

Maine Law Review

Volume 58
Number 2 *Symposium: French and American
Perspectives Towards International Law
and International Institutions*

Article 10

June 2006

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Recommended Citation

Stéphanie Bellier, *Unilateral and Multilateral Preventive Self-Defense*, 58 Me. L. Rev. 507 (2006).
Available at: <https://digitalcommons.maine.maine.edu/mlr/vol58/iss2/10>

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UNILATERAL AND MULTILATERAL PREVENTIVE SELF-DEFENSE

Stéphanie Bellier*

The governing principle of the collective security system created by the United Nations Charter in 1945¹ is the rule prohibiting the use of force in Article 2(4), which provides that "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 Purpose of the United Nations."²

This rule prohibiting the use of force was considered revolutionary at the time because it transformed into international law ideas which had for centuries, if not millennia, preoccupied the minds of people obliged to accept with fatalism the horrors of continual war as a scourge much like the plague or famine which from time to time decimated whole populations.³

The Charter, however, expressly recognized two exceptions to the rule prohibiting the use of force: the right of self-defense permitted by Article 51; and collective action against threats to the peace, breaches of the peace, and acts of aggression pursuant to Chapter VII.⁴ Collective action is to be undertaken and managed by an organ called the Security Council.⁵

Thus, beginning in 1945 with the creation of the collective security system, two types of rules have coexisted in the international legal order. Some rules are 'relative'; they arise out of situational or needs-driven relationships. Other rules are 'institutional'; they arise out of institutional relationships and are based on recognition by member states of their common interests. These two types of rules coexist and confront each other in a dialectical tension.⁶ It appears that even today the 'institutional' dimension of international law has not displaced its 'relational' character.⁷

The coexistence of "relational" and "institutional" rules in the international legal system of today respects no law of equilibrium—sometimes one type prevails to the detriment of the other, and at other times the other type predominates. Ever since the

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

2. *Id.*

3. JAROSLAV ZOUREK, *L'INTERDICTION DE L'EMPLOI DE LA FORCE EN DROIT INTERNATIONAL* 43 (1974).

4. These measures are found in Chapter VII of the United Nations Charter, which encompasses Articles 39 through 51.

5. The Security Council includes five permanent members with veto rights: China, Great Britain, the United States, France, and Russia. See U.N. Charter art. 23, para. 1.

6. René Jean Dupuy, *Communauté internationale et disparités de développement*, 165 *RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.]* 21, 46, 49 (1979).

7. Juan Antonio Carillo-Salcedo, *Permanence et mutations en droit international in* BOUTROS BOUTROS-GHALI, *AMICORUM DISCIPULORUMQUE LIBER-PAIX, DÉVELOPPEMENT ET DÉMOCRATIE*, 297 (1999).

emergence of new threats to international peace and security it seems that the imbalance favors 'relational' rules. In fact, in overturning the traditional paradigms of international security by the dissolution of the traditional boundary between international security and national security, new threats to the peace have occasioned the emergence of state practice that disregards an international legal order which regards itself as supranational and supreme. Some states have recently reminded the world that in 1945 they did not abandon their right to have recourse to the use of force, one of sovereignty's essential attributes. They merely gave the impression of doing so.

These new threats to international peace and security consist mainly of terrorism and the proliferation of weapons of mass destruction.⁸ Actually, these threats are not new; terrorism, for instance, has always existed.⁹ But they are considered new because they characterize the threats of the twenty-first century and are distinct from the Soviet threat that existed for almost fifty years, which was military and conventional. In contrast, terrorism and weapons of mass destruction are asymmetrical threats. The concept of 'asymmetrical threats' was invented by the United States¹⁰ to describe a new type of threat or non-conventional warfare challenging western supremacy. This type of warfare includes three distinct elements that are sometimes superimposed on each other: asymmetric actors, asymmetric goals, and asymmetric means. This new type of warfare is also characterized by a different relation to space.¹¹ Asymmetric warfare seeks to convert the enemy's strength into weakness, and is, therefore, especially focused on manipulating information and communication. Whereas conventional warfare pursues strategic objectives of a material nature (like the conquest of territory, etc.), asymmetrical warfare pursues strategic objectives which often are of an immaterial nature, with an emphasis on legitimacy. In other words, asymmetrical strategies aim more to influence and to change minds than to conquer. Appearing in the early 1990s, these new threats drastically disrupted the international order on September 11, 2001.

On September 11, 2001, a single image played over and over on television screens throughout the world: the collapse of the twin towers of the World Trade Center in New York. The scene seemed right out of a science-fiction movie, yet it was real. For the first time since 1812, the American national territory had been attacked.¹² Within

8. The proliferation of weapons of mass destruction represents one of the most serious threats to humanity. President of the Security Council, Note by the President of the Security Council, delivered to the Security Council, U.N. Doc. S/23500 (Jan. 31, 1992).

9. Judge Gilbert Guillaume has given a commonly accepted definition of terrorism: "Terrorism implies the use of force in situations whose nature endangers a person's life or their physical integrity within the context of an enterprise whose goal is to provoke terror in order to bring about certain ends." Gilbert Guillaume, *Terrorisme et droit internationale*, 215 R.C.A.D.I. 306 (1989).

10. The Quadrennial Defense Review introduced the notion of "asymmetrical threats" in 1997. "Asymmetry" must be made distinct from "dissymmetry," which indicates a quantitative difference between the numbers or strength of combatants. See generally DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT (2001), available at www.defenselink.mil/pubs/qdrl.

11. On an operational level, the traditional battlefield has given way to an operational space, which can be defined as the area in which security and military operations are undertaken. It encompasses the traditional three dimensional space where operations are physically undertaken, as well as the domain of electronic warfare, cyberspace. Cyberspace refers to the "infosphere" where numerical information circulates and opinions are manipulated, creating subtle interactions that are at the heart of modern security problems.

12. The September 11, 2001 attacks have often been compared to the December 7, 1941 Japanese

a few minutes, two American commercial airliners crashed into the World Trade Center towers and a third into the Pentagon near Washington, D.C.¹³ It was a terrorist attack orchestrated by Osama bin Laden. On September 14, 2001, an America, still burying its dead, announced through the voice of its forty-third president, George W. Bush, that: "War has been waged against us by stealth and deceit and murder. This nation is peaceful, but fierce when stirred to anger. This conflict was begun on the timing and terms of others. It will end in a way, and at an hour, of our choosing."¹⁴

The United States declared war.¹⁵ On October 6, 2001, the United States intervened militarily in Afghanistan, a country accused of harboring terrorists. The operation was initially called *Infinite Justice*, and then rebaptized *Enduring Freedom*. It was presented as an exercise of the United States' right of self-defense under Article 51 of the U.N. Charter in response to an armed aggression—the 9/11 terrorist attacks on the World Trade Center and the Pentagon:

In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.¹⁶

The international community as a whole approved the United States' argument.¹⁷ The European Union itself had already given its support a few weeks prior to the intervention:

The European Council is totally supportive of the American people in the face of the deadly terrorist attacks. These attacks are an assault on our open, democratic, tolerant and multicultural societies. They are a challenge to the conscience of each human being. The European Union will cooperate with the United States in bringing to justice and punishing the perpetrators, sponsors and accomplices of such barbaric acts.¹⁸

But once the intervention in Afghanistan was over, the United States discovered another regime capable of threatening international peace and security. On September 12, 2002, a year and a day after the terrorist attacks on the World Trade Center and the

attack of the American Navy at Pearl Harbor, Hawaii. Close to 2400 American sailors were killed during this attack. See generally ALAN SCHOM, *THE EAGLE AND THE RISING SUN: THE JAPANESE-AMERICAN WAR, 1941-1943, PEARL HARBOR THROUGH GUADALCANAL* (2004).

13. See THE 9/11 COMMISSION REPORT, available at <http://www.9-11commission.gov/report/911Report.pdf>.

14. George Walker Bush, President's Remarks at National Day of Prayer and Remembrance (Sept. 14, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010914-2.html>.

15. S.J. Res. 23, 107th Cong. (2001), available at <http://www.senate.gov>.

16. Letter from the Permanent Representative of the United States of America to the President of the United Nations Security Council, ¶ 4, U.N. Doc. S/2001/946 (Oct. 7, 2001), available at <http://www.un.int.usa/s-2001-946.html>.

17. Only a few States considered the U.S.-led actions in Afghanistan to be contrary to international law. These States were Belarus, Brazil, North Korea, Cuba, Indonesia, Iraq, Iran, Malaysia, Qatar, Syria, Vietnam, and Yemen.

18. Extraordinary European Council Meeting, Conclusions and Plan of Action (EC) (Sept. 21, 2001), available at http://europa.eu.int/comm/external_relations/cfsp/doc/concl_21_09_01.htm/.

Pentagon, President Bush delivered a speech to the United Nations General Assembly in which he portrayed Iraq, and more specifically Saddam Hussein, as a grave threat to the peace.¹⁹ The Iraqi regime seemingly was refusing to fulfill its international obligations: specifically, its obligations to disarm and to dispose of its weapons of mass destruction. President Bush exhorted world leaders to act in order to compel Iraq to live up to its responsibilities.²⁰ He called on Saddam Hussein to “immediately and unconditionally forswear, disclose and remove or destroy all weapons of mass destruction.”²¹ On September 16, 2002, a few days after this directive, in a letter to the United Nations Secretary General, Iraq announced that it accepted unconditionally the return of United Nations arms inspectors.²² But on September 24, 2002, British Prime Minister Tony Blair made public a British secret service report according to which the Iraqi regime “continues to develop weapons of mass destruction” and would soon be able to build a short-range nuclear weapon.²³ These findings led the U.S. Congress to authorize the unilateral use of force against Iraq.²⁴ On November 8, 2002, the U.N. Security Council reacted to these events by adopting Resolution 1441,²⁵ which ordered Saddam Hussein to eliminate all his programs for the development and production of weapons of mass destruction. Iraq complied with this Resolution on December 7, 2002, by providing a report of its weapons programs to U.N. weapons inspectors.²⁶ In spite of the well-publicized efforts of the Iraqi regime to comply with Resolution 1441, the Bush administration made increasingly clear its intention to intervene militarily in Iraq, regardless of the findings of chief U.N. weapons experts Hans Blix and Mohamed El Baradei. Indeed, throughout February 2003, they had repeatedly asserted in the Security Council that “UNMOVIC did not find evidence of the continuation or resumption of programmes of weapons of mass destruction.”²⁷ Nevertheless, on March 17, 2003, President Bush stated that “the Security Council has not lived up to its responsibilities”²⁸ and that Iraq still has weapons of mass destruction. As a result, on March 20, 2003, Iraq was bombed with authorization from the Security Council.

19. George Walker Bush, *Speech to the United Nations, Delivered to the General Assembly*, U.N. Doc. A/57/PV.2 (Sept. 12, 2002).

20. *Id.*

21. *Id.*

22. Letter from the U.N. Secretary General to the President of the Security Council, U.N. Doc. S/2002/1034 (Sept. 16, 2002).

23. JOINT INTELLIGENCE COMMITTEE, IRAQ’S WEAPONS OF MASS DESTRUCTION: THE ASSESSMENT OF BRITISH GOVERNMENT (2002) (U.K.), available at <http://www.fco.gov.uk/Files/kfile/iraqdossier.pdf>.

24. H.R.J. Res. 114, 107th Cong. (2002) (authorizing President Bush to use military force against Iraq if needed), available at <http://www.house.gov/>. This was adopted on October 10 and 11, 2002, by the two Houses and signed by the President on October 16, 2002.

25. S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

26. The Secretary General, *Twelfth Quarterly Report of the Executive Chairman of the United Nations Monitoring, Verification and Inspection Commission in Accordance with Paragraph 12 of Security Council Resolution 1284* (1999), delivered to the Security Council, U.N. Doc. S/2003/232 (Feb. 28, 2003).

27. The Secretary General, *Thirteenth Quarterly Report of the Executive Chairman of the United Nations Monitoring, Verification and Inspection Commission in Accordance with Paragraph 12 of Security Council Resolution 1284* (1999), U.N. Doc. S/2003/580, 5 (May 30, 2003).

28. George Walker Bush, Remarks by the President in Address to the Nation (Mar. 17, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html>.

This intervention did not occur without strong opposition from many states. Indeed, throughout the negotiations concerning the intervention in Iraq, many states opposed war, favoring increased reliance on the inspection system. Because of its outspoken position on this question, France emerged as spokesman for the opposition to the war option. This gave rise to serious political tension between France and the United States.

France firmly rejected the idea of military intervention in Iraq, considering that even if Iraq had to be disarmed, the country posed no direct threat to international peace and security. Moreover, even if France were mistaken about the danger posed by Iraq, only the Security Council was authorized to use force against it. At this juncture France assumed a unique role, both within the European Union and in relation to the United States, which began before American military intervention in Iraq and continued during and after it. France rejected the idea of an Iraq war waged by a coalition of states, declaring that it "attaches importance to the principle of collective security. . . . The Iraqi question cannot be an exception."²⁹ Subsequently, as voiced by its then Minister of Foreign Affairs Dominique de Villepin, France stated that "no single country has the means to build Iraq's future. Above all, no State can claim the necessary legitimacy. The legal and moral authority for such an undertaking can stem only from the United Nations."³⁰ France considered it necessary to give inspections a chance first, as these had been resumed in September 2002, following President Bush's speech to the General Assembly. More specifically, French President Jacques Chirac believed that inspectors should be allowed the necessary time to carry out their mission, in accordance with the recommendations of the chief U.N. weapons inspectors. Hans Blix and Mohamed El Baradei did in fact feel that their work in Iraq had progressed, despite obstacles created by the government of Saddam Hussein. A few days before the start of Operation Iraqi Freedom, French President Jacques Chirac firmly asserted: "My position is that whatever the circumstances may be, France will vote no because [this evening] it considers that there is no good reason to wage a war to obtain the objective to which we are committed."³¹ Because of its position, France became for Washington in turn a "stooge, scapegoat, sacrificial lamb, fall guy, black sheep—terms not mutually exclusive, and which would not necessarily stand in the way of limited cooperation with Paris."³²

The United States and France have long been in opposition on the question of Iraq, on the appropriate way to respond to the new threats to the peace, and as a result on how to read the U.N. Charter.³³ It is undeniable that the Charter has been

29. Jean-Davide Levitte, Speech to the U.N. Security Council, 5 U.N. Doc. S/PV.4625 (Oct. 17, 2002) (emphasis added).

30. Dominic de Villepin, Speech to the U.N. Security Council, 6 U.N. Doc. S/PV.4721 (Mar. 19, 2003) (emphasis added).

31. Press Release from Jacques Chirac, President of France (Feb. 17, 2003).

32. Justin Vaisse, *Le Nouvel âge postatlantique*, 103 COMMENTAIRE 541, 544 (Fall 2003).

33. Pierre-Marie Dupuy, *L'Unité de l'ordre juridique international*, 297 R.C.A.D.I. 222-23 (2002).

The Charter is no longer only a constitution, setting forth rights and obligations as well as allocating jurisdiction. More specifically, although it is a highly normative text, it is also a text for which it could be said the norms are entered in 'double entry' bookkeeping, that is to say, according to a double register of norms: on one side legal, on the other side, ideological and political. Ranging in this way over the full field of law, the Charter can

undermined by the actions of a few U.N. member states with respect to the intervention in Iraq. The Anglo-American military action of March 20, 2003, was neither an act of self-defense under Article 51 of the Charter nor an act *stricto sensu* pursuant to Chapter VII.

Self-defense became an autonomous legal concept with the signing of the Kellogg-Briand Pact on August 26, 1928, which prohibited the use of force, although making an exception for self-defense. Article 51 of the Charter incorporates the right of self-defense. It provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the 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.³⁴

A reading of Article 51 reveals that the right of a state to use force in self-defense must satisfy three conditions. First, the right is only temporary; it terminates once the Security Council has "taken measures necessary to maintain international peace and security." The second refers to the supervision that is to be exercised by the Security Council.³⁵ The third condition is a *sine qua non* and, therefore, a substantive condition. The use of force in self-defense is permitted only if the state employing force was the object of an armed attack on its territory. This was certainly not the case with respect to the American intervention in Iraq.

Moreover, use of force under Chapter VII's provisions for collective action in the face of a threat to the peace is only authorized if the Security Council, after having determined that there exists a threat to international peace and security, deems military intervention necessary.³⁶ This procedure is based on the traditional idea of international solidarity. The American action in Iraq was not authorized in this manner.³⁷

appear as archetypal Law. . . . Regardless of the faith it appears to uphold or create, however, the essence of a foundational text is to assign for its flock a demanding ideal, something that will mobilize the flock yet remain largely inaccessible The text thus accommodates itself to a certain measure of infidelity from its followers, because it is in its nature to invite them to rise above themselves in a way that the authors know in advance is not completely possible [In like fashion] the Charter is thus constantly exposed . . . to abnegation by its members' acts.

Id.

34. U.N. Charter art. 51.

35. For a complete study, see D.W. Greig, *Self-defense and the Security council: What does Article 51 require?*, 40 INT'L & COMP. L.Q. 366 (1991); Linos-Alexandre Sicilianos, *Le Contrôle par le Conseil de Sécurité des actes de légitime défense*, in COLLOQUE DE LA SOCIÉTÉ FRANÇAIS DE DROIT INTERNATIONAL: LE CHAPITRE VII DE LA CHARTE DES NATIONS UNIS 59 (1995).

36. U.N. Charter art. 39.

37. As Charles de Visscher reminds us:

In the State it is the vital interests, the most highly political, that evoke the supreme solidarities. The opposite is the case in the international community. There one observes minor solidarities of an economic or technical order, for example; but the nearer one approaches vital questions, such as the preservation of peace and prevention of war, the less

How then should the American intervention in Iraq be characterized? It is within this chaotic universe of legal definition that the concept of preventive self-defense emerges. The substitution of “threat” for “armed attack” (that is, a response no longer to force but to the threat of force) as the legal basis for the use of force has made an uninvited appearance in international legal doctrine. But international law is first and foremost the law of states. And states still do surprising things. The substitution of “threat” for “armed attack”—also termed “preventive self-defense”—is one such surprise.

In preventive self-defense “the burden of proof is inverted: an armed attack is no longer the critical determinant . . . [R]ather countering its preparation by any means possible, including the use of force, becomes legitimate”³⁸ Preventive self-defense is thus understood as an armed action in reaction to a potential threat. It is different from preemptive self-defense (also known as anticipatory self-defense) which instead is the use of force in reaction to an imminent threat.³⁹ As explained in a recent report:

In the case of preventive action, however, the threat is more remote. Action is taken at an earlier stage than in the case of pre-emptive action so as to ensure that the threat in question does not evolve into an imminent attack. Moreover, the term ‘preventive action’ also frequently relates to a much wider range of measures (including non-military measures) that can be used to thwart an attack.⁴⁰

It would appear that the U.S.-led armed action can be categorized as preventive self-defense. Faced with this claim, it seems advisable to heed the advice of Patrick Daillier, who asks us “to resist the ‘temptation’ to reopen the question of defining self-defense so as not to encourage uncertainty and the decline in the influence of international law on the conduct of international relations.”⁴¹ Yet the United States has already called into question the doctrine of self-defense. So how can we not reconsider

influence the community has on its members. Solidarities diminish as the perils threatening it grow. The solidarities that then assert themselves turn back towards their traditional home, the nation. On the rational plane, men [do] not deny the existence of supranational values; in the sphere of action they rarely obey any but national imperatives.

CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 90-91 (P.E. Corbett trans. 1968).

38. Eric Remacle, *Vers un multilatéralisme en réseau comme instrument de la lutte contre le terrorisme?*, in *LE DROIT INTERNATIONAL FACE AU TERRORISME*, 17 *CAHIERS INTERNATIONAUX*, 331, 337-38 (Karine Bannelier et al. eds., 2002).

39. Defined by Michael Kelly as the:

precept that if a State is about to be invaded, it may attack the invading force before the actual invasion has begun in order to stave off the *imminent* attack or otherwise ameliorate the effects of it. Unlike its doctrinal cousin, traditional self-defense, the State under imminent threat of attack is not required to absorb the first blow before responding with military force.

Michael J. Kelly, *Time Warp to 1945—Resurrection of the Reprisal and Anticipatory Self-Defense Doctrine in International Law*, 13 *J. TRANSNAT’L L. & POL’Y* 1, 22 (2003) (emphasis added).

40. JOINT REPORT BY ADVISORY COUNCIL ON INTERNATIONAL AFFAIRS AND ADVISORY COMMITTEE ON ISSUES OF PUBLIC INTERNATIONAL LAW, *PRE-EMPTIVE ACTION* 5 (2004).

41. Patrick Daillier, *Les Nations Unies et la légitime défense*, in *LES NATIONS UNIES ET L’AFGHANISTAN* 107, 109 (2003).

it? To do so, we must focus on the fundamental question: does the U.N. Charter provide for preventive self-defense?⁴²

According to international legal doctrine, there are two answers to this question, because there are two possible readings of Article 51 as it relates to preventive self-defense. Some think that the right of preventive self-defense is contained in Article 51. Partisans of this conception believe that the adjective “inherent,” which modifies the right of self-defense, implies the existence of a customary right of preventive self-defense, which is thereby preserved in Article 51. Supporters of such a reading include Anthony Clark Arend, Robert Beck, Derek William Bowett, John Alan Cohan, Myres McDougal, Robert O’Brien, Julius Stone, Oscar Schachter, and Sir Humphrey Waldock. This is definitely a minority view. The majority, however, insist on a restrictive reading of Article 51, focusing on the terms “if an armed attack occurs,” to argue that the use of force in self-defense is only possible in response to an armed attack and therefore prohibits preventive self-defense. Defenders of this position include Ian Brownlie, Anthony D’Amato, Yoram Dinstein, Michael Glennon, Louis Henkin, Philip Jessup, Hans Kelsen, Hilaire McCoubrey and William Burke-White, Sean Murphy, Lassa Oppenheim, and Bruno Simma.⁴³

Even though preventive self-defense is not expressly provided for in the Charter, states have invoked and used it on many occasions in the past. The first invocation of the right of preventive self-defense was by the United States during the Cuban Missile Crisis of 1962. In May 1962, Nikita Khrushchev decided to deploy intermediate-range ballistic missiles in Cuba.⁴⁴ A deployment in Cuba would have greatly increased Soviet strategic capacity and would have provided a formidable deterrent against an American attack on the Soviet Union. For the United States, the crisis started on October 15, 1962, when military photographs revealed the assembling of Soviet missiles in Cuba. Early the next day, President Kennedy was informed of the discovery of the Soviet installations. The crisis officially began on October 22, 1962, when President Kennedy announced the discovery of the missiles to the public. The next day, after demanding that the Soviet Union cease these activities, President Kennedy, considering that the Soviet position was “a deliberately provocative and unjustified change in the status quo,” ordered “a naval blockade (a quarantine) so that the Soviet Union could not

42. See Timothy L.H. McComack, *Anticipatory Self-Defense in the Legislative History of the United Nations Charter*, 25 ISR. L. REV. 1 (1991).

43. “Restrictionists” view Article 51 as a limit on customary international law. Kelly, *supra* note 39, at 23. “Counter-restrictionists” view Article 51 as incorporating customary law as it existed in 1945, rather than being a limit on customary international law. *Id.* Alternatively, they argue that the development of nuclear weapons and intercontinental ballistic missiles, in combination with a reading of Article 51, inevitably leads to a right to anticipatory self-defense “as a practical matter.” *Id.*

44. In his speech of October 23, 1962, President Kennedy described the missiles in Cuba:

The characteristics of these new missile sites indicate two distinct types of installations. Several of them include medium range ballistic missiles, capable of carrying a nuclear warhead for a distance of more than 1,000 nautical miles. Each of these missiles, in short, is capable of striking Washington, D.C., the Panama Canal, Cape Canaveral, Mexico City, or any other city in the southeastern part of the United States, in Central America or in the Caribbean area.

John F. Kennedy, Speech to the American Public (Oct. 22, 1962), available at <http://www.cnn.com/SPECIALS/cold.war/episodes/10/documents/kennedy.speech/>.

transport the material to Cuba.”⁴⁵ President Kennedy explained that he was acting “in defense of our security and of the entire Western Hemisphere.”⁴⁶

Israel has also invoked the argument of preventive self-defense on several occasions. The first time was on October 29, 1956, when Israel launched a military operation in the Sinai, which was in Egyptian territory. Israel presented its military intervention as a response to Egyptian aggression, which, in its view, took three forms. First, a naval blockage established by the Egyptian government whereby Israeli ships were forbidden to transit the Suez Canal, the Gulf of Aqaba, and the Straits of Tiran; second, a wave of attacks on Israeli territory since 1955 by fedayeen from Egypt; and third, a serious risk of an imminent attack by Egyptian armed forces.⁴⁷ In 1967, at the time of the Six-Day War, Israel again invoked the doctrine of preventive self-defense. Following the withdrawal of the United Nations forces,⁴⁸ which had been stationed on Egyptian territory since 1956, Egyptian President Nasser closed the Gulf of Aqaba to Israeli ships. In response, on June 5, 1967, Israel invaded the Sinai, considering that it had been “attacked” by the Egyptian measure. Israel again invoked the preventive self-defense argument three times: on the occasions of its raid on Palestinian camps in Lebanon in December 1975, its air strike on Iraq’s Osiriq nuclear reactor in June 1981, and its raid on P.L.O. headquarters in Tunis in 1985.

How did United Nation’s organs respond when confronted with the position of some states that the doctrine of preventive self-defense justified the use of force in certain situations? The Security Council and the International Court of Justice have both strictly prohibited the use of the doctrine.⁴⁹ The Security Council took a clear position for the first time in its Resolution 487 of June 10, 1981, following Israel’s strike on Iraq’s Osiriq nuclear reactor.⁵⁰ The Security Council “strongly condemns the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct,” and “calls upon Israel to refrain in the future from any such acts or threats thereof.”⁵¹

The International Court of Justice has adopted a position similar to that of the Security Council.⁵² It does not recognize preventive self-defense. Only an armed

45. *Id.*

46. *Id.*

47. S/PV/745 § 36 (Oct. 25, 1956). Tel-Aviv justified the intervention, because “the patience and exemplary moderation that Israel has shown during many months went above and beyond that which the obligations of a sovereign state require a state endowed with the inalienable right of legitimate defense.” *Id.*

48. G.A. Res. 1000 (ES-1) (Nov. 5, 1956) (creating the Emergency Force of the United Nations, charged with enforcing the convention of armistice and overseeing the cessation of hostilities).

49. See generally Louis B. Sohn, *The International Court of Justice and the Scope of the Right of Self-Defense and the Duty of Non Intervention*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY, ESSAYS IN HONOUR OF SHABTAI ROSENNE* (Yoram Dinstein, ed., 1989).

50. S.C. Res. 487, U.N. Doc. S/RES/487 (June 19, 1981). On the question of the Security Council and preventive self-defense, see Antonio Cassese, *Article 51*, in *LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE 771* (Jean Pierre Cot & Alain Pellet, eds., 2d ed. 1991).

51. S.C. Res. 487, *supra* note 50, at ¶¶ 1-2.

52. A doubt may have existed as to the position of the International Court of Justice after the *Corfu Channel* decision. See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (April 9). See Ronald St. John Macdonald, *L’Emploi de la force par les Etats en droit international*, in *DROIT INTERNATIONAL-BILAN ET PERSPECTIVES* 775 (Mohammed Bedjaoui, ed. 1991).

attack and it alone justifies the use of force in self-defense under Article 51 of the Charter. The Court made its position clear in its *Nicaragua* decision of 1986,⁵³ which it reaffirmed in its *Oil Platforms* decision of 2003.⁵⁴ The Court also addressed the issue in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.⁵⁵ In *Nicaragua*, the Court declared: “[T]he lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack.”⁵⁶ In *Oil Platforms*, the Court reaffirmed its position:

[T]he United States was only entitled to recourse to force under the provision in question if it was acting in self defense. The Court adds that the United States could exercise such a right of self-defense only if it had been the victim of an armed attack by Iran and makes it clear that, in that case, the United States’ actions must be necessary and proportional to the armed attack against it.⁵⁷

In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the question of self-defense and implementation was not expressly included in the legal question posed to the Court by the General Assembly and the World Health Organization, but the Court decided to examine it because of its link to the question of the use of armed force. The portions of the opinion dealing with self-defense are ambiguous. They can be interpreted either as authorizing or as denying the use of preventive force. The Court emphasized that it “cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake.”⁵⁸ With its reference to “survival at stake,” some have interpreted this opinion as implicitly recognizing the right of preventive self-defense. But, by referring expressly to Article 51 of the Charter, and as a partisan of a strict reading of the Charter, the Court actually appears to reject any right of preventive self-defense.

Why then is the doctrine of preventive self-defense so alive today? Why did the United States invoke and defend it despite the strong opposition of states like France? What is the situation or fact that explains the revival of a concept that was once thought to be obsolete? The situation is the new threat to the peace; the fact is September 11th.⁵⁹ How should we think of preventive self-defense from now on? As an effective response to new threats to the peace, but forbidden by the U.N. Charter? In fact the

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

54. *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161 (Nov. 6).

55. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 2 (July 8).

56. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 110 (June 27).

57. Press Release 2003/38, International Court of Justice, *Oil Platforms* (Nov. 6, 2003), available at <http://www.icj-cij.org>.

58. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 1, 33 (July 8).

59. See, e.g., Lucy Martinez, *September 11th, Iraq and the Doctrine of Anticipatory Self-Defense*, 72 UMKC L. REV. 123, 147 (2003-2004) (stating “at the international level, the events of September 11 have revealed at least one facet of the new reality of our international system, or at [least] one facet of our new understanding of the reality of our international system. Only one superpower means only one [main] target, and that target, like most States, was shown on September 11 to be achingly vulnerable to terrorist attacks. Inevitably, this has led to a questioning of previously fundamental and foundational beliefs relating to the use of force . . .”).

Charter does not forbid all acts of preventive self-defense. The Charter, too, still surprises.

In reality there exist two types of preventive self-defense: one implicitly forbidden by the Charter and the other explicitly authorized by it. The first, or forbidden, type is that which is implemented unilaterally by states outside of the U.N. framework. It is prohibited by the Charter and thus is in no way capable of being considered as an exception to the rule prohibiting the use of force, but rather as a violation of this rule. The second type is, on the contrary, expressly authorized by Chapter VII of the Charter. It is activated by the Security Council alone in the case of a threat to the peace and it falls within a multilateral framework. A threat to the peace in and of itself suffices to justify action by the Security Council. The first type of preventive self-defense is unilateral; the second is multilateral. United States action in intervening in Iraq, citing a threat to the peace, illustrates the first type of preventive self-defense. On the other side of the Atlantic, France was exhausting itself by repeatedly emphasizing the traditional role of the Security Council, that of intervening in cases of threats to the peace, even new ones.

I. UNILATERAL (OR AMERICAN) PREVENTIVE ACTION

When it adopted its new security doctrine in September 2002, the United States confirmed the opinion of some that it has never really been committed to the suppression of war.⁶⁰

A. *The New United States Security Doctrine*

The official document outlining new U.S. security doctrine is entitled *National Security Strategy of the United States of America*.⁶¹ Until September 11, 2001, the United States was concerned with Homeland Defense.⁶² Homeland Defense has been defined by the Department of Defense as “the protection of the territory, the

60. See, e.g., Maurice Bourquin, *Le Problème de la sécurité internationale*, 49 R.C.A.D.I. 524, 526 (1969) (stating “[n]either North America nor Latin America have ever shown any inclination toward the suppression of war . . . In their eyes, preventive action is a more practical resource than punishment of the aggressor.”).

61. WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>. Two other documents reveal the direction of positions taken by the administration of George W. Bush on national security. The first document, drafted by Pentagon officials under the Secretary of Defense in close consultation with the U.S. President, is called the Quadrennial Defense Review Report. DEP’T OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT (2001), available at <http://www.pdgs.org.ar/featured/fea-usa-indice.htm>. The second document, the Nuclear Posture Review, is an audit of U.S. nuclear strategy and weapons produced by the Pentagon at the Senate’s request. DEP’T OF DEF., NUCLEAR POSTURE REVIEW REPORT (2001). This document is classified, but the forward by Secretary of Defense Donald Rumsfeld is available at <http://www.defenselink.mil/news/Jan2002/d2002019npr.pdf>. Excerpts from the report are available at <http://globalsecurity.org/wind/library/policy/dod/npr.htm>.

62. David Grondin, *Penser la stratégie américaine de la sécurité du territoire national*, 4 ANNuaIRE FRANCAIS DE RELATIONS INTERNATIONALES (A.F.R.I.) 613, 616 (2003); see generally Steven J. Tomisek, *Homeland Security: The New Role for Defense*, 189 STRATEGIC FORUM 1 (2002).

sovereignty, the population, and the critical infrastructure of the United States against external threats and aggression.”⁶³

In the aftermath of 9/11, the talk is only of Homeland Security.⁶⁴ The Department of Defense’s official definition of Homeland Security is: “the preparation for, prevention of, defense against, and response to threats and aggressions directed towards U.S. territory, sovereignty, domestic population, and infrastructure; as well as crisis management, consequence management, and other domestic civil support.”⁶⁵ Homeland Security is a security strategy for the national territory that embodies the formulation and operationalizing of the U.S. response to internal and external terrorism.⁶⁶ Homeland Security is inseparable from a national security strategy. Indeed, the U.S. understands that a Homeland Security strategy facilitates the development of a better integrated national security strategy and permits a wide-ranging defense of the national territory, concerning itself both with non-state actors and with the states that harbor them.⁶⁷

The *National Security Strategy of the United States* is a document that gathers together a number of speeches delivered by President George W. Bush between September 2001 and September 2002 on the priorities of his administration with respect to security matters.⁶⁸ The most important speech is that delivered on June 1, 2002, at West Point.⁶⁹ Consisting of nine chapters, the *National Security Strategy* dedicates three chapters to preventive self-defense.⁷⁰ In these three chapters, the Bush administration arrogates to itself the right to anticipatory military intervention⁷¹ against states or terrorist actors suspected of trying to acquire or of possessing weapons of

63. Grondin, *supra* note 62, at 616; Tomisek, *supra* note 62, at 4.

64. The expression Homeland Security was suggested by the U.S. Commission on National Security/21st Century (commonly known as the Hart-Rudman Task Force on Homeland Security) created by President Bill Clinton in 1998. Grondin, *supra* note 62, at 615. This bipartisan commission, co-chaired by former Senators Gary Hart and Warren B. Rudman, drafted three reports in 1999, 2000, and 2001, in which the concept of homeland security was made official. *Id.* These are *New World Coming: American Security in the 21st Century* (Sept. 15, 1999), *Seeking a National Strategy: A Concert for Preserving Security and Promoting Freedom* (Sept. 15, 2000), and *Road Map for National Security: Imperative for Change* (Feb. 15, 2001). Grondin, *supra* note 62, at n.615, available at <http://www.fas.org/man/docs/nwcl/>.

65. Tomisek, *supra* note 62, at 4.

66. Grondin, *supra* note 62, at 617.

67. *Id.*

68. Bernard Sionneau claims that the initiatives proposed in the *Quadrennial Defense Review Report* (2001), *Nuclear Posture Review* (2001) and *National Security Strategy of the United States of America* (2002) were formulated between spring 1997 and September 2000 in the *Project for The New American Century*, available at <http://newamericancentury.org>. Bernard Sionneau, *Réseaux conservateurs et nouvelle doctrine américaine de sécurité*, 4 A.F.R.I., 498, 508 (2003).

69. George W. Bush, Remarks by the President at 2002 Graduation Exercise of the United States Military Academy West Point, (June 1, 2002), available at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>.

70. Chapter I presents an *Overview of America’s International Strategy*; chapter III describes how to *Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against Us and Our Friends*; and chapter V relates to those measures that will *Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction*. WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, [hereinafter NATIONAL SECURITY STRATEGY] pdf available at <http://www.whitehouse.gov/nsc/nss.pdf>.

71. The expression “anticipatory self-defense” allows two types of self-defense identified in the chapters on strategy to be joined: preventive and preemptive self-defense.

mass destruction for use against American interests. Sometimes the document refers to preventive self-defense, sometimes it refers to preemptive self-defense.

The *Strategy*'s preamble first refers to preventive self-defense:

And, as a matter of common sense and self-defense, *America will act against such emerging threats before they are fully formed.* We cannot defend America and our friends by hoping for the best. So we must be prepared to defeat our enemies' plans, using the best intelligence and proceeding with deliberation. History will judge harshly those who saw this coming danger but failed to act. In the new world we have entered, the only path to peace and security is the path of action.⁷²

Chapter I reiterates this approach:

The U.S. national security strategy will be based on a distinctly American internationalism that reflects the union of our values and our national interests. The aim of this strategy is to help make the world not just safer but better To achieve these goals, the United States will . . . strengthen alliances to defeat global terrorism and *work to prevent attacks against us and our friends.*⁷³

Chapters III and V, however, which address the measures needed to prevent an enemy of the United States and its allies from threatening them with weapons of mass destruction, interject difficulties by speaking in terms of preemption. Chapter III, for example, refers to both preventive and preemptive self-defense:

defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of *self-defense by acting preemptively* against such terrorists, to prevent them from doing harm against our people and our country.⁷⁴

Chapter V reads in part as follows:

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.*⁷⁵

From then on, the Bush administration has been seen as confusing prevention with preemption,⁷⁶ and what is more, equating the notion of prevention with that of preemption.⁷⁷ Prevention and preemption, however, refer to two quite different

72. NATIONAL SECURITY STRATEGY, *supra* note 70, at preamble (emphasis added).

73. *Id.* at 1 (emphasis added).

74. *Id.* at 6 (emphasis added).

75. *Id.* at 15 (emphasis added).

76. The French seem to use the term "preemption" only in its original sense, that is, the right of acquisition. American military strategy language introduced the distinction between preemption and prevention, which the Bush Administration disregards.

77. See generally Ivo H. Daalder, *L'Emploi de la force dans un monde en changement*, 4 A.F.R.I. 215 (2003).

realities. Preemption refers to an attack on an adversary who is preparing to strike, while prevention is an action undertaken to prevent a threat from materializing. In other words, preventive strikes are launched cold, while preemptive strikes are in response to a clear and immediate threat. The actions described in Chapters III and IV as preemptive are, in reality, preventive.

It would seem, however, that rather than confusing preemption and prevention, the Bush administration actually uses the two terms interchangeably, without concern for the nuances of meaning that distinguish them. The objective of the Bush *Strategy* is simple, and can be met just as well by legitimacy based on a preventive or a preemptive justification: to claim for itself the right to attack in the case of a mere threat. The justification advanced is that the unique characteristics of new forms of threats to the peace, such as terrorism, require the changes to traditional means of defense.⁷⁸

The doctrine of anticipatory self-defense has been invoked as an important tool in an age of weapons of mass destruction.⁷⁹ But what are the foundations of this new doctrine? The United States has been accused of reincorporating the old “just war” doctrine into contemporary models of international security by invoking preventive self-defense. In reality, though, as a close look at the 2002 *Strategy* makes clear, the just war theory does not expressly appear there. If implicitly raised, the just war doctrine therein implied corresponds in no way to the doctrine derived from theologians and proponents of natural law. It seems, rather, that the new position of the United States revives the distinction established by the Covenant of the League of Nations between licit and illicit war. The war waged by the United States in Iraq must be justified on the basis of the first theory (a licit war), or, if that argument cannot be made out, as justified by necessity.

B. The Foundations of the New American Security Doctrine

The new American security doctrine has advanced the just war argument to preventive self-defense, but the just war concept has no legal foundation. It rests only

78. 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, 552 (2002) (“Waiting for an aggressor to fire the first shot may be a fitting code for television westerns, but it is unrealistic for policy-makers entrusted with the solemn responsibility of safe-guarding the well-being of their citizenry.”); P. Rambaud, *La Définition de l’agression par l’Organisation des Nations Unies*, R.G.D.I.P. 878 (1976). Rambaud states:

The use of modern weapons of mass destruction implies an adaptation of military strategy, which can greatly make room for the preventive self-defense concept, the anticipated destruction of enemy forces sometimes being the condition for the effectiveness of a country’s defense. Obviously the definition of aggression is powerless to resolve the controversy.

Id.

79. Joseph L. Falvey, Jr., *Our Cause is Just: An Analysis of Operation Iraqi Freedom Under International Law and The Just War Doctrine*, 2 AVE MARIA L. REV. 65, 77 (2004). According to Falvey, [t]he doctrine of anticipatory self-defense becomes increasingly important in this age of weapons of mass destruction. The devastating potential of such weapons, the swiftness of their delivery, and their covert capability (e.g. suitcase bombs, vials of toxic chemical or biological agents, infected persons) makes waiting for a strike suicide, not self-defense.

Id.

on a moral foundation.⁸⁰ The only legal foundations that could support preventive self-defense are the antiquated distinction between licit and illicit war and the concept of state of necessity.

1. *The Just War Doctrine*

The medieval Christian just war doctrine⁸¹ first appeared with Ambrose (330-397), who believed that defending the Empire from barbarians and defending the faith were indistinguishable from each other.⁸² Later, in *The City of God*, Saint Augustine (354-430) proposed criteria for a just war.⁸³ The war must be waged only in case of necessity and its exclusive aim must be to restore peace. The medieval just war concept reached its fullest development with Bernard de Clairvaux (1091-1153),⁸⁴ and it was later referred to by numerous writers.⁸⁵

In international law, the theory was utilized by the Spanish Jesuit theologian Francisco de Suarez (1548-1617) and later by Hugo Grotius (1583-1645). In Grotius' principal work, *De jure belli ac pacis* (*The Law of War and Peace*), first published in 1625, this Dutch lawyer further refined the canon-law distinction between just and unjust wars.⁸⁶ According to Grotius, injustices are identified by natural principles, and then must be redressed by just wars.

Understood in this way, is a war just solely because it responds to injustice, a concept as ill-defined and elusive as the new threats, like terrorism, which confront us today? Although the notion of a just war derives from moral and philosophical considerations, the doctrine does specify two criteria essential to a just war. First, a war is just when it occurs after an injustice committed by a state against an important state interest of another state that cannot be redressed because of the inability of international law to impose a peaceful solution to the conflict. In other words, a war

80. *See id.* at 67. Falvey argues:

This just war doctrine reflects the classical Catholic perspective regarding the necessity of politics serving moral ends, and it advances the concept of war as a form of politics, which must serve some moral end. In this regard, the just war doctrine reflects the moral judgment that the State, having a monopoly on coercive power and use of force, has the obligation to defend the common good.

Id.

81. In the Old Testament, the idea of a just war is based on three principles: the first is the divine justification of wars as the religious reinterpretation of God's promise of unwavering support for his people. In other words, wars are those of God. *See* 1 Samuel 18; 1 Samuel 17: 25; 1 Samuel 28. The second is that a just use of force includes the destruction of everything that belonged to the defeated party. *See Joseph* 6; *Joseph* 21. Finally, the third principle is that just violence coexists with unjust violence; namely violence against innocents. The idea of a just war is not foreign to Judaism, Islam, or Buddhism. On the concept of just war in religion, *see generally* Michel Dion, *L'Idéal de paix et le concept de guerre juste: entre la méta-norme, la dialectique et la recherche de solutions humanistes*, 47 ARCHIVES DE PHILOSOPHIE DU DROIT 263 (2003).

82. *See generally*, AMBROSE DE OFICIIS (Ivor J. Davidson trans., Oxford U. Press 2001).

83. *See* AUGUSTINE, CITY OF GOD (Marcus Dods trans., Modern Library 1993).

84. *See, e.g.*, BERNARD DE CLAIRVAUX, ON THE LOVE OF GOD (Mowbray 1982).

85. *See, e.g.*, MARTIN LUTHER, DISPUTATION OF DOCTOR MARTIN LUTHER ON THE POWER AND EFFICACY OF INDULGENCES (NetLibrary 2001).

86. *See generally* HUGO GROTIUS, DE JURE BELLII AC PACIS (James Brown Scott ed., Francis W. Kelsey trans., Oceana Pub. 1964).

is just only upon the failure of all peaceful means of obtaining satisfaction. Viewed in the light of this requirement, the new security doctrine propounded by the United States cannot be justified by use of the just war doctrine. This is so for two principal reasons.

The first reason is the timing of a just war as compared to an action of preventive self-defense. A just war is undertaken after an injustice has been committed and thus is similar to traditional self-defense. Indeed, self-defense, as incorporated into the U.N. Charter, is a response to an armed attack, to violence that has already occurred. The use of force in traditional self-defense, therefore, always occurs “after,” just like in a just war. Thus, Louis Le Fur considers that “in international law, one should say ‘just war,’ just as one says ‘self-defense’ in criminal law”⁸⁷ According to the just war doctrine, then, self-defense is a just cause for war.⁸⁸ Because intervention occurs at clearly different times, one before and the other after an unjust act of violence, however, preventive action and just war are not alike. The first is a response to potential violence; the second to real violence which has already taken place. Moreover, the different temporal sequence of responsive action indicates that these two doctrines are really pursuing different objectives.

It seems, however, that one aspect of U.S. doctrine, ignoring the difference just described, is to base itself on the just war doctrine in order to provide moral justification for new U.S. security strategy. An example is the manifesto of February 2002 of sixty leading American intellectuals called *What We Are Fighting For*, which places the war against terrorism within the traditional context of a just war.⁸⁹ *The National Security Strategy of the United States*, however, does not itself suggest that the U.S. is relying on the theories of preventive self-defense or just war. Nor does it seek to justify preventive self-defense by conflating it with the just war theory.

The second requirement for a just war concerns the preliminary matter of an attempt to obtain satisfaction by peaceful means. In his address to the nation on March 17, 2003, President Bush refers to this requirement, declaring: “For more than a decade, the United States and other nations have pursued patient and honorable efforts to disarm the Iraqi regime without war Our good faith has not been returned.”⁹⁰ On the one hand one might wonder if the Bush administration had undertaken reasonable efforts to negotiate the disarmament of Iraq with the Iraqi regime. On the other hand, President Bush also advanced the idea that it is appropriate to prevent the Iraqi regime from acquiring and developing weapons of mass destruction. According

87. Dion, *supra* note 81, at 277.

88. *Id.*

89. Letter from the Inst. for Am. Values, *What We're Fighting For*, (Feb. 2002), available at <http://www.americanvalues.org>. The letter's title is inspired by a series of documentaries made in the 1940's by Frank Capra at the request of President Franklin Roosevelt, in order to lead the American population, strongly attached to isolationism, to support an intervention against the Nazis. These documentaries were entitled 'Why We Fight.' Among the authors of the 2002 letter are Francis Fukuyama and Samuel Huntington. This is not surprising since, “Huntington is not just any author, but rather an ‘organic intellectual’ . . . whose research and teaching are financed by the John M. Olin Foundation, one of the more conservative foundations . . . that supports the activities of ultra-conservative networks” Bernard Sionneau, *Réseaux conservateurs et nouvelle doctrine américaine de sécurité*, 4 A.F.R.I. 33-34 (2003).

90. George Walker Bush, Address to the Nation (Mar. 17, 2003).

to Grotius in the *The Law of War and Peace*, however, it has never been acceptable in the law of nations for a state to use force to weaken another state whose power is growing based on the fear that one day that state may be in the position to harm the state taking the preventive action.⁹¹

The doctrinal distinction between just and unjust wars has never been enacted into positive law, even if we consider the views of one commentator that Article 51 sanctions the use of force when a State has 'just cause' because it has been attacked, even though Article 51 does not explicitly refer to "the vague doctrine of just war."⁹² Some have used this to argue that when a State has a 'just' cause, it may use force in self-defense.⁹³ "In this way, the just war has been resurrected to justify the use of force in situations not contemplated by the Charter."⁹⁴

2. *The Distinction Between Licit and Illicit War and the Theory of State of Necessity*

The men of law succumbed to the eternal temptation of the jurist; they sacrificed substance to form. They introduced into the law of nations the distinction between legal and licit wars. A war unjust in its causes may nevertheless be licit if it is carried on by a sovereign prince and preceded by a declaration of war . . . the dogma of unlimited sovereignty killed the theory of just war.⁹⁵

Preventive self-defense, even if based on a broad interpretation of the just war doctrine, would still be lacking a legal foundation. The events of September 11, far from compelling us to look ahead, compel us instead to look back. The legal foundation for the American theory of preventive self-defense seems to be based on the international law of the past—the distinction made by the Covenant of the League of Nations between two types of war (licit and illicit) and the theory of state of necessity.

The jurist's temptation to favor form over substance is formalized in Articles 10 through 15.8 of the Covenant of the League of Nations, with its distinction between licit and illicit war.⁹⁶ The just war theory was replaced by that of the licit war. A war whose causes are unjust is still a licit war if it is waged by sovereign and preceded by a declaration of war. It seems as if the United States has taken note of this distinction. For instance, a U.S.-led war to defend a right "which by international law is solely within the domestic jurisdiction"⁹⁷ of a state, such as national security, is a licit war.

The United States also invokes the theory of state of necessity when it advances the pressing matter of national security, as it did in the aftermath of the attacks on

91. See generally Louis Le Fur, *Guerre juste et juste paix*, 26 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC [R.G.D.I.P.] 268 (1919).

92. John Dugard, *International Terrorism and the Just War*, 12 STAN. J. INT'L STUD. 21, 23 (1977).

93. *Id.*

94. *Id.*

95. VISSCHER, *supra* note 37, at 19.

96. Illicit wars are: wars of aggression; wars launched before the 3 month deadline after the adoption of a Council report, or the pronouncement of an arbitral or legal decision; wars initiated before their justifications have been submitted to a pacific procedure; wars directed against a State. League of Nations Covenant art.s 10-15.

97. *Id.* at art. 15.8.

September 11. A state that invokes the state of necessity “argues for the existence of an interest so essential that the State must deviate from its obligation to respect a subjective law determined by another State, since such respect would be incompatible with safeguarding its interests.”⁹⁸

The United States first recognized the argument of necessity during the *Caroline Incident* of 1837, thought by the International Law Commission to be an illustration of the “plea of necessity at a time when the law concerning the use of force had a quite different basis than it has now.”⁹⁹ During this incident,¹⁰⁰ Canadian insurgents who had taken refuge in the United States equipped a ship, the *Caroline*, with the aid of American citizens, with a view to returning to Canada to assist the rebellion. Informed of these facts, the Canadian government dispatched a contingent of British troops to American territory, which after a successful operation, destroyed the ship and sent it over Niagara Falls. Following the protest of U.S. Secretary of State John Forsythe, the British Minister in Washington, Henry Fox, invoked the necessity of self-defense and self-protection. The incident was resolved in 1842 after an exchange of notes between the new Secretary of State Daniel Webster and the British Minister. In a letter to the British government dated April 24, 1841, Secretary of State Webster stated the conditions for justifying an action based on necessity. Webster defined “necessity” as:

a necessity of self defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act justified by the necessity of self defence, must be limited by that necessity and kept clearly within it.¹⁰¹

The *Caroline* doctrine established that a nation may use force in self-defense only if the force is both necessary and proportional.¹⁰² Necessity requires that force must be in response to an armed attack or imminent threat of attack, and there is no alternative means to resolve the situation.¹⁰³ The International Court of Justice considered the requirements for a state of necessity in its 1997 decision in the *Gabcikovo-Nagymaros* case.¹⁰⁴ According to the Court, an “essential interest” of a state taking action under this doctrine must be in conflict with the state’s international obligations.¹⁰⁵ A “grave and imminent peril” must threaten the essential interest; the action must be the “only means” to safeguard the interest; and the action must not “seriously impair” an

98. This is the definition given by Roberto Ago, Special Rapporteur of the International Law Commission in *Eighth Session (Addendum) of Roberto Ago on State Responsibility*, [1980] 2 Y.B. Int’l L. Comm’n 18, U.N. Doc. A/CN.4/318/Add.8.

99. U.N. Int’l L. Comm., Report of the International Law Commission, 196 U.N. Doc. A/56/10 (Aug. 10, 2001).

100. See generally R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82 (1938).

101. Letter from Daniel Webster to Henry S. Fox (Apr. 24, 1841), in 29 BRITISH AND FOREIGN STATES PAPERS, 1840-1841, at 1137-38 (1857).

102. Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT’L L. 493, 498 (1990).

103. *Id.*

104. (Hung. V. Slov.), 1997 I.C.J. 92 (Sept. 25).

105. *Id.*

essential interest of the state owed the obligation.¹⁰⁶ Lastly, the state taking action must not have contributed to the emergence of the state of necessity. The Court stated that "Those conditions reflect customary international law."¹⁰⁷ Thus, four conditions are commonly identified for a state of necessity. First, an essential interest of a state must be involved; second, this interest must be threatened by a grave and imminent peril; third, the use of force must be the only means of countering this peril; and finally, "necessity can never be invoked to justify an act that does not comply with international obligations if this act seriously harms an essential interest of the state owed the obligation."¹⁰⁸

Were the conditions for a state of necessity present when the Bush administration invoked preventive self-defense? Throughout 2002, what essential American interest was threatened by Iraq? Security? The survival of its population? Was the use of force that began on March 20, 2003, the only means to prevent Iraq from developing or employing weapons of mass destruction? The answers to these questions is clearly no. But even if a state of necessity had existed it cannot be used to create indirectly a new exception to the fundamental rule which prohibits of the use of force.¹⁰⁹

In reality, the United States has always had a very broad conception of self-defense, considering that it has the right to intervene with force any time the life or property of an American citizen is directly or indirectly threatened in another country. But we need to assess the impact of the current American position on international law. We have to ask whether the new U.S. strategy, that of the world's principal power, might drastically alter international law itself.

3. *The Influence of a Political Doctrine on the Development of International Law*

It is not a rare thing for States . . . seeking . . . to consolidate . . . their security, to formulate their views or announce their line of conduct in a declaration cast in more or less solemn doctrinal terms. Authors are inclined to deny that such declarations have any legal effect in the international order. History shows, however, that the positions so taken, though political in their motives and in their unilateral character, have had an influence, sometimes considerable, on the formation and application of international law.¹¹⁰

The history of international law itself demonstrates how and to what extent political doctrines can influence the evolution of international law when a particular state occupies a special place on the international stage. The influence of a political doctrine on international law depends of course on the degree of power held by the state whose conduct is governed by that political doctrine.

Thus, Catherine II's statement of policy in her Declaration of Armed Neutrality in 1780 formed the basis for the League of Armed Neutrality and led to the adoption of the Paris Declaration in 1856. The Declaration of Paris derived from the need of

106. *Id.*

107. *Id.* at ¶ 52.

108. Théodore Christakis, *Vers une reconnaissance de la notion de guerre préventive?* in *L'INTERVENTION EN IRAK ET LE DROIT INTERNATIONAL* 9, 38 (Karine Bannelier et al. eds., 2004).

109. *Id.*

110. DE VISSCHER, *supra* note 37, at 163.

France and Great Britain, engaged at the time in war with Russia, to change their traditional practices with respect to maritime capture. The Declaration of Paris responded to the liberal ideas of the period, favoring the commercial freedom of neutrals and distinguishing between war, a state endeavor, and commerce, an individual matter. The legal rules enunciated in the Paris Declaration were in effect nothing more than the adoption of the political principles contained in Catherine II's Declaration.

Although in a way different from Catherine II's declaration of policy, the political principle of balance of power has also played a role in the shaping of international law. The balance of power principle is based on an understanding among states that power must be divided in such a way as to produce a balance of forces. This principle was implicitly formulated in the Treaties of Westphalia of 1648. Later, the Concert of Europe again institutionalized the old balance of power idea.¹¹¹ The balance of power doctrine had the effect of promoting the observance of treaties, respect for the independence of small states, and the development of rights of neutrality. The balance of power doctrine contributed to the development of international law by assuring a climate of moderation through the maintenance of peace.

Other doctrines formulated by states, such as the Calvo Doctrine,¹¹² have also had repercussions on international law. The Calvo Doctrine, first enunciated by Argentine diplomat Carlos Calvo, was described by Argentine Minister of Foreign Affairs Luis María Drago as:

an inherent qualification of sovereignty that no proceedings for the execution of a judgment may be instituted or carried out against it, since this manner of collection would compromise its very existence and cause the independence and freedom of the respective government to disappear . . . that the public debt cannot occasion armed intervention, nor still less, the actual occupation of the territory of American nations by an European power.¹¹³

This principle still remains relevant today.

The United States has also influenced international law by its formulation of political doctrine. The Monroe Doctrine, for example, highly political in nature because of its basis in national security concerns, challenged important principles of international law. This doctrine, enunciated by President Monroe in an address on December 2, 1823, was based on two important principles: non-colonization and non-intervention. The principle of non-colonization was still unknown to international law, even at the end of the nineteenth century; but less than fifty years later it was recognized by international law. It would be correct to think that the Monroe Doctrine played a role, direct or indirect, in this recognition. With respect to non-intervention, the Monroe Doctrine distinguished between political and non-political interventions, a distinction which has later taken on importance for international law.¹¹⁴

111. The balance of power, however, changed progressively after 1880, due especially to the rise of nationalism in the nineteenth century.

112. See Percy Bordwell, *Calvo and the "Calvo Doctrine,"* 18 THE GREEN BAG 377 (1906).

113. Bordwell, *supra* note 113, at 377-78.

114. Charlemagne Tower, *The Origin, Meaning and International Force of the Monroe Doctrine*, 14 AM. J. INT'L L. 1, 16-17 (1920) ("[I]t is not an act of legislation, neither does it call for legislative authority

Any political doctrine of the United States has a real potential to significantly influence international law because the United States has always occupied a privileged place on the international stage. This place of privilege confers a particular authority on its doctrines. From this perspective, American approval of the doctrine of preventive self-defense threatens to overturn existing principles of international law. That is why U.N. Secretary General Kofi Annan said of the new United States strategy that it:

represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last fifty-eight years. My concern is that, if it were to be adopted, it could set precedents that resulted in a proliferation of the unilateral and lawless use of force, with or without justification.¹¹⁵

The U.S. is also taking a great risk, for any precedent created by its practice will also be available, "like a loaded gun, for other states to use as well."¹¹⁶ The U.S. has worked against the preemptive use of force since 1945.¹¹⁷ A precedent of preemptive self-defense "would provide legal justification for Pakistan to attack India, for Iran to attack Iraq, for Russia to attack Georgia, for Azerbaijan to attack Armenia, for North Korea to attack South Korea, and so on."¹¹⁸

It may therefore not be in the best interests of the United States to question positive international law. And in fact the United States may not really be seeking to challenge existing international law as such. In the past the United States has been opposed to a right of preemptive self-defense "because it has found the U.N. Charter rules to be in its interest as a matter of policy and prudence . . . [I]t is not in the interest of the United States to reconstruct the law of the Charter so as to dilute and confuse its normative prohibitions."¹¹⁹

Even though the United States does not want to provoke a "dissolution" of the Charter, nevertheless it is exploiting its ambiguities and weaknesses. The new U.S. security strategy in effect approves a doctrine that clearly violates the prohibition of preventive self-defense contained in Article 51 of the Charter.

4. American Practice Violates the Charter's Prohibition of Preventive Self-Defense

Why is the United States not at all reluctant today to contemplate the possibility of preventive self-defense, even though for Nguyen Quoc Dinh, a leading French international lawyer of the last generation, "the principle prohibiting preventive self-

from Congress to give it the formal and legal sanction of the United States Government as a mode of procedure, or of a process subject to judicial determination and enforcement as the law of the land.").

115. Kofi Annan, U.N. Secretary General, Address to the U.N. Gen. Assembly (Sept. 23, 2003), available at <http://www.un.org/webcast/ga/58/statements/sg2eng030923>.

116. MARY ELLEN O'CONNELL, AM. SOC'Y OF INT'L L., THE MYTH OF PREEMPTIVE SELF-DEFENSE 19 (2002), available at <http://www.asil.org/taskforce/oconnell.pdf>.

117. *Id.* at 15.

118. *Id.* at 19.

119. *Id.* at 15-16 (quoting LOUIS HENKIN, USE OF FORCE: LAW AND U.S. POLICY, IN MIGHT V. RIGHT, INTERNATIONAL LAW AND THE USE OF FORCE 69 (Louis Henkin et al. eds., 1989)).

defense unquestionably derives from the Charter."¹²⁰ It must be recognized, however, that even if the prohibition of preventive self-defense does derive from the Charter, there is still room for discussion. Its prohibition is not absolute and is on the contrary somewhat relative. This relativity is derived from the fact that the Charter has not outlawed self-help. It only gives the appearance of having done so. Moreover, even if preventive self-defense is prohibited by international law, we must not forget that this prohibition only results *a contrario* from the Charter.

First, self-help was only seemingly outlawed. In fact, by including in Article 51 "the inherent right of individual . . . self-defense," the authors of the Charter admitted, by the adjective "inherent," "that such a right already existed in customary law *before* its recognition by United Nations law."¹²¹ The qualifier "inherent" endows self-defense with an autonomous existence, independent of any agreement, treaty, or even the Charter. Self-defense is an important concept in legal communities where the protection of rights is an exclusive function of the state and where, therefore, members of the community are prohibited from resorting to self-help.¹²² In those communities self-defense is an exception to this prohibition.¹²³ In the international legal system, the right of self-defense under Article 51, as an inherent right, represents an exception to the prohibition against self-help. Consequently, Article 51 may be said to contain within itself the theory of preventive self-defense.

Nevertheless, many scholars make a distinction between self-help and self-defense. The distinction is based on the difference in the structure of societies. Self-defense exists only in "organized" societies, and self-help only in "primitive" societies.¹²⁴ But these structural differences seem tenuous and exaggerated. And to view international society as an organized society is clearly an idealistic act. International society is, for the most part, still weakly structured, despite the U.N. Charter's attempt to centralize questions concerning the use of force in the Security Council.

One commentator considers that because of the frequent use of self-defense by states, self-defense approximates a common law practice which has become assimilated into the idea of self-help.¹²⁵ It seems, however, that self-defense, instead of merging into self-help, is itself an element of self-help. Thus, in providing for self-defense,

120. Nguyen Quoc Dinh, *La Légitime défense d'après la Charte des Nations Unies*, 52 R.G.D.I.P. 241 (1948).

121. Pierre Marie Dupuy, *La Communauté internationale et le terrorisme*, in *LES NOUVELLES MENACES CONTRE LA PAIX ET LA SÉCURITÉ INTERNATIONALES* 35, 37 (2004).

122. Nguyen, *supra* note 120, at 241.

123. *Id.*

124. CHRISTIAN ALIBERT, *DU DROIT SE FAIR JUSTICE DANS LA SOCIÉTÉ INTERNATIONALE DEPUIS 1945*, in *LIBRAIRIE GÉNÉRALE DE DROIT ET DE JURISPRUDENCE* 701 (1983). Alibert argues:

A Member of a society whose existence is threatened can react to an attack with force. This right of defense, very largely recognized in an unorganized society, is much more limited in an organized society If they can seek justice, that is to say, have recourse to self-protection or to self-help in a primitive society, in an organized society they must seek justice from the competent authorities In internal societies, the right to self-protection has long been replaced by the right of self-defense; in international society, this transformation, which is a real revolution, is recent. It dates back to 1945.

Id.

125. *Id.*

Article 51 did not eliminate self-help, but merely made it into an exception. As Louis Le Fur stated in 1932 with respect to the Covenant of the League of Nations:

If a state's right to self-help is generally condemned today and if all recourse to armed force is rejected . . . there is nevertheless one case where this right continues to be recognized and will always be, as it has been between individuals: this is the case of self-defense.¹²⁶

Second, the Charter's prohibition of preventive self-defense is not stated explicitly, but only *a contrario*. What bars the use of force is the requirement of anteriority.¹²⁷ A state can never use force before being the victim of an armed attack—only after. Article 51 might be epitomized in these terms, as well as the prohibition of preventive self-defense in international law. If a state decides to make preventive attacks against another state because it feels threatened, it becomes an aggressor, because "the aggressor is the one who attacks first, the one who employs armed force rather than some other form of pressure or constraint not entailing the use of armed force or the threat of such force."¹²⁸

Two questions remain. First, why can international law not recognize the right of preventive self-defense? Second, does the absence of an express prohibition of preventive self-defense by the Charter explain why the United States recognizes the right to use such force in its internal documents?

As for the first question, Hans Kelsen has advanced the notion that international law does not accept the extension of the doctrine of self-defense to include preventive self-defense because of the impossibility of objective fact-finding regarding the alleged illegal situation.¹²⁹ Only the existence of a tribunal with compulsory jurisdiction could support the extension of the doctrine of self-defense, without such extension becoming a remedy worse than the evil itself.¹³⁰

As for the second question, it seems that the only factor motivating the United States to assert a right to make preventive attacks is a change in political doctrine linked to the ideas of the current administration, with economic stakes playing a major role in the new policy.

In sum, the United States has claimed a right to a use of force that is barred *a contrario* by the U.N. Charter and has been clearly rejected by key organs of the U.N. system, such as the International Court of Justice and the Security Council. It would appear then that to the United States, the theoretical foundations for the use of this force (just war, necessity, etc.) matter little. On the symbolic level, the recognition of use of force for preventive self-defense is just as revolutionary as was the prohibition of the use of force in the U.N. Charter in 1945. The U.S. position undermines the entire

126. Louis-Erasmus Le Fur, *Développement historique du droit international*, 41 R.C.A.D.I. 501, 535 (1932).

127. Giraud, *L'interdiction du recours à la force, la théorie et la pratique des Nations Unies*, R.G.D.I.P. 514 (1963) ("The concept of anteriority is the cornerstone of every system that outlaws resort to the use of force and authorizes self-defense.").

128. *Id.* at 517.

129. CÉCILE TOURNAYE, *KELSEN ET LA SÉCURITÉ COLLECTIVE* 87-88 (1995).

130. *Id.*; see also Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 267 (1989) ("[T]he line between violations and emerging law may be difficult to draw, made more difficult by the absence of judicial authority and the great disparities in power in the international community.").

edifice erected by the Charter, reminding us that, even today, international law is a body of law highly resistant to systematization. As Charles de Visscher has observed, international law is not susceptible to systematization because “value judgments have not acquired in international law the degree of firmness and concentration which is the motor of any efficient systematization.”¹³¹

Perhaps international law resists systematization because the international community places little value on the rule of law. According to one view, in an organic, integrated society, or even in a homogeneous society governed by a developed legal system, power sides with the rule of law, and respect for the rule of law is considered an essential value. That is the situation within states. But “in the contemporary international community, with concern for respect for the rule of law non-existent or relegated to the background, governments that possess power are essentially motivated by political considerations that lead them to take positions both in compliance with and in opposition to the rule.”¹³²

II. MULTILATERAL (OR FRENCH) PREVENTIVE ACTION

During the negotiations before the Iraq war, the French position was that the Security Council has the “monopoly on preventive armed force”¹³³ and that it must expressly authorize the use of force. Although France recognizes only multilateral preventive action, it has innovated in the last few years in accepting a broadening of the concept of self-defense. However, this broadening is not to be confused with unilateral preventive self-defense.

A. Security Council Monopoly on Preventive Armed Force

The Security Council has the monopoly on the use of preventive armed force by virtue of its responsibility under the U.N. Charter to maintain international peace and security. France and the other European states referred to this responsibility in the security strategy that they adopted in May 2003.

1. Primary Responsibility of Security Council for International Peace and Security

Article 24 of the United Nations Charter recognizes that the Security Council has the primary responsibility for the maintenance of international peace and security. This means that it falls primarily to the Security Council to decide whether and under what conditions force is to be utilized in a given situation. Before authorizing the use of force, however, the Security Council must first determine that there has been a threat to the peace pursuant to Article 39 of the Charter. Article 39 states: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”¹³⁴

131. Charles De Visscher, *Méthodes et système en droit international*, 138 R.C.A.D.I. 75, 77 (1973).

132. Giraud, *supra* note 127, at 542.

133. Christakis, *supra* note 108, at 15.

134. U.N. Charter art. 39.

By virtue of this article, only the Security Council can determine that a situation qualifies as a threat to the peace, and it possesses broad discretion in determining whether there exists a threat to the peace, a breach of the peace, or an act of aggression.¹³⁵ This broad discretion is important because a threat to the peace may not necessarily be characterized by military operations, as would be the case with an act of aggression or a breach of the peace. Article 39, pursuant to which the Security Council may find that there is a threat to the peace, also authorizes it to take measures to maintain or to restore international peace and security. This means that, even in the absence of an armed attack, and confronted only with a threat to international peace and security, the Security Council can intervene militarily in a country. The Security Council is accorded this power because it is entrusted with the task of maintaining international peace and security. It is for this reason that the Security Council authorized the use of force in Somalia and Haiti, although no act of aggression had been committed with respect to those countries.¹³⁶

In fact, Resolution 1441 on Iraq refers to this authority of the Security Council. The Resolution mentions the "serious consequences" that Iraq would face were it to continue to fail to fulfill its obligations.¹³⁷ The mention of "serious consequences" implies the possibility of a use of military force against Iraq, which the Security Council, of course, would already have decided. When it authorizes the use of force the Security Council uses a clear and unambiguous formula, such as "The Security Council authorizes States to use all necessary means to [attain certain definite objectives]".¹³⁸

The United States cannot substitute itself for the Security Council, as Kofi Annan pointed out in the following terms:

When States decide to use force, not in self-defense but to deal with broader threats to international peace and security, there is no substitute for the unique legitimacy provided by the United Nations Security Council. States and peoples around the world attach fundamental importance to such legitimacy, and to the international rule of law.¹³⁹

Described as the keystone of the collective security system,¹⁴⁰ the Security Council centralizes the use of force, a power delegated to it under Article 24(1) by U.N. member states. It has been pointed out, however, that while the U.N. Charter gives the Security Council primary responsibility for the maintenance of international peace and

135. See generally B. Conforti, *Le Pouvoir discrétionnaire du Conseil de sécurité en matière de constatation d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression*, in *LE DÉVELOPPEMENT DU RÔLE DU CONSEIL DE SÉCURITÉ: PEACE-KEEPING AND PEACE-BUILDING* 51 (1992).

136. On Somalia, see S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992). On Haiti, see S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994).

137. S.C. Res. 1441, *supra* note 25, ¶ 13.

138. See, e.g., S.C. Res. 794, *supra* note 136, ¶ 10. See also S.C. Res. 1491, ¶¶ 10-13, U.N. Doc. S/RES/1491 (July 11, 2003) (concerning enforcing peace agreement in former Yugoslavia); S.C. Res. 1264, ¶ 3, U.N. Doc. S/RES/1264 (Sept. 15, 1999) (concerning human rights violations in East Timor).

139. Press Release, Kofi Annan, U.N. Secretary General (Feb. 8, 2003), available at www.un.org/News/Press/docs/2003/sgsm8600.doc.htm.

140. See K. Herndl, *Reflections on the Role, Functions and Procedures of the Security Council of the United Nations*, 206 R.C.A.D.I. 289 (1987).

security, it does not give it exclusive authority in this area. Thus, states may still have recourse at times to the use of force without authorization from the Security Council. Thomas Franck was certainly not exaggerating when he said that “the Charter itself provided enough ambiguities to open the rules to deadly erosion.”¹⁴¹ But the use of force by states outside the U.N. framework is clearly illegal, in contrast to use of force which is authorized by the Security Council.

The unlawfulness of war, established by the U.N. Charter, does not exclude the legitimate use of force . . . [I]t is clear that the difference between war and the legitimate use of force is not a formal difference that can be obscured by simply manipulating words The difference is essential and resides in the guarantee that, in contrast to war, the legitimate use of force serves no partisan interest Thus the difference is similar to that between justice and vengeance or between law and fact: each is a negation of the other and is defined by this negation. By its very nature war is a disproportionate and uncontrolled use of force . . . [T]he use of force authorized by the Charter is only that which is strictly necessary . . . for the maintenance of international peace and security.¹⁴²

By its unfavorable view of the Iraq war, France has expressed its commitment to the system established by the U.N. Charter. France reiterated its support for the Charter system through its participation in the adoption of the new European Security Strategy.

2. Adoption of a European Security Strategy and the Role of the Security Council

During a non-official meeting at Rhodes on May 3, and 4, 2003, close to a month and a half after the start of the Iraq war, the European Council charged Javier Solana, the European Union’s High Representative for the Common Foreign and Security Policy, to prepare a first draft of a European Union security strategy. Adopted on June 20, 2003, at Thessalonika, the strategy was entitled “A Secure Europe in a Better World.”¹⁴³

For the first time in its history, the European Union (EU) had a security strategy. The decision has been described as “historic and unexpected because it put an end to the existing taboo on strategic thinking at the EU level.”¹⁴⁴ The EU’s strategy however, did not either directly or indirectly disrupt the collective security system, since it merely reaffirmed the responsibility of the Security Council for the maintenance of international peace and security and its authority to take preventive action toward that end. Thus, any approval given to the doctrine of preventive self-defense by the fifteen EU member states during June, 2003, only confirmed the Security Council’s traditional role. This position can be explained by the deep commitment of European states, including France, to multilateralism. This is evident in the Thessalonika strategy, when

141. Thomas M. Franck, *Who Killed Article 2 (4)?* 64 AM. J. INT’L L. 809, 809 (1970).

142. Le Tribunal Permanent des Peuples, *Le Droit international et les nouvelles guerres*, 36 REVUE BELGE DE DROIT INTERNATIONAL [R.B.D.I.] 249, 256 (2003) (Belg.).

143. European Council, *A Secure Europe in a Better World*, 17 (EC) June 20, 2003, *available at* ue.eu.int/ueDocs/cms_Data/docs/pressdata/EN/reports/76255.pdf.

144. Sven Biscop & Rik Coolhaet, *Une Stratégie de l’UE pour la sécurité: définir la voie européenne*, 59 DEFENSE NATIONALE 125, 125 (2003).

it states: "We need to build an international order based on effective multilateralism."¹⁴⁵ Italian Prime Minister Silvio Berlusconi, speaking for the EU at the U.N. General Assembly on September 23, 2003, reiterated its position regarding the U.N.: "Finally, should all political and diplomatic measures fail, recourse to enforcement measures provided for by the United Nations Charter cannot be ruled out."¹⁴⁶ Europe has a common culture of multilateralism; and European states are all very much committed to international organizations and to collective defense.

In developing their new security strategy, France and the European states approved nothing really new and disturbed nothing presently existing. They only reaffirmed that the Security Council has a monopoly on preventive action and that it never implicitly authorizes the use of force.

B. Recognition of the Security Council's Exclusive Right to Expressly Authorize the Use of Force

The U.N. Charter provides that the Security Council may act directly (Articles 39, 42, and 43)¹⁴⁷ or it may authorize a regional organization to act (Article 53).¹⁴⁸ The United States and its European allies, wishing to legitimate their preventive actions in Iraq, have added a third possibility, which goes under the name of "implicit authorization."¹⁴⁹ France, however, made clear that in its view, Security Council authorization had to be explicit. According to Professor Corten:

Although it is difficult to define it precisely, [the argument of implicit authorization] consists in justifying coercive military action undertaken against a state even though the conditions for self-defense have not been satisfied and the Security Council has not expressly authorized it in a prior resolution. By "express authorization," we mean the formulations traditionally used, which consist in authorizing states "to use all necessary means" . . . with a view to achieving certain defined objectives. Lacking any use of these terms, "an implicit authorization" might hypothetically be deduced from the Council's behavior, either during or even after the military operation had been undertaken.¹⁵⁰

This argument was used several times in the past by the United States to justify recourse to force, but went largely unnoticed until the third Gulf War. As invoked by the United States, it is a testament to the Anglo-American coalition's desire to fit the

145. European Council, *supra* note 143, at 6.

146. U.N. GAOR, 58th Sess., 7th plen. mtg. at 31, U.N. Doc. A/58/PV.7 (Sept. 23, 2003) (statement by the Prime Minister of Italy, H.E. Silvio Berlusconi, on behalf of the European Union).

147. U.N. Charter arts. 39, 42, 43.

148. U.N. Charter art. 53.

149. Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the U.N. Security Council, U.N. Doc. S/2003/350 (Mar. 20, 2003) (expressing its position on U.S. preventive action); Letter from the Permanent Representative of the United States to the U.N. Security Council, U.N. Doc. S/2003/351 (Mar. 20, 2003).

150. Olivier Corten & Francois Dubuisson, *L'Hypothèse d'une règle émergente fondant une intervention militaire sur une 'autorisation implicite' du Conseil de sécurité*, 104 R.G.D.I.P. 873, 876 (2000).

Iraq war into the U.N. framework.¹⁵¹ France has rejected such a construction: legality under the U.N. Charter cannot be implied. It must be expressly affirmed.

The theory of “implicit” Security Council authorization for the use of force was first advanced by the United States at the time of the Cuban quarantine.¹⁵² In the 1990s it resurfaced to justify certain military operations in Iraq undertaken by the United States and the United Kingdom after the cease-fire of 1991. There were the operations Provide Comfort and Southern Watch, whose official objective was to establish security zones in Iraqi Kurdistan so as to encourage the return of civilians who were trapped in the mountains bordering Turkey as they fled the repression of Saddam Hussein’s regime.¹⁵³ Shortly afterwards, the United States and the United Kingdom invoked Iraqi violations of Resolutions 687 and 678 to justify other incursions. The “implicit” authorization argument was again used at the time of the so-called “Presidential Palaces” crisis, which was resolved by the signing of a Memorandum of Understanding between Iraq and Secretary General Kofi Annan and by Security Council Resolution 1154.¹⁵⁴ On December 16, 1998, following a negative report of UNSCOM chief Richard Butler, Operation Desert Fox was launched. The United States and the United Kingdom justified the operation by a reference to a sentence fragment contained in Resolution 1154, according to which “any violation [of Resolution 687] would have severest consequences for Iraq.”¹⁵⁵ Finally, during the Kosovo crisis the “implicit” authorization argument was made on the basis of Security Council Resolutions 1160, 1199, and 1203,¹⁵⁶ and from the persistent refusal of Yugoslav authorities to comply with them by putting an end to acts of violence against the Albanian community in Kosovo. In fact, those three Security Council Resolutions approved of no coercive measures against Yugoslavia, with the exception of an arms embargo.¹⁵⁷

After having undertaken preventive action in Iraq, the United States attempted to bring this action within the framework of international law. The justification for Operation Iraqi Freedom revolved around one Security Council Resolution: Resolution

151. See, e.g., President George W. Bush’s speech before the United Nations General Assembly: The Security Council was right to be alarmed. The Security Council was right to demand that Iraq destroy its illegal weapons and prove it had done so. The Security Council was right to vow serious consequences if Iraq refused to comply. And because there were consequences, because a coalition of nations acted to defend the peace, and the credibility of the United Nations, Iraq is free

U.N. GAOR, 58th Sess., 7th plen. mtg. at 9, U.N. Doc. A/58/PV.7 (Sept. 23, 2003).

152. See Corten & Dubuisson, *supra* note 150 at 879.

153. *Id.* The intervening States considered that in Resolution 688, of April 5, 1991, the Security Council had given authorization, perhaps implicit, but authorization none the less, for a resort to force. However, “absolutely nothing in the text of Resolution 688 permits a reading that the Security Council would, for the first time in its history, have authorized a military intervention in the territory of a State not determined to be the first aggressor.” *Id.* at 879.

154. Memorandum of Understanding signed by Tariq Aziz, Deputy Prime Minister of Iraq, and Kofi Annan, United Nations Secretary-General, U.N. Doc. S/1998/166 (Mar. 27, 1998); S.C. Res. 1154, U.N. Doc. S/RES/1154 (Mar. 2, 1998).

155. S.C. Res. 1154, *supra* note 154, ¶ 3.

156. S.C. Res. 1160, U.N. Doc. S/RES/1160 (Mar. 31, 1998); S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998); S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 14, 1998).

157. S.C. Res. 1160, *supra* note 156, ¶ 8.

1441.¹⁵⁸ This Resolution did not authorize the use of force, but rather allowed the allies to find a legal basis for the use of force of March 20, 2003, by its referral to other Resolutions. In this Resolution, the Security Council

Decides . . . to afford Iraq . . . a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council; and accordingly decides to set up an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process established by resolution 687 (1991) and subsequent resolutions of the Council.¹⁵⁹

Finally, it stated “that the council has repeatedly warned Iraq that it will face serious consequences as a result of continued violations of its obligations.”¹⁶⁰ On November 13, 2002, Iraq accepted the terms of Resolution 1441; on November 25 the first UNMOVIC and IAEA inspectors arrived in Baghdad; and on December 7, Iraqi authorities submitted a declaration of over 12,000 pages regarding their arms programs. The stated objective of Resolution 1441 was to oversee Iraq’s disarmament. The Iraqi regime was supposed to cooperate for this purpose. But, according to the Anglo-American coalition, Resolution 1441 contained two other important elements. The first was that Iraq had violated Resolutions 687 and 678. The second was that the Resolution did not explicitly provide that the Security Council was alone competent to authorize the use of force in case the Resolution was violated.

As for the first element, the Permanent Representative of the United States to the United Nations sent a letter to the President of the Security Council on March 20, 2003, addressing the question of the legal basis of the military action just launched against Iraq. His letter stated that “the actions being undertaken are authorized under existing Security Council resolutions including resolution 678 (1990) and 687 (1991).”¹⁶¹ Security Council Resolutions 678 and 687, therefore, authorized the Anglo-American coalition to intervene militarily in Iraq. These Resolutions imposed a number of obligations on Iraq, the most important of which was the obligation to disarm. The coalition considered that these Resolutions had not been respected and that, consequently, their violation should entail the “severest consequences,” according to the formulation of the Security Council. These consequences were a military intervention.

As for the second element, the Anglo-American coalition asserted that Resolution 1441 did not expressly provide that the Security Council had the sole authority to use force against Iraq.¹⁶² Paragraph 4 of the Resolution stated only that “false statements

158. S.C. Res. 1441, *supra* note 25.

159. *Id.*, ¶ 2.

160. *Id.*, ¶ 13.

161. Letter from the Permanent Representative of the United States of America to the United Nations, U.N. Doc. S/2003/351 (Mar. 20, 2003). The United Kingdom advanced the same argument, in a Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations, U.N. Doc. S/2003/350 (Mar. 20, 2003).

162. On this issue, Oliver Corten maintains that:

The Council . . . obviously does not need to specify in its resolutions that it is the only competent body to authorize use of force. This competency derives from the United Nations Charter itself and in fact, supposing the Council wished so, could not be questioned by the Security Council, which still submits to the United Nations constitution.

or omissions in the declarations submitted by Iraq . . . will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below.”¹⁶³ Or in any case that is how the Anglo-American coalition wanted to interpret Resolution 1441.¹⁶⁴

When the United States advanced this argument to support the proposition that the Security Council had given it an implicit authorization to use force, it also implied that the Security Council had delegated enforcement power to it. Because the Security Council lacked real enforcement capabilities, the United States and its allies would undertake that task on its behalf. According to this view, the United States was an agent acting on behalf of all humanity.¹⁶⁵ At least that is how the United States hoped that the world community would interpret its acts. This is in fact how it presented the war in Iraq.

France opposed this position because such a view would endanger the health of the collective security system; it would authorize states to use force unilaterally and to avoid bringing the matter to the Security Council.¹⁶⁶ This would produce a situation just like that during its final days when “the League of Nations was no longer consulted, its isolation attesting to the fact that although the Covenant system was still formally in force, it was no longer a reality.”¹⁶⁷

It is this very same risk that today weighs on the system established by the United Nations Charter. That is why it is necessary “to establish a common basis from which we might talk seriously about implicit authorization or approval.”¹⁶⁸ How should we determine what factors are sufficient to constitute an “implicit” authorization? What are those factors? Is it enough that the Security Council has determined that there is a threat to international peace and security? Or must there be a Resolution containing a finding of illegality?

France explained its position in a joint statement with China and Russia, in which it seeks to be true to the mission assigned by the Charter to the Security Council:

Oliver Corten, *Opération Iraqi Freedom: peut-on admettre l'argument de l'autorisation implicite du Conseil de sécurité?* 36 R.B.D.I. 205, 212 (2003) (Belg.).

163. S.C. Res. 1441, *supra* note 25, ¶ 4.

164. For example, speaking for the United Kingdom, the Attorney General, Lord Goldsmith stated that: Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorize force.

Attorney General Lord Goldsmith, *Legal Basis for Use of Force Against Iraq* (Mar. 17, 2003), <http://www.number10.gov.uk/output/Page3287.asp>.

165. This coincides with the concept of a “new manifest destiny,” found in the neo-conservative philosophy. Created by the journalist John Louis O'Sullivan in 1845 and revived by the neo-conservative Ben Wattenberg in the 1990s, this concept means that “America is a unique experience, a real laboratory of progress in matters of freedom and democracy; this being so, Americans have the moral duty to allow the rest of the planet to benefit from this, such is their manifest destiny.” Bernard Sionneau, *supra* note 68 at 512 (2003).

166. Boutros Boutros-Ghali stated that “the temptation to return to a unilateral resort to the use of armed force is today a strong tendency in international society.” Boutros Boutros-Ghali, *Le droit international à la recherche de ses valeurs : paix, développement, démocratisation*, 286 R.C.A.D.I. 17, 19 (2000).

167. Emile Giraud, *L'Interdiction du recours à la force, la théorie et la pratique des Nations Unies*, 67 R.G.D.I.P. 501, 528 (1963).

168. Linos-Alexandre Sicilianos, *L'Autorisation par le Conseil de sécurité de recourir à la force: une tentative d'évaluation*, 106 R.G.D.I.P. 5, 44 (2002).

Resolution 1441 (2002) adopted today by the Security Council excludes any automaticity in the use of force In the case of a failure by Iraq to comply with its obligations, the provisions of paragraphs 4, 11 and 12 will apply. Such failure will be reported to the Security Council It will then be for the Council to take a position on the basis of that report. Therefore, the resolution fully respects the competence of the Security Council in the maintenance of international peace and security, in conformity with the Charter of the United Nations.¹⁶⁹

Security Council Resolution 1441 was adopted only because the Council's permanent members thought that only the Security Council would be able to intervene in case Iraq failed to fulfill its obligations. On this point, the United States and the United Kingdom had in fact given a prior guarantee that the text of the Resolution would not sanction the unilateral use of force. The U.S. Representative had stated this clearly: "As we have said on numerous occasions to Council members, this resolution contains no 'hidden triggers' and no 'automaticity' with respect to the use of force. If there is a further Iraqi breach . . . the matter will return to the Council for discussions as required in paragraph 12."¹⁷⁰ The U.K. Representative confirmed this understanding: "There is no 'automaticity' in this resolution. If there is a further Iraqi breach of its disarmament obligations, the matter will return to the Council for discussion as required in paragraph 12."¹⁷¹

Thus, French President Jacques Chirac stated on March 10, 2003:

And the international community, unanimously, by voting for Security Council Resolution 1441, made a decision that amounts to saying: "we are going to disarm Iraq by pacific means, that is to say through inspections. We will name inspectors, and it is they who will tell us if this direction is possible or not."¹⁷²

President Chirac's statement was echoed in the French press:

Resolution 1441 neither says nor implies that any State, even the most powerful, can claim the right to determine unilaterally that Iraq has again failed to fulfill its obligations, and to unleash at will the "serious consequences" with which that country was rightly threatened if it continued to defy the international community, or to determine the means to be employed [if those grave consequences should be unleashed].¹⁷³

The reason for this is that the primary responsibility for the maintenance of international peace and security belongs to the Security Council. That having been said, however, France has not been reluctant to reshape certain concepts of international law, one of which in particular is creating major problems today. Although France has been a defender of the role of the Security Council in deciding on military intervention and

169. Press Release, Embassy of France in the United States, Iraq—Joint Statement by the People's Republic of China, France and the Russian Federation (Nov. 8, 2002), available at <http://www.info-france-usa.org/news/statmnts/2002/iraq111302.asp>.

170. U.N. SCOR, 57th Sess., 4644th mtg. at 3, U.N. Doc. S/PV.4644 (Nov. 8, 2002).

171. *Id.* at 5.

172. Interview by Patrick Poivre d'Arvor and David Pujadas with Jacques Chirac, President of France, in Elysee Palace, Paris, France (Mar. 10, 2003), available at http://www.info-france-usa.org/news/tatmnts/003/chirac_iraq031003.asp.

173. Alvin Pellet, *L'Agression*, LE MONDE, Mar. 23, 2003.

thus a defender of multilateral preventive action, it has nevertheless innovated by broadening the traditional concept of self-defense.

C. Recognition of a 'Broadened' Notion of Self-Defense

France has broadened the traditional notion of self-defense, first by enlarging the concept of armed attack, one of its key elements, and second by its intervention in the Ivory Coast.

1. The Enlargement of the Concept of Armed Attack

France accepted the broadening of the concept of armed attack when, in agreement with the American position, it decided to regard the September 11 terrorist attacks as an armed attack. The resulting definition reshapes the nature of armed attack in international law. An armed attack no longer involves two states, but rather can involve one state and a group of private individuals. The strictly interstate context in which armed attack had traditionally been conceived has been exceeded.

It was during Operation Enduring Freedom in Afghanistan, undertaken in the context of the North Atlantic Treaty Organization (NATO), that France first recognized the broadening of the concept of armed attack. "What is an alliance? Essentially promises of aid in case of aggression."¹⁷⁴ A promise that NATO kept. On September 12, 2003, for the first time in its history, at the initiative of its then Secretary General, the Briton George Robertson, the alliance invoked Article 5 of its mutual defense treaty.¹⁷⁵ In his farewell address, Mr. Robertson described the moment when NATO invoked Article 5 for the first time. He stated:

We sat there on 12 September 2001 and invoked Article 5 of our founding Treaty which many had to read in detail for the very first time We did it in 5 1/2 hours and loudly told the US we all stood with them, told the world that we were deadly serious, and told the terrorists that they had crossed a line which even the Soviets had not dared to do.¹⁷⁶

So, on September 12, 2003, the nineteen NATO members demonstrated that they shared the United States' vision that:

174. Maurice Bourquin, *Le Problème de la sécurité internationale*, 49 R.C.A.D.I. 469, 525 (1934).

175. Article 5 of the North Atlantic Treaty Organization states:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

North Atlantic Treaty, art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243, available at <http://www.nato.int/docu/basicxt/treaty.htm>.

176. Lord Robertson, NATO Secretary General, Farewell Speech to the Council (Dec. 17, 2003), available at <http://www.nato.int/docu/speech/2003/s031217a.htm>.

If it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.¹⁷⁷

Article 5 deals with armed attack. In invoking it, the members of the Atlantic Alliance accepted that the terrorist acts of September 11 constituted an armed attack, even though these acts were committed by individuals. NATO thus included terrorist acts with the concept of armed attack. Henceforth, acts of private individuals are possible grounds for the exercise of the right of self-defense. It has been noted that there are some precedents for the use of self-defense to justify the use of armed force against terrorists.¹⁷⁸ This was the first time, however, that self-defense was "presented as the primary weapon in the fight against terrorism, without on the whole having met with strong criticism or general disapproval."¹⁷⁹

This leads to equating terrorist acts with a sort of indirect armed attack, a view that was first given systematic expression in a Soviet draft presented at the League of Nations Conference for the Reduction and Limitation of Armaments of 1933.¹⁸⁰ Amended by a seventeen-member committee concerned with questions of security, presided over by Nicolas Politis, this draft became the Convention for the Definition of Aggression, also known as the Politis Report.¹⁸¹ It defines indirect aggression as "support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection."¹⁸² This concept of indirect aggression was accepted later by the U.N. General Assembly in its Resolution entitled Declaration on Principles of International Law Concerning Friendly Relations Among States¹⁸³ and in Article 3(g) of its "Definition of Aggression" Resolution of 1974.¹⁸⁴ The latter Resolution states that: "*Sending armed bands, groups, irregulars or mercenaries by or on behalf of a State, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.*"¹⁸⁵

177. Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001), *reprinted in* 40 INT'L LEGAL MATERIALS 1267, 1267, *available at* <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

178. Joe Verhoeven, *Les 'Etirements' de la légitime défense*, 3 A.F.R.I. 50 (2002).

179. *Id.*

180. This project was sometimes called Project Litvinov, named after the Soviet Foreign Minister who championed it.

181. The Politis Report was not, however, the object of a convention. But regarding the definition of aggression, this act has nevertheless received a large measure of approval within the Committee where all great powers were represented.

182. Convention for the Definition of Aggression art. 2, para. 5, July 3, 1933, 147 L.N.T.S. 52, *available at* http://www.letton.ch/lvx_33da.htm.

183. "Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force." Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 123, U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8082 (Oct. 24, 1970).

184. G.A. Res. 3314 (XXIX), at 143, 29th Sess., Supp. No. 19, U.N. Doc. A/9619 (Dec. 14, 1974).

185. *Id.*

The concept of indirect aggression, which has been recognized by France, broadens the definition of self-defense under Article 51 by expanding the meaning of the term “armed attack.” From now on, even if France does not recognize a right to unilateral preventive self-defense, it is in agreement with the United States on one important point—that the constituent elements of the traditional concept of self-defense as recognized by international law are subject to redefinition. The intervention of the French army in the Ivory Coast on November 6, 2004, provides an empirical example.

2. French Army Intervention in the Ivory Coast

Around 3:00 p.m. on November 6, 2004, Ivorian armed forces loyal to President Laurent Gbagbo, during the course of an aerial bombardment of rebel positions, struck a French army barracks in Bouake.¹⁸⁶ French forces reported that nine people were killed and about twenty injured.¹⁸⁷ In reaction to the attack, France ordered the destruction of the Ivorian air force.¹⁸⁸ Jean-Francois Bureau, spokesman for the French Ministry of Defense, stated that France “had responded in a situation of legitimate defense.”¹⁸⁹ The French army claimed a right of self-defense because it had been attacked in Bouake on November 6, and also because it felt itself threatened during the movement of its troops from the northern part of the country. Moreover, it invoked a state of “broadened self-defense” for the protection of civilians, especially French civilians, and their property in Ivorian territory.¹⁹⁰ French forces took over road intersections in armored cars, and gunboats guarded bridges in an attempt to stop rioting.¹⁹¹

The concept of “broadened self-defense” has no legal basis in international law. It is a French theory intended to justify French intervention. In arguing for a broadened notion of self-defense, France has demonstrated that even if it does not accept the doctrine of unilateral preventive self-defense out of respect for the existing system of law, it does however accept a concept of self-defense that is not recognized by international law. In so doing, France itself invalidates some of its own arguments. In the final analysis, states do not have ideals or progressive ideas. These are the province of civil society. States merely follow their interests, and from these interests flow different interpretations of the U.N. Charter, a document ceaselessly confronted with the infidelities of the parties to it.

CONCLUSION

Several questions still remain unanswered: Why do France and the United States not perceive new threats to international peace and security in the same way? Why are

186. Ivory Coast Mobs Clash with French, November 7, 2004, available at: <http://www.cnn.com/linkto/netscape.html>.

187. *Id.*

188. *Id.*

189. France Attacks Ivorian Airbase, November 6, 2004, <http://news.bbc.co.uk/2/hi/africa/3988769.stm>.

190. France limits Ivory Coast Pullout, November 8, 2004, available at: <http://www.cnn.com/WORLD/africa/11/07/ivory.coast/index.html>.

191. *See* Troops Move to End Ivorian Riots, November 7, 2004, <http://news.bbc.co.uk/2/hi/africa/3989941.stm>.

these two states still divided on problems of international security and the advisability of military intervention, as in Iraq? In other words, what do we believe is the source of legal obligation? According to J.L. Brierly, "we believe that legal obligation obligates us because we believe that the world is a cosmos, an organized whole. Inevitably, all of us will never see the organization's details in the same way."¹⁹²

Inevitably, the United States and France will not see the details of the international system in the same way. We can only take note of our differences in perception and in our ways of dealing with new threats to the peace, and expose them, confront them, attempt to justify them, and understand them. We can never hope to eliminate them.

From the Franco-American crisis and the position of each state on the Iraq question we can take away at least one lesson: the revolution promised by the prohibition of the use of force by Article 2(4) of the U.N. Charter has not occurred because one of its exceptions was poorly drafted. It must be explained to future generations that the United Nations collective security system was defective because Article 51 of the Charter was badly written.

The revolution has not occurred, but this does not threaten the existence of international law or foreshadow its disappearance. For the present, however, we should think hard about these matters, as did heads of state from around the world on September 14, 2005, at the United Nations in New York. These inquiries should give rise to the ambitious idea of rewriting the Charter, not simply that of reforming U.N. bodies. We should not fear change, because, as we all know "what is least new under the sun of the international lawyer is constant change in the law."¹⁹³

192. J.-L. Brierly, *Le Fondement du caractère obligatoire du droit international*, 23 R.C.A.D.I. 463, 549 (1928).

193. P. Weil, *Toujours le même et toujours recommencé: les thèmes contrastes du changement et de la permanence du droit international*, in *ECRITS DE DROIT INTERNATIONAL*, 8 (2000).

COLLECTIVE SECURITY AND THE INTERNATIONAL ENFORCEMENT OF INTERNATIONAL LAW: FRENCH AND AMERICAN PERSPECTIVES

Ana Peyró Llopis

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