

**DON'T STOP NOW:  
THE DEVELOPMENT OF THE INTERNATIONAL LAW  
RIGHT TO USE FORCE IN SELF-DEFENSE**

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**INTRODUCTION**

The question of how to address the threat to international security posed by States attempting to acquire nuclear weapons is at the heart of the issue as to whether and to what extent other States should be able to unilaterally employ force without explicit authorization to do so from the United Nations Security Council. This issue came to the forefront of international debate following the decision of the United States and the United Kingdom to undertake military action in Iraq in March 2003 without the explicit authorization of the Security Council.<sup>1</sup>

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<sup>1</sup> For a formal statement of the U.S. position that it had a right to use force preemptively “even if uncertainty remains as to the time and place of the enemy’s attack,” see the National Security Strategy of the United States of America, at 18, Mar. 16, 2006, *available at* <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>, in which

Concerns about the nuclear intentions and capabilities of both Iran and North Korea<sup>2</sup> and the potential for future terrorist attacks continue to highlight the gravity and import of this question.

The struggle between the United Nations for both leadership and control over States' use of force, on the one hand, and States' desire to use force outside the auspices of UN authorization, on the other, is not new. Hopes that the UN would take center stage in ensuring international peace and security after the Cold War were shattered after both the 2003 military action in Iraq and NATO's humanitarian intervention in Kosovo in 1999 occurred without Security Council authorization. As a result, the effectiveness of the UN and the UN Charter rules on the use of force were questioned. While some scholars have postulated that these rules are ineffective,<sup>3</sup> States nevertheless endorsed the importance of such rules during the 2005 World Summit meeting of Heads of State at the United Nations in New York. The final document for the Summit "reiterate[d] the obligation of all Member States to refrain in their international relations from the threat or use of force in any manner inconsistent with the Charter of the United Nations" and "reaffirm[ed] that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security."<sup>4</sup>

While Heads of State were willing to assert a right to use force as collective security via the Security Council, in cases of human rights violations, they did not address the use of force to respond to external threats.<sup>5</sup> The 2005 World Summit Outcome document considers the use of force by States to counter a threat emanating from another State only at a general policy level.<sup>6</sup> The key theme, throughout the relevant paragraphs, is the centrality of the United Nations Charter; the document actually cites the principles and purposes of the United Nations contained in article 1 of the UN Charter.<sup>7</sup> States also "stress[ed their] commitment to multilateralism," "reaffirm[ed] the authority of the Security Council" related to issues of international peace and security, and "note[d] the role of the General Assembly relating to the maintenance of international peace and security in accordance with the relevant provisions of the Charter."<sup>8</sup>

However, States avoided two key issues that have engendered significant debate over the use of force. The former Secretary-General, Kofi Annan, posed the dilemma in his March 2005 report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, which was provided to States in preparation for the World Summit.<sup>9</sup> The report, which took the findings of a high-level panel of experts convened at the former Secretary-General's request as

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President Bush reiterates his position on pre-emption contained in the National Security Strategy of the United States of the United States of America, 41 I.L.M. 1478 (Sept. 2002).

<sup>2</sup> Public awareness of possible plans by the U.S. was triggered by an article in the *New Yorker* magazine written by Seymour Hersch. See Seymour Hersch, *The Iran Plans*, NEW YORKER, Apr. 17, 2006.

<sup>3</sup> John Yoo, for example, contends that "virtually all international legal scholars think that the Kosovo, Afghanistan, or Iraq wars have left the UN Charter system in tatters." John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 746 (2004).

<sup>4</sup> *2005 World Summit Outcome*, G.A. Res. 60/1, ¶ 77, 79, U.N. Doc. A/RES/60/1 (Oct. 24, 2005). The 2005 World Summit Outcome document essentially charts a path forward for the United Nations in the myriad of areas discussed at the 2000 Millennium Summit and proposes structural changes to the United Nations.

<sup>5</sup> *Id.* ¶ 139.

<sup>6</sup> The topic of the "Use of force under the Charter of the United Nations" is covered in 4 paragraphs. *Id.* ¶ 77-80.

<sup>7</sup> *Id.* ¶ 77.

<sup>8</sup> *Id.* ¶ 79-80.

<sup>9</sup> The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *Report of the Secretary-General*]. The report was drafted as a follow-up to the 2000 Millennium Summit and in preparation for the 2005 Summit Meeting.

its inspiration,<sup>10</sup> spotlights the issue of the right to use force preemptively to defend against an imminent threat and also the issue of the right to use force preventively to defend against a non-imminent or latent threat.<sup>11</sup> Not only did States fail to provide any guidance on these issues, but they did not even suggest that this area requires further discussion.

A proposed paragraph that “recognize[d] the need to continue discussing principles for the use of force, including those identified by the former Secretary-General,” was deleted during the discussions.<sup>12</sup> As a result, States have deliberately bypassed an opportunity to further clarify the development of international law on the use of force despite the impending threats to international peace and security.

The former Secretary-General’s two questions are intended to serve as the catalyst for the elucidation of article 51 of the UN Charter, which provides the only legally acceptable justification for the use of force by a State against another State without UN Security Council authorization.<sup>13</sup> Any military action taken by a State against terrorists or a State developing nuclear weapons, without UN Security Council approval, would likely be justified by the acting State as the exercise of its right to self-defense, under article 51,<sup>14</sup> in order not to be construed as a violation of the prohibition on the use of force contained in article 2(4) of the UN Charter.<sup>15</sup> After all, States do not wish to be perceived as violating international law. The right to use force in self-defense then becomes the crucial focal point in the struggle between the UN and States for control over the use of force in addressing current international threats.

This article, therefore, steps back from current events to focus on the legal framework governing the use of force in self-defense (part I)<sup>16</sup> and the weaknesses in the international standards (part II). In acknowledgement that this right requires further clarification, two different approaches are then evaluated as possible means for addressing such weaknesses. States’ creation of new treaty or customary international law is considered as one option (part

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<sup>10</sup> *A more secure world: Our shared responsibility: Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change*, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *Report of the High-level Panel*].

<sup>11</sup> The Secretary-General, *Report of the Secretary-General*, *supra* note 9, ¶ 122. It should be noted that the former Secretary-General’s use of the term “pre-emptively” differs from that of U.S. President Bush. The former Secretary-General is referring to cases where there is an imminent threat, whereas President Bush is referring to a threat that is more removed in time.

<sup>12</sup> The wording was originally contained in paragraph 47 of the Draft Outcome Document of the high-level plenary meeting of the General Assembly of September 2005 submitted by the President of the General Assembly. U.N. Doc. A/59/HLPM/CRP.1 (June 8, 2005).

<sup>13</sup> Article 51 provides that “[n]othing 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 or security.” U.N. Charter art. 51.

<sup>14</sup> Christine Gray notes that since the Military and Paramilitary Activities case, “states have taken care to invoke Article 51 to justify their use of force. They do so even when this seems entirely implausible and to involve the stretching of Article 51 beyond all measure.” CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 99 (2d ed. 2004).

<sup>15</sup> Article 2(4) provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. Charter art. 2, para. 4.

<sup>16</sup> This article does not consider, however, the issue of what “counter-measures analogous to but short of self-defence” may be taken in response to “forcible measures short of an armed attack” as Dinstein terms them. *See* YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 174 (3d ed. 2001).

III) and several alternative approaches, under the auspices of the United Nations, are also evaluated (part IV).

## **I. THE LEGAL FRAMEWORK**

The right to use force in self-defense is a norm that is tightly woven into the overall legal framework of the use of force. Consideration of such right, therefore, should first be placed within this general context. The starting point for an elaboration of the legal structure on the use of force must begin with the traditional reference to article 38(1) of the Statute of the International Court of Justice (ICJ).

Article 38(1) identifies the sources of law that are to be used by the ICJ in rendering decisions. This article has also become widely accepted as the definitive pronouncement of the sources of international law.<sup>17</sup> The first two sources enumerated in this article are the two primary sources created by States, “international conventions, whether general or particular” and “international custom, as evidence of a general practice accepted as law.”<sup>18</sup> Thus, these two sources are employed to construct the legal framework on the use of force.

### **A. Treaty Rules**

Treaty rules on the use of force are of a unique character when compared with those for other topics of international law. They are found in a document that is the most consequential treaty among States, the United Nations Charter. No other area of international law has such a momentous foundation. While on the one hand, this lends authority and import to the laws on the use of force, it also poses other problems, such as the difficulty of modifying the legal rules.

The principal rule on the use of force is contained in article 2(4) of the Charter, which provides a considerable limitation on the use of force by States.<sup>19</sup> It states 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 purposes of the United Nations.”<sup>20</sup>

Article 2(4) is not an absolute prohibition; the UN Charter specifies three exceptions. Two of the three, the right to individual and collective self-defense, are detailed in article 51 which provides that: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . .”

The third exception is found in Chapter VII of the Charter and concerns enforcement action authorized by the United Nations Security Council. Under Chapter VII, once the Security Council has determined that there is a threat to the peace, breach of the peace, or an act of

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<sup>17</sup> See, e.g., MALCOLM N. SHAW, *INTERNATIONAL LAW* 66 (5th ed. 2003) and ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 17-18 (1994).

<sup>18</sup> Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055.

<sup>19</sup> This provision went further than any previous international agreement in prohibiting the use of force. The Covenant of the League of Nations, the United Nations' predecessor, had not prohibited war between States, but only provided a mechanism intended to allow States to resolve the underlying dispute prior to actually resorting to war. The 1928 Kellogg-Briand Pact contained a declaration by State parties that they “condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.” However, it did not cover the use of force that was not a “war.” Albrecht Randelzhofer, *Article 2(4)*, in 1 *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 115-16 (Bruno Simma ed., 2d ed. 2002).

<sup>20</sup> U.N. Charter art. 2, para. 4.

aggression, it may recommend measures that do not involve the use of armed force, such as the severance of economic or diplomatic relations,<sup>21</sup> or may authorize the use of armed force.<sup>22</sup> No other exception to article 2(4)'s prohibition on the use of force is foreseen under the UN Charter.

### **B. Customary International Law Rules**

While the United Nations Charter contains the foundations for the international legal rules on the use of force, customary international law rules also make a significant contribution to the legal framework. The prohibition on the use of force, contained in article 2(4) of the UN Charter, is a rule of customary international law and is even considered to have the status of *jus cogens*, while the right to use force as a measure of individual or collective self-defense, contained in article 51 of the Charter, is recognized as a customary law right.<sup>23</sup> Customary international law also contributes two rules related to the right to self-defense that are not found in the UN Charter. First, measures of self-defense must be proportionate to the armed attack. Second, such measures must be necessary to respond to it.<sup>24</sup>

## **II. THE WEAKNESSES IN THE LEGAL RULES ON THE RIGHT TO USE FORCE IN SELF-DEFENSE**

The legal framework related to the use of force, as with most areas of international law, is not a seamless one. UN Charter rules and customary international law rules overlap on certain principles, such as the general prohibition on the use of force and the right to use force in self-defense against an armed attack. This does not pose any significant problem; to the contrary, it can actually ensure a more comprehensive application of the legal rules as is evidenced by the ICJ's holding in the Nicaragua case where although the ICJ was unable to apply the UN Charter rules relevant to the use of force, it was able to apply similar rules of customary international law.<sup>25</sup> The rules also complement one another on some points. For example, the customary international law rule, that measures used by a State in self-defense must be necessary and proportionate to the threat, delimits the response of States, which employ force against an armed attack, under article 51 of the UN Charter.<sup>26</sup> However, a crucial question about the scope of this legal framework emerges from the intersection of customary international law and article 51 of the UN Charter, as will be seen below.

In addition, the lack of clarification by States of the reach, parameters and content of the right to use force in self-defense has resulted in ambiguities in the standards. This lack of elucidation differs sharply from the approach taken by States with respect to the prohibition on

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<sup>21</sup> U.N. Charter art. 41.

<sup>22</sup> *Id.* art. 42.

<sup>23</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 190, 193 (June 27). [hereinafter Military and Paramilitary Activities].

<sup>24</sup> *See id.* at 194; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1994 I.C.J. 41 (July 8); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 74 (Nov. 6). The principles of "necessity" and "proportionality" are derived from the Caroline incident. *See infra* note 34 for a brief summary of the incident.

<sup>25</sup> The United States made a reservation to the ICJ's jurisdiction for disputes arising under multi-lateral treaties. Therefore, the ICJ could not consider the claims made by Nicaragua that arose under the UN Charter or other multi-lateral treaties to which the United States and Nicaragua were parties. However, since Nicaragua asserted that the United States violated customary international rules of international, the ICJ was able to assess Nicaragua's claims under customary international law. Military and Paramilitary Activities, *supra* note 23, at 69.

<sup>26</sup> Legality of the Threat or Use of Nuclear Weapons, *supra* note 24, at 41.

the use of force provided for in article 2(4) of the UN Charter. In the case of article 2(4), States have attempted, through the General Assembly, to define more specifically what is included in the prohibition on the threat or use of force. The General Assembly has adopted a series of illuminating instruments including the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>27</sup> the 1974 Definition of Aggression,<sup>28</sup> and the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations.<sup>29</sup> While these resolutions are non-binding, they do guide and influence State behavior<sup>30</sup> and have been cited by the International Court of Justice.<sup>31</sup>

In contrast, only the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations refers to a right of self-defense.<sup>32</sup> Paragraph 13 of the Declaration provides that “States have the inherent right of individual or collective self-defense if an armed attack occurs, as set forth in the Charter of the UN.” Thus, the provision, while reinforcing the view that article 51 of the Charter contains the basis for the right to self-defense, fails to provide any further elaboration on the scope, limits or substance of the right.

**A. *The Intersection of Article 51 and the Customary Law Rule on the Right To Use Force in Self-Defense***

One of the most notable problems with determining the scope of the right to use force in self-defense derives from a lack of clarity as to the interaction between the right to self-defense under the UN Charter’s article 51 and the pre-existing customary international law rule. At its core, the debate concerns whether and to what extent a customary international law right to self-defense was incorporated into the UN Charter’s provision on self-defense through the reference to an “inherent right of individual or collective self-defense” in this article. If article 51 contains the definitive statement on the law, then the right to use self-defense is limited to responses to “armed attacks” by States. To the extent that the customary international law right survived and was fused, as an “inherent right” into article 51 then, arguably, the right to use force in self-defense is broadened substantially and as some would maintain, may include the right to respond to imminent threats, non-imminent latent threats, or even a right to protect nationals abroad.

This dispute remains open and extremely relevant. Proponents of a broad and narrow construction of article 51 refer to the status of customary international law at the time of the drafting of the UN Charter in support of their positions. Views conflict as to whether, at such

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<sup>27</sup> Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970).

<sup>28</sup> Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. Doc. A/9831 (Dec. 14, 1974).

<sup>29</sup> G.A. Res. 42/22, U.N. Doc. A/RES/42/22 (Nov. 18, 1987).

<sup>30</sup> However, despite these elucidations about the meaning of Article 2(4), there is still discussion about its scope, in particular whether armed attacks which are not against the territorial integrity or political independence of a State are still permissible.

<sup>31</sup> See, e.g., *Military and Paramilitary Activities*, *supra* note 23, at ¶¶ 193, 195 (discussing how the ICJ looked for the *opinio juris* of States for customary international law rules in the General Assembly resolutions concerning the 1970 Principles of International Law concerning Friendly Relations, G.A. Res. 2625, *supra* note 27 and the 1974 Definition of Aggression, G.A. Res. 3314, *supra* note 28).

<sup>32</sup> G.A. Res. 42/22, *supra* note 29.

time, the customary right to self-defense was broader than the right articulated in article 51 of the UN Charter.<sup>33</sup>

The argument most frequently used in support of the position that a broader right to self-defense existed than that contained in article 51 of the UN Charter is the Caroline case<sup>34</sup>. Of particular interest is an 1841 letter written by Mr. Daniel Webster, the U.S. Secretary of State, to Mr. Fox, the British Minister in Washington.<sup>35</sup> Mr. Webster's letter was accepted by the British authorities as setting forth general principles in this area of law, namely, that self-defense was justified where there is "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation" and that the responsive action was not "unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."<sup>36</sup>

The formulation of the principle of necessity, contained in Mr. Webster's 1841 letter, was acknowledged by the International Military Tribunal at Nuremberg as providing the criteria for an act of self-defense in the case of an imminent attack.<sup>37</sup> On this basis, it has been argued that the right to self-defense includes a right to use force in the case of an imminent attack and perhaps even a right to protect nationals.<sup>38</sup>

The ICJ addressed the problem of the interplay between the customary and UN Charter rules on self-defense in its Military and Paramilitary Activities decision, but instead of disentangling the sources, the Court essentially intertwined the two. The Court stated that "Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right and it is hard to see how this can be anything other than of a customary nature, even if its present content has been confirmed and influenced by the Charter."<sup>39</sup> Thus, the Court confirmed that a customary international law right of self-defense survived the creation of the UN Charter. However, the Court did not delve into whether this customary right is more extensive than the

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<sup>33</sup> See, for example, the differing views of Bowett and Brownlie concerning the customary international law right to self-defense at the time of the drafting of the UN Charter. Bowett finds that the customary international law right was broader than the Article 51 right and that Article 51 was not included in the Charter in order to restrict such customary right but rather to preserve regional arrangements for defense. Derek Bowett, *SELF-DEFENCE IN INTERNATIONAL LAW* 182-93 (1958). Brownlie claims that the delegations at the San Francisco conference on the UN Charter believed article 2(4) was to be an absolute prohibition on the use of force and that self-defense was to be an exceptional right. Moreover, he finds the customary international law right to be much closer to the article 51 right. See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 273-75 (1963).

<sup>34</sup> The British were fighting Canadian rebels in connection with the Canadian Rebellion of 1837. A group largely comprised of Americans took possession of an island in the Niagara River from which they launched attacks on the Canadian shore and British ships. The Caroline, an American ship, supplied the force on the island with armaments from the U.S. side of the river. In the night of December 29th, a British force seized, set fire and then towed the Caroline into the current of the river, which resulted in its descent into Niagara Falls. R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 83-84 (1938).

<sup>35</sup> Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841), 29 BRITISH AND FOREIGN STATE PAPERS 1129, 1137-1138 (1840-41).

<sup>36</sup> Letter from Lord Ashburton to Mr. Webster (July 28, 1842), 30 BRITISH AND FOREIGN STATE PAPERS, 195, 195-96 (1841-42).

<sup>37</sup> *Judicial Decisions Involving Questions of International Law—International Military Tribunal (Nuremberg), Judgement and Sentences*, 41 AMER. J. INT'L L. 172, 205 (1947). The Tribunal utilizes the necessity criterion in evaluating whether Germany was compelled to attack Norway in order to prevent an invasion by the Allies.

<sup>38</sup> See GRAY, *supra* note 14, at 98.

<sup>39</sup> *Military and Paramilitary Activities*, *supra* note 23, ¶ 176.

right provided in article 51 of the Charter<sup>40</sup> and expressly avoided a determination of whether the scope of the customary right to self-defense includes the use of force in response to an imminent threat of armed attack.<sup>41</sup>

This lingering conflict between the two views on the right to self-defense leaves the scope of the right ambiguous and open to the assertion by the United States that it includes a preemptive right.<sup>42</sup> Some scholars have even reached back into the Caroline incident to support a preemptive right to self-defense. When the British destroyed the *Caroline*, it was docked and therefore not positioned to carry out an immediate attack, although the British were convinced that the ship would be used for future attacks.<sup>43</sup> These facts have been used to justify an attack in self-defense where future attacks are anticipated but are not imminent.<sup>44</sup> Given the lack of consistent state practice and an unclear *opinio juris* on the scope of the right to use force in self-defense, the *Caroline* case tends to be the most authoritative source invoked to justify a broad customary international law right.

## **B. Ambiguities in Treaty and Customary International Law Standards**

A second and more pervasive problem within the legal framework is that the content of article 51 and the companion customary international law standard have not been clarified.

### 1. MEANING OF “ARMED ATTACK” IN ARTICLE 51

Even the requirement of an “armed attack,” which the International Court of Justice,<sup>45</sup> States and scholars uniformly agree does trigger a right to self-defense under customary international law and article 51 of the UN Charter, is susceptible to a variety of interpretations, as to who must carry out the “armed attack” and what the content of the “armed attack” must be, which in turn affect when self-defense may be used.

#### a. Who Must Carry Out the “Armed Attack”

Given that the UN Charter is a treaty among States, it is logical that the requirement of an “armed attack” in article 51 covers attacks by States. However, the issue that is debated, particularly since September 11, 2001, is whether groups or individuals, and in particular terrorists, can be said to carry out “armed attacks” under this article as well.

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<sup>40</sup> Randelzhofer notes that the ICJ only distinguished Article 51 from customary international law on the right to self-defense in the *Military and Paramilitary Activities* case with respect to the obligation in Article 51 to report to the Security Council. See Randelzhofer, *supra* note 19, at 790.

<sup>41</sup> See *Military and Paramilitary Activities*, *supra* note 23, ¶ 194. The ICJ declined to make such a determination in a recent case as well. See *Armed Activities on the Territory of the Congo (D.R. Congo v. Uganda)* 2005 I.C.J. 143 (Dec. 19, 2005) [hereinafter *Armed Activities on the Territory of the Congo*].

<sup>42</sup> See September 2002 and March 2006 National Security Strategy of the United States of America documents, *supra* note 1, at 18. Gray has noted that the UK has used the term of preemption in connection with Operation Enduring Freedom but not with respect to action taken in Iraq. See GRAY, *supra* note 14, at 178 n.86.

<sup>43</sup> Letter from Lord Ashburton to Mr. Webster (July 28, 1942), *supra* note 36, at 197.

<sup>44</sup> For example, Sofaer argues that the necessity principle formulated by Mr. Webster in his 1841 letter should apply to preemptive attacks where “the state on whose territory pre-emptive action is contemplated is not responsible for the threat involved, and is both able and willing to act appropriately to prevent the threat from being realized.” Abraham Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209, 220 (2003) (Italy).

<sup>45</sup> See *Military and Paramilitary Activities*, *supra* note 23, at ¶ 195 (stating that the right to self-defense is “subject to the State concerned having been the victim of an armed attack”).

The International Court of Justice has espoused a definition of “armed attack,” which it claims is derived from customary international law,<sup>46</sup> and which is founded upon the concept of traditional armed forces linked to a State. In its *Military and Paramilitary Activities* decision, the Court stated that an “armed attack” includes “not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State.”<sup>47</sup> In its decision in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case in 2004, the Court held that Israel does not have a right to self-defense since the occupied Palestinian territory is not a State and therefore, actions taken by the Palestinians could not be considered to be “armed attacks.”<sup>48</sup> Thus, pursuant to the Court’s holdings, non-traditional armed attacks, by small groups or individuals not under the authority of a State, such as dissidents or terrorists, would not qualify as “armed attacks” since the individuals or groups are not sent by or on behalf of the State. As a result, attacks without the requisite link to the State do not constitute a sufficient basis for self-defense under article 51 or customary international law according to the Court.

Although the degree of such link between the State and the attacking forces is not entirely clear, what does emerge from the ICJ’s decisions is the underlying idea that to be internationally responsible, a State must have carried out the action or the acts must be attributable to the State in some manner. As the Court clarified, the State would essentially need “effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”<sup>49</sup> However, some scholars argue that article 51 of the Charter does not specifically mention that the attack must be by a State,<sup>50</sup> as contrasted with article 2(4), and others have seized upon Security Council resolutions 1368 and 1373, which were adopted shortly after September 11, 2001, as support for the view that an “armed attack,” under article 51 of the UN

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<sup>46</sup> The Court, in framing its definition of “armed attack,” quoted from the definition contained in the General Assembly’s Resolution 3314 on the Definition of Aggression, which it considered reflected customary international law. *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 139 (July 9). In addition, the ICJ has addressed issues of self-defense in three other cases, but did not elaborate upon the content of the right in those cases. In the *Armed Activities on the Territory of the Congo* case, in which the Democratic Republic of the Congo (DRC) claimed that Uganda had perpetrated illegal armed activities on its territory, the ICJ evaluated the validity of Uganda’s claim to self-defense as well as a similar claim by the DRC against Uganda’s counter-claim. The Court concluded that “the legal and factual circumstances for the exercise of a right to self-defense by Uganda against the DRC were not present” but accepted the DRC’s claim to self-defense. *Armed Activities on the Territory of the Congo*, *supra* note 41, at ¶¶ 147, 304. In the *Legality of the Threat or Use of Nuclear Weapons* case, the court responded to the question posed by the General Assembly, “Is the threat or use of nuclear weapons in any circumstances permitted under international law?” The Court held that it was unable to “reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake.” *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 24, ¶ 97. In the *Oil Platforms* case, the Court reviewed whether a U.S. attack on Iranian oil platforms could be justified as self-defense. Thus, the Court considered whether factually the U.S. had produced sufficient proof of an armed attack. It concluded that the U.S. had not met the standard of proof. *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. ¶¶ 64-72 (Nov. 6.).

<sup>49</sup> *Military and Paramilitary Activities*, *supra* note 23, at ¶ 115. *But cf.* *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A (Judgment), 38 I.L.M. 1518, ¶¶ 115-145 (July 15, 1999) (disagreeing with the ICJ’s employment of the “effective control” test and believes that the proper standard should be one of “overall control”).

<sup>50</sup> Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AM. JUR. INT’L. L. 52, 58 (2005).

Charter, can be committed by a non-State organization, such as a terrorist group.<sup>51</sup> The Caroline case has also been cited in support of this view.<sup>52</sup>

b. Nature of the “Armed Attack”

The ICJ’s decision in the Military and Paramilitary Activities case left a host of other questions and issues, related to what the content of an “armed attack” must be, unanswered. Who must be killed? Would civilians be sufficient or would officials of the government need to be affected? Can the attack be merely the killing of one person on the territory of another State? What level of deaths, crudely put, would be required? Is it sufficient to harm infrastructure or property in the territory of the State and if so, how much damage would have to be done? Does injuring a State’s nationals or property on the high seas or in another State constitute an armed attack and in such case, who and what would have to be attacked and what would have to be the degree of such attack?

In other words, significant ambiguity exists as to who and what must be attacked, where such persons or things must be attacked, and the scale of the attack. One of the few points of reference on these issues, besides the Military and Paramilitary Activities case, is the Oil Platforms case. This case suggests that attacks on commercial vessels of a State as well as vessels of another State, which sailed under the flag of the State that was attacked, might constitute sufficient targets. Apart from this point, the decision in the Oil Platforms case, which is primarily factually based, fails to provide any real elucidation of the concept of “armed attack.”<sup>53</sup>

Debate also centers on the issue of whether small attacks, which do not individually rise to the level of an “armed attack,” could be grouped together under the “cumulation of events” approach and in this way considered to be an “armed attack.” The ICJ in its decisions in the Military and Paramilitary Activities, Oil Platforms and Armed Activities on the Territory of the Congo cases,<sup>54</sup> suggests that the “cumulation of events” theory could be used by a State to justify the use of force in self-defense,<sup>55</sup> but the Security Council in its 1964 resolution concerning the Harib Fort did not agree with this approach.<sup>56</sup>

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<sup>51</sup> See Thomas Franck, *What Happens Now? The United Nations after Iraq*, 97 AM. J. INT’L. L. 607, 610 (2003). See also Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT’L. L.J. 7, 17 (2003).

<sup>52</sup> Greenwood, *supra* note 51. However, the background to the Caroline case and the correspondence between Mr. Webster and Mr. Fox and between Lord Ashburton and Mr. Webster belie this interpretation of the Caroline case. The attacks against the British were part of a rebellion within British territory and the rebels were British subjects. In addition, Mr. Webster notes in a letter sent to Mr. Fox that the rebels were partaking in a civil war, in which Americans had taken the side of the rebels. Letter of April 24, 1841 from Mr. Webster to Mr. Fox, *supra* note 35, at 1134. Thus, these rebels were more akin to Basque separatists or Chechnyan rebels fighting against the authorities than to Al Qaeda operatives committing terrorist acts.

<sup>53</sup> The General Assembly’s 1974 Definition of Aggression provides that “[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State” constitutes an act of aggression. G.A. Res. 3314, *supra* note 28, at ¶ 3(d).

<sup>54</sup> *Armed Activities on the Territory of the Congo*, *supra* note 41, at ¶ 146.

<sup>55</sup> *Military and Paramilitary Activities*, *supra* note 23, at ¶ 231; *Oil Platforms*, *supra* note 24, at ¶ 64.

<sup>56</sup> See S.C. Res. 188, U.N. SCOR, 19th Sess., U.N. Doc. S/5650 (Apr. 9, 1964) and U.N. SCOR, U.N. Doc. S/5635 (Apr. 9, 1964).

In addition, there is no international mechanism for determining which State is the aggressor and which the victim<sup>57</sup> so as to clarify which State is entitled to use force in self-defense.<sup>58</sup> Therefore, as Franck says, the tendency is “to attack first and lie.”<sup>59</sup>

## 2. THE RESPONSE TO AN “ARMED ATTACK”

The requirements, articulated in Mr. Webster’s letter in the Caroline case, that the measures taken in response to the armed attack must be necessary and proportionate in order to be lawful, are not entirely clear either. The ICJ in the Nicaragua case, although concluding that there was no “armed attack” to justify the U.S. claim of collective self-defense, still determined that the requirements of necessity and proportionality in relationship to the U.S. response were not met. The Court, however, did not elaborate upon the content of the legal principles, but instead applied them to the facts.<sup>60</sup> Similarly, in its decisions in the Oil Platforms and Armed Activities on the Territory of the Congo cases as well as its advisory opinion in the Legality of the Threat or Use of Nuclear Weapons case, the Court, while citing the standards of necessity and proportionality, did not explain their content.<sup>61</sup>

With respect to the necessity requirement, some scholars claim that this means that “attempts at achieving a peaceful solution have already been exhausted.”<sup>62</sup> Implicit in this formulation is the idea that force is only to be used as a last resort<sup>63</sup> and as an extreme measure. However, others find that such an approach cannot be applied in all situations.<sup>64</sup> The criterion that the response to an “armed attack” must be proportionate is even less well defined than that of necessity. A basic question related to the principle of proportionality is whether, in deciding what measures of force should be used in self-defense, account should be taken of the threat of attack in the future, past attacks or both.

These concepts, according to Gray, have not been discussed much by scholars since the determination in actual cases is normally a factual one.<sup>65</sup> However, without any guidance on the application of the principles of necessity and proportionality, States are free to interpret them to suit their needs, as was demonstrated by the U.S. military action in Afghanistan. Moreover, just as there is no mechanism for determining whether a State is authorized to use self-defense, there is no mechanism for determining whether the measures used in self-defense meet the necessity and proportionality requirements.

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<sup>57</sup> Thomas Franck, *Who Killed Article 2(4)*, 64 AM. J. INT’L. L. 809, 811 (1970).

<sup>58</sup> The Security Council may review the basis for a claim to self-defense and the issue might come before the ICJ, but this occurs on a case-by-case basis since there is no regular mechanism for the review of such claims.

<sup>59</sup> Franck, *supra* note 57, at 811.

<sup>60</sup> Military and Paramilitary Activities, *supra* note 23, at ¶¶ 194, 237.

<sup>61</sup> Legality of the Threat or Use of Nuclear Weapons, *supra* note 24, at ¶ 41-3. However, the Court stated that to be proportionate, the self-defense must comply with international humanitarian law rules. *Armed Activities on the Territory of the Congo*, *supra* note 41, ¶ 147; *Oil Platforms*, *supra* note 24, at ¶ 74-7.

<sup>62</sup> Antonio Cassese, *The International Community’s Response to Terrorism*, 38 INT’L & COMP. L.Q. 589, 597 (1989). Dinstein also follows this approach. He states that there must be “a necessity to rely on force (in response to the armed attack) because no alternative means of redress is available.” DINSTEIN, *supra* note 16, at 184.

<sup>63</sup> Cassese, *supra* note 62, at 596.

<sup>64</sup> OSCAR SCHACTER, INTERNATIONAL LAW IN THEORY AND PRACTICE, 152-3 (1991).

<sup>65</sup> GRAY, *supra* note 14, at 121.

### 3. OTHER ISSUES

Article 51 also provides that self-defense is permissible “until the Security Council takes action.” Thus, there is a duty to discontinue using force in self-defense once the Security Council has acted. However, this phrase raises questions as to what constitutes “action.” While arguably, the Security Council does not have to authorize military measures in order to have taken “action,” it is not clear whether a generally phrased Security Council resolution demanding that the parties cease hostilities would suffice or whether the resolution would have to refer to a termination of the right to self-defense or authorize or require States to take measures. If States are not clear on when the Security Council has undertaken action then they would feel free to continue their military action in self-defense.

The right to employ collective self-defense raises many of the same issues mentioned above, but also introduces several particular ones. While the ICJ stated in the *Military and Paramilitary Activities* case that an “armed attack” does not include “assistance to rebels in the form of the provision of weapons or logistical or other support,”<sup>66</sup> the Court did not elaborate further, thus leaving a significant gray area as to whether other types of assistance, and if so which ones, by a third State to a non-State entity, such as rebels or a terrorist group, attacking another State could constitute an “armed attack.” In addition, it is not clear, following the decision in the *Military and Paramilitary Activities* case, whether the victim State must make a timely declaration of an attack and formally request assistance from a third State.<sup>67</sup>

### III. POSSIBLE LEGAL APPROACHES BY STATES TO RESOLVE SUCH WEAKNESSES

Despite States’ desire to sidestep a prime opportunity, at the September 2005 World Summit, to suggest the need for the further development of international law principles related to the use of force and to indicate aspects for its development, they now could pursue two traditional means to develop the international law rules on the right to use force in self-defense: first, the creation of new treaty rules; or second, the creation of new customary international law rules.

#### A. *New Treaty Rules*

The drafting of a new treaty provides one means for States to further refine the right to use force in self-defense. However, States have never revised or supplemented the UN Charter rules on the use of force by a later treaty, although they have created disarmament treaties that concern the means available for waging armed conflict, in particular on the prohibition of the use and production of certain weapons, including nuclear, biological and chemical weapons.<sup>68</sup>

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<sup>66</sup> The ICJ in the *Military and Paramilitary Activities* case stated “the Court does not believe that the concept of “armed attack” includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.” *Military and Paramilitary Activities*, *supra* note 23, at 195. Although the wording of the Court is a bit convoluted, the ICJ essentially expressed the idea that an “armed attack” does not include situations where assistance to rebels takes the form of weapons, logistical aid, or other support. However, it would have made more sense for the ICJ to say that the State is internationally responsible for the armed attack through its contribution since the provision of assistance in and of itself, does not constitute an armed attack.

<sup>67</sup> *See id.* ¶ 199.

<sup>68</sup> Examples include the Comprehensive Nuclear Test Ban Treaty, Sept. 24, 1996, U.N. Doc. A/50/1027, Annex; the Convention on Prohibitions or Restriction on the Use of Conventional Weapons which may be deemed to be

Despite States' willingness to adopt General Assembly resolutions on the prohibition on the use of force, as mentioned above in section II, States have demonstrated a distinct unwillingness to turn such resolutions into a treaty, which would formally bind them. In addition, they have been unable to reach agreement on the codification of further standards on the right to self-defense and have not acted, by means of the General Assembly, to have the topic referred to the International Law Commission for progressive development.

Practically speaking, the amendment of any of the UN Charter provisions would be extremely difficult; this would require a vote of two-thirds of the 192 States in the General Assembly and ratification by two-thirds of the member States, including all five permanent members of the Security Council.<sup>69</sup> As a result, it is unlikely that States will take the initiative to clarify the content of the rule on the use of force in self-defense through the creation of a new treaty.

### **B. *New Customary International Law Rules***

The possibility of States creating new customary international law rules to resolve ambiguities in the present rules on the use of force in self-defense also has several deficiencies. First, customary international law rules in this area are slow to develop. Second, there are fundamental difficulties with determining when a new rule of customary international law has been created related to the use of force. Until the International Court of Justice has clearly acknowledged in a decision that a new customary international rule exists, debate over the existence of the rule generally continues unabated among scholars.

Divergences in views, as to when a new customary international law rule has been established, are due to the difficulty in determining when there is sufficient *opinio juris* and state practice to establish the rule. The law on the use of force, and more specifically the right to self-defense, is also open to the criticism that state practice is being established and unduly influenced by a few militarily assertive States.<sup>70</sup> While, from a legal standpoint, action by a single State could create customary international law if there is sufficient *opinio juris*, one of the profound hurdles in the area is in determining exactly whether there is such *opinio juris* of other States. The natural places to look to determine what States believe are votes on Security Council and General Assembly resolutions related to such uses of force. However, votes in these bodies are often based on political rather than legal considerations and thus, unless a General Assembly resolution specifically states that it is articulating legal principles, it could not be relied upon as evidence of sufficient *opinio juris*.

Customary international law rules also have the disadvantage of frequently being of a general nature and, therefore, would not necessarily have the specificity to resolve the particular difficulties related to the right to self-defense.

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Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II, and III), Oct. 10, 1980, 1342 U.N.T.S. 137; the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45; and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacterial (Biological) and Toxin Weapons and on their Destruction, Mar. 26, 1975, 1015 U.N.T.S. 163.

<sup>69</sup> U.N. Charter art. 108.

<sup>70</sup> While Vaughan Lowe does not have any difficulty with customary international law reflecting the interests and concerns of the States that most actively use force, States that are not so active would likely not take the same view. See Vaughan Lowe, *The Iraq Crisis: What Now*, 52 INT'L & COMP. L.Q. 859, 863 (2003).

#### **IV. MEANS FOR THE UNITED NATIONS TO CONTRIBUTE TO THE RESOLUTION OF SUCH WEAKNESSES**

The United Nations furnishes a logical place to look for means to clarify the international law rules on self-defense. Since only States can create international law, the role of the United Nations, by definition, is limited to facilitating this process. The question then becomes one of identifying the proper UN body and its means to do so.

##### **A. *The Potential Role of United Nations Bodies***

The first logical body to turn to is the General Assembly, which has the key role in the development of international law under the UN Charter. Specifically, the role of the General Assembly is to “initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification.”<sup>71</sup> This UN body does not generally carry out this work itself, but instead assigns the development of international law topics to the International Law Commission, which it created only a few years after its own formation.<sup>72</sup> While the International Law Commission has drafted articles on a variety of topics, it has never addressed the issue of the use of force<sup>73</sup> and, as mentioned above, there does not presently appear to be any initiative to assign this subject to the Commission by the General Assembly.<sup>74</sup>

Moreover, if the General Assembly attempted to formulate standards in a resolution at this time, there is a risk, given the General Assembly’s political nature, that it would be compelled to draft a document at the lowest common denominator. Thus, the document, in order to meet the wishes of all States, would be virtually devoid of any meaningful content and would not provide the clarification and substance required.

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<sup>71</sup> U.N. Charter art. 13, para. 1(a).

<sup>72</sup> *Statute of the International Law Commission*, G.A. Res. 174 (II), U.N. Doc. A/519 (Nov. 21, 1947). The General Assembly has created other bodies as well to assist it with such responsibilities, including the United Nations Commission on International Trade Law, the Sixth Committee and a variety of ad hoc committees. See Carl-August Fleischhauer, *Article 1*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 298-317, (Bruno Simma, ed., 2002).

<sup>73</sup> The International Law Commission, however, has included references to the use of force in international criminal law documents, which establish individual responsibility for certain crimes. For example, see Article 2 of the 1954 “Draft Code of Offences against the Peace and Security of Mankind,” which includes, as a crime under international law for which responsible individuals shall be punished, “Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defense.” *Yearbook of the International Law Commission*, [1954] vol. II, 6th Sess. 140, U.N. Doc. A/2693 (1954). Also see the 1966 *Draft Code of Crimes Against the Peace and Security of Mankind*, which provides for individual responsibility for a person “who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State.” *Report of the International Law Commission to the General Assembly*, ¶ 16, 48 U.N. GAOR Supp. (No. 10), U.N. Doc. A/51/10 (May 6-July 26, 1996). In addition, the International Law Commission’s 2001 “Articles on Responsibility of States for Internationally Wrongful Acts” includes a provision that reinforces Article 2(4) of the UN Charter. Specifically, Article 50 provides that “[c]ountermeasures shall not affect: (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.” *Report of the International Law Commission to the General Assembly*, ¶ 50, 56 U.N. GAOR Supp. (No. 10), Annex to G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

<sup>74</sup> The International Law Commission (ILC) could, of course, initiate the codification of the law on the use of force, but what is needed with respect to the development of the right to self-defense is further development, which the ILC cannot initiate but must have assigned to it by the General Assembly. See *Statute of the International Law Commission*, *supra* note 72, arts. 16, 18.

Another potential forum for the resolution of such ambiguities is the International Court of Justice. However, the Court thus far has heard only a handful of cases relating to the use of force in self-defense and has been fairly tentative in its decisions. In the *Military and Paramilitary Activities and the Armed Activities on the Territory of the Congo* cases, for example, the ICJ specifically declined to render a judgment on the legality of the use of anticipatory self-defense.<sup>75</sup> Moreover, in these cases, as well as the *Oil Platforms* case and the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, while the Court affirmed that the use of force in self-defense must meet the requirements of necessity and proportionality, it did not elaborate upon the legal content of these standards as mentioned in Section II.B.2 above.<sup>76</sup> Thus, the Court provides a plausible option, but would need to be much less tentative in elaborating principles in order to provide effective guidance on the various issues related to self-defense.

There is another resource within the UN, which is often overlooked in the development of international law: the Secretary-General with the UN secretariat that he supervises. The Secretary-General owes his allegiance to the United Nations rather than to his own State of nationality or to any other State or States<sup>77</sup> and possesses an enormous potential for stimulating the clarification of the content of rules on the use of force in self-defense. The former Secretary-General, Kofi Annan, has already initiated such a process.

## **B. *The Reports***

The initial step taken by the former Secretary-General to clarify and expound upon the substance of article 51 in the UN Charter as well as customary international law rules related to the use of force, was the invocation of a High-level Panel of Experts in November 2003. The Panel, comprised of eminent former government officials, many of whom also have held high level positions in international organizations, was mandated to recommend measures for ensuring effective collective security.<sup>78</sup> After a little more than a year, the Panel provided its completed report titled “A more secure world: Our Shared Responsibility” to the former

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<sup>75</sup> See *Military and Paramilitary Activities*, *supra* note 23, ¶ 194; *Armed Activities on the Territory of the Congo*, *supra* note 41, ¶ 143.

<sup>76</sup> *Military and Paramilitary Activities*, *supra* note 23, ¶ 194, 237; *Armed Activities on the Territory of the Congo*, *supra* note 41, ¶ 147; *Oil Platforms*, *supra* note 24, ¶ 74-77, *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 24, ¶¶ 41-43.

<sup>77</sup> Article 100 of the UN Charter reads as follows:

“1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization. 2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

U.N. Charter art. 100.

<sup>78</sup> As the former Secretary-General stated in his report, “In November 2003, alarmed by the lack of agreement among Member States on the proper role of the United Nations in providing collective security—or even on the nature of the most compelling threats that we face—I set up the High-level Panel on Threats, Challenges and Change.” *Report of the Secretary-General*, *supra* note 9, ¶ 76. The High-level Panel was asked by Kofi Annan “to assess current threats to international peace and security; to evaluate how our existing policies and institutions have done in addressing those threats; and to make recommendations for strengthening the United Nations so that it can provide collective security for all in the twenty-first century.” *Report of the High-level Panel*, *supra* note 10, ¶ 3.

Secretary-General in December 2004.<sup>79</sup> The document views collective security not only from the standpoint of inter-State conflict and internal conflicts, but also as linked to economic and social threats, such as poverty, infectious diseases and environmental degradation as well as nuclear, biological, chemical and radiological weapons, terrorism and transnational crime.

Then, in March 2005, the former Secretary-General issued his report, which includes an assessment of the progress made towards the objective of freedom from fear established in the Millennium Summit report.<sup>80</sup> The 2005 report, titled “In larger freedom: towards development, security and human rights for all,”<sup>81</sup> was inspired by the High-level Panel’s conclusions and advances similar views. The report was intended to lead to the adoption by States of kindred points on the use of force in the 2005 World Summit Outcome document.<sup>82</sup> However, notably absent from the Summit document is any reference to the right to self-defense. Thus, the High-level Panel’s Report and the former Secretary-General’s report remain the cornerstones for further clarification of the right to use force in self-defense.

## 1. GENERAL POINTS

The former Secretary-General and the High-level Panel begin their discussion of the use of force with, as would be expected, the rules of law embodied in the UN Charter.<sup>83</sup> The High-level Panel embraces the concept that security should be maintained by the rule of law and rejects the idea of security being maintained by a “balance of power, or by any single—even benignly motivated—superpower.”<sup>84</sup> In addition, the former Secretary-General’s report accepts the premise explicitly recognized by the High-level Panel that “[m]ilitary force, legally and properly applied, is a vital component of any workable system of collective security.”<sup>85</sup> Thus, neither report rules out all uses of force.

Both reports make a clear distinction between situations in which States may use force in self-defense and those where collective security should be employed to address the threats. The section in the former Secretary-General’s report on the use of force is much briefer than that of the Panel’s report, thereby leaving the Panel’s report as the more substantive consideration of such issues.

## 2. STATES’ RIGHT TO USE FORCE IN SELF-DEFENSE

Kofi Annan, in his “In Larger Freedom” report, notes that the right to use self-defense, under article 51 of the UN Charter, covers not only actual “armed attacks,” which is explicitly

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<sup>79</sup> *Id.*

<sup>80</sup> In the section of the report on *Freedom from Fear*, the focus is the “protection of communities and individuals from internal violence.” With the end of the Cold War it was believed, and hoped, that the principal problems of security which the world community need to address were those of internal conflicts. The events of September 11, 2001 changed all this. The Secretary-General, *We the Peoples: The Role of the United Nations in the 21st Century, delivered to the General Assembly*, U.N. Doc. A/54/2000 at 43 (Mar. 27, 2000).

<sup>81</sup> *Report of the Secretary-General*, *supra* note 9.

<sup>82</sup> *2005 World Summit Outcome*, *supra* note 4.

<sup>83</sup> *Report of the Secretary-General*, *supra* note 9, at ¶ 123; *Report of the High-level Panel*, *supra* note 10, at ¶ 185.

<sup>84</sup> *Report of the High-level Panel*, *supra* note 10, at ¶¶ 185-186.

<sup>85</sup> *Id.* ¶ 183. The Report of the former Secretary-General states that “an essential part of the consensus we seek must be agreement on when and how force can be used to defend international peace and security.” *Report of the Secretary-General*, *supra* note 9, ¶ 122.

mentioned in article 51, but also imminent threats.<sup>86</sup> The High-level Panel similarly notes that “according to long established international law,” a State “can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate.”<sup>87</sup> Neither the former Secretary-General’s nor the High-level Panel’s report details the legal basis for this right. However, their acknowledgement of such a right implicitly buttresses the view that a customary right to use force against an imminent threat was incorporated into article 51 of the Charter.

### 3. THE USE OF COLLECTIVE SECURITY TO ADDRESS EXTERNAL THREATS

The former Secretary-General clearly distinguishes the situation of an imminent threat from a non-imminent one. In the case of the latter, the report provides that “the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security.”<sup>88</sup> Thus, while phrased more diplomatically, the former Secretary-General’s report endorses the High-level Panel’s more explicit view on non-imminent threats, that “if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to.”<sup>89</sup>

As a result, the reports reject the U.S./Bush policy on pre-emptive intervention. Any claim by a State that it is using military force in self-defense where the attack is non-imminent would be an attack against the political or territorial independence of a State and inconsistent with the purposes of the United Nations.<sup>90</sup> In addition, the reports’ distinction between imminent and non-imminent threats contradicts a broad interpretation of Security Council resolutions 1368 and 1373<sup>91</sup> that would authorize States to take military action against terrorists at any time.<sup>92</sup> The former Secretary-General’s report “embrace[s] the broad vision that the [Panel’s] report articulates and its case for a more comprehensive concept of collective security.”<sup>93</sup> In discussing collective security to address external threats, the Panel reaffirms the right of the Security Council to approve coercive action, including military coercion.<sup>94</sup> Thus, the Panel clarifies that the Security Council may authorize action against not only a present or an imminent threat, but also a more remote threat in the future.<sup>95</sup>

The Panel’s assertion of the Security Council’s right to authorize military action is coupled with a veiled plea that States not take action themselves but instead, work through the United Nations, specifically the Security Council. Rather idealistically or hopefully perhaps, the

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<sup>86</sup> *Report of the Secretary-General*, *supra* note 9, ¶ 124.

<sup>87</sup> *Report of the High-level Panel*, *supra* note 10, ¶ 188.

<sup>88</sup> *Report of the Secretary-General*, *supra* note 9, ¶ 125.

<sup>89</sup> *Report of the High-level Panel*, *supra* note 10, ¶ 190.

<sup>90</sup> U.N. Charter art. 2, para. 4.

<sup>91</sup> Security Council resolution 1368, passed the day after the September 11, 2001 terrorist attacks on the U.S., calls “on the international community to redouble their efforts to prevent and suppress terrorist acts.” S.C. Res. 1368, ¶ 4, U.N. Doc. S/RES/1368 (Sept. 12, 2001). Security Council resolution 1373 passed two and one-half weeks after the attacks, provides “that all States shall “[t]ake the necessary steps to prevent the commission of terrorist acts.” S.C. Res. 1373, ¶ 2(b), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>92</sup> However, the reports do not clarify whether force can be used in self-defense solely against States or also against non-state actors.

<sup>93</sup> *Report of the Secretary-General*, *supra* note 9, ¶ 77.

<sup>94</sup> *Report of the High-level Panel*, *supra* note 10, ¶ 193.

<sup>95</sup> *Id.*

High-level Panel asserts that “the balance between unilateral use of force and collectively authorized force has shifted dramatically” and then more realistically states that “[c]ollectively authorized use of force may not be the rule today, but it is no longer an exception.”<sup>96</sup>

However, while the Panel’s report specifically raises the issue of what to do when “a State appears to be posing an external threat, actual or potential, to other States or people outside its borders, but there is disagreement in the Security Council as to what to do about it,”<sup>97</sup> as occurred prior to the U.S.-led military intervention in Iraq in March 2003, neither report clarifies what steps should be taken in such cases. Instead, the Panel’s report emphasizes the central role of the Security Council in the area of international peace and security and links the Security Council’s effectiveness to proposed reforms to that body.<sup>98</sup>

#### 4. MORE THAN JUST LAW

Perhaps the most striking and far-reaching points contained in the former Secretary-General’s and the Panel’s reports are the five factors that relate not to “whether force *can* legally be used but whether, as a matter of good conscience and good sense, it *should* be.”<sup>99</sup> These five factors, which are essentially an elaboration and extension of the criteria of necessity and proportionality, first formulated in Secretary of State Webster’s response in the Caroline case, include how serious the threat is, whether there is a proper purpose in the usage of force, whether military force is used as a last resort, whether proportional means are used, and what the balance of the consequences are.

The Panel posits a potential clarification of the “necessity” requirement through the inclusion of the criteria of “seriousness of threat,” and “proper purpose”; these supplement the more traditional notion of “necessity” articulated by the “last resort” criterion, that “every non-military option for meeting the threat in question [has] been explored, with reasonable grounds for believing that other measures will not succeed.”<sup>100</sup> The “seriousness of threat” criterion raises the preliminary question whether the threatened harm is “of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force,” while the “proper purpose” criterion gives prominence to the motives for the use of force and prescribes the strict requirement that “the primary purpose of the proposed military action is to halt or avert the threat in question.”<sup>101</sup> Force used for another purpose, such as regime change or to stymie the development of nuclear weapons, would be a violation of article 2(4) of the Charter and risks being considered as an act of reprisal. The “proper purpose” requirement also impliedly suggests that where a single or even a string of terrorist acts occur, the decision as to whether force could be used in self-defense would be determined on the basis, not of the concluded acts, but of whether there is an imminent threat.

With respect to “proportionality,” the High-level Panel states that “the scale, duration and intensity of the proposed military action [should be] the minimum necessary to meet the threat in question.”<sup>102</sup> This definition of “proportional means”<sup>103</sup> reaffirms that it is necessary to look to

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<sup>96</sup> *Id.* ¶ 81.

<sup>97</sup> *Id.* ¶ 187.

<sup>98</sup> The Report of the High-level Panel states the following: “The Council may well need to be prepared to be much more proactive on these issues, taking more decisive action earlier, than it has in the past.” *Id.* ¶ 194.

<sup>99</sup> *Id.* ¶ 205.

<sup>100</sup> *Id.* ¶ 207.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* ¶ 207.

the future threat rather than the attacks which may have already taken place in determining how to respond. As a result, the argument that proportionality should be determined based not only on future threats but also on prior acts, is correct. The “balance of consequences” criterion then adds another dimension to the consideration of the means to be used against a particular threat by posing the issue of whether “there [is] a reasonable chance of the military action being successful in meeting the threat in question with the consequences of action not likely to be worse than the consequences of inaction.”<sup>104</sup> Thus, the effects of the use of force must also be evaluated.

Both the former Secretary-General and the High-level Panel recommend that the Security Council adopt a resolution that contains these five principles and utilize them “when deciding whether to authorize or mandate the use of force.”<sup>105</sup> Thus, the Security Council is to consider these “five basic criteria of legitimacy,” as the High-level Panel terms them, when determining whether to authorize force as collective security.

The reports are a bit ambiguous as to whether these five criteria also should apply to decisions by the Security Council when evaluating whether to endorse a State’s or States’ use of force in self-defense, without prior Security Council authorization. While both reports state that these criteria should be used to “authorize or *endorse* the use of military force,”<sup>106</sup> the term “endorse” is dropped in the recommendatory paragraphs.<sup>107</sup> Yet, the High-level Panel’s final recommendation in the “Using force: rules and guidelines” section of the report suggests that “it would be valuable if individual Member States, whether or not they are members of the Security Council, subscribed to them.”<sup>108</sup> Since the five criteria essentially add content to the necessity and proportionality requirements of self-defense, they could be used by States on the Security Council when evaluating whether to endorse action taken by States in self-defense, as well as by States contemplating self-defense actions. In the latter case, the criteria would assist a State in making a determination as to whether and how force, intended to be used as self-defense, should be carried out.<sup>109</sup>

### **C. *The Effects of the Former Secretary-General’s and the High-Level Panel’s Reports***

The former Secretary-General’s and the High-level Panel’s reports lay a foundation for the further development of international rules on the use of force in self-defense. As a starting point, they are a clear reaffirmation of the centrality of the UN Charter’s rules on the use of force.<sup>110</sup> The reports also implicitly reject the notion that the Charter’s rules on the use of force

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<sup>103</sup> The former Secretary-General states this criterion as “whether the military option is proportional to the threat at hand.” *Report of the Secretary-General, supra* note 9, ¶ 126.

<sup>104</sup> *Report of the High-level Panel, supra* note 10, ¶ 207.

<sup>105</sup> *Report of the Secretary-General, supra* note 9, ¶ 126. The High-level Panel also suggests that these be adopted by the General Assembly in a declaratory resolution. *Report of the High-level Panel, supra* note 10, ¶ 208.

<sup>106</sup> *Report of the Secretary-General, supra* note 9, ¶ 126. *Report of the High-level Panel, supra* note 10, ¶ 207 (emphasis added).

<sup>107</sup> *Report of the Secretary-General, supra* note 9, ¶ 126. *Report of the High-level Panel, supra* note 10, ¶ 208 and Annex, ¶ 6(h).

<sup>108</sup> *Report of the High-level Panel, supra* note 10, ¶ 209.

<sup>109</sup> In the case of an actual armed attack which has already occurred, however, the criterion of “seriousness of threat” would not be applicable.

<sup>110</sup> This general point, at least, was endorsed by States in the 2005 World Summit Outcome document. *2005 World Summit Outcome, supra* note 4.

in self-defense should be rewritten to account for current concerns about terrorism<sup>111</sup> although they do acknowledge the critical need for a “comprehensive convention on terrorism”<sup>112</sup> since, as the Panel states, “the norms governing the use of force by non-State actors have not kept pace with those pertaining to States.”<sup>113</sup> During Kofi Annan’s tenure as Secretary-General, he pursued and proposed means for dealing with terrorism other than through the use of force. For example, a report on suggested approaches for combating terrorism, which he issued during the last year of his term as Secretary-General, nowhere mentions the use of force to combat terrorism, but instead proposes peaceful options involving co-operation among states.<sup>114</sup>

The former Secretary-General’s and the High-level Panel’s reports take the preliminary steps in defining the contours and content of the use of force in self-defense. First, these reports reaffirm the three exceptions to the prohibition on the use of force: the right to individual and collective self-defense and the right to exercise collective security pursuant to a decision of the Security Council.<sup>115</sup> Although the reports do not expressly reject other exceptions, their enumeration of permitted exceptions could be interpreted as a negation of other possible exceptions, such as reprisals involving the use of force as well as the protection of nationals.

Second, the reports clarify the fundamental conflict between the customary international law rules and article 51 in the UN Charter on the scope of the right to self-defense. The reports acknowledge that a customary international law right to use force in self-defense, where an attack is imminent, was incorporated into the UN Charter provision. As a result, while the Panel reaches the conclusion that it does not favor the reinterpretation of article 51,<sup>116</sup> both the Panel and the former Secretary-General have established their interpretation of article 51.

Third, the reports draw a clear line between the right of a state to use force in self-defense against an “imminent threat” and the obligation of States to seek Security Council authorization in order to use force against “non-imminent threats.”

Fourth, they provide the basis for further refinement of the meaning of the “necessity” and “proportionality” requirements for any military response taken by States in self-defense under article 51 with the five criteria of legitimacy for the use of force.

With these four clarifications, the former Secretary-General and the High-level Panel essentially attempted to constrain the right of States to use force in self-defense. The “five basic criteria of legitimacy” are of particular importance. They would enhance the meaning of the “necessity” and “proportionality” requirements and could, if applied by States to their own decisions on self-defense or to the decisions of other States, when determining whether to express support or disapproval for such actions, limit the discretion of States in this area. As a result, it would be more difficult for States to use self-defense as an excuse for military action that violates article 2(4) of the Charter. Moreover, this clarification of the “necessity” and “proportionality” requirements is particularly important since there is no formal institution with

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<sup>111</sup> The Panel states that it does “not favor the rewriting or reinterpretation of Article 51.” *Report of the High-level Panel*, *supra* note 10, ¶ 192.

<sup>112</sup> *Report of the Secretary-General*, *supra* note 9, ¶ 91 and *Report of the High-level Panel*, *supra* note 10, ¶ 159.

<sup>113</sup> *Id.* ¶ 159.

<sup>114</sup> The Secretary-General, *Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy*, delivered to the General Assembly, U.N. Doc. A/60/825 (Apr. 27, 2006). For example, the report considers options for: dissuading groups from resorting to terrorism or supporting it, denying terrorists the means to carry out an attack, deterring States from supporting terrorist groups, and developing State capacity to prevent terrorism. According to the Report, these approaches must be undertaken, while at the same time human rights are defended.

<sup>115</sup> The High-level Panel report actually groups individual and collective self-defense together as one exception. See *Report of the High-level Panel*, *supra* note 10, ¶ 185.

<sup>116</sup> *Id.* ¶ 192.

responsibility for determining the validity of claims made to self-defense and since the Security Council only exceptionally reacts to such claims with a resolution.

Finally, the positions asserted by the former Secretary-General and the High-level Panel in their reports also launch an attempt to re-establish the authorization for the use of force with the United Nations. The reports clearly state that the use of force against a non-imminent threat must be authorized by the UN Security Council, thereby limiting the scope of States' right to use force unilaterally, without prior Security Council authorization, to situations where an actual armed attack has occurred or is imminent. In articulating such delimitation, the reports also squarely stand against a broader interpretation of the right to use self-defense which might ultimately lead to a complete undermining of the meaning of article 51 and the risk that if one State can undertake unilateral preventive action, then all can.<sup>117</sup>

## V. CONCLUSION

The United Nations Charter was drafted at a unique moment in history when the atrocities of the Second World War motivated States to pursue the lofty objective of creating an organization that would help ensure international peace and security. A general prohibition on the use of force, placed in article 2(4) of the UN Charter, was meant to underpin this objective.

For decades, States' invocation of the right to use force in self-defense to justify certain military actions has highlighted problems in the legal framework on the use of force. The inability to clearly identify both the legal rules applicable and their content has meant that it is difficult for States to know when and how they can utilize their right to use force in self-defense and for other States to determine whether a State has legally employed force in self-defense.

One reason for the uncertainty is that there has been a lack of clarity as to whether a customary international law right to self-defense was incorporated into article 51 of the UN Charter as a result of its reference to an "inherent right of individual or collective self-defense" and if so, the extent of such right. Another reason is due to the ambiguous standards related to self-defense under article 51 in the UN Charter and in customary international law. In particular, questions proliferate as to who must carry out the "armed attack" under article 51 and thus also relate to who may pose an imminent threat to justify self-defense. Other questions concern what the nature of the attack must be, that is who and what must be attacked, the location of such attacks, and the scale of the attacks, as well as what the parameters of the response to the attack must be, among others.

States, as seen with their failure to include any provisions in the 2005 Summit Outcome document related to the right to use force in self-defense, are unlikely to take steps to address these problems in the near future. In addition, customary international law does not really serve as a viable means to develop the law on the right to self-defense due to the time it would take for a new rule to develop and the fact that it would not likely have sufficient specificity to address the ambiguities in the article 51 and customary international law standards.

Another means for furthering the development of the law on the right to use force in self-defense is needed. The United Nations is a logical place to look for assistance to States in sorting out such difficulties. The General Assembly, which has the key role under the UN Charter for the development of international law, could adopt a resolution, but risks doing so at the lowest common denominator due to the divergent views of States' at this time. The International Law Commission could prepare a report on the issue to further develop the law, but

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<sup>117</sup> *Id.* ¶ 191.

the Commission does not presently have the topic on its agenda. Alternatively, the International Court of Justice could render decisions in other cases which raise issues related to self-defense. Yet the ICJ has been quite tentative in its decisions thus far, which suggests that the Court is not ready to elaborate upon the standards of such a right.

Another option for promoting the development of the law in this area is the UN Secretary-General with the UN secretariat under his direction. The former Secretary-General, Kofi Annan, already initiated a process to stimulate the clarification and elaboration of the right to use force in self-defense in November 2003, when he appointed a high level panel of experts to consider the assurance of international peace and security. This Panel, of former high-level State officials, had the advantage of being able to consider such issues from a universal standpoint rather than merely from a particular national standpoint and in a global rather than on a case-by-case basis. The High-level Panel's report then served as a basis for the former Secretary-General's March 2005 report "In larger freedom: towards development, security and human rights for all."

The former Secretary-General's and the High-level Panel's reports establish the framework for the further development of the right to use armed force in self-defense. They embody two underlying convictions: one, that the UN Charter should remain the centerpiece in the law on the use of force and does not require revision to retain such position; and two, that the United Nations should play the pivotal role in determining when and how force should be used to maintain international peace and security. Essentially, the reports reject any reasons for States to use force other than as a right to individual or collective self-defense or as an exercise of collective security pursuant to a decision of the Security Council.

In addition, the reports assert three firm departure points for further consideration of how to refine and develop the right to use armed force in self-defense. First, the reports clarify that the reference in article 51 to an "inherent right of individual or collective self-defense" includes a right to respond to an "imminent attack." Second, a clear distinction is made between States' right to use force in self-defense against an imminent attack and the obligation for military action against a non-imminent threat to be authorized by the Security Council. Third, the reports suggest five criteria of legitimacy that could assist in clarifying the content of the necessity and proportionality criteria. These points also provide an overall direction to the development of the law in this area; specifically, States' right to use force in self-defense should be construed as a narrow exception to the Charter's prohibition on the use of force.

Thus, the reports are a welcome, although tentative, step towards a clarification of the parameters and content of the right to use force in self-defense. The reports provide the broad legal framework for such right and lead naturally to the next point of consideration, that of clarification of the content of such right. More work now needs to be done, through the initiative of Ban Ki-moon, to provide brighter and bolder standards to ensure that States' use of force in self-defense is limited. For example, guidance should be provided for determining what constitutes a threat of an "imminent attack" and the myriad of issues related to the meaning of "armed attack" in article 51 of the UN Charter should be addressed, among others.

Ban Ki-moon should continue the efforts undertaken by Kofi Annan to provide guidance and principles through the utilization of resources in the Secretariat and outside experts, in consultation with States, non-governmental associations, academics, specialists and others. In so doing, he will help ensure the elaboration of the content of the right to use force in self-defense in a manner consistent with the purposes of the UN Charter. He will also enhance the objective

of having the use of force regulated by the rule of law and help counter the tendency of States to misuse the right to self-defense to justify unlawful military action.

The further elaboration of more detailed principles or guidelines could then serve as a basis for a General Assembly or Security Council resolution and eventually, draft articles by the International Law Commission. This is not a process that will be completed in a few months, but is one of stages, with the first being the clarification of the rules and a later step being their articulation in an instrument of a binding nature. In connection with the elaboration of the content of this right, consideration will eventually need to be given to the enforcement of the standards governing the right.<sup>118</sup>

In the meantime, even though the principles, including the five criteria for legitimacy articulated by the former Secretary-General, are not binding law and cannot be enforced, they do provide an authoritative source with which to evaluate States' use of force in self-defense. Non-governmental organizations, academics and others can and should refer to such principles.<sup>119</sup> In addition, they as well as States could make reference to the principles when they assess a State's justification of its recourse to force as self-defense. This is particularly important at a time when it appears, according to Thomas Franck, that a new approach to international law is emerging in the United States among academics, practicing lawyers, and the White House whereby international law is only "a disposable tool of diplomacy."<sup>120</sup>

In conclusion, there is a great deal that remains to be done to ensure that legal principles on the right to use force in self-defense are further elaborated upon, adopted, implemented and enforced. The underlying difficulty remains the need to reconcile "the universalist ethical ends of humanitarian and human rights considerations and the particularist and means of military and political power available to support and enforce them."<sup>121</sup> However, the use of force ultimately affects individuals and their rights and should be a concern of everyone.

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<sup>118</sup> These are not rules that were clarified in order to have "straight lines" simply to "judge when a State's actions are lawful or not" as David Kaye might suggest, but rather to establish clearer boundaries for a right that has been and will remain, without such clarification, subject to abuse. See David Kaye, *Adjudicating Self-Defense: Discretion, Perception, and the Resort to Force in International Law*, 44 COLUM. J. TRANSNAT'L L. 134, 146-47 (2005).

<sup>119</sup> John Yoo has already agreed with some of the principles in the reports and disputed others. See John Yoo, *Symposium: UN Reform: Force Rules: UN Reform and Intervention*, 6 CHI. J. INT'L L. 641, 647-8 (2006). Thomas Franck has also cited some portions of the High-level Panel's report with approval. See, Thomas Franck, *Centennial Essay: The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88, 103-04 (2006).

<sup>120</sup> Specifically, Franck asserts that while "it has been the common belief among American international lawyers and professors, as well as occupants of the White House, if not the Congress, that the promotion of international law is a worthy cause, one that, over time, will triumph over narrow nationalism and, in so doing, will promote the peaceful settlement of disputes and a common cooperative approach to the resolution of global issues . . . this is no longer the unchallenged view . . . Emerging is a rather different approach that classifies international law as a disposable tool of diplomacy, its system of rules merely one of many considerations to be taken into account by government when deciding, transaction by transaction, what strategy is most likely to advance the national interest." Franck, *supra* note 119, at 89.

<sup>121</sup> Martin L. Cook, *Symposium: The Rule of Law in Conflict and Post-Conflict Situations: Ethical and Legal Dimensions of the Bush "Preemption" Strategy*, 27 HARV. J.L. & PUB. POL'Y 797, 806 (2004).