannot completely do away with the

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<sup>236</sup> GRAY, *USE OF FORCE*, *supra* note 15, at 105 ("As part of the basic core of self-defence all states agree that self-defence must be necessary and proportionate.")

<sup>237</sup> See, e.g., Louis Rene Beres, *Preserving the Third Temple: Israel's Right of Anticipatory Self-Defense Under International Law*, 26 VAND. J. TRANSNAT'L L. 111, 147-48 (1993); see also SINGH, *supra* note 39, at 16 (discussing limits on the use of anticipatory self-defense).

<sup>238</sup> See NSS, *supra* note 2, at 15 (explaining the evolving concept of "imminent threat" since the Cold War); Simma, *supra* note 29, at 114-15 (discussing that before the twentieth century, the use of force was not prohibited under international law); BROWNLEE, *supra* note 44, at 40-41 (presumably, the NSS refers to these old justifications).

<sup>239</sup> See, e.g., American Soc'y of Int'l Law, *Self-Defense in an age of Terrorism*, *supra* note 101, at 147-48.

<sup>240</sup> See NSS, *supra* note 2, at 15.



requirement of an armed attack.<sup>241</sup> To the extent that preemptive self-defense is asserted to justify the use of force against speculative threats that bear no relation to any armed attack, the Charter will bar the claim.<sup>242</sup> Second, customary rules are likely to foreclose the permissibility of preemptive self-defense if circumstances arise in which Article 51 does not. Unjustifiable preemptive self-defense differs from potentially permissible anticipatory self-defense in that it allows states to unleash force against one another with much greater ease.<sup>243</sup> Anticipatory self-defense, as advocated by most adherents to the permissive interpretation of self-defense, is impermissible if a state cannot demonstrate that a threat actually exists and is imminent.<sup>244</sup> In contrast, preemptive self-defense, such as that called for by the NSS, permits the use of force by states that merely feel threatened, without requiring a showing of objectively verifiable indications that the asserted threat warrants the use of force in reply.<sup>245</sup> Proportionality becomes virtually impossible to measure as to preemptive force, because no attack has occurred, is occurring, or is planned as to which the use of force must be proportionate.<sup>246</sup> A legal regime that would permit the preemptive use of force in self-defense would be far too careless in its handling of the use of interstate force, a fearsome villain who the parties to the Charter knew from personal experience<sup>247</sup> had to be kept in shackles of law.<sup>248</sup>

Second, those advocating a permissive approach agree with their restrictive-minded counterparts that the use of force in self-defense must be restrained by the customary law concepts of

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<sup>241</sup> See U.N. Charter, art. 2, para. 4 (suggesting that although member states must refrain from threatening or using force where inconsistent with the Charter, they may threaten or use force when it is *not* inconsistent with the purposes of the United Nations).

<sup>242</sup> See, e.g., O'CONNELL, *supra* note 208, at 6 (“[W]here a state is threatened by force not amounting to an armed attack, it must resort to measures less than armed self-defense . . .”).

<sup>243</sup> See CASSESE, *supra* note 46, at 310 (suggesting that “risks of abuse” might arise in a legal regime that permitted pre-emptive strikes) (emphasis omitted).

<sup>244</sup> E.g., SINGH, *supra* note 39, at 16; Simma, *supra* note 29, at 803 (noting that many advocates of anticipatory self-defense view it as incorporating a requirement of imminence).

<sup>245</sup> O'CONNELL, *supra* note 208, at 21 (identifying concerns with the subjective nature of the determination of when a sufficient threat has arisen, and characterizing the U.S. justification for preemptive war as based on “speculative concerns about [a] state’s possible future actions”); CASSESE, *supra* note 46, at 310 (“[P]re-emptive strikes . . . may be[] based on subjective and arbitrary appraisals by individual States.”).

<sup>246</sup> O'CONNELL, *supra* note 208, at 19.

<sup>247</sup> See U.N. Charter pmb. (prominently evincing the widely shared desire “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”).

<sup>248</sup> See U.N. Charter art. 2, paras. 3-4; see also SHAW, *supra* note 50, at 681 (remarking that “the law must seek to provide mechanisms to restrain and punish the resort to violence”).

necessity and proportionality.<sup>249</sup> However, one cannot assess the facts and circumstances that give rise to the necessity of the use of force, and confine its proportions, before the attack actually occurs.<sup>250</sup> For adherents of the restrictive view, this is one reason why an armed attack must actually have occurred before force is used in self-defense. For adherents of the permissive view, the requirement that the armed attack be imminent assuages concerns about the availability of facts sufficient to draw conclusions about whether a given use of force is justified.

The NSS, however, does not require a showing of an imminent threat before authorizing preemptive uses of force. The administration explains that, “as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed.”<sup>251</sup> Indeed, the U.S. strategy expressly seeks to “adapt the concept of imminent threat,” apparently allowing for force to be used “preemptively,” “even if uncertainty remains as to the time and place of the enemy’s attack,” and even before “dangers gather.”<sup>252</sup> U.S. action against Iraq demonstrates that the NSS’s notion of imminence does not require an immediate or tremendous threat by a potential attacker.<sup>253</sup> Indeed, if the Iraq situation is any guide, a threat may be sufficient to trigger NSS authorization to use force in purported self-defense if it is little more than plausible or even a hypothetical threat.

If the rules regulating the use of force are relaxed to reflect U.S. policy, conflicts may arise that could be prevented if the rules governing self-defense continue to require a truly imminent threat.<sup>254</sup> The U.S. position may also produce interstate violence by creating an increased incidence of improper uses of force by states that feel less reluctant to use force purportedly in self-defense than in the past.<sup>255</sup> Moreover, a standard that relies on a considerably less imminent threat is more likely to give rise to mistakes by the defenders as to whether they faced a threat at

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<sup>249</sup> See Van den hole, *supra* note 22, at 97 (one of many articles asserting the permissibility of anticipatory self-defense while agreeing that the customary rules apply to its exercise); see also GRAY, USE OF FORCE, *supra* note 15, at 105 (discussing the agreement of states as to the necessity and proportionality requirements of self-defense).

<sup>250</sup> See BROWNIE, *supra* note 44, at 259.

<sup>251</sup> NSS, *supra* note 2, at Introduction.

<sup>252</sup> NSS, *supra* note 2, at 15.

<sup>253</sup> See Eckert & Mofidi, *supra* note 15, at 126 (noting the wide discrepancies between the U.S. assertions of the existence of a threat stemming from weapons of mass destruction that were used to justify the action against Iraq, and Iraq’s apparent lack of such weapons).

<sup>254</sup> Ramirez, *supra* note 219, at 23-24; BROWNIE, *supra* note 44, at 259.

<sup>255</sup> BROWNIE, *supra* note 44, at 259.

all.<sup>256</sup> As the evidentiary problems with the case for self-defense in Iraq demonstrate, the U.S. government will experience mistakes with its current understanding of the self-defense rule.<sup>257</sup> The abandonment of the requirement of an imminent threat leaves no principled means by which the law can distinguish force used in self-defense from aggression.<sup>258</sup> The Bush administration's understanding of the constraints of customary law on self-defense is at variance with that law in its present form.

Thus, the U.S. position in the NSS may be best described as an argument for a change in the law. Some writers have argued, on the assumption that the use of force in self-defense can be permitted before an armed attack occurs, that the war in Iraq is state practice that provides evidence of a change in the customary law loosening the constraints of necessity and proportionality.<sup>259</sup> Some scholars have gone further, arguing that the prohibition on the use of force has come to lack vitality, and that the use of force for purposes such as preemptive self-defense is no longer forbidden.<sup>260</sup> These arguments are misplaced. The creation of a new customary rule traditionally requires "an established, widespread, and consistent practice"<sup>261</sup> combined with "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."<sup>262</sup> The practice of justifying the use of force on grounds of preemptive or anticipatory self-defense is not consistent or widespread.<sup>263</sup> Furthermore, the psychological element of *opinio juris* is not present: the U.S. has conceded that "[it] must adapt the concept of imminent threat" as currently understood,<sup>264</sup> and many other states apparently view the U.S. justification of self-defense for the preemptive use of force in Iraq as inappropriate.<sup>265</sup> This refusal to treat divergent state practice as an emerging customary rule suggests the continued vitality of existing

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<sup>256</sup> The U.S. requires less information about the purported attacker's disposition to justify the use of force as compared to the current permissive view of anticipatory self-defense. See *NSS*, *supra* note 2, at Introduction, 15.

<sup>257</sup> Eckert & Mofidi, *supra* note 15, at 127-28.

<sup>258</sup> See, e.g., American Soc'y of Int'l Law, *supra* note 101, at 151-52.

<sup>259</sup> See, e.g., Cohan, *supra* note 95, at 292, 356.

<sup>260</sup> Martinez, *supra* note 16, at 164. *Contra* Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 INT'L & COMP. L.Q. 401, 410-11 (2002).

<sup>261</sup> Thirlway, *supra* note 24, at 125.

<sup>262</sup> Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 90 (July 25).

<sup>263</sup> GRAY, USE OF FORCE, *supra* note 15, at 112.

<sup>264</sup> *NSS*, *supra* note 2, at 15.

<sup>265</sup> David P. Fidler, *International Law and Weapons of Mass Destruction: End of the Arms Control?*, 14 DUKE J. COMP. & INT'L L. 39, 72-73 (2004); Eckert & Mofidi, *supra* note 15, at 127.

rules.<sup>266</sup> Finally, from a policy standpoint, it cannot be denied that the elimination or substantial weakening of the rules restricting the use of force would have a deleterious effect on international order, potentially unleashing anarchy as states other than the U.S. come to view the use of force as a permissible means of resolving their disputes.<sup>267</sup>

Perhaps to avoid the negative impact of other states' assertions of a right to use preemptive force, the NSS appears to have taken an extreme approach. The NSS can be read to argue that different rules should apply to constrain the use of force by the U.S., and that these rules should be relatively permissive.<sup>268</sup> This approach, however, is difficult to square with the U.N.'s fundamental "principle of the sovereign equality of all its Members."<sup>269</sup> While states are not equal in other respects, each should be treated as a formal equal of the others for purposes of applying the rules of international law.<sup>270</sup> Exceptional approaches subvert this important principle. They place international law in the unsatisfying position of serving as an ongoing and evolving apologia for the actions of powerful states.<sup>271</sup> They are also inconsistent with basic notions of

<sup>266</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J 14, 98 (June 27).

<sup>267</sup> See Martinez, *supra* note 16, at 164-65 (discussing these concerns in the context of the debate over the permissibility of anticipatory self-defense); see also Eckert & Mofidi, *supra* note 15, at 150 (warning of the danger of leaving states with "a loose, unsubstantiated notion of 'preemptive self-defense'"); O'CONNELL, *supra* note 208, at 19 (discussing possible effects of America's precedent).

<sup>268</sup> See NSS, *supra* note 2, at 15 (the NSS briefly refers to international law, but then asserts that "[w]e must adapt" it. The document then indicates that "[t]he United States has long maintained the option of preemptive actions." Implicit in these remarks is the suggestion that the U.S. can unilaterally change international law, and that it possesses rights under that law that may differ from those of other states); see also Michael Byers & Simon Chesterman, *Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 177, 195 (J. L. Holzgrefe & Robert O. Keohane eds., 2003) (suggesting that the creation of exceptional rights characterizes the current administration's approach to international relations generally); Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 843-48 (2001) (suggesting the applicability of special international rules to hegemons).

<sup>269</sup> U.N. Charter art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

<sup>270</sup> U.N. Charter, art. 2, para 1; see CASSESE, *supra* note 46, at 88, 90; Simma, *supra* note 29, at 85; see also Declaration on Friendly Relations, *supra* note 141 (explaining that "[a]ll states . . . have equal rights and duties and are equal members of the international community").

<sup>271</sup> See Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717, 724 (1995) (summarizing the argument that international law can be aimed either at meaningfully constraining state behavior or as merely justifying it at every turn); see also THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 402 (Rex Warner trans., Penguin Books 1972) (1954) ("[W]hen these matters are discussed by practical people, the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept.").

fairness in an international system that has long been governed by rules that are the product of states' mutual consent.<sup>272</sup>

#### IV. CONCLUSION

The strategy of preemptive self-defense articulated by the U.S. in the NSS, and apparently applied against Iraq, is at odds with current norms governing the use of force in self-defense. In order for the preemptive use of force to be lawful notwithstanding the Charter's prohibition of the use of force, U.S. strategy would have to comport with the Charter and customary law relevant to the right of self-defense. Application of either of the prevailing interpretations of the right of self-defense leads to the conclusion that the U.S. strategy does not comply with international law. The U.S. strategy calls for resorting to force at an earlier stage than the Charter and customary law permit. Consequently, unless and until changes to the law are made that render the U.S. position regarding preemptive force compatible with the law governing self-defense, the U.S.'s "threat or use of force" in the circumstances identified in its strategy will remain inconsistent with international law.<sup>273</sup>

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<sup>272</sup> See Dinah Shelton, *International Law and 'Relative Normativity,'* in INTERNATIONAL LAW 145, 151 (Malcolm Evans ed., Oxford University Press 2003); CASSESE, *supra* note 46, at 123; *see also* Matthew 7:12 (New American Bible) ("Do to others whatever you would have them do to you.").

<sup>273</sup> U.N. Charter art. 2, para. 4.