" THE DUTY TO DEFEND THEM"[1]: A NATURAL LAW JUSTIFICATION FOR THE BUSH DOCTRINE OF PREVENTIVE WAR

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Introduction

"We cannot stand by and do nothing while dangers gather."[3]

The horrific events of September 11th, 2001 heralded the dawn of an Age of Terror[4] in which wicked malcreants bent on acquiring weapons of mass destruction[5] ["WMD"] will abjure all legal restraint[6] and deliberately murder civilians to advance their anti-civilizational designs. The sobering prospect that successive attacks in which enormously destructive nuclear, chemical, or biological weapons might be brought to bear upon its civilian population[7] by suicidal terrorists living within its midst greatly enhanced the perception of vulnerability and prompted the U.S. to undertake a dramatic revision of its national security strategy in response to this existential threat.[8] The September 2002 National Security Strategy of the United States of America[9] ["NSSUSA"], also known as the Bush Doctrine, warns transnational terrorists and rogue states that the U.S. has abandoned deterrence in favor of a robust and proactive strategic doctrine that sanctions the use of military force to eliminate threats posed by the intersection of WMD and an emerging breed of undeterrable adversaries[10] before they can

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[1] *See* Glenn Frankel & Dana Milbank, *In Britain, Bush Answers Critics on Iraq*, WASH. POST, Nov. 20, 2003, at A1 ("The people have given us the duty to defend them, and that duty sometimes requires the violent restraint of violent men.") (citing President George W. Bush)

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[3] President George W. Bush, Address to the United Nations General Assembly, 38 WEEKLY COMP. PRES. DOC. 1529 (Sept. 16, 2002).

[4] Terrorism, defined as the "threat or use of violence in order to create extreme fear and anxiety in a target group so as to coerce them to meet the political objectives of the perpetrators," has descended into new depths of destructiveness and barbarism in recent years. *See* Oscar Schachter, *The Extraterritorial Use of Force Against Terrorist Bases*, 11 HOUS. J. INT'L L. 309 (1989).

[5] A "weapon of mass destruction" is defined as "any weapon or device that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of . . . toxic or poisonous chemicals or their precursors; . . . a disease organism; or . . . radiation or radioactivity." 50 U.S.C. 2302(1)(2000).

[6] Terrorism, the "totalitarian form of war and politics," rejects any obligation to adhere to the dictates of law or morality and in so doing "shatters [IHL]." Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect Its Citizens*, 15 TEMP. INT'L & COMP. L. J. 195, 233 (2001). Among the more reprehensible tactics they employ is sheltering their number in areas populated by civilians in order to "exploit the rules of the game . . ., which categorically state that the civilian population must not be involved in the armed conflict." *Id*. This and other violations of IHL were committed by forces fighting for the Saddam Hussein regime in Iraq. *See* Neil A. Lewis, *U.S. Is Preparing to Try Iraqis for Crimes Against Humanity*, N.Y. TIMES, Mar. 29, 2003, at A1 (listing Iraqi violations of IHL, including mistreatment and extrajudicial killing of POWs, perfidious surrender, fighting in civilian garb, using civilians as human shields, employing hospitals and ambulances to military ends, and placing cash bounties on U.S. pilots).

[7] Fear that the terrorists responsible would attempt further attacks shaped the perceptions of the public and government decisionmakers in the aftermath of September 11th. BOB WOODWARD, BUSH AT WAR 349 (2002).

[8] It may be impossible to overestimate the severity of the threat posed by the intersection of transnational terrorism and the proliferation of WMD. *See* KATHLEEN BAILEY, DOOMSDAY WEAPONS IN THE HANDS OF MANY 6 (1991) (describing this intersection as the gravest threat ever posed to U.S. national security); Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT'L L. & POL. 483, 483-84 (1999) ("The proliferation of weapons of mass destruction . . . is one of the most significant and protracted threats to international security . . . ever faced by mankind.").

[9] *See* National Security Strategy of the United States of America (September 2002) ["NSSUSA"], available at www.whitehouse.gove/nsc/nss.pdf.

[10] The Bush Doctrine contends that deterrence, predicated upon the maintenance of the threat that attacks against the U.S. will be met with an overwhelming response and thus redound to the detriment of the attacker, is ineffective against terrorists and rogue states who have no values against which the threat of force in response might counsel restraint. *See* NSSUSA, *supra* note_, at 15

materialize. Specifically, the Bush Doctrine clearly and unmistakably claims the legal right to unilaterally employ force to preempt and eliminate an incipient threat that, even if not yet operational, will, if permitted to mature, be reducible only at a much greater cost in lives and treasure.[11] For the U.S., the lesson of September 11th is unmistakably clear: "Take care of threats early."[12]

Immediately upon its promulgation the Bush Doctrine sparked a legal debate over whether the use of military force to prevent megaterrorism on the order of September 11th constituted one of the permissible exceptions to a general prohibition on the use of force in international relations and whether the substantive and procedural obligations concerning resolution of international disputes incumbent upon member-states of the United Nations could countenance the resort to self-help under such circumstances.[13] Although the U.S.-led intervention against and deposition of the Hussein regime in Iraq in March and April 2003 was predicated not upon an argument in favor of preventive war[14] but upon far less controversial legal justifications,[15] the characterization of the grounds for intervention for domestic

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(contending the "deadly threat of Islamic terrorists whose avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death," is not susceptible to deterrence).

[11] *See id*. at 15 (stating that the "immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit . . . let[ting] our enemies strike first."); *see also* NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION 3 (Dec. 2002), at http:/www.whitehouse.gove/response/index/html ("Because deterrence may not succeed, and because of the potentially devastating consequences of WMD use against our forces and civilian population, U.S. military forces and appropriate civilian agencies must have the capability to defend against WMD-armed adversaries, including in appropriate cases through preemptive measures."); David E. Langer, *Bush Renews Pledge to Strike First to Counter Terror Threats*, N.Y. TIMES, Jul. 20, 2002, at A3 (reporting message from President Bush to U.S. troops in Afghanistan stating that the U.S. will preemptively strike against states developing WMD and that "America must act against these terrible threats before they're fully formed[.]").

[12] BOB WOODWARD, BUSH AT WAR 350 (2002) (quoting President George W. Bush in a discussion with National Security Adviser Condoleeza Rice).

[13] *See* Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L. J. 533, 533 (2002) (describing debates).

[14] The Bush Doctrine, rather than establish an expanded doctrine of preemptive self-defense, transcends preemption in favor of the doctrine of preventive war. *See infra* at note_ (defining the doctrine of preventive war). Some use the terms preemption and prevention interchangeably. *See, e.g*., George K. Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, VALPO. U. L. REV. 489, 536 (2003) (equating preemption and prevention). Others equate anticipatory self-defense, preemptive self-defense, and prevention. However, there are important distinctions between these terms that this Article will elaborate *infra* at Part II.

[15] Neither the Bush Administration nor the United Kingdom defined the March 2003 intervention against the Hussein regime as a preventive war but rather as a Chapter VII enforcement action with legal authority claimed under prior United Nations Security Council resolutions, specifically Resolutions 678 and 687 requiring, as a condition of the ceasefire negotiated in 1991, that Iraq permit inspections to verify disarmament. *See* President Says Saddam Hussein Must Leave Iraq within 48 Hours: Remarks by the President in Address to the Nation, March 17, 2003, at http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html ["March 17th Address"]("Under Resolutions 678 and 687—both still in effect—the United States and our allies are authorized to use force in ridding Iraq of weapons of mass destruction."); Frances Gibb, Attorney-General Gives MPs Legal Basis for War, LONDON TIMES, Mar. 18, 2003, at 1 (quoting Attorney-General of the United Kingdom as stating "the government would be legally justified in declaring war on Iraq because of the combined effect of three UN resolutions[.]"); Letter from U.N. Ambassador John Negroponte to Ambassador Mamady Traore, President of the Security Council (Mar. 20, 2003), at http://www.usembassy.it/file2003_03/alia/A3032109.htm (providing U.S. position on legal justification and indicating primary focus on material breach of resolutions). International law scholars concur that the material breach of these resolutions constitutes a necessary and sufficient basis for intervention. *See* Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576, 578 (2003) (contending that the use of force against Iraq in March 2003 was warranted by the "continuing effect" of relevant Security Council resolutions and Iraqi material breach of these resolutions); Jane Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 629 (2003) (characterizing this legal rationale as a "plausible argument"). Iraqi refusal to permit weapons inspections thus constituted a breach of the 1991 ceasefire and, under international law governing armistices, permitted belligerent parties to resume hostilities to secure the objectives specified under Resolutions 678 and 687. *See* John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 565-69 (2003) (analyzing international law of armistice and justifying 2003 intervention on the basis of Iraqi material breach of UN resolutions, by its refusal to permit good-faith inspections in the winter of 2002-2003, creating the conditions of the ceasefire) (referencing Iraqi ejection of weapons inspectors in October 1998 and the description of the ejection by the Security Council as a "flagrant violation of resolution 687 . . . and other relevant resolutions[.]") (U.N.S.C. Res. 1205, Nov. 5, 1998). Legal counsel for the U.S. Department of State supports the interpretations of international legal scholars. *See* William H. Taft

political consumption by the Bush Administration as a preventive war,[16] along with a widespread perception that intervention could not be legally justified on any other basis,[17] has thrust the contentious assertion of the right of states to engage in preventive war to the forefront of international legal discourse where in some quarters it is no longer understood merely as a doctrine around which to orient debates concerning the intervention in Iraq specifically or the norms and institutions that should govern contemporary international relations more generally but, rather, as an "international constitutional moment"[18] that will prove decisive for the future of international law.[19] Whereas, without conceding that intervention in Iraq was an act of preventive war, the U.S. and allied states claim the forcible ouster of the Hussein regime as a triumphal success, entirely consistent or at least reconcilable with international law, that liberated the people of Iraq and rescued the credibility of the United Nations after an ignominious decade marked by failures to prevent famine, end genocide, and enforce the disarmament of rogue states, a number of states and commentators excoriate the decision to intervene without the Security Council imprimatur as a jurispathic act posing a grave threat not only to a half-century-long commitment to multilateralism[20] but to the international rule of law[21] and, derivatively, to global order.

IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557, 573 (2003) (describing 2003 intervention not as preventive war but as the result of Iraqi material breach of Security Council resolutions, violation of a ceasefire agreement, and the "final episode in a conflict initiated more than a dozen years earlier by Iraq's invasion of Kuwait"). For a thorough examination of the sources of legal support for the 2003 intervention and for an argument that the Bush Administration did not characterize its action as a preventive war, *see* Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L. J. 2004 (forthcoming April 2004).

[16] In his address to the nation on March 17, 2003, President Bush, although he referenced humanitarian considerations and self-defense arguments as well as Iraqi violations of the 1991 ceasefire, rested his justification for the intervention largely on the ground that "[i]n 1 year, or 5 years, the power of Iraq to inflict harm on all free nations would be multiplied many times over" and that failure to "meet that threat now, where it arises, before it can appear suddenly in our skies and cities" would be an act of national "suicide." President George W. Bush, Address to the Nation on Iraq, Mar. 17, 2003, 39 WEEKLY COMP. PRES. DOC. 338, 340 (Mar. 24, 2003).

[17] A number of commentators reject the argument that existing Security Council resolutions standing alone provide adequate legal justification for the March 2003 intervention. *See* Anne-Marie Slaughter, *Good Reasons for Going Around the U.N.*, N.Y. Times, Mar. 18, 2003, at A31 (opining that "[m]ost international lawyers will probably reject this claim and find the use of force illegal under the terms of the [UN] Charter."); Thomas Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 613 (2003) (""Neither the text nor the debates on the adoption of Resolution 687 reveal the slightest indication that the Council intended to empower any of its members, by themselves, to determine that Iraq was in material breach."); Yoo, *supra* note_, at 563, 567 (conceding that many international legal scholars and a number of states, including France, Germany, and Russia, do not accept the prior Security Council authorization justification). Moreover, several commentators, after analyzing the evidence adduced by the U.S., reject the U.S. claim to have acted in self-defense on the ground that no imminent threat existed. See, e.g., Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT'L L. 590, 598 (2003); Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599, 603 (2003). For a discussion of the element of "imminence" in respect to a claim of self-defense under international law, *see infra* at note_ and accompanying text.

[18] *See* Anne-Marie Slaughter, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 2 ("Just as in 1945, the nations of the world today face an international constitutional moment.") (writing in response to the debate over the Bush Doctrine of preventive war in the context of the then-proposed Iraqi intervention).

[19] *See* Kofi Annan, Excerpt from Speech at the General Assembly, Sept. 23, 2003, at A11, available at http://www,nytimes.com/international (stating that the assertion of the right to engage in preventive war stands as "a moment no less decisive than 1945 itself, when the United Nations was founded."). Many observers concur with the assessment that the advent of the Bush Doctrine is, "[w]ithout question, the most pressing issue in the international realm." Jeffrey F. Addicott, *Proposal for a New Executive Order Banning Assassination*, 37 U. RICHMOND L. REV. 751, 754 (2003). *See, e.g.*, Slaughter, *supra* note_, at 2 ("Few events in global history can have galvanized the international system to action so completely in so short a time.") (quoting British Foreign Secretary Jack Straw).

[20] *See* Annan, *supra* note_, at 11 (insisting that U.S.-led intervention against the Hussein regime has posed a "fundamental challenge" to multilateralism and to the role of the UN in preserving peace and security); *see also* Steven R. Weisman, *An Audience Unmoved*, N.Y. TIMES, Sept. 24, 2003, at A1 (reporting that French President Jacques Chirac has termed the legal division over the 2003 intervention as "one of the gravest threats to multilateral institutions in modern times"). Some go so far as to accuse the U.S. of seeking to "disable the United Nations" the better to rid the U.S. of "an international regime that is insufficiently responsive to both America's needs and the reality of U.S. disproportionate power" and establish an "American

Even if it were possible to forge a consensus as to whether the use of force against Iraq in March 2003 can better be described as an illegal act of preventive war that bodes ill for international law and institutions or as a benevolent police action in defense of human rights and law-governed international society, the resolution of this issue would not be dispositive of other questions at the core of the current international constitutional crisis: In a world with no central enforcement mechanism, must a state cower in terror until it absorbs a devastating first strike from WMD-armed terrorists before acting in self-defense, or may it resort to self-help? Does the failure of the framers of the UN Charter to anticipate the virulence of contemporary terrorism and the lethality of modern weapons technology[22] render the Charter framework an unsalvageable anachronism, or does the UN Charter provide a "viable legal framework if the rules are refined to take account of recent experience and emerging security threats[?]"[23] Put slightly differently, does the lethal and barbarous marriage of WMD and international terrorism require a fundamental reinterpretation or reimagination of the international law governing the use of force in self-defense against terrorists and rogue states, to include the identification of profoundly different rules and norms better tailored to facilitate state survival?[24] If so, is the Bush Doctrine a jurisgenerative approach to legal reform that elaborates a well-reasoned basis for the extension of the War on Terror to terrorist groups and their state sponsors, even where such terrorists and states are not presently engaged in overt acts of aggression against the U.S., or is it an abject negation of law altogether that threatens to rend the legal fabric of global order? In other words, in the Age of Terror may states, when their very survival is threatened, engage in preventive war to defend their own survival, and does the Bush Doctrine provide an adequate legal foundation for this claimed entitlement? Finally, are other states impressed with a corresponding obligation to support, or at least not interfere with, coercive diplomacy and the use of force, where necessary, in defense of this right?

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protectorate" in its stead. Franck, *supra* note_, at 616, 617; *see also* Stromseth, *supra* note_, at 637 (suggesting the result of U.S. actions consistent with the Bush Doctrine will be the circumscription of the UN). Thus, for Franck and others, the Bush Doctrine represents a mortal threat to the international legal regime governing the use of force. *Id*. at 610 (blaming the U.S. for the "death" of international law governing the use of force); Richard B. Bilder & Mary Ellen O'Connell, *Review Essay: Releashing the Dogs of War* (Review of Christine Gray, International Law and the Use of Force, 97 AM. J. INT'L L. 446, 446 (2003) (noting the resurfacing of the suggestion that the international law governing the resort to force is moribund as a result of the Iraq intervention).

[21] *See* Lori Fisler Damrosch & Bernard H. Oxman, *Editor's Introduction, Agora: Future Implications of the Iraq Conflict,* 97 AM. J. INT' L. 553, 553 (2003) (contending that "military action against Iraq in spring 2003 is one of the few events of the UN Charter period holding the potential for . . . destruction, of the system of law governing the use of force that had evolved during the twentieth century."). The effect of noncompliance upon the continued vitality of international law, an issue raised but by no means answered by the Iraqi intervention, is the "most profound epistemological question" in the international law academy. Tom J. Farer, *The Prospect for International Law and Order in the Wake of Iraq*, 97 AM. J. INT'L L. 621, 621 (2003).

[22] *See* Robert J. Beck & Anthony Clark Arend, *"Don't Tread on U.S.": International Law and Forcible State Response to Terrorism*, 12 WISC. INT'L L. J. 153, 214 (1994) (describing the UN Charter as a time-bound document).

[23] Stromseth, *supra* note_, at 637.

[24] *See* Slaughter, *supra* note_, at 2 (arguing that an effective response the new threat environment of the post-September 11th era dictates the development of new rules); *see also* Addicott, *supra* note_, at 775 (inquiring whether the "traditional international rules related to the use of force . . . actually work in the real world" of transnational terrorism). A number of commentators describe the threat environment of the 21st century as so radically at variance with the geopolitical, technological, and ideological conditions that obtained in the immediate aftermath of World War II that the UN Charter cannot any longer, without substantial modification or reinterpretation, serve the purpose of preventing armed conflict for which it was intended. See, e.g., Michael Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WKLY. STAND., Jan. 28, 2002, at 24, 26 (resting the argument that the UN Charter is fundamentally incompatible with the contemporary defensive requirements of states by virtue of the emergence of robust transnational terrorist groups and state sponsors, unforeseeable by the framers, who possess the capacity

Part I of this Article will analyze the primary customary and treaty-based sources constituting the international legal regime governing self-defense, as well as relevant state practice in the post-Charter era, to evaluate the arguments as to the legality of measures undertaken in anticipation of an armed attack, as well as the continued functionality of the UN Charter framework in the Age of Terror. Part II will examine the Bush Doctrine as an expression of a doctrine of preventive war that transcends entirely the debate over the use of armed force in anticipation of an imminent attack. Part III will present the claim that an examination of historical sources of international legal obligation predating the Charter and a less restrictivist, less positivist read of the Charter reveals a natural legal basis for the right, and, even more pointedly, the duty of states to engage in preventive war where necessary to defend their nationals and vital interests against existential threats. Part IV will examine the U.S. Constitution, and in particular its allocation of competence over defense matters, as a domestic expression of a Presidential legal duty, arising under natural law, to defend the U.S. against external threats; it will then make the assertion that the Bush Doctrine is an expression of the intent to faithfully discharge this natural legal duty and that the doctrine of preventive war it elaborates is not only theoretically consistent with obligations under international law but even promotive of the ends law is intended to secure, even if the exercise of the right to preventive war is subject to some important qualifications. Part V will offer proposals to harmonize the Bush Doctrine with the UN Charter framework and guide formal international legal institutions, including the Security Council and the International Criminal Court, toward enhanced functionality in the simultaneous defense of the natural right of states and peoples to life and the promotion of law-governed order and justice in the international system; several criticisms will be anticipated and, to some degree addressed in concluding remarks.

I. Self-Defense in the Charter Era

Self-defence is Nature's eldest law.[25]

A. Sovereignty Circumscribed: The UN Charter and the Prohibition on Aggressive War

For most of history the sovereign prerogative of states to resort to armed conflict was largely immune from regulation under international law.[26] Sovereignty was its own justification for war: although the Peace of Westphalia of 1648[27] was motivated in part by collective interests in preventing religious disputes from giving rise to interstate conflicts, states continued to claim, as a constituent aspect of their sovereignty, the right to engage in war in response to a host of perceived offenses, to collect debts, and to acquire territory well into the twentieth century.[28] However, early twentieth century efforts

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to deliver devastating attacks with essentially no warning and against whom the Charter does not expressly authorize states to undertake measures now revealed as necessary in self-defense).

[25] John Dryden, "Absalom and Achitopel" (1681).

[26] YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 176 (1994). As late as the 17th century, jurists proclaimed that the right of self-defense extended to the vindication of any national claim. *See* D.P. O'CONNELL, INTERNATIONAL LAW 339 (1965).

[27] *See* Treaty of Peace of Munster, Oct. 14/24, 1648, 1 Consol. T.S. 271, and Treaty of Peace of Osnabruck, Oct. 14/24, 1648, 1 Consol. T.S. 119 ["Treaty of Westphalia"] (ending Thirty Years' War and establishing modern system of sovereign states).

[28] *See* 6 HACKWORTH, DIGEST OF INTERNATIONAL LAW 152-55 (1943) (discussing legal bases for state practice in employing force in early 20th century).

to regulate the resort to war, most notably the Covenant of the League of Nations[29] and the Kellogg-Briand Pact of 1928,[30] advanced the crystallization of an as yet inchoate international customary prohibition[31] on "aggressive" war, commonly defined as the use of armed force against the territorial integrity or political independence of another state.[32] In turn, the emerging *jus ad bellum*[33] proscribing aggressive war found positive expression in the Charter of the United Nations,[34] which entered into force in 1945, as well as application at Nuremburg,[35] and quickly acquired the status of a peremptory norm.[36] Article 2(4) of the Charter categorically proscribes "the threat or use of force against the territorial

[29] *See* Covenant of the League of Nations, Treaty of Versailles, Jun. 20, 1919, Part I, 225 Consol. T.S. 189, at Art. 12 (committing states-parties not to resort to war against other states-parties "within three months" after an unsuccessful attempt to arbitrate the dispute).

[30] *See* Treaty Providing for Renunciation of War as an Instrument of National Policy ["Kellogg-Briand Pact"], Aug. 28, 1928, 46 Stat. 2343, 94 L.N.T.S. 57, at Art. 1 ("condemn[ing] recourse to war for the solution of international controversies, and renounc[ing] it, as an instrument of national policy" in relations between states-parties).

[31] International law consists of treaty-based, as well as customary, sources of law. *See* Statute of the International Court of Justice, art. 38, 59 Stat. 1055 (1945) (enumerating sources of international law as treaties, custom, general principles, and the opinions of expert commentators). Customary international law ["CIL"] evolves from the practice of states consistent with the subjective understanding that such practice is legally obligatory. *North Sea Continental Shelf Cases* (F.R.G. v. Denmark & Netherlands), 1969 I.C.J. 4. State practice, particularly by directly affected states, is the most concrete element. Michael Akenhurst, *Custom As A Source of International Law*, 47 BRIT. Y.B. INT'L L. 18 (1977). To become binding, the practice must be consistent, settled, and uniform. Prosper Weil*, Towards Relative Normativity in International Law?,* 77 AM. J. INT'L L. 413, 433 (1983). states. Although the ICJ has specifically addressed the question of the requisite degree of consistent practice necessary to constitute custom, determining that it need not be universal, no authoritative judicial pronouncement exists to delineate the precise boundaries of customary IHL. *See Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. U.S.), Merits, 1986 I.C.J. 1, para. 186 ("The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.").

[32] The precise definition of "aggression" has bedeviled international lawyers for nearly a century. *See* Jonathan A. Bush, *"The Supreme Crime" and its Origins: The Lost Legislative History of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324 (2002) (chronicling the history of attempts to define the term); JULIUS STONE, AGGRESSION AND WORLD ORDER 88 (suggesting it may be impossible to overcome politics and achieve a universal definition). Nevertheless, progress has been made in recent decades, and in 1974 a definition was adopted without a vote by the United Nations General Assembly. *See* Resolution on the Definition of Aggression, Dec. 14, 1974, G.A. Res. 3314, 29 U.N. GAOR Supp., No. 31, at 142, U.N. Doc. A/9631 (1975), 13 I.L.M. 710 (1974), at Art. 1 (enjoining members from the "threat or use of force against the territorial integrity or political independence of any state" and establishing a rebuttable presumption that the "first use of armed force by a state in contravention of the Charter" constitutes prima facie evidence of aggression but, by limiting aggression to force used "in contravention of the Charter," suggesting that some first uses of force may be permissible). In intervening years a general definition of aggression has emerged that includes the elements of a military attack, not otherwise justified by international law, directed against the territory of another state. *See* Louis Rene Beres, *After the Gulf War: Israel, Preemption, and Anticipatory Self-Defense*, 13 HOUSTON J. INT'L L. 259, 263 n.5 (1991) (synthesizing various definitions of aggression).

[33] The strand of international humanitarian law known as the*jus ad bellum* governs the right to resort to armed force, whereas the jus in bello governs the methods and means employed in war and specifies who and what are legitimate targets. *See* William J. Fenrick, *Should Crimes Against Humanity Replace War Crimes?*, 37 COLUM. J. TRANSNAT'L L. 767, 770 (1999) (differenting the *jus ad bellum* from the *jus in bello*).

[34] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, TS 993, 3 Bevans 1153, entered into force Oct. 24, 1945, at Art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any state[.]").

[35] *See* 1 TRIAL MAJ. WAR CRIM. BEFORE INT'L MIL. TRIB 208, 218-22 (1946), reprinted at 41 AM. J. INT'L L. 205, 207 (1947) ["Nuremburg Judgment"] (convicting defendants of conspiracy to wage "aggressive war").

[36] A peremptory norm, also known as a norm of *jus cogens*, is the most powerful genre of all the sources of international law. A norm of jus cogens "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 22, 1969, 8 I.L.M. 679, at Art. 53. The prohibition against aggression in international relations is widely regarded as having attained the status of a norm with the character of jus cogens. *See* ARTHUR WARRS, 2 THE INTERNATIONAL LAW COMMISSION 1949-1998 741 (1999) ("the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens.") (quoting the International Law Commission 1966 Commentary to the Final Draft Articles on the Law of Treaties); Case Concerning Military and Paramilitary Activities in and around Nicaragua (Nicar. V. U.S.), 1986 I.C.J. at 100 (holding that the norms represented by Article 2(4) of the UN Charter approached jus cogens status).

integrity or political independence of any state,"[37] and thus, fifty-eight years into the Charter era, it is "well settled in modern international law that no nation may engage in aggression."[38]

B. Sovereignty Preserved: The Inherent Right of Self-Defense

Nevertheless, imposition of a sharp prohibition on aggression has not disabled the "inherent right" of states to self-defense,[39] nor has it prevented state practice inconsistent with what former Justice Hersch Lauterpacht termed the "guiding norm" of the UN enterprise: "there shall be no violence."[40] Although the UN Charter has had a transformative effect on the law governing the resort to force,[41] states remain free under customary international law to use force "in conformity with the Charter."[42] Accordingly, states continue to resort to armed self-help to defend their territory and political independence against aggression and to protect their nationals and property abroad from serious threats of death or injury,[43] and they do so without impinging either the territorial integrity or political independence of states that fail in their duty to protect aliens and alien property within their jurisdiction.[44] Moreover, self-defense remains so intrinsic to the concept of sovereignty even in the Charter era that the right is "one that would be asserted by nations absent recognition in international law."[45]

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[37] UN Charter, *supra* note_, at Art. 2(4). The text of the Charter only admits of two exceptions to Article 2(4), namely Article 106, which allowed the current permanent members of the Security Council to undertake collective action prior to the establishment of the Security Council, and Article 107, which allowed states to take action gainst the Axis Powers during World War II. See UN Charter, *supra* notes_, at Arts. 106, 107.

[38] Addicott, *supra* note_, at 769.

[39] "Self-defense" under international law may be defined as "a lawful use of force . . . under conditions prescribed by international law, in response to a previous unlawful use (or, at least, a threat) of force." DINSTEIN, *supra* note_, at 175.

[40] Cited in Thomas M. Franck, *The Use of Force in International Law*, 11 TUL. J. INT'L & COMP. L. 7, 7 (2003).

[41] Scholars debate not whether the UN Charter has transformed the *jus ad bellum* but the degree to which it has done so. *See* Timothy Kearley, Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent, WYOMING L. REV. 664, 665 (2003) (examining such debates).

[42] Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Rep.

[43] *See* Abraham D. Sofaer, *Terrorism, the Law, and National Defense*, 126 MIL. L. REV. 95, 99 (1989) (noting that states "have traditionally defended their military personnel, citizens, commerce, and property from attacks[.]"); Robert Beck & Anthony Clark Arend, *"Don't Tread on Us": International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L. J. 153 (199) ("No nation should be limited to using force to protect its citizens . . . to situations in which they are within its boundaries.") (quoting U.S. State Department Legal Adviser); Jordan W. Paust, *Responding Lawfully to International Terrorism*, WHITTIER L. REV. 711, 729 (1986) (enumerating lawful bases for the use of force in self-defense). The Israeli rescue of hostages held by terrorists at Entebbe Airport in Uganda in 1976 is perhaps the most familiar example of the use of force in defense of nationals. *See* United Nations, Security Council Debate and Draft Resolutions Concerning the Operation to Rescue Hijacked Hostages at the Entebbe Airport, 15 ILM 1224, 1231 (1976).

[44] *See* JULIUS STONE, OF LAW AND NATIONS 24-26 (1974) (contrasting aggression in violation of Article 2(4) with defensive measures consistent with Article 2(4)); BOWETT, *supra* note_, at 91-104 (characterizing use of force to protect nationals as lawful), MYERS MCDOUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 862-70 (1981) (supporting use of force to protect nationals), I L. OPPENHEIM, INTERNATIONAL LAW 309 (H. Lauterpacht 8th ed. 1955) (finding intervention to protect nationals lawful); John Norton Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145. 153-54 (1984) (declaring protection of nationals by armed force lawful); Jordan J. Paust, *The Seizure and Recovery of the Mayaguez*, 85 YALE L.J. 774, 800 (1976) (same). Although analysis of the literature suggests that a majority of contemporary commentators now supports the right of a state to protect its nationals where necessary by armed force, for opposing views *see* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 301, (rejecting right of intervention to protect nationals); LOUIS HENKIN, HOW NATIONS BEHAVE 145 (2d ed. 1979) (same); P. JESSUP, A MODERN LAW OF NATIONS 169-70 (3d ed. 1968) (expressing doubt about the legality of intervention to save lives and property); HANS KELSEN & ROBERT TUCKER, PRINCIPLES OF INTERNATIONAL LAW 64-87 (2d ed. 1966) (rejecting right of intervention to protect nationals).

[45] Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, NAV. L. REV. 217, 218 (1998). Indeed, as soon as the Kellogg-Briand Pact entered into force the U.S. and nearly a dozen other states moved to qualify the instrument with an authoritative interpretation providing that nothing in the text "restricts or impairs in any way the right of self-defense[,]" which is "inherent in every sovereign state and is implicit in every treaty." United States, Identic Notes, 1928, reprinted in 22 AM. J. INT'L L. Supp (1928).

In fact, the Charter does not of its own force disable or impair the right to self-defense, nor is it at all likely that its framers intended that it do so.[46] Article 2(4), although broadly drafted, prohibits only three specific applications of force in international relations: (1) the threat or use of force prejudicial to the territorial integrity of states; (2) the threat or use of force contrary to the political independence of states; and (3) the threat or use of force "in any other manner inconsistent with the Purposes of the United Nations."[47] In other words, all those uses of force not excluded by operation of Article 2(4) are permitted, and provided that a particular use of force cannot legitimately be construed as challenging either the territorial integrity or political independence of a state or as inconsistent with the primary purpose of the United Nations, the "maintenance of international peace and security,"[48] the use of force in question is arguably permissible.[49] The exercise of the right to self-defense, even where it involves armed force, is thus not inconsistent with the maintenance of international peace and security and not contrary to the Charter. Even more directly, Article 51 recognizes[50] the "inherent right" of a state subjected to aggression to engage in self-defense, and to receive the assistance of other states to that end.[51] In sum, the Charter is not limited in its ends to the promotion of international peace, nor is it most accurately construed when the exceptions to Article 2(4) are read narrowly: the framers recognized that justice, measured in terms of the right of states to resist and defeat aggression, is a concomitant of peace, particularly in a world in which there is no effective international monopoly on the right to use force and no sovereign to which states may turn for resolution of their disputes, vindication of their rights, and guarantee of their security.

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[46] *See* TIMOTHY L.H. McCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW 159 (1996) (concluding an extensive analysis of the legislative history of the drafting conference that the UN Charter was not intended to terminate the customary international law with regard to the use of force or to draw all uses of force within the scope of Article 2(4)); BROWNLIE, *supra* note_, at 271 (finding "no indication that the Charter language was meant to do anything other than reflect the current right of self-defense."); D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 188 (1958) (contending that the drafters of the UN Charter intended to preserve the customary right of self-defense) (citing Doc. 1179, I/9(1), 6 U.N.C.I.O. Docs. 247 (1945)) (stating that under the UN Charter "self-defense remains admitted and unimpaired); E. COLBERT, RETALIATION IN INTERNATIONAL LAW 203 (1948) (branding the notion that signatories to the Charter intended to restrict the right of self-defense in any way as inconsistent with practical realities and their expressed interests); Sean D. Magenis, *Natural Law as the Customary International Law of Self-Defense*, B.U. INT'L L.J. 413, 414 (2002) (explaining that framers of the UN Charter did not intend to limit the natural right of states to self-defense as it existed at customary international law) (citing Melvina Halberstam, The Right to Self-Defense Once the Security Council Takes Action, 17 MICH. J. INT'L L. 229, 240-43 nn.50-63 (1996)); Walker, *supra* note_, at 351 (noting that the Charter framers understood self-defense to be an inherent and inalienable right); Thomas Mallison & Sally Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense*, 15 VAND. J. TRANSNAT'L L. 417, 420 (1982) (concluding from the drafting history of the Charter that the text incorporates the inherent right of self-defense as it existed *ex ante* in customary law *in toto*). *But see* Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH U. J.L. & POL'Y 51, 58 (2001) (examining the travaux preparatoires of the Charter and concluding that the framers intended a transformative approach to the law of force that would preclude the use of force in self-defense unless preceded by an armed attack).

[47] UN Charter, *supra* note_, at Art. 2(4).

[48] UN Charter, *supra* note_, at Art. 1(1).

[49] *See* Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, CORNELL INT'L L. J. 533, 536 (2003) (making this argument); Michael N. Schmitt, *Preemptive Strategies in International Law*, MICH. J. INT'L L. 513, 521-22 (same); BOWETT, *supra* note_, at 185-86; *but see* Rex J. Zedalis, *On the Lawfulness of Forceful Remedies for Violations of Arms Control Agreements: "Star Wars" and Other Glimpses of the Future*, N.Y.U. J. INT'L L. & POL. 73, 90-92 (1985) (conducting detailed exegesis of the travaux preparatoires of the UN Charter to reach the conclusion that "Article 2(4) was not intended to permit force to be used even when not inconsistent with the purposes of the United Nations.").

[50] It is important to note that Article 51 is not an affirmative grant but is rather the recognition of an inherent right of self-defense. Clemmons & Brown, *supra* note_, at 241; *see also* Walker, *supra* note_, at 351-52 (clarifying the status of the right to self-defense in the Charter as a recognized, and not a conferred, right).

C. Whither Customary International Law Governing the Resort to Force? The Doctrine of Anticipatory Self-Defense

1. Restrictivists: Plain Language and Security Council Primacy Abridge States' Rights under Customary International Law

Some commentators contest the argument that the customary international law of self-defense is little transformed by the Charter, suggesting instead that a further reading of Article 51, coupled with an examination of the drafting history of the entire document, supports the conclusion that a much more prohibitive regime in derogation of the customary international law of self-defense was created in San Francisco in 1945. For this restrictivist camp, Article 51 explicitly qualifies the right to individual or collective self-defense to those circumstances in which an "armed attack" has occurred,[52] and in the absence of the satisfaction of this condition precedent states which resort to armed force cannot avail themselves of the self-defense exception to the general prohibition of Article 2(4), which in any event is to be read very narrowly consistent with the primary purpose of the United Nations—maintaining peace.[53] Moreover, Article 51, which provides further that "[n]othing in the present Charter shall impair the inherent right of . . . self-defense*, until the Security Council has taken measures necessary to maintain international peace and security*[,]"[54] can be read to have structurally modified the inherent right to self-defense by subordinating it to the Security Council, the UN organ charged with primary responsibility for the maintenance of international peace and security.[55] Although it is hotly debated to what extent and with what degree of success the Security Council must intervene in a given case to preclude a state from employing force in self-defense,[56] and although the record of the Security Council in maintaining

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[51] *See* UN Charter, *supra* note_, at Art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an amred attack occurs against a Member of the United Nations[.]").

[52] *See, e.g.*, BERT V. A. ROLING, THE CURRENT LEGAL REGULATION ON THE USE OF FORCE 5 (1986).

[53] *See* Michael Franklin Lohr, *Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism*, NAV. L. REV. 1, 18 (1985) (summarizing the restrictivist argument with regard to Article 51).

[54] UN Charter, *supra* note_, at Art. 51.

[55] Article 24 of the Charter confers upon the Security Council "primary responsibility for the maintenance of international peace and security. UN Charter, supra note_, at Art. 24. Under Chapter VII of the Charter, the Security Council is specifically empowered to "determine the existence of any threat to the peace, breach of the peace, or act of aggression." *Id*. at Art. 39. Should the Security Council make such a determination, it may at its discretion make recommendations as to measures to restore international peace and security or it may call upon members to take a wide array of "measures not involving the use of armed force[,]" to include, *inter alia*, the "complete or partial interruption of economic relations . . . and the severance of diplomatic relations." *Id*. at Arts. 40, 41. Should such non-forceful measures prove inadequate, or should the Security Council decide that such measures would not suffice, the Council may authorize member states to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." *Id*. at Art. 42. The Security Council may also authorize regional organizations to undertake enforcement measures consistent with the restoration of international peace and security. *Id*. at Arts. 52, 53.

[56] Some scholars, interpreting Article 51 literally, contend that once the Security Council becomes seized of a matter the right of self-defense is automatically suspended. *See* Yutaka Arai-Takahashi, *Shifting Boundaries of the Right to Self-Defence—Appraising the Impact of the September 11th Attacks on Jus Ad Bellum*, 36 INT'L LAWÁER 1081, 1089 (2003) (positing this interpretation of Article 51); Sean M. Condron, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, MIL. L. REV. 115, 132-34 (1999) (surveying proponents of the "literalist" interpretation of Article 51). According to this literalist interpretation, it matters not whether Security Council takes effective measures against the aggressor; the right of a state to self-defense is in abeyance. Critics of this literalist interpretation suggest that to prevent an injured state from taking measures in self-defense despite the ineffectiveness of the Security Council would be "an implausible—indeed absurd—interpretation" entirely inconsistent with the intent of the framers of the Charter to protect, rather than render illusory, the inherent right of self-defense. *See* Schmitt, supra note_, at 532 (insisting that "the mere fact that the Security Council . . . is considering the situation . . . does not deprive a State [sic] of its right to self-defense."); Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 458 (1991); *see also* Roger K. Smith, *The Legality of Coercive Arms Control*, YALE J. INT'L L. 455, 497-98 (1994) (noting that language that would have explicitly terminated the right of

international peace and security is abominable,[57] the plain language of Article 51 supports the restrictivist argument that the customary right of self-defense has been abridged by the investment of the primary responsibility for peace and security in the Security Council even where the Security Council fails to respond or responds ineffectively.

The customary international law doctrine of anticipatory self-defense ["ASD"][58], a subset of the broader body of custom predating the Charter which holds that when a state is faced with an imminent threat of armed attack it may lawfully resort to proportional acts of defensive armed force to preempt the attack before it is inflicted,[59] has of late become the wedge that has broadened the theoretical division between restrictivists and pragmatists on the subject of self-defense. That a customary right of states to engage in ASD existed in the pre-Charter era is uncontroverted.[60] European multilateral defense treaties codified express provisions for the collective exercise of self-defense in anticipation of aggression as late

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continuing self-defense upon the Security Council becoming seized of a dispute was proposed and rejected at the San Francisco drafting conference). According to this pragmatic interpretation of Article 51, the right to self-defense cannot be suspended upon anything short of an affirmative Security Council finding that the state acting in self-defense has exceeded the scope of Article 51 to the point where its actions in response to aggression constitute an independent threat to international security. Thomas K. Pflofchan, Jr., *Article 51: Limits on Self-Defense?*, 13 MICH. J. INT'L L. 336, 351-52 (1992) (stating that the right to self-defense terminates only upon an explicit Security Council determination that continued measures in self-defense would constitute aggression).

[57] Only a quarter-century into the Charter era, commentators were eulogizing the Security Council on the ground that it had failed in its mission of preserving international peace and security. *See, e.g.*, Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970) (noting the abuse of Charter provisions by states falsely claiming to act in self-defense, the spurious invocation of the authority of regional organizations, and the inability of the Security Council to enforce prohibitions on the use of force). Subsequent analyses of the performance of the Security Council, offered four and nearly six decades, and several genocides, after its founding, supports the argument that it has failed abjectly. *See* W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 279080 (1985) (suggesting that states have ignored the Charter provisions governing the use of force and modified the role of the Security Council by practice); Wedgwood, *supra* note_, at 581 (describing the Security Council as having "enormously weakened its own prestige by ineffectual responses to the disastrous conflicts in the former Yugoslavia and Rwanda in the 1990s."); Michael Glennon, *Self-Defense and Incoherence in the U.N. Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 540 (2002) ("Between 1945 and 1999, two-thirds of the members of the United Nations—126 states out of 189—fought 291 interstate conflicts in which 22 million people were killed."); *id.* ("The upshot is that the Charter's use of force regime has all but collapsed."); Bilder & O'Connell, *supra* note_, at 449 (describing the Security Council as "limp[ing] along under a cloud of questioned legitimacy" after its exclusion in favor of NATO during the Kosovo Crisis in 1998-1999); Roberts, *supra* note_, at 484 (describing contrary state practice as having rendered the Charter provisions governing the use of force "moribund."). Some commentators lay much of the blame at the foot of states and suggest that their failures to participate in Article 43 agreements and to otherwise contribute to collective security is at the root of Security Council ineffectiveness. *See* ANTHONY CLARK AREND & ROBERT BECK, INTERNATIONAL LAW AND THE USE OF FORCE 56-58 (1993) (suggesting states "are simply not committed enough to the principle of collective security to be willing to use force in circumstances that seem to have little direct relevance to their own national security goals."); Kofi Annan, Excerpt from Speech at the General Assembly, N.Y. TIMES, Sept. 23, 2003, at A11 (reminding member states that the UN has not yet proven "that [the] concerns [of "uniquely vulnerable" states] can, and will, be addressed effectively through collective action.").

[58] Anticipatory self-defense is sometimes referred to as "preemptive self-defense." *See, e.g.,* Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599, 600 (equating ASD with preemptive self-defense); Timothy Kearley, *Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent*, WYOMING L. REV. 664, 665 (same). Although it is possible to differentiate the two, this Article accepts the argument that ASD and preemptive self-defense are largely equivalent; nevertheless, there is a crucial distinction between these two terms and the doctrine of preventive war, discussed *infra* at Part_.

[59] In the strict sense, the doctrine of ASD is inapplicable to ongoing conflicts, under which circumstances the formal state of belligerence has been created, military operations are not designed to anticipate enemy attacks, and the rights of belligerents to self-defense cannot be said to depend upon whether it is possible to demonstrate an imminent threat, as the threat exists from the moment of the first strike. *See* Michael N. Schmitt, Preemptive Strategies in International Law, MICH. J. INT'L L. 513, 535 (2003) ("Once the first attack in an ongoing campaign has been launched, the issue of [ASD] becomes moot. Imminence is irrelevant because an armed attack is already underway.").

[60] *See* ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 72 (1993) (finding a near-consensus on the question); Louis Rene Beres, *Israel, Lebanon, and Hizbullah: A Jurisprudential Assessment*, 14 ARIZ. J. INT'L & COMP. L. 141, 150 (same); Ruth Wedgwood, NAT'L L.J. (Oct. 28, 2002) (asserting the general acceptance of ASD by international lawyers since the Caroline Case); I L. OPPENHEIM, INTERNATIONAL LAW 303 (H. Lauterpacht 8th ed. 1955) (discussing historical instances of ASD).

as the early twentieth century,[61] and with the Monroe Doctrine (1823) the United States issued a clear expression of its intent to engage in ASD should any European power attempt to extend its sphere of influence into the Western Hemisphere.[62] The classic recitation of the doctrine, enunciated in the *Caroline Case* (1842), established a more secure foundation in international law for the right of a state to anticipate a threat with force provided that "the necessity of . . . self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[63] The *Caroline* formulation, which acquired near-universal acceptance over the course of the next century as the authoritative expression of the right of states to ASD, influenced the interpretation of the Kellogg-Briand Pact[64] and the jurisprudence of the Nuremburg Tribunal,[65] which cited it approvingly even in denying the defense proffered by Nazi defendants to charges of aggressive war.[66] However, although the existence of the right to ASD under traditional customary international law is well-established, the question remains whether the transformations wrought upon the international legal regime governing self-defense by the establishment of the UN Charter include impairment of the right of states to engage in ASD even under the narrowly delimited circumstances of necessity resulting from an imminent threat of sufficient magnitude.[67]

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[61] *See* Walker, *supra* note_, at 327 (examining treaties from the 18th through 20th centuries established collective self-defense regimes and incorporating ASD provisions as support for the existence of a right at customary international law to invoke the doctrine of ASD); *see also id*. at 350 (interpreting the Covenant of the League of Nations, the Kellog-Briand Pact, and other treaties taken together as strongly supportive of the customary international legal right to ASD).

[62] *See* Elihu Root, *The Real Monroe Doctrine*, 8 AM. J. INT'L L. 427, 431 (1914) (describing the Monroe Doctrine as an expression of a U.S. right to engage in ASD if challenged in the Western Hemisphere by a European power).

[63] Secretary of State Daniel Webster, Letter to Lord Ashburton (Aug. 6, 1842), reprinted in Destruction of the "Caroline," 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 409-14 (1906). The facts of the Caroline Case are as follows: during an uprising against British rule in Upper Canada in 1837, a British officer authorized an armed band of irregular forces to cross into the U.S. to destroy a vessel, the Caroline, then moored in port, by sending it over the Niagara Falls. From the available information it appeared the Caroline was to be used by Americans to provide arms and supplies to the Canadian insurgents, and the British Government characterized the destruction of the Caroline, in the context of diplomatic correspondence concerning the criminal trial of a captured British national, as an act of ASD. Diplomatic correspondence between Britain and the U.S. resolved the dispute and provided authoritative expressions in support of the qualified right of states to engage in ASD. *See* 1 ROBERT PHILMORE, COMMENTARIES UPON INTERNATIONAL LAW 189 (1854) (offering contemporaneous support for the doctrine of ASD as articulated in the Caroline Case). For a discussion of the Caroline Case, *see* Thomas Graham, *National Self-Defense, International Law, and Weapons of Mass Destruction*, 1 CHI. J. INT'L L. 1, 6-7 (2003).

[64] *See* Walker, *supra* note_, at 342-43 (noting that 14 of the parties to the Kellogg-Briand Pact signed a statement of authoritative interpretation of the Pact stating that the Pact did not affect their "inalienable" right of self-defense, to include the right to ASD).

[65] *See* International Military Tribunal, Judgment and Sentences (Oct. 1, 1946), 1 TRIALS MAJ. WAR CRIM 208, 218-22, reprinted in 41 AM. J. INT'L L. 172, 205-07 (1947) ("Preventative action in foreign territory is justified only in the case of an instant and overwhelming necessity for self-defense, leaving no choice of means and no moment for deliberation."); *id*. (holding that on the facts the German invasions of Denmark and Norway did not meet these threshhold requirements).

[66] The International Military Tribunal for the Far East restated the Caroline Case in approving the exercise of ASD by the Netherlands in response to an impeding Japanese attack upon its possessions in the South Pacific. See United States v. Araki, Judgment of the International Military Tribunal for the Far East (Nov. 4-12, 1948), reprinted in 1 THE TOKYO JUDGMENT 382 (B.V.A. Roling & C.F. Ruter eds. 1977) ("The fact that the Netherlands . . . fully apprised of the imminence of the attack . . . in self-defense declared war against Japan . . . cannot change that war from a war of aggression [by] Japan into something other than that.").

[67] To the requirement of imminence, some commentators add the requirement that the threat be of sufficient magnitude as to justify the resort to ASD on the theory that lesser threats can be managed without the resort to force that carries with it the prospect of being adjudged to be in violation of the general proscription on the use of force. Addicott, *supra* note_, at 778. Moreover, the exercise of ASD, as well as the use of force generally, is subject to the requirement of proportionality, which provides that an injury should be requited reciprocally but not with a greater injury and that military force not be employed to cause damage "excessive in relation to the concrete and direct military advantage anticipated." HENRY SEDGWICK, ELEMENTS OF POLITICS 254 (1891). The requirement that a state, prior to exercising ASD, exhaust peaceful remedies is a customary international legal duty that has found a place in the Charter. *See* UN Charter, supra note_, at Art. 33 (requiring states to first seek peaceful settlement of disputes).

For restrictivists,[68] ASD, despite its pedigree, is "fertile ground for torturing the self-defense concept"[69] and a dangerous warrant for manipulative, self-serving states to engage in prima facie illegal aggression while cloaking their actions under the guise of ASD and claiming legal legitimacy.[70] Analysis of the legitimacy of an act of ASD requires replacing the objectively verifiable prerequisite of an "armed attack" under Article 51 with the subjective perception of a "threat" of such an attack as perceived by the state believing itself a target, and thus determination of whether a state has demonstrated imminence before engaging in ASD lends itself to *post hoc* judgments of an infinite number of potential scenarios spanning a continuum from the most innocuous of putatively civilian acts, including building roads and performing scientific research, to the most threatening, including the overt marshaling of thousands of combat troops in offensive dispositions along a contested border. Establishing the necessity of ASD in response to a pattern of isolated incidents over a period of time is an equally subjective task susceptible to multiple determinations and without empirical standards to guide judgment.[71] History is replete with examples of aggression masquerading as ASD,[72] including the Japanese invasion of Manchuria in 1931[73] and the German invasion of Poland in 1939,[74] and by simply recharacterizing their actions as ASD rather than aggression dedicated to territorial revanchism or fulfillment of religious obligations, self-interested states such as China, North Korea, Pakistan, or members of the Arab League, restrictivists warn, might

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[68] A number of commentators hew to the restrictivist position and reject the post-Charter viability of the customary international law doctrine of ASD as incompatible with the regime regulating the resort to armed conflict established by the Charter. *See, e.g*., YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 159-85 (3d ed. 2001); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 8-10, 121-22 (1995); ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 32 (1987); LOUIS HENKIN, HOW NATIONS BEHAVE 141-44 (2d ed. 1979); AHMED M. RIFAAT, INTERNATIONAL AGGRESSION 126 (1974); PHILLIP JESSUP, A MODERN LAW OF NATIONS 166-67 (3d ed. 1968); J. KUNZ, THE CHANGING LAW OF NATIONS 571- 72 (1968); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 257-61, 273-79, 366-67 (1963); 2 LASSA OPPENHEIM, INTERNATIONAL LAW 156 (Hersch Lauterpacht ed., 7th ed. 1952); H. KELSEN, THE LAW OF THE UNITED NATIONS 797-98 (1950); R. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in LAW AND CIVIL WAR IN THE MODERN WORLD 229, 244 (J. Moore ed. 1974);Tom Farer, *Law and Wars*, in III THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: CONFLICT MANAGEMENT 30, 36-37 (C. Black & R. Falk eds. 1971); Jules Lobel, *The Use of Force to Prevent Terrorist Attacks*, 24 YALE J. INT'L L. 537, 541 (1999); Robert W. Tucker, Reprisals and Self-Defense: The Customary Law, 66 AM. J. INT'L L. 586 (1972); Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 560 (1963); Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947). At least one restrictivist approves, on policy grounds, of ASD but rejects the doctrine as incompatible with legal obligations assumed under the Charter. *See* Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 Harv J L & Pub Poly 539, 539 (2002) (suggesting that although ASD can be a sound policy argument "it would plainly violate Article 51 of the United Nations Charter").

[69] Clemmons & Brown, *supra* note_, at 228.

[70] *See* Derek Bowett, *Reprisals Involving Recourse to Armed Force, in International Law: A Contemporary Perspective* 394-410 (Richard A. Falk eds. 1985) (developing arguments in support of this concern).

[71] Paust, *supra* note_, at 732.

[72] *See* Clemmons & Brown, *supra* note_, at 221-22 (chronicling the history of the "over-zealous" application of ASD, including in the War of Spanish Succession (1700) and the Anglo-Franco-Danish Conflict (1807)); *id*. at 235 (characterizing Indo-Pakistani wars as instances of illegitimate exercises of ASD); John-Alex Romano, *Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity*, GEORGETOWN L.J. 1023, 1046-48 (1999) (noting the rejection by the International Law Commission of the German claim that its invasion of Luxembourg and Belgium in 1914 was an act of ASD).

[73] *See* League of Nations O.J. Spec. Supp. 177, V1, at 42 (1933) (rejecting the Japanese claim of ASD in view of facts which demonstrated the absence of a threat from China without prejudicing the general availability of an ASD defense).

[74] The Nuremburg Tribunal concluded that the German invasion of Poland was not predicated upon " an intention formed in good faith and honesty of conviction to protect one's safety, that safety being immediately threatened," in convicting German defendants of conspiracy to launch an aggressive war against Poland. II TRIALS WAR CRIM. 207 (1946). For restrictivists, the essential purpose of Article 51 was to preclude "bogus claims to be acting in self-defense" such as the German invasion of Poland. Franck, *supra* note_, at 620.

claim the legal entitlement to attack, respectively, Taiwan, South Korea, India, and Israel.[75] Moreover, taken to its logical extreme the doctrine of ASD might be interpreted as authorizing a state under the leadership of a paranoid decisionmaker to attack the entire world on the false suspicion of threats emanating from every corner.[76]

In short, restrictivists champion the Charter as a rigidly positivist legal framework in which ASD is an unwelcome and even repugnant legal anachronism that blurs the distinction between aggression and self-defense by substituting a highly subjective imminence standard in place of an objective requirement of an antecedent armed attack; all but a handful of restrictivists conclude that to read Article 51 as anything other than a clear and deliberate measure intended by the framers to override and extinguish the customary law as an independent source of an inherent right of self-defense and impose a restrictive obligation upon states-parties would jeopardize the legal project of restraining state discretion in regard to the resort to armed force.[77] Accordingly, for restrictivists, Article 51 is unambiguous in its requirement that an armed attack occur prior to the lawful exercise of self-defense, and "unless troops, planes, or ships cross an international border to commence an attack,"[78] the right of ASD simply does not arise.[79] Moreover, any application of military force undertaken absent an armed attack is *ipso facto* an aggressive act in violation of the plain terms of Article 2(4) unless authorized by the Security Council;[80] in theory, a state engaging in ASD without such authorization could itself become branded an outlaw and the target of

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[75] *See* Harold Hongju Koh, *On American Exceptionalism*, STAN. L. REV. 1479, 1516 (2003) (presenting examples of disputes ripe for exploitation through false claims of ASD as the legal justification for aggression). In the words of French President Jacques Chirac,

> As soon as one nation claims the right to take preventive action, other countries will naturally do the same . . . What would you say in the entirely hypothetical even that China wanted to take pre-emptive action against Taiwan, saying that Taiwan was a threat to it? . . . Or what if India decided to take preventive action against Pakistan, or vice versa?

Elaine Sciolino, *French Leader Offers Formula to Tackle Iraq*, N.Y. TIMES, Sept. 9, 2002, at A1

[76] The proper exercise of ASD requires far more than the judgment that another state might eventually harbor ill-will toward another state, or that a state may by waxing in power: capacity, coupled with direct and specific intent to make immediate use of that capacity by aggressive action, are necessary elements which must be proven. *See* William H. Taft IV & Todd F. Buchwald, Preemption, Iraq, and International Law, 97 AM. J. INT'L L. 557, 557 (2003) ("One state may not strike another merely because the second might someday develop an ability and desire to attack it."). Put somewhat differently, "pure capability is not a sufficient casus belli . . . And pure capability with a smarmy attitude is not casus belli." Ruth Wedgwood, Outlook: Six Degrees of Preemption, WASH. POST, Sept. 29, 2002, at B2.

[77] *See* John Quigley, *A Weak Defense of Anticipatory Self-Defense*, 10 TEMP. INT'L & COMP. L.J. 255, 257 (1996) ("In a world hard pressed to stop aggressive war, it makes little sense to open a loophole large enough to accommodate a tank division."); *see also* Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense,* at 15 (2002), available at http://www.asil.org/taskforce/oconnell.pdf ("The UN Charter was adopted for the very purpose of creating a far wider prohibition on force than existed under treaty or custom in 1945[.]"). A handful of restrictivists may be amenable to the conclusion that a vestigial right under customary international law entitling states to resort to ASD is available in those highly unusual circumstances in which a threat is "nearly certain to materialize," the threat is of a very high order of magnitude, and nonforceful options are certain to fail. Schmitt, *supra* note_, at 530. However, the overwhelming majority of restrictivists read Article 51 as having extinguished any other source of an inherent right to self-defense apart from that stated and qualified by Article 51. *See, e.g.,* J.B. BRIERLY, THE LAW OF NATIONS 417 (H. Waldock ed., 6th ed. 1963); BROWNLIE, supra note_, at 271-72; JESSUP, supra note_, at 166-68; HANS KELSEN, RECENT TRENDS IN THE LAW OF NATIONS 913-14 (1961); Arthur L. Goodhart, The North Atlantic Treaty of 1949, 79 RECUIEL DES COURS 187, 192 (1951).

[78] Condron, *supra* note_, at 132.

[79] *See* HENKIN, supra note_, at 295 ("[T]he Charter intended to permit unilateral use of force only in a very narrow and clear circumstance, in self-defense *if an armed attack occurs*.") (emphasis added).

[80] The International Court of Justice, in a much-criticized and –cited opinion, offered strong support for the restrictivist position, holding that the legitimacy of a claim to self-defense rests upon and is "subject to the State concerned having been the victim of armed attack[,]" thus seeming to restrictivists to categorically reject the doctrine of ASD as incompatible with the UN Charter, and in particular Article 2(4). *See* Case Concerning Military and Paramilitary Activities in and against Nicaragua, (Nicar. v. U.S.), 1986 I.C.J. 193-95 (1986).

Security Council action under Article 42.

2. Pragmatists: The Charter Accommodates Custom and Necessity

In stark contrast, pragmatists[81] assert that, as an essential constituent of sovereignty, the traditional right of states to self-defense is to be presumed to have survived the Charter in the absence of compelling evidence to the contrary,[82] and that available evidence indicates the intent that the Charter co-exist with, rather than trump, custom as an independent source of rights and duties under the international law pertinent to the use of force.[83] Accordingly, ASD, a subset of the inherent right of self-defense that

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[81] A number of commentators espouse views that can collectively be termed the "pragmatist" position which asserts that the post-Charter viability of the customary international law doctrine of ASD was intended by the framers of the Charter and is necessary in a world lacking a central executive with the power to sanction aggressors. *See, e.g*., BOWETT, *supra* note_, at 187-93 (1958); II L. OPPENHEIM, INTERNATIONAL LAW 156 (1958); MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 232-41 (1961); J. BRIERLY, THE LAW OF NATIONS 418-21 (6th ed. 1963); ANN VAN WYNEN THOMAS & A.J. THOMAS, THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW 127 (1972); JULIUS STONE, OF LAW AND NATIONS: BETWEEN POWER POLITICS AND HUMAN HOPES 3 (1974); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 152-55 (1991); STANIMAR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 296 (1996); TIMOTHY L.H. McCORMACK, SELF- DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR 122-24, 238-39, 253-84, 302 (1996); Banks & Raven-Hansen, *supra* note_, at 725; Abraham D. Sofaer, *Iraq and International Law*, WALL ST. J., Jan. 31, 2003, at A10Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization,* 5 WASH. U. J.L. & POL'Y 51, 68 (2001); Ruth Wedgwood, *Responding to Terrorism: The Strikes Again bin Laden*, 24 YALE J. INT'L L. 559, 566 (1999); Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1071, 1080-83 (1998); David K. Linnan, *Self-Defense, Necessity and U.N. Collective Security: United States and Other Views*, 1991 DUKE J. COMP. & INT'L L. 57, 65- 84, 122; Rein Mullerson & David J. Scheffer, Legal Regulation of the Use of Force, in BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA 93, 109-14 (Lori Fisler Damrosch et al. eds., 1991); John F. Murphy, Commentary on Intervention to Combat Terrorism and Drug Trafficking, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 241 (Lori Fisler Damrosch & David J. Scheffer eds., 1991); W. Michael Reisman, Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 26, 44-47 (Lori Fisler Damrosch & David J. Scheffer eds., 1991); Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89. 95 (1989); McDougal & Reisman at 979, 988-91; Louis Rene Beres, *After the Scud Attacks: Israel,, "Palestine," and Anticipatory Self-Defense*, 6 EMORY INT'L L. REV. 71, 75-77 (1992); William V. O'Brien, *Reprisals, Deterrence and Self Defense in Counterterror Operations*, 30 VA. J. INT'L L. 421, 478 (1990) (supporting right of preemptive self-defense). George Bunn, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?,* 39 NAV. WAR C. REV. 69-70 (May-June 1986); W. Michael Reisman, Criteria for the Lawful Use of Force in International Law, 10 YALE. J. INT'L L. 279, 279-80 (1985); Oscar Schacter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634 (1984); Claude Humphrey Meredith Waldock, *The Regulation of Force by Individual States in International Law*, 81 R.C.A.D.I. 451, 496-99 (1952).

[82] *See* McDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 231-32, 236 (1961) ("[ASD] has long been honored . . . as one of the fundamental 'rights' of sovereign states . . .[and] limitations or derogations from sovereign competence are not lightly to be assumed."); D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 184-85 (1958) (same).

[83] The *travaux preparatoires* of the Charter is silent with regard to ASD, and some scholars read into this silence an intent to "eliminate the preexisting right to act in anticipation." HENKIN, *supra* note_, at 141; *see also* Zedalis, *supra* note_, at 100-01 ("Had Article 51's reference to self-defense "if an armed attack occurs" not been intended to eliminate the preexisting right to act in anticipation, some effort to have the travaux capture that fundamental point would have seemed natural. The failure of the travaux to do so, therefore, is somewhat suggestive[.]"). However, many scholars are doubtful that the travaux supports the restrictivist argument. *See, e.g*., Oscar Schachter, The Right of States to Use Armed Force, 82 MICH. L. REV. 1620, 1634 (1984) ("it is not clear that article 51 was intended to eliminate the customary law right of self- defense"). Pragmatists interpret any indeterminacy in Article 51 to mean that the inclusion in Article 51 of the words "nothing . . . shall impair the inherent right" evinces a clear intent not to restrict the pre-Charter customary legal rights of self-defense, to include ASD. *See* Summary Report of Fourth Meeting of Committee, Doc. 885, I/1/34, 6 U.N.C.I.O.Docs. 387, 400 (1945) (stating that under the Charter the customary law of "self-defense remains admitted and unimpaired"); Clemmons & Brown, *supra* note_, at 234 ("to the extent that Article 51 . . . provide[s] that the inherent right of self-defense is not impaired, the anticipatory right should stand, as it was customary law before the Charter existed."). Pragmatists differ further from restrictivists in regard to the language relevant to the analysis, insisting that the French language version of article 51, which uses the phrase "aggression armée"—armed aggression—instead of "armed attack," was intended to accord states a margin of appreciation to permit them to respond to armed aggression in the form of threats even in the absence of an armed attack and as such is a better interpretation of the framers' intent. *See* W. Thomas Mallison & Sally V. Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?,* 15 VAND.J.TRANSNAT'L L. 417, 420-21 (1982) (arguing that French text, which is equally authentic as is the English version, more accurately reflects the negotiating history and the intent of the parties). For pragmatists, the travaux preparatoires clearly reveals that ASD survives the Charter as an independent source of legal authority for self-defense in the face

antedates the Charter, coexists easily with the text of Article 51, a provision the "plain and natural meaning" of which neither compels, nor was it intended to compel, the cramped restrictivist conclusion that self-defense is permitted under international law "if, *and only if*, an armed attack occurs."[84] Thus, to restrictivist claims that the resort to ASD without the pre-authorization of the Security Council constitutes aggression, pragmatists counter with the assertion that because the inherent right to self-defense, to include ASD, is a peremptory norm from which no derogation is permitted,[85] the all-too-frequent failure of the Security Council to take effective measures to thwart a would-be aggressor does not preclude or place outside the law the prudent exercise of ASD, particularly when the survival of the threatened state is at risk.[86] In other words, nothing in the language of Article 51, its drafting history, or its relation to the object and purpose of the UN Charter compels the absurd conclusion that the framers intended to abolish the customary right of states to ASD "when [their] survival is at stake."[87]

Moreover, pragmatists argue, not only is ASD compatible with the Charter, but ongoing processes of technological development, proliferation of WMD, and radicalization of international relations have so enhanced the magnitude of the threats to civilian populations and the speed with which enemies can attack that the *Caroline* standard for "imminence," developed in a pre-WMD era, is no longer sufficient to simultaneously restrain states while guaranteeing their survival.[88] For pragmatists, the

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of threatened attack. *See* Graham, supra note_, at 5-6 (summarizing the restrictivist position on the survival of the customary law of self-defense in the Charter era); Beth M. Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, N.Y.U.L. REV. 187, 202 (1984) (summarizing this position as of 1984); McCORMACK, *supra* note_, at 184 (discerning a clear intent to preserve the customary doctrine of ASD).

[84] *See* Nicaragua v. U.S., 1986 I.C.J. Rep. 347-48 (June 27) (Schwebel, J., dissenting) ("I wish, ex abundanti cautela, to make clear that, for my part, I do not agree with a construction of the United Nations Charter which would read Article 51 as if it were worded: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if, and only if, an armed attack occurs . . .' I do not agree that the terms or intent of Article 51 eliminate the right of self-defense under customary international law, or confine its entire scope to the express terms of Article 51.").

[85] Scholars diverge in their opinions as to precisely which norms can be considered to be peremptory norms in international law. *See* Mark Weisburd*, The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1 (1995). However, at least two commentators conclude that the right to self-defense has attained the status of norm of jus cogens. Carin Kahgan, *Jus Cogens and the Inherent Right to Self-Defense*, 3 I.L.S.A. J. INT'L & COMP. L. 767, 827 (1997); Louis Rene Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321, 322 n.3 (1991). If the right to self-defense is a norm of jus cogens, it trumps treaty-based norms, including those created or reflected by the UN Charter, in the event of conflict. Walker, *supra* note_, at 355 n.212.

[86] Timothy Kearley, *Raising the Caroline*, WISC. INT'L L.J. 325, 346 (1999) (challenging the notion that Security Council inactivity in respect to threatened aggression renders an act of ASD in the face of that aggression an illegal act); see also Taft & Buchwald, *supra* note_, at 557 ("An otherwise lawful use of force does not become unlawful because it can be characterized as preemption.").

[87] *See* Legality of the Threat or use of Nuclear Weapons, 1996 I.C.J. 226, 263 (Advisory Opinion of July 8) (opining that a state may resort to any means, including nuclear weapons, when its survival is threatened, thereby implying the inherent right of states to survival).

[88] In regard to the determination of imminence, pragmatists assert that fundamental changes in political and military circumstances that render a legal test inappropos to a contemporary threat environment demand that the test be revised to reflect current realities. *See* McDougal, *supra* note_, at 598 (contending, in regard to the proliferation of nuclear weapons in the 1960s and the application of the *Caroline* test to that threat environment, that a "test formulated in the previous century for a controversy between two friendly states is hardly relevant to contemporary controversies, involving high expectations of violence, between nuclear-armed protagonists."). Professor McDougal noted further that

> [U]nder the hard conditions of the contemporary technology of destruction, which makes possible the complete obliteration of states with still incredible speed from still incredible distances, the principle of effectiveness, requiring that agreements be interpreted in accordance with the major purposes and demands projected by the parties, could scarcely be served by requiring states confronted with the necessity for defense to assume the posture of 'sitting ducks.' Any such interpretation could only make a mockery, both in its acceptability to states and in its potential application, of the Charter's major purpose of minimizing unauthorized coercion and violence across state lines.

Id. at 600-01.

conceivable acts of aggression against which states were historically entitled to defend included not merely transborder attacks but also military preparations undertaken as preludes to or as threats of an attack,[89] and to read the Charter hypertechnically to require that a state assume the posture of a "sitting duck" and submit to potentially decisive first strike, thereby risking its very survival, would "completely alter customary law as it existed at the birth of the UN"[90] and "protect the aggressor's right to the first stroke,"[91] a conclusion utterly bereft of "moral, political, or even legal sense."[92] The argument that the

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More recent pragmatists observe that technological transformations not foreseeable at the time of the drafting of the UN Charter have enabled methods of intelligence collection, such as satellite intelligence and communications intercepts, that yield proof of the hostile intent of adversaries long before an actual armed attack and should thus permit states to act in self-defense in anticipation of such attacks. *See, e.g.*, Michael Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WKLY STAND., Jan. 28, 2002, at 24, 26.

[89] Pragmatists take a far more expansive view than do restrictivists on the question of precisely what constitutes aggression against which states are entitled to exercise their inherent right of self-defense. *See* C. H. M. Waldock, The Regulation of the Use of Force by Individual States in International Law, 81 RECUEIL DES COURS 451, 498 (1952) ("Where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack maybe said to have begun to occur, though it has not passed the frontier."); Myres S. McDougal, *The Soviet-Cuban Quarantine and Self Defense*, 57 AM. J. INT'L L. 597, 598 (1963) (stating that conditions giving rise to a finding of aggression are not limited to an "actual armed attack" but include "imminence of attack of such high degree as to preclude effective resport by the intended victim to non-violent modalities of response[.]"); Richard G. Maxson, *Nature's Eldest Law: A Survey of a Nation's Right to Act in Self-Defense*, PARAMETERS 55, 65-66 (Autumn 1995) (requiring only "objective indicators," such as troop buildups and increased alert levels, to satisfy the imminence requirement); Alford, *The Legality of American Military Involvement in Viet Nam: A Broader Perspective*, 75 Yale L.J. 1109, 1113 (1966) (positing that the definition of "armed attack" should comprehend preparatory stages rather than a solitary event); Polebaum, *supra* note_, at 203 ("The Charter should not be read to require one nation to permit another the benefits of military armament, surprise attack, and offensive advantage, against which no defense may lie."). As Colonel Roberts further explains,

> Aggression does not usually begin, and injury is not usually incurred when the first weapons are fired. The uses of force are usually but one phase of a competition of interest and power. As Clauswitz observed, the aggressor is often peace-loving, and it is his resistant victim who causes war to erupt: "[a] conqueror is always a lover of peace (as Bonaparte always asserted of himself); he would like to make his entry into our state unopposed; in order to prevent this, we must choose war."

Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT'L L. & POL'Y 483, 517 (1999) (citation omitted).

[90] Romano, *supra* note_, at 1035-36.

[91] C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law,* 81 RECUEIL DES COURS 455, 498 (1952); *see also id*. "[I]t would be a travesty of the purposes of the Charter to compel a defending State to allow its assailant to deliver the first, and perhaps fatal, blow[.]"); Christopher Clarke Posteraro, *Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism*, FLA. J. INT'L L. 151, 184-85 (2002) (extrapolating the logic of a prohibition on ASD into a blanket of territorial inviolability for states that harbor the "most blatant preparation for an assault upon another state's independence[.]").

[92] JULIUS STONE, AGGRESSION AND WORLD ORDER 101 (1958). Professor Stone asks the following rhetorical questions to underscore his point that a restrictivist interpretation of the Charter that abolishes the customary doctrine of ASD is inconsistent with the requirements of law, politics, and morality:

> Suppose military intelligence at the Pentagon received indisputable evidence that a hostile State was poised to launch intercontinental ballistic missiles, at a fixed zero hour only 24 hours ahead, against New York, Boston and Washington, would it be an aggressor under the Charter if it refused to wait until those cities had received the missiles before it reacted by the use of force? . . .[I]s it bound by law to wait for its own destruction?

Id. at Art. 99.

Some restrictivists concede that a coherent theory of legal regulation of force in international relations must make room for ASD in some very limited circumstances. *See, e.g*., YORAM DINSTEIN, WAR, AGGRESSION, AND SELF- DEFENCE 172-75 (3d ed. 2001) (arguing that the U.S. could legally have attacked the Japanese fleet en route to Pearl Harbor on the ground the U.S. had "clear and convincing" intelligence that the Japanese were committed to attack); MICHAEL WALZER, JUST AND UNJUST WARS 81 (3d ed. 2000) (allowing the permissibility of ASD where the enemy demonstrates "a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk."); WOLFGANG FRIEDMANN, THE THREAT OF TOTAL DESTRUCTION AND SELF-DEFENSE 259-60 (1964) ("[I]n the absence of effective international machinery the right of self-defence must . . . be extended to the defence against a clearly imminent aggression, despite the apparently contrary language of Article 51[.]"). However, not all restrictivists are as tolerant of even a slight exception under such circumstances, and thus even before the conclusion of the UN Charter, representatives to the San Francisco Conference questioned whether the argument that the Charter could be construed to abolish customary rights of self-defense, including ASD, was politically and legally defensible. *See, e.g*., U.N. Doc.A/2211, paras. 392-93 (indicating questioning of the delegates by Representative Maktos (U.S.) and van

definition of imminence must be pegged to the swiftness of delivery and destructiveness of weapons technology is not new: as President John F. Kennedy noted in 1962,

> Neither the United States of America nor the world community of nations can tolerate deliberate deception and offensive threats on the part of any nation, large or small. We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.[93]

However, revolutions in political and military affairs over the course of the last forty years have fundamentally transformed the nature of armed conflict at a pace beyond the demonstrated capacity of the law to adapt, and the introduction of WMD, ballistic missiles, and information warfare have contracted the battlespace, reduced the time necessary to deliver deadly payloads, and greatly multiplied the costs of miscalculation;[94] for pragmatists, the emergence of far more elusive and deadly threats posed by the intersection of international terrorism and WMD has rendered restrictive standards for determining imminence irrational and even dangerous.[95] Some pragmatists go so far as to suggest that technological transformations have drawn whole categories of threats to the verge of imminence,[96] thereby

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Glabbeke (Belgium) as to whether the U.S., if it had received prior notice of an impending Japanese attack on Pearl Harbor, would have been branded an aggressor had it engaged in ASD to destroy the Japanese forces detailed to bomb Pearl Harbor). A former jurist of the ICJ demonstrates the continued incongruity of the restrictivist position nearly sixty years later.

> [C]ommon sense cannot require one to interpret an ambiguous provision in a text in a way that requires a state passively to accept its fate before it can defend itself. And, even in the face of conventional warfare, this would also seem the only realistic interpretation of the contemporary right to self-defence . . . [T]his view accords better with State practice and with the realities of modern military conditions than with the more restrictive interpretation of Article 51[.]

ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 242 (1994).

[93] The Soviet Threat to the Americans, Address by President Kennedy, 47 DEP'T ST. BULL. 716 (1962). Sixteen years earlier the U.S. representative made an almost identical point in attaching a memorandum to the report of the U.N. Atomic Energy Commission to the Security Council that stated the U.S. position that "[i]t is . . . clear that an 'armed attack' is now something entirely different from what it was prior to the discovery of atomic weapons." The memorandum continued, noting that "[I]t would therefore seem to be both important and appropriate . . . that the treaty define 'armed attack' is [sic] a manner appropriate to atomic weapons and include in the definition not simply the actual dropping of an atomic bomb, but also certain steps in themselves preliminary to such action." The First Report of the Atomic Energy Commission to the Security Council, U.N. DCOR, 2nd Sess., Special Supp., Annex 4, at 106, U.N. Doc. 5/Supplements (1946).

[94] Pragmatists argue that determinations of imminence must evolve in parallel to transformations in military technology and the nature of the international system; standards appropriate in earlier historical eras when the marshaling and deployment of force took far more time under conditions of greater transparency and with far less threat to civilians are unsuited to the present. *See* Polebaum, *supra* note_, at 228 ("When war machines operated at a slower and more deliberate tempo and could not threaten the very existence of humanity, a standard of justifiable self-defense, requiring a nation to wait for an armed attack on its soil, was a reasonable and stabilizing rule."); Yoo, *supra* note_, at 572 (noting that the conjunction of weapons proliferation and the evolution of radical transnational terrorism has "dramatically increased the degree of potential harm[,] . . . vastly improved the capability for stealth, . . . and render[ed] threats more imminent because there is less time to prevent their launch."). The proliferation of weapons of far greater destructive capacity, coupled with the structural complexities in identifying, locating, and deterring suicidal enemies that take cover deep within the civilian infrastructure of sponsoring states and target states alike, has spawned the greatest threat to international peace and security in history, and in defending against this threat, pragmatists rail against the application of antiquated legal standards wholly incompatible with the nature and intensity of the threat.

[95] See, e.g., Michael Glennon, The Fog of War: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter, 25 HARV. J.L. & PUB. POL'Y 539, 552 (suggesting that critics of ASD are "fight[ing] a losing battle with common sense" and that "no rational decision-maker" can be expected to refrain from ASD when an attack is imminent).

[96] *See* McDougal, *supra* note_, at 601 (noting, four decades previously, that in light of advances in modern weaponry and the speed of delivery the difference between attack and imminent attack may now be obsolete). Pragmatists assert that by burrowing deeply into the civilian populations of the states they seek to target only to quickly become operational and attack without warning, terrorists have transformed the practical definition of imminence beyond the capacity of antiquated legal definitions to stretch. Yoo, *supra* note_, at 572.

authoritatively resolving in the affirmative the debate over whether ASD has a place in the Charter era;[97] others simply demand that in an "age of instant deliverables"[98] the interpretation of the Charter keep pace with technological developments and that far more relaxed standards for determining when ASD may be lawfully exercised be developed,[99] particularly in regard to the intersection of terrorists and WMD.[100] Accordingly, pragmatists have offered a range of proposals to channel the application of ASD to the contemporary threat environment consistent with their view of lawfulness, ranging from the most restrictive, requiring that a state be prepared to demonstrate, beyond a reasonable doubt, that it exhausted diplomatic remedies[101] and took action only during the "last possible window of opportunity in the face of an attack that was almost certainly going to occur"[102] or that the resort to ASD was unlawful yet excusable on the grounds of extreme necessity[103] or duress,[104] to more permissive proposals that dispense

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[97] *See* Walker, *supra* note_, at 522-23 (concluding that, save for "those who may not be familiar with new weapons technology and the WMD threat[,]" the "debate over whether [ASD] is or is not permitted under international law . . . has become largely moot[.]").

[98] Ruth Wedgwood, *Strike at Saddam Now*, NAT'L L. J. (Oct. 28, 2002), A16.

[99] *See, e.g.*, Anthony Clark Arend, *International Law and Rogue States: The Failure of the Charter Framework*, 36 NEW ENG. L. REV. 735, 750-53 (arguing that transformations in technology and strategy have overtaken Article 51 and necessitated relaxed legal rules to govern application of ASD).

[100] *See* Roberts, *supra* note_, *at* 485 (arguing that when rogue states or terrorist groups possessed of WMD directly threaten the survival of another state, the threatened state has the right to engage in ASD "to either deter acquisition plans, eliminate acquisition programs or destroy illicit WMD sites[.]"); Graham, supra note_, at 9 (warning that the proliferation of WMD to terrorists "make[s] waiting for an actual armed attack exceedingly dangerous[.]"); El-Ayouty at 492 (stating that "in the case of universal and catastrophic terrorism . . . striking at the terrorists does not wait until a definite nexus is established between the terrorists and their actions."); Louis Rene Beres, *On Assassination as Anticipatory Self-Defense: Is it Permissible?*, 70 U. DETROIT MERCY L. REV. 13, 22 (1992) (warning that in an era of terrorism and WMD "it may be a form of suicide for a state to wait for an actual act of aggression to occur.").

[101] Satisfaction of the exhaustion requirement generally requires that states attempt direct negotiations with the alleged aggressor state and make appeals to the Security Council. Polebaum, *supra* note_, at 198-99.

[102] Schmitt, *supra* note_, at 535, 547. The most restrictive of the proposals for evaluating the lawfulness of ASD deviate very little from the *Caroline* requirement of imminence. *See, e.g.*, Beres, *supra* note_, at 329 n.33 (maintaining "that the danger posed . . . [be] instant and overwhelming" and "involve the threat of immediate and catastrophic (e.g., nuclear/biological/chemical) attack."). To this standard some would add the requirement, imported perhaps from Christian Just War Doctrine, that the harm to be prevented be greater than that occasioned by the application of ASD, a requirement clearly met in cases involving the intersection of terrorism and WMD. *See, e.g.*, Yoo, *supra* note_, at 575 (creating a "reformulated" standard incorporating this requirement). The most restrictive of the pragmatists would hold states to an evidentiary standard identical to that associated with the common-law criminal justice system and require states exercising rights under ASD to prove, beyond a reasonable doubt, the factual predicate underlying their claims by post hoc presentations of the intelligence information available at the time of the decision to engage in ASD. *See* Beres, *supra* note_, at 23 n.41 (insisting that the "beyond a reasonable doubt" standard be maintained to protect against abuse of ASD); Schmitt, *supra* note_, at 531 (warning of the risk that a lesser standard will promote aggression). Some pragmatists would add still further preconditions, including the publication of the threat in such a manner as to enhance the prospects for diplomatic resolution. *See* Polebaum, *supra* note_, at 211-13 (requiring publicization "so that the threatening nation's intent can be debated in international for a and pressure exerted to defuse . . . [the] crisis.").

[103] The domestic criminal law systems of many common-law states permit a "necessity" defense in which the violent self-help is immunized under narrow circumstances where there is no morally justifiable or reasonable alternative. *See* Martin E. Veinsreideris, *The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women*, PENN. L. REV. 613, 621-23 (2000) (discussing basis for and widespread availability of the necessity defense). A "state of necessity" under international law is analogous, denoting circumstances in which the "only means for the State to safeguard an essential interest against a grave and imminent peril" is to adopt conduct "not in conformity with an international obligation of that state." United Nations International Law Commission, Draft Articles on State Responsibility, UN Doc. A/CN.4/L.574, at Art. 33, State of Necessity. The most restrictive pragmatists would allow states arguably faced with the choice between elimination or the prudent exercise of ASD to elect preemptive force out of "necessity," and the conduct of states electing ASD out of necessity, even if technically unlawful, would be effectively "pardoned" and fully immunized under international law. Romano, *supra* note_, at 1045-46 (proposing a necessity-based standard that would "preclud[e] the wrongfulness" of ASD). Some pragmatists characterized the necessity standard as, in effect, not a guide for judging the lawfulness of an application of ASD but rather a defense against what would otherwise be unlawful conduct that carries with it the benefit of preserving what they claim is a general prohibition against ASD that gives way only under circumstances of genuine peril such as is created by possession of WMD by terrorists, actors whose conduct, in comparison to defending states, is demonstrably more culpable. *See* Franck, *supra* note_, at 13 (allowing for the "flexible application of existing rules, in accordance with . . . contextual exigencies and with narrow exceptions for situations of extreme necessity.").

with imminence considerations to require instead that a state prove (by some objective evidence) the exhaustion of peaceful remedies and the existence of a "coherent" threat,[105] to the most permissive, which would legitimate the resort to ASD under a forgiving "reasonable state standard" that would inquire solely whether, viewing all the circumstances from the perspective of and in the light most favorable the defending state could be considered, on the basis of available information, to have had "no adequate alternative."[106] This reasonable state standard does not establish an *a priori* probability threshold to define the imminence of enemy threats or impose specific criteria to guide post-hoc lawfulness evaluations but rather accords states a broad margin of appreciation[107] to determine and apply those measures that will best harmonize their rights to self-defend with the faithful performance of their legal obligations. Significantly, mistakes, so long as they can be construed as reasonable, do not *ipso facto* render the resort to ASD unlawful under this most permissive standard,[108] which served as the basis for

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[104] Pragmatists offering a duress-based argument do not contend that ASD is lawful but instead would permit a defending state to engage in an otherwise prohibited use of force when there is a "clear and present danger" and moral choice—whether to engage in ASD or to accept destruction—is not in fact possible. DINSTEIN, *supra* note_, at 141-42.

[105] Mark E. Newcomb*, Non-Proliferation, Self-Defense, and the Korean Crisis*, 27 VAND. J. TRANSNAT'L L. 603, 621 (1994). Intermediate pragmatists develop a series of categories of evidence that states must assemble to prove the objective and subjective merits of a resort to ASD. *See* Graham, *supra* note_, at 8-9 (requiring a demonstration of threatening alterations in military posture, "past conduct or hostile declarations" that "reasonably lead to a conclusion that an attack is probable," the availability to the enemy of and capacity to use specific weapons systems, and exhaustion of diplomatic solutions); Maxon, *supra* note_, at 66 (stressing that the "past conduct or hostile declarations" of the alleged aggressor are important to a determination of imminence and thus the lawfulness of an exercise of ASD). Some pragmatists would tie the lawfulness of an exercise of ASD to an evaluation of the capacity of a targeted state to defend against a particular threat by other means, while granting that terrorists threats, by virtue of the difficulty in locating and targeting loose bands of individuals in civilian midst, may not be susceptible to reduction by any means other than ASD. Schmitt, *supra* note_, at 534. Still others in the intermediate category would require satisfaction of additional steps as conditions precedent to the lawful exercise of ASD, including a declaratory statement that a state in possession of WMD constitutes a concrete "threat to the vital national security interests of the state, regional security, and international peace and security and a formal "finding that further delay in undertaking the preventive strike will . . . unreasonably increase the possibility of harm to its civilian population." Roberts, *supra* note_, at 519-21.

[106] *See, e.g.,* Louis J. Capezzuto, *Preemptive Strikes Against Nuclear Terrorists and Their Sponsors: A Reasonable Solution*, N.Y.L. SCH. J.INT'L & COMP. L. 375, 393-96 (1993) (advocating substitution of imminence requirement in cases of ASD with a reasonableness standard); T. Mallison, *Limited Naval Blockade or Quarantine Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 GEO. WASH. L. REV. 335, 359-60 (1962) ("[A] target state is authorized to [undertake ASD] when it *reasonably expects* that it must use the military instrument of national policy to preserve its physical integrity and continued existence[.]") (emphasis added). Several commentators would admit prior bad acts and statements of the threatening state to substantiate, post hoc, the reasonableness of the exercise of ASD. *See, e.g.*, Polebaum, supra note_, at 212-13 (considering that "past acts may indicate whether the threatening nation has shown a sufficient disregard for the threatened nation's integrity and civilian life to persuade it to take the . . . threats seriously.").

[107] The doctrine of "margin of appreciation," developed in the European Union, directs courts to accord a measure of deference to member-states in determining whether actions taken to harmonize domestic law with EU law are consistent with member-state obligations under relevant treaties. *See generally* R. ST.J. MACDONALD, THE MARGIN OF APPRECIATION IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS (1990).

[108] Under general principles of law common to the domestic systems of many states, the use of force in self-defense is justifiable even if the defender is mistaken about the necessity to act in self-defense provided the mistake is "reasonable." *See, e.g.,* AMERICAN LAW INSTITUTE, MODEL PENAL CODE §3.09(2) (1963) (deeming all acts of self-defense premised upon mistaken but sincere beliefs justified even if otherwise negligent); 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 358-59 (4th ed. 1927) (discussing availability of defense of mistake to justification of self-defense under English common law); Dolores A. Donovan & Getachew Assefa, *Homicide in Ethiopia, Human Rights, Federalism, and Legal Pluralism*, 51 AM. J. COMP. L. 505 (2003) (noting the availability of a mistake defense in cases of individual self-defense resulting in death in European and African legal systems); TIMOTHY L.H. McCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW 271 (stating that all major legal systems—"Western, Eastern European, Asian, African, Latin American"—as well as religious systems broadly recognize the individual right of self-defense). Building upon this tolerance for mistake in domestic legal systems, proponents of a permissive standard argue that the mistaken exercise of ASD, whether as the result of an overestimation of the magnitude or imminence of a threat or of the premature resort to force when diplomatic measures are later revealed to have had prospects for success, should not give rise to a finding of unlawfulness in violation of Article 2(4) under the reasonable state standard unless the defending state's actions are manifestly unreasonable. In evaluating whether the mistaken actions of the defending state are unreasonable, permissive pragmatists insist that the proper determinant is not what the facts are subsequently determined to have been but rather what the defending state believed them to have been at the time it elected to engage in ASD. DINSTEIN, *supra* note_, at 191 ("Hindsight knowledge, suggesting that—notwithstanding the well-founded contemporaneous

adjudicating the individual criminal liability of defendants at Nuremburg.[109]

Notwithstanding the sharp theoretical bifurcation on the question of its lawfulness in the abstract, ASD is almost invariably appraised in light of, and following, specific applications of the doctrine in practice; moreover, although a specific exercise of ASD is immediately opened to contestation, its legal legitimacy is often not ripe for review until long afterwards, when the defending state finally declassifies and submits the sensitive intelligence that established the factual predicate upon which its decision to act rested to public review.[110] Accordingly, a review of relevant practice is necessary to assess the state of

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appraisal of events—the situation may have been less desperate than it appeared, is immaterial[,'" as the "invocation of the right of self-defence must be weighed on the basis of the information available . . . at the moment of action, without the benefit of post factum wisdom."); Mallison, *supra* note_, at 359-60; Walker, *supra* note_, at 370-71 ("A national leader should be held accountable for what he or she . . . knew or reasonably should have known, when a decision is made to respond [with ASD.]"); Polebaum, *supra* note_, at 220 ("Whether an action is justifiably taken in self-defense . . . should be judged from the perspective of the threatened nation[.]").

[109] *See* 1 TRIALS MAJ. WAR CRIM. 208-22 (holding that the standard for determining individual criminal liability in regard to the decision to undertake ASD requires an evaluation of what the defendants knew or should have known in making the decision and that mistakes occasioned by uncertainty or inaccurate information are to be judged by a reasonableness standard). Even the prosecution recognized that mistake was an available defense. *See* 19 TRIALS WAR CRIM. 461 (1948) (individuals liable for acts claimed as exercises of ASD only where such acts were abuses of discretion or acts that "twist[ed] the right of self-defense into a weapon of predatory aggrandisement and lust" but not in cases of misapprehension of facts) (statement of Hartley Shawcross, British Chief Prosecutor). Nevertheless, although it recognized that sovereign states were entitled to a broad margin of appreciation in their decisions with regard to the use of force in self-defense, the Nuremburg Tribunal did not accept the argument that measures of ASD were entirely self-judging on the ground that the international law governing the use of force would otherwise be gutted of any force. *Id*. Although the doctrine of margin of appreciation cannot be expanded to effectively render the resort to ASD self-judging, however, since the Nuremburg trials there has been no contrary, authoritative judicial statement in regard to individual criminal liability in connection with the decision to undertake ASD, and state decisions are arguably immunized upon subsequent review provided they are not manifestly unreasonable. Walker, *supra* note_, at 370-71.

[110] Some commentators insist that states engaging in ASD submit to an international "jurying" process whereby the evidence adduced by the state seeking a variance is "tried" aforehand with the onus on the requesting state to prove its purity of motives, the proportionality of the proposed use of force, and the severity of the threat. *See* Thomas M. Franck, *The Use of Force in International Law*, 11 TUL. J. INT'L & COMP. L. 7, 15-17 (2003); Graham, *supra* note_, at 14 (insisting that if international relations is to become law-governed, "states must openly justify their actions[,]" to include decisions to engage in ASD, to the review of states and international organizations). However, considerations of bureaucratic inefficiency, opposing political interests, and the absence of effective transnational procedures for protecting shared intelligence sources and methods militate against submission to an international jury. To wit, the establishment of the factual predicate of an imminent threat is a time-consuming process made all the more so by the machinery of the UN system. *See Post-Cold War International Security Threats: Terrorism, Drugs, and Organized Crime Symposium*, MICH. J. INT'L L. 655, 716 (discussing bureaucratic inefficiencies and glacial pace of the UN system); Michael A. Lysobey, *How Iraq Maintained its Weapons of Mass Destruction Programs: An Analysis of the Disarmament of Iraq and the Legal Enforcement Options of the United Nations Security Council in 1997-1998*, 5 U.C.L.A. J. INT'L L. & FOR. AFF. 135, 152-53 (2000) (describing determination of material breaches of peace and security as "plodding" and subject to the "whim of whatever political and economic factors are motivating the Council."). Moreover, proof requires the sharing of intelligence, something states are loathe to do with all but their closest allies for fear that revelation of the evidence will permit deductions as to how the evidence was acquired (methods) and by whom (sources), as well as the possibility that reviewers sympathetic to the target might share the intelligence with the target. Sara N. Scheideman, *Standards of Proof in Forcible Responses to Terrorism*, 50 Syracuse L. Rev. 249 (2000); *see also* Linkie, *supra* note_, at 573 (explaining that the U.S. cannot reveal all its evidence without compromising the human intelligence sources, who may be placed within terrorist organizations or supply networks, or disclosing its methods of interception and decryption of enemy communications); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559, 567 (1999) ("[I]n the midst of a . . . war, a country defending its territory and its nationals will rarely be able to disclose intelligence sources in a public forum."); Graham, *supra* note_, at 7 (conceding that it is very unrealistic to suggest that states be forced to disgorge the intelligence upon which they rely in taking measures to preempt attack). Moreover, even after reviewing the evidence, states unwilling on other grounds to approve a proposed exercise of ASD are far less likely to concede that the proffered evidence is probative of the existence of the requisite imminent threat. *Id*. Worse yet, the inaccessibility of the target state to the state engaging in ASD, coupled with the interest of target states in concealing relevant evidence of WMDs or terrorist training centers that would otherwise supply the "smoking gun" justifying the act of ASD, creates difficulties in acquiring and assembling all the evidence necessary to establish the factual predicate beyond a reasonable doubt that would be required in a domestic criminal case, yet the most strident critics of a particular exercise of ASD are likely to demand that the acting state clear this evidentiary hurdle. Romano, *supra* note_, at 1039-40. Even if the burden of proof were to be reduced to merely require a state to prove the facts justifying an exception to the general prohibition against self-help by "sophisticated pleading backed by relevant and highly probative evidence," as some suggest should suffice, states will, in some instances, be hard-pressed to satisfy this lesser standard. Franck, *supra* note_, at 16.

the governing law—customary and Charter-based—applicable to ASD.[111]

D. Anticipatory Self-Defense in Practice, 1945-Present

Analysts of the post-1945 history of ASD have found state practice generally inconclusive in regard to the Charter-era validity of ASD,[112] in part because, although post-Charter international relations have been no less sanguinary than earlier historical epochs, there have been relatively few instances in which states resorting to force have explicitly justified their actions under the ASD doctrine rather than by passing reference to Article 51.[113] Furthermore, no international tribunal post-Nuremburg has issued an authoritative pronouncement on the lawfulness of ASD.[114] Still, although few states have openly embraced ASD as official policy,[115] since the 1960s the doctrine has become very contested terrain. A handful of cases, all of which involved the United States and Israel as defending states, are generally regarded as instances in which an arguably legitimate claim to ASD was either asserted or would have been the most defensible basis for the resort to force had it been offered contemporaneously: the 1962 Cuban Missile Crisis (U.S.), the 1967 Six Day War (Israel), the 1981 destruction of the Tuwaitha reactor in Iraq (Israel), the 1986 airstrikes against Libya (U.S.), and the 1998 attacks on al-Qaeda targets in Afghanistan and Sudan.[116]

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[111] The customary international law of treaties provides that in interpreting a treaty resort is to be had to, inter alia, state practice to resolve ambiguities in the text of the treaty. Vienna Convention, *supra* note_, at Art. 31(3)(b).

[112] *See* JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 842 (2002) (inconclusive); Zedalis, *supra* note_, at 105-06 (finding the significance of state practice "questionable" given the paucity of cases and the failure of the UN General Assembly to offer direct support for the doctrine).

[113] *See* AREND & BECK, *supra* note_, at 74 (indicating, in 1993, that cases in which the resort to force was justified or could have been justified as an act of ASD include the 1962 Cuban Missile Crisis, the 1967 Six Day War, and the 1981 Israeli bombing of the Osirak reactor, whereas the 1983 U.S. invasion of Grenada and the 1986 airstrike on Libya were justified primarily on other grounds). Although the use of force has been little-justified under the ASD doctrine, states have justified the resort to force largely under Article 51, claiming that in particular circumstances at issue the requisite "armed attack" under that article has in fact occurred. *See id*. *Many of these claims have been summarily rejected as entirely without merit by the Security Council and General Assembly. See, e.g.,* U.N. SCOR 188, Apr. 9, 1964 (rejecting Portuguese claim of self-defense under Article 51 in the shelling of Senegal); U.N. SCOR 488, Jun. 19, 1981 (rejecting Israeli invocation of Article 51 as basis for destruction of Iraqi nuclear weapons facility despite Israeli evidence that the reactor was to be used to make bombs to target Israel); G.A. Res. 6/2, Jan. 14, 1981 (rejecting invocation of Article 51 by Soviet Union as justification for invasion of Afghanistan). Although ASD has not been frequently claimed in justification, force has been so prevalent in the Charter-era that Arend and Beck contend that a new legal regime, known as the "post-Charter self-help" paradigm, has replaced the Charter as the fundamental rules governing the use of force. *Id*. at 178.

[114] The ICJ did not address this question directly in the Nicaragua Case, holding only that the definition of an "armed attack" included "not merely action by regular armed forces across an international border" and thus seeming to recognize a legal, albeit narrow, basis for the claim of Article 51 self-defense in the absence of a traditional transborder attack by national forces. Nicarague v. U.S., 1986 I.C.J. 103-04, 119, para. 195. For a discussion of the opinion, *see generally* John Norton Moore, *The Nicaragua Case and the Deterioration of World Order*, 81 AM. J. INT'L L. 135 (1987); Richard Falk, The World Court's Achievement, 81 AM. J. INT'L L. 106 (1987); Tom Farer, *Drawing the Right Line*, 81 AM. J. INT'L L. 112 (1987).

[115] W. Hays Parks, *Memorandum of Law: Executive Order 12,333 and Assassination*, ARMY LAW, Dec. 1989, at 7 (surveying state policy with respect to ASD generally and assassination specifically). The U.S. and Israel are perhaps alone in the international community in their adherence to ASD as official policy. *Id*.; *see also* Beres, *supra* note_, at 76-77. For the U.S., official support for ASD is longstanding: during the Cold War, in the event of an imminent Soviet first strike, standing doctrine called for counterforce weapons to have been employed in exercise of the right to ASD. Graham, *supra* note_, at 3. Nevertheless, many states may well tacitly support the doctrine, as the International Court of Justice implied in 1986. *See* Nicaragua Case, *supra* note_, at (raising but declining to decide the issue); see also Condron, supra note_, at 139 (stating that "there is a large block [sic] of nations around the globe which support [sic] the use of [ASD] under certain limited conditions."); AREND & BECK, *supra* note_, at 79 (suggesting that support for ASD is growing).

[116] Other instances of the use of force have been characterized as ASD, including the 1981 Israeli invasion of Lebanon, the U.S.-led invasion of Grenada in 1983, the U.S. invasion of Panama in 1989, and the U.S. attack on the Iraqi intelligence headquarters after the discovery of an Iraqi plan to assassinate former President Bush in 1993. However, most scholars consider each of these cases to have failed to meet even the most permissive standards for justification as an act of ASD and would thus classify them as acts of reprisal, as interventions in defense of nationals, or as illegal interventions. *See* Mark J. Yost, *Self-Defense or Presidential Pretext? The Constitutionality of Unilateral Preemptive Military Action*, 78 GEO. L.J. 415, 438-39 (1989) (noting

Although domestic ratification debates reveal that U.S. membership in the UN was predicated upon the explicit assertion in the text of the Charter of an inherent right to self-defense,[117] and notwithstanding strong historical American support for ASD,[118] U.S. statements of official policy initially rejected the doctrine as an "impossibility" in the nuclear age.[119] In 1962, the Cuban Missile Crisis ["CMC"] provided the first, and arguably most significant, post-Charter test of the continued viability of customary law as an independent source of support for, as well as official U.S. policy in regard to, ASD.

1. Cuban Missile Crisis, 1962

On 20 October 1962, the U.S., four days after acquiring credible intelligence that the Soviet Union was deploying medium-range nuclear-armed missiles ninety miles from U.S. shores in Cuba,[120] demanded their removal and instituted a "pacific naval blockade"[121] to prevent further shipments. During a heated debate within the Kennedy Administration, senior officials of the Departments of Justice and State urged the U.S. to claim ASD as the legal justification for the blockade and subsequent airstrikes,[122] and others, led by State Department Legal Adviser Abram Chayes, counseled that to mount such an argument on the basis of the facts, which in their estimation could not support a claim that an "armed

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that the Reagan administration characterized the invasion of Grenada as a defense of U.S. nationals); Richard G. Maxson, *Nature's Eldest Law: A Survey of a Nation's Right to Act in Self-Defense*, PARAMETERS 55 (Autumn 1995) (suggesting that the attack on the Iraqi intelligence headquarters was an act of reprisal). Some scholars judge the March 2003 intervention in Iraq as an exercise of ASD despite the fact that the U.S. and its allies justified the intervention on other grounds. *See, e.g.*, Graham, *supra* note_, at 13 (judging the intervention a lawful exercise of ASD); Yoo, *supra* note_, at 574 (same); Sapiro, *supra* note_, at 604 (considering the intervention an extension of ASD beyond legally legitimate boundaries); Franck, *supra* note_, at 619 (judging the intervention an unlawful attack on the rule of law); Koh, *supra* note_, at 15-16 (anticipating the March 2003 invasion and denying any possibility that it could be justified as ASD while acknowledging a legal justification on the ground of Iraqi violations of Security Council resolutions). Nevertheless, taxonomy is inherently subjective, and only time will reveal the full truth; for purposes of this Article the justification offered by the Bush Administration for the March 2003 intervention in Iraq will be taken for granted as true and the intervention will be treated as a Chapter VII enforcement action.

[117] *See* (note).

[118] *See, e.g.* Elihu Root, *The Real Monroe Doctrine*, 8 AM. J. INT'L L. 427, 432 (1914) (stating official U.S. policy as the principle that a state has the sovereign right to act in advance of an attack "to protect itself by preventing a condition of affairs in which it will be too late to protect itself."

[119] *See* McGEORGE BUNDY, DANGER AND SURVIVAL 252 (1988) (citing a 1954 press conference in which President Eisenhower stated the destruction that would follow an act of ASD was so great that he "wouldn't even listen to anyone seriously that came in and talked about such a thing.").

[120] The U.S. Ambassador to the UN, Adlai Stevenson, produced photographic and other documentary evidence establishing for the other members of the Security Council the "smoking gun" that proved the presence of Soviet missiles in Cuba and established the factual predicate for U.S. actions during the Cuban Missile Crisis. ROBERT F. KENNEDY, THIRTEEN DAYS IN OCTOBER: A MEMOIR OF THE CUBAN MISSILE CRISIS 23, 105-10 (1969).

[121] *See* Radio-TV Address of the President to the Nation from the White House (Oct. 22, 1963) (announcing the blockade).

[122] *See* Memorandum for the Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, Re: Legality under International Law of Remedial Action Against Use of Cuba as a Missile Base by the Soviet Union (Aug. 30, 1962), at 2 ("The concept of self-defense in international law of course justifies more than activity designed merely to resist an armed attack which is already in progress. Under international law every state has, in the words of Elihu Root, 'the right . . . to protect itself by preventing a condition of affairs in which it will be too late to protect itself.'"). For many administration officials, the presence of Soviet missiles a scant 90 miles from the U.S. transformed the relative capability of the Soviet Union so radically that this fact, standing alone, constituted a threat of such imminence that any proportional exercise of force would have been a permissible act of ASD under any legal standard. *See* McGEORGE BUNDY, DANGER AND SURVIVAL 398 (1988) (describing the views of Secretary of State Acheson and others as centered upon the change in capability as representing a sufficiently imminent threat to justify military action in self-defense). Interestingly, even those administration officials who favored the blockade and airstrikes and would have defended these uses of force as legitimate acts of ASD considered providing a limited advance warning to allies as well as the target states on the belief that failure to do so would cause the U.S. to be "marked as a reckless aggressor and this Administration cursed forever as the force which opened the door to a world of catch-as-catch-can violence." *See* LAURENCE CHANGE & PETER KORNBLUTH (EDS.), THE CUBAN MISSILE CRISIS: A NATIONAL SECURITY ARCHIVE DOCUMENTS READER 128-32 (1992) (reprinting a formerly classified document entitled "Air Strike Scenario for October 19, 1962"). In other words, proponents of ASD in the context of the Cuban Missile Crisis recognized the obligation to justify its application lest failure to do so carry with it adverse legal and political consequences.

attack" had occurred or that a threat to the U.S. was imminent, would be to stretch the definition of ASD beyond reasonable bounds and "trivialize the whole effort at legal justification."[123] Although opponents of ASD could not convince President Kennedy that the presence of missiles in Cuba did not constitute an imminent threat to U.S. security as a matter of policy,[124] they prevailed on the question of legal justification, and the U.S. characterized the blockade not as an act of ASD under Article 51 but rather as regional action authorized by the Organization of American States[125] under Articles 52 and 53 of the UN Charter.[126]

In subsequent days the Security Council staged a parallel debate—this one conducted along Cold War lines—over whether the blockade could be justified as an act of ASD.[127] The expressed U.S. justification was largely ignored, reflecting the broad understanding that ASD provided the more legitimate, or even the sole defensible, position. A number of states expressed strong opposition, alleging that the U.S. had adduced insufficient proof that the missiles had been emplaced for offensive purposes to meet the imminence threshold necessary to permit the exercise of ASD[128] and that, as a consequence, the blockade was an unlawful exercise of force in violation of Article 2(4). Others reached the opposite conclusion, judging the blockade a lawful act of ASD in response to an imminent threat posed by

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[123] ABRAM CHAYES, THE CUBAN MISSILE CRISIS 65-66 (1974). For Chayes and others, including a number of officials from the State Department, the Soviet deployment of missiles was not only not an imminent threat, it was not illegal, and to interpret their deployment as an armed attack to satisfy the requirements of Article 51 was simply unsustainable. *See* JAMES G. BLIGHT & DAVID A. WELCH, ON THE BRINK: AMERICANS AND SOVIETS REEXAMINE THE CUBAN MISSILE CRISIS 40 ("[O]ur legal problem was that their [the Soviets] action wasn't illegal[.]"). Thus, to have asserted the doctrine of ASD, although it retained legal utility in the Charter era, under circumstances where not only could no objective imminent threat be openly identified but the action that would be claimed as haven given rise to an imminent threat was considered legal would have been to withdraw entirely the use of force in self-defense from the realm of international law and reinvest in that of political discretion:

> No doubt the phrase "armed attack" must be construed broadly enough to permit some anticipatory response. But it is a very different matter to expand it to include threatening deployments or demonstrations that do not have imminent attack as their purpose or probable outcome. To accept that reading is to make the occasion for forceful response essentially a question for unilateral national decision that would not only be formally unreviewable, but not subject to intelligent criticism, either . . . . Whenever a nation believed that interests, which in the heat and pressure of a crisis it is prepared to characterize as vital, were threatened, its use of force in response would become permissible. In this sense, I believe an Article 51 defense would have signaled that the United States did not take the legal issues involved very seriously, that in its view the situation was to be governed by national discretion, not international law.

Id.

[124] *See* Yoo, *supra* note_, at 573 (noting that during the CMC the near-consensus among senior U.S. officials was that the establishment of nuclear-armed missile bases in Cuba by the Soviet Union constituted an imminent threat to U.S. security even in the absence of proof of an "imminent" threat under the Caroline standard).

[125] The Organization of American States is a regional organization created in 1948 under Chapter VIII of the UN Charter. *See* CHARTER OF THE ORGANIZATION OF AMERICAN STATES (1948). On October 23, 1962, a resolution of the OAS General Assembly authorized member states to participate in the blockade of Cuba. *See* (note).

[126] Sapiro, *supra* note_, at 601. Article 52 recognizes the existence of regional organizations with mandates for the maintenance of regional peace and security. UN Charter, *supra* note_, at Art. 52. Article 53 contemplates that Article 52 regional organizations may take enforcement action with the authorization of the Security Council. *Id*. at Art. 53.

[127] *See* AREND & BECK, *supra* note_, at 74-76 (characterizing Security Council debate over the U.S. blockade of Cuba as having been couched, explicitly and implicitly, in terms of ASD).

[128] A bloc of states rejected the blockade as a violation of Article 2(4) not otherwise permissible under Article 51 on the ground that unless the U.S. could prove an offensive purpose for the missiles it could not demonstrate an imminent threat against which the lawful exercise of ASD could be maintained. *See, e.g.*, U.N. SCOR, 17th Sess.,, 1023d mtg., at 19, U.N. Doc. S/PV.1023 (1962) (statement of Quaison-Sackey, delegate of Ghana to the Security Council) (arguing that there was insufficient proof to conclude that the missiles had been emplaced for offensive purposes and that as a result the U.S. blockade was not in response to an imminent threat and therefor not lawful); see also Condron, supra note_, at 134-35 (noting that the Soviet Union, Ghana, Romania, and the United Arab Republic led opposition to the U.S. blockade as an act of ASD).

offensive missiles.[129] Despite the intensity of the debate, however, the Security Council took no action,[130] a fact U.S. officials interpreted as implied authorization for U.S. actions in self-defense and for the resort to the OAS.[131] On October 28, the CMC ended with a public concession by the Soviet Union promising to withdraw all missiles from Cuba.[132]

Subsequent analysis has revealed a general agreement that the mere presence of Soviet missiles in Cuba did not constitute an imminent threat to the U.S. sufficient to satisfy the standard elaborated in the *Caroline Case*[133] even though the U.S. response to the CMC is "widely accepted as legitimate."[134] The reason for the apparent gap between law and legitimacy may stem from the fact that many scholars of the CMC read into the silence of the Security Council on the question of the legitimacy of ASD a widespread implicit endorsement not only of the U.S. naval blockade but also of a more expansive legal basis for U.S. military action in self-defense than is provided by Article 53.[135] Because much of the debate in the Security Council centered not upon law but upon whether the missiles were in fact offensive or defensive (and therefore whether the missiles genuinely posed a threat to the U.S.), and as the Security Council did not specifically reject the continuing validity of ASD in the Charter era, some suggest not only that ASD was the more defensible legal justification for the U.S. blockade but also that the real lesson of the CMC is that ASD survived the advent of the Charter and even evolved to reflect changed technological circumstances that transformed the functional definition of imminence.[136]

2. Six Day War, 1967

In May 1967, President Gamal Abdel Nasser of Egypt (then the United Arab Republic), after months of hostile public statements expressing an intent to destroy Israel,[137] evicted the UN Emergency Force in Sinai,[138] closed the Gulf of Aqaba and the Straits of Tiran to Israeli shipping,[139] and deployed Egyptian forces in an offensive posture and on maximum alert status near the Israeli border. Although

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[129] AREND & BECK, *supra* note_, at 75 (listing states in support of the blockade as Chile, France, Ireland, Taiwan, the United Kingdom, and Venezuela).
[130] The Security Council took not action in respect of the Cuban Missile Crisis. A. MARK WEISBURD, USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II, 217-18 (1997).
[131] *See* Abram Chayes, *Law and the Quarantine of Cuba*, 41 FOREIGN AFF. 550, 556 (1963) ("[F]ailure of the Security Council to disapprove regional action amounts to authorization within the meaning of Article 53."); *see also* Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AM.J.INT'L L. 515, 522 (1963) (arguing that since the quarantine continued with the knowledge of the Security Council, "authorization may be said to have been granted by the course which the Council adopted[.]").
[132] CHANG & KORNBLUH, *supra* note_, at 347-400 (discussing the resolution of the CMC).
[133] *See* Smith, *supra* note_, at 488-89 (concluding that the "Soviets did not deploy missiles in Cuba in order to launch a war against the United States" but rather to achieve parity with the U.S.); Roberts, *supra* note_, at 528-29 (contending that the presence of Soviet missiles in Cuba "did not per se constitute a threat against the United States and the Western Hemisphere[,]" although in conjunction with other examples of Soviet brinksmanship, support for terrorism, and other acts of aggression the missiles may have been adjudged a threat, whether imminent or not).
[134] Wedgwood, supra note_, at 584.
[135] A number of commentators have criticized the resort to the OAS specifically and the doctrine of implicit Security Council authorization of regional organizations as enforcement mechanism as inconsistent with the express terms of the UN Charter. See, e.g. (note).
[136] *See* AREND & BECK at 75 (analyzing the Security Council debate and concluding that most states implicitly approved ASD); Smith, *supra* note_, at 495 (concluding that the UN debate on the CMC supports the proposition that even in the Charter era "certain steps" well short of an armed attack can trigger the right to self-defense under Article 51).
[137] NADAV SAFRAN, FROM WAR TO WAR: THE ARAB-ISRAELI CONFRONTATION, 1948-1967 268 (1969).
[138] Special Report of the Secretary-General, U.N. Doc. A/6669, at 1 (1967); Report of the Secretary-General on the Situation in the Near East, U.N. SCOR, 22d Sess., U.N. Doc. S/7896 (1976).
[139] *See id*. at S/7906.

Egypt conceded that the closure of the waterways was a belligerent act, Nasser justified the measure as legitimate on the ground that Israel and Egypt had continued in a state of war since 1948 and that either party could engage in belligerency without altering the legal status quo.[140] In response, Israeli Prime Minister Levi Eshkol warned that Israel regarded the re-opening of the waterways as an act of self-defense that Israel was prepared to undertake.[141] In turn, Egypt rejected the Israel claim as a diversion from the Palestinian question and defended the closure as an act oriented toward ensuring the right of the Palestinian people to self-determination.[142] While Israel dispatched emissaries to Western capitals to seek diplomatic assistance to resolve the brewing crisis,[143] Egypt incorporated the armed forces of Syria, Jordan, and Iraq under its unified command.[144] Finally, on June 5, 1967, Israel launched a decisive air campaign against the air forces of the UAR Unified Command, to which the Arab states, despite suffering the results of complete tactical surprise and the destruction of their air support, responded by attacking with ground forces along and across their borders with Israel. In subsequent days Israel defeated combined Arab ground forces and captured the entire Sinai Peninsula, the West Bank, and the Golan Heights, and by June 10 all parties had accepted a ceasefire.[145]

In the aftermath of the brief but decisive conflict, Israel justified its attack under Article 51 in part on the premise that the closure of the Straits of Tiran constituted an "armed attack" justifying the Israeli use of force in self-defense[146] and in part on the basis that the presence of the troops of a hostile state on its southern border, coupled with the clearly expressed intent of that state to destroy Israel and convincing intelligence that an Egyptian attack was imminent, posed a serious and imminent threat to its national security justifying the exercise of ASD.[147] The ensuing debate within the Security Council largely

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[140] *See* Comment, *The Arab-Israeli War and International Law*, 9 HARV. INT'L L. J. 232, 245 (1968) (recounting the Egyptian legal justification for the closure of the waterways and the eviction of UN forces in Sinai).

[141] *See* SAFRAN, *supra* note_, at 269 ("Any interference with freedom of shipping in the Gulf and in the Strait constitutes a gross violation of international law, a blow at the sovereign rights of other nations, and an act of aggression against Israel.") (statement of Prime Minister Eshkol).

[142] *See* AL AHRAM (Cairo), May 30, 1967 ("The issue today is not the question of Aqaba, or the Strait of Tiran, or U.N.E.F. The issue is the rights of the people of Palestine, the aggression against Palestine that took place in 1948, with the help of Britain and the United States.... [Others] want to confine [the conflict] to the Strait of Tiran, U.N.E.F., and the rights of passage. We say: We want the rights of the people of Palestine--complete.") (statement of President Nasser to Egyptian National Assembly); *see also* U.A.R. Statement on Withdrawal of U.N.E.F. and Closing of Strait of Tiran to Israeli Ships, in part reprinted in 6 I.L.M. 573 (1967) (excerpting speech by Nasser to UAR Air Force Advanced Command, May 22, 1967, and defending actions as on behalf of Palestinian people).

[143] SAFRAN, *supra* note_, at 269.

[144] *See* SAFRAN, *supra* note_, at 269 (reporting that Algerian, Kuwaiti, Libyan, and Sudanese units were also placed under Egyptian operational control).

[145] For a detailed discussion of the Six Day War, *see* GEORGE LENCZOWSKI, A CONCISE HISTORY OF THE MIDDLE EAST (4th ed. 1995). For an examination of Israeli decisionmaking, *see* MICHAEL BRECHER, DECISIONS IN CRISIS: 1967 and 1973 (1980).

[146] Some commentators have suggested that the Israeli justification for the use of force was that the closure of the Straits of Tiran constituted an "armed attack" for purposes of self-defense under Article 51. -1967 Israeli attack on Egypt, though frequently cited as the classic modern case of legitimate ASD, was justified by Israel on the basis not of preemption but that Arab preparations for war constituted an "armed attack"(786)

See CONDRON, *supra* note_, at 136 (initially implying the opposite but then concluding that the Israeli use of force constituted an exercise of ASD)

[147] From the Israeli perspective the Six Day War was one of *ein breaira* ("no alternative") as the survival of the state was in jeopardy had Israel not chosen to engage in ASD.(713) *See* AVRAHAM TAMIR, A SOLDIER IN SEARCH OF PEACE: AN INSIDE LOOK AT ISRAEL'S STRATEGY 171 (1988) (relating, from the perspective of a senior Israeli military official, the Israeli perspective in the days before June 5, 1967).

rejected the former argument and centered upon the reasonableness of the Israeli attack, inquiring whether under the circumstances the threat could have been considered sufficiently imminent to dispatch with the requirement of an "armed attack" as a condition precedent to self-defense.[148] As might have been expected during the height of the Cold War, the Soviet Union and its Arab clients steered the discussion away from the threat the UAR had posed to Israel and focused formalistically on the text of Article 51, defining the Israeli action as *ipso facto* illegal aggression in violation of Article 2(4) by virtue of the fact that Israel had been first to resort to the overt use of force.[149] Predictably, the Russo-Arabic bloc categorically refused to engage on the question of the availability of ASD.[150] In contrast, although little serious consideration was paid to the argument that the closure of the Straits of Tiran constituted an "armed attack," the U.S. and other Western states defended the Israeli position that the imminence and magnitude of the threat justified the exercise of measures in self-defense, and this bloc shielded Israel from adverse legal judgment: although the Security Council did not make an official pronouncement upon the legitimacy of ASD in context, none of the three Security Council resolutions that emerged from the aftermath of the Six Day War condemned Israeli actions.[151]

Although the question of whether the threat to Israel was in fact sufficiently imminent to justify ASD remains the subject to legal and political wrangling, most commentators view the Israeli belief that the threat justified the response to be reasonable.[152] More importantly, commentators generally read into Security Council silence on the legitimacy of the Israeli ASD argument implicit support for the proposition that the right to ASD continues in force under the customary international law of the Charter era, particularly where the survival of a state is arguably at issue.[153]

3. Osiraq, 1981

Despite what amounted to, arguably, tacit approval of Israeli acts in preemption of the Arab threat in 1967, residual doubts over whether ASD was a legally defensible doctrine may well have contributed

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[148] U.N. SCOR, 22d Sess., 1348th mtg., U.N.Doc. S/PV/1348 (1967).

[149] See AREND & BECK, *supra* note_, at 77 (noting that the Russo-Arabic position was reducible to the argument that the first use of force was aggression regardless of the circumstances prompting that use of force).

[150] *Id*.

[151] *See* S.C.Res. 233, U.N. SCOR, 22d Sess., 1348th mtg. at 1-2, U.N.Doc. S/7935 (1967); S.C.Res. 234, U.N. SCOR, 22d Sess., 1350th mtg. at 2, U.N.Doc. S/7941 (1967); S.C.Res. 235, U.N. SCOR, 22d Sess., 1352d mtg. at 4, U.N.Doc. S/7960 (1967). Moreover, a Soviet-sponsored resolution that would have condemned Israel was defeated in the Security Council and the General Assembly. See U.N. SCOR, 22d Sess., 1351st mtg. at 5, U.N.Doc. S/7951 (1967) (defeating condemnation of Israel); U.N. GAOR, 5th Emergency Special Sess., 1548th mtg., at 171, U.N.Doc. A/PV.1525-1559 (1967) (defeating condemnation of Israel).

[152] *See* Polebaum, *supra* note_, at 194 ("Most commentators concluded that Israel's belief that it was about to be attacked on all its borders was reasonable."). For a defense of the factual predicate giving rise to the Israeli claim of legal legitimacy, *see* Amos Shapira, *The Six-Day War and the Right of Self-Defense*, 6 ISR. L. REV. 65, 73-75 (1971) (contending that Israel was faced with imminent attack). For a counter-argument, *see* M. Chefif Bassiouni, The Middle East: The Misunderstood Conflict, in THE ARAB ISRAELI CONFLICT 327, 347-50 (John Norton Moore ed., 1977) (arguing that Israel committed aggression because it "started the shooting").

[153] *See, e.g*., Smith, *supra* note_, at 483-85 (concluding that Security Council and General Assembly refusal to condemn Israeli actions constitutes implicit affirmation of the right to ASD); Franck, supra note_, at 12 ("In some circumstances, the Charter system has condoned a state's recourse to force to preempt an imminent attack on it; an example is the Israeli war against Egypt (1967)."); DINSTEIN, *supra* note_, at 191 ("In the circumstances, as perceived in June 1967, Israel did not have to wait idly by for the expected shattering blow[.]"). Those most critical of the legality of the Israeli actions of June 5, 1967, generally contend either that the facts did not support ASD under the particular circumstances or that the failure of the Security Council to expressly condemn the actions cannot be interpreted as condoning ASD. *31* Bilder & O'Connell, *supra* note_, at 453 (challenging the legitimacy of Israeli actions as unsupported by the facts, which did not amount to an imminent threat); *see also* Condron, *supra* note_, at 136 (concluding that the failure of the UN to condemn Israel leaves the question of the legality of ASD simply an "unsettled question.").

to Israeli failures to employ ASD in 1973, when Israeli decisionmakers failed to correctly diagnose Syrian troop maneuvers and a host of other indicators as preparations for a joint Syrian-Egyptian attack on October 6, 1973.[154] The lessons of the failure to correctly assess enemy intentions in 1973 may have influenced future Israeli responses to yet another threat.

By spring 1981, Iraq, with French assistance, was nearing completion of its Osiraq nuclear reactor facility, a project which, although the Hussein government publicly claimed it would be dedicated to peaceful research only, Israeli intelligence claimed to be a nuclear weapons production facility.[155] When several months of Israeli efforts to alert the international community to the brewing danger and to secure condemnation of the Iraqi attempt to acquire WMD were unsuccessful, Israel responded with military force. At sunset on June 7, 1981, 8 Israeli F- 16 aircraft accompanied by six F-15 escorts destroyed the Osiraq nuclear reactor with twelve two thousand pound bombs shortly before it could become operational.[156] Israel defended the destruction of Osiraq as an act of ASD justified on the grounds that if Iraq, a state committed to the destruction of Israel, were permitted to acquire a nuclear reactor capable of producing weapons it would do so; that such weapons would certainly be used against Israel at the earliest possible juncture;[157] and that therefore Israel, and in particular its civilian population, was subject to an immediate and direct threat by the existence of an operational, or nearly operational, reactor.[158] Israel claimed further that even if the reactor had not been fully operational, had Israel delayed until such time as it was fully operational before destroying it more Iraqi civilians would have been exposed to radiation leaking from the facility, a likelihood supporting the conclusion that the threat, even at the moment of the attack, was already sufficiently imminent for purposes of Israeli compliance with

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[154] *See* TAMIR, *supra* note_, at 194-95 (describing Syrian and Egyptian troop movements, the withdrawal of the families of Soviet military advisers from Syria, and other ominous warning signals as evidence of an imminent attack that Israeli decisionmakers interpreted as nonthreatening in large measure due to overconfidence and misperceptiveness).

[155] *See Israeli and Iraqi Statements on Raid on Nuclear Plant* ["Israeli and Iraqi Statements"], N.Y. TIMES, June 9, 1981, at A8 (indicating that Israel claimed to possess intelligence from "sources of unquestioned reliability" that the Osiraq reactor would be in production of nuclear weapons within three months).

[156] David K. Shipler, *Israeli Jets Destroy Iraqi Atomic Reactor*, N.Y. TIMES, June 9, 1981, at A1. Most analysts believe the Osiraq reactor was either operational or nearly so: for a discussion of the operational status of the Osiraq reactor, *see* Louis Rene Beres & Yoash Tsiddon-Chatto*, Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor*, 9 TEMPLE INT'L & COMP. L.J. 437, 438 (1995) (contending the reactor was operational or very nearly so); George Russell, Attack—and Fallout; Israel Blasts Iraq's Reactor and Creates a Global Shock Wave, TIME, June 22, 1981, at 24 (same); *but see* Anthony D'Amato, *Israel's Air Strike Against the Osiraq Reactor: A Retrospective*, 10 TEMP. INT'L & COMP. L.J. 259, 261 (1996) (noting that the reactor was not operational at the moment of the attack).

[157] *See Attack-and Fallout*, TIME, June 22, 1981, at 24, 30 (reporting statement from Israeli Prime Minister Begin claiming that after an Iranian aircraft had attempted unsuccessfully to bomb Osiraq Iraq had issued a statement to the Baghdad press stating that "[t]he Iranian people should not fear the Iraqi nuclear reactor, which is not intended to be used against Iran, but against the Zionist enemy."). The Iraqi government had released numerous statements calling upon Arab states to develop nuclear weapons for the destruction of Israel. *See, e.g.*, IRAQI NEWS AGENCY (Baghdad), Aug. 19, 1980 ("President Saddam Hussein has stressed that a decision better than boycotting the states that move their embassies to Arab Jerusalem is to destroy Tel Aviv with bombs. He added that until the possibility of responding to the enemy with bombs becomes available, all available weapons must be used with the help of the Arab brothers . . . The president concluded his speech by stressing that when the time comes for Iraq to vent its anger on the Zionist entity, it will do so.").

[158] *See Israeli and Iraqi Statements*, *supra* note_, at A8 ("We were therefore forced to defend ourselves against the construction of an atomic bomb in Iraq, which itself would not have hesitated to use it against Israel and its population centers." (official statement of Israel); *see also id.* ("[The reactor was] intended . . . for the production of bombs. The goal for these bombs was Israel. This was explicitly stated by the Iraqi ruler. After the Iranians slightly damaged the reactor, Saddam Hussein remarked that it was pointless for the Iranians to attack the reactor because it was being built against Israel alone."(referencing an earlier Iranian attempt to destroy the reactor).

international law.[159] In other words, the fact that the threat emanated from the proliferation of nuclear weapons to an enemy state determined to use them against Israel dictated a relaxed interpretation of imminence consistent with the magnitude and seriousness of the particular threat profile as perceived by the intended target of that threat.

Arab states swiftly and publicly condemned the attack,[160] and the Security Council, with U.S. and British support,[161] followed suit, unanimously "condemn[ing] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct" and stating that Iraq was entitled to "appropriate redress for the destruction it has suffered."[162] For most states, the facts that Israel could not prove that Iraq possessed nuclear weapons it intended to use in the very near future against Israel and that therefore the Iraqi threat was not so imminent that it left "no moment for deliberation" and created an immediate and overwhelming necessity to attack the reactor—a determination subsequently reinforced by evidence that Israel had initiated preparations and planning for the destruction of the Osiraq reactor at least as early as March 1981[163]—vitiated, consistent with the *Caroline* standard, the Israeli claim of lawfulness as an exercise of ASD[164] and suggested to the contrary that the strike was a premeditated act in violation of Article 2(4) of the Charter.[165] Although the Security council imposed no sanctions, it rejected the Israeli claim to ASD in these circumstances because the threat, viewed objectively rather than subjectively and in light of the traditional rule rather than in terms

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[159] *See* David Shipler, *Begin Defends Raid, Pledges to Thwart a New "Holocaust,"* N.Y. TIMES, June 10, 1981, at A12 ("We faced a terrible dilemma. Should we now be passive, and then lose the last opportunity, without those horrible casualties amongst the Baghdad population, to destroy the hotbed of death?") (arguing that the threat posed by the reactor was already imminent due to the increased civilian casualties that were certain to occur had Israeli waited to strike); Statement of Permanent Representative of Israel to the United Nations, U.N. SCOR, 36th Sess., 2280th mtg. at 57-60, U.N. Doc. S/PV.2280 (1981) (arguing that had Israel failed to strike immediately the Iraqi civilian casualties would have been unacceptably high and that as a consequence the threat was imminent as a matter of law); Excerpts from Security Council Provisional Verbatim Record of June 15, 1981) ("[I]n removing this terrible nuclear threat to its existence, Israel was only exercising its legitimate right of self-defence within the meaning of this term in international law and as preserved also under the United Nations Charter."). In other words, further delay would have rendered an otherwise discriminate and proportional response to the Iraqi threat an indiscriminate disproportional, and therefore unlawful, use of force. *See* Schmitt, *supra* note_, at 532-33 (describing the Israeli strike on Osiraq as a "surgical[] exterminat[ion] of the threat due to its limited scope and duration and the absence of civilian casualties).

[160] *See Arabs Assail Raid as "Peak of International Terrrism,"* N.Y. TIMES, June 9, 1981, at A1.

[161] *See* Smith, *supra* note_, at 485-87 ("Armed attack in such circumstances cannot be justified. It represents a grave breach of international law.") (remarks of British Prime Minister Margaret Thatcher) in response to the Israeli attack on Osiraq); Judith Miller, *U.S. Officials Say Iraq Had Ability to Make Nuclear Weapon in 1981*, N.Y. TIMES, June 9, 1981, at A9 (reporting U.S. condemnation of the Israeli strike and suspension of arms shipments in response).

[162] U.N. S.C.Res. 487, U.N. SCOR, 36th Sess., 2288th mtg. at 58, U.N.Doc. S/PV.2288 (1981). The General Assembly joined in condemning the Israeli strike. G.A. Res. 27, 36 U.N. GAOR Supp. (No. 51) at 17, U.N. Doc. A/Res./ 36/27 (1981).

[163] *See* Smith, *supra* note_, at 487 (noting that Israeli Prime Minister Begin conceded that Israeli preparations for the attack had commenced in March 1981 and noting further that Israel began developing intelligence about the reactor as a potential target as early as 1979).

[164] *See, e.g.*, U.N. SCOR, 36th Sess., 2282 mtg, at 106; U.N. Doc. S/PV/2282 (1981) ("It has been argued that the Israeli attack was an act of self-defence. But it was not a response to an armed attack on Israel by Iraq. There was no instant or overwhelming necessity for self-defence. Nor can it be justified as a forcible measure of self-protection. The Israeli intervention amounted to a use of force which cannot find a place in international law or in the Charter and which violated the sovereignty of Iraq.") (statement of Sir Anthony Parsons, Permanent Representative of United Kingdom to United Nations).

[165] *See, e.g.*, U.N. SCOR, 36th Sess., 2283d mtg. at 145, U.N. Doc. S/PV.2283 (1981) (evaluating the Israeli strike as having failed to satisfy the absence of premeditation requirement of the Caroline rule of necessity) (statement of Permanent Representative of Sierra Leone). For many states, however, the unlawfulness of the Israeli strike was the exclusive consequence of a lack of imminence of the threat—had it been clear that Iraq would produce nuclear weapons and that those weapons would be imminently used against Israel, the Israeli claim to ASD might well have avoided condemnation. See Condron, supra note_, at 137-39 (analyzing Security Council debates and concluding that had Israel been able to adduce evidence in support of its factual predicate, the Israeli argument would not have been perceived to be so attenuated and might well have avoided legal condemnation).

of the relaxed standard propounded by Israel, was deemed simply too prospective to justify the use of force.

In the main, the contemporaneous judgment of the legal academy affirmed the Security Council assessment that the Israeli attack could not be justified under the international law of self-defense on the grounds that Israel had neither satisfied the imminence requirement[166] nor exhausted peaceful means of dispute resolution prior to engaging in self-help.[167] At least one scholar drew the still-broader conclusion that even if ASD had survived the entry into force of the Charter it could not be exercised except with the prior approval of "some community of states."[168] In other words, the Israeli air strike in 1981 stood for the proposition that the unilateral resort to force, however otherwise justified, was now incompatible with the framework of the Charter.

However, with the benefit of two decades' hindsight some now question whether the facts upon which the Security Council relied in reaching its judgment were incomplete and whether, in light of the revelation of new information regarding the extent of the Iraqi nuclear weapons program developed during the period from the Gulf War to the present, the Israeli claim that the threat posed by Iraq was imminent might have justified the Israeli attack on Osiraq as an act of ASD despite the absence of an "armed attack."[169] The most restrictivist scholars may not concede, as do a growing number of commentators, that "it was unquestionable that Israel was the target of nuclear weapons."[170] However, whether in light of evidence unavailable or not credited as accurate at the time of the attack or out of a pragmatist commitment to ASD in principle, a number of commentators now grant that the formalistic evaluation of imminence is unsuited to an era replete with rogue states armed with WMD that seek the destruction of their otherwise helpless neighbors[171] and that the Israeli attack on Osiraq must therefore be reconceived not as an unlawful act of aggression but rather as a "heroic and indispensable act of law enforcement"[172]

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[166] *See* Anthony D'Amato, *Israeli's Air Strike Against the Osiraq Reactor: A Retrospective*, 10 TEMP. INT'L & COMP. L.J. 259, 260 (1996) (evaluating scholarly reaction to the Israeli attack on Osiraq);

[167] Smith, *supra* note_, at 486-87; Sapiro, *supra* note_, at 601.

[168] *See* Smith, *supra* note_, at 495-96 ("The condemnation of Israel in 1981 following its raid on [Osiraq] suggests that the invocation of support from some community of states is an essential prerequisite for the permissible exercise of coercive arms control under the Charter.").

[169] *See* Graham, *supra* note_, at 10 (suggesting that the Israel attack may well have been justified as ASD on the ground that subsequent UN weapons inspections revealed that the extent of the Iraqi nuclear weapons program was far closer to the Israeli estimate than to the consensus of the international community and that had Israel permitted the Osiraq reactor to become operational the likelihood that Iraq would have developed weapons that could have destroyed Israel in the 1980s was great); Koh, *supra* note_, at 15-16 (conceding that Israel faced an imminent threat in 1981 due to Iraqi progress toward completing nuclear weapons technologies). Interestingly, although the U.S. joined in the Security Council condemnation of Israel, as early as 1981 the U.S. government confirmed that an important element of the factual predicate upon which Israel relied in destroying the Iraqi reactor—that Iraq had or would soon have nuclear weapons—was accurate. *See* Judith Miller, *U.S. Officials Say Iraq Had Ability to Make Nuclear Weapon in 1981*, N.Y. TIMES, June 9, 1981, at A9 (reporting that U.S. intelligence officials "believed that Iraq had acquired enough enriched uranium and sensitive technology to make one nuclear weapon by the end of [1981] and several bombs by the mid 1980s.").

[170] Sean D. Magenis, *Natural Law as the Customary International Law of Self-Defense*, B.U. INT'L L.J. 413, 430 (2002); *see also* Beres & Tsiddon-Chatto, *supra* note_, at 437 ("[L]ooking back a decade and a half later it is well-known that Hussein's plans to build a French-supplied reactor . . . were designed to produce militarily significant amounts of weapons[.]").

[171] *See* Richard N. Gardner, Commentary on the Law of Self-Defense, in Law and Force in the New International Order (Lori Fisler Damrosch & David J. Scheffer eds.) ("[I]f anticipatory self-defense cannot cover the Iraqi reactor case . . . how are we going to deal with a Saddam Hussein who may be preparing to use weapons of mass destruction against his neighbors?").

[172] Beres & Tsiddon-Chatto, *supra* note_, at 440.

4. U.S. Airstrikes on Libya, 1986

On April 5, 1986, one day after U.S. intelligence intercepted a cable indicating Libyan terrorists would attack a target in Berlin the next day, a bomb detonated in a West Berlin nightclub known to be frequented by American military personnel, killing two U.S. nationals and wounding 78 others.[173] Nine days later, on April 14, U.S. FB-111 fighter-bombers departed from bases in England and attacked five military and regime targets in Libya.[174] In his address to the nation, President Reagan indicated that the U.S. possessed "clear evidence that Libya is planning future attacks" and stated that the "preemptive action" was intended to "preempt and discourage Libyan attacks on innocent civilians in the future."[175] Although in subsequent statements Reagan administration officials made reference to other claims to legal justification for the attack on Libya, including in reprisal for the terrorist bombing of April 5th and as an exercise of self-defense against ongoing attacks on U.S. nationals and embassies abroad,[176] the official legal justification for the use of force against Libya posited that Libya was actively planning future attacks against the U.S.,[177] that no diplomatic resolution of the dispute was possible, that the U.S. action constituted an exercise of the inherent right of ASD to preempt these future attacks, and that the U.S. action was taken consistent with Article 51 of the Charter.[178]

Although the United Kingdom, France, Australia, and Denmark joined the U.S. in preventing Security Council condemnation of the U.S. attack on Libya,[179] many states judged the response to have been an unlawful reprisal,[180] as did the General Assembly.[181] Furthermore, a great many states and commentators found the facts alleged in support of the argument that future attacks against which force had been directed were imminent to be insufficient to support the claim of self-defense,[182] and still others concluded that the magnitude of the response was disproportionate to the alleged threat.[183] Despite British support for the notion that the exercise of the inherent right to self-defense "plainly includes the right to destroy or weaken the capacity of one's assailant, reduce his resources, and weaken his will so as to discourage and prevent future violence[,]"[184] the general conclusion within the international community

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[173] *See* N.Y. TIMES, Apr. 6, 1986, at A1.
[174] *See* Gwertzman, *Plots on Global Scale Charged*, N.Y. TIMES, Apr. 15, 1986, at A1.
[175] Address to the Nation, President Ronald W. Reagan, Apr. 14, 1986, reprinted in Reagan: *"We Have Done What We Had to Do,"* WASH. POST, Apr. 15, 1986, at A23.
[176] *See, e.g., U.S. Defends Raid Before U.N. Body*, N.Y. TIMES, Apr. 16, 1986, at A17; statements of Ambassadors Okun and Walters before the U.N. Security Council, April 14-15, 1986, reprinted in 80 AM. J. INT'L L. 632-633 (1986).
[177] *See* Abraham D. Sofaer, *Terrorism and the Law*, 64 FOR. AFF. 901, 921 (1986) (stating that the U.S. attacked Libya to prevent "some 30 possible impending Libyan attacks on U.S. facilities and personnel throughout the world.").
[178] *See* President's Report to the Speaker of the House of Representatives, Consistent with the War Powers Resolution, Relative to U.S. Air and Naval Forces Conducting Bombing Strikes on Terrorist Facilities and Military Installations in Libya, on April 14, 1986, 22 WEEKLY COMP. PRES. DOC. 499 (Apr. 16, 1986) (contending that the attack on Libya, justified under Article 51 of the UN Charter as an act of ASD, was narrowly tailored to preempt future Libyan attacks on U.S. interests currently underway).
[179] 41 U.N.SCOR, 2679th mtg., UN Doc. S/PV 2678 (17 Apr. 1986) (cited in Yoo, supra note_, at 573).
[180] McCORMACK, *supra* note_, at 229.
[181] *See* G.A. Res. 41/38, 41 U.N. GAOR Supp. (No. 23), at 34-35 (condemning the U.S. attack as an unlawful act).
[182] *See* Romano, *supra* note_, at 1041 (surveying international commentary on the U.S. attack on Libya and concluding that "the international community, in significant part, repudiated [the U.S. strike]").
[183] *See, e.g.,* Paust, *supra* note_, at 730-31 (arguing that 1) the U.S. introduced insufficient factual support for its assertion that future armed attacks on the U.S. were imminent and that 2) even if such attacks were certain it was not clear that U.S. action against Libyan military targets, rather than defensive measures to protect the intended U.S. targets, was the more proportionate and direct measure, or that attacking Libyan targets dedicated to long-term planning would better and more directly tailor the response to reducing the threat than selecting more specific and limited targets).
[184] Statement of the Representative of the United Kingdom, 41 U.N.SCOR (2679th mtg), UN Doc. S/PV. 2678 (17 Apr. 1986).

was that the U.S. attack on Libya was difficult to characterize as anything but a reprisal and that, as such, the question of ASD had not arisen.

5. U.S. Bombing of Sudan and Afghanistan, 1998

On August 20, 1998, twelve days after the al Qaeda terrorist group attacked and destroyed the U.S. embassies in Tanzania and Kenya, the U.S. fired cruise missiles at several al Qaeda terrorist training camps in Afghanistan and at the al Shifa factory in Sudan the U.S. alleged was a production facility for chemical weapons intended for al Qaeda.[185] Although various Clinton Administration officials hinted that the action had been undertaken in retaliation for the embassy bombings,[186] the U.S. invoked ASD as the predominant legal justification for its attacks on Afghanistan and Sudan, contending that the application of military force had been necessary to prevent specific imminent terrorist attacks about which it possessed clear and credible intelligence.[187]

Some restrictivist scholars argued that the U.S. failed to established that the threat posed by al Qaeda was sufficiently imminent as to be necessary for purposes of analysis under the *Caroline* standard, and that the action must consequently be examined not as an exercise of ASD but rather as an act of reprisal for the embassy bombings.[188] To some degree, criticisms of the U.S. ASD justification hinged on the sufficiency of the evidence offered in support of the claim: some commentators, otherwise supportive of the inherent right of states to engage in ASD, questioned its applicability given the absence of sufficient proof of imminence,[189] while others, although generally hostile to ASD, evaluated the U.S. claim on its merits while nonetheless concluding that the "questionable nature of some of [the U.S.] factual assertions, and the circumstances surrounding the strikes, render the success of its legal

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[185] James Bennet*, U.S. Cruise Missiles Strike Sudan and Afghan Targets Tied to Terrorist Network*, N.Y. TIMES, Aug. 21, 1998, at A1.

[186] *See, e.g.,* Bradley Graham, *Bin Laden Was at Camp Just Before U.S. Attack*, WASH. POST, Aug. 29, 1998, at A1 (quoting official statements that U.S. plans for strikes were conceived as possible retaliatory measures to terrorist attacks before the embassy bombings occurred); Secretary of State Madeleine Albright, Remarks during Appearance on *This Week* (Aug. 23, 1998) (transcript available at 1998 WL 6392416 at 4) (stating that the embassy "bombings had a huge part" in prompting the attacks on Afghanistan and Sudan).

[187] *See* Bennett*, supra* note_ (reporting that the Clinton Administration justified the strikes in Afghanistan and Sudan as ASD on the grounds that al Qaida was responsible for these and other acts of terrorism, al Qaida had declared its intention to conduct additional attacks, and "key terrorist leaders" were gathered at the headquarters, establishing the imminence of a continuing threat to U.S. nationals); "We Acted to Preempt Terrorist Acts", WASH POST., Aug. 21, 1998, at A19 (describing the strikes as oriented toward "do[ing] something that would disrupt Osama bin Laden and his organization's ability to conduct additional terrorist activities[.]") (quoting Secretary of State Madeleine Albright); *id*. (quoting National Security Adviser Sandy Berger to the effect the U.S. "had very specific information about very specific threats with respect to very specific targets[.]"); *Clinton's Words: "There Will Be No Sanctuary for Terrorists",* N.Y. TIMES, Aug. 21, 1998, at A12 (claiming inherent right to self-defense against future attacks under Article 51 of the Charter); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 162-63 (1999) (reporting that the U.S. claimed the right to defend against imminent attacks by al Qaida).

[188] *See* Paust, *supra* note_, at 536 (suggesting that, although the strikes may well have been directed towards future unspecified but anticipated al Qaida attacks against the U.S., the threats posed by such potentialities was not sufficient to constitute imminence for purposes of evaluation as an act of ASD); Lacey, *supra* note_, at 296-97 (contending that on the evidence offered it is impossible for the U.S. to argue that the destruction of the U.S. embassies required an instant, overwhelming response against the particular targets selected and that it had "no choice of means, and no moment for deliberation.") (citing the *Caroline* standard).

[189] On the basis of the evidence made available for review it was difficult for many commentators to comprehend precisely how the destruction of the Sudanese factory in particular was necessary to prevent imminent terrorist attacks, for if the attacks were in fact imminent it was unlikely that terrorists would receive weapons produced by the factory in the near-term future and that any imminent attacks would be conducted with weapons already in their possession. *See, e.g.,* Roberts, *supra* note_, at 535 (accepting ASD in principle but rejecting its application to Afghanistan and Sudan on the ground that the U.S. had failed to "convincingly explain that acquisition [of chemical weapons] and use was imminent."); Romano, *supra* note_, at 1041 (same).

justification very unique."[190] Although the U.S. countered reports that the factory and the camp had been developed by U.S. intelligence and military officials as a potential targets many months before their destruction[191] by releasing some of the intelligence upon which it had relied in reaching its decision to destroy the sites,[192] restrictivists seized upon these reports and other indications that the factory may not have in fact been a chemical weapons production facility[193] as proof that the strikes were indefensible as acts of ASD inasmuch as any threats that had existed for months without necessitating a U.S. attack were not suddenly invested with imminence by the destruction of the U.S. embassies.

Nevertheless, despite widespread dissatisfaction with the evidentiary support for the U.S. strikes, the Security Council took no formal action in response,[194] nor did the attacks or the justification therefor confront substantial opposition internationally.[195] Although some commentators consider the muted international response to a "questionable American self-defense argument" a reflection of the distaste for al Qaeda and grudging tolerance of incomplete disclosure of intelligence sources and means in the particular case at issue , rather than an affirmation of a right to ASD,[196] more pragmatist commentators suggest that the U.S. strikes on Sudan and Afghanistan demonstrates that the right of states to engage in ASD is, if not already a norm of customary international law that predates and survives the Charter, emerging as *lex ferenda*.[197]

6. Lessons from State Practice

Several conclusions may be drawn from the preceding analysis of the five cases of ASD in the Charter era. First, as the state-preserving benefits that might accrue from an act of ASD are apt to degrade with the passage of time, states are likely to engage in self-defense first, and legal legitimization second, when they perceive their survival to be at stake by the acts of another state or terrorist group. Second, where states cannot credibly claim to have been the victim of an armed attack, they will claim the right to ASD. Third, the division of the academy into restrictivist and pragmatist camps maps neatly onto scholarly analyses of states' claims to justification for the use of force: the most restrictivist

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[190] Romano, *supra* note_, at 1041.
[191] *See* Vernon Loeb & Bradley Graham, *Sudan Plant Was Probed Months Before Attack*, WASH. POST, Sept. 1, 1998, at A14 (factory); Bradley Graham, Bin Laden Was at Camp Just Before U.S. Attack, WASH. POST, Aug. 29, 1998, at A1 (camp).
[192] *See* Linkie, *supra* note_, at 569 (noting that the U.S. produced physical evidence that the al Shifa facility had been producing chemical precursors for VX nerve gas). For further discussion of the U.S. evidence, see *Pentagon and C.I.A. Defend Sudan Missile Attack*, N.Y. TIMES, Sept. 2, 1998, at A5.
[193] *See* David L. Marcus, *Franck Criticizes Bombing of Plant in Sudan*, BOSTON GLOBE, Sept. 25, 1998, at A9 (stating that newly-released evidence suggests that the Sudanese factory was in fact either a pharmaceutical plant or an animal feed plant as claimed by Sudan).
[194] Yoo, *supra* note_, at 573. In a letter to the President of the Security Council justifying the U.S. attacks, the U.S. claimed to have acted only after repeated warnings to Afghanistan and Sudan to "shut down terrorist activities and cease cooperation with the Bin Ladin Organization[.]" U.N. Daily Highlights, Aug. 21, 1998.
[195] *See* Douglas Jehl, *U.S. Raids Provoke Fury in Muslim World*, N.Y. TIMES, Aug. 22, 1998, at A6 (discussing international reactions to 1998 strikes and reporting that most of the hostility to the U.S. actions was confined to Islamic states); Romano, *supra* note_, at 1041 (noting that the justification of ASD was received "with scant objection from the international community.").
[196] Romano, *supra* note_, at 1041; *see also id*. ("Perhaps the relatively passive international response is best explained by the wealth of intelligence information the United States had amassed linking Osama bin Laden's terrorist network to the embassy bombings and other past terrorist plots.").
[197] *See, e.g.*, Romano, *supra* note_, at 1040 (suggesting that the largely absent criticism of the U.S. strikes may indicate the "growing acceptance" of ASD). The most pragmatist scholars insist that, because ASD survives the Charter and the threat posed by terrorists seeking WMD requires a transformed standard of imminence, the strikes were perfectly legitimate as an exercise of ASD. *See, e.g.*, Addicott, *supra* note_, at 772.

commentators reject out-of-hand that a right to ASD exists in the Charter era, whereas others focus on the evidence for proof that the threat was sufficiently imminent and pragmatists tend to be much less critical of state claims in this regard; although debates persist, it is likely "impossible to prove the existence of an authoritative and controlling norm prohibiting the use of force for [ASD]."[198] Fourth, reasonable minds can differ as to whether, in a particular instance, an act of ASD was justified, and in all likelihood the quested-after objective standard that would permit quick and precise evaluation of the legitimacy of a particular act of preemption is but a chimera.[199] Fifth, other states tend to adopt positions with respect to claims of ASD that mirror their ideological commitments to much broader issues in international relations. Sixth, international organizations, and in particular the Security Council, have steadfastly refused to impose sanctions upon states asserting claimed rights to ASD, and the extent of Security Council disapprobation is to some extent a function of the degree to which the acting state has sought multilateral support (and is therefore a political determination). Seventh, evaluations of the legal legitimacy of state decisions to engage in ASD are often subject to revision as the passage of time permits revelation of the intelligence upon which acting states relied in reaching the decision to engage in ASD. Eighth, the resort to ASD remains rare: it has occurred fewer than once every decade. Ninth, the legal significance of the debate over the right of states to resort to ASD is increasing in a hyper-ideological and -weaponized era in which the meaning of the term "imminence" has assumed, or should assume, new understandings. Finally, in every instance where states have resorted to ASD in the Charter era, acting states made efforts at proving the factual predicate necessary to satisfy other states, at least formally, that the threat presented was sufficiently imminent to justify the response. In other words, while state evaluations of the concept of "imminence" as applied to practice have varied and evolved in light of technological transformations, the *Caroline* standard has remained the generally accepted restatement of the inherent right of states under customary international law to engage in ASD.[200]

Still, after September 11th it is not enough simply to draw lessons from state practice and scholarly analysis to ascertain the international law governing the resort to preemptive force. Indeed, a number of commentators have approached the Bush Doctrine as essentially a formal distillation and

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[198] AREND & BECK, *supra* note_, at 79.

[199] Many restrictivists would concede the legitimacy of self-defense only in those circumstances where the factual predicate offered in justification meets an objective or "legitimate, non-political" standard of imminence as determined by the UN. *See, e.g.*, Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 267-68 (1989). State practice, and UN assessment of that practice, calls into question whether the evaluation of the use of force under international law could ever be described in such terms. *See supra* at pp._.

[200] The most authoritative "soft law" restatement of the lawfulness of ASD under customary international law may well be Article 25 of the International Law Commission Articles on State Responsibility, now before the General Assembly and due for debate in 2004, which supports ASD under the state of necessity doctrine. *See* U.N. International Law Commission, Report of the International Law Commission, U.N. GAOR, 56th Sess., Supp. No. 10, at 194-206, U.N. Doc. A/56/10 & Corr. 1 (2001, reprinted in JAMES CRAWFORD, THE INTERNTIONAL LAW COMMISSIONS'S ARTICLES ON STATE RESPONSIBILITY 168-69, 178-86, 281-305 (2002). A "state of necessity" excuses conduct that would otherwise be unlawful where a state's "sole means of safeguarding an interests threatened by a grave an imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation[.]" *See id*. at Art. 25. Although the Report does not necessarily constitute customary international law, adoption would signal strong support for either the recognition of ASD as a new norm or for the strengthening of an emerging norm recited therein. *See* Rest. (3rd) For. Rel. L. U.S. 103(2)(d), cmt. C. rep. n.2 (noting that nearly all General Assembly resolutions pertinent to Articles 10-11, 13-14, and Chapters VI and VII of the UN Charter are, although nonbinding, important evidence of emerging customary international law). Moreover, recent jurisprudence

restatement of the emerging practice of states facing grave threats to their vital national interests in a world in which terrorism and WMD are allied.[201] However, rather than simply extend the pattern of Charter-era practice with regard to ASD into War on Terror, the Bush Doctrine, as the next Part will demonstrate, proposes a paradigmatic shift toward a fundamentally new legal regime that radically alters the definition of imminence and would permit, in effect, measures to prevent, rather than merely to anticipate, attack.

II. Beyond Anticipation: The Bush Doctrine as an Assertion of the Right to Engage in Preventive War

"The chief foundations of all states, whether new, old, or mixed, are good laws and good arms."[202]

"Thrice is he armed that hath his quarrel just, But four times he who gets his blow in fust."[203]

Whereas the doctrine of ASD justifies the resort to force in anticipation of an imminent armed attack out of necessity where so great is the threat that no moment for deliberation is possible, the use of force in the absence of an imminent threat that is intended to destroy the potential that an enemy may pose a future threat is termed "preventive war."[204] The Bush Doctrine, articulated in the NSSUSA,[205] prominent presidential addresses, and the statements of senior officials,[206] is effectively a unilateral U.S. assertion of the right to engage in preventive war. Although "[i]t has taken almost a decade for [the U.S.] to comprehend the nature of th[e] new threat"[207] posed by the proliferation of WMD to irrational enemies endowed with the "capability to blackmail us"[208] and the "catastrophic power" to emerge from concealment to inflict "wanton destruction" without warning,[209] the Bush Doctrine contends that the U.S. is compelled, in light of the capabilities and intentions of their adversaries—a threat matrix even more hazardous than that posed by the Soviet Union[210]—to abandon their traditional "reactive posture" and replace outmoded standards for evaluating the lawfulness of self-defense with a contemporary doctrine adapted to the "capabilities and objectives of today's adversaries."[211] Therefore, the Bush Doctrine warns that the U.S. will no longer "wait for threats to fully materialize" but will take "preemptive action when

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of the ICJ reinforces the argument that necessity precludes wrongfulness under customary international law. See *Case Concerning the Gabcikovo-Nagymaros Project* , 1997 I.C.J. Rep. 7 (Sept. 25).

[201] A very few scholars maintain that the Bush Doctrine is more than simply a robust restatement of the right to ASD and that it represents something much more contentious: i.e., the "public[] embrac[e]" of the right to engage in preventive war. Sapiro, *supra* note_, at 599 n.4.

[202] NICCOLO MACHIAVELLI, IL PRINCIPE 72 (Oxford transl. 1903) (1532).

[203] Josh Billings (pseudonym of Henry Wheeler Shaw, U.S. humorist, 1818-1885).

[204] Efraim Inbar, *The "No Choice War " Debate in Israel*, J. STRAT. STUD. 35 (Mar. 1989); *see also* RICHARD HAASS, INTERVENTION: THE USE OF AMERICAN MILITARY POWER IN THE POST-COLD WAR WORLD _) (1999) (distinguishing preventive use of force which is intended to "stop another state . . . from developing a military capability before it becomes threatening or to hobble or destroy it thereafter," from ASD (otherwise termed "preemption), which refers to the use of force "against a backdrop of tactical intelligence or warning indicating imminent military action by an adversary."). For an official definition of "preventive war," *see* U.S. Department of Defense Dictionary of Military and Associated Terms 461 (2001) (defining "preventive war" as a war "initiated in the belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk[.]").

[205] *See supra* at note_.

[206] *See* Addicott, *supra* note_, at 780 ("Our approach has been to aim at prevention and not merely punishment. We are at war. Self-defense requires prevention[.]") (quoting U.S. Deputy Secretary of Defense Paul Wolfowitz).

[207] NSSUSA, *supra* note_, at 6.

[208] President George W. Bush, Remarks at Graduation Exercise of the United States Military Academy, West Point, New York (June 1, 2002) ["West Point Address"], available at http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html.

[209] NSSUSA, supra note_, at 15.

[210] *See* NSSUSA, *supra* note_, at 13 (stating that the possession of WMD by terrorists, coupled with the "greater likelihood that they will use [WMD] against us [as compared to the likelihood that the Soviet Union would have done so], make today's security environment more complex and dangerous.").

necessary to defend our liberty and to defend our lives"[212] and "deter and defend against the threat before it is unleashed."[213] Although the U.S. "will not use force in all cases to preempt emerging threats," and although the U.S. does not intend that the Bush Doctrine be employed by other states as a "pretext for aggression,"[214] the Bush Doctrine proclaims that the U.S. will "not hesitate to . . . exercise our right of self-defense by acting preemptively[,]"[215] *even if "uncertainty remains as to the time and place of the enemy's attack*."[216]

Thus, although the U.S. references traditional support at customary international law for ASD to justify the Bush Doctrine as simply an adaptation of longstanding U.S. support for the doctrine of ASD to contemporary threats,[217] and although the U.S. employs the language of "anticipatory action"[218] and "preemptive options,"[219] in purporting to dispense with any obligation to support the exercise of force in self-defense with evidence demonstrating the imminence of an armed attack, in truth the Bush Doctrine invites application to circumstances where threats are neither operational, nor at all certain to ripen into attacks on the U.S., nor otherwise amenable to proof by objective evidence in a manner sufficient to satisfy the requirements of even a relaxed *Caroline* standard. As such it would be disingenuous to cast the Bush Doctrine as a variant of ASD; rather, it must be understood as an assertion of the right to engage in preventive war predicated upon the policy judgment that war with terrorists and rogue states is inevitable or at least probable,[220] that delay redounds to the benefit of terrorists and the detriment of innocent civilians, and that failure to act preventively may mean the loss of the last best chance to prevent tremendous destruction on a scale not heretofore witnessed. Although the Bush Administration has not yet been forced to defend the specific question of whether the Bush Doctrine and its exposition of the doctrine of preventive war are consistent with international legal obligations under the Charter, the March

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[211] *Id*. at 15.
[212] West Point Address, *supra* note_; *see also* NSSUSA, *supra* note_, at 15 (warning that the U.S. will "act preemptively" to deter and defeat terrorists).
[213] NSSUSA, *supra* note_, at 6.
[214] NSSUSA, *supra* note_, at 16.
[215] NSSUSA, *supra* note_, at 16.
[216] *Id*. at 15 (emphasis added).
[217] *See* NSSUSA, *supra* note_, at 15 ("For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack."). Senior Bush Administration officials suggest further that the Bush Doctrine is nothing more than a restatement of the U.S. position on ASD that is largely consistent with the policies of prior administrations, including those of President Clinton. *See, e.g*., *Dr. Condoleeza Rice Discusses President's National Security Strategy* (Oct. 1, 2002) available at www.whitehouse.gov/news/releases/2002/10/20021001=6.html (suggesting that the Bush Doctrine states a policy with regard to ASD that is identical to the policy adopted by the Clinton Administration affirming the right of the U.S. to resort to ASD in regard to the 1994 crisis with North Korea). Analysis of the statements of Clinton Administration officials lend credence to the claim that the U.S. subscribed to the doctrine of preventive war long before the advent of the Bush Doctrine. *See* The Administration's Missile Defense Program and the ABM Treaty: Hearing Before the Senate Comm. On Foreign Relations, 107th Cong. 88 (2001) (proposing that in conjunction with a ballistic missile defense system the U.S. establish the policy "that we will attack the launch sites of any nation that threatens to attack the U.S. with nuclear or biological weapons." (statement of U.S. Secretary of Defense William J. Perry). In fact, the earliest embrace of the doctrine of preventive war as a pillar of U.S. defense policy may well reach back nearly two decades to the Reagan Administration, when Secretary of State Shultz advocated the "use force to prevent or pre-empt future attacks," to "retaliate" against prior attacks, and to defeat "those states that support, train or harbor terrorists." George P. Schultz, Address to the National Defense University, January 15, 1986, reprinted in 25 ILM 206 (1986).
[218] *See* NSSUSA, *supra* note_, at 15 stating that "the greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves.").
[219] NSSUSA, supra note_, at 16.

2003 intervention in Iraq sparked academic debates as to whether preventive war, rather than the proclaimed enforcement of Security Council resolutions, was in fact the legal basis upon which the U.S. had undertaken military operations.[221] Even if it is unclear that the future applications of the Bush Doctrine will "stand the Charter on its head[,]"[222] the public pronouncement that U.S. strategy is constructed upon a theoretical foundation that trumpets the doctrine of preventive war is indeed a "militant and highly transformative assertion"[223] that dramatically transcends the parameters of ASD and therefore demands legal justification on a basis independent of this latter doctrine. Natural law, as the next Part demonstrates, supports the proposition that under limited circumstances preventive war, and thus the Bush Doctrine, is consistent with international legal obligations even in the Charter era inasmuch as the Bush Doctrine restates a general principle of law immune from derogation even by the Charter.

III. Natural Law and the Doctrine of Preventive War

If a man meets his enemy, does he let him go his way unharmed?[224]

A. Introduction

For millennia, philosophers have propounded and defended the notion that there exists a set of absolute and universal rules or precepts that, although ascertainable or discoverable by the deductive exercise of human reason, nevertheless binds mankind and the political communities instituted to govern the affairs of men on earth, trumping any inconsistent rules by virtue of its intrinsic moral merit.[225] Natural law,[226] an immediate and eternal expression of the principles of rights and justice that though gleaned from observation of the natural universe and referenced as the "ultimate origin of law" and the "beginning of moral life proper,"[227] long antedates the origin of man,[228] is effectively "super-law": where by the contrivance of man-made institutions natural law is forced into conflict with positive sources of regulation that are out of harmony with natural reason or that represent the "arbitrary construction of opinion"[229] or base assertion of power, natural law not only prevails over the "will of human governors"

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[220] *See* Franck, *supra* note_, at 619 (describing the Bush Doctrine as having substituted an imminence requirement for a "balancing of probabilities").
[221] *See supra* at note_.
[222] Franck, *supra* note_, at 619.
[223] *Id*.; *see also* 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, 278 (2003) (condemning the Bush Doctrine as a "dramatic departur[e] from the existing international law that governs the use of force.").
[224] I Samuel 24:20
[225] *See* Beres, *supra* note_, at 328 n.31 (tracing the development of natural law from ancient Hebraic philosophers through the ancient Greeks and Romans to the present).
[226] The term "lex aeterna" is sometimes used to refer to natural law, although the latter is better understood as a subset of the former inasmuch as the lex aeterna includes universal principles of "cosmic reason" that human reason has yet to discover. Beres, *supra* note_, at 728.
[227] PASSERIN D'ENTREVES, NATURAL LAW 122 (1950).
[228] *See* EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 4-5 (1955) ("[Natural law] principles were made by no human hands" and either "antedate deity itself" or else "so express its nature as to bind and control it."); Louis Rene Beres, *International Law, Personhood and the Prevention of Genocide*, 11 LOYOLA L.A. INT'L & COMP. L.J. 25, 34 (1989) ("Not of today or yesterday its force . . . It springs eternal; no man knows its birth.") (quoting Sophocles' Antigone) (citation omitted). Although natural legal philosophy has a branch that posits the origin of natural law stems from the expressed will of a divine creator, a branch of natural law contends that even in the absence of a divinity the authority of natural law is rooted in the objective analysis of the natural order of the universe from which generalizations can be drawn and that the origin of this natural order is not relevant for purposes of establishing the authority of natural law. For a comparative discussion and analysis of the secular and clerical schools of natural legal philosophy, *see*_.
[229] *Id*. at 35.

but rejects utterly the notion that such contrary statements of obligation have the force of law.[230] Put very simply, natural legal philosophy, the supreme source of normative guidance for and judgment of human conduct, demarcates the legal universe, affirmatively prescribes rights and duties,[231] and defines the limits of our legal reach in insisting that

> [o]nly good laws are laws. And for a law to be good, it must be based, in one way or another, upon natural law . . . If a human law is at variance with natural law it is no longer legal[.][232]

B. Intellectual History

The natural law tradition found its earliest expression among the ancient Israelites, for whom the Torah, as the literal word of God, stood as the sole and unambiguous basis of legal obligations.[233] To the extent religious scholars imputed to the Torah obligations not evident from the words themselves, Jewish law treated these scholarly analyses not as new sources of law but as revelations of law "already given to Moses on Mount Sinai."[234] For the ancient Greeks natural law was the universal font of all human laws,[235] and human laws contrary to natural law were of no legal force.[236] In ancient Rome natural law prescribed universal rules of right and wrong, and positive laws, known as *lex scripta*, at variance with the "true law" or were "not to be regarded as law[;]"[237] to preserve the conformity of Roman law to natural reason, the Roman *lex scripta* incorporated savings clauses to the effect that statutory enactments were not intended to abrogate *jus naturale* (natural law),[238] and Roman lawyers drew upon such clauses to defend *jus naturale* against legislative assaults upon its supremacy.[239]

Christian scholars elaborated a strong association between natural law and universal moral principles[240]: positive laws or customs that did not mirror the substantive justice and morality of natural law were not "true law" but rather "iniquit[ies]"[241] to be denied any legal effect.[242] The first principle of

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[230] *See* CORWIN, *supra* note_, at 4-5 (insisting that only those "human laws" created through the faithful "discovery and declaration" of natural law and codified as a precise "record or transcript" of the same deserve recognition as law).
[231] Natural law creates both negative and positive rights and duties. *See* Christian Thomasius, Fundamenta Iuris Naturae et Gentium, in The Philosophy of Law (W. Hastie trans. 1887) (distinguishing natural law as a source of affirmative and negative obligations and rights). For a discussion of affirmative natural legal duties in the context of self-defense under international law, *see infra* at Part IV.
[232] D'ENTREVES, *supra* note_, at 81 (citation omitted).
[233] *See generally* AARON M. SCHREIBER, JEWISH LAW AND DECISIONMAKING: A STUDY THROUGH TIME (1979) (discussing ancient Jewish law).
[234] Beres, *Oslo, supra* note_, at 727 n.52 (citing Jerusalem Talmud, Jerusalem Megilla IV, 74(d)).
[235] *See* Beres, *supra* note_, at 727 n.53 ("For all human laws are nourished by one, which is divine.") (citing HERMANN FIELS & WALTHER KRANZ, DIE FRAGMENTE DER VORSOKRATIER (Weidmann ed. 1966) (fragment of Heraclitus).
[236] *See* 3 THE DIALOGUES OF PLATO 11 (B. Jowett trans. 4th ed. 1953) (arguing that, from the perspective of Plato, laws contrary to natural law were not worthy of being obeyed).
[237] MARCUS TULLIUS CICERO, DE LEGIBUS BK. II, 13 (52 B.C), at http://www.thelatinlibrary.com/cicero/leg.shtml.
[238] CORWIN, *supra* note_, at 12.
[239] The Roman Senator and lawyer Marcus Tullius Cicero offered the quintessential assertion of the imperviousness of *jus natural* to positive law and of the duty of legislators not to attempt to derogate from this supreme source of law:

> It is a sacred obligation not to attempt to legislate in contradiction to [natural] law; nor may it be derogated from nor abrogated. Indeed, by neither the Senate nor the people can we be released from this law[.]

MARCUS TULLIUS CICERO, DE REPUBLICA, BK. III, xxii *III* (C.W. Keyes trans. 1928), at 211 (52 B.C.).
[240] Christian natural legal theorists posited that certain universal moral principles were superior to and not susceptible to abrogation by the parochial customs and laws of princes and secular rules. *See* DICKINSON, THE STATESMAN'S BOOK OF JOHN OF SALISBURY 33 (1927) ("[T]here are certain precepts of law which have perpetual necessity, having the force of law among all nations and which absolutely cannot be broken.") (quoting John of Salisbury, 13th century political scientist); *see generally* JEAN BODIN, DE REPUBLICA LIBRI SEX (1577) (conceding that natural law imposes moral limits on the expression of state sovereignty).
[241] ST. AUGUSTINE, ON FREE WILL ().

natural was very simply "to do good and to avoid evil."[243] For Christian natural legal theorists, the duty of obedience to secular authority extended only insofar as the "order of justice requires[,]" and Christians were obliged to abandon allegiance to rulers who "command things to be done which are unjust."[244] In turn, Enlightenment scholars developed a theory of natural law premised upon the argument that the exercise of natural reason led ineluctably to the conclusion that Creation[245] had invested each individual with an equal body of inalienable rights and liberties and obligated every other person in the "state of nature," and by extension each state, to accord reciprocal respect to these rights and liberties.[246] Those who trespassed against this fundamental law of nature declared themselves beyond "that measure God has set to the actions of men[,]"[247] and the inevitable attempts to abrogate these divinely ordained rights and liberties by legislative or executive action, whether at the level of the state or by agreement between states, inevitably foundered upon the immutable shoals of natural legal command.[248]

The natural legal concepts that positive law is subject to and limited by a superior source of law, and that individuals are not obligated to obey commands of sovereigns that transgress rules and principles revealed by reasoned study of a divine or natural purpose, exerted potent influence upon the subsequent development of the positive legal frameworks of a number of leading states, as well as of the emerging positive international legal order, beginning in the late seventeenth century.[249] To underscore the depth of

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[242] *See* DECRETUM GRATIANI, BK. I, viii, §2 (1140) ("Natural law absolutely prevails in dignity over customs and constitutions . . . Whatever has been recognized by usage, or laid down in writing, if it contradicts natural law, must be considered null and void.") (cited in D'ENTREVES, *supra* note_, at 34).

[243] D'ENTREVES, *supra* note_, at 80.

[244] ST. THOMAS AQUINAS, SUMMA THEOLOGICA, BK. II (A), quae. 91, art. 1 & 2 (1258).

[245] Natural legal philosophers of the 18th century developed a somewhat secularized theory of natural law that allowed agnostics to substitute Nature in the stead of a divinity as the source of order, justice, and human obligation without disturbing the central precepts of the theory. *See* Beres, *After, supra* note_, at 498 n.30 (discussing the parallel development of a secular theory of natural law).

[246] *See* THOMAS HOBBES, LEVIATHAN 93 (R. Tuck ed. 1991) (1651) ("And therefore there be some Rights, which no man can be understood by any words, or other signes to have abandoned, or transferred."); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 278-79 (P. Laslett ed. 1988) (1690) ("The state of nature has a law to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, liberty, or possessions[.]").

[247] LOCKE, *supra* note_, at 278-79.

[248] In the words of 18th century Swiss jurist Emmerich de Vatel,

> Since, therefore, the necessary Law of Nations consists in applying the natural law to States, and since the natural law is not subject to change, being founded on the nature of things and particularly upon the nature of man, it follows that the necessary Law of Nations is not subject to change. Since this law is not subject to change, and the obligation which it imposes are necessary and indispensable, Nations cannot alter it by agreement, nor individually or mutually release themselves from it.

EMMERICH DE VATTEL, THE LAW OF NATIONS ON THE PRINCIPLES OF NATURAL LAW 4 (C. Fenwick trans. 1964) (1758).

[249] The work of 18th century British jurists and social scientists suggests that the English common law regarded international law as a species of natural law, and therefore a part of the domestic law, that bound all individuals and states consistent with the principle that natural law resided at the apex of the hierarchy of sources of law both domestic and international. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND BK. IV, Of Public Wrongs, at (stating that international law was "deducible from natural law and is therefore binding upon all individuals and states, and each state is expected to aid and enforce the law of nations, as part of the common law[,] by inflicting an adequate punishment upon offenses against that universal law."); ADAM SMITH, THEORY OF MORAL SENTIMENTS 340-41 (D.D. Raphael ed. 1976) (1759) ("Every system of positive law may be regarded as a more or less imperfect attempt towards a system of natural jurisprudence."). In the U.S., the Declaration of Independence reflected a commitment to the natural legal principle, also recognized as a principle of international law known as "self-determination," that a people possess the right of revolution whenever a sovereign becomes destructive of inalienable rights invested in them by the "Laws of Nature and of Nature's God." DECLARATION OF INDEPDENCE (U.S. 1776). Moreover, the Supremacy Clause of the U.S. Constitution reflects the commitment to the Lockean notion that a transcendant body of law, termed the "Law of Nations," forms part of the law of the United States. *See* U.S.

natural legal hostility to pure positivism, one need only reference the Nazi Nuremburg laws and the concentration camps, monstrosities all of which were "legal" in the positivist, but not even remotely in the naturalist, sense of the word.

C. Self-Defense under Natural Law

The question of the right to undertake preventive measures in self-defense has garnered much analysis within the natural law canon. The Torah exonerates the potential victim of a robbery who responds by killing the would-be attacker prior to the commission of the planned crime.[250] The Roman jurist Cicero, although addressing the question in the context of the individual right to self-defense,[251] insisted that under natural law "every means of securing our safety is honorable" if "our life be in danger from plots, or of open violence, or from the weapons of robbers or enemies," including preventive measures.[252] For English philosopher Thomas Hobbes it was inconceivable that it could be "against the dictates of true reason for a man to use all his endeavours to preserve and defend his Body, and the Members thereof from death[,]"[253] as men did not have the freedom to voluntarily surrender their divinely-granted natural rights to life and liberty. Thus, although the first "Fundamentall Law of Nature" required men to "seek Peace, and follow it[,]" the "Second, the summe of the Right of Nature," permitted men "[b]y all means we can, to defend our selves."[254] Where presented with a choice between evils—death or the use of force to prevent death—"man by nature chooseth the lesser evil."[255] John Locke further elaborated the Hobbesian recognition of a "State of War" triggering the natural right to use preventive force against a "settled Design, upon another Mans Life"[256] Moreover, for Locke the natural right to self-defense, to include the right to engage in preventive force, in self-preservation extended beyond the intended victim to all others who would join in the defense of the innocent: "A criminal, who

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CONST., Art. VI. a discussion of the Declaration of Independence and the U.S. Constitution as having established a natural legal framework for the U.S., *see generally* CORWIN, *supra* note_. For an exposition of the relationship of natural law to international law as well as domestic law, *see infra* at *pp*._.

[250] *See* Exodus 22:2 ("If a thief be found breaking up, and be smitten that he die, there shall no blood be shed for him."). Rabbinical commentaries on this passage state further that "if a man comes to slay you, forestall by slaying him!" Rashi, Sanhedrin 72(a), available at http://www.geocities.com/yeshol/Sanhedrin.html

[251] Contemporary scholars suggest that Cicero's argument in favor of preventive self-defense applies by extension to states on the theory that if individuals have such great latitude in protecting their personal lives, how much greater is the latitude of a state in preserving its collective 'life?'" Beres, *On International, supra* note_, at 31 n.60.

[252] In the words of Cicero, offered in defense of his client Titus Annius Milo against the charge of murder:

> But if there be any occasion on which it is proper to slay a man—and there are many such—surely that occasion is not only a just one, but even a necessary one, when violence is offered, and can only be repelled by violence . . . What is the meaning of our retinues, what of our swords? Surely it would never be permitted to us to have them if we might never use them. This, therefore, is a law, O judges, not written, but born with us—which we have not learned, or received by tradition, or read, but which we have taken and sucked in and imbibed from nature herself; a law which we were not taught, but to which we were made—which we were trained in, but which is ingrained in us—namely, that if our life be in danger from plots, or from open violence, or from the weapons of robbers or enemies, every means of securing our safety is honorable. For laws are silent when arms are raised, and do not expect themselves to be waited for, when he who waits will have to suffer an undeserved penalty before he can exact a merited punishment.

The Speech of M.T. Cicero In Defense of Titus Annius Milo, in SELECT ORATIONS OF M.T. CICERO 177-78 (C.D. Young trans. 1882).

[253] THOMAS HOBBES, DE CIVE 47 (H. Warrender ed. 1983) (1651)

[254] HOBBES, LEVIATHAN, *supra* note_, at 91-92.

[255] *Id*. at 98.

[256] LOCKE, *supra* note_, at 278-29 (stating that when a party declares "by Word or Action, not a passionate and hasty, but a sedate settled Design, upon another Mans Life, [he] puts him[self] in a State of War with him against whom he has declared such an Intention, and so has exposed his

having renounced reason . . . hath . . . declared war against all mankind."[257] By their very designs that ran counter to the restraints imposed by natural law, aggressors forfeited their right to life and liberty and merited destruction just as did other "Beasts of Prey."[258] The current domestic laws of many states regarding the right of individual self-defense continue to reflect the influence of natural law in their tolerance for the exercise of measures of preventive force against potential aggressors even in the absence of an objective, imminent threat.[259]

The founders of the modern international legal regime paid homage to natural law generally[260] and specifically regard to their analyses regarding the right of states to self-defense. Hugo Grotius made direct reference to the self-defense arguments developed by Cicero[261] and ancient Greek authors in articulating a natural law exception to the general proposition that a declaration must precede the initiation of war:

> Whenever he who chooses to wait [for legal authorization] will be obliged to pay an unjust penalty before he can exact a just penalty . . . [an exception to the obligation to first declare war before initiating hostilities] exists whenever matters do not admit of delay . . . For—as Aelian says, citing Plato as his

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[257] *Id*. In other words, the right to exercise preventive force against a planned extend is both an individual and a group right:

[One who threatens another] puts himself in a State of War with him against whom he has declared such an Intention, and so has exposed his Life to the others Power to be taken away by him, or any one that joyns with him in his Defence, and espouses his Quarrel: it being reasonable and just I should have a Right to destroy that which threatens me with Destruction. For by the Fundamentall Law of Nature, Man being to be preserved, as much as possible, when all cannot be preserv'd, the safety of the Innocent is to be preferred[.]"
LOCKE, *supra* note_, at 278-79.

[258] "[O[ne may destroy a Man who makes War upon him, or has discovered an Enmity to his being, for the same Reason, that he may kill a Wolf or a Lyon; because such Men are not under the ties of the Common Law of Reason, have no other Rule, but that of Force and Violence, and so may be treated as Beasts of Prey[.]"). LOCKE, *supra* note_, at 279.

[259] The principle that an individual may defend himself against an unlawful attack so long as the responsive force is necessary, in response to an imminent attack, and proportional to the threatened force has traditionally been a feature of the domestic jurisprudence of almost all states. *See supra* at note_; *see also* Martin E. Veinsreideris, *The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women*, PENN. L. REV. 613 (2000) (analyzing the elements of a individual self-defense claim under the laws of U.S. jurisdictions). The question of whether individuals may exercise preventive force to defend against the possibility, or probability, of future violence from a known aggressor has been much-debated, often on natural legal grounds, in recent decades. *See* Larry Alexander*, A Unified Excuse of Preemptive Self-Protection*, 74 NOTRE DAME L. REV. 1475, 1477 (1999) (analogizing the individual right of preventive self-defense to the right of states to ASD). Battered women have found some success in defending against homicide charges by asserting that "battered woman syndrome," a psychological condition diminishing capacity caused by the chronic abuse meted out by the batterer-victim, constitutes a defense to an otherwise unlawful exercise of preventive force. *See* Lauren E. Goldman, *Nonconfrontational Killings and the Appropriate Use of Battered Child Syndrome Testimony: The Hazards of Subjective Self-Defense and the Merits of Partial Excuse*, CASE W. RES. L. REV. 185, 188-89 (1994) (surveying this trend). Nevertheless, the right of individual preventive self-defense, particularly as applied to the question of the domestic abuse of women or culturally-based defenses to homicide, along with the canons of interpretation of elements such as imminence and proportionality, remains much contested in the U.S. legal academy and in U.S. courts. ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS (1998)); *see also* Lorain Patricia Eber, *The Battered Wife's Dilemma: To Kill or Be Killed*, 32 HASTINGS L.J. 895 (1981) (battered women); Dorian Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (cultural defenses to homicide). Some commentators reject the lawfulness of the preventive use of force by individuals in terms similar to restrictivists on the subject of ASD, holding that in the absence of a "visible manifestation of aggression" preventive strikes are "grounded in a prediction of how the feared enemy is likely to behave in the future[,]" a standard rife with possibilities for abuse. GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 20 (1988). For an excellent discussion of the relationship of natural law to the contemporary law of individual self-defense in the U.S., *see* Alexander, *supra* this note.

[260] See HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES x (F.W. Kelsey trans. 1925) (1625) ("The law of nature is a dictate of right reason which points out that an act according as it is or is not in conformity with the social and rational nature of man has in it a quality of moral baseness or moral necessity, and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God."

[261] *See supra* note_.

> authority—any war undertaken for the necessary repulsion of injury, is proclaimed not be a crier nor by a herald but by the voice of Nature herself.[262]

In so doing, Grotius implied the fundamental right of state self-defense at natural law to undertake not only what might be understood presently as measures of ASD but also preventive measures designed "to kill him who is making ready to kill."[263] Leading lights of international law such as Alberico Gentili,[264] Emmerich de Vattel,[265] and Samuel Pufendorf explicitly recognized that states were not obligated to "receive the first blow, or merely avoid and parry those aimed at [them]" but were rather entitled, at natural law, to engage in preventive war "even though [an enemy] has not yet fully revealed his intentions."[266] The sole limitations these commentators recognized upon the natural right of states to engage in preventive war in self-defense provided only that peaceful remedies be either exhausted, fruitless, or likely to compromise effective defense by apprising the aggressor of preventive efforts underway.[267]

Subsequent scholars carried forward and incorporated the natural law doctrine of preventive war into the domestic jurisprudence of their respective states. Thomas Jefferson, one of the principal legal architects of the U.S., held that the natural law of self-defense "control[led] the written laws[,]"[268] and thus irrespective of any domestic or international laws governing the resort to force and whatever treaty obligations the U.S. had incurred,[269] the U.S. bore not merely the right but the "[m]oral dut[y]" and "indispensable obligation" to engage in preventive war where necessary to ensure "its preservation and safety."[270]

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[262] HUGO GROTIUS, DE IURE PRAEDE COMMENTARIUS, in CLASSICS OF INTERNATIONAL LAW 96 (J.B. Scott ed., G.L. William et al trans. 1964) (1604).
[263] GROTIUS, DE JURE, *supra* note_, at 173.
[264] *See* ALBERICO GENTILI, DE JURE BELLI LIBRI TRES, reprinted in 2 CLASSICS OF INTERNATIONAL LAW 58 (J.B. Scott ed. 1933) (1612) (commenting that natural law permitted a defensive attack by a threatened state).
[265] According to 18th century Swiss scholar Vattel,

> The safest plan is to prevent evil, where that is possible. A Nation has the right to resist the injury another seeks to inflict upon it, and to use force . . . against the aggressor. It may even anticipate the other's design . . .

EMMERICH DE VATTEL, DE JURE GENTIUM (1758).
[266] 2 SAMUEL VON PUFENDORF, DE OFFICIO HOMINIS ET CIVIS LIBRI DUO (ON THE DUTY OF MAN AND CITIZENS ACCORDING TO NATURAL LAW) 32 (F.G. Moore trans. 1964) (1682). According to Pufendorf,

> [W]here it is quite clear that the other is already planning an attack upon me, even though he has not yet fully revealed his intentions, it will be permitted at once to begin forcible self-defense, and to anticipate him who is preparing mischief . . . [T]he excuse of self-defense will be his, who by quickness shall overpower his slower assailant[.]

Id.
[267] *See, e.g.*, PUFENDORF, supra note_, at 32 (requiring exhaustion of peaceful remedies prior to exercise of right to preventive war unless "there be no hope that, when admonished in a friendly spirit, [the enemy] may put off his hostile temper; or if such admonition be likely to injure our cause.").
[268] A KOCH & W. PEDEN, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 607 (1944).
[269] Although "[c]ompacts . . . between nation and nation are obligatory on them by the same moral law which obliges individuals to observe their compacts[,]" and although treaties created the same "[m]oral duties" between states that existed between individuals under natural law, for Jefferson there were "circumstances . . . which sometimes excuse[d] the nonperformance of contracts . . . between nation and nation." Thomas Jefferson, Opinion on the French Treaties (Apr. 28, 1793), in MERRIL D. PETERSON, ED., THE POLITICAL WRITINGS OF THOMAS JEFFERSON 113-14 (1993). Where performance was rendered impossible or "self-destructive to [a] party, the law of self-preservation overrules the laws of obligation to others." *Id*. It would thus appear self-evident that for Jefferson the obligation to defend the U.S. would prevail in a conflict with a treaty or other domestic law. In his own words, "a treaty pernicious to the state is null, and not at all obligatory; no governor of a nation having power to engage things capable of destroying the state, for the safety of which the empire is trusted to him." *Id*. at 115.
[270] PETERSON, *supra* note_, at 115 (" The nation itself, bound necessarily to whatever its preservation and safety require, cannot enter into engagements contrary to its indispensable obligations.").

D. *Erosion of Natural Law by Legal Positivism*

1. Generally

Over the course of the nineteenth century, the legal philosophy of positivism began to emerge as the regnant paradigm in international law, incrementally banishing the natural legal principle that manmade laws inconsistent with the dictates of reason deduced from observation of the divinely orchestrated natural world were of no legal force and substituting the manifested will of sovereign states as the exclusive source and form of international legal norms.[271] For the positivist, law is not a rough attempt to codify reason or justice but rather the "command of the sovereign" backed by the threat of sanctions in the absence of compliance:[272] positivism supplants reason as the source of legal obligation with "fear: fear of violence, fear of lost advantage or amenity, or fear of social disapproval."[273] With the origins of positivism and the displacement of natural law from atop the hierarchy of sources of norms, the invocation of higher principles of reason and justice as authoritative sources of injunction no longer reliably restrained the political preferences of states in their international relations, and by the turn of the twentieth century the maturation of positivism had "bled white" international law by rendering state consent the sole criterion for adjudging the validity of norms in international relations.[274] In its mildest forms, positivism is merely agnostic in regard to the notion that specific enactments are intended as vehicles for the expression of moral content[275]; in its more extreme versions, positivism eschews entirely the proposition that law and morality ought to be drawn into any relationship whatsoever[276] and proceeds to assert as lawful the pursuit of state objectives with utter indifference to the natural justice, or absence thereof, appurtenant to state practice.[277] For the most committed positivists, the self-defense of states is at best a limited right, rather than a duty, and as such it is susceptible to qualification and regulation.[278]

2. The Positivist Attack on Natural Law in International Relations, and the Natural Law Response

The philosophical changing-of-the guard from the justice-centered approach of natural law to sovereignty-centric positivism in the discipline of international law and the practice of states over the

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[271] *See generally* Stephen Hall, *The Persistent Spectre: Natural Law, Internal Order and the Limits of Legal Positivism*, 12 EUR. J. INT'L L. 269 (2001) (defining and distinguishing positivism from natural law in the development of international law).
[272] *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (W. Rumble ed. 1995) (1832) (elaborating the "command theory" of positivism which holds that law is but the "command" of the sovereign rather than a statement of morality or a pathway to justice).
[273] Hall, *supra* note_, at 279.
[274] C. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW vii (P.E. Corbett trans. 1968).
[275] Some commentators suggest that so great as their adherence to the principle of state sovereignty and their neglect of other bases for normative judgment that for positivists the very act of asserting state sovereignty through domestic legislative enactment or by treaty, without regard to the substantive content of the law or international agreement itself, is by definition intrinsically just. *See, e.g.,* Beres, *supra* note_, at 728 (describing the extreme sovereigntist bias of positivism).
[276] *See* D'ENTREVES, *supra* note_, at 111 (stating that in its pure form positivism is a "pernicious doctrine that there is no law but positive law, or that might equals right, since for all practical purposes the two propositions are perfectly equivalent.").
[277] "[H]umankind has not only been indifferent to the law of nature, but has often even coupled this indifference with adherence to undiscovered "laws" that reject justice." Beres, *On International, supra* note_, at 5 n.9.
[278] *See, e.g.*, DINSTEIN, *supra* note_, at 178-79 ("Although the statement [that self-defense is a duty] may reflect morality or theology, it does not comport with international law."); J. Zouerek, *La Notion de Legitime Defense en Droit International*, 56 A.I.D.I. 1, 51 (1975) (describing self-defense as optional under international law).

course of the last two centuries[279] has not passed without remark. Critics of positivism more generally have assailed the "undue respect for law" it demands, particularly where positive laws have been susceptible to challenge on justice grounds;[280] others have registered pointed objections to the renunciation of natural legal formulations and the unquestioning devotion adherents of positivism grant to "undiscovered 'laws' that reject justice."[281] Critics of the erosion of natural law as the philosophical basis for international legal theory have excoriated the turn, wrought by positivism, away from the exercise of human reason and the participation of individuals possessed of inalienable rights in the (re)discovery of principles of eternal and immutable justice.[282] Natural law jurisprudence has enjoyed a revival of sorts towards the end of the twentieth century as a number of scholars, particularly in the fields of human rights and international relations theory, have begun to demand that international law be reintroduced to justice and morality and reconfigured to provide a more secure legal foundation for the expression and protection of inalienable rights, known alternatively as "natural rights" or "human rights."[283] For "new natural law" theorists, there are limits to lawmaking: states, although sovereign and the authors of domestic law, are no more "free to transform moral wrongs into human rights" than they are to criminalize the exercise of human rights, and considerations of justice, along with the application of practical reason to collective social problems by "free, rational[,] and moral beings," will require the restructuring of legal relationships between individuals, between individuals and states, and between states.[284] Nevertheless, although the pendulum of international legal theory may be once again swinging in the direction of natural legal philosophy, positivism is ascendant, and international law is arid terrain for the assertion and defense of norms, principles, and rules derived from the exercise of human reason and informed by considerations of universal justice and morality.[285]

E. General Principles of International Law: Repository for Natural Legal Principles in the Contemporary International Legal Regime

Although the Charter elaborates on behalf of the international community, acting as a collective sovereign, a series of textual proscriptions and prescriptions often seemingly devoid of natural legal content, it is not at all evident that Articles 2(4) and 51 either create or recognize an absolute and authoritative prohibition on the resort of states to preventive measures of force, including preventive war.

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[279] The 17th-century French philosopher Blaise Pascal may have presaged the rise of positivism by more than a century in commenting that "[i]t is a singular thing to consider that there are people in the world who, having renounced all the laws of God and nature, have made laws for themselves which they strictly obey[.]" BLAISE PASCAL, PENSEES §393 (1660). However, positivism did not displace natural law from its theoretical dominance in international law until the 19th century. *See* FREDERICK POLLOCK, ESSAYS IN THE LAW 63 (1922) (noting that "all authorities down to the end of the eighteenth century . . . have treated [international law] as a body of doctrine derived from and justified by the law of Nature.").

[280] *See, e.g.*, HENRY DAVID THOREAU, WALDEN AND CIVIL DISOBEDIENCE 387 (Penguin edn. 1983) (1849).

[281] Beres, *On International*, supra note_, at 5 n.9.

[282] *See, e.g.*, SHERSTON BAKER, FIRST STEPS IN INTERNATIONAL LAW 16 (1899); JOHN WESTLAKE, INTERNATIONAL LAW 14-15 (1910).

[283] For an excellent analysis of scholarship in what has come to be known as "new natural law" theory, *see, e.g.*, ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (1999); *see also* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

[284] For a discussion of the invigoration of natural legal philosophy in the field of human rights, *see* Hall, *supra* note_, at 302 (explaining that the "new natural law" school challenges the theoretical foundations of the power of states to "hinder[] or prevent[] the enjoyment of . . . natural rights").

[285] *See generally* Hall, *supr*a note_.

There is, at the very least, a fluid and vigorous debate as to whether the right of states at customary international law to engage in measures of force in anticipation of an imminent threat survives into the Charter era. Although the doctrine of preventive war, which is predicated not upon an imminent threat but rather authorizes the use of force to end an incipient threat that has not yet matured into an imminent attack, requires a basis of legal legitimization broader than that supporting the narrower doctrine of ASD, natural law, as the preceding analysis demonstrates, justifies force in self-defense even absent perfect information as to an enemy's intention and authorizes the destruction of those who are merely in preparation for a future attack at a date and time uncertain and with whom negotiation would be pointless. While the Charter framework is on its face a positivist instrument, the Statute of the International Court of Justice elaborates a more pluralist theoretical foundation: Article 38 recognizes, in addition to treaties and customary international law, that "general principles of law recognized by civilized nations" are cognizable as sources of international law applicable to the resolution of international disputes.[286]

1. Introduction

General principles of law provide "a reservoir from which apparent gaps in the corpus of international law may be filled" and "reinforce the view that international law should be regarded as a 'complete system,' i.e., that every international situation is capable of being determined as a matter of law[.]"[287] Their purpose is not limited to gap-filling, however: the argument that these "general principles," which number among them, *inter alia*, the denial of legal liability in the absence of fault, the defense of estoppel, the "clean hands" doctrine, the freedom to contract, a concept of due process that includes the right to be heard, the principle of *pacta sunt servanda* and the principle that no party ought to be a judge in his own case,[288] are derived from, and reflect the influence of, natural legal theory has gained adherents in recent years.[289] At least one scholar contends that the "very existence of general principles as a source of law indicates that treaty and custom do not provide an exhaustive source of legal norms in international law[,]" suggesting further that the general principles of international law referenced in the Statute of the ICJ are in fact principles and norms of natural law.[290] No less authoritative a forum than the International Court of Justice has offered validation to the notion that these "general principles" are indeed norms and rules of natural law for which positivism must make room: as Justice Kotaro Tanaka held in the *Southwest Africa Cases*,

> [T]he "general principles of law" conceived as a source of law are in many ways indistinguishable from the law of nature as often applied in the past in that sphere. There is no occasion, for that reason, with suspicion or embarrassment. The part of the law of nature in legal history—including the history of international law—is more enduring and more beneficent than that of positivism, which either identifies the law with, or considers it the result of, the mere will of the state and its agencies.[291]

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[286] *See* Statute of the International Court of Justice, Arts. 92-96, Charter of the United Nations, June 26, 1945, 59 Stat. 1031 (1945).
[287] Hall, *supra* note_, at 297.
[288] JOHN FINNIS NATURAL LAW AND NATURAL RIGHTS 108-09 (1980) (listing general principles of international law); *see also* Permanent Court of International Justice, Advisory Committee of Jurists, Proces-Verbaux of the Proceedings of the Committee 335 (1920) (enumerating general principles).
[289] *See, e.g.*, Hall, *supra* note_, at 292-97; Polebaum, *supra* note_, at 195; Magenis, *supra* note_, at 433-34.
[290] Hall, *supra* note_, at 292.
[291] Ethiopia v. South Africa, Liberia v. South Africa (Second Phase), ICJ Rep. 6, 298 (1966).

2. Preventive War as a General Principle of International Law

The UN Charter does not explicitly prohibit the resort to preventive war. Articles 2(4) and 51 are susceptible to restrictivist and pragmatist interpretations just as they are in respect of the doctrine of ASD.[292] Similarly, the question of whether the lawfulness of preventive war under traditional customary international law[293] has survived into the Charter era has been left open by divergent state practice and by diverging scholarly opinion. The orthodox methodology of international legal analysis permits the resolution of a legal question by resort to general principles of international law where analysis of relevant treaties and customary sources is not dispositive of the issue. The preceding analysis suggests that it is at the very least arguable that the right of states under natural law to take all such measures as they should deem necessary to reduce incipient threats posed by avowed enemies to their existence, even where no such threats are objectively imminent, continues as a general principle of international law that functions to fill the gap in the Charter-era international law governing the use of force in self-defense and to justify preventive war under some circumstances. If the Bush Doctrine is thus merely the assertion of the natural legal right of the U.S. to engage in preventive war, it ought to be received as thus nothing more than a restatement of a general principle of international law rather than as a unilateral gambit to subvert the international legal order to American purpose.[294]

The next Part will build upon the argument that the Bush Doctrine is a lawful assertion of the natural legal right of states to engage in preventive force by positing that under the U.S. Constitution and the domestic common-law the President of the U.S. is impressed with a duty, independent of any international legal considerations, to engage in preventive war where and when he deems it necessary to defend the nation and its people from existential threats.

IV. The Presidential Duty to Engage in Preventive War: A Natural Law Defense of the Bush Doctrine

When you see a rattlesnake poised to strike, you do not wait until he has struck before you crush him.[295]

A. Presidential War Powers under the U.S. Constitution

1. The Constitutional Text

Under Article II of the U.S. Constitution, the President "shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[296] The President is also vested with "the executive Power"[297] and charged with the duty to "take Care that the Laws be faithfully executed,"[298] and upon assuming office is required to "solemnly swear (or affirm) that [he or she] will faithfully execute the office of President of the United

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[292] *See supra* at pp._.
[293] *See supra* at pp._. Prior to the 20th century, resort to war was largely unregulated by law and left to the sovereign discretion of states. See supra at note_. The question of whether states, in the post-Charter era, may resort to force in the absence of an armed attack is discussed extensively *supra* at pp._ and is answered by restrictivists in the negative without distinction as between ASD and preventive war even though the two doctrines rest upon different evidentiary standards.
[294] *See supra* note_ (describing the Bush Doctrine in these terms).
[295] Franklin Delano Roosevelt, Fireside Chat of Sept. 11, 1941, quoted in DICTIONARY OF MILITARY AND NAVAL QUOTATIONS 247 (1966).
[296] U.S. CONST., Art. II, §2.
[297] *Id*. at Art. II, §1.
[298] *Id*. at Art. II, §3.

States, and will to the best of [his or her] ability, preserve, protect and defend the Constitution of the United States."[299] Despite these several textual commitments, the precise contours of the powers and duties of the President in regard to the use of military force have been contested since the origin of the U.S. as an independent nation.[300] Advocates of legislative supremacy, fixing upon the textual commitment of the power to "Declare War" to Congress under Article I,[301] have accused Presidents, particularly in the twentieth century, of waging undeclared and thus "unconstitutional wars"[302] and have sought to restrain presidential independence and initiative in warmaking through legislation;[303] proponents of a strong and independent executive have defended "energy in the executive" as "essential to the protection of the [nation] against foreign attacks."[304] Although the inter-branch battle over the distribution of the war powers continues to be waged within the legal academy, two centuries of practice marked by the presidential employment of U.S. military forces more than 125 times[305] suggests that the President and the Congress have approximated the sort of system for the shared exercise of the power to employ the Armed Forces of the U.S. that analyses of the original understandings of the constitutional design indicate the Framers intended: the President is encouraged to exercise initiative in the use of force but Congress is granted the ultimate power to check executive action through its powers of appropriation, statutory authorization, and impeachment.[306] Moreover, the judicial branch has largely abstained from the interbranch war power fray on political question grounds,[307] recognizing that the President is entitled to

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[299] Id. at Art. II, §1.

[300] For a discussion of this history, *see generally* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

[301] *Id*. at Art. I, §8.

[302] *See, e.g.,* Philip Bobbitt, *An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364, 1369-70 (1994) (listing sources); JOHN H. ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3 (1993) (contending that "all wars, big or small, 'declared' in so many words or not . . . ha[ve] to be legislatively authorized" to be constitutional); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 26 (1990) ("[T]he President's designation as Commander in Chief . . . appears to have implied no substantive authority to use the armed forces, whether for war (unless the United States were suddenly attacked) or for peacetime purposes, except as Congress directed.").

[303] *See* The War Powers Act of 1973 ["WPA"], P.L. 93-148, 93d Cong., H.J. Res. 542 (Nov. 7, 1973), at §2(a) (declaring Congress' intent to "fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicate by the circumstances, and to the continued use of such forces in hostilities or in such situations."): *see also id*. at §2(c) (declaring further that "the constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.").

[304] THE FEDERALIST No. 70, at 423 (A. Hamilton) (C. Rossiter ed. 1961).

[305] *See* E. FIRMAGE & F. WORMUTH, TO CHAIN THE DOG OF WAR 145-51 (1986) (listing instances of what the authors term "presidential acts of war").

[306] *See* W. Michael Reisman, *War Powers: The Operational Code of Competence*, 83 AM. J. INT'L L. 777 (1989) (describing as an "operational code of competence" the system in which the President assumes the primary role in the initial decision to exercise the war powers, Congress accepts a subordinate role in authorizing and appropriating funds for military operations, and the judiciary abstains from interbranch conflicts); Yoo, *supra* note_, at 188 (advancing a similar theory of the Framers' original intent regarding the practical exercise of the constitutional allocation of war powers). Not all scholars describe the practical exercise of the war powers approvingly. *See id*. (noting that some constitutional scholars fault the established system as overly prone to Congressional "acquiescence" in presidential faits d'accompli).

[307] For a discussion and analysis of the political question doctrine, *see Baker v. Carr*, 369 U.S. 186, 187 (1962) (holding that judicial abstention from the resolution of a dispute is obligatory where a case presents a "textually demonstrable constitutional commitment" of an issue to a "coordinate political department", a "lack of judicially discoverable and manageable standards" to resolve the issue, an "impossibility of deciding without an initial policy determination reserved for nonjudicial decisions", an "impossibility of deciding without expressing lack of respect for the coordinate branches of government", an "unusual need for

the widest margin of discretion in the exercise of his constitutionally committed and functionally essential power as the "sole organ of the nation in its external relations"[308] and as "Commander in Chief."[309]

2. The Relationship with Congress: A Model of Presidential Primacy

That the President is endowed with initiative in the employment of the U.S. Armed Forces and discretion in the conduct of international relations does not deny Congress a role in the war powers. The War Powers Act signifies the Congressional intent that the "collective judgement of both the Congress and the President" will be brought to bear on the question of the exercise of the war powers,[310] and the Supreme Court has superimposed a conceptual framework upon the political branches that, without intruding into the arena reserved to political questions, recognizes that presidential prerogatives are subject to the "express or implied will of Congress" and that the President, although the Commander in Chief, is not absolutely autonomous in this realm.[311] Nevertheless, although the power to repel imminent attacks or to otherwise act in defense of the U.S. is not explicitly mentioned in Article II, analysis of the Framers' original intent, a sustained pattern of executive practice and congressional acquiescence, and judicial interpretation of the textual allocation of powers conjoin in support of the argument that the President possesses not only a significant and exclusive measure of power to employ military force even absent any congressional declaration of war or statutory authorization where necessary to protect and defend the U.S. against foreign enemies.[312]

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adherence to a political decision already made", or the "potentiality for embarrassment from multifarious pronouncements by various departments.").

[308] The seminal judicial pronouncement upon executive power, primacy, and discretion in international relations provides as follows:

> Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation . . . It is important to bear in mind that we are here dealing . . . [with] the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations [.]

U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 307 (1936) (Sutherland, J.).

[309] *See The Prize Cases*, 67 U.S. (2 Black) 635 (1863) (holding that the question of whether and how the President employs military force as Commander in Chief "is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted."); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (holding that Congress may not direct the conduct of campaigns, a function constitutionally committed to the President under the Commander in Chief grant of power) (Chase, C.J., & Miller, Swayne, Wayne, J.J., concurring); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644-45 (1952) (Jackson, J., concurring) (same). For a discussion of the scope of presidential powers under the Commander in Chief Clause and an argument that the executive was granted monopoly power over the tactical and operational command of the U.S. Armed Forces, *see* George K. Walker, *United States National Security Law and United Nations Peacekeeping or Peacemaking Operations*, WAKE FOREST L. REV. 435, 473-78 (1994); for a discussion of the intellectual history surrounding the question of the commitment of the power of tactical command over the Armed Forces, *see* Yoo, *supra* note_, at 201.

[310] WPA, *supra* note_, at §2(a).

[311] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (analyzing presidential war powers not textually conferred by the Constitution and holding that (1) when the President acts consistent with the will of Congress his power is at a zenith; (2) when the President acts in the face of congressional silence, the constitutionality of his actions is in an uncertain "zone of twilight"; and (3) when the President acts in opposition "to the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his constitutional powers minus any constitutional powers of Congress over the matter.") (Jackson, J., concurring); *see also Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.")

[312] The roots of executive powers to act in case of emergency "according to discretion for the public good, without the prescription of the law, and sometimes even against it[,]" extend even further back in time through State Constitutions, English common law, and eventually to the writings of John Locke. *See* Yoo, *supra* note_, at 199-200 (conducting an extensive intellectual historical analysis and exposition of common-law executive prerogative in the areas of war powers and in particular

Read in isolation, the Commander in Chief and Executive Power clauses might be read narrowly to authorize the President to employ the Armed Forces in defense of the U.S., even during emergencies, only subsequent to congressional authorization.[313] However, when read in conjunction with the Take Care Clause[314] and with Article IV, Section 4, guaranteeing the States protection against invasion,[315] and Article I, Section 10, clause 3, providing that States may engage in war if "in such imminent Danger as will not admit of delay[,]"[316] the Commander in Chief and Executive Power clauses lead many to conclude that the Framers intended, in part out of efficiency considerations[317] and in part out of a desire to continue to accord to the executive common-law powers that had traditionally been within the province of the that branch responsible for the conduct of martial operations,[318] that the President, rather than Congress, initiate military action to fulfil this obligation.[319] Moreover, a close textual exegesis of the language in Article I conferring upon Congress the power to "Declare" rather than to "make" war represents for generations of scholars a conscious and deliberate election to allocate to the President residual emergency power to respond to foreign threats without obligating him to wait, perhaps disastrously, for legislative recognition of the *de facto* state of hostility.[320] In short, it is exceedingly difficult to conceive of the Constitution as having created a model of legislative supremacy that grants the President only that warmaking power necessary to execute legislative declarations of war and withholds the means and power to respond to attack or the threat thereof without reading the precise language

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the defense of the polity during emergencies) (citing JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT §160 (J.W. Gough ed., 3d ed. 1966).

[313] *See* THE FEDERALIST NO. 69, at 418 (A. Hamilton) (C. Rossiter ed.1961) (reassuring critics of the proposed Constitution that *even subsequent to congressional authorization* the President would have "nothing more than the supreme command and direction of the military and naval forces" and not, as did the English King, the power of declaring of war); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 38 (1993) (suggesting that Congressional notification and authorization is a condition subsequent to the exercise of presidential emergency powers).

[314] U.S. CONST. Art. II, §3.

[315] *See* U.S. CONST., Art. IV, §4 (providing in part that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion[.]").

[316] U.S. CONST., Art. I, §10, cl.3.

[317] *See* THE FEDERALIST 70, at 423 (A. Hamilton) (C. Rossiter ed.1961) ("Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks[.]"); *id*. at 472 ("Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number[.]").

[318] *See* Yoo, *supra* note_, at 202-03 (suggesting that the Framers were influenced by the views developed by Blackstone and Locke to the effect that the executive should be endowed with a "broad catalogue of executive power and duties" regarding the use of force, to include the "discretionary power of acting for the public good." (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 244).

[319] *See, e.g.*, W. REVELEY, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCHES? 39 (1981) (arguing that, after significant debate at the Constitutional Convention, the Framers intended that the Constitution preserve in the President the power to "repel sudden attacks."); Walker, *supra* note_, at 478 n.288 (same); Jordan J. Paust, U*.N. Peace and Security Powers and Related Presidential Powers*, 26 GA. J. INT'L & COMP. L. 15 (1996) (suggesting that the Take Care Clause would require the President to, if necessary, employ military force to execute treaties and customary international law, which are laws of the U.S, where Congress was unwilling to act in enforcement).

[320] *See, e.g.*, Yoo, *supra* note_, at 246-48 (examining constitutional debates and contemporaneous scholarly commentary and suggesting that the use of the word "declare" connoted the largely ceremonial act of recognition, rather than the authorization, of a state of war to the mind of the reasonable person at the time of the framing of the Constitution, a fact that reinforces the significance of granting Congress only this lesser power); FIRMAGE & WORMUTH, *supra* note_, at 18 (summarizing the linguistic debate over the choice of the word "declare" rather than "make in connection with the war power under Article I); ABRAHAM SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 31-32 (1976) (arguing that the choice of "declare" rather than "make" reflects the decision to preserve presidential initiative); Charles A. Lofgren, *War Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 675-77 (1972) (contending that many of the delegates in Philadelphia were of the view that the final draft of the Constitution retained on behalf of the President the power to repel attacks).

chosen by the Framers out of the document.[321]

3. War Powers in Practice: Congressional Acquiescence in and Judicial Recognition of a Presidential Power to Engage in Anticipatory Self-Defense

Moreover, Presidential practice, congressional acquiescence in that practice, and judicial review of the concord established by the political branches has lent additional force to the argument that the Constitution drapes the President with the power to respond unilaterally, at least where Congress has not acted, to defend the U.S. against the threat of attack. During the Civil War President Lincoln ordered the blockade of Southern ports as a measure designed to prevent and otherwise hinder attack on the U.S. and its interests by the Confederate States of America. In the *Prize Cases* the Supreme Court upheld the seizure and condemnation of vessels in pursuit of the blockade order against a challenge alleging that the President did not have the inherent power to defend the U.S. in the absence of express congressional authorization, holding that the President was not only inherently authorized but duty-bound to defend the U.S. against attack:

> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He . . . is bound to accept the challenge without waiting for special legislative authority.[322]

The Court went on to note that the President, in fulfilling his duty as Commander in Chief, was the sole entity competent to determine the degree of force necessary to suppress an insurrection or repel a foreign invasion.[323]

In a second Civil War era case, *Durand v. Hollins*,[324] a similarly broad construction was given to the Executive Power Clause in response to the question of whether the following of lawful orders to attack a government threatening U.S. nationals and interests, issued by the President to a naval officer, could be raised as a defense to a civil action against the naval officer for damages in connection with injuries arising from the execution of the orders.[325] In upholding the proffered defense, the court not only upheld executive power to engage in unauthorized self-defense but recognized a presidential *duty* to afford U.S. nations protection for their persons and property by the prudential exercise of measures in self-defense:

> As the executive head of the nation, the president is made the only legitimate organ of the general government . . . It is to him [that] the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently [sic], require the most prompt and decided action. Under our system of government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment

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[321] In arguing that Congress must be granted the power to maintain a standing Army in order that the President have available troops to command, Hamilton foresaw that future threats would obligate the President to swiftly and preemptively employ the means "by which nations anticipate distant danger, and meet the gathering storm[,]" in order to preserve the new nation. THE FEDERALIST No. 25, at 161 (A. Hamilton) (J. Cooke ed. 1961). Madison, in support of the Federalist position, warned that the President would require the instruments necessary to make war to protect the U.S. and warned the Framers against erecting "constitutional barriers to the impulse of self-preservation." *Id*., No. 41, at 270 (J. Madison).

[322] *The Prize Cases*, 67 U.S. (2 Black) 635, 638, 670 (1863).

[323] *Id. at 638*.

[324] 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186).

[325] *Id*.

of the object, or the performance of duty, is not worth preserving.[326]

Subsequent practice throughout the twentieth century, stretching from the Korean War to the Gulf, adds additional layers of gloss upon the constitutionality of the presidential power to act with alacrity and firmness to protect vital U.S. interests overseas in order to preserve U.S. national security and afford Congress the opportunity for meaningful participation.[327]

Although the Supreme Court has never directly decided the question of whether ASD is constitutional,[328] most scholars concur that the *Prize Cases*, congressional acquiescence in subsequent executive practice, and the practical exigencies of the contemporary threat environment[329] clearly support the constitutional interpretation that in the event of an invasion or other imminent harm against U.S. citizens or property, inherent presidential powers of self defense for the exercise of which the President need neither seek nor receive Congressional authorization are triggered,[330] even if the President remains obligated to make a subsequent request for congressional authorization of his course of action *post hoc*.[331] In other words, the President has the unambiguous authority substantially equivalent to an executive "necessary and proper" power[332] to employ military force to defend the U.S. against attack or the threat thereof, and relevant caselaw suggests that resort to the doctrine of ASD is within the scope of lawful presidential authority under such circumstances. Moreover, a determination by the President that the resort to ASD is imperative is within his sole discretion, and any challenges to the lawfulness of acts ordered by the President pursuant to the doctrine of ASD present nonjusticiable political questions.

B. A Presidential Duty to Defend

However, *Durand* not only accords judicial legitimation to the exercise of the executive power to "make" war in instances requiring the protection of U.S. nationals and interests against invasion or threat of harm; rather, it identifies a presidential *duty* to do so. A "duty" is distinct from a power: whereas the latter can be described as a state-enforced *capacity* to act in a given fashion, the former is better

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[326] *Id*. at 111-12.

[327] *See* Yoo, *supra* note_, at 296 (examining presidential practice in cases of national emergency).

[328] *See* Banks & Raven-Hansen, *supra* note_, at 748 (noting that although the question of the constitutionality of ASD is "just starting to receive the attention it deserves[,]" the Supreme Court has never decided the issue). Legislative proposals to ground ASD on sound constitutional footing, either by amendment to the War Powers Act or in other forms, have been the occasional subject of academic, but not serious political, consideration. *See, e.g*., Joseph R. Biden & John B. Ritch, *The War Power at a Constitutional Impasse: A "Joint Decision" Solution*, 77 GEO. L.J. 367, 398 (1988) (proposing to create a "joint decision framework" that would "confirm" presidential inherent authority to use force even absent legislative participation to, inter alia, "respond to a foreign military threat that severely and directly jeopardizes the supreme national interests of the United States under extraordinary emergency conditions . . ." and "to forestall an imminent act of international terrorism known to be directed against citizens or nationals of the United States[.]").

[329] *See* Bobbitt, *supra* note_, at 1382 ("In a world in which many foreign states have the power to attack U.S. forces—and some even the U.S. mainland—almost instantly, it is impractical to require the President to seek advance authorization to use force.").

[330] *See* Yost*, supra* note_, at 429 (1989) (surveying relevant literature). A minority of scholars read the *Prize Cases* more narrowly for the proposition that unilateral presidential warmaking authority is limited to invasions of the U.S. or an attack on U.S. interests, thereby rejecting entirely the argument that the Constitution grants the President the power to engage in ASD absent Congressional authorization. *See, e.g*., FIRMAGE & WORMUTH, *supra* note_ at 34 (making this argument); *see also* Paust, *supra* note_, at 533 (suggesting that presidential authority to engage in ASD under the Constitution is limited by international law, which prohibits ASD).

[331] *See* Bobbitt, *supra* note_, at 1369 (indicating that even a great number of scholars chary of presidential authority in respect of the war powers accept that in the event of an imminent invasion of the U.S. the President, provided he sought post hoc Congressional ratification of his actions, could defend the U.S. without waiting for Congressional authorization).

understood as the *obligation* to act in a given fashion that runs to the benefit of bearer(s) of the legal right that the party upon whom the obligation is incumbent to so act.[333] In other words, by explicitly recognizing that threats to the U.S. "cannot be anticipated and provided for" and that responses in self-defense "require the most prompt and decided action," the *Durand* opinion arguably establishes judicial recognition of a presidential duty to, where necessary, employ military force to prevent "acts of violence, or of threatened violence to the citizen or his property."[334] Although the opinion did not elaborate a reasoned basis for its recognition of a presidential duty to prevent injury to the U.S., its nationals, and its interests, the roots of such an obligation reach back in time, antedating the concept of sovereignty and drawing nourishment from principles of natural law that, woven together, nurture the theory of social contract.[335]

1. Protection as the First Duty of the State

a. Origins in Natural Law

i. allegiance-based theories

The argument that the state is brought into existence solely to protect its nationals against harm and to preserve the *tranquilitas ordinis*,[336] and that the state has a moral and legal duty to use force where necessary to accord this protection, dates at least to ancient Greece.[337] In exchange for service from its citizens, the state was obligated not merely to refrain from causing its citizens injury but to affirmatively discover and defeat any threat to the *polis*.[338] Although by the Middle Ages the democratic basis for the organization of the state had given way to more hierarchical forms that restricted political participation, the symbiotic relationship between state and nationals in which protection was exchanged for service had so conditioned understandings of the meaning of sovereignty that the king was judged to be entitled to

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[332] *See* Monaghan, *supra* note_, at 42 (describing presidential emergency powers as having evolved through practice the point where they are now akin to Congressional powers under the Necessary and Proper Clause of Article I, Section 8, Clause 18.).

[333] *See* Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913) (constructing an early theory of the distinctions between rights and duties under the law). Duties and rights exist in a correlative relationship: to possess a right implies that others bear duties toward the right-holder to act or refrain from action by virtue of the existence of the right, and to this extent duties arise whenever rights are recognized. *See* Albert Kocourek, *Various Definitions of Jural Relation*, 20 COLUM. L. REV. 394, 412 (1920) (building upon the Hohfeldian dichotomies). Moreover, the existence of a duty implies that in the event of a breach of that duty a transgression against the bearer of the correlative right occurs which exposes the incumbent to liability and entitles the right-holder to a remedy. *See* JULIUS STONE, THE PROVINCE AND FUNCTION OF LAW 98 (1950) (linking breaches of duties with liability to the bearers of correlative rights). Although a discussion of "rights" is more generally accessible to the modern reader than is a discussion of "duties," the latter analytical concept, however, has a "more strategic explanatory role than the concept of rights" in a broader discussion of natural law and the notion of moral obligation upon which its rests. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 210 (1980). Accordingly, it is to duties that this Article turns in developing and testing its natural law defense of the Bush Doctrine.

[334] *Durand v. Hollins*, 8 F. Cas. at 111-12.

[335] In this Article the description of a presidential duty to defend against threatened harm is limited to threats emanating from abroad and does not take up the potentially more complex question of a presidential duty to defend against domestic threats. For a thorough analysis of this latter issue, *see* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993).

[336] "Public peace."

[337] *See* Lacey, *supra* note_, at 310 (locating the ancient Greek origins of the theory of protection of nationals as the *raison d'etat*). Some commentators might locate the earliest example of an affirmative state duty of protection in ancient Israel. *See* Addicott, *supra* note_, at 761-62 (describing Mosaic law as "centering on the duty of the state to protect its citizens both internally against criminal behavior and externally against enemies).

[338] *See* ROBERT H. MURRAY, THE HISTORY OF POLITICAL SCIENCE FROM PLATO TO THE PRESENT 1 (1925) (presenting the Platonic theory of the perfect state and noting its incorporation of affirmative state duties); see also PLATO, THE REPUBLIC_ ("The action of the state may be positive or preventive. It may stimulate the good life or it may remove hindrances to it.").

obedience and loyalty only insofar as he afforded justice and a reasonable assurance of protection to his subjects.[339] Maintenance of subjects in "suretie of their persons" was, in effect, consideration granted by the sovereign in exchange for the "obeysance" of his subjects.[340]

ii. contractarian theories

In the Age of Enlightenment, sovereignty came to be understood as derivative of the duty of protection owed to subjects by their sovereign; individuals contracted out of a state of nature to enhance their security, relinquishing their natural liberty for the safety bestowed by the sovereign, who, by virtue of this bargain, was impressed by a duty to defeat any threats to his subjects.[341] The supreme duty of the state was the protection of rights to life, liberty, and property owed under natural law to its nationals, who gave up their natural capacity to act in their own self-preservation to the state,[342] and to discharge this duty the state was therefore obliged to "punish the transgressors of that law to such a degree, as it may hinder its violation."[343] Failure to engage or conquer threats to those within his protection stripped the sovereign of his entitlement to obedience and fidelity and invalidated this social contract, and thus for Hobbes "[t]he obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them."[344] Moreover, should the state neglect its first duty to provide the requisite degree of protection, its government is dissolved and the people regain the natural legal entitlement to establish a new government that will more faithfully discharge its obligation.[345] In short, protection implied subjection, yet subjection implied protection.[346]

iii. common-law theories

The "common right and reason"[347] at the core of the natural law bargain, conditionally exchanging protection for allegiance, was conveyed forward through the efforts of prominent Whigs and the rhetoric of colonial politicians,[348] ultimately finding expression in the constituent documents of the several American States[349] as well as of the U.S. The generation that affixed their hands to the

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[339] By the traditional English doctrine of allegiance, every loyal subject was entitled to the protection of the King. ANTHONY FITZ-HERBERT, THE NEW NATURA BREVIUM 29 (1534). However, allegiance was conditional upon the provision of that protection. *See* CORWIN, *supra* note_, at 27 (summarizing the writings of the 13th century English jurist Bracton on the theoretical basis for the relationship between medieval sovereigns and their subjects).

[340] JEAN BODIN, LA REPUBLIQUE, *supra* note_, at_.

[341] HOBBES, LEVIATHAN, ch. XVII, supra note_, at 227 (C.B. MacPherson ed. 1985)

[342] LOCKE, TWO TREATISES ON CIVIL GOVERNMENT, *supra* note_, at 129-31.

[343] *Id*. at 4, 7.

[344] *Id*. at ch. XXI; see also LOCKE, supra note_, at 131 (theorizing that because the state is established to protect the community it is "obliged" to secure the life, liberty, and property of every individual).

[345] LOCKE, *supra* note_, at 224 ("[T]he community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject."; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 233 (G. Tucker ed. 1803, reprinted1969) (approving as part of the English common legal heritage the Lockean doctrine that the failure of a sovereign to afford protection terminated the duty of obedience and justified the replacement of the sovereign).

[346] *See* Calvin's Case, 7 Co. Rep. 1(a), 77 Eng. Rep. 377 (1608) Coke, J) (defining the relationship between sovereign and subject with the maxim "protectio trahit subjectionem, et subjectio protectionem" (protection implies subjection, and subjection protection) (cited in 1 BLACKSTONE, supra note_, at 233).

[347] Bonham's Case, 8 Coke Rep. 114(a), 119 (1610).

[348] *See Claude* H. Van Tyne, *Influence of the Clergy on the American Revolution*, 14 AM. HIST. REV. 49 (1913) ("[G]overnment is a conditional compact between king and people . . . [and] violation of the covenant by either party discharges the other from obligation.") (quoting Patrick Henry).

[349] *See, e.g.*, Mass. Const. (1780), pt. I, art. X, reprinted at 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 94 (W.F. Swindler ed. 1973) ("[E]ach individual of the society has a right to be protected in the enjoyment of

Declaration of Independence justified violent separation from the United Kingdom to the "opinions of mankind" on the ground that their king had "abdicated Government . . . by declaring us out of his Protection and waging War against us."[350] The failure of King George III to protect the "unalienable rights" with which his American subjects had been "endowed by their Creator" violated the "Laws of Nature and of Nature's God" not only "entitle[d]" them to "alter or abolish" British rule in North America but imposed upon them a "duty to throw off such Government, and to provide new Guards for their future security."[351] The Constitution of this new government launched the new nation on a natural law course and reflects its Framers' "deep-seated conviction that [it] is an expression of the Higher Law, that it is in fact imperfect man's most perfect rendering of . . . 'the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms, and which he has enabled human reason to discover, so far as they are necessary for the conduct of human relations.'"[352] That positive law should ever be invoked to interfere with the provision of the protection owed to the people was a proposition utterly inimical to reason and to the survivability of the fledgling U.S. in the judgment of the Framers; in the words of Thomas Jefferson:

> A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of a higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.[353]

That the nascent U.S. Government was charged with the moral and legal obligation to defend its citizens and its interests was a largely uncontested proposition throughout the first century of national independence despite the waxing influence of legal positivism:[354] Reconstruction Era legislative debates sparked declarations to the effect that "[t]he first duty of government is to afford protection to its citizens"[355] and that "American citizenship would be little worth if it did not carry protection with it."[356] At least one contemporary scholar posits that should the U.S. cease to afford its nationals protection this failure would "void the very foundations of its existence."[357]

2. The Duty to Defend: Incumbent Upon the Executive under Natural Law

a. Constitutional Analysis

Investment of primary responsibility for the protective function of government in the executive branch was an uncontroversial incorporation of the English common-law doctrine of "conservation of the

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his life, liberty, and property, according to standing laws."); Pa. Const. (1776), Declaration of Rights, art. VIII, reprinted in 8 *id.* at 278 ("Every member of society hath a right to be protected in the enjoyment of life, liberty and property.").

[350] Declaration of Independence (U.S. 1776), at para. 25.

[351] *Id*.

[352] CORWIN, *supra* note_, at v (citation omitted). For a thorough defense of the position that the Constitution is a natural law document, *see* RANDY BARNETT, THE IMPERATIVE OF NATURAL RIGHTS IN TODAY'S WORLD 1-8 (forthcoming, 2004).

[353] PETERSON, *supra* note_, at 1231 (quoting letter from Thomas Jefferson to John B. Colvin, Sept. 20, 1810).

[354] Positivist commentators regarded the state, rather than a divinity or a process of natural reason, as the source of legal entitlements and corresponding state duties of protection. *See, e.g.*, J.K. BLUNTSCHLI, THE THEORY OF THE STATE 2 (1885) ("[T]he individual requires the state to give him a legal existence: apart from the state he has neither safety or freedom."). For a discussion of legal positivism more generally, *see supra* at note_.

[355] CONG. GLOBE, 39th Cong., 2d Sess. 101 (1867) (remarks of Rep. Farnsworth).

[356] CONG. GLOBE, 39th Cong, 1st Sess. 17575 (1866) (statements of Sen. Trumbull).

peace," which ensured to all law-abiding subjects not merely the arrest and prosecution of offenders but affirmative state action oriented toward the prevention of violence.[358] At common-law, executive branch officers who breached or neglected their duty to protect the polity against violence were subject to civil and even criminal sanctions,[359] and in *South v. Maryland* the Supreme Court held that this "public duty doctrine," although it immunized public officials against civil liability, permitted their criminal prosecution in the event of neglect or breach of their duty to protect the public.[360] More than three decades later in the case of *In re Neagle*, the Court, in determining whether the President was empowered to afford protection to a Supreme Court justice, read the Take Care Clause as having not merely vested a power in the President but rather as having imposed upon him a duty to enforce not merely the "express terms" of acts of Congress and the Constitution but all the "rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution[.]"[361] Without directly referencing the public duty doctrine or identifying any available sanctions for a breach of presidential duties, and without extending its holding to impose a corresponding duty upon the States through the Fourteenth Amendment,[362] the *Neagle* Court implied that the origin of the presidential duty to protect is to be found in extra-constitutional and decidedly non-positivist sources of obligation—i.e., the common law, and therefore, ultimately, natural law.[363]

b. Extra-Constitutional Sources of Obligation

Although the public duty doctrine and additional positive sources expressly impose upon officers in the U.S. Armed Forces a legally-enforceable duty to exhibit courage and initiative in the defense of the U.S. against foreign and domestic threats,[364] no constitutional provision or statutory enactment expressly

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[357] Glennon, *supra* note_, at 313.

[358] *See* 1 BLACKSTONE, *supra* note_, at 266-70, 349-54 (discussing the "conservation of the peace" doctrine and expressly characterizing its enforcement by executive branch officials as a "duty"); *id*. at 353-54 (observing that, at common law, the power and duty of conservators of the peace included "suppressing riots and affrays, . . . taking securities for the peace, and . . . apprehending and committing felons and other . . . criminals"); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 15 (1826) ("[E]very person is entitled to the preventive arm of the magistrate, as a further protection from threatened or impending danger[.]").

[359] *See* 4 BLACKSTONE, *supra* note_, at 140 (indicating generally that negligence of public officials was a misdemeanor at common law and more specifically that conservators of the peace who failed to discharge their duties were subject to criminal prosecution).

[360] *See South v. Maryland ex rel. Pottle*, 59 U.S. (18 How.) 396, 402-03 (1856) (holding, in the case of a conservator of the peace who failed to provide requested protection to a plaintiff against persons who had threatened his life, that criminal, but not civil, liability resulted from breach of a discretionary duty).

[361] In re Neagle, 135 U.S. 1, 4 (1890).

[362] *See* Deshaney v. Winnebago County, 489 U.S. 189, 195 (1989) (Rehnquist, C.J.) (holding that the14th Amendment "cannot fairly be extended to impose an affirmative obligation on the State" to protect life, liberty, or property "against invasion by private actors."). The specific question of whether States are duty-bound to protect citizens against "invasion" by foreign "public actors" has never been presented to the Supreme Court, although the Court has held, in dictum, that "[a]s a general matter, a State is under no constitutional duty to provide substantive services for those within its borders." *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982). Arguably, because the President is the "sole organ of the federal government in the field of international relations," it is to the President alone that citizens must look for the performance of the protective function against external threats. *Curtiss-Wright,* 299 U.S. at 307.

[363] Subsequent opinions of inferior courts reinforce *Neagle* in holding that the duty of the state to protect arises from extra-constitutional sources on the ground that the Constitution is "a charter of negative rather than positive liberties." *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.).

[364] The Oath of Office administered to personnel upon enlistment or commissioning into the U.S. Armed Forces obligates the enlistee or officer to "support and defend the Constitution of the United States against all enemies, foreign and domestic[.]" *See* Oath of Office—Military Personnel, Dept. of the Army, Form 71 (Jul. 1999), 10 U.S.C. §1031 (2002). For failure to faithfully

imposes upon the President a general duty to defend against foreign threats.[365] Absent any authoritative statutory command obligating presidential action in response to a specific threat, if the President is duty-bound to defend the U.S. the source of such a duty must necessarily arise as the logical corollary to the natural rights, and in particular the rights to life and liberty, possessed by U.S. citizens. Accordingly, in charging presidents with the "solemn responsibility"[366] to safeguard the nation and its population against the threat or use of force, scholars, presidents, and sitting heads-of-state have drawn heavily upon the language and ethos of natural legal theory. Contractarian theorists hold the state to its bargain, demanding protection of life and liberty from officials specifically entrusted with the duty to defend;[367] just war and Catholic theorists insist not only that human beings are collectively obligated to protect and defend life "even if it means occasionally using arms" but that state leaders and other "key actors" bear "moral obligations . . . to protect and defend . . . the innocent from grave evil[.]"[368] President Truman, in justifying his seizure of steel mills needed to produce war materiel during the Korean War, emphasized

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and courageously discharge this duty, domestic law imposes penalties as serious as death. *See* Uniform Code of Military Justice, 10 U.S.C. §§899(99) (2003), at Art. 99, "Misbehavior Before the Enemy" (providing that Any member of the armed forces who before or in the presence of the enemy—(1) runs away; (2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend; (3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property; . . . (5) is guilty of cowardly conduct; . . (8) wilfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or (9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle; shall be punished by death or such other punishment as a court-martial may direct."). Individual commanders are also obligated to undertake necessary measures to protect the forces under their commands as well as "U.S. citizens, their property, U.S. commercial assets[.]") *See* Joint Chiefs of Staff Standing Rules of Engagement, Chairman of the Joint Chiefs of Staff, Instr. 3121.01 (A)(4), Standing Rules of Engagement for U.S. Forces (15 Jan. 2000) ("A commander has the authority and obligation to use all necessary means available and to take all appropriate actions to defend that commander's unit and other U.S. Forces in the vicinity from a hostile act or demonstrated hostile intent."); *id*. at A(5) (defining "hostile act" and "hostile intent" as an attack or threat of imminent use of force "by a foreign force or terrorist unit . . . aginat the United States, U.S. forces, and in certain circumstances, U.S. citizens, their property, [and] U.S. commercial assets[.]").

[365] Some commentators argue that the Oath of Office implies a constitutional duty to defend. *See, e.g.,* Bobbitt, *supra* note_, at 1396 (arguing that the Oath of Office imposes upon the President the obligation to act in the face of "imminent danger" to protect the U.S., its nationals, and its interests, and that the President can be compelled to engage in war even against his judgment). Were Congress to pass specific statutory authorization requiring the President to take particular measures in respect of a particular threat, the President would incur the duty under the Take Care Clause to faithfully execute its particular provisions, provided its terms did not otherwise intrude upon his inherent powers. *See* U.S. CONST., Art. II, §3. In the wake of September 11th, Congress passed a joint resolution authorizing the President to "take action to deter and prevent acts of international terrorism against the United States" and to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Commentators disagree as to whether this resolution or the October 2002 resolution authorizing intervention in Iraq authorized the President to engage in acts of preventive war. *See* Schmitt, *supra* note_, at 523-29 (arguing that both did); Banks & Raven-Hansen (same); Paust, *supra* note_, at 553-54 (arguing that it did not). The questions whether, if Congress did authorize the President to engage in preventive war with either resolution, the Congress purported to grant the President power he already possessed, and whether, in the absence of such a legislative authorization, the President was nonetheless obligated to engage in preventive war if necessary, has not yet been the subject of discussion or analysis as best this Author can determine.

[366] Glennon, *supra* note_, at 552.

[367] *See, e.g.*, VATELL, LE DROIT DE GENS, BK. III, 35 (G. Fenwick trans. 1916) ("Self-defence against an unjust attack is not only a right which every Nation has, but it is a duty, and one of its most sacred duties."); Lacey, *supra* note_, at 308 (describing an "affirmative responsibility to protect . . . citizens at home and abroad from lethal force" and characterizing this duty as the corollary of a *juris ad vitae*).

[368] Maryann Cusimano Love, *Globalization, Ethics, and the War on Terrorism*, 16 NOTRE DAME L.J. ETHICS & PUB. POL'Y 65, 72 (2002). The U.S. Conference of Catholic Bishops "acknowledge[s] . . . the right and duty of a nation and the international community to use military force if necessary to defend the common good by protecting the innocent against mass terrorism." U.S. Conference of Catholic Bishops, A Pastoral Message: Living With Faith and Hope After September 11th, available at http://www.usccb.org/sdwp/sept11.htm.

that "the President, under the Constitution, must use his powers to safeguard the nation."[369] During the height of the Cold War, President Eisenhower feared that the Soviet threat was so great the U.S. "would be forced to consider whether or not our duty to future generations did not require us to initiate war at the most propitious moment that we could designate."[370] In ordering the blockade of Cuba in 1962—arguably an act of war[371]—President Kennedy expressed his understanding that had he failed to undertake an act tantamount to preventive war he would have been impeached for breach of a fundamental duty.[372] Former Israeli Prime Minister Shimon Peres considered it his moral duty to his state and its people to "meet [war] under the least dangerous conditions" and therefore, if necessary, to act preventively;[373] current Australian Prime Minister John Howard describes the refusal of any leader to engage in preventive war where necessary to defend his state and its people as the failure of "the most basic test of office."[374] Perhaps the boldest assertion of a presidential duty to defend the U.S. against external threats issued from President Theodore Roosevelt in his theory of presidential stewardship:

> [The President is] bound actively and affirmatively to do all he [can] for the people. It is not only his right but his duty to do anything that the needs of the nation demand, unless such action [is] forbidden by the Constitution or by the law.[375]

Again, however, notwithstanding the cogency of the various arguments on behalf of a natural legal obligation requiring the President to engage in preventive war where necessary to defend the U.S., its nationals, and its interests against threats to life and liberty, neither the Constitution nor any provision of statutory or common-law imposes any legal sanction for dereliction of this duty. Whether exigent circumstances have arisen in the realm of international relations necessitating presidential action is, although a factual question, entirely left to presidential discretion.[376] Moreover, even if the political question doctrine did not almost certainly render any presidential decision to refrain from engaging in preventive war nonjusticiable and thus immune from judicial review,[377] the President arguably enjoys immunity from criminal prosecution[378] as well as from civil liability for his official acts and omissions

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[369] 2 HARRY S. TRUMAN, MEMOIRS: YEARS OF TRIAL AND HOPE 478 (1956).
[370] McGEORGE BUNDY, DANGER AND SURVIVAL 251 (citing memorandum to John Foster Dulles, Sept. 1953).
[371] *See supra* at note_.
[372] *Id*. at 394.
[373] SHIMON PERES, SEVEN FOUNDERS OF THE STATE OF ISRAEL 55 (1979).
[374] John Shaw, *Startling His Neighbors, Australian Leader Favors First Strikes*, N.Y.TIMES, Dec. 2, 2002, at A11.
[375] THEODORE ROOSEVELT, AUTOBIOGRAPHY 372 (1914).
[376] *See Martin v. Mott*, 25 U.S. 19, 30 (1827) (holding that "the authority to decide whether the exigency has arisen, belongs exclusively to the President, and . . . his decision is conclusive upon all other persons.").
[377] As Chief Justice Marshall noted more than two centuries ago in establishing the constitutional basis for the political question doctrine,

> By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . The subjects are political . . . and being entrusted to the executive, the decision of the executive is conclusive . . . Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

Marbury v. Madison, 5 U.S. 137, 165-66 (1803).
[378] *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (1988) (stating that "[t]he question must be regarded as an open one[.]"); see also (maintaining that the President, as a co-equal branch of government and as the chief law enforcement officer, is necessarily immune from criminal prosecution).

while in office.[379] In sum, the only sanction to which the President may theoretically expose himself through neglect or breach of his duty to defend is impeachment[380] and removal from office,[381] a remedy inherently political rather than legal in nature.

C. Positivist Critiques of a Presidential Duty to Defend, and Responses to Positivists

For positivists, rights and duties are the "creation of Law, or aris[e] from the Command of the Sovereign in a given independent society."[382] It is axiomatic for positivists that "where there is a legal right there is also a legal remedy, . . . whenever that right is invaded[;]"[383] in the absence of a positive law creating a right and providing a sanction for the violation of that right, positivism therefore denies the existence of the right.[384] Where there is no legally enforceable right, there can be no duty, and thus whatever else can be said of the President in terms of his powers and obligations the notion that he has a duty to defend the U.S., its nationals, or its interests is limited to the province of judicial dictum. For positivists, natural law is nothing more than "a brooding omnipresence in the sky[,]"[385] and the attempt to identify and enforce such a duty by grafting indeterminate sources of obligation on to a positive legal framework is an exercise is anathema to constitutional government.

However, it is not entirely clear that the absence of a legal remedy is to be read into the constitutional silence on the matter in connection with rights recognized therein. In the case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court rejected this argument and held to the contrary that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[386] In other words, the absence of an explicit remedy for the breach of a constitutionally-protected right neither negates the existence of that right nor the duty to protect that right. Put slightly differently, the failure of the Framers to expressly provide a positive remedy for the breach of a right inferable from the text and historical subtext of the Constitution is not fatal to a theory of rights and duties that maintains its relative independence from positive law and claims in its stead a natural law genealogy. Because the presidential obligation to protect the U.S., its nationals, and its interests does not arise from the command of a sovereign, the failure of the positive legal order to provide a remedy to parties injured by breach or neglect of this duty is not determinative of whether U.S. citizens bear the right to preventive defense against foreign threats or whether it is nevertheless incumbent upon the President, as the embodiment of the state whose reason for being is the preservation of the life and liberty of its nationals, to engage in preventive war where necessary. Just as the judicial interpretation of the Constitution admits of extra-

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[379] *See Clinton v. Jones*, 520 U.S. 681, 705-06 (holding that although the President is liable for his "purely private acts" he is cloaked in civil immunity with respect to acts taken in his "public character").
[380] *See* U.S. CONST., Art. II, §4 (providing that the President "shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.").
[381] *Id*. at Art. I, §3 (providing for removal from office upon impeachment).
[382] JOHN AUSTIN, LECTURES ON JURISPRUDENCE 61 (1861-1863).
[383] 3 BLACKSTONE, *supra* note_, at 23.
[384] *Id*.; *see also* JEREMY BENTHAM, AN INTRODUCTION TO PRINCIPLES OF MORALS AND LEGISLATION 212 (H. Hart ed. 1970) (same).
[385] *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).
[386] 408 U.S. 388, 392 (citing *Bell v. Hood*, 327 U.S. at 684).

constitutional sources of presidential power,[387] our understandings of presidential duties must be similarly informed and tolerant of the notion that, although our Constitution is a positive law document the President, as the embodiment of U.S. sovereignty in its international relations, possesses powers and bears duties not entirely tethered to or limited by its provisions. In short, under the constitutional framework establishing a republican form of government, neither presidential powers nor presidential duties can be adequately described or understood in purely formal terms.

D. Conclusions

There should be scant surprise that in practice presidents have acknowledged and embraced the "great object and duty" with which natural law charged them to defend U.S. lives, liberty, and property through "prompt and decided action."[388] Viewed in this light, the Bush Doctrine, notwithstanding its proclamation of the unilateral right to engage in preventive war, is revealed as nothing more than a renewed commitment to the natural law duty to defend which is at once wholly consistent with the letter and spirit of international law as well as with the object and purpose of the Framers of the U.S. Constitution.[389] That a President should interpret his aggregated powers against the backdrop of natural legal history, and with an eye toward the practical exigencies of the struggle against international terrorists armed with WMD, to reach the conclusion that he has not merely the capacity but the solemn obligation to defend the U.S., its nationals, and its interests would, standing alone, presents no question of international law. That a President should assert that the faithful discharge of this duty may require him to engage in preventive war is another matter entirely if one does not accept the argument that preventive war is, under delineated circumstances, consistent with obligations under the UN Charter, particularly Article 51, as a permissible exercise of the natural legal right of self-defense. The potential that the U.S. might engage in the use of force justified by the Bush Doctrine, which unabashedly asserts that the duty to defend encompasses preventive war, might be challenged as a violation of a conflicting legal duty under customary international law as well as Article 2(4) of the Charter to refrain from acts of aggression looms large. With the advent of the International Criminal Court, it becomes imperative to develop a mechanism for adjudicating between contending claims derivative from these conflicting duties lest good-faith measures of self-defense be criminalized to the detriment of global peace and order. The next Part proposes that it is possible and desirable to harmonize[390] the domestic duty to defend as articulated in the Bush Doctrine with the international duty to refrain from acts of aggression.

V. Harmonizing the Bush Doctrine with International Law: A New Categorical Imperative

"All that is required for the triumph of evil is that good men do nothing."[391]

"The law will never make men free; it is men who have got to make the law free."[392]

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[387] *See United States v. Curtis-Wright Export Corp*., 299 U.S. 304, 310 (1936) (analyzing the locus of sovereignty in a chain from Great Britain to the States to the United States and concluding that "[I]t results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.")

[388] *Durand*, 8 F. Cas. at 111-12.

[389] *See supra* at note_.

[390] "Harmonization" is a term that refers to the iterative process whereby a common view of law emerges through the ongoing comparison and gradual revision of divergent laws and legal systems until convergence is achieved.

[391] Edmund Burke, Reflections on the Revolution in France (1790).

[392] HENRY DAVID THOREAU, ON CIVIL DISOBEDIENCE.

A. Toward International Legal Recognition of a Domestic Duty to Defend

That the Bush Doctrine and the categorical prohibition of aggression under international law[393] must be drawn ineluctably into conflict is by no means preordained. The recent Report of the International Commission on Intervention and State Sovereignty ["Report"],[394] which recognizes that sovereignty "implies responsibility . . . for the protection of [the] people within the state[,]" offers strong support to the arguments that it is incumbent upon states to protect their nationals not only against domestic threats but from foreign threats as well, and that the Bush Doctrine is simply an expression of the acceptance of this international legal duty.[395] If the Report reflects a reconceptualization of the meaning of sovereignty under international law that takes seriously not merely the powers and rights of states but also their duties, then in future instances where a President perceives a potential existential threat to the U.S. it need not be inevitable that the Security Council fail to authorize the U.S. and other member states to intervene forcibly to check rogue states or terrorists,[396] nor need the Security Council, having failed to authorize intervention, characterize the U.S. resort to arms as unlawful *post hoc*. Although the UN has proven a rather unreliable collective security system at best, its failures are generally attributed not to the structural insufficiencies that bedeviled the League of Nations, but rather to the political nature of the enterprise, and it is thus not impossible that the UN might in the future shuffle off its dysfunction and engage in the sort of credible and aggressive policing necessary to support multilateral deterrence and preservation of individual and collective security.[397] In recent years, the UN has exhibited greatly reduced deference to the territorial sovereignty of states engaged in genocide and

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[393] *See supra* at pp._.

[394] *See* Report of the International Commission on Intervention and State Sovereignty, ch. 2.14, Synopsis 1 (2001), available at http://www.idrc.ca/books/960and961/02_Protect.html.

[395] As Posteraro notes in evaluating the Report,

> International law has, for too long, regarded self-defense as a right of sovereigns rather than a responsibility. But, sovereignty carries with it a responsibility to protect citizens from preventable harm from both within and without state borders . . . The responsibility of states to prevent mass murder of their citizens is just as imperative against foreign enemies as from homegrown threats . . . The relationship between individuals and governments that this reconceptualization of sovereignty produces demands that states act decisively to uphold their responsibility to protect their people.

Posteraro, supra note_, at 201-02.

[396] UN Secretary-General Kofi Annan concedes that the Security Council may need to move far more swiftly to authorize member states to use force against developing threats to their security:

> The Council needs to consider how it will deal with the possibility that individual states may use force preemptively against perceived threats. Its members may need to begin a discussion on the criteria for an early authorization of coercive measures to address certain types of threats, for instance, terrorist groups armed with weapons of mass destruction.

Kofi Annan, *Speech at the General Assembly*, N.Y. TIMES, Sept. 23, 2003, at A11. Where the Security Council authorizes preventive war, any controversy as to its lawfulness is, at the very least, greatly mitigated. *See* William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557, 563 (2003) ("Preemptive use of force is certainly lawful where . . . it is consistent with the resolutions of the Security Council.").

[397] Still, there is reason to believe that even if the Security Council could commit to this mandate in theory it would be handicapped by its institutional and procedural incapacity to make the sort of "speedy and objective" decisions necessary to collective security and to influence member states to make the troop contributions necessary to enable this function. *See* Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U.J.L. & POL'Y 51, 52 (2001) (warning against over-optimism on this score). For an evaluation and comparison of the League of Nations and the United Nations as dysfunctional collective security systems, as well as prescriptions for reform, *see* Michael Ramsey, 79 NOTRE DAME L. REV. (forthcoming, 2004).

systematic violations of human rights, and whether this incipient tendency towards interventionism might translate into political support for U.S.-led efforts to internalize the costs imposed upon the international system by rogue states and terrorists groups remains to be determined.

B. A Duty to Defend, and a Corresponding Duty Not to Obstruct Self-Defense: General Principles of International Law

In the alternative, the exercise of the preventive war under the Bush Doctrine to defend the U.S. against brewing threats may come to be viewed by relevant actors as a general principle of international law and therefore, by definition, consistent with international legal obligations[398] and deservedly immune from obstruction in the Security Council.[399] Similarly, under the increasing weight of future state practice consistent with a belief that it is lawful to engage in preventive war to defend the state, its nationals, and its interests, the U.S. might credibly claim that the gates of customary international law must open to admit preventive war into its domain[400]—in other words, where intrepid states go in pursuit of policy objectives, international law must follow.[401] In other words, ongoing social processes coexist with and animate the meaning of the UN Charter, an instrument which is, just as is the U.S. Constitution, a living, breathing document intentionally designed by its Framers to with sufficient malleability to adapt to and resolve previously unforeseen threats to peace and security. If, as the Report intimates, the authority of the Charter is a function of the degree to which it does not impede collective action even where there is normative controversy over a bedrock legal principle, then, in the face of what generally law-abiding states in good faith deem threats to their security,[402] it behooves unaffected member states to abstain from

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[398] *See supra* at note_ (describing the doctrine of preventive war in self-defense as a general principle of international law).

[399] The Independent Commission on Kosovo, in summarizing the lessons to be learned from that conflict, recommended, *inter alia*, that the permanent members of the UN Security Council consider committing to the principle that they will not cast adverse votes in the setting of impending and grave threats to human life. *See* INDEPENDENT COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED ["REPORT"] 185-98 (2002). Had such a principle been in effect in 1998, Russia and China would not have obstructed the UN process, the NATO-led intervention in Kosovo would have borne the UN imprimatur and would thus not be susceptible to the characterization offered by the Commission of "illegal, but legitimate." *Id*. Closure of the "legality/legitimacy gap" by securing a commitment to this principle would potentially prevent the erosion of UN credibility in cases of future threats to peace and security, including those that might otherwise give rise to unilateral U.S. interventions that some commentators, focusing on the absence of UN authorization rather than upon the nature of the threat, might characterize as illegal. *See* Falk, *supra* note_, at 591 (proposing adoption of the recommendation of the Kosovo Commission as a strategic move to buttress the authority of the UN and the legitimacy of future U.S. actions).

[400] *See North Sea Continental Shelf Cases* (W. Germany v. Den.; W. Germany v. Neth.), 1969 ICJ 3 (Feb. 20) (restating the elements of customary international law as practice coupled with opinio juris and indicating that no specific minimum time period is required to establish the requisite degree of practice); Rest. (3d) For. Rel. L. U.S. §102(1)(c)(3) cmt. C (1987) (indicating that international law can be constituted solely by state practice followed as a matter of legal obligation).

[401] *See* Romano, *supra* note_, at 1056 (making the narrower claim that even if ASD is not presently lawful under international law, contemporary state declarations in favor of ASD as customary law may "possibly lay the foundation for its proper invocation in the future."); *see also* Louis Henkin, *Use of Force: Law and U.S. Policy*, in RIGHT v. MIGHT 37, 38-39 (Louis Henkin et al. eds., 2d ed. 1991) (noting that the question of whether the customary international law of self-defense survived the adoption of the Charter remains a source of debate). The same process would arguably be available to states asserting a right to preventive war or to other aspects of state practice inconsistent with the Charter. See W. Michael Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, in The American Society of International Law Proceedings 75 (1986) (contending that the Charter cannot be interpreted as an authoritative statement of the international law on the use of force because state practice reveals a contrary understanding); Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT'L L. 1 (1990) (same). That state interests should be " an integral part of that decision making process which we call international law" is unobjectionable to the extent that one accepts that in the absence of a sovereign, law making and enforcement are essentially political endeavors. Roberts, *supra* note_, at 517. For a discussion of whether the customary international law regarding the use of force survived adoption of the Charter, *see supra* at pp._.

[402] A state's determination that it was obligated to resort to ASD or other measures of prevention is generally accorded great and perhaps conclusive weight, even if later events proved that judgment mistaken." 19 TRiALS OF WAR CRIMINALS 421 (1948)

all those actions that might hamper an interpretation of the Charter that would harmonize that document with the complementary sources of law invoked by states seeking authorization for the use of force.[403] There is support in the t*ravaux preparatoires* for the assertion that the Framers conceived the Charter in precisely this flexible and functionalist spirit:

> Instead of trying to govern the actions of the members and the organs of the United Nations by precise and intricate codes of procedure, we have preferred to lay down purposes and principles under which they are to act. And by that means, we hope to insure that they act in conformity with the express desires of the nations assembled here, while, at the same time, we give them freedom to accommodate their actions to circumstances which today no man can foresee. We all want our Organization to have life . . . We want it to be free to deal with all the situations that may arise in international relations. We do not want to lay down rules which may, in the future, be the signpost for the guilty and a trap for the innocent.[404]

C. The Moral Obligation to Authorize Preventive War in the Age of Terror

Although he has withheld his blessing from what some are calling a "post-Charter self-help paradigm,"[405] UN Secretary-General Kofi Annan, in registering his preference that the rules of international law be made more responsive to contemporary problems in international relations without compromising the textual and normative constraints imposed by the Charter on the use of force, seems to have invested, however tacitly, his considerable social capital in each of these proposals.[406] The notion that the black letter of the Charter should be the subject of evolutionary processes that conform law to

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(statement of Justice and Chief Prosecutor Robert Jackson). Although the international law governing the resort to force is manipulable by states bent on sheltering their actions from charges of unlawful aggression, the duty of good faith is a general principle of international law incumbent upon all states at all times. *See supra* note_ and accompanying text (enumerating general principles of international law and describing their application as sources of international law). Although heads of state may not be repositories of perfect political wisdom and judgment, there is an important distinction between legitimate differences in opinion as to the nature and severity of a particular threat on the one hand, and deliberate attempts to exploit ambiguity to serve interests other than self-defense on the other, which international law can and must preserve and accommodate. One of the primary challenges for international law and institutions in the coming years will be the development of more consistent and well-reasoned rules and procedures to differentiate between good-faith judgments and malicious claims when evaluating rights and responsibilities regarding the use of force in international relations. The most difficult aspect of this task will likely be constructing mechanisms for the sharing of sensitive intelligence between states, a function necessary for the establishment of the factual predicate underlying lawful exercises of force in anticipation of threats. Several scholars scholar suggest that this function can presently be performed by the Security Council, the ICJ, or "various international bodies and public opinion." Roberts, *supra* note_, at 517; *see also* Franck, *supra* note_, at_ (describing the evaluation of the factual predicate underlying a request for authorization of ASD or prevention as an international "jurying function"). There is reason to doubt whether these fora are sufficiently protective of information so as to allay the concern of intelligence-rich states.

[403] *See* REPORT, *supra* note_, at xiii ("The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situations—and that the statute and credibility of the United Nations may suffer thereby."). For over two decades, scholars have pegged the legitimacy of the UN to its willingness and capacity to intervene to restore peace and security in cases of gross and systematic violations of human rights and serious threats to state survival. *See, e.g.*, Zedalis, *supra* note_, at 98 (doubting whether laws governing the use of force that compel certain behavior in the face of longstanding contrary practice can be described as legitimate); Polebaum, *supra* note_, at 208 (concluding that when it fails to authorize state actions vital to the prevention of grave harm to state survival and to its nationals, international law is revealed as an impotent and counterproductive instrument); W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 281-82 (1982) (warning that "insistence on non-violence and deference to all established institutions in a global system with many injustices can be tantamount to confirmation and reinforcement of those injustices" and that for international law to refuse to recognize that the use of force is permissible in defense of state survival would have delegitimizing effects). For a more general discussion of the relationship between law and legitimacy in the context of collective action problems, see W. Bradley Wendel, *Civil Obedience*, _ COLUM. L. REV. (forthcoming, 2004).

[404] Lord Halifax, Verbatim Minutes of First Meeting of Commission I, UN Doc. 1006, June 15, 1945, in UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION SELECTED DOCUMENTS 529, 537 (1946).

[405] AREND & BECK, *supra* note_, at 178.

[406] *See* Report of the Secretary-General on the Work of the Organization, U.N. GAOR, 54th Sess., 4th plen. mtg., Agenda Item 10, at 3-4, U.N. Doc. A/54/PV.4 (1999); *see also* Annan, *supra* note_, at_ (admitting that in future crises it may be necessary that the

practice as well as practice to law, and that law serves a functional role in the maintenance of systemic order, is for pragmatists a matter of "moral necessity"[407] and one to which even restrictivists subscribe.[408] Functionalist jurisprudes maintain that the relevance of law requires that it be construed in the context in which it is to be applied, and much ink has been spilled in recent years urging that, in light of the dramatic transformations in threats and capabilities wrought by terrorist groups and rogue states, international law must be adapted if it is to remain suitable to its teleological purpose: the maintenance of international peace.[409] For several eminent scholars, the international legal justifications for the use of force captured by the UN Charter bear the stamp of a historical era marked by "fascist dictators, dueling superpowers, and . . . warring bands of militiamen on a colonial frontier[,]" and because these anachronistic doctrines are simply an inadequate defense against lawless predators such as WMD-armed terrorists, existing international law must be revisited and re-engineered.[410] In short, the Charter need not and should not be an "obstacle to doing what needs to be done[,]"[411] and a half-century of experience teaches that it is sufficiently flexible to withstand reinterpretation where necessary to suit fundamentally changed circumstances. Responsibility thus falls squarely upon the present generation to draw legitimacy and legality—concepts inherently related but gradually drifting apart—into a closer relationship.[412]

If one accepts the assertion that the Charter itself presents no impediment to the defeat of WMD-armed international terrorists, one must conclude, by the same process of logic, that preventive war, if justifiable on non-positivist legal grounds as essential to victory over these malignant foes, need not threaten the Charter. Proceeding further down this neofunctionalist and utilitarian[413] path, some scholars champion preventive war as a "law-enforcing" doctrine in a world without an executive able and willing to enforce law and order and in which threats abound.[414] Although some scholars might criticize the foregoing as an unduly consequentialist approach that trivializes the rule of law,[415] when a terrorist group

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Security Council grant "an early authorization of coercive measures" to avoid a repetition of the events leading to the intervention in Iraq in March 2003).

[407] Wedgwood, *Fall, supra* note_, at 578; *see also id*. at 584 ("The United nations Charter is appropriately read, even now, as an attempt to overcome the failures of Woodrow Wilson's League of Nations and its covenant of inaction . . . This should inform the reading of [the Charter].").

[408] *See* Franck, *Use of Force, supra* note_, at 11 (describing the text of the Charter as having "become more tensile, evolving in accordance with functional criteria and procedures in response to new and unforeseen circumstances.").

[409] *See, e.g.*, LOUIS HENKIN, HOW NATIONS BEHAVE 91 (1969) ("International law, like all living law, is in a process of continuous growth and adaptation to new needs and circumstances."); Franck, *Use, supra* note_, at 7 ("[T]he meaning of the Charter does evolve as it is applied to practical situations."); Wedgwood, *supra* note_, at 577 (explaining that "[p]rocedural dynamism is an underlying feature of the Charter—a willingness, sometimes after lamentation and sometimes quietly, to allow alternative methods of decision making.")

[410] Posteraro, *supra* note_, at 199; see also Anne-Marie Slaughter, A Fork in the Road, ASIL Newsletter, Sept./Oct. 2003, at 4 (calling on UN member-states to evaluate the adequacy and effectiveness of the rules of international law and to undertake a "collective compromise" that results in their revision in light of lessons learned with the recent intervention in Iraq).

[411] Franck, *Use, supra* n*ote_, at 18.*

[412] *See* Wedgwood, *Fall, supra* note_, at 581 (suggesting that the reconnection of international law and legitimacy may require consideration, on a case-by-case basis, of "degrees of legality" rather than an all-or-nothing approach to the determination of the lawfulness of a particular resort to force).

[413] *Utilitarianism is the philosophical school that judges the moral virtues of human action almost exclusively in light of its consequences.* See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 125 (W. Harrison ed. 1960) (1780) (describing utilitarianism as a consequentialist moral and legal theory).

[414] Louis Rene Beres, *The Newly Expanded American Doctrine of Preemption: Can It Include Assassination?*, 31 DENV. J. INT'L L. & POL'Y 157, 176 (2002) (asserting that preemptive measures "may sometimes offer the best available remedy to aggression and terrorism in world law" due to the absence of any central *executive enforcement capability).*

[415] *See* Sapiro, *supra* note_, at 603-04 (querying whether Iraq was "a case where the ends justify the means, regardless of

or rogue state armed with WMD threatens to wreak death and destruction upon millions of innocents, a preventive war precisely tailored toward the elimination of terrorist infrastructures and their weapons, although it may cause the unintended deaths of innocent civilians in the proximity of legitimate targets, may be likely, and even virtually certain, to produce outcomes significantly more preservative of human life and thus manifestly preferable to all other alternatives.[416]

In other words, although preventive war may always catalyze political controversy, in no small measure by virtue of the fact that judgments concerning the immediacy of anticipated aggression require speculation and are prone to distortions by motivated biases, its legitimacy should not be determined solely or even primarily by way of a crabbed reading of the text of the UN Charter but rather by evaluating whether the use of force tends toward the reinforcement of the "basic and enduring values of contemporary world public order and human dignity."[417] As with all treaty-based undertakings, the UN enterprise, although infused with politics, rests upon a legal *quid pro quo*: if states are bound to a solemn duty of prudence restraining them from injudicious or malicious exercises of the sovereign prerogative to use force contrary to law and to justice, the Security Council must, in the face of threats to peace or other fundamental and universal values, accept and adhere to a corresponding duty to either carry out its contractual responsibilities and authorize collective intervention or, failing that, absolve states of legal and moral opprobrium when they resort to self-help.[418]

D. When the Security Council Fails: The Return to the State of Nature, and the Duty of Individual Self-Defense

The question of state responsibilities in the event that the Security Council fails to grant the requested authorization while doing little to quell the impression that subsequent acts of self-defense against the alleged threat would lack the requisite quantum of legal legitimacy is precisely the issue presented in the case of Iraq in March 2003. Although states generally tailor their conduct to conform

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legality[?]").

[416] *See* Jeremy Waldron, *Self-Defense: Agent-Neutral and Agent-Relative Accounts*, 88 CAL. L. REV. 711, 716 (2000) (offering this consequentialist standard, drawn from a reading of Hobbes and Locke, as the basis for judging the moral legitimacy of an act of self-defense).

[417] Reisman, *Criteria, supra* note_, at 281-82. Reisman elaborates this test, explaining that for consequentialists

> [t]he critical question, in a decentralized international security system such as ours, is not whether coercion has been applied but whether it has been applied in support of or against community order and basic policies, and whether it has been applied in ways whose net consequences include increased congruence with community goals and minimum order[.]

Id.

[418] At least one scholar argues that the Security Council is bound, just as are member-states, by a duty of good-faith and is therefore obliged to grant authorization for the use of force to requesting member states save for where no credible argument can be made in support of the request. *See* Elias Davidsson, *The U.N. Security Council's Obligations of Good Faith*, 15 FL. J. INT'L L. 541 (2003). That the Security Council might one day fail to discharge its responsibilities in good-faith or to otherwise fail in its responsibilities for the maintenance of international peace and securitywas very much within the contemplation of its Framers, who proposed "an independent body of eminent men . . . known for their integrity . . . who should be available to pronounce [on] a decision of the Security Council . . . solely from the point of view of whether [it] is in keeping with . . . moral principles[.]" Suggestions Presented by the Netherlands Government Concerning the Proposals for the Maintenance of Peace and Security Agreed on at the Four Power Conference of Dumbarton Oaks as Published on Oct. 9, 1945, 313 (cited in Franck, *Use, supra* note_, at 9). However, no such supervisory organ was created, and thus formal oversight of the Security Council is unavailable. *Id*. Thus, where states take exception to an act or omission of the Security Council, their most effective recourse may well be to resort to self-help.

with principles of international law,[419] where they perceive, rightly or wrongly, an emergent threat to their survival or their vital interests their propensity is to react without regard to legal ramifications or the potential for condemnation by the international community.[420] Scrupulous adherence to the restraints indirectly imposed by a sclerotic Security Council might well be tantamount to national suicide, a pact into which states are understandably loathe venture. A commitment to self-preservation trumps all other obligations; in the words of former U.S. Secretary of State Dean Acheson, "[t]he survival of states is not a matter of law."[421] Should the Security Council—a quintessentially political organism despite its legal mandate—passively default upon its responsibilities for collective security in the face of danger, states may conclude that they are released from their obligations under the Charter and free to act beyond the purview of a UN system slouching towards irrelevance.[422] If so, the resulting standard of review of acts of preemption and prevention may devolve still further from the objective and impartial ideal laid down at Nuremburg,[423] and in the place of the current pluralistic political process ripe for abuse yet nonetheless garbed, however loosely, in the language and trappings of law, states will substitute a baldly auto-interpretive regime where each resort to force is judged in the first and last instance by none other than its author.[424]

Worse still is the sobering prospect that the Security Council will revert to a paralytic condition

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[419] The famous aphorism penned by Louis Henkin reminds us that "most states observe international law most of the time." HENKIN, HOW, *supra* note_, at _.

[420] *See supra* at pp._ (analyzing state practice); *see also* Maxson, *supra* note_, at 62 ("As a practical matter, each party—the Security Council and the defending state—must make its own determination of the effectiveness of the UN measures . . . Should the individual state reach a conclusion different from the Security Council, it will continue its military response as it deems appropriate."); Zedalis, *supra* note_, at 114-15 (stating tht in circumstances of grave danger the "only significant restraint on the use of preemptive force is the possibility that it might not succeed . . . , no matter how the international community views anticipatory force.").

[421] Statement of Former Secretary of State Dean Acheson on the Cuban Missile Crisis, _ PROC. AM. SOC. INT'L L. 13, 14 (1963). Others have analogized to the example of living organisms to conclude that the instinct of states to self-preservation is far more powerful than the compliance pull of the laws governing the resort to force. *See, e.g.*, 1 D. O'CONNELL, INTERNATIONAL LAW 339 (1965) (stating that the instinct of self preservation is so strong that "if the law is ineffective the primordial right of self-defence must reassert itself[.]"); HENKIN, HOW, *supra* note_, at 143-44 (recognizing that preventive uses of force against an attack that threatens to extinguish the state or devastate its population is in all likelihood beyond the realm of law).

[422] *See* Brunson MacChesney, *Some Comments on the Quarantine of Cuba*, 57 AM. J. INT'L L. 592, 597 (1963) (reminding critics of ASD that states denied authorization to use force in self-defense will be forced to act either outside or above the law.").

[423] The Nuremburg Tribunal, while recognizing the entitlement to ASD, reserved for the international community of states, sitting ostensibly as an impartial jury and applying objective standards post hoc, the right to determine the legal legitimacy of a particular exercise of the doctrine; as a general principle of international law, states were emphatically prohibited from sitting as judges in their own cases. In the words of Hartley Shawcross, Chief Prosecutor for the United Kingdom,

> Neither the Pact of Paris nor any other treaty was intended to, or could, take away the right of self-defense. Nor did it deprive its signatories of the right to determine in the first instance, whether there was any danger in delay or whether immediate action to defend themselves was imperative; and that only is the meaning of the express proviso that each state judges whether action in self-defense is necessary. But that does not mean that the state thus acting is the ultimate judge of the propriety and of the legality of its conduct. It acts at its peril. Just as the individual is answerable for the exercise of his common law right of self-defense, so the state is answerable if it abuses its discretion, if it twists the right of self-defense into a weapon of predatory aggrandisement and lust. The ultimate decision as to the lawfulness of the action claimed to be taken in self-defense does not lie with the state concerned[.]

19 TRIALS WAR CRIM. 461 (1948).

[424] The power of states to self-determine their compliance with the international law governing the use of force—an unattractive facet of sovereignty, particularly when abused—is a persistent feature of the international system. *See* Thomas Franck, *Who Killed Article 2(4)? Or Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L. L. 809, 818 (1970) ("Unfortunately, there is nothing in the U.N. Charter or in the machinery of the international system which limits the nation's right to determine for itself when an act of aggression has occurred."). Although it is generally held in reserve and used

akin to that which prevailed during the Cold War wherein permanent members actively veto requests for authorization despite objective evidence that rogue states or terrorist are scheming to inflict grievous harm on member states.[425] Based upon highly credible yet very sensitive intelligence from well-placed human agents, the U.S. may well determine that the gathering threat posed by the government of North Korea, a criminally irresponsible regime that deliberately and unabashedly violates its international obligations by actively pursuing acquisition of WMD[426] and openly supporting terrorist groups in their quest for nuclear weapons,[427] has surpassed a tolerable threshold and can no longer be abided.[428] Should a vote in the Security Council be defeated by a Chinese veto and the U.S. be expressly denied authorization under Article 42 to forcibly reduce the North Korean threat, the U.S. would face the stark choice between potentially fatal inaction or intervention sure to be condemned by a host of states as criminal aggression in violation of Article 2(4). Under this set of circumstances two ostensibly conflicting duties would seem to bracket the range of options available to U.S. decisionmakers: while the UN Charter, a treaty of the U.S., imposes a duty under international and domestic law to refrain from the use of force "against the territorial integrity or political independence"[429] of North Korea, natural law directs the President and his

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sparingly, the self-determination of compliance is likely to rush into the adjudicatory vacuum left by a disengaged or unresponsive Security Council.

[425] Some commentators have argued that the Security Council never succeeded in transporting states out of the relative state of nature in which they had existed prior to the formation of the UN framework. *See, e.g.*, Jean Combacau, *The Exception of Self-Defense in U.N. Practice,* in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 9, 32 (Antonio Cassese ed. 1986) ("But whatever the official pretence, and perhaps the legal situation, the international community is in fact back where it was before 1945: in the state of nature . . ."). Others simply opine that a narrow window of opportunity in which to engineer a more law-governed and peaceful pattern of international relations that opened with the fall of the Berlin Wall has been closed by the failure of the Council to impose sanctions upon lawbreakers and that as a consequence the Charter is nearly defunct. See Michael J. Glennon, *How War Left the Law Behind*, N.Y. TIMES, Nov. 21, 2002, at A33; Ramsey, *supra* note_.

[426] In 1994 North Korea entered into a treaty with the U.S. pledging not to pursue nuclear weapons in exchange for assistance with the development of peaceful nuclear power. See Agreed Framework of the Nuclear Issue on the Korean Peninsula, Oct. 21, 1994, N. Korea-U.S., reprinted in 34 ILM 603 (1995).

[427] In early 2003, North Korea admitted that it had deliberate breached its obligations under the Nuclear Non-Proliferation Treaty and its 1994 treaty with the U.S. and shortly thereafter announced that it possessed two nuclear devices for sale to any bidder. David E. Sanger, N.Y.TIMES, Jul. 20, 2003, at A1.

[428] Iran, the other member of the Axis of Evil, represents another potential near-term application of the Bush Doctrine in justification of preventive war. *See* Karl Vick, *Iranian Hard-Liners Wary of Nuclear Deal*, WASH. POST, Nov. 20, 2003, at A28 (chronicling the steadily growing Iranian threat and reporting Bush Administration claims of a connection between Iran and proliferation of WMD to terrorists).

[429] *See* UN Charter, *supra* note_, at Art. 2(4). Because of the dualist nature of the U.S. legal system, the analysis of U.S. legal obligations under domestic law arising from membership in the UN Charter is more complex than is a similar analysis of international legal obligations. *See* BROWNLIE, *supra* note_, at 32-34 (contrasting monist and dualist approaches to incorporation of international law in domestic legal systems). The UN Charter is a treaty of the United States, and thus part of domestic law under the Supremacy Clause of the U.S. Constitution. *See* U.S. CONST, Art. VI (providing that the "Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land[.]"). However, under U.S. domestic law the Charter, as a treaty, is subject to principles of construction in U.S. jurisprudence. Thus, as between the Charter or a Security Council Resolution passed thereunder on the one hand and a later congressional enactment or a controlling statement of the legislative or executive branches as to customary international law on the other, the "last in time" rule provides that the federal statute or interpretation will prevail if there is a clear conflict. *See*, e.*g., Diggs v. Shultz*, 470 F.2d 461, 465-67 (D.C. Cir.), cert. denied, 411 U.S. 931 (1972) (conflict with Security Council Resolution); *Paquete Habana*, 175 U.S. 677 (1900) (controlling statement of executive or legislative branches overrides customary international law or treaty obligation). Although there is a presumption against invalidation of treaty obligations by later federal legislation or executive practice, Congress and the President are empowered under the dualist U.S. legal system to abrogate treaties and interpret or violate customary international law. Paquete Habana, 175 U.S. at 677-70. If the President should interpret his natural legal duty to require violation of the Charter or a Security Council resolution passed under the authority of the Charter, or if Congress should direct him to execute a law under his powers granted in the Take Care Clause, the President would, as a matter of U.S. law, have the clear authority to act in a manner inconsistent with the Charter or the Resolution even if to do so would arguably violate international law. *See United States v. Palestine Liberation Org*., 695 F. Supp. 1456 (S.D.N.Y. 1988); Rest. 3d, For. Rel. L. U.S. §115(1).

delegees to defend the U.S., its nationals, and its interests by whatever means necessary.[430]

Viewed from the natural legal perspective, there need be no antinomy between a natural legal duty to defend and an obligation, however absolute, under the positive law of the UN Charter. The central tenet of natural legal jurisprudence is the commitment to the principle that all law is subordinate to divine inspiration and human reason, and therefore positive law can only be considered legally binding to the extent that it reinforces natural law, the superior expression of rationality in relation to which all other sources of law are subordinate.[431] As any interpretation of the Charter that would obstruct or prevent the discharge of a natural legal duty carries no legal force, either such an interpretation is to be avoided if at all possible[432] or the Charter must be reconceived as a limited expression of the rights and duties of states, confined in its application to those circumstances that do not implicate state survival or the defense of vital interests against existential threats and overridden by the transcendent duties imposed by natural law.

Much of the international legal academy may deem it a heretical capitulation to power violative of law's majesty to suggest that the latter canon of construction be applied to legitimize preventive war.[433] Moreover, that an individual state in a conundrum created by the clash of conflicting duties should be permitted to self-judge whether the Charter applies to its intended use of force as a means to relieve legal pressure will strike many commentators as an abject abandonment of law altogether. Under orthodox positivist precepts, conflicts between international and domestic obligations are to be resolved in favor of the international legal duty,[434] and many moral philosophers contend that where duties conflict prioritization is to be accorded to negative duties over positive duties[435]—i.e., the duty to refrain from the use of force in contravention of the Charter framework, a negative duty, trumps the duty to use force to defend the state, a positive duty.

Nevertheless, if the Security Council, by a negative authorization vote, returns a state to the state of nature and forces it to select either pious resignation to its own devastation as an affirmative duty or unilateral measures consistent with a positive duty under natural law, howevermuch at odds with a

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[430] *See supra* at Part_.
[431] *See supra* at pp._.
[432] Although under the dualist system of U.S. law a combination of limiting doctrines (e.g., the "last in time" rule and the presumption against the self-execution of treaties) suggest that international law does not automatically trump domestic obligations, international law is part of the law of the U.S., and an important canon of statutory interpretation provides that "an act of Congress ought never to be construed to violate [international law] if any other possible construction remains[.]" *The Charming Betsy*, 6. U.S. 64 (2 Cranch.), 118 (1804). An analogous principle of international law would require adjudicative bodies to resist the impulse to find a conflict between a domestic law or duty and an international legal obligation and to attempt to harmonize the two.
[433] *See* Beres, *International, supra* note_, at 37 (cautioning in 1989 that "it is probably unreasonable to claim that we have returned to the classical/medieval idea of natural law's preeminence over all human institutions[.]").
[434] *See U.S. v. Von Leeb et al, The High Command Case*, 11 I.M.T. 462 (1949) ("International common law must be superior to and, where it conflicts with, take precedence over national law or directives issued by any national governmental authority."). Conflicts between the domestic laws of states are generally resolved in favor of the territorial principle of jurisdiction. See Council of Europe, Extraterritorial Criminal Jurisdiction, 3 CRIM. L.F. 441, 467 (1992) (advocating the principle of territorial primacy in conflicts between domestic laws of multiple jurisdictions). However, in conflicts between a domestic law and international law, positivism privileges the international obligation. 11 I.M.T. at 508.
[435] For Kant, the preferred means whereby to determine which of two conflicting duties deserved priority was the preference of the negative to the positive. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 141 (M. Gregor ed. & trans. 1991) (1797) (privileging, in the case of *collisio officiorum s. obligtionum* (conflict of duties), the negative duty over the positive duty). Many modern scholars accord Kant's solution considerable deference in their own work. See Russell L. Christopher, *The Prosecutor's Dilemma: Bargains and Punishments*, 72 FORDHAM L. REV. 93, 159-60 (2003) (describing contemporary formulations of the problem of conflicting duties).

restrictivist interpretation of the Charter, the inevitable election of self-help cannot seriously be labeled a voluntaristic act. Furthermore, under natural law each state is not merely authorized to independently deduce those principles of right reason that govern behavior and to position duties in a relative hierarchy; rather, it is obliged to do so,[436] and the duty to defend is the ultimate responsibility of the state. Although UN member states accept the primacy of the Security Council in matters of international peace and security, any interpretation of the bare fact of their membership as a standing writ to suspend their natural rights to self-defense and strip their nationals of their entitlement to protection is inconsistent with the natural legal principle that no individual or state may undertake to renounce self-defense or to perform any other act destructive or pernicious to survival.[437] States' accession to membership was not purchased at the price of the renunciation of the right to self-defense or the entitlement of individuals to protection, by preventive war if necessary, and no state would have struck such a bargain if offered.[438] In sum, positive duties follow upon the "monopolization of a particular path of relief"[439] as a matter of international law, and if the Security Council, the organ primarily responsible under the Charter for the maintenance of international peace and security, fails in its duty to defend against threatened violence, even the most restrictive positivists cannot in good conscience strenuously object to the proposition that in such cases "the law of nature . . . ma[kes] the individual [state] [its] own protector."[440]

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[436] CICERO, DE REPUBLICA, BK. III, *supra* note_, at 22 (describing natural law as self-interpreting).

[437] In contrast to positivism's subordination of individuals and states to the binding force of written law, natural law considers that individuals and states are "mechanisms programmed to resist the immediate evils of death and bodily debilitation[,]" and thus "a contract not to defend oneself is void not only because it is unintelligible, but also because it involves a promise to perform the impossible." HOBBES, DE CIVE, *supra* note_, at_. Accordingly, a treaty that requires a state to subordinate its security and survival is, if no other interpretation is possible, "null, and not at all obligatory, as no conductor of a nation has the power to enter into engagements to do such things as are capable of destroying the state[.]"). VATTEL, *supra* note_ at 194; *see also id*. at 198 "If the assistance and offices that are due by virtue of such a treaty should on any occasion provide incompatible with the duties a nation owes to herself . . . the case is tacitly and necessarily accepted in the treaty . . . Neither the nation or the sovereign could enter into an engagement to neglect the care of her safety.").

[438] Contractarians analyzing the individual right to self-defense under domestic law reach the conclusion that, unless the protection enjoyed by individuals under the social contract is greater than that in the state of nature, the social contract cannot abate the individual right to self-defense. *See, e.g.,* Sanford H. Kadish, Respect for Life and Regard for Rights in the Criminal Law, in Blame and Punishment: Essays in the Criminal Law 109, 122-23 (Sanford H. Kadish ed. 1987) ("[T]here are some cases where nothing but my own self-protection will do. Since it would be irrational to assume that by consenting to the social contract I had less rather than more protection than before, I must be permitted to defend myself in this exigency.").

[439] *Deshaney*, 109 S. Ct. at 1009 (Brennan, J., dissenting). Theories of positive rights duties have not acquired much purchase upon Western legal systems, due to the influence of positivism, yet the proposition that in exchange for the grant of authority a sovereign incurs positive duties to its subjects to provide for basic necessities, including protection, has clear foundations in natural law and has been cited favorably in the supreme courts of several states as well as in a number of international instruments. See, e.g., International Covenant for Economic and Social Rights, Annex to G.A. Res. 2200, 21 GAOR, Supp. 16, U.N. Doc. A/6316 at 490, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967), at Art. 2 (Each State Party . . . undertakes to take steps, . . . especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means[.]").

[440] 4 BLACKSTONE, *supra* note_, at 30. The principle that the absence of an effective international sovereign precludes derogation from the natural right of states to self-determine their legal obligations with regard to the use of force, just as individuals are wont to do in the state of nature, is central to the argument dating at least to the Enlightenment that holds that the failure of the international institutions to approximate effective enforcement releases states from any contractual obligations they assume to refrain from the use of force in self-defense:

> The independent societies of men, called States, acknowledge no common arbiter or judge, except such as are constituted by special compact. The law by which they are governed, or profess to be governed, is deficient in those positive sanctions which are annexed to the municipal code of each distinct society. Every State has therefore a right to resort to force, as the only means of redress for injuries inflicted upon it by others, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society. Each State is also entitled to judge for itself, what are the nature and extent of the injuries which will justify such a means of redress.

HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 290 (8th ed. 1866).

E. Heightening the Stakes: The International Criminal Court and the Prospect for Criminalization of Political Differences over Preventive War

Whatever one makes of the foregoing analysis, if it were not for the possibility that the recently-created International Criminal Court ["ICC"][441] might enter the fray and criminalize a future exercise of preventive war as an unlawful act of aggression, the controversy over the lawfulness of the use of force in the absence of Security Council authorization would become little more than the stuff of contentious political debates in international institutional contexts[442] and eventual fodder for the engine of academe. However, it is not inconceivable that the eventual exercise of ICC jurisdiction over the crime of "aggression" as it comes to be defined[443] could result in an attempt to hale U.S. personnel—civilian and military—who execute the Bush Doctrine to the Hague to answer criminal charges on the theory that preventive war is a *per se* violation of an international legal prohibition on aggressive war. Where one duty commands conduct prohibited on pain of criminal sanction by a second duty with which it is inextricably in conflict, the domestic courts of the U.S. are instructed to "proceed with greater precision" lest they subject to the rigor of criminal punishment an individual lacking any viable legal alternative but to violate one of two duties.[444] The case of *Kirby v. U.S.*, in which a State official halted a steamboat to detain a federal mail carrier on a murder warrant but was subsequently convicted for violation of a federal statute prohibiting "obstructing or retarding the passage of the U.S. Mail," provides guidance to courts reviewing the acts of individuals caught in the vise between conflicting duties:

> All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.[445]

Whether the ICC would labor to provide the "sensible construction" to the definition of aggression that would be necessary to preclude the attachment of criminal liability to the acts of U.S.

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[441] *See* Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. 32/A/CONF. 183/9, 37 I.L.M. 999 (1998) ["Rome Statute"] (creating an International Criminal Court). The International Court came into being upon the sixtieth ratification of the Rome Statute in July 2002. *See* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp (listing ratifications).

[442] *See* Sapiro, *supra* note_, at 606 (reminding that state practice over the past half-century teaches that "as a practical matter, a state always has the option of using forceful measures to protect what it deems to be vital interests, and then face the consequences if world opinion disagrees.").

[443] A long quasilegislative history precedes attempts to define the crime of "aggression" at international law. *See* Jonathan A. Bush, *"The Supreme Crime" and its Origins: The Lost Legislative History of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324 (2002) (chronicling this history); *see also* Charter of the IMT, *supra* note_, at art. 6 (defining "crimes against peace" as including "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international law, treaties, agreements, or assurances."). Although the crime of aggression was included within ICC jurisdiction, the negotiating parties could not agree upon a definition. *See* Van de Kieft, *supra* note 48, at 2359-63 (describing various proposed definitions of aggression giving rise to individual criminal liabiliy as including an option that would require as a condition precedent a determination of state responsibility for an unlawful war, a second option limiting individual liability to those ordering the aggressive acts, and a third identical to the first with the exception that peacekeeping operations were exempted). As a result the ICC will not exercise jurisdiction over aggression until the States Parties agree, by a 7/8 majority, to a definition and to any conditions precedent and in no event will this occur prior to 7 years after the entry into force of the Rome Statute. *See* Rome Statute, *supra* note 32, at Art. 5(1)(d) (granting the ICC jurisdiction over the crime of aggression); *id*. at Art. 5(2) (providing that the ICC "shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the [ICC] shall exercise jurisdiction[.]"); *id*. at Art. 121, 123 (providing rules and procedures for voting amendments to the ICC).

[444] *Colautti v. Franklin*, 439 U.S. 379, 401 (1979).

[445] *Kirby v. United States*, 74 U.S. (7 Wall.) 482, 486-87 (1869).

civilian and military personnel who plan and execute a preventive war against WMD-armed terrorists or their rogue state sponsors is unclear. Even if the unauthorized resort to preventive war is preceded by gross malfeasance in the Security Council and justified by the President of the U.S. as the discharge of his natural legal duty, the ICC may well adhere to the principle established at Nuremburg that "[a] directive to violate international criminal . . . law is . . . void and can afford no protection to one who violates such law in reliance on such a directive"[446] in reaching the decision to charge and prosecute the entire chain of command stretching from the most junior enlisted personnel through the ranks and ultimately to the President of the U.S.[447] Putting aside the practical questions of whether the U.S. would ever cooperate with the ICC and how the ICC would ever acquire custody of U.S. personnel in the absence of such cooperation,[448] the prospect that the ICC might one day sit in judgment on the legality of the Bush Doctrine dramatically heightens the salience of theoretical partitions that pit restrictivists against pragmatists and leave positivists and naturalists quarreling over the most fundamental issue within the field of international law: may a state scorned by the machinery of the UN framework lawfully resort to unilateral forcible measures to defend against a threat that it believes, in good-faith, poses or will eventually pose an existential threat to its survival or to the lives and well-being of its nationals? Even if the ICC is never tasked to adjudicate the criminal liability of the President of the U.S. or of senior civilian officials within the politico-military chain of command, the omnipresent possibility that the Bush Doctrine might one day intersect with the agenda of the ICC introduces additional uncertainty into the decisional calculus of the U.S. and other states for whom the question of the lawfulness of preventive war registers as perhaps the most critical foreign policy issue. Without a formal paradigmatic transformation of international law, the lawfulness of preventive war under the UN Charter will remain an open and hotly-contested question. Accordingly, proponents of the Bush Doctrine, predicated upon the theory that principles of natural law predating the modern international system impose upon the state and its officials

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[446] U*.S. v. Von Leeb et al, The High Command Case*, 11 I.M.T. 462, 508 (1949).

[447] It is also possible that, rather than criminalize the Bush Doctrine, the ICC might adhere to the position that where failure to act, even if commanded by a legal duty, would result in the forfeiture of life "for no benefit to anyone and to no effect whatsoever apart from setting a heroic example for mankind[,]" law cannot force an individual into inactivity. See Prosecutor v. Eremovic, Case IT-96-22-T (Separate and Dissenting Opinion of Judge Cassese, appended to Judgment), International Criminal Tribunal for the Former Yugoslavia (Trial) (1996), http://www.un.org/icty/erdemovic/appeal/judgment/erd-adojcas971007e.htm, at para. 44. Law cannot command suicide, as the criminalization of the Bush Doctrine might be construed to require of the U.S. President and, derivatively, of the U.S. population; as Judge Antonio Cassesse noted further in his dissent,

> Law is based on what society can reasonably expect of its members. It should not set intractable standards of behavior which require mankind to perform acts of martyrdom, and brand as criminal behavior falling below those standards.

Id. at para. 47. However, despite the inherent logic of the Cassesse dissent, the majority opinion suggests that national suicide is precisely what would be expected of the U.S. under circumstances where failure to act could threaten national existence. Whether the ICC would follow this line of "reasoning" is unknown.

[448] The "Hague Invasion Clause" of the American Servicemembers' Protection Act commands the President to use "all means necessary," including military force, to rescue any U.S. national who falls into the custody of the ICC. See American Servicemembers' Protection Act, Pub. L. No. 107-206, 116 Stat. 899 (2002); *see also* H.R. 1794 (May 10, 2001) (amending, as earlier version of ASPA, the Foreign Relations Authorization Act, 2002-03, H.R. 1646 (2001)) (instructing President to use "all means necessary" to effect release any U.S. or allied personnel detained against their will or on behalf of the ICC).. ASPA, designed to "protect United States military personnel and other elected and appointed officials of the U[.] S[.] . . . against criminal prosecution by [the ICC . . .]", prohibits all agencies and entities of the U.S., or of any state or local government, from cooperating with the ICC. *Id*. at §2006. The notion that the ICC or any other institution, organization, or state might successfully defeat an effort by the U.S. Armed Force to prevent the capture of or liberate U.S. personnel, and in particular the President, from its custody, is, at best, fanciful.

a non-derogable duty to prevent grievous harm to its people and their interests and that, where in conflict, international law must be harmonized to support that duty, would be well-advised to develop a strategy, well in advance of a future crisis, to "make the world safe for preventive war"[449] as well as for U.S. personnel.

F. Resolving the Tensions between Positivism and Naturalism: Proposals for Amendment of the UN Charter

The first plank of a proactive U.S. legal strategy in defense of preventive war might well be a proposal for an amendment to the UN Charter.[450] Although some scholars counsel that the Charter is presently amenable to the resort to preemptive measures under circumstances of an imminent threat and that if further flexibility is necessary to shelter the authors of preventive war it will evolve "through the persistent and principled practice of its principle organs[,]"[451] most commentators cautioning against amendment reposit great faith in the formal institutions of the Charter framework,,[452] and recent practice, particularly in the Security Council, casts doubt upon whether such trust is well-placed.[453] Article 51 has become the focus of proposals suggesting amendments that would add explicit language recognizing that the nebulous yet deadly threat posed by terrorists, and in particular those armed with WMD, is *ipso facto* sufficiently imminent as to confer, without the requirement for any action by the Security Council, preauthorization for the use of force. [454] With a proposal that would far more narrowly circumscribe the competence of the Security Council in regard to the resort to force, at least one scholar suggests the replacement of the language of Article 2(4) with text that would simply reinforce the customary

[449] President Woodrow Wilson led the U.S. into the Great War in 1917 on the slogan that the purpose of U.S. intervention was to defeat the imperial powers Germany and Austria-Hungary and to "make the world safe for democracy." *See* Joseph S. Nye, *Scenarios for Making the World Safe: Middle East Futures*, CHRIST. SCI. MONITOR, Mar. 12, 2003 (discussing comparisons between current U.S. foreign policy and the Wilson-era foreign policy).

[450] *See* UN Charter, *supra* note_, at Arts. 108, 109 (providing procedures for amendment of the Charter).

[451] Franck, *Use, supra* note_, at 8. The discussion of the Charter as a malleable blueprint, rather than as a rigid code of conduct, is old wine in a new bottle. *See* Francis Wilcox, *How the United Nations Charter Has Developed*, 296 ANNALS 1, 4-11 (1954) (discussing modes of transformation of the UN Charter through nonimplementation of provisions, creation of treaties and other supplementary agreements, and development of subsidiary organs).

[452] Anne-Marie Slaughter proposes a UN Security Council "recognizing that the following set of conditions would constitute a threat to the peace sufficient to justify the use of force: 1) possession of weapons of mass destruction or clear and convincing evidence of attempts to gain such weapons; 2) grave and systematic human rights abuses sufficient to demonstrate the absence of any internal constraints on government behavior; and 3) evidence of aggressive intent with regard to other nations." Anne-Marie Slaughter, *Chance to Reshape* the U.N., WASH. POST, Apr. 13, 2003, at B7. However, while such a resolution might make other states feel "stronger and safer[,]" a lack of confidence that the Security Council could be relied upon to act in good-faith and not obstruct preemptive and preventive applications of force call into question whether a mere resolution would yield the transformative effects necessary to harmonize the Bush Doctrine with international law.

[453] *See* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1519 (2003) (criticizing the member states of the Security Council for their "obstinacy" and "fecklessness" in the months before the U.S.-led intervention in Iraq in March 2003 and stating that "all deserve a good share of the blame" for the failure to authorize intervention and for the "future weakening" of the Council).

[454] *See* Neil Frankland, *Australian Prime Minister Ready to Act Against Terror*, ASSOC. PRESS, Dec. 1, 2002 (reporting proposal to this effect offered by Australian Prime Minister John Howard); *see also* Richard N. Gardner, *Neither Bush nor the "Jurisprudes,"* 97 AM. J. INT'L L. 585, 590 (2003) (proposing a "modest reinterpretation" of Article 51 to permit the use of force absent Security Council authorization to "destroy terrorist groups" and prevent transfer of WMD to terrorists); Polebaum, *supra* note_, at 216 (calling for the relaxation of the imminency standard, read into Article 51 by all but the most restrictivist scholars, to permit preemption of nuclear threats).

prohibition in the deliberate targeting of noncombatants while permitting all other applications of force in international relations, including preventive war.[455]

G. If All Else Fails: Denouncing the UN Charter

However, for many states, the War on Terror is of secondary or even tertiary importance, and "soft-threats" such as extreme poverty, malnourishment, disease, and environmental degradation are far more appropriate and timely subjects for international legal reform.[456] Should international or domestic opposition to amendment prove impossible to overcome,[457] the alternative may be to withdraw from the UN Charter. If sovereignty has not been drained of all significance, states are only bound by those rules of law to which they consent,[458] and when treaties, just as any other form of contract, become injurious to fundamental state interests such as survival they are made to be broken[459] or, better still, denounced.[460] In the words of Hobbes, "[t]o be tyed to impossibilities is contrary to the very nature of compacts."[461] If the benefit of the bargain sought through UN membership—a collective guarantee of security—can for whatever reason no longer be secured in the post-September 11th milieu of the Security Council, the U.S. is entitled to denounce the UN Charter, reclaim from a defunct and discredited institution all the authority it delegated in 1945, and assume the exclusive competence to provide for its own self-defense, whether individually or in ad hoc coalitions of allied states whose views on crucial issue-areas are closely aligned.[462] While it should not be insensitive to international public opinion in reaching the decision to withdraw from the UN, neither should the U.S. allow considerations other than how to most effectively

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[455] Anne-Marie Slaughter, *Good Reasons for Going Around the U.N.*, N.Y. TIMES, Mar. 15, 2003 (?). Guy Roberts would eliminate Article 2(4) altogether on the basis that in light of the numerous unsanctioned violations of its provisions it has become "clearly inconsistent with the overwhelming realities of state practice" and thus is no longer "good law." Roberts, *supra* note_, at 511.

[456] *See* Annan, *supra* note_, at A11 (stating that for many states the threat of WMD-armed terrorists are not "self-evidently the main challenge to world peace and security").

[457] Amendment of the UN Charter requires the affirmative vote of a two-thirds majority of the member states in the General Assembly as well as the domestic ratification of two-thirds of the member states. UN Charter, supra note_, at Art. 108.

[458] Franck, *What, supra* note_, at 618 (describing the "consent" theory of international law).

[459] The doctrine of *rebus sic stantibus* ("so long as conditions remain the same") is an implied term in every treaty that permits a state to terminate when a change occurs in the circumstances that formed the intent to be bound and served as consideration between the parties. *See* Harold Garner, *The Doctrine of Rebus Sic Stantibus and the Termination of Treaties*, 21 AM. J. INT'L L. 509, 511-13 (1927) ("A treaty obligation may be terminated unilaterally following changes in condition that make performance of the treaty injurious to a list of fundamental rights—existence, self-preservation, independence, growth and development—all of which may be summarized under the title of 'rights of necessity.'"). Traditional international law treated peace treaties as the equivalent of other treaties for purposes of termination analysis. *See* HALL, *supra* note_, at 368 (discussing termination of peace and security treaties).

[460] Article 56 of the Vienna Convention on the Law of Treaties provides that a party to a treaty that does not contain a provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless the parties intended to the treaty to be so subject or a right of denunciation or withdrawal may be implied by the nature of the treaty. See Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, U.N. Doc. A/CONF.39/27 (1969), 8 I.L.M. 679 (1969), entered into force 27 Jan. 1980, at Art. 56. Although the UN Charter is silent as to denunciation or withdrawal, the right to denounce or withdraw from the Charter was arguably within the contemplation of the states-parties, suggesting that the U.S. is free to withdraw from the Charter upon provision of no less than 12 months' notice. *Id.* at Art. 56(2) (providing for a minimum 12 months' notice as a condition precedent for withdrawal from a treaty). State practice reinforces this interpretation: in 1965, Indonesia withdrew from the UN. However, a counter-argument suggests that the Charter was intended to create not merely a treaty relationship but rather to serve as the constitution of a "community" with perpetual life from which, like the U.S. Constitution, secession is, in practice, forbidden. For an argument that the Charter does not permit withdrawal or denunciation, *see* Thomas Franck, *Is the U.N. Charter a Constitution?* 94, 96-98 (1995), available at http://edoc.mpil.de/fs/2003/eitel.cfm.

[461] THOMAS HOBBES, DE CIVE 59 (H. Warrender ed. 1983) (1651). For Jefferson, when performance of a treaty became "impossible, nonpeformance [wa]s not immoral[,]" and the U.S. was excused from "engagements contrary to its indispensable obligations." Peterson, *supra* note_, at 114-15.

[462] *See* Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFF. 16, 34 (May/June 2003) (predicting the collapse of the Security Council and its replacement with ad hoc coalitions).

discharge the duty to defend its nationals and interests to set its legal and political course.

VI. Conclusion

"It's better to be judged by twelve than carried by six."[463]

The defense of the Bush Doctrine as merely an assertive acknowledgement by a U.S. President of a duty to defend nationals and vital interests is wholly consistent with, or, at the very least, readily harmonized with an international legal regime in which natural law still holds pride of place. Nevertheless, it comes freighted with caveats. Foremost among them is that the Bush Doctrine must never be appropriated as a pretext for aggression. A formal legal defense need not necessarily follow immediately upon the heels of an exercise of rights under the Bush Doctrine, but unless the U.S. is prepared to demonstrate eventually that a particular act of preventive war was a reasonable and necessary measure directed toward the reduction of a threat of the highest magnitude, such as the elimination of terrorist groups or rogue state regimes in pursuit or possession of WMD and bent on using them against U.S. targets, the risk that the military action may be characterized as a "U.S.-initiated 'Pearl Harbor' on a small nation which history could neither understand nor forget"[464] militates in favor of other policy options.

Second, the Bush Doctrine should be categorically inapplicable to lesser-order threats or military problems amenable to resolution by other means. The Bush Doctrine is not a Panglossian palliative for all that ails international relations or a cure-all for all the intractable problems of the international system. To permit it to burst through these conceptual boundaries would be a legal, political, and even moral failure that would soon become the father to others.[465] Unless the U.S. is prepared to explain and justify its preventive wars to other states on the grounds of necessity and domestic duty—and explanations and justifications will ultimately, albeit not immediately, require the sharing of some of the intelligence establishing the existence of the relevant threats with some responsible states[466]—the cumulative costs associated with defending a doctrine stripped in the process of application from all connections to its theoretical roots in natural law may outweigh the benefits.[467] The efficient assertion of American power depends in important part upon the general sense that it is benignly exercised.

Finally, it may be important to recognize that the traumatic events of September 11th may have

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[463] Anonymous.

[464] LAURENCE CHANG & PETER KORNBLUTH, THE CUBAN MISSILE CRISIS, 1962 133 (1992) (quoting objection by Theodore Sorensen, special counsel to President Kennedy, to the planned airstrikes on Cuba during the Cuban Missile Crisis).

[465] *See* ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 65 (1974) (warning that expansion of the use of measures of preemption or prevention against lesser-order threats would estop the U.S. from challenging similar measures by other states).

[466] The question of precisely how much intelligence must be shared with which states must be resolved if states are to be checked from "exercis[ing] broad defensive action based on thin evidence" and in the process calling into question whether their actions are better characterized as aggressive. Yutaka Arai-Takahashi, *Shifting Boundaries of the Rights of Self-Defense—Appraising the Impact of the September 11th Attacks on Jus Ad Bellum*, 36 INT'L LAWYER 1081, 1088 (2003). However, a "dearth of discussion" has prevented the development of principles to guide post hoc analysis of the legitimacy of preventive actions, and this issue-area must be invested with a significant deal of thought and negotiation if future applications of the Bush Doctrine are to benefit from the broad perception of legitimacy that accompanies the objective proof of the nature and degree the threats that give rise to the use of military force without compromising U.S. sources and methods. *See supra* at note_ (discussing potential dangers of overbroad sharing of intelligence).

[467] *See* Franck, *Use, supra* note_, at 17 (positing that the maintenance of U.S. hegemony depends in important measure upon its willingness to justify and explain its military actions to other states).

compromised the ability of all Americans, including U.S. decisionmakers, to exercise disciplined and informed moral restraint in the aftermath.[468] Accordingly, preventive war is a medicine to be used sparingly and in full cognizance of its potential side-effects, and the decision to apply the Bush Doctrine must be made only after consultation with legal advisers steeped in an appreciation of the relevant moral philosophical issues attendant to the doctrine of preventive war and after sober and deliberate contemplation of a range of alternatives.

These proposed limitations upon the Bush Doctrine will not satisfy a bevy of critics. For committed positivists, resort to natural law in justification of preventive war is an epistemologically suspect venture inasmuch as the identification of a universally valid moral canon is beyond the capacity of a human community divided along the fault lines of religion and social ideology to discern,[469] and wholly inadequate to the project of informing rational international institutions in the orderly administration of human affairs. The positivist optic instructs that, however well-intentioned, the "contamination of legality with morality" is "wholly outside the province of the lawyer[,]"[470] and if preventive war does in fact merit admission to the pantheon of legal doctrines, a determination that can only follow the running of the Bush Doctrine, just as any other contested principle, through the multilateral institutional gamut wherein other sovereign states may assert their coequal lawmaking authority, it must be invited through the front-door of positive legislation.[471] The very most ideological of positivists may go so far as to insist that, even if extant international legal regime governing the resort to force is morally bankrupt, the U.S. is obligated to scrupulously adhere to its terms "because the law stands in for a social decision about what ought to be done, collectively speaking, in the face of disagreement."[472] The authoritative resolution of disputes, which depends upon not reawakening conflict

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[468] Post-traumatic stress disorder ["PTSD"] is a complex of "characteristic symptoms that follow exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL IV (rev.) (1994), "Post-Traumatic Stress Disorder, 309.81." A diagnosis of PTSD generally requires that the subject experience intense fear, helplessness, or horror, and requires symptomatology that includes persistent rexperiencing of the traumatic event, persistent avoidance of stimuli associated with the trauma and a numbing of general responsiveness, and persistent hyperarousal in response to a perceived ongoing threat that causes clinically significant distress or impairment in social, occupational, or other important areas of functioning. Id. Traumatic events often include, inter alia, military combat, violent personal assault, kidnapping, terrorist attack, torture, incarceration as a prisoner of war, and manmade disasters. Id. That U.S. decisionmakers should be suffering from PTSD after September 11th is not an impossibility, nor is the notion that their judgment, particular as regards the appropriate response to the actions of the perpetrators, might be influenced by trauma.

[469] In other words, some critics may consider the resort to preventive war as a normative claim of right to be culturally-bound. *See* Alasdair MacIntyre, *Moral Relativism, Truth, and Justification*, in The MacIntyre Reader 202 (Kelvin Knight ed., 1998) (questioning whether and how normative claims generated within one culture can be universalized).

[470] D'ENTREVES, *supra* note_, at 83.

[471] A number of restrictivists hew to the positivist dogma that law and morality are conceptually distinct and that it is solely through the formal, positive procedures of the sovereign, or institutions invested with attributes of quasi-sovereignty such as the ICJ, the Security Council, and the General Assembly, that law is to be made, (re)interpreted, and applied. *See, e.g.*, Bilder & O'Connell, *supra* note_, at 455-56 (castigating non-positivists defined as "those inclined to pursue policy goals through a reinterpretation of the international law on the use of force, rather than explication of the current rules . . .[;] scholars who, in the pursuit of their own agendas, ignore or mischaracterize state practice, dismiss decisions of the ICJ, read their own meaning into the actual terms of Security Council resolutions, or never look at votes in the General Assembly.").

[472] Wendel, *supra* note_,at 7-8. For extreme positivists, the written law is a "substantial social achievement" inasmuch as it secures some objective normative standards against which to judge conduct, and even in the face of "deep and persistent disagreement about the underlying moral principles at stake" this codification, because it transports use beyond moral disagreement, is the authoritative guide to practice. *Id*. at 9-10.

over the applicable rules or otherwise "recapitulating . . . normative disagreement" that might "undercut" the rule of law, is thus, for the most prescriptive legal positivists, more important than striving toward substantive justice, even if the positive law "commands a catastrophic moral evil."[473]

For very different reasons, realists may take umbrage at the assertion that morality bears any relationship to law and may therefore defend the Bush Doctrine on the unrelated and less defensible ground, at least in a world aspiring to law, that preventive war makes efficient use of power.[474] Realists and liberals alike may express concern that the Bush Doctrine is an invitation to imitation and that other states, most of which will treat far less seriously the responsibilities that attend to military and political leadership than the U.S.,[475] will promulgate preventive war doctrines[476] that will one day "justify" strikes against the U.S. and its allies.[477] Fears that the Bush Doctrine will open a Pandora's Box from which international law itself may escape leads some commentators, who might be favorably disposed to a more narrowly tailored expansion of the right to ASD under international law to reject preventive war as a "drastic formulation"[478] that will have the unanticipated consequence of undermining global security. Still others caution against the possibility of mistakes.[479] Finally, with regard to the moral question, some restrictivists worry that the resort to preventive war is little more than a self-indulgent exemption from all legal accountability that will strip the U.S. of its relative moral purity and render it "guilty of the very act that it anticipates and judges on the part of its enemy."[480] For the most strident moral auditors of the Bush

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[473] *Id*. at 92.
[474] *See* Marshall Cohen, Moral Skepticism and International Relations, in International Ethics 3 (Charles R. Beitz et al. eds. 1985) (expressing the realists' doubt that foreign policy should ever be justified on grounds other than power and security).
[475] To their credit, many of the vociferous critics of the present Administration, even while challenging what they deem is an increasing reluctance to "play by the world's rules," recognize that the U.S. is an exceptional nation far more likely to contribute positively to the development of international law, human rights, and democracy than any other nation. *See* Koh, *supra* note_, at 321-22 ("The United States remains the only superpower capable, and at times willing, to commit real resources and to make real sacrifices to build, sustain, and drive an international system committed to international law, democracy, and the promotion of human rights[.]"_; Koh, *supra* note_, at 1487 (cheering the U.S. for having been a "genuinely exceptional" nation in regard to the promotion and defense of international law, human rights, and democracy, and noting that U.S. leadership in the defense of international human rights is a necessary condition to success). The inference follows that other nations are not so committed in practice to rights or to law even if they do not openly call the international legal regime into question.
[476] *See, e.g.*, ABRAM CHAYES, LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 21 (1991) (warning that by defending preemptive measures as lawful "the United States is opening the international door for abuse by other nations."); Schmitt, *supra* note_, at 548 ("There are enormous risks associated with preemptive strategies, for each preemptive act builds a body of State practice that can be relied upon by those who would 'claim' the right malevolently."); Gardner, *supra* note_, at 588 (condemning the Bush Doctrine as an "ominous" statement that would "legitimize preemptive attacks by Arab countries against Israel, by China against Taiwan, by India against Pakistan, and by North Korea against South Korea[.]").
[477] "By expanding the right of preemption against an imminent attack into a right of preventive war against potentially dangerous adversaries, the Bush administration has created a 'loaded weapon' that can be used against the United States and against the general interest in a stable world order." Gardner, *supra* note_, at 588.
[478] Gardner, *supra* note_, at 589; *see also* Stromseth, *supra* note_, at 638-39 ("It would be far better for the United States to articulate a more tailored right of anticipatory self-defense focused especially on the unique attributes and threats posed by terrorist networks[.]"). Consistent with their commitment to a belief that the Charter is a flexible, living document, these critics contend that the UN is not a "legal prison" from out of which the U.S. must break, destroying fundamental norms in the process, if it is to be free to defend itself and that the Charter is instead an instrument within which adaptation to contemporary conditions is possible. Falk, *supra* note_, at 598 (insisting that it is unnecessary to jettison the Charter in favor of the doctrine of preventive war because, under the Charter, "[t]he law can be stretched as new necessities arise[.]").
[479] Glennon, *supra* note_, at 552-53.
[480] Paul Jersild, *Further Reflections on the "War Against Terrorism,"* J. LUTHERAN ETHICS, Sept. 11, 2002, available at http://www.elca.org/jle/articles/contemporary_issues/september_11th/article.jersild-paul_01.html; *see also* Falk, *supra* note_, at 598 (categorically rejecting preventive war as inconsistent with the letter and spirit of international law).

Administration, the Bush Doctrine is but Nazism repackaged,[481] and some commentators, in thrall to a vision of the U.S. as a fallen nation, question whether the U.S. embrace of preventive war signals that it is no longer the sort of state one need never suspect of harboring designs of conquest or imperialist domination.

While the comparison of the Bush Doctrine to Nazism or the passive submission to the despotism of positive law may strike observers as outlandish, the Bush Doctrine can only benefit from reasoned discussion and critical analysis in the halls of government and in the legal academy. Although the translation of the Bush Doctrine from a statement of national policy into operational plans with rules of engagement for warfighters cannot be predicted with certainty in advance of future crises, critical examination of the law and policy underlying preventive war is best performed well in advance when judgment is less likely to be clouded by the emotional and physical crush of events. Mistakes are possible, even if it is preferable that "the price of those mistakes be paid by states that so posture themselves than by innocent states asked patiently to await slaughter."[482] Nonetheless, that the Bush Doctrine should be a residual policy limited in its application to the most dangerous and compelling of threats, or that policymakers who order preventive war should be prepared to offer some objective evidence in support lest other states seize upon it as precedent for far more malicious acts far more destructive of international law, does not compromise the potential utility of preventive war in the Age of Terror. Notwithstanding the rants of French intellectuals envious of American cultural and material hegemony,[483] the Bush Administration is not, metaphorically speaking, tilting at windmills. The Bush Doctrine is no ideological fever. Threats abound, and others are gathering. Any President who failed to respond aggressively to the scourge of WMD-armed terrorism with all the instruments of policy at his disposal would have failed in his most basic obligation to the American people. If "mostly minor and sometimes venal . . governments are able to project a degree of power entirely incommensurate with reality"[484] and clog the multilateral institutional machinery of the UN, then when they do the bets are off, and collective security must yield to the individual right to self-defense. Similarly, the law governing the resort to force, if it is to continue to serve human values in the post-September 11th international system, must remain concordant with the moral imperative that states are entitled, and even obligated, to use all necessary means to defend their existence, their nationals, and their interests. Shaping the law to fulfil this function without compromising its Grotian aspirations toward a peaceful, rule-governed international system is a venture in which many parties have a stake, and it will require dialogue and even compromise.

Even if the Bush Doctrine is in tension with the positive international legal regime governing the resort to force as codified in the UN Charter, it is a creative tension, and natural law stands on guard,

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[481] *See* FRANCIS A. BOYLE, THE CRIMINALITY OF NUCLEAR DETERRENCE (2002) (equating the Bush Doctrine with the Nazi self-defense argument offered at Nuremburg and suggesting that the Bush Administration is as evasive of its legal obligations as was the Nazi regime).

[482] Glennon, *supra* note_, at 553.

[483] A passel of French intellectual elites excoriate U.S. foreign policy generally and the Bush Doctrine specifically as a "domestic delusion" that is leading to "brainwash[ing] [of] the world" and is geared toward establishment of an American Empire. *See, e.g.,* Regis Debray, *Americans, If You Only Knew*, LE FIGARO (Paris), Sept. 5, 2003.

[484] Franck, *supra* note_, at 615 (characterizing the Bush Administration perception of the workings of the UN).

prepared to release us from the captivity of a hypertechnical reading of Articles 2(4) and 51. That positivists and restrictivists would counsel reflexive obeisance to laws all but certain to deliver us up to evil should stiffen our moral resolve and propel us to search the intellectual history of the international legal enterprise for a way out of this theoretical slough of despond. Having done so, we need but muster the courage to plead that in the Age of Terror only preventive war—the natural right and duty of states beset by existential threats—preserves the highest communal values law is intended to serve: order, justice, and ultimately peace. While preventive war should never excite the same sort of enthusiasm reserved for more peaceful forms of international intercourse, in this, the best of all possible worlds, even the most utopic of observers will be inclined to concede that the Bush Doctrine will likely be, in residual instances, the least of many evils.[485] Although September 11th continues to reverberate throughout the international system and in the consciousness of many Americans, it is regrettable that the conclusions drawn in the aftermath of that dreadful day by many members of the international legal academy reveal little sympathy for the notion that a reconception of the regime governing the resort to force to grant states a greater margin of appreciation in their struggle against terrorists and rogue states is essential to the preservation of civilization against barbarity. That it requires mention is disappointing, and yet it must be remembered in the context of the discussion of the legality of preventive war, that the U.S. civilians and military personnel who may one day take the battle to their enemies before these terrorists carry out their threats to attack American citizens yet again are emphatically not the modern-day equivalents of the Nuremberg defendants. One must look not to Washington but to places such as Baghdad, Pyongyang, Teheran, Gaza, Damascus, and the border regions of Afghanistan and Pakistan if one seeks the contemporary analogues of the Nazis. Some moral perspective is in order.

Despite the fashionableness of the moral agnosticism as to the inherent goodness of the U.S. and the studied indifference as to the legitimacy of its cause that dominate contemporary discourses on international law, the validity of certain moral truths captured by the Bush Doctrine does not depend upon whether or not they are acknowledged by majorities or enshrined in constitutive documents. Nor does the decision to engage in preventive war require the blessing of other states.[486] Under natural law, the President of the U.S. is ineffably bound to defend the U.S., its nationals, and its vital interests against wicked malcreants whose predations are infinitely more threatening to the civilizational values of order and justice than is the Bush Doctrine. In an ideal world, international lawyers and international institutions, recognizing that the Bush Doctrine is its best hope for the continued viability of international law in the Age of Terror, would rush forward to stamp it with their imprimatur. In the world that is, international law will have to be coaxed, and sometimes even dragged, along. Where law fears to tread, there are moments when the President must nevertheless be ready and willing to rush in, ever hopeful that

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[485] *See* THOMAS MORE, UTOPIA (advocating a pragmatic form of morality that prefers policies that, analyzed in the abstract, are distasteful but in comparison to alternatives are the "lesser evil").

[486] *See* President George W. Bush, State of the Union Address, Jan. 28th, 2003, at http://www.whitehouse.gov/nes/releases/2003/01/print/20030128-19.html ("The course of this nation does not depend on the decision of others. Whatever action is required, whatever action is necessary, I will defend the freedom of the American people.").

his leadership will hearten the law and induce it to follow. There may be places where law simply will not go. But in the Age of Terror, duty must be intrepid, and forged of much sterner steel.

That this is so is testament to a gap between law and legitimacy that has been widening for the better part of a decade. It is disquieting that, in an age of great moral contrast and conflict between terrorists and their intended targets, some scholars and statesmen should give positivism free rein to scrub international law clean of its natural legal origins and to banish the relevance of justice from international relations. However, from the ashes of September 11th a new impetus toward converging the conceptual and moral universes partitioning positivists from naturalists, and restrictivists from pragmatists, has arisen. Even its authors would not claim that the Bush Doctrine is the ultimate repositor of all the wisdom and good judgment that can be accumulated on the question of preventive war. Nearly six decades after the founding of the UN, a thorough reexamination of the doctrinal, philosophical, and moral bases of the international law governing the resort to force is even more overdue than is a legal restatement on preventive war that can claim both natural and positive provenance and thus command more universal acceptance than does the Bush Doctrine. Interestingly, and perhaps unwittingly, the Bush Doctrine, in the final analysis, has offered up not merely a fundamentally reordered national security strategy predestined to provoke controversy but an entreaty, even an exhortation, to responsible members of the international community, calling them to collectively diagnose the reasons for the untimely divorce of law and legitimacy in the most vital issue-are in international law and to negotiate toward a reconciliation. The exigencies of our times behoove scholars and policymakers, whatever their disciplinary, theoretical, or ideological commitments and whatever their views on preventive war, to join this conversation.