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THE DOCTRINE OF PREEMPTIVE SELF-DEFENSE

SEAN D. MURPHY*

I. INTRODUCTION

AN enduring reality demonstrated by the terrorist attacks of September 11, 2001 is that non-state actors are capable of projecting extreme violence across the globe. The September 11 attackers were a variety of individuals who were trained and recruited across multiple states, who were instructed and funded by a loose but sophisticated Al Qaeda network, and who then surreptitiously acquired the means to unleash a vicious attack that within a matter of hours killed more than three thousand people, mostly civilians.¹

This ability of non-state actors to project force across the globe is particularly troubling in the context of their potential use of weapons of mass destruction (WMD). Although governments have possessed WMD for many decades, such weapons have rarely been used, largely because of the understanding by states that the use of WMD against another state would almost certainly lead to general, worldwide condemnation and possibly a response in kind. Such notions of inter-state deterrence and reciprocity, however, are far less apparent with respect to relations between a state and a non-state actor engaged in terrorist behavior, especially if the non-state actor is not seeking broad sympathy for its cause. A terrorist organization may well believe that responsibility for a WMD attack could be concealed from the attacked state, or believe that the attacked state could not effectively respond against an amorphous non-state network. Thus, were such a network able to obtain WMD—whether in the form of biological, chemical or nuclear weapons—there may be little incentive not to use them.

Acquisition of WMD by non-state actors may be difficult, but is not impossible. Large stocks of Russian plutonium from dismantled weapons are vulnerable to theft and sale on the black market.² Infectious orga-

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1. See generally THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004) (providing account of events leading up to and including terrorist attacks of September 11, 2001).

2. See, e.g., AMY F. WOOLF, CONGRESSIONAL RESEARCH SERVICE, NUCLEAR WEAPONS IN RUSSIA: SAFETY, SECURITY, AND CONTROL ISSUES, CRS ISSUE BRIEF (updated Aug. 15, 2003), available at <http://www.fas.org/spp/starwars/crs/IB98038.pdf> (explaining potential safety issues regarding nuclear weapons security and storage in former Soviet Union).

nisms suitable for bioterrorist use are available for commercial sale; some twenty-five such organisms can even be obtained from natural sources, such as infected animals or, in the case of anthrax, the soil.³ The possibility of an attack by terrorists using chemical weapons was vividly demonstrated in March 1995 in Tokyo, Japan, when a religious cult released a form of sarin nerve gas in Tokyo's subway system during morning rush hour, killing twelve and injuring more than five thousand people.⁴ Once WMD are acquired, transporting them across the globe is also difficult, but not impossible. The United States has 14,000 small airports and 95,000 miles of unprotected coastline; of the some 16,000,000 cargo containers that reach U.S. shores each year, only five percent are inspected.⁵ The idea that an organization such as Al Qaeda may obtain a WMD, smuggle it into the United States on board a container ship and then release or detonate it in a major U.S. city, strikes many analysts as not so much a question of "if" as it is a question of "when."⁶

The realities of the post-September 11 period led the Bush administration in 2002 to articulate, in very strong and public terms, a doctrine of "preemptive self-defense." Among other things, the doctrine asserted an evolved right under international law for the United States to use military force "preemptively" against the threat posed by "rogue states" or terrorists who possess WMD.⁷ According to the Bush administration:

3. See Jonathan B. Tucker, *Biosecurity: Limiting Terrorist Access to Deadly Pathogens*, 52 PEACEWORKS 1, 15-18 (2003), available at <http://www.usip.org/pubs/peaceworks/pwks52.pdf> (discussing potential sources of biological agents used in manufacture of biological weapons).

4. See T.R. Reid, *Japanese Police Arrest Key Cult Figure; Media Reports Say 25-Year-Old Planned Lethal Subway Gas Attack*, WASH. POST, May 15, 1995, at A13 (describing circumstances and facts surrounding Tokyo subway gas attack).

5. See Matthew Brzezinski, *Fortress America: On the Front Lines of Homeland Security—An Inside Look at the Coming Surveillance State* 8, 220 (2004) (noting vulnerabilities of United States); see also Stephen Flynn, *America the Vulnerable: How Our Government is Failing to Protect Us from Terrorism* 81-110 (2004) (discussing vulnerability of United States to terrorist attack via shipping containers coming through American ports).

6. See, e.g., ANONYMOUS, *IMPERIAL HUBRIS: WHY THE WEST IS LOSING THE WAR ON TERROR* 152-58 (2004) (describing analysis by anonymous CIA official of Al Qaeda's determination to use WMD against United States); see also Bill Miller & Christine Haughney, *Nation Left Jittery by Latest Series of Terror Warnings*, WASH. POST, May 22, 2002, at A1 (reporting U.S. Secretary of Defense Donald H. Rumsfeld's statement that terrorists will inevitably obtain WMD and U.S. Homeland Security Director Tom Ridge's statement that additional terrorist attacks are "not a question of if, but a question of when"). Al Qaeda has already carried out post-September 11 attacks in Bali, Casablanca, Chechnya, Iraq, Istanbul, Madrid, Philippines, Riyadh and Thailand. See ANONYMOUS, *supra*, at 91-100 (listing numerous attacks carried out by Al Qaeda around world since September 11 attacks).

7. See THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> [hereinafter NATIONAL SECURITY STRATEGY] (asserting that international law has recognized need for nations to defend themselves against states that present imminent danger and that United States maintains option of preemptive actions against serious dangers to national security); see also President George W. Bush, Commencement Address

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. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

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

...

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.⁸

Although the Bush administration articulated the doctrine, acceptance of the doctrine within the U.S. government appears widespread. In the joint resolution enacted by Congress to authorize the use of force against Iraq in 2002-03, Congress found:

Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the

at the United States Military Academy in West Point, New York, 38 WEEKLY COMP. PRES. DOC. 944, 946 (June 10, 2002) (“[O]ur security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives.”); NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION 3 (2002), available at <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf> (arguing that in order for counter-terrorism measures to be effective, U.S. military forces must have ability to preemptively attack WMD-armed adversaries, destroying WMD before they can be used); SECRETARY OF DEFENSE DONALD H. RUMSFELD, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS 30 (2002), available at <http://www.defenselink.mil/execsec/adr2002/index.htm> (evaluating lessons that should be learned by United States following events of September 11, 2001 and military campaign in Afghanistan, including lesson that “defending the United States requires prevention and sometimes preemption”); Richard N. Haass, Sovereignty: Existing Rights, Evolving Responsibilities, Remarks at Georgetown University (Jan. 14, 2003), at <http://www.state.gov/s/p/rem/2003/16648.htm> (asserting that United States must take preventative measures to prevent failure of states and consequences that follow).

8. NATIONAL SECURITY STRATEGY, *supra* note 7, at 15.

United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself.⁹

Asked about this issue during the 2004 presidential campaign, the nominee for the Democratic Party endorsed the doctrine.¹⁰

Compliance with international law on the use of armed force presents extraordinary problems, for such law implicates core national security interests of states (the same phenomenon may be seen in disputes over the war power in U.S. constitutional law). Nevertheless, policy-makers must pay attention to whether a particular act of “preemptive self-defense” would likely be regarded as violating international law, because there may be significant political, economic and military repercussions, as discussed in Part II.¹¹ To date, however, no authoritative decision-maker within the international community has taken a position on whether preemptive self-defense is permissible under international law, or whether it is permissible but only under certain conditions. The judicial wing of the United Nations, the International Court of Justice (ICJ), has not passed upon a case or issued an advisory opinion on preemptive self-defense. In the *Military and Paramilitary Activities in and Against Nicaragua*¹² case (“*Nicaragua case*”), the ICJ advanced important interpretations regarding the status of law on the use of force, but the ICJ went out of its way to state expressly that it took no view on “the lawfulness of a response to the imminent threat of an armed attack.”¹³ The U.N. Security Council, charged with maintaining peace and security, has issued no resolution expressly con-

9. Joint Resolution Authorizing the Use of Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498, 1499 (2002); see CARL E. BEHRENS, CONGRESSIONAL RESEARCH SERVICE, NUCLEAR NONPROLIFERATION ISSUES, CRS ISSUE BRIEF (updated June 21, 2004), available at <http://www.fas.org/spp/starwars/crs/IB10091.pdf> (“If nonproliferation and deterrence fail, the Defense Department could be ordered to use military force to destroy weapons of mass destruction.”).

10. See *Transcript: First Presidential Debate* (Sept. 30, 2004), at http://www.washingtonpost.com/wp-srv/politics/debatereferee/debate_0930.html (debating issues of foreign policy). Asked for his “position on the whole concept of preemptive war,” Senator John Kerry answered:

The president always has the right, and always has had the right, for preemptive strike. That was a great doctrine throughout the Cold War. And it was always one of the things we argued about with respect to arms control. No president, though [sic] all of American history, has ever ceded, and nor would I, the right to preempt in any way necessary to protect the United States of America.

Id.

11. For a discussion of the repercussions of violating international law on preemptive self-defense, see *infra* notes 16-18 and accompanying text.

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

13. See *id.* at 103.

demning or approving of preemptive self-defense, although it has issued important decisions that relate to the issue.

Consequently, states and scholars are left arguing its legality based principally on their interpretation of the meaning of the U.N. Charter and on state practice since the Charter's enactment in 1945. As discussed in Part III, international lawyers (whether government attorneys, other practitioners or academics) have taken very different views regarding the legality of preemptive self-defense, and their views might be seen as falling into four basic schools of thought: the strict constructionist school, the imminent threat school, the qualitative threat school and the "charter is dead" school.¹⁴ Part IV suggests that this fracturing of views is attributable at least in part to the unwillingness of most international lawyers to articulate and defend the methodology that they are using in reaching their views, which would require confronting certain methodological problems in assessing state practice since the enactment of the U.N. Charter in 1945.¹⁵ The lawyer's craft is something between an art and a science; although interpretation of prior precedent cannot be done with precision, it must be done in accordance with recognizable and rational standards in order to be persuasive.

Until lawyers more fully grapple with these issues of methodology, it is unlikely that greater convergence within the community of international lawyers will emerge. Through greater convergence, the normative standards set by international law may become clearer and more helpful for states in ordering their relations, thus promoting greater stability for interstate relations. Moreover, if at some point there is an effort to amend the Charter or to supplement the Charter with more detailed criteria for uses of force, greater convergence of views among international lawyers will be essential.

Before turning to the relevance of international law to this particular topic, a word on terminology is in order. For purposes of this article, the term "self-defense" refers to the use of armed coercion by a state against another state in response to a prior use of armed coercion by the other state or by a non-state actor operating from that other state. "Anticipatory self-defense" refers to the use of armed coercion by a state to halt an imminent act of armed coercion by another state (or non-state actor operating from that other state). Thus, anticipatory self-defense contemplates a situation where a state has not yet been the victim of such a coercive act, but perceives that such an act is about to occur in the immediate future (e.g., a foreign army is massing itself along the border in apparent preparation for invasion), and thus that potential victim state undertakes its own act of armed coercion to stave off the other's act. Such anticipatory self-defense

14. For a discussion of the different views of the legality of preemptive self-defense, see *infra* notes 19-68 and accompanying text.

15. For a discussion of methodological problems in assessing state practice, see *infra* 69-197 and accompanying text.

is, of course, "preemptive" in nature, but for purposes of this article, the term "preemptive" is not used to describe this form of self-defense. Instead, "preemptive self-defense" is used to refer to the use of armed coercion by a state to prevent another state (or non-state actor) from pursuing a particular course of action that is not yet directly threatening, but which, if permitted to continue, could result at some future point in an act of armed coercion against the first state. Such preemptive self-defense is, of course, "anticipatory" and might even be called "preventive" self-defense, but for purposes of this article, such terminology is not used to describe this form of self-defense.

II. WHY THE LAW MATTERS

Law has many different functions. In the context of international law relating to the use of military force, law is best seen as a means of predicting global reactions to a proposed use of such force. In this context, when a lawyer says that a proposed course of action would be unlawful, the lawyer is really saying that in the past, international society has decided that such an action is wrongful and, in similar circumstances, will likely do so again. Lawyers are trained to be good at making such predictions; they are fixated on the instruments of the past, be they treaties or statutes, which crystallize societal expectations, principles and beliefs into rules. Lawyers are also fixated on understanding and interpreting prior factual incidents in which those societal beliefs were tested and perhaps refined through courts and other decision-makers. Where there are gaps in our understanding of societal expectations, lawyers are clever at analytically filling those gaps and at seeking to extrapolate from what we know about societal beliefs to make situations of uncertainty more certain. And perhaps most important, lawyers appreciate that society deeply adheres to a normative system that will endure, and this in turn means that rules must operate over the long-term. They cannot be set aside when convenient to serve short-term interests, and they must be perceived as fair, legitimate, just and consistent with notions of equality, rather than arbitrary or irrational.

A government policy-maker considering an act of preemptive self-defense will want to know if the act would be regarded as lawful because it helps predict attitudes within the policy-maker's own government, whether those attitudes emerge in executive, legislative or judicial settings. To the extent that the act is regarded as a violation of international law, the policy-maker is being alerted that the act would likely be viewed as wrongful. Knowing whether the act would be regarded as lawful will assist the policy-maker in predicting whether the general public would view the course of action as wrongful and whether foreign governments and their peoples, and possibly an international court, would react adversely to the

course of action.¹⁶ Even in the United States, a country where public attitudes toward international law vary considerably, government officials and legislators seek to convince the public why a particular course of action is consistent with international law.¹⁷

Societal attitudes are important because if resistance is strong, the policy-maker may not be able to undertake a particular course of action (e.g., in the United States or the United Kingdom, an adverse legislative vote may make an executive resort to military force untenable). Of course, even in the face of strong resistance, the policy-maker might undertake the act if, for political or national security reasons, the policy-maker feels there is no choice. But the policy-maker may be interested in knowing whether, by conducting the action in a particular way, the policy-maker is more or less likely to run afoul of the law, for such knowledge may help the policy-maker achieve the objectives with the lowest level of societal approbation. That approbation may have serious consequences for the policy-maker, particularly over the long-term, in the form of eroding political support domestically and abroad for a government's policies, inability to secure military assistance from foreign partners in the form of troops, bases, transport and materials, and the inability to share with those partners or international organizations the economic costs of both the military action and any ensuing acts of peacekeeping or reconstruction.

To date, however, lawyers have had difficulty in reaching a consensus on whether preemptive self-defense is lawful and, if so, whether certain criteria or conditions must be met. Because no authoritative decision-maker has spoken directly to the issue, international lawyers are left arguing the legality of preemptive self-defense based principally on their interpretation of the meaning of the U.N. Charter as enacted in 1945 and on state practice since that time. In doing so, lawyers have taken very different views regarding the legality of preemptive self-defense and, as discussed in the next section, those views might be seen as falling into four basic schools of thought.¹⁸

16. The International Court of Justice (ICJ) has only occasionally received cases concerning transnational use of force, although currently the ICJ has before it a case arising from an alleged invasion of the Democratic Republic of Congo by Uganda in 1998. See International Court of Justice: Current Docket of the Court, at <http://www.icj-cij.org/icjwww/idocket.htm> (showing list of cases currently awaiting adjudication before ICJ) (last visited Mar. 15, 2005).

17. For a detailed discussion of the United States and the difficult problems that arise in its adherence to international norms on the use of force, see JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 142-71 (2004) (discussing historical examples of American use of force and relating those examples to problems under international law); see also John E. Noyes, *American Hegemony, U.S. Political Leaders, and General International Law*, 19 CONN. J. INT'L L. 293, 294 (2004) (arguing that international law "has some purchase on top U.S. officials").

18. For a discussion of the four different schools of thought regarding preemptive self-defense, see *infra* notes 19-68 and accompanying text.

III. FOUR SCHOOLS OF THOUGHT

Contemporary attitudes of government lawyers or academics on the issue of preemptive self-defense tend to fall into four different schools of thought. Describing these views as “schools” may be overly formal; such lawyers probably do not see themselves as part of a “school” in the sense of having an elaborate framework upon which their views are constructed. Moreover, international lawyers within a single school may differ in certain respects, and the views of some international lawyers may be seen as straddling these schools of thought or as moving from one school to another over time.¹⁹ Nevertheless, the different schools identified here rest upon broad conceptions as to the status of international law on this topic, and probing at those different conceptions may help in promoting convergence among them.

A. *The Strict-Constructionist School*

The strict constructionist school begins with the proposition that Article 2(4) of the U.N. Charter contains a broad prohibition on the use of force.²⁰ The term “use of force” in Article 2(4)—as opposed to the term “war,” as used in the Kellogg-Briand Pact of 1928²¹—reflected a desire to prohibit transnational armed conflicts generally, not just conflicts arising from a formal state of war. As such, this school emphasizes that Article 2(4) is best viewed as outlawing any transboundary use of military force, including force justified by reference to the various doctrines developed in the pre-Charter era of forcible self-help, reprisal, protection of nationals and humanitarian intervention.²² To the extent that there is a need to

19. For example, Thomas Franck at one time lamented the apparent death of Article 2(4), thus placing him in the “Charter-is-dead” school. See generally 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) (discussing demise of Article 2(4)). For a discussion of the “Charter-is-dead” school, see *infra* notes 67-68 and accompanying text. After the U.S. intervention in Iraq, Franck asserted that Article 2(4) “has died again,” but then used arguments suggesting that he really falls into the “imminent threat” school and rejects the reasoning of the “qualitative threat” school. See Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT’L L. 607, 610, 619 (2003) [hereinafter *What Happens Now?*] (asserting that doctrine of preemptive self-defense as articulated by Bush administration “would stand the Charter on its head”). For a discussion of the “imminent threat” and the “qualitative threat” schools, see *infra* notes 37-66 and accompanying text.

20. See U.N. CHARTER art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

21. See International Treaty Providing for the Renunciation of War, Aug. 27, 1928, 46 Stat. 2343, 2345-46, 94 L.N.T.S. 57 (“The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.”).

22. There are other norms of international law prohibiting the use of force, such as norms embedded in regional charters. See, e.g., Charter of the Organiza-

refer to the negotiating history of the U.N. Charter, that history indicates that Article 2(4) was intended to be a comprehensive prohibition on the use of force by one state against the other.²³

The strict constructionist school acknowledges that the U.N. Charter provides two express exceptions to this broad prohibition. First, the Security Council may authorize a use of force under Chapter VII of the Charter,²⁴ which would require an affirmative vote of nine of its fifteen Members and the concurrence or abstention of its five permanent Members (China, France, Russia, United Kingdom and United States). Some strict constructionists might challenge the authority of the Security Council to authorize Member States, especially if operating under national military command, to engage in preemptive self-defense, but the debate over preemptive self-defense to date has not related to potential Security Council authorization.

tion of African Unity, done May 25, 1963, preamble, arts. II-III, 479 U.N.T.S. 39, available at <http://www.africa-union.org/home/Welcome.htm> (asserting that key principle of African Union was respect for sovereignty of each state and non-interference in their affairs). The OAU Charter was recently superseded by Charter of the African Union. In the *Nicaragua* case, the ICJ identified additional, related norms under customary international law in the form of a prohibition on the violation of a state's sovereignty and a prohibition on intervention in the affairs of another state. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 106-09, 111, 212 (June 27) (discussing non-intervention principle in customary international law); IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 26-49 (Oxford Univ. Press 1963) (looking at justifications for historical examples of nations resorting to war and examining customary reasons for using force under international law); HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* § 290 (A.C. Boyd ed., Stevens & Sons 1889) (describing circumstances under which it is acceptable for states to resort to force for redress, including embargoes and taking forcible possession of "things in controversy").

23. See BROWNLIE, *supra* note 22, at 265-68 (arguing that Article 2(4) cannot be given meaning that allows nations to use force so long as nations simply state that it has no intention of infringing on other state's territorial integrity; provision must be read more broadly than that); 1 *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 123-24 (Bruno Simma ed., Oxford Univ. Press 2d ed. 1994) [hereinafter *CHARTER COMMENTARY*] (arguing that any interpretation of Article 2(4) that permits states to use force is incompatible with purpose of provision and is therefore untenable); *LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE* 125 (J. Cot & A. Pellet eds., 2d ed. 1991); LELAND GOODRICH & EDVARD HAMBRO, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 44-45 (World Peace Foundation, 3d ed. 1969) (asserting that Article 2(4) was designed to prevent armed conflict, leaving very few exceptions to that goal); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 112-13 (1991) (discussing interpretations of Article 2(4) and noting that its words qualify as all-inclusive prohibition against force but that extent of this prohibition is not clear from textual analysis alone); C. Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 R.C.A.D.I. 451, 493 (1952-II).

24. See generally ERIKA DE WET, *THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL* 133-49 (2004) (discussing power of Security Council under Chapter VII and "the threshold that triggers Chapter VII action"); see also U.N. CHARTER, art. 39-51, (setting forth U.N. procedures for handling threats to peace, breaches of peace and acts of aggression, including Security Council authorization of use of force against states that aggressively threaten peace).

Second, states may use force in self-defense pursuant to Article 51 of the Charter. Article 51 states that the Charter does not impair the "inherent right" of self-defense "if an armed attack occurs" against a U.N. Member.²⁵ In considering the legality of preemptive self-defense, the strict constructionist school hews closely to the language of Article 51. Because Article 51 only contemplates an act of self-defense "if an armed attack occurs," the strict constructionist maintains that neither anticipatory self-defense nor preemptive self-defense can be lawful because such forms of self-defense envisage action prior to an armed attack actually occurring.²⁶ Thus, Ian Brownlie, writing in 1963, found that "the view that Article 51 does not permit anticipatory action is correct and. . . arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence."²⁷ For Philip Jessup, "[u]nder the Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened."²⁸ For Louis Henkin, allowing anticipatory action "would replace a clear standard with a vague, self-serving one, and open a loophole large enough to empty the rule."²⁹ Likewise, Yoram Dinstein, writing more recently, finds:

When a country feels menaced by the threat of an armed attack, all that it is free to do—in keeping with the Charter—is make the necessary military preparations for repulsing the hostile action

25. U.N. CHARTER, art. 51. In its entirety, the article reads: Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.

26. For a detailed presentation of strict constructionist views, see *infra* notes 27-36 and accompanying text.

27. BROWNLIE, *supra* note 22, at 278; see HANS Kelsen, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 797-98 (Stevens & Sons 1951) (arguing that Article 51's allowance of use of force in self-defense applies only when nation faces actual armed attack, and therefore, no "imminent" threat of attack can justify armed aggression under Article 51); 2 LASSA OPPENHEIM, INTERNATIONAL LAW 156 (H. Lauterpacht ed., Longmans, Green & Co. 7th ed. 1952) (noting that U.N. Charter "confines the right of armed self-defence to the case of an armed attack as distinguished from anticipated attack or from various forms of unfriendly conduct falling short of armed attack"); Hans Wehberg, *L'Interdiction du Recours à la Force: Le Principe et les Problèmes qui se Posent*, 78 R.C.A.D.I. 1, 81 (1951) (finding that self-defense under Article 51 is impermissible "en cas de simple menace d'agression").

28. PHILIP JESSUP, A MODERN LAW OF NATIONS 166 (Archon Books 1968).

29. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS 156 (1990).

should it materialize, as well as bring the matter forthwith to the attention of the Security Council.³⁰

Moreover, the strict constructionist would note that in using the language “armed attack” rather than “use of force,” Article 51 is limiting the use of self-defense to those situations where the victim state is exposed to a large-scale use of force, such as an invasion or a bombardment or other “most grave forms of the use of force.”³¹ This form of limitation does not

30. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 167 (Cambridge Univ. Press 3d ed. 2001); see *CHARTER COMMENTARY*, *supra* note 23, at 676 (“An anticipatory right of self-defence would be contrary to the wording of Art. 51 (‘if an armed attack occurs’)”); *id.* n.138 (citing authorities disfavoring anticipatory self-defense or preemptive self-defense); REPORT OF THE SECRETARY-GENERAL’S HIGH LEVEL PANEL ON THREATS, CHALLENGES, AND CHANGE, *A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY* 63 (2004) (“[I]f there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to.”). At the same time, Dinstein would allow for self-defense in a situation where an attacker “has committed itself to an armed attack in an ostensibly irrevocable way” even if the attacker has not crossed the frontier, although he is unclear how one would judge that such an attack is irrevocably underway. See *DINSTEIN*, *supra*, at 172 (arguing for legitimacy of “interceptive” self-defense under Art. 51 with belief that it would be preposterous to force nations to endure potentially crippling first strike simply to preserve their absolute right to self-defense).

31. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 101 (June 27) (“[I]t will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.”); see also *Concerning Oil Platforms (Islamic Republic of Iran v. U.S.)*, 2003 I.C.J. 161, 187-88 (Nov. 6) (ruling that in order for nation to attack another nation, it must show that there was armed attack for which other nation is responsible). As noted previously, the ICJ in *Military and Paramilitary Activities in and Against Nicaragua* said that it was not expressing a view with respect to the right to defend against an imminent attack. For a discussion of *Military and Paramilitary Activities in and Against Nicaragua*, see *supra* notes 12-13 and accompanying text.

The ICJ, however, confirmed that states do not have a right of individual or collective armed response to acts that do not constitute an “armed attack.” See *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. at 103, 110 (noting that for one state to legally use force against another because of other’s own act, that act in question must be armed attack). In doing so, the ICJ did not provide a complete definition of what constituted an “armed attack.” On the one hand, the ICJ implied that a “mere frontier incident” does not constitute an “armed attack” and stated that providing assistance to rebels in the target state in the form of weapons or logistical or other support did not constitute an “armed attack.” See *id.* at 103-04. On the other hand, the ICJ considered an “armed attack” as occurring when regular armed forces cross an international border, or when a state sends armed bands, groups, irregulars or mercenaries that carry out acts of armed force against another state of sufficient gravity so as to equate with an actual armed attack by regular forces. See *id.* at 103 (describing actions by state that would constitute armed attack according to ICJ); see also *CHARTER COMMENTARY*, *supra* note 23, at 670 (noting that “armed attacks” must be “military actions [that] are on a certain scale and have a major effect, and are thus not to be considered mere frontier incidents”); *DINSTEIN*, *supra* note 30, at 173-74 (“There is no doubt that, for an illegal use of force to acquire the dimensions of an armed attack, a minimal threshold has to be reached In the absence of an armed attack, self-defense is not an option available to the victim State”).

speak directly to the issue of preemptive self-defense, but the uncertainty as to whether a future threat would actually rise to a level of being an "armed attack" may also suggest that preemptive self-defense was disfavored under Article 51.³²

Adherents to this school typically accept that state practice subsequent to the enactment of the U.N. Charter is relevant,³³ although they (and many international lawyers) are often not clear whether such practice is relevant for the purpose of: (1) interpreting the meaning of the Charter, because conduct by the parties to the Charter demonstrate the parties' interpretation of its meaning; or (2) establishing a new norm of customary international law that supersedes the obligation of the Charter. In any event, the strict constructionist's review of that practice finds that invocations of a right of anticipatory self-defense (let alone a right of preemptive self-defense) are rare and are resisted by other states. Thus, Louis Henkin, writing in 1979, asserted that "neither the failure of the Security Council, nor the Cold War, nor the birth of many new nations, nor the development of terrible weapons, suggests that the Charter should now be read to authorize unilateral force even if an armed attack has not occurred."³⁴ Christine Gray, writing in 2000, concluded:

States prefer to argue for an extended interpretation of armed attack and to avoid the fundamental doctrinal debate. The clear trend in state practice is to try to bring the action within Article 51 and to claim the existence of an armed attack rather than to expressly argue for a wider right under customary international law.³⁵

32. For a discussion of the meaning of "armed attack," see *supra* note 31 and accompanying text.

33. See, e.g., Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544, 545 (1971) (looking to Korean War, President Kennedy's response to Cuban Missile Crisis in 1962 and War in Vietnam as examples of state action after ratification of U.N. Charter).

34. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 141 (2d ed. 1979) [hereinafter *HOW NATIONS BEHAVE*]; see ANTONIO CASSESE, *INTERNATIONAL LAW* 309 (2001) [hereinafter *CASSESE, INTERNATIONAL LAW*] ("If one undertakes a perusal of State practice . . . it becomes apparent that such practice does not evince agreement among States regarding the interpretation or the application of Article 51 with regard to anticipatory self-defence."); HENKIN, *supra* note 29, at 156 ("The permissive interpretation of Article 51 has found little favour with Governments."). But see ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 230-36 (Clarendon Press 1986) (arguing that consensus is growing for allowing anticipatory self-defense).

35. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 115 (Malcolm Evans & Phoebe Okowa eds., 2000). By 2004, Gray was less certain about this "trend," and modified her treatise to speak of a clear trend before the terrorist attacks of September 11. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 133 (2d ed. 2004) [hereinafter *GRAY 2d ed.*] ("The clear trend in state practice before 9/11 was to try to bring the action within Article 51 and to claim the existence of an armed attack rather than to argue expressly for a wider right under customary international law.")

When pressed, some strict constructionists accept that anticipatory or preemptive action, while illegal, in some circumstances "may be justified on moral and political grounds and the community will eventually condone [it] or mete out lenient condemnation."³⁶

B. *The Imminent Threat School*

Adherents to the "imminent threat" school accept that the language of Article 51 speaks of self-defense in response to an armed attack, but they employ three lines of argument to advance a norm favoring a right of anticipatory self-defense, but not preemptive self-defense.³⁷

First, they note that Article 51 speaks of the Charter not impairing an "inherent right" of self-defense, meaning that Article 51 does not create a right of self-defense but instead preserves a right that pre-existed the Charter.³⁸ As such, adherents to this school note that the customary international law of self-defense prior to 1945 recognized the ability of a state to defend against not just an existing attack, but also against an imminent threat of attack.³⁹ The principal precedent relied upon is the *Caroline* incident, an 1836 clash between the United States and the United Kingdom in which U.S. Secretary of State Daniel Webster stated that self-defense is confined to "cases in which the 'necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'"⁴⁰

For adherents to the imminent threat school, this inherent right to defend against an imminent threat was preserved in Article 51.⁴¹ The lan-

36. CASSESE, *INTERNATIONAL LAW*, *supra* note 34, at 310-11.

37. For a listing of authorities falling into this school, see CHARTER COMMENTARY, *supra* note 23, at 666 n.28.

38. See D.W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 187 (Manchester Univ. Press 1959) (stating reference to "inherent right" in Article 51 indicates "an existing right, independent of the Charter and not the subject of an express grant").

39. For a pre-1945, and thus pre-U.N. Charter, example of defense against an imminent threat, see *infra* note 40 and accompanying text.

40. 2 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* 412 (1906) (quoting Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842)). The incident involved an assertion by the United Kingdom that its attack in U.S. territory on the schooner *Caroline* was permissible self-defense because the schooner had previously been used (and might be used again) to ferry supplies across the border to Canada to rebels who were fighting U.K. rule in Canada. See *id.* at 409-12; see also DANIEL WEBSTER, *THE WORKS OF DANIEL WEBSTER* 292-303 (1851). Webster rejected the U.K. assertion, observing that at the time of the attack, the *Caroline* was not engaged in or being prepared for such transport. In support of his views, Webster cited to eminent scholars of international law, including Grotius, Pufendorf and Vattel. For a view that anticipatory self-defense did not exist even under pre-Charter customary international law, see Roberto Ago, *Addendum to Eighth Report on State Responsibility*, (1980) II(1) Y.B. INT'L L. COMM'N. 13, at 65-67, U.N. Doc. A/CN.4/333.

41. See, e.g., BOWETT, *supra* note 38, at 188-89 (arguing that Article 51 definitely allows right to self-defense and that this right has always been presumed to be anticipatory); Jutta Brunnée & Stephen J. Toope, *The Use of Force: International*

guage “if an armed attack occurs” does not impose a condition on the exercise of this inherent right; it is simply indicating the general type of right that is being preserved.⁴² Indeed, this school notes, the French text of the U.N. Charter (which is equally authoritative with the English text), preserved an inherent right of self-defense “dans un cas où un Membre des Nations Unies est l’objet d’une agression armée” (“in a situation where a Member of the United Nations is the object of an armed attack”), a formulation that reads much less restrictively than its English counterpart.⁴³ Although the strict constructionist sees such an interpretation as writing the “armed attack” language out of Article 51, the imminent threat theorist finds absurdity in believing that the drafters bent over backwards in Article 51 so as not to impair an “*inherent* right” only to then significantly restrict that right.⁴⁴

A second line of argument employed by this school is to expand the meaning of the term “armed attack.” Although a narrow interpretation of armed attack might envisage only a use of force that has been consummated, a broader interpretation would view an “armed attack” as including an attack that is imminent and unavoidable even if not yet consummated. Thus, when a state begins massing an army in an attack configuration along the border of another state, the first state has commenced the initial step of a multi-step armed attack, and the second state may respond in self-defense. Here, too, the argument is concerned with the temporal nature of the threat; it must be closely associated in time and space with the expected unleashing of force. Although Louis Henkin is typically associated with the strict constructionist school, he accepts that if

there were clear evidence of an attack so imminent that there was no time for political action to prevent it, the only meaningful defense for the potential victim might indeed be the preemptive attack and—it may be argued—the scheme of Article 2(4) together with Article 51 was not intended to bar such attack. But this argument would claim a small and special exception for the special case of the surprise nuclear attack. . . .⁴⁵

Law After Iraq, 53 INT’L & COMP. L.Q. 785, 792 (2004) (asserting that Article 51 permits anticipatory self-defense, as matter of customary law, so long as it is proportionate response to threat).

42. See Brunnée & Toope, *supra* note 41, at 792 (claiming that even though Article 51 specifically refers to armed attack, there is no impairment of right of anticipatory self-defense when attack is imminent).

43. See J.L. BRIERLY, *THE LAW OF NATIONS* 419 (H. Waldock ed., 6th ed. 1963) (analyzing other interpretations of French text and finding room for uncertainty in interpretation).

44. For a further discussion of the inherent right to self-defense as included in Article 51 of the U.N. Charter, see *supra* notes 41-43 and accompanying text.

45. HOW NATIONS BEHAVE, *supra* note 34, at 143-44; see JULIUS STONE, *AGGRESSION AND WORLD ORDER* 99 (1958). The author posits:

Suppose military intelligence at the Pentagon received indisputable evidence that a hostile State was poised to launch intercontinental ballistic

Third, this school focuses on state practice since 1945, which purportedly demonstrates an acceptance of self-defense by states when an attack is imminent and unavoidable. In this regard, repeated references are made to certain key incidents, such as: the 1962 “quarantine” of Cuba by the United States; the 1967 Arab-Israeli war; the 1981 Israeli attack against an Iraqi nuclear facility; and the 1986 U.S. bombing raids against Libya.⁴⁶ For each incident, according to this school, a state may be seen undertaking an action purportedly in self-defense that precedes an armed attack.⁴⁷ Adherents to the imminent threat school conclude that, by parsing this practice, states may be seen either accepting or tolerating the use of military force by a state against another state when faced with an imminent armed attack.⁴⁸ Thus, Thomas Franck writes:

States seem willing to accept strong evidence of the imminence of an overpowering attack as tantamount to the attack itself, allowing a demonstrably threatened state to respond under Article 51 as if the attack had already occurred, or at least to treat such circumstances, when demonstrated, as mitigating the system’s judgment of the threatened state’s pre-emptive response.⁴⁹

At the same time, adherents to this school are unwilling to expand the meaning of Article 51 beyond the concept of responding to an imminent armed attack.⁵⁰ For them, accepting the legality of preemptive self-

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?

Id.

46. For a discussion of these incidents, see Christopher Greenwood, *International Law and the United States’ Air Operation Against Libya*, 89 W. VA. L. REV. 933 (1986) (discussing situation surrounding air attack, domestic and world reaction to air strike, claim by United States that act was justified under article 51 of U.N. Charter and other justifications for attack); William V. O’Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VA. J. INT’L L. 421, 464-65 (1990) (summarizing position of United States and its allies versus position of many Third World and Communist States).

47. For a further discussion of these attacks and the international legal issues implicated by them, see *supra* note 46 and accompanying text.

48. For a discussion of the views of one adherent to the imminent threat school regarding the acceptability of the use of force in the face of an imminent armed attack, see *infra* note 49 and accompanying text.

49. THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 107 (2002) [hereinafter *RECOURSE TO FORCE*]; *What Happens Now?*, *supra* note 19, at 619 (“The principle of anticipatory self-defense has been known to international law for almost two centuries and has gained a certain credibility, despite the restrictive terms of Charter Article 51. This credibility is augmented both by contemporary state practice and by deduction from the logic of modern weaponry.”).

50. See *What Happens Now?*, *supra* note 19, at 619 (finding Bush administration’s doctrine of preemptive self-defense to be expanding exponentially range of permissible action); Georg Nolte, *Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order*, in 5 THEORETICAL INQUIRIES IN L. 111 (2004) (arguing

defense would place the law on a very slippery slope, taking us back into the pre-Charter world in which nations resorted to warfare for “just” causes.⁵¹ Without the immediacy of an attack, states must try to predict a future threat based on intelligence that will always be tentative and often inaccurate.⁵² Further, in rejecting the concept of preemptive self-defense, the imminent threat school relies in part on the customary international law doctrine that force must only be used in accordance with principles of necessity and proportionality.⁵³ In considering whether force is “necessary,” international lawyers ask certain core questions, such as whether the act undertaken seeks solely to halt or repel the armed attack,⁵⁴ and

that Bush doctrine and Israeli policy of “targeted killing” risk transforming indispensable foundations of international law on use of force and human rights).

51. See Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT’L L. 227, 238 (2003) (asserting that creating rule that did not provide “workable definition of permissible force might end the abolition of the prohibition of the use of force altogether”); MICHAEL WALZER, JUST AND UNJUST WARS 74-75 (analyzing Webster’s formulation as supporting action only against imminent threat).

52. The failure of the U.S. intelligence community to assess accurately Iraq’s WMD capability is described in SENATE SELECT COMMITTEE ON INTELLIGENCE, REPORT ON THE U.S. INTELLIGENCE COMMUNITY’S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ (July 7, 2004), available at <http://intelligence.senate.gov/iraqreport2.pdf> (analyzing pre-war intelligence regarding Iraq’s WMD programs and Iraq’s connection to terrorism). For a discussion of how intelligence can be manipulated, see generally JAMES BAMFORD, A PRETEXT FOR WAR: 9/11, IRAQ, AND THE ABUSE OF AMERICA’S INTELLIGENCE AGENCIES (2004).

53. The ICJ has stated:

The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*: “There is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.” (I.C.J. Reports 1986, p. 94, para. 176). This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 245 (July 8) [hereinafter Nuclear Weapons Advisory Opinion]; see Concerning Oil Platforms (Islamic Republic of Iran v. U.S.), 2003 I.C.J. 161, 187-88 (Nov. 6) (“The United States must also show that its actions were necessary and proportional to the armed attack made on it.”). Discussions of necessity and proportionality also often refer to the *Caroline* incident since Secretary of State Daniel Webster analyzed those elements as cornerstones of the legal doctrine of self-defense. See 29 BRIT. & FOREIGN STATE PAPERS 1129, 1138 (1937).

54. See, e.g., GRAY 2d ed., *supra* note 35, at 121 (noting that necessity and proportionality are both required aspects of actions taken in self-defense and that such action is necessary and proportionate only if it is taken to repel or stop attack, and not for punitive or retaliatory measures). There is a link between the customary rules on necessity and proportionality between the *ius ad bellum* and the *ius in bello*. See generally Christopher Greenwood, *The Relationship Between Jus Ad Bellum and Jus in Bello*, 9 REV. INT’L STUD. 221 (1983). Thus, the Lieber Code’s definition of necessity states: “Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.” Francis Lieber, *Instructions for the Government of the Armies of the United States in the*

whether there were peaceful alternatives available, such as pursuing diplomatic efforts.⁵⁵ In considering whether an act of self-defense is proportional, international lawyers consider the scale of the defensive force in relation to the act against which it is directed.⁵⁶ Under either principle, the imminent threat school stresses that a movement from anticipatory self-defense to preemptive self-defense presents troubling and insurmountable conflicts.⁵⁷ It is simply not possible to gauge with any degree of confidence whether an act of preemptive self-defense today is necessary to deal with a threat that may not materialize for months or years. Similarly, one cannot gauge whether the act of preemptive self-defense today is proportionate to an inchoate future threat.⁵⁸ As such, preemptive self-defense cannot be regarded as lawful.

C. *The Qualitative Threat School*

Adherents to the qualitative threat school agree with the imminent threat school that a state need not await an actual armed attack, but believe that the latter school's requirement of an imminent threat is misplaced. For the qualitative threat school, the world has changed significantly since 1945, particularly with the advent of WMD and the rise of global terrorism. Adhering to the strictures of the *Caroline* standard in a contemporary world is a recipe for paralysis in the face of grave threats.⁵⁹

Field, in DIETRICH SCHINDLER & JIRÍ TOMAN, *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 3, 6 (3d ed. 1988).

55. See, e.g., *Concerning Oil Platforms*, 2003 I.C.J. 161, 198-99 ("In this connection, the Court notes that there is no evidence that the United States complained to Iran of the military activities of the platforms, . . . which does not suggest that the targeting of the platforms was seen as a necessary act.").

56. See Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 391 (1993). The author states:

The resort to force . . . is limited by the customary law requirement that it be proportionate to the unlawful aggression that gave rise to the right. In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy.

Id.

Thus, in the *Oil Platforms* case, the ICJ decided that even if Iran had laid a mine that severely damaged a U.S. warship, responding to that mining with a military operation that destroyed two Iranian frigates and a number of other Iranian naval vessels and aircraft, could not be regarded as proportionate self-defense. See *Concerning Oil Platforms*, 2003 I.C.J. at 198-99 ("As a response to the mining, . . . of a single United States warship . . . neither 'Operation Praying Mantis' as a whole, nor even that part of it that destroyed the [platforms], can be regarded, in the circumstances of this case, as a proportionate use of force in self defence.").

57. For a further discussion of the beliefs and arguments of the imminent threat school, see *supra* notes 37-58 and accompanying text.

58. See Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense* 19-20, Aug. 2002 (ASIL Task Force on Terrorism), available at <http://www.asil.org/taskforce/oconnell.pdf> (pointing out that only by taking over another country wholly and eliminating its government can one country be sure that another will not attack).

59. See MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 217 (1961) (examining requirements of self-defense: neces-

For this school, President John Kennedy had it right when he identified the nuclear age as one in which the actual firing of a weapon can no longer be the touchstone for determining whether a nation is in peril.⁶⁰ Rather than emphasize just the temporal nature of a future attack, this school looks to other qualitative factors,⁶¹ such as the probability that an attack will occur at some future point, the availability of non-forcible means for addressing the situation and the magnitude of harm that the attack would inflict.⁶² Where those qualitative factors indicate that there is a high probability of a future, highly destructive attack, a state may act as necessary and proportionate in preemptive self-defense. According to this school, accepting this approach to self-defense would result in a greater, not lesser likelihood of maintaining world public order because it would serve to deter state and non-state actors from embarking on programs likely to lead to armed conflict.⁶³

sity and proportionality). Abraham Sofaer argues that the *Caroline* standard of responding against a threat that is “instant, overwhelming, and leaving no choice of means . . .” should be limited only to situations where “the state from which attacks are anticipated is not responsible for the threat, and is both able and willing to suppress them.” Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209, 219-20 (2003). In all other situations, Sofaer believes that anticipatory or preemptive self-defense is simply governed by the principles of necessity and proportionality. See *id.* at 320 (“[T]he standard generally applicable to preemptive self-defence is, rather, the same general rule applicable to all uses of force: necessity . . . together with the requirement that any action be proportionate to the threat addressed.”).

60. In 1962 President Kennedy stated:

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.

President John F. Kennedy, Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba, 485 PUB. PAPERS 806, 807 (Oct. 22, 1962).

61. See, e.g., Sofaer, *supra* note 59, at 220 (finding necessity to act and proportionality to be proper standard, with several factors determining necessity, including: nature and magnitude of threat, likelihood threat will be realized, availability and exhaustion of other alternatives and whether use of force is consistent with U.N. Charter and other international law); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT’L L. 563, 572, 574 (2003) (examining *Caroline* test in light of WMD and finding that current test has become significantly more nuanced than Webster’s *Caroline* definition).

62. Most international lawyers do not focus on the magnitude of harm to the victim, but in the Nuclear Weapons Advisory Opinion, *supra* note 53, at 262-63, 266, the ICJ accepted that fundamental rules of international law change “in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.” See *id.* at 262-63.

63. See W. Michael Reisman, *Assessing Claims to Revise the Law of War*, 97 AM. J. INT’L L. 82 *passim* (2003) (suggesting that such doctrine may contribute to world public order if subjected to appropriate criteria).

For this school, state practice since 1945—such as the U.S. “quarantine” of Cuba, the 1989 U.S. invasion of Panama,⁶⁴ and the U.S. attacks against Libya in 1986, Iraq in 1993,⁶⁵ and Sudan and Afghanistan in 1998⁶⁶—supports the acceptance of preemptive self-defense because there was no imminent attack against which the state in those incidents was defending. Although many states opposed such uses of force (and most incidents involved deployment of force by just a single actor, the United States), this school nevertheless sees those incidents as evincing a degree of global tolerance of preemptive self-defense in appropriate circumstances.

The qualitative threat school sees its views as simply extending the position expressed by the imminent threat school, so as to take account of the full spectrum of potential armed attacks. If one were to try to represent graphically the views of the qualitative threat school, one might develop something along the lines of Figure 1. The three-dimensional graph suggests that there are three principal factors of relevance in determining the legality of an act of preemptive self-defense: (1) the imminence of an attack (the higher it is, preemptive force is more acceptable); (2) the level of coercive force used in response (the lower it is, preemptive force is more acceptable); and (3) the threat to the existence of the responding state (the higher it is, preemptive force is more acceptable). The graph suggests one set of placements for various incidents, but qualitative threat theorists may well choose to place such incidents differently, finding that the 1981 and 2003 Iraq incidents and 1986 Libya incident fall on the “lawful” side of the graph.

D. *The “Charter-Is-Dead” School*

Finally, there is a school of thought that sees the rules on the use of force embedded in the Charter as completely devoid of any legally significant normative value. In 1945 these rules might have had some cachet, but the practice of states over the course of the past sixty years can only lead to a conclusion that states do not adhere to the U.N. Charter in any legally meaningful way and, therefore, the rules have fallen into desuetude. States may say that the rules exist and that they are adhering to them,⁶⁷ but this is simply empty rhetoric, a public relations ploy designed

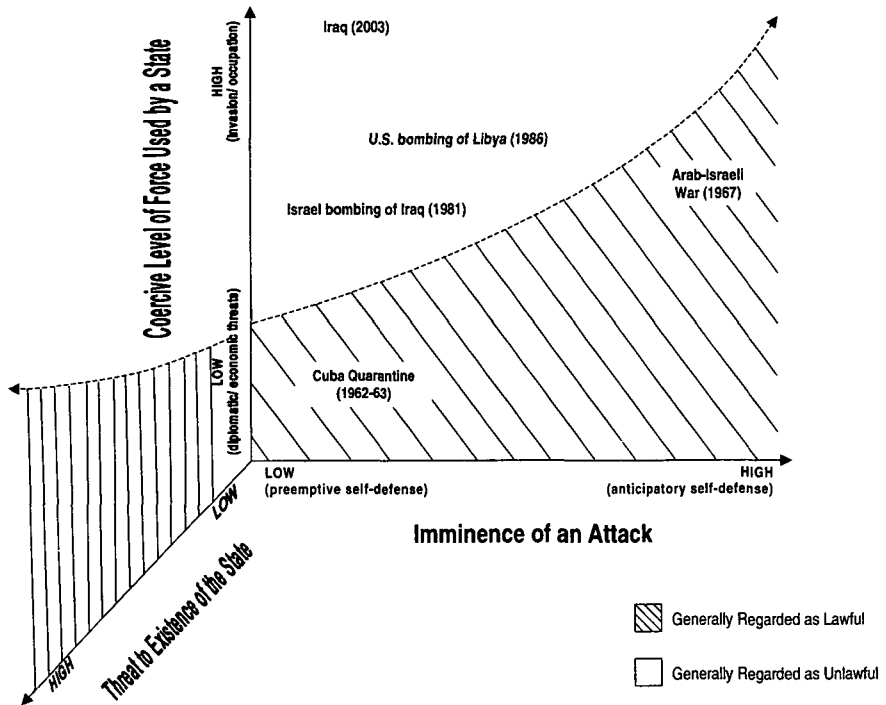
64. For background on the invasion of Panama, see Jennifer Miller, *International Intervention: The United States Invasion of Panama*, 31 HARV. INT'L L.J. 633 (1990).

65. For background on the 1993 attack on Iraq, see Alan D. Surchin, *Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad*, 5 DUKE J. COMP. & INT'L L. 457 (1995).

66. For background on the attacks in Sudan and Afghanistan, see Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537 (1999); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559 (1999).

67. See, e.g., Kim R. Holmes, U.S. Dep't of State, Assistant Sec'y for Int'l Org. Affairs, *The Future of U.S.-UN Relations*, Remarks at the XXI German American

FIGURE 1: THE LEGALITY OF PREEMPTIVE SELF-DEFENSE FOR THE QUALITATIVE THREAT SCHOOL



to mask the reality of states simply pursuing their political interests. Michael Glennon writes:

The Charter's use of force rules have been widely and regularly disregarded. Since 1945, two-thirds of the members of the United Nations—126 states out of 189—have fought 291 interstate conflicts in which over 22 million people have been killed. In every one of those conflicts at least one belligerent necessarily violated the Charter. In most of those conflicts, most of the belligerents claim to act in self-defense. States' earlier intent, ex-

Conference (June 13, 2003), at <http://www.state.gov/p/io/rls/rm/2003/21913.htm>. The speaker remarked:

As contentious as the disagreement over Iraq was, it should not be over-emphasized. Neither the United States nor the U.K. ever asserted a right to operate outside their obligations under international law. Neither took a position that called into question the existing international legal regime related to the use of force. Each country had lawyers examine relevant [U.N. Security Council] resolutions and clarify the legal basis for use of force before the decision to proceed was made.

Id.

pressed in words, has been superseded by their later intent, expressed in deeds.⁶⁸

As a consequence, the “Charter-is-dead” school sees no legal impediment to engaging in self-defense, anticipatory self-defense or preemptive self-defense, whenever a state perceives a need to protect the well-being of its people. Our global civilization may evolve such that states, powerful and less powerful alike, can reach consensus on international rules concerning the use of force (perhaps through effective enforcement mechanisms), but until then there is no point in trying to split legal hairs about the meaning of Article 51.

IV. CAN THE SCHOOLS BE RECONCILED? CONFRONTING METHODOLOGICAL PROBLEMS IN ASSESSING STATE PRACTICE

The strikingly divergent views on the legality of preemptive self-defense no doubt have several causal explanations. International law as a whole suffers from the lack of authoritative decision-makers, such as a supreme court with plenary power to decide controversial questions of either legal process or substance, thus making a convergence of views harder. Further, international law on the use of force presents particular difficulties in promoting state fidelity to a normative structure given that adherence to norms is under the greatest stress when issues of national security are at stake. Finally, the norms may not be static in nature. Whether September 11 can be viewed as a “constitutional moment” for

68. Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WKLY. STANDARD, Jan. 28, 2002, at 24, 27 [hereinafter *Preempting Terrorism*]; see also MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* (2001) [hereinafter *LIMITS OF LAW*] (examining humanity’s effort to subject use of force to rule of law and finding that it is no longer possible to know when use of force by state is legal under international law). Currently states intervene on basis of less concrete concepts such as “justice”, or simply when it serves perceived interests of state. *Id.*; Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 540 (2002) (noting that use of force rules in U.N. Charter have been routinely disregarded and are basically illusory). Professor Glennon is not alone, especially if one looks outside the realm of international lawyers to that of international relations theorists. See, e.g., Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT’L L. 1, 28 (1990). One theorist stated:

Based on what states have been saying and what they have been doing, there simply does not seem to be a *legal* prohibition on the use of force against the political independence and territorial integrity of states as provided in even a modified version of Article 2(4). The rule-creating process—authoritative state practice—has rejected that norm.

Id.; see also Christine Chinkin, *The State that Acts Alone: Bully, Good Samaritan or Iconoclast?*, 11 EUR. J. INT’L L. 31 (2000) (questioning indispensability of United Nations after Kosovo and finding United Nations’ role as icon of universal collective responsibility may no longer functionally exist); John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PACE INT’L L. REV. 283, 327 (2003) (“Article 51’s constraint on use of force has collapsed in actual practice.”).

international law—meaning a moment in which seismic shifts in international law occurred without any formal amendment—is unclear, but the rise of global terrorism represented by those attacks challenges many of the conventional assumptions upon which international law has been based.

Despite these many factors, a central reason for these divergences of view may well be that: (1) international lawyers are not explaining the methodology that they are employing in determining the state of the law; (2) are not recognizing that their disagreement with other international lawyers arises largely from the use of different methodologies; and (3) are not articulating why one methodology is superior to another. In particular, to the extent that state practice is deemed significant for purposes of interpreting the U.N. Charter or determining the emergence of a new customary rule of law, international lawyers rarely explain their view as to the circumstances that merit using state practice to establish an evolution in the state of the law and too often provide only a cursory analysis of such practice to see if those circumstances are met. Unfortunately, in reading the literature one cannot help but feel that international lawyers are often coming to this issue with firm predispositions as to whether anticipatory self-defense or preemptive self-defense should or should not be legal and then molding their interpretation of state practice to fit their predispositions.

Ideally, international lawyers would agree upon a narrative explanatory protocol that would set forth a coherent structure for analyzing and configuring state practice, as has been done in the field of international relations theory.⁶⁹ Among other things, developing such a protocol may allow international lawyers to move away from a binary discussion of whether preemptive self-defense is lawful or unlawful, to one that explores the subtleties and nuances of how states react to varying levels of such force being used in different kinds of factual scenarios. The purpose of this section is to identify some of the key issues that arise in assessing methodology and state practice on this topic in the hope that it may promote the pursuit of an explanatory protocol, and in turn, more rigorous analyses by international lawyers and more convergence in the positions taken by them regarding the legality of preemptive self-defense.⁷⁰ Through greater convergence in the views taken by international lawyers, the nor-

69. See JOHN G. RUGGIE, *CONSTRUCTING THE WORLD POLITY* 94 (1998) (explaining that narrative explanatory protocol comprises two “orders” of information: descriptive and configurative); John G. Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructive Challenge*, 52 *INT’L ORG.* 855-85 (1998) (discussing how modern theorizing in international relations views world in terms of actors and interests, ignoring “class of facts that do not exist in the physical object world . . . [facts that] depend on human agreement that they exist and typically require human institutions for their existence. Social facts include money, property rights . . . [and] marriage . . .”).

70. For a further discussion of the key issues that arise in assessing methodology and state practice on this topic, see *infra* notes 72-198 and accompanying text.

mative standards set by international law may become clearer and more helpful for states in ordering their relations.

A. *The Problem of Clarifying Methodology*

Most international lawyers are taught that when faced with a question of whether a particular treaty has been violated (such as the U.N. Charter), one is to focus on the “ordinary meaning” of the terms of the treaty, in their context and in light of the treaty’s “object and purpose.”⁷¹ Moreover, one may also take into account “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”⁷² Virtually all international lawyers writing on the doctrine of preemptive self-defense either consciously or unconsciously use some elements of this approach to treaty interpretation, but they often adopt a particular component of the methodology that is useful for advancing their position on preemptive self-defense and avoid emphasizing (or even recognizing) other components. An emphasis on the text of the treaty is sometimes referred to as a “textual” or “literal” approach, and an emphasis on the object and purpose of the treaty is an “effective” or “teleological” approach.⁷³

Thus, the “strict constructionist” school heavily relies on the ordinary meaning of the terms of Article 51, which, as discussed above, appears to require an “armed attack” prior to engaging in a right of self-defense.⁷⁴ For the strict constructionist, the language of Article 51 presents a high hurdle over which the other schools cannot leap. Yet, this school tends to downplay or ignore the other elements relevant to treaty analysis, particularly the possibility that over time states may reinterpret Article 51 through their practice. Since 1945, states have deviated from the language of the Charter in many ways that are found acceptable by states, ranging from

71. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, S. TREATY DOC. NO. 92-12, 1155 U.N.T.S. 331, 340 [hereinafter VCLT] (providing general rule of interpretation of treaties, including that treaties should be interpreted in good faith, context for interpretation of treaty and other considerations that should be taken into account). The VCLT’s authoritative character as law, even for states not a party to it, derives from the fact that it is now generally accepted that most of its provisions are declaratory of the customary international law of treaties. See *id.* at 331 (stating that Vienna Convention on law of treaties was registered *ex officio* on January 27, 1980). Although the United States has not become a party to the VCLT, it regards the substantive provisions of the VCLT as reflective of customary international law on the subject. See S. EXEC. DOC. L, 92-1, at 1 (1971) (“The convention is already generally recognized as the authoritative guide to current treaty law and practice.”); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. III, introductory note (1987) (finding that Department of State has stated that it regards particular articles of Vienna Convention as codifying international law, and noting that U.S. courts have treated various provisions of Convention as authoritative).

72. VCLT, *supra* note 71, art. 31(3)(b).

73. See ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 185 (2000).

74. For a further discussion of the beliefs and theories of the strict constructionist school, see *supra* notes 20-36 and accompanying text.

the practice of permanent Members abstaining (rather than concurring) on substantive issues decided by the Security Council⁷⁵ to the reading of U.N. Charter Article 23's reference to "the Union of Soviet Socialist Republics" as meaning now the "Russian Federation"⁷⁶ to the use of conflict resolution techniques nowhere contemplated in the Charter, such as U.N.-authorized "peacekeeping" forces, the General Assembly's use of the "Uniting for Peace" resolution⁷⁷ or U.N. authorizations to military forces operating under national commands.

The strict constructionist normally reviews some of the state practice since 1945, but finds such practice too sparse or unconvincing to establish a reinterpretation of Article 51.⁷⁸ The strict constructionist, however, would be more convincing by explaining clearly the methodology for examining state practice (such as by confronting several of the problems identified below) and indicating why a norm favoring, for example, the bestowal of Security Council authority on states operating under national commands is deemed lawful under that methodology, whereas preemptive self-defense is not. Moreover, the strict constructionist often stresses evidence within the negotiating history of the Charter that favors a restrictive reading of Article 51, even though standard treaty interpretation disfavors reference to such history absent ambiguity in the text or absurdity in application of the text.⁷⁹ The strict constructionist should confront the fact that subsequent state practice holds a higher place under standard treaty interpretation than negotiating history and should candidly assess whether the ordinary meaning of Article 51 is ambiguous and susceptible to alternative interpretations.

The "imminent threat" school also dwells somewhat on the ordinary meaning of Article 51, but stresses the term "inherent right" of self-defense and uses such language to bootstrap in the pre-Charter standard of self-defense reflected in the *Caroline* incident in support of its position.⁸⁰

75. See CHARTER COMMENTARY, *supra* note 23, at 493-98.

76. See *id.* at 439.

77. G.A. Res. 377(V), U.N. GAOR, 5th Sess., 302nd Plen. Mtg., U.N. Doc. A/PV.302, 341 at 347 (Nov. 3, 1950). The resolution, entitled "Uniting for Peace" in essence purports to transfer from the Security Council to the General Assembly the authority to authorize the use of force under Chapter VII in cases where the Security Council is deadlocked. See *id.*

78. For a further discussion of the beliefs and views held by the strict constructionist school, see *supra* notes 20-36 and accompanying text.

79. Treaty interpretation calls for recourse to the preparatory work of the treaty (that is, the negotiating record) only where the initial interpretation leads to an ambiguous or obscure meaning or to an absurd or unreasonable result. See VCLT, *supra* note 71, art. 32, 1155 U.N.T.S. at 340 (presenting procedure for treaty interpretation).

80. See, e.g., Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 53 AM. J. INT'L L. 597, 598-600 (1963) (referring to *Caroline* incident to show that necessity of self-defense does not require actual armed attack); BOWETT, *supra* note 38, at 187-90 (stating that Article 51 was intended to safeguard right of self-defense, and not restrict it and referring to *Caroline* as classical illustration of anticipatory self-defense). While McDougal does not use the term "inherent right," he

Yet, the “imminent threat” school senses the weakness in focusing on the language of Article 51 and thus moves quickly in its methodology to post-1945 state practice, typically providing a more detailed account of that practice than the strict constructionist.⁸¹ Here too, however, “imminent threat” theorists usually do not examine their methodology for assessing state practice; it remains unclear exactly what elements of state practice are relevant and why. Like strict constructionists, imminent threat theorists would be more convincing if they set forth a cogent methodology, explained how that methodology fit with respect to issues other than anticipatory self-defense and then used the methodology to demonstrate why anticipatory self-defense is permissible.

The “qualitative threat” school downplays the ordinary meaning of Article 51 of the U.N. Charter—even denigrates reliance on such language as a “push button” approach to legal analysis⁸²—and further downplays post-1945 state practice, no doubt realizing that neither is particularly useful in establishing a right of preemptive self-defense. Instead, the qualitative threat school at its heart argues that preemptive self-defense is lawful because the “object and purpose” of Article 51 is to maintain each state’s inherent right of self-defense.⁸³ They believe that in a world with WMD and terrorists acting secretly and with state support the only reasonable way of achieving this purpose is to permit preemptive self-defense.⁸⁴

A central problem with this approach is that reasonable minds disagree on the object and purpose of Article 51. For the strict constructionist school, the object and purpose of Article 51 is to “cut to a minimum the unilateral use of force in international relations,”⁸⁵ which is best served by precluding both anticipatory self-defense and preemptive self-defense. At the end of the day, the qualitative threat school must confront why its “reasonable” interpretation of the Charter’s object and purpose is superior to that of others. The most plausible means for doing so would be to establish that the “qualitative threat” interpretation has been widely adopted by states, which in turn should lead this school into identifying and demonstrating a methodology of assessing state practice.

repeatedly refers to the understanding that acting in self-defense does not require an actual armed attack as the “customary right” of self-defense. *Id.*; see also D.W. Bowett, *The Interrelation of Theories of Intervention and Self-Defense*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 38, 38-40 (John Norton Moore ed., 1974) (arguing that Article 51 was intended to preserve “traditional right” of self-defense, which included right to take action against threat before actual armed attack occurred).

81. For further discussion, see *supra* notes 37-58 and accompanying text.

82. See Sofaer, *supra* note 59, at 213 (presenting some scholars’ belief that ‘push button’ approach to analyzing Charter is flawed).

83. See *id.* at 212 (stating that current standard is “necessity” and this should be determined in light of purposes of U.N. Charter).

84. See *id.* at 213-14 (concluding that qualitative threat school believes that preemptive self-defense is only reasonable way to protect states from terrorism).

85. CHARTER COMMENTARY, *supra* note 23, at 803.

The “Charter-is-dead” school is deeply interested in post-1945 state practice, to the point of finding that such practice has completely upended whatever normative rules emerged in 1945. As noted above, for this school there is such widespread evidence in state practice of a departure from Charter norms that the norms have no meaning.⁸⁶ Therefore, preemptive self-defense is lawful (or at least cannot be considered unlawful). But this school typically does not advance a methodology of legal interpretation that can be seen as holding true with respect to international law and that therefore is appropriate to apply to preemptive self-defense. For instance, this school’s reference to “291 interstate conflicts” since 1945 might prove that Charter rules on the use of force have no normative value, but on the same logic, perhaps the lack of, say, 582 interstate conflicts proves that such rules have normative value.⁸⁷ In other words, laws are broken all the time; in the United States in 2002 there were 16,204 murders and 2,151,875 burglaries.⁸⁸ But the fact of law violation—even widespread law violation—is not commonly viewed as proving that the law does not exist or that it does not have an effect in conditioning the behavior of those to whom it is addressed.⁸⁹ For example, if the speed limit on a road is fifty-five miles per hour, but it is widely accepted that one may travel at sixty miles per hour without repercussions, then the speed limit has established a normative standard (fifty-five plus five) that individuals accept as appropriate for judging deviant behavior.

To seriously consider the relevance of interstate conflict since 1945, it would help to know whether there were instances where interstate conflict did not occur because an aggressor state found unacceptable the consequences of violating the non-aggression norm. It would help to know whether the existence of global norms on the use of force has, in some sense, seeped into the “collective consciousness” of global society. If so, then perhaps, leaders today (as opposed to their predecessors of a century ago) are more apt to abide by the norm than they would in its absence. People are more apt to resist leaders who depart from the norm, and states are more apt to condemn other states that depart from the norm even though such departures inevitably occur. One might want to know in how many interstate conflicts since 1945 the norm provided a basis for galvanizing global reaction to the resort to force, whether in the dramatic form of the U.N.-authorized coalition that expelled Iraq from Kuwait in

86. For a discussion of the Charter is dead view that norms have no meaning, see *supra* note 68.

87. See HOW NATIONS BEHAVE, *supra* note 34, at 146 (recognizing that norms lies against use of force by states); MARTHA FINNEMORE, THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE 7-8 (2003) (“It is precisely because states show restraint that we live in a world of sovereign states at all.”).

88. See FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2002: UNIFORM CRIME REPORTS 19, 45 (2003) (presenting national crime statistics).

89. See Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 130-31 (1986) (arguing that violation of laws does not mean that legal restraints on conduct do not exist).

1991 or the insistent pressure brought to bear on Eritrea and Ethiopia during 1998-2000. Even with respect to resort to force by powerful states, one might posit that raw power may be occasionally used, but that because deviation from the norm promotes instability and escalation, such states more often apply their power within the framework of the normative system.⁹⁰ The "Charter-is-dead" school is correct that we cannot simply assume these things;⁹¹ they must, if possible, be demonstrated.⁹² At the same time, it is not convincing simply to assume that state conduct is not affected by norms on the use of force, especially because states repeatedly and consistently assert that the norms of the Charter are relevant and applicable and because there are instances where adherence to the norms seem quite important to states.⁹³ Close analysis of state practice would appear to be the best way for the "Charter-is-dead" school to prove that the rules of the Charter are indeed dead.

It would also be useful to clarify whether state practice since 1945 is relevant for the purpose of interpreting the meaning of the Charter or, alternatively, for the purpose of determining whether a new norm of customary international law has emerged that supersedes the obligations set forth in the Charter, and if so whether it makes any difference. To the extent that there is discussion of this issue, the strict constructionist school may resort to the notion of *jus cogens*⁹⁴ as a means of arguing that a new

90. See MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 6 (1999) (noting that use of quick, unorganized force to achieve goals has many disadvantages, however, organized use of force backed by legal system is more efficient and safer for states to employ).

91. See LIMITS OF LAW, *supra* note 68, at 42 ("There is simply no reason to assume that state conduct necessarily is caused by perceptions as to what a treaty permits or prohibits. States act for reasons altogether unrelated to their treaty obligations.").

92. See generally FINNEMORE, *supra* note 87 (discussing various justifications for military intervention). Professor Finnemore analyzes rules on the use of force from a sociological perspective, meaning a perspective that explains the conduct of actors by reference to the social structures in which they are embedded. *Id.* Among other things, she finds that legal norms have played a key role in fundamentally changing state practice regarding the use of force. *Id.*

93. For example, in the course of the decision to invade Iraq in 2003, British Prime Minister Tony Blair apparently saw considerable importance in obtaining Security Council authorization, to the point that his government was considered at risk of falling in March 2003 when it became clear that express Security Council authorization was not forthcoming. See, e.g., Karen DeYoung & Colum Lynch, *Britain Races to Rework Resolution*, WASH. POST, Mar. 11, 2003, at A1 (reporting that Blair supported amending resolution even in face of challenge to power); Glenn Frankel, *Parliament Backs Blair on Action Against Baghdad*, WASH. POST, Mar. 19, 2003, at A17 (reporting on revolt, which ultimately was defeated, in Blair's Labor Party).

94. *Jus cogens* refers to a fundamental or peremptory norm of international law from which states cannot deviate. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 100-01 (June 27) (finding that rule against use of force is "conspicuous example of a rule of international law having the character of *jus cogens*"); see also VCLT, *supra* note 71, art. 53, 1155 U.N.T.S. at 344 ("*Jus cogens*" is a

rule of customary international law cannot emerge because states may not deviate from the strict constructionist's interpretation of Articles 2(4) and 51,⁹⁵ but the other schools may question whether the emergent custom really deviates from the U.N. Charter or may challenge the very notion of *jus cogens*.⁹⁶ In any event, most discussions of preemptive self-defense tend to glide over this issue, even though it is central to the question of why and how one is considering state practice.

The brief discussion above suggests that there is a common component among the four schools of thought: the general lack of attention to the methodological approach in assessing the legality of preemptive self-defense and an unwillingness to explain why one approach is superior to another. At the same time, each of the four schools appears interested, to a degree, in the role of state practice since 1945, such that if better agreement existed among the schools regarding how such practice should be treated, it might be possible to see some convergence among them.⁹⁷ Thus, if the "strict constructionist" and the "imminent threat" theorist can agree that post-1945 state practice matters, then focusing on and perhaps reaching agreement how such practice should be assessed would be a helpful step prior to actually assessing the practice. Likewise, the "qualitative threat" theorist may downplay state practice of the kind typically raised in discussions of preemptive self-defense, but if the qualitative threat theorist could convince the other schools that state practice should be viewed as broader than just actual incidents of state conduct so as to encompass evidence of broader expectations and beliefs of governments and peoples, then the qualitative threat theorist might be positioned to demonstrate that state practice supports preemptive self-defense. With these observations in mind, the remaining portions of this section focus on some of the problems that must be confronted in taking state practice in this area seriously.⁹⁸

norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted . . .").

95. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987) (stating that provisions of U.N. Charter prohibiting use of force have character of *jus cogens* as recognized by international community).

96. See LIMITS OF LAW, *supra* note 68, at 40-42 (asking why majority of states cannot simply act to change rule that was previously accepted by international community).

97. For a discussion of the interest in state practice, see *supra* notes 33-35, 48, 64-66, 69 and accompanying text.

98. For a discussion of the problem of examining what states say versus examining what states do, see *infra* notes 99-121 and accompanying text. For a discussion of the issues surrounding identifying what states actually do, see *infra* notes 122-40 and accompanying text. For a discussion on how to incorporate the global reaction to a states use of force, see *infra* notes 141-47 and accompanying text. For a discussion of the problems of the relative infrequency of state actions and possible solutions, see *infra* notes 148-75 and accompanying text. For a discussion on the importance of recent versus historical state practice, particularly in light of the events of September 11, see *infra* note 176 and accompanying text. For a discus-

B. *The Problem of Relying on What States Say Versus What They Do*

In assessing whether states in the past have engaged in anticipatory or preemptive self-defense, international lawyers are divided over whether, in assessing an incident of state practice, one should focus on the legal justification asserted by the state undertaking a use of force or, rather, look past that justification to try to ascertain what decision-makers actually believed about what was legally permissible.⁹⁹ In other words, if a state undertakes an action in a situation that on its face appears to be anticipatory or preemptive self-defense (i.e., there is no factual basis for the existence of a prior armed attack), and the state nevertheless claims that it is acting in self-defense against an armed attack, international lawyers differ on whether this demonstrates adherence to the traditional norm of self-defense against an armed attack (albeit mistaken self-defense) or tacitly demonstrates adherence to a new norm of anticipatory or preemptive self-defense.¹⁰⁰ A more robust exchange among international lawyers as to whether a state's asserted legal justification is the exclusive touchstone when assessing state practice may help in promoting better convergences in their views.

For example, in her analysis of why state practice does not support a right of anticipatory self-defense, Christine Gray principally focuses on what states say they are doing, because

reluctance expressly to invoke anticipatory self-defense is in itself a clear indication of the doubtful status of this justification for the use of force. States take care to try to secure the widest possible support; they do not invoke a doctrine that they know will be unacceptable to the vast majority of states.¹⁰¹

Gray then reviews various incidents sometimes referred to as demonstrating anticipatory self-defense, such as the 1967 Israeli strikes against Egypt, Jordan and Syria and finds that because the attacking state (e.g., Israel) publicly stated that it had been the victim of a prior armed attack, the incident cannot stand as an example of anticipatory self-defense.¹⁰²

This approach to assessing state practice may have the benefit of simplicity; one simply looks for the publicly asserted legal justification by the relevant state actor and decides whether that statement asserts the emer-

sion of the problems associated with resorting to the Travaux (preparatory work) of the Charter, see *infra* notes 177-89 and accompanying text.

99. See RECOURSE TO FORCE, *supra* note 49, at 102-03.

100. See, e.g., CASSESE, INTERNATIONAL LAW, *supra* note 34, at 308-10 (discussing rationale and conflicting views on anticipatory defense).

101. GRAY 2d ed., *supra* note 35, at 130; see also Brunnée & Toope, *supra* note 41, at 790-91 ("For the purposes of assessing the fit of an action within a normative framework, however, one must focus upon justifications actually offered rather than suspected motivations.").

102. See GRAY 2d ed., *supra* note 35, at 130-31 (stating that "the point of importance is that Israel did not rely on anticipatory self-defence to justify its actions").

gence of a new norm. In particular, one might focus exclusively on the legal justification presented by a state in its report to the Security Council, which is supposed to occur as part of the state's obligation under U.N. Charter Article 51.¹⁰³ At the same time, there may be differing legal justifications advanced by different branches or agencies of a government, legal justifications may change over time and, even if a single justification is asserted, the justification may either be too simple in nature ("we are acting consistent with the U.N. Charter") or too diverse in nature ("our actions are legally justified for a variety of reasons"), such that drawing a definitive conclusion becomes problematic.¹⁰⁴ Yet, assuming that one can divine a single stated legal justification, reliance solely on that justification raises important questions. If it were the case that states were repeatedly and consistently engaging in anticipatory self-defense or preemptive self-defense and yet simply stating that such action was in response to an armed attack, even when it was not, is it really correct simply to rely on the asserted legal justification when determining the operative rule? If the law on the books provides for a speed limit of fifty-five miles per hour, but a driver says that "I am not speeding" when the driver is going sixty miles per hour and there are no repercussions in doing so, it would seem that the better advice when someone asks "how fast can I go?" is that the normative system allows one to go sixty miles per hour. The reluctance of states to assert a legal justification that adopts a new norm may reflect a state's belief that there is no such norm, but it may also reflect the reality that during the time when states in transition from an old norm to a new, states wish to act in accordance with the new norm without being labeled as acting unlawfully, and thus seek to portray their acts as complying with the old norm.

The other schools appear much less focused on what a state says about its actions and more focused on what a state does. For example, Thomas Franck finds that the 1967 Israeli strikes were a precedent of anticipatory self-defense because Israel's argument that it was the victim of an armed attack "was difficult to credit," and that other "words and ac-

103. States have not always submitted a report to the Security Council when they have used force against other states. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 121 (June 27). The United States' failure to report to the Security Council in this manner during the actions at issue in the *Nicaragua* case, however, led the ICJ to observe "that this conduct of the United States hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence as consecrated by Article 51 of the Charter," and thus contributed to the ICJ's finding that the United States was not acting in self-defense. See *id.* Consequently, since that time the United States typically has submitted such reports to the Security Council when undertaking a use of force. See GRAY 2d ed., *supra* note 35, at 102-03 (discussing how after *Nicaragua* case, states regularly report actions to Security Council, and in fact now tend to over-report claims). The United States chose to report and thus justify each episode of use of force against Iran during period of conflict between Iraq and Iran. *Id.*

104. For trenchant criticisms in this regard, see LIMITS OF LAW, *supra* note 68, at 44-46, 56-58, 76-78 & 80.

tions" demonstrated an Israeli acceptance of the right of anticipatory self-defense.¹⁰⁵ Similarly, in considering the relevance of the U.S. "quarantine" of Cuba in 1962, some international lawyers note that the United States based its official legal justification on a theory of "regional enforcement action" under Chapter VIII of the Charter and thus find that the quarantine is not a precedent for preemptive self-defense,¹⁰⁶ but others find such a justification not credible and therefore look past it to support a right of anticipatory self-defense¹⁰⁷ or preemptive self-defense.¹⁰⁸ Indeed, the entire "New Haven" school of international law as policy science was built upon peeling away the formalistic rules advanced by states so as to ascertain the true rules upon which states actually operate.¹⁰⁹ Yet, as discussed in the next sub-section, the difficulty with this approach is in figuring out exactly what states are doing.¹¹⁰

This problem of whether to focus on what states say as opposed to what they do may account for why some international lawyers state unequivocally that the U.S. government has consistently supported a prohibition on the preemptive self-defense,¹¹¹ but others have asserted that the U.S. government has claimed a right of preemptive self-defense starting in the 1980s.¹¹² Still others see the United States as having engaged in pre-

105. See RECOURSE TO FORCE, *supra* note 49, at 102-03 (finding that Security Council gave credence to argument to anticipatory self-defense by not censuring Israeli action in any of its resolutions on issue); see CASSESE, INTERNATIONAL LAW, *supra* note 34, at 308 ("Israel has resorted to anticipatory self-defence on various occasions: for example in 1967 against Egypt . . .").

106. See, e.g., Richard N. Gardner, *Neither Bush nor the "Jurisprudes,"* 97 AM. J. INT'L L. 585, 587-88 (2003); see also ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 62-66 (1974) (stating that preemptive self-defense argument was continually rejected as justification for quarantine).

107. See, e.g., RECOURSE TO FORCE, *supra* note 49, at 99-101 (looking past United States' stated reasons for its actions).

108. See, e.g., Yoo, *supra* note 61, at 573 (positing that United States' justification for Cuban quarantine was not credible and that preemptive self-defense was true ground for action).

109. See generally HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992) (discussing how states use stated rules to set forth their own policy). The New Haven school would see the function of rules on the use of force as "not mechanically to dictate specific decision but to guide the attention of decision-makers to significant variable factors in typical recurring contexts of decision, to serve as summary indices to relevant crystallized community expectations, and, hence, to permit creative and adaptive, instead of arbitrary and irrational, decisions." MCDUGAL & FELICIANO, *supra* note 59, at 57.

110. For a discussion of the issues surrounding identifying what states actually do, see *infra* notes 122-40 and accompanying text.

111. See O'Connell, *supra* note 58, at 3 (concluding that, because of national values and need for national security, United States has taken strong position against preemptive self-defense).

112. See *Preempting Terrorism*, *supra* note 68, at 25 (noting that in 1986, United States claimed right to use preemptive self-defense against Libya following terrorist attack in Berlin).

emptive self-defense from the earliest days of its history.¹¹³ The recent invasion of Iraq highlights this problem. There is a widespread perception that the invasion of Iraq was an implementation of the doctrine articulated by the Bush administration in 2002.¹¹⁴ Indeed, when President Bush announced to the nation that military operations against Iraq had begun in March 2003, he said:

The people of the United States and our friends and allies will not live at the mercy of an outlaw regime that threatens the peace with weapons of mass murder. We will meet that threat now, with our Army, Air Force, Navy, Coast Guard and Marines, so that we do not have to meet it later with armies of firefighters and police and doctors on the streets of our cities.¹¹⁵

At the same time, when explaining the legal basis for its action against Iraq under international law, the United States did not assert that the invasion of Iraq was permissible under international law because of an evolved right of preemptive self-defense.¹¹⁶ Rather, the United States asserted that the invasion was lawful because it was authorized by the Security Council,¹¹⁷ a theory also maintained by the other members of the U.S.-led

113. See generally JOHN LEWIS GADDIS, *SURPRISE, SECURITY, AND THE AMERICAN EXPERIENCE* (2004) (arguing that with end of U.S.-French alliance in 1800, fledgling United States had to defend itself against real threats and did so by acting unilaterally and preemptively).

114. See GRAY 2d ed., *supra* note 35, at 177 (noting that opposition by many states to Operation Iraqi Freedom makes it clear that many states were not willing to accept pre-emptive self-defense as legal basis for operation).

115. President George W. Bush, Address to the Nation on Iraq, 39 WEEKLY COMP. PRES. DOC. 342, 343 (Mar. 19, 2003) [hereinafter Bush Address to Nation].

116. See, e.g., CONG. RESEARCH SER., U.S. USE OF PREEMPTIVE MILITARY FORCE, CRS REPORT RS21311 (updated Apr. 11, 2003) ("The President did not explicitly characterize his military action as an implementation of the expansive concept of preemptive use of military force against rogue states with WMD contained in his National Security Strategy document of September 2002.").

117. See *Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/2003/351 (2003) ("The actions being taken are authorized under existing Council resolutions."); see also Bush Address to Nation, *supra* note 115, at 339 ("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. This is not a question of authority. It is a question of will."); U.N. SCOR, 58th Sess., 4726th mtg. at 25, U.N. Doc. S/PV.4726 (Resumption 1) (2003) (statement of U.S. Permanent Representative to United Nations to Security Council) ("Resolution 687 (1991) imposed a series of obligations on Iraq that were the conditions of the ceasefire. It has long been recognized and understood that a material breach of those obligations removes the basis of the ceasefire and revives the authority to use force under resolution 678 (1990)."); William H. Taft, IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557, 563 (2003) (containing essay by State Department Legal Adviser and his assistant basing legality of invasion on Security Council resolutions, but also stating that "a principal objective" of coalition forces in context of those resolutions was to preempt Iraq's possession and use of WMD); see also Holmes, *supra* note 67 ("The decision to go to war with Iraq was based on international law: Existing Security

coalition.¹¹⁸ At most, it seems that some of the U.S. government's statements on the legality of the action contained cryptic references suggesting legal authority other than that emanating from Security Council resolutions, but the terms "anticipatory self-defense" or "preemptive self-defense" are never used.¹¹⁹ Consequently, it is no surprise that some international lawyers believe that the invasion of Iraq provides no precedent for a right of preemptive self-defense,¹²⁰ but others assert that it does.¹²¹

Council resolutions against Iraq provided a sufficient legal basis for military action."); William H. Taft, IV, U.S. Dep't of State Legal Adviser, Remarks Before the National Association of Attorneys General 15-16 (Mar. 20, 2003) [hereinafter Taft Remarks], at <http://usinfo.state.gov/regional/nea/iraq/text2003/032129taft.htm>. ("Under international law, the basis for use of force is equally strong. There is clear authorization from the Security Council to use force to disarm Iraq."). For my analysis of this legal theory, finding it plausible but ultimately unpersuasive, see Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004).

118. For the Australia letter to the Security Council, see *Letter Dated 20 March 2003 From the Permanent Representative of Australia to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, 58th Sess., U.N. Doc. S/2003/352 (2003). For the U.K. letter to the Security Council, see *Letter Dated 20 March 2003 From the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, 58th Sess., U.N. Doc. S/2003/350 (2003). For the legal analysis of the U.K. Attorney-General, see *Current Development: Public International Law*, 52 INT'L & COMP. L.Q. 811, 811-12 (statement by U.K. Attorney-General Lord Goldsmith in answer to parliamentary question in House of Lords). Although Spain did not contribute troops to the invasion, it supported, as a Security Council Member, the legal theory advanced by the United States and its allies. See U.N. SCOR, 58th Sess., 4721st mtg. at 15-16, U.N. Doc. S/PV.4721 (2003) (explaining its support for United States with regard to "alleviat[ing] the suffering of the Iraqi people"). For Poland, which was not a Member of the Security Council, but did contribute forces, see U.N. SCOR, 58th Sess., 4726th mtg. at 24-25, U.N. Doc. S/PV.4726 (2003) (expressing its alignment with European Union because of desire to remove Iraq's weapons of mass destruction, "which threaten international peace and security").

119. See, e.g., Bush Address to Nation, *supra* note 115, at 339 ("The United States of America has the sovereign authority to use force in assuring its own national security."); see also *Letter Dated 20 March 2003 From the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, *supra* note 117, at 2 ("The actions that coalition forces are undertaking . . . are necessary steps to defend the United States . . . from the threat posed by Iraq . . ."); see also Taft Remarks, *supra* note 117, at 15-16 ("The President may also, of course, always use force under international law in self-defense.").

120. See, e.g., Brunnée & Toope, *supra* note 41, at 794 (noting some commentators' arguments that "an intervention in Iraq could not be justified as self-defence").

121. See, e.g., Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 547-48 (2002-03) (finding that "the controversy centers on whether the situation was ripe for a U.S. military preemptive operation, not the legality of such an operation in the abstract").

C. *The Problem of Figuring Out What States Are Actually Doing*

If international lawyers look past a state's asserted legal justification to find out what states are actually doing, they may avoid some of the concerns noted above, but they then must confront additional concerns. Is the inquiry in seeking to determine objectively, without reference to a state's decision-makers' subjective attitudes, whether the state's conduct in using force demonstrates the emergence of a new legal norm? Alternatively, is the inquiry seeking to determine the attitudes of the state's relevant decision-makers, which might encompass attitudes as to why the state is using force or why its conduct is lawful?¹²² In other words, in considering the action against Iraq in 2003, are we simply asking whether the United States embarked on a use of force in a situation that looks like preemptive self-defense? Or are we asking whether U.S. decision-makers undertook such action with a belief that they were preempting a future threat or that preemptive self-defense was lawful under the U.N. Charter, regardless of whether the official U.S. legal justification advanced a different theory?¹²³ If we are interested in decision-makers' attitudes, then we must further decide whether to focus on the heads of state, ministers, legal advisers, legislators or the general public. The imminent threat and qualitative threat schools might be more convincing to the strict constructionist and "Charter-is-dead" schools if they elaborated on exactly how such an inquiry should be conducted (e.g., by explaining which tools, such as social science techniques, should be brought to bear) and then conducted such an inquiry. Indeed, the "Charter-is-dead" school doubts whether such an inquiry is even possible and suggests that if it were conducted

122. Standard theories of customary international law call for an analysis of both state conduct and *opinio juris*, which is a belief by the state's decision-makers that the conduct is lawful. See G.J.H. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 85-113 (Kluwer Law & Taxation Publishers 1983) (discussing custom as it pertains to international law); see also MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 11-63 (Kluwer Law International 1997) (explaining how to analyze state actions and how to determine rationale behind these actions). As noted above, however, it often is not clear whether international lawyers are engaging in an analysis of emergent customary international law, as opposed to an interpretation of a treaty based on subsequent state practice. See *id.* at 29-37 (differentiating between customary interpretations of international rules and digressions from them).

123. Some observers think that the driving motivation of influential persons in the Bush administration was not to deal with an urgent and imminent danger to the United States, but rather, to establish a democracy in Iraq that would help in democratizing the whole Islamic world. See STEFAN HALPER & JONATHAN CLARKE, *AMERICA ALONE: THE NEO-CONSERVATIVES AND THE GLOBAL ORDER* 218-19 (2004) (suggesting that if Bush administration could democratize Iraq, other Middle Eastern powers would follow Iraq's lead); see also JAMES MANN, *RISE OF THE VULCANS: THE HISTORY OF BUSH'S WAR CABINET* 346 (Viking 2004) ("Some of the Vulcans hoped that in overthrowing Saddam Hussein, the United States could turn Iraq into a model for democracy that would transform Arab political culture and the politics of the entire Middle East . . .").

successfully, the answer might be that decision-makers are acting without any thought as to "the law."¹²⁴

Leaving aside the issue of the relevant decision-makers' attitudes, a related concern is that it may prove extremely difficult to draw lines between "traditional" self-defense and anticipatory or preemptive self-defense in assessing what states are actually doing. International lawyers should clearly explain how one determines that a state is acting in "anticipation" or in "preemption" of a future action, rather than responding to a prior act. International lawyers would do well to recognize that traditional acts of self-defense often are concerned with the prevention of future coercion, though acts of preemptive self-defense invariably are concerned in part with preexisting coercion. Finding an appropriate delineation between the two is more difficult than international lawyers are usually willing to admit.

Thus, a standard formulation of what constitutes a "defensive" response refers to steps taken to repel an attacker, but state practice suggests that this is far too restrictive in nature.¹²⁵ It is commonly accepted that when one state invades another state, the invaded state may respond by not just repelling the invader, but by entering the invader's territory for reasons such as setting up a buffer zone until an armistice is concluded.¹²⁶ If the invader has been repulsed, however, why is a buffer zone allowed? It is a defensive means of preventing future attacks, even long after the guns have fallen silent. Further, even if a state does not invade another state, it is commonly accepted that if a state bombs a military base of another state, the second state may respond in proportionate self-defense, not as a means of stopping the initial bombing (which has already ended), but to deter and prevent such future attacks. Whether one classifies such a response as "defensive armed reprisal,"¹²⁷ "defensive retaliation"¹²⁸ or an

124. See LIMITS OF LAW, *supra* note 68, at 46 ("International lawyers pine for better ways to get 'into the heads' of state decision makers . . . [but] many of those decision makers, if at all candid, would reply 'Who cares?' or 'There's no such thing.'").

125. See, e.g., GRAY 2d ed., *supra* note 35, at 121 ("States have invoked collective self-defence as a justification for inviting in foreign troops before any armed attack has occurred, in case collective self-defence is needed in the future; that is, as a deterrent or as a precaution."); see also CHARTER COMMENTARY, *supra* note 23, at 805 ("Consequently, lawful self-defence is restricted to the repulse of an armed attack and must not entail retaliatory or punitive actions.").

126. Recent state practice on this may be seen in the Iraq-Kuwait conflict of 1990-91 (although in that instance, claims of self-defense were mixed with Chapter VII authority) and the Ethiopia-Eritrea conflict of 1998-2001.

127. See DINSTEIN, *supra* note 30, at 194-203 ("To be defensive, and therefore lawful, armed reprisals must be future oriented, and not limited to a desire to punish past transgressions.").

128. See Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1638 (1984) ("Thus, 'defensive retaliation' may be justified when a state has good reason to expect a series of attacks from the same source and such retaliation serves as a deterrent or protective action.").

act “undertaken in the framework of an ongoing armed conflict,”¹²⁹ the point is that a traditional act of self-defense is often future-oriented, seeking to stop acts that are yet to occur.

Even the ICJ, which is very restrictive in its approach to use of force issues, accepts that a series of military raids, in which territory is not occupied, might constitute an armed attack that merits self-defense. Here too, such a response is not repulsion of the prior raids, but anticipation and prevention of future ones.¹³⁰ The ICJ may even accept that it is possible to engage in self-defense to prevent *future* mining attacks, after just a single ship has been mined, so long as the complaining State can establish who mined the ship and the complaining State’s response is necessary and proportionate to the mining.¹³¹

The problem of how one characterizes a “defensive” response is even more apparent in the context of responding to terrorist attacks, which are designed as sudden, single attacks without further sustained paramilitary engagement. For example, consider the United States’ response to the terrorist attacks of September 11, 2001. Most international lawyers believe that the United States: (1) sustained an armed attack in September 2001 from a terrorist group supported by Afghanistan’s de facto government and therefore (2) was entitled, under Article 51, to respond in self-defense in November 2001, deploying military forces to Afghanistan to eliminate Al Qaeda bases and topple the Taliban government that tolerated them.¹³² This factual sequence of self-defense is relatively straightforward and was accepted by Security Council, the North Atlantic Treaty Organization (NATO) and the Organization of American States.¹³³ Some international lawyers, however, have asserted that the United States’ use of force constituted preemptive self-defense because the “armed attack against the World Trade Center and the Pentagon was over, and no defensive action could have ameliorated its effects.”¹³⁴

129. See Bothe, *supra* note 51, at 235 (explaining that “legality of anticipatory self-defence” is not pertinent to analyses of armed attacks).

130. See *Military and Paramilitary Activities in (Nicar. v. U.S.)*, 1986 I.C.J. 14, 119 (June 27) (considering whether United States acted in self-defense with regard to its military activities in Nicaragua).

131. See *Concerning Oil Platforms (Islamic Republic of Iran v. U.S.)*, 2003 I.C.J. 161, 195 (Nov. 6) (“The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the ‘inherent right of self-defence’ . . .”).

132. See Sean D. Murphy, *Terrorism and the Concept of Armed Attack in Article 51 of the U.N. Charter*, 43 HARV. J. INT’L L. 41, 47, 50-51 (2002) (arguing that September 11 attack on United States was “armed attack” by comparing it to Japanese attack on Pearl Harbor and explaining that United States had authority, under Article 51, to respond in self-defense).

133. See *id.* (discussing support for theory that United States had been attacked in September 2001, thus justifying its response in self-defense).

134. See *Preempting Terrorism*, *supra* note 68, at 26 (discussing argument that United States’ military action in Afghanistan in 2001 was not prompted by armed attack and was, instead, preemptive strike).

This disagreement raises the question of what factual continuum should be used in considering whether an action is being taken “in anticipation” or “preemptively,” which then raises the question of what a state may do when it engages in self-defense. Most international lawyers would not conclude, for example, that on December 8, 1941, the United States had no basis for acting in self-defense against Japan’s attack on Pearl Harbor, simply because the attack was over and no defensive action could ameliorate its effects. Nor did the United States lose its right to engage in self-defense, even though it took many weeks for a buildup of ground and air forces in the Pacific before the United States could meaningfully respond to Japan’s attack and took months before General Doolittle’s raid on Tokyo.¹³⁵ Rather, in these situations, there is a sense that—given the fact of a prior attack—the attacked state must be able to engage in any action that is necessary to preclude any such attacks in the future, to wit defeating Japan militarily. Whether one is considering the World Trade Center or Pearl Harbor, there is an idea, embedded within standard notions of self-defense, that a state, having been attacked, may ward off future similar attacks through defensive action. Granted, the likelihood of future attacks is much more apparent when an attack already has occurred, but nevertheless the defensive response focuses on preventing future attacks, not simply repulsing the prior attack. Conversely, acts of preemptive self-defense, likely by definition, entail some preceding action by the state or group against whom the action is taken.

If this is true, then the salient question asks at what point this traditional right of self-defense transitions into one of anticipatory self-defense or preemptive self-defense. In 1986, a bomb exploded in a German discotheque frequented by U.S. servicemen.¹³⁶ Thereafter, the United States bombed Libya.¹³⁷ Assuming that the initial bombing is regarded as an “armed attack” (which raises a different issue), is the U.S. action best regarded as traditional self-defense against a pre-existing attack, as some international lawyers claim, or is it preemptive self-defense against unknown attacks that may occur at some unspecified point in the future, as other international lawyers claim?¹³⁸ If one takes at face value NATO’s claim

135. See GERHARD L. WEINBERG, *A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II* 329, 331 (Cambridge Univ. Press 1994) (discussing growth of United States’ forces as it prepared to attack Japan and other related history).

136. See DINSTEN, *supra* note 30, at 201 (noting bombing in Berlin that killed two American servicemen); see also BBC News, 1986: *US Launches Air Strikes on Libya* (Apr. 15, 1986), at http://news.bbc.co.uk/onthisday/hi/dates/stories/april/15/newsid_3975000/3975455.stm (last visited Mar. 15, 2005) (discussing alleged details of Berlin night club bombing, as noted by President Reagan).

137. See DINSTEN, *supra* note 30, at 201 (discussing United States’ 1986 attacks on Libya in response to Libyan attacks, including Berlin bombing).

138. See, e.g., HENKIN, *supra* note 29, at 154-56 (explaining differing views on definition of self-defense, as some lawyers argue that traditional self-defense is “in response to armed attack” and is restricted to necessity and proportionality, whereas others do not require acts in self-defense to be in response to armed attacks, arguing that they can “be invoked also to defend other vital interests”); see

that it was at least partially acting in self-defense when it bombed the Federal Republic of Yugoslavia (FRY), Serbia & Montenegro in 1999,¹³⁹ is such action “anticipatory” given that the FRY had not yet unleashed its forces in Kosovo¹⁴⁰ or not because of the FRY’s prior aggression in the Balkans in the course of the 1990s? Assuming that the U.S.-led invasion of Iraq in 2003 is best seen as a form of self-defense under Article 51, is it preemptive or is it responsive to prior Iraqi armed attacks on its neighbors during the 1980s and 1990s, along with the threat created by its use of, and efforts to acquire WMD? Until we achieve greater clarity in classifying such conduct, convergence of views about states’ conduct in this area will be difficult.

D. *The Problem of Accounting for Global Reactions*

Assuming that international lawyers can sort out how best to analyze the conduct of a state that resorts to a use of force, a further problem arises in gauging the reaction of other states to that state’s conduct. In situations where arguably the state resorts to anticipatory self-defense or preemptive self-defense, the strict constructionist school dismisses that action as law-breaking, rather than law-making, by reference to whether other states have accepted the conduct as lawful or not.¹⁴¹ This approach appears to be methodologically acceptable, whether one is considering state practice for purposes of interpreting the U.N. Charter or for determining the existence of a new customary rule of international law, but the same types of problems identified above, with respect to analyzing a state’s conduct in using force, is now amplified by having to determine all other states’ counter-practices in response to that force. Are we concerned only with the official positions of other states or do we wish to look behind them? Are we looking for legal interpretations or are the reactions of foreign states that might be construed as simply political statements relevant as well? When a foreign state condemns a use of force, it may express that condemnation in legal terms or it may not (one can condemn a lawful act for political, moral or other reasons). Moreover, should one construe a state’s silence in the face of a use of force as tacit acceptance, indifference

also Yoo, *supra* note 61, at 573 (“In the past two decades, the United States has used military force in anticipatory self-defense against Libya, Panama, Iraq, Afghanistan, and the Sudan.”).

139. See SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW, VOL. I: 1999-2001 392-94 (2002) (citing President Clinton’s address on March 24, 1999, in which he justified NATO’s attacks on FRY, Serbia and Montenegro as “act to protect thousands of innocent people in Kosovo from a mounting military offensive” and “to prevent a wider war, to defuse a powder keg at the heart of Europe that has exploded twice before in this century with catastrophic results”).

140. See Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT’L L. 834 (1999) (noting that Kosovo intervention occurred after United Nations “was unable to act effectively in Rwanda and Bosnia”).

141. See, e.g., GRAY 2d ed., *supra* note 35, at 129-33, 181-84 (expressing view that self-defensive actions are unlawful).

or meaningless? Should we give equal weight to all states' views, so that tiny Andorra's voice is equal to China's and authoritarian governments' perspectives are just as valuable as those of democratic governments? The reality is that no international lawyer conducts a systematic review of the reactions of all 190 states to just one state's use of force, nor explains how, if such a review were done, we should deal with silence and conflicting views among states. Instead, international lawyers often look at the practice of just a few readily available states.¹⁴² One has to worry that the availability of states' views may be self-selecting; perhaps states that vehemently oppose the use of force are those whose practice is easily located, whereas those who approve or are acquiescent leave little trace of their views.

To avoid some of these difficulties, international lawyers often rely on decisions of the Security Council or the General Assembly in condemning, or not condemning, a particular use of force.¹⁴³ Nevertheless, use of state practice for treaty interpretation should focus on the states that are parties to the treaty, and not on other states, organizations or persons. As such, it is arguable that decisions of the Security Council or the General Assembly or of a regional organization, as to whether a state is acting consistently with Article 51 of the U.N. Charter, are not directly relevant or should be placed lower in the hierarchy of relevant state practice. They might only be relevant if the state's action had a bearing upon the provisions of the U.N. Charter that is relevant to that U.N. organ or regional organization.¹⁴⁴ These decisions might be used as surrogates for providing information about what states themselves actually think, but they should be recognized as indirect evidence of relevant state practice. And, again, at their heart, the General Assembly and the Security Council are political, not legal, organs; it is not always clear if they are expressing a view as to whether a particular use of force is a violation of the U.N. Charter.

On the other hand, perhaps the Security Council's decisions should, in some sense, be granted special significance given the role of the Security Council in maintaining international peace and security under the

142. See LIMITS OF LAW, *supra* note 68, at 58, 79-80 (indicating that international lawyers analyze actions of individual states to determine "international reaction" of all states, collectively).

143. See *id.* at 49-51, 58 (suggesting that international law provides limited guidance and that international lawyers, "[f]aced more often than not with a dearth of data . . . continue to infer community intent from a handful of its members").

144. See, e.g., Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 9 (Mar. 3) (looking to practice of Security Council and General Assembly when interpreting U.N. Charter provisions on admission of states to United Nations); see also 1983 U.N. Jurid. Y.B. 179, U.N. Doc. ST/LEG/SER.C/21 (highlighting U.N. Security Council practice for purpose of interpreting Rules 13 and 15 of U.N. Security Council provisional rules of procedure); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 22 (June 21) (using such practice to interpret voting requirements of U.N. Charter article 27(3)).

U.N. Charter.¹⁴⁵ Perhaps when joining the Charter, states delegate to the Security Council the right to express their views on what conduct falls within or outside the norms set by the U.N. Charter, in which case we should downgrade the practice of states who are not Members of the Security Council at the time of the use of force in question.¹⁴⁶ Yet, to the extent that the views of an organ such as the Security Council are found to be particularly relevant, are only the resolutions actually adopted by the organ relevant, or are the individual views of the Security Council Members significant as well? If the views of the Security Council Members are indeed relevant, should we grant even greater relevance to the Security Council's permanent members, which have been recognized as having a special status in the maintenance of peace and security?¹⁴⁷ Sorting through issues regarding the way we assess global state practice is critical to closing the significant gaps between the different schools of thought on preemptive self-defense.

E. *The Problem of Frequency of Practice*

One central problem in analyzing state practice regarding preemptive self-defense is that traditional state practice on this topic is quite sparse. For lawyers opposed to preemptive self-defense, this lack of practice signals that preemptive self-defense is disfavored.¹⁴⁸ Yet scarcity of practice does not necessarily reflect such a belief; it may just indicate that the circumstances calling for preemptive self-defense only infrequently arise. At the same time, lawyers favoring a right of preemptive self-defense may believe they have identified certain instances where such action is condoned,

145. For an argument that the international legal order is built upon accommodations to the "Great Powers," see GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* 52 (2004) (explaining that "legislative equality is affected by distinctions existing between different classes of state on the basis of their influence of power" and noting that "[t]he Great Powers possess constitutional privileges within international organizations or dominate the law-making process at international conferences"). Professor Finemore writes: "Decision makers in strong states with the capacity for extensive military intervention have a much greater impact on changes in these rules than other people do, and, through the several centuries examined here, those states are overwhelmingly Western ones that become increasingly liberal, democratic, and capitalistic over time." FINEMORE, *supra* note 87, at 18.

146. Michael Byers raises this possibility without himself adopting whether such a methodology is appropriate. See Michael Byers, Book Review, 97 *AM. J. INT'L L.* 721, 722-23 (2003) ("One could argue that the practice of the Council is the delegated practice of all the members of the United Nations . . .").

147. See *id.* at 723 (emphasizing significant influence of Security Council's permanent members). But see Thomas L. Lee, *International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today*, 67 *LAW & CONTEMP. PROBS.* 147, 148 (2004) (arguing in favor of maintaining principle of sovereign equality).

148. See DINSTEN, *supra* note 30, at 167 (suggesting that self-defense in response to armed attacks is more favored than preemptive self-defense).

but the infrequency of such practice makes it hard to ascertain a clear emergent consensus on the matter.

Four avenues of addressing the infrequency problem may be fruitful for analyses in this area. First, as indicated in the prior sections, each incident of potential preemptive self-defense should be more carefully analyzed so as to discern not just the circumstances of that incident, but also whether the incident suggests certain trends and, if so, their nuances.¹⁴⁹ It is not enough to recount briefly the facts of an incident and a few reactions from some states; more robust methodologies can, and should, be employed in determining what the incident stands for and how it should be viewed in the context of other incidents. One thoughtful approach may be seen in a genre of study advocated by Michael Reisman.¹⁵⁰ Perhaps through a higher quality of analysis of incidents of potential preemptive self-defense, the problem of quantity of incidents will be less severe.

Second, clarifying whether state practice is relevant in interpreting the meaning of the Charter or, alternatively, in determining whether a new norm of customary international law has emerged, may assist international lawyers when considering the frequency of practice necessary to establish a new meaning or norm. If resort to state practice is for the purpose of interpreting the Charter, arguably there need not be a high level of frequency of conduct; rather, what is needed is practice that "is consistent, and is common to, or accepted by, all the parties."¹⁵¹ Alternatively, if state practice is being used as a means of establishing a new norm of customary international law, then there may be an expectation of greater repetition and constancy of practice,¹⁵² possibly through acts and not just words,¹⁵³ particularly if it is deviating from a treaty to which states are parties.

Third, lawyers should consider expanding the scope of the practice taken into consideration when assessing the legality of preemptive self-de-

149. See INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 23 (W. Michael Reisman et al. eds., 1988) ("Incidents may serve as a type of 'meta-law,' providing normative guidelines for decision makers in the international system in those vast deserts in which case law is sparse.").

150. See *id.* ("A genre whose practitioners continue to update and correct the expression of the code of international law is required. If it is established . . . it can ultimately yield an abundant literature of international appraisal . . . more accurate in expressing international normative expectations.").

151. See AUST, *supra* note 73, at 194 (citing to U.S.-France Air Services Arbitration, 54 I.L.R. 303 (1963)).

152. The basic rule emphasizing constancy and repetition was articulated by the ICJ in *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 267-77 (Nov. 20).

153. Pursuit of this analysis would need to confront the divergences of views over what constitutes practice for purposes of customary international law, as exemplified in the debate between Michael Akehurst and Anthony D'Amato. See ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 80-81 (Cornell Univ. Press 1971) (explaining that "international law is all-pervasive" and indicating that definition of customary practices, under international law, is broad).

fense because it may provide a much richer base of data upon which to assess legal expectations. Incidents of actual preemptive self-defense are obviously relevant, but a careful analysis would also look for other forms of state practice. For example, there may be relevant incidents where states decided that preemptive self-defense could be undertaken or where they threatened preemptive self-defense, even if ultimately such action was not taken. As discussed in President Clinton's recent memoirs, in 1993 the United States considered a preemptive strike against North Korea to disable a potential nuclear weapons program, but stepped back from doing so when North Korea entered into an accord with the United States.¹⁵⁴ Similarly, in February 2003, Japan asserted that it would launch a preemptive military action against North Korea if Japan had firm evidence North Korea was planning a missile attack.¹⁵⁵ Lawyers might systematically seek to uncover such decisions and warnings by states so as to determine whether states capable of projecting force when confronted with a dangerous, albeit long-term threat, view their obligations under the U.N. Charter as permitting the use of force against that threat, even if force ultimately is not deployed. Alternatively, such analysis might reveal insistent voices in opposition to the deployment of such force, whose objections are galvanized by concerns with violating global expectations as embodied in the U.N. Charter. Further, relevant state practice might be found in the use of force beyond scenarios of anticipatory self-defense or preemptive self-defense. If state practice can be found in other areas, such as humanitarian intervention or rescue of nationals, indicating a departure from the apparent norm embedded in Article 51, then perhaps all such practice considered collectively can provide better insight into general contemporary norms on the use of force, which in turn would be helpful in considering preemptive self-defense.

There may also be relevant state practice separate from incidents of the use of force. Rather than trying to take "snapshots" of government attitudes in reaction to specific incidents, perhaps international lawyers should be seeking information about the attitudes of government decision-makers on a day-to-day basis, and perhaps with respect to matters of direct concern to them. For example, suppose it were possible to obtain a memorandum from the legal office of every foreign ministry of all 191 states that would directly answer the following three questions:

1. If your government was convinced that your country was in danger of an imminent attack by a neighboring state, and you

154. See BILL CLINTON, *MY LIFE* 602-03 (2004) (stating that Clinton Administration considered taking military action against North Korea until North Korea changed its policy and agreed to start talks with United States in Geneva).

155. See BBC News, *Japan Threatens Force Against N. Korea*, (Feb. 14, 2003), at <http://news.bbc.co.uk/2/hi/asia-pacific/2757923.stm> (describing Japan's warning to conduct preemptive military action against North Korea, in response to Pyongyang's nuclear capabilities).

had the means to act militarily in advance of that attack to stop it, would doing so violate your obligations under the U.N. Charter?

2. If your government was convinced that your country was in danger of an attack at some point in the next twelve months by a neighboring state, and you had the means to act militarily in advance of that attack to stop it, would doing so violate your obligations under the U.N. Charter?

3. Do you still regard the U.N. Charter as binding law with respect to the use of force by Member States?

International lawyers might consider whether having those 191 memoranda would be much better evidence of the status of contemporary norms on the use of force than focusing exclusively on actual incidents of anticipatory or preemptive self-defense. Certainly, the answers given by a state in the context of itself facing a threat of an attack seems more pertinent than the vote of that state's representative at the U.N. General Assembly, with respect to an incident that occurred across the globe (a vote about which the permanent representative may not even have instructions from the representative's home government). If having such memoranda would be highly probative, then perhaps international lawyers should be thinking about how to go about getting them or something like them.

Other forms of practice might be considered as well, such as trends in the development of new international agreements or the attitudes of states as expressed through decisions by international organizations unrelated to specific incidents. For example, there is an extensive web of international agreements on WMD, ranging from the Nuclear Non-Proliferation Treaty¹⁵⁶ to the Chemical Weapons Convention¹⁵⁷ to the Biological

156. See generally *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter *Nuclear Non-Proliferation Treaty*] (calling upon states to work toward nuclear disarmament and to share nuclear technology for peaceful purposes, but preserving right of five states to possess nuclear weapons: China, France, Russia, United Kingdom and United States). Certain states with nuclear weapons capability—India, Israel, North Korea and Pakistan—either have not joined or have withdrawn from this treaty. See *id.* (excluding India, Israel, North Korea and Pakistan from Treaty on Non-Proliferation of Nuclear Weapons).

157. See generally *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, opened for signature Jan. 13, 1993, S. TREATY DOC. NO. 103-21 (1993), 1974 U.N.T.S. 317 [hereinafter *Chemical Weapons Convention*] (forbidding parties from “develop[ing], produc[ing], otherwise acquir[ing], stockpil[ing] or retain[ing] chemical weapons, or transfer[ing], directly or indirectly, chemical weapons to anyone” and requiring all parties to destroy their chemical weapons within ten years after convention's entry into force, which occurred in 1997).

Weapons Convention¹⁵⁸ to other related instruments,¹⁵⁹ all designed to help maintain international peace and security among states. Although none of these instruments expressly authorizes states on their own initiative to enforce compliance, and indeed contemplate alternative methods for monitoring and exposing compliance, international lawyers might consider whether the existence of such widely adhered-to agreements has influenced for states the meaning to be placed on Article 51. Shortly after adoption of the U.N. Charter, the International Atomic Energy Agency (IAEA) asserted that violation of an IAEA convention might be of so grave a character as to give rise to a right of self-defense under Article 51.¹⁶⁰ The United States also took this position.¹⁶¹ International lawyers might study whether such an attitude can be found within various international organizations today concerned with WMD, whether the use of military force by one or more of the major military powers to ensure compliance with WMD obligations is acknowledged or at least tacitly accepted by such organizations in their dealings with recalcitrant states, or whether, in fact, such a possibility is routinely rejected as unlawful.

Similarly, there is an extensive web of international agreements directed against specific types of terrorist acts, such as hijacking of aircraft,¹⁶² sabotage of aircraft,¹⁶³ taking of hostages,¹⁶⁴ violent offenses

158. See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 [hereinafter Biological Weapons Convention] (banning development, production, stockpiling or acquisition of biological agents or toxins "of types and in quantities that have no justification for prophylactic, protective, and other peaceful purposes").

159. See, e.g., Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, *done* June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter Geneva Protocol] (banning use in war of "asphyxiating, poisonous or other gases," and "bacteriological methods of warfare").

160. See BROWNLIE, *supra* note 22, at 276 (citing First Report of the U.N. Atomic Energy Commission which states violation of treaty may be so grave so as to rise to right of self-defense under Article 51); JESSUP, *supra* note 28, at 167 (quoting from First Report of Atomic Energy Commission); see also Quincy Wright, *The Prevention of Aggression*, 50 AM. J. INT'L L. 514, 529 (1956) (citing to similar IAEA report in 1950s).

161. See JESSUP, *supra* note 28, at 166-67 (discussing United States' view on controlling atomic warfare).

162. See Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), *opened for signature* Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 (providing appropriate measures among contracting states for punishing persons who unlawfully intimidate, seize or exercise control of aircraft while on board).

163. See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), *opened for signature* Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 (providing penalties among contracting states for persons who commit sabotage on board aircraft).

164. See International Convention Against the Taking of Hostages, *adopted* Dec. 17, 1979, T.I.A.S. 11,081, 1316 U.N.T.S. 205 (providing for punishment of individuals who commit acts of hostage taking).

onboard aircraft,¹⁶⁵ crimes against certain protected persons¹⁶⁶ and—most recently—the suppression of terrorist bombings¹⁶⁷ and the financing of terrorism.¹⁶⁸ Although none of these instruments expressly authorizes states to use military force against another state to prevent terrorist attacks, the conventions typically require states to criminalize not just the commission of a terrorist act, but the intent to commit such acts, as well as the facilitation and support given to such acts.¹⁶⁹ At the same time, states' language with respect to terrorism has become increasingly cast in terms of a "war" on terrorism and a need to "combat" terrorists. Thus, the Security Council has repeatedly declared that "acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century"¹⁷⁰ and has called upon states "to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism."¹⁷¹ Moreover, the Security Council has expressed its determination to "*combat by all means threats to international peace and security caused by terrorist acts,*" and in that context has recognized the inherent right of self-defense.¹⁷² International lawyers might consider whether the existence of widely adhered-to agreements outlawing terrorism and the increasingly strident premium placed

165. See Convention on Offences and Certain Other Acts Committed on Board Aircraft, *done* Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (providing measures of dealing with person committing violent acts on board aircraft).

166. See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted* Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 (providing for state parties to Convention to make crimes against diplomatic agents and other internationally protected persons punishable according to their grave nature).

167. See International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164, U.N. GAOR, 52nd Sess., U.N. Doc. A/RES/52/164 (1997) (providing that parties to Convention assign appropriate penalties for terrorist offenses).

168. See International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/109 (1999) (discussing measures for punishing individuals involved in financing terrorism).

169. See, e.g., International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164, U.N. GAOR, 52nd Sess., U.N. Doc. A/RES/52/164 (1997) (mandating that attempt to commit terrorist acts violates resolution as if terrorist act had been successful).

170. S.C. Res. 1377, U.N. SCOR, 56th Sess., 4413th mtg. at 2, U.N. Doc. S/RES/1377 (2001); see, e.g., S.C. Res. 1566, U.N. SCOR, 59th Sess., 5053rd mtg. at para. 1, U.N. Doc. S/RES/1566 (2004) (referring to terrorism as serious threat to peace and security); S.C. Res. 1070, U.N. SCOR, 51st Sess., 3690th mtg. at 2, U.N. Doc. S/RES/1070 (1996) (stating suppressing international terrorism is necessary to maintain international peace and security); S.C. Res. 731, U.N. SCOR, 47th Sess., 3033rd mtg., U.N. Doc. S/RES/731 (1992) (referring to acts of international terrorism that threaten international peace and security).

171. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. at 1, U.N. Doc. S/RES/1373 (2001).

172. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg. U.N. Doc. S/RES/1368 (2001) (emphasis added).

on adhering to such agreements to "combat" such a "threat" to international peace has begun to influence the meaning to be placed on Article 51; the same way that the emergence of human rights treaties has led to changing views on the permissibility of humanitarian intervention.¹⁷³ A close analysis of the conclusion of terrorist-related agreements and resolutions might lead to a view that the attitudes of states are changing, or might alternatively demonstrate that such attitudes are closely hewing to the belief that preemptive self-defense is not within the scope of global expectations with respect to permissible action.

Finally, international lawyers might do better at considering the relevance of national laws relevant to the issue of preemptive self-defense. In international law, principles of law operating among the national legal systems of states are accepted as a source of international law, typically filling in the gaps and uncertainties that necessarily exist in a decentralized interstate system. If one were to survey civil law, common law, Islamic law and the legal systems of Africa and Asia, an international lawyer might uncover useful information about societal expectations on how the law should operate in situations involving the use of force and self-defense by persons. Such laws might arise in the context of transnational uses of force,¹⁷⁴ in the context of the rules of engagement adopted as a part of national military regulations and instructions or in the context of permissible self-defense by persons under national criminal laws.¹⁷⁵ If there is a consistent pattern of legal systems that accept "self-defense" as inherently including actions in response to an immediate threat, then such information would appear to be of some value in gauging contemporary interpretations of Article 51. Likewise, the inquiry might provide useful information on whether self-defense may be preemptive in nature, such as national criminal laws allowing a wife to slay an abusive, sleeping husband who she thinks, at some point in the future, will in turn slay her. Of course, there are reasons why the patterns discerned in global legal systems may not be appropriate; with respect to national criminal laws, states are not persons, and persons typically operate within sophisticated national criminal law systems whereas states do not. Nevertheless, by broadening their scope of inquiry to include general principles of law, international lawyers might help close some of the gaps among them.

F. *The Problem of Recent Versus Distant Practice*

Assuming that the above problems can be addressed, international lawyers might also consider whether more recent state practice should be given greater emphasis than more distant practice. Whether that practice

173. See FINNEMORE, *supra* note 87, at 73-84 (discussing humanitarian intervention and its changing over time).

174. See, e.g., Joint Resolution Authorizing Force Against Iraq, *supra* note 9, at 1500 (stating that President has constitutional authority to prevent and deter acts of terrorism).

175. *Id.*

is in the form of actual incidents involving the use of force or other evidence of the attitudes of state decision-makers, presumably older practice is less relevant than newer practice. International lawyers, however, rarely discuss state practice in such a manner, and instead lump together incidents spanning decades. Yet, there appear to be significant historical periods where global politics have dramatically influenced the way states think about uses of force, whether it be the bipolar confrontation of the Cold War, the "new world order" of the immediate post-Cold War or the post-September 11 period in which we now find ourselves. Is evidence of state practice across these different time periods all of equal weight? Should the most distant be discarded as antiquated or should practice within any particular period be discarded as aberrant?

For example, should any examples of anticipatory or preemptive self-defense during the Cold War, when there was virtually no chance of the Security Council authorizing states to use force, now be discarded because the Security Council has demonstrated repeatedly since 1990 its willingness to authorize the use of force, even if in some circumstances (e.g., the 2003 invasion of Iraq) it does not? Or conversely, to the extent that it is relevant that the Israeli attack on the Iraqi nuclear facility at Osirak in 1981 was widely condemned by states at the time,¹⁷⁶ would it also be relevant if it could be shown that by 1991, after weapons inspectors entered Iraq and realized how much progress Iraq had made on the development of nuclear weapons, many states believed that, in hindsight, the Israeli attack was a blessing?

G. *The Problem of Resort to the Travaux of the Charter*

As noted above, treaty interpretation calls for recourse to the preparatory work of the treaty (or *travaux préparatoires*) only when the initial interpretation leads to an ambiguous or obscure meaning or to an absurd or unreasonable result.¹⁷⁷ In the context of construing Article 51 of the U.N. Charter, the different schools discussed above typically find their own interpretation as unambiguous, but that of the other schools as absurd or unreasonable.¹⁷⁸ As such, international lawyers tend to resort to the negotiating history of the Charter (principally the records of the San Francisco Conference in 1945) to bolster their existing position.¹⁷⁹ Strict construc-

176. See, e.g., CASSESE, *INTERNATIONAL LAW*, *supra* note 34, at 309-10 (stating that all members of Security Council except Israel disagreed with Israeli justification for attack on Iraqi nuclear reactor).

177. See VCLT, *supra* note 71, art. 31 (discussing supplementary means of interpretation, including preparatory work, in treaty interpretation).

178. For a discussion of the disagreement between different schools of thought relating to preemptive self-defense, see *supra* notes 72-98 and accompanying text.

179. For a discussion of the use of the negotiating history of the Charter, see *supra* note 23 and accompanying text. For an example of how a particular school, the strict constructionists, uses the negotiating history of the Charter to further its cause, see *supra* note 80 and accompanying text.

tionists find that the *travaux préparatoires* preclude anticipatory self-defense and preemptive self-defense,¹⁸⁰ but imminent and qualitative threat theorists find the opposite.¹⁸¹

To the extent that international lawyers see the *travaux préparatoires* as relevant,¹⁸² international lawyers might first confront the proposition—for which there is some authority—that when interpreting the text of the constitution of an international organization, the original intention of the drafters of the constitution should not be emphasized, particularly because the parties may increase or change, and because such a constitution, by its nature, should not be viewed as static.¹⁸³ If that proposition is correct, then we are better served by inquiring into state practice today by the Members of the United Nations, then trying to fathom original meanings.

On the other hand, if we are to explore original meanings, international lawyers may wish to broaden their inquiry beyond the official documents tabled at the San Francisco Conference, because by doing so they will find that the idea of preemptive self-defense was known to those present at San Francisco and that the Charter was drafted to preclude such action.¹⁸⁴ The impetus for Article 51 came from the U.S. delegation to the conference in response to certain demands from the Latin American delegations.¹⁸⁵ In the course of the U.S. drafting of the article, U.K. Foreign Minister Anthony Eden apparently argued to U.S. Secretary of State Edward Stettinius (the head of the U.S. delegation) that the right of self-defense under Article 51 should not be triggered only when there was an “armed attack.”¹⁸⁶ Eden reportedly indicated that the United Kingdom might wish to act in self-defense against potential measures undertaken by

180. See, e.g., BROWNLIE, *supra* note 22, at 275-76 (discussing how *travaux préparatoires* suggests presumption against self-defense in Article 51).

181. See, e.g., BRIERLY, *supra* note 43, at 417-18 (mentioning *travaux préparatoires* suggests Article 51 supports recourse to self-defense).

182. See generally Timothy Kearley, *Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent*, 3 WYOMING L. REV. 663 (2003) (discussing drafting history of Charter to determine whether drafters intended to permit state to use preventive or preemptive force in self-defense).

183. See, e.g., Certain Expenses of the United Nations, 1962 I.C.J. 151, 185 (July 20) (separate opinion of Judge Spender) (stating terms of Charter itself in context should be looked at for interpreting text rather than *travaux préparatoires*).

184. See RECOURSE TO FORCE, *supra* note 49, at 50 (recounting exchanges between Harold Stassen and members of U.S. delegation, including State Department Legal Adviser Green Hackworth, in which Stassen made clear that actual armed attack must occur before resort to self-defense); Kearley, *supra* note 182, at 669 (concluding that drafters did not intend to preclude self-defense against imminent attack, but intended to preclude self-defense against attack believed to be inevitable, but not imminent).

185. See Kearley, *supra* note 182, at 680-81 (stating that right to self-defense that exists in Article 51 is due to Latin American nations' demands for collective security arrangements).

186. See *id.* at 701-03 (noting Eden's support of French proposal, rather than U.S. proposal, that triggers right to self-defense only when there is “armed attack”).

the USSR to expand its influence in Europe and the Mediterranean.¹⁸⁷ Consequently, Eden wanted Article 51 to allow self-defense against measures that fell short of direct aggression. Stettinius, however, refused to drop the reference to “armed attack,” saying that a broader phraseology would allow states too great a leeway, including the right to preventive actions, which could destroy the viability of the United Nations.¹⁸⁸ Indeed, Stettinius reportedly noted that both World War I and World War II had begun with preventative attacks. In the face of Stettinius’ refusal, the United Kingdom backed down.¹⁸⁹ To the extent that resort is made to such history, international lawyers should consider whether similar exchanges and attitudes could be found among the other delegations to the San Francisco Conference.

V. CONCLUSION

To the extent that the intervention in Iraq in 2003 is regarded as an act of preemptive self-defense, the aftermath of that intervention may pre-empt an era where states resist resorting to large-scale preemptive self-defense. The intervention in Iraq highlighted considerable policy difficulties with the resort to preemptive self-defense: an inability to attract allies; the dangers of faulty intelligence regarding a foreign state’s weapons programs and relations with terrorist groups; the political, economic and human costs in pursuing wars of choice; and the resistance of a local populace or radicalized factions to what is viewed as an unwarranted foreign invasion and occupation.¹⁹⁰ Preemptive self-defense may continue to be used by powerful states, however, especially on a smaller scale, such as missile attacks against weapons facilities or terrorist camps in “rogue” states.

Resort to such force is “channeled and disciplined by the notions that members of a society share about when force is legitimate and what kinds of goals it can achieve.”¹⁹¹ In part, those notions are captured by the

187. *See id.* at 702 (discussing Eden’s fear of possible attack by using hypothetical example of “Soviet instigated attack by Bulgaria on Turkey,” which would lead Great Britain to want to preemptively attack enemy to protect itself).

188. *See id.* at 702-14 (providing extensive discussion of negotiating language of Article 51, ending with final agreement including phrase “armed attack” proposed by United States).

189. For a summary of this encounter, see STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS* (2003). Stettinius was likely referring to Germany’s attack on Poland in 1939 and on Norway in 1940, both of which were asserted by German officials to be anticipatory self-defense and both of which were found to be aggression by the International Military Tribunal at Nuremberg. *See International Military Tribunal (Nuremberg), Judgement and Sentences*, 41 AM. J. INT’L L. 172, 205 (1947) (stating Germany attacked Norway to prevent Allied invasion). Stettinius may also have had in mind Japan’s attack on Manchuria in 1931, which Japan asserted was a necessary act of self-defense.

190. *See, e.g.,* Robin Wright, *Iraq Occupation Erodes Bush Doctrine*, WASH. POST, June 28, 2004, at 1.

191. FINNEMORE, *supra* note 87, at 1.

norms of international law because, over time, war has become perceived not as an honorable undertaking by states, but as a necessary evil, one to be avoided except as a matter of last resort and one that is now circumscribed by legal and multilateral frameworks.¹⁹² Policy-makers considering a resort to preemptive self-defense want to know whether such force will be regarded as internationally lawful as a means of predicting its costs, and may avoid or at least shape the action to minimize those costs.

Unfortunately, the views of international lawyers are fractured on whether preemptive self-defense is lawful.¹⁹³ Numerically, most international lawyers appear to fall into the schools of thought that reject preemptive self-defense, but the debate is robust and will no doubt continue.¹⁹⁴ As it continues, this essay urges international lawyers to focus more on the theory and methodology they employ in reaching their conclusions.¹⁹⁵ Too often, international lawyers are not explaining the basic legal theory they are using for their analysis.¹⁹⁶ To the extent that state practice since 1945 is a part of that legal theory, international lawyers usually do not articulate the methodology that they believe is appropriate for assessing incidents of intervention, nor why that methodology is superior to other methodologies, prior to embarking on such assessments.¹⁹⁷ The discourse among international lawyers is uneven, not joined and at times breezy. The notion of preemptive self-defense raises certain difficult issues of methodology, several of which have been noted in this essay. Only by grappling squarely with such issues of theory and methodology will international lawyers be able to achieve a greater level of convergence in their views, thereby providing policy-makers with better guidance and laying the groundwork for more stable international rules on the use of force.

192. *See id.* at 19 (“Waging wars for the glory of one’s country is no longer honored or even respectable in contemporary politics. Force is viewed as legitimate only as a last resort, and only for defensive or humanitarian purposes.”).

193. For a discussion of the debate between four different schools of thought, see *supra* notes 70-100 and accompanying text.

194. For a discussion of the lack of methodological approach to determining legality of preemptive self-defense, see *supra* notes 99-100 and accompanying text.

195. For a discussion of the problem of lawyers failing to explain the legal theories they are using with respect to preemptive self-defense, see *supra* notes 154-75 and accompanying text.

196. For a discussion of the problems created by international lawyers not explaining why one method of analysis is superior to another, see *supra* notes 68-70 and accompanying text.

197. For a discussion of distinct problems of law surrounding preemptive self-defense, see *supra* notes 72-190 and accompanying text.