

## ARTICLE

The Return of Gunboat Diplomacy: How the West has Undermined the Ban on  
the Use of Force

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## Abstract

This article outlines how the West's manifold attempts at reforming the *jus ad bellum*, by permitting an increasing number of exceptions to the ban on the use of force, has led to a serious weakening of the structures on which the conduct of international affairs has rested since the end of WWII. The belief that the invocation of novel justifications for resorting to the use of force could be restricted to the West and its close allies has proved unfounded as many states from Russia via the Arab peninsula to Turkey are now also laying claim to the right to use force in an increasing number of cases. Thus what was once heralded as a modernizing effort actually has led to an erosion of the ban on the use of force.

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## I. Introduction

This article explores how the “West,” the main creator of modern international law after WWII, is now, nevertheless, steadily undermining it. While purporting to be reemphasizing each state’s right to defend itself and elevating the protection of human rights, the West is, in truth, rendering the far-reaching ban on the use of force envisaged in the U.N. Charter ineffective, thereby paving the ground for a return to 19<sup>th</sup> century gunboat diplomacy.<sup>1</sup> This new age of international law is marked by the use of force no longer being governed by the rule of law, but rather almost exclusively by the raw power of states—a fact western politicians attempt to conceal by issuing dubious, often hypocritical, but well-sounding statements. These states have abandoned the—perhaps utopian—goal of realizing the principle of sovereign equality and are increasingly replacing it with an aggressively hierarchical order of states reminiscent of the colonial era of the 19<sup>th</sup> century.

Seemingly disparate western forces are eroding the ban on the use of force: right-wing interventionists—predominantly, but not exclusively—to be found in the United States, and so-called liberals spread across the West. Common to both approaches is the argument that international law is steadily and necessarily evolving to adapt to developments in the modern world.

There are supposedly stark differences between right wing and liberal approaches to international law. Right-wing interventionists tend to be quite open about their disdain for international law, sometimes even claiming that law does not and/or has never governed international relations and that outcomes are ultimately the result of the involved states’ relative power.<sup>2</sup> Others, such as Michael Glennon, do accept that international law has a role to play in foreign affairs, but argue that its rules should flexibly adjust to the major powers’ relative strength.<sup>3</sup> Furthermore, right-wing interventionists tend to focus their arguments on the rules governing the use of force while the liberals’ reforming zeal is generally broader.

The liberal approach tends to emphasize its strict adherence to the rule of law in international affairs. Liberals, however, often argue that international law, especially customary international law, is evolving under the influence of international human rights law. It is no longer the state, but the individual human

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<sup>1</sup> The term “gunboat diplomacy” refers to the way states conducted their foreign affairs in the 19<sup>th</sup> century. In order to achieve their foreign policy goals, powerful states, such as the U.K. or Germany, would frequently deploy their naval forces in order to threaten weaker states with military intervention.

<sup>2</sup> See John R. Bolton, *Is There Really “Law” in International Affairs*, 10 *TRANSNAT’L L. & CONTEMP. PROBS.* 1, 2–8 (2000).

<sup>3</sup> See Michael J. Glennon, *The U.N. Security Council in a Unipolar World*, 44 *VA. J. INT’L L.* 91, 98–100 (2003); a more nuanced version of his arguments can be found in *The Rise and Fall of the U.N. Charter’s Use of Force Rules*, 27 *HASTINGS INT’L & COMP. L. REV.* 497 (2004).

being that is becoming and should become the focus of international law.<sup>4</sup> This has allegedly led to the emergence of a right to intervene abroad on humanitarian grounds. More extreme advocates of the liberal strand of thought have even justified interventions in order to install/reinstate a “democratic” government. At this point, some liberal and right-wing scholars have in fact found limited common ground, as this argument can readily serve to justify the right-wing interventionists’ general “regime change” agenda in “rogue states.”

This article will show both strands of thought to be similarly harmful to the international rule of law. Both necessarily require the acceptance of a hierarchy of states, based on their relative power, and both rely on the United States’ alleged exceptionalism as leader of the Free World and the West’s unparalleled strength following the Eastern Bloc’s collapse in the early 1990s. Since then, the widespread assumption has been that only the United States and its close allies could retain the capabilities to rely on more generous rules permitting the use of force.

As we near the end of the second decade of the 21<sup>st</sup> century, this blasé attitude towards the rest of the world has turned out to be misplaced. Rather, countries as diverse as Russia, Saudi Arabia, Colombia, and Turkey have increasingly come to rely on ever-expanding exceptions to the ban on the use of force first advocated by the West. Consequently, we are witnessing a return to gunboat diplomacy: states that feel powerful enough to intervene forcefully in another state’s internal affairs will do so and claim justification based on the often ill-defined and ill-advised rules that right-wing interventionists and liberals have tried to impose. The rule of law is thus again being replaced by the Darwinian principle of the “survival of the fittest.” Meanwhile, we are steadily approaching the point Glennon claims we have already passed,<sup>5</sup> whereby the *jus ad bellum* has become indeterminate, meaning that few, if any, constraining rules on the use of force remain.

Recent developments illustrate this: the United States did not even bother to put forward a serious legal argument to justify its attacks on Syrian forces in 2017 and 2018 in retaliation for their alleged use of chemical weapons. The frequent recourse to force irrespective of international law, as practiced by western and, increasingly, other states has led to a widespread increase in spending on defensive and offensive capabilities. States wish to protect both their sovereignty and standing in the new hierarchy of states, and many of them have presumably come to the same conclusion as India already had in 2003, following the United

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<sup>4</sup> See ANDREW WILLIAMS, *LIBERALISM AND WAR, THE VICTORS AND THE VANQUISHED* 62–63, 166 (2006).

<sup>5</sup> See Michael J. Glennon, *Pre-empting Proliferation: International Law, Morality, and Nuclear Weapons*, 24 EUR. J. INT’L L. 109, 111 (2013); Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25 ETHICS & INT’L AFF. 293, 302–03 (2011).

States' and the U.K.'s unlawful attack on Iraq: disagreement with the United States requires the possession of nuclear weapons.<sup>6</sup>

The article will focus on the two areas of the law on the use of force where the effect of western thought has contributed to the serious weakening of legal structures. First, I will examine the erosion of the law on self-defense in some detail, before subsequently turning to the attempts to justify the use of force in other cases, notably during humanitarian crises. I will first outline the arguments in support of an expansive view of the right to resort to force before assessing them according to the U.N. Charter, the jurisprudence of the International Court of Justice (hereinafter ICJ) and traditional customary international law. This will be followed by an exposé of state practice and *opinio juris*. Finally, a brief conclusion will summarize the current state of affairs.

This analysis will demonstrate that successive attempts at “modernizing” international law are in danger of dismantling the safeguards against war and of recreating a world in which a few privileged states can attempt to impose their will on the rest. The logic of an ever-expanding concept of justified military action self-evidently reveals a hierarchal view of the international community: only the wealthy and privileged western states and their close allies should benefit from such generous rules. It was never in the West's interest that other states, such as Russia, China, or India should invoke an expansive view of the right to use force. However, as recent developments illustrate, the West has miscalculated; its power is no longer sufficient to stop other states from exploiting its dubious precedents.

As I will frequently be referring to Articles 2(4) and 51 of the U.N. Charter, I am providing their texts at the outset:

*Article 2(4)*

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.<sup>7</sup>

*Article 51*

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council

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<sup>6</sup> See Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT'L L. & POL'Y 483, 498 (1999); Thomas Graham Jr., *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHI. J. INT'L L. 1, 12 (2003) (attributing this view to the Indian Defence Secretary).

<sup>7</sup> U.N. Charter art. 2, ¶ 4.

has taken measures necessary to maintain international peace and security . . . .<sup>8</sup>

Very often I will also refer to *customary international law* and the way new rules emerge. When doing so, I will base my analysis on the view the ICJ has taken on the creation of customary international law whereby a rule can only be recognized as part of customary international law if both state practice and *opinio juris* are present.<sup>9</sup> The requirement of *opinio juris* is vital, because a new rule in international law can only plausibly be created if the state acting in a specific way maintains that it has the legal right or obligation to do so. The practice alone of a state that acknowledges the unlawfulness of its conduct or, more likely, unconvincingly claims its conduct to be in accordance with existing rules of international law, cannot contribute to creating new law. Although there are controversies as to the extent of state practice necessary, and the way *opinio juris* is expressed, customary international law can only come into being when at least those states whose interests are most affected by the new rule do not object to its creation.<sup>10</sup> This ensures that at least these states will have considered whether a rule's benefits outweigh its disadvantages before it becomes new customary law.

## II. Self-defense

The attacks on the limits imposed by Article 51 of the U.N. Charter are manifold. The imminence criterion of self-defense is being extended to include, on the one hand, so-called “preventive” self-defense, and, on the other hand, subsequent reprisals, thus effectively rendering the requirement that self-defense is only permitted when “an armed attack occurs” meaningless and obfuscating the line between the defensive, offensive, and punitive use of force. At the same time, the threshold of an “armed attack” is perpetually being lowered and now supposedly even includes an attack on a state's nationals. Furthermore, attacks by terrorists are increasingly seen as justifying the use of force against the state they are located in, irrespective of whether the attacks are actually imputable to that state. Related to the punitive use of force is the emerging argument that treaty obligations may be enforced by force.

I will examine each “new” self-defense justification by analyzing the supportive arguments, comparing them to ICJ jurisprudence and customary international law and then outlining more recent state practice.

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<sup>8</sup> U.N. Charter art. 51.

<sup>9</sup> See Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 1060; Military and Paramilitary Activities in and against Nicaragua (Nicar. v U.S.), Judgment, 1986 I.C.J. 14, ¶ 186 (June 27) (hereinafter *Nicaragua*).

<sup>10</sup> See North Sea Continental Shelf (Fed. Rep. of Ger. v. Den. & Neth.), Judgment, 1969 I.C.J. 3, ¶¶ 73–74; Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 380 (2005); LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 29, 33–35 (2d ed. 1979).

*Attack on Nationals*

Customary international law prior to the U.N. Charter permitted military intervention in another country to protect nationals.<sup>11</sup> This is, however, not the case under the U.N. Charter. Nevertheless, this limitation was the first to come under sustained attack by states following the adoption of the Charter. By the late 1990s it was difficult to claim that a forceful intervention abroad to purportedly protect nationals was unlawful.

1. Forcible rescue missions are legal

In the 1950s already, states frequently justified their use of force by claiming to be protecting nationals. In truth this was almost always a smokescreen for darker, less worthy motives. Nevertheless, the arguments put forward to support this right to intervene are manifold. Some argue that the U.N. Charter itself allows such missions, others argue that pre-Charter customary international law has “survived” the U.N. Charter, while others claim that new customary international law has emerged which allows rescue missions. None of these arguments is convincing, as I will briefly outline.

The conformity of forcible rescue missions to the U.N. Charter is based on two arguments, centered, respectively, on Article 2(4) or Article 51. In respect to Article 2(4), some argue that protecting nationals abroad does not contravene Article 2(4), as it was neither directed “against the territorial integrity or political independence” of the state, nor was it “inconsistent with” the U.N.’s purposes. Others argue that Article 2(4) never intended to regulate customary international law on self-defense as it stood in 1945.<sup>12</sup> Rather, the drafters of the Charter were united in their belief that the use of force in self-defense was justified and not subject to the ban.<sup>13</sup> Article 51 is thus superfluous, and its inclusion was due only to the wishes of members of various regional security pacts.<sup>14</sup> Furthermore, Article

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<sup>11</sup> See Roderick D. Margo, *The Legality of the Entebbe Raid in International Law*, 94 S. AFR. L.J. 306, 318 (1977); Ulrich Beyerlin, *Die israelische Befreiungsaktion von Entebbe in völkerrechtlicher Sicht*, ZAÖRV 213, 225 (1977); Richard B. Lillich, *Forcible Protection of Nationals Abroad: The Liberian ‘Incident’ of 1990*, 35 GER. Y.B. INT’L L. 205, 213 (1992); Steven F. Day, *Legal Considerations in Noncombatant Evacuation Operations*, 40 NAVAL L. REV. 45, 48 (1992); Helmut Strebel, *Nochmals zur Geiselnbefreiung in Entebbe*, ZAÖRV 691, 703 (1977); TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* 170 (2005); Thomas C. Wingfield, *Forcible Protection of Nationals Abroad*, 104 DICK. L. REV. 439, 441–44 (2000); John R. D’Angelo, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality under International Law*, 21 VA. J. INT’L L. 485, 487 (1981).

<sup>12</sup> See DEREK WILLIAM BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 184–85 (1958).

<sup>13</sup> See *id.* at 185–86.

<sup>14</sup> See *id.* at 182–84, 187–93 (discussing regional security pacts and how Article 51 does not alter pre-Charter rules on self-defense).



51 only applied “if an armed attack occur[ed].” Therefore, under extant customary international law, other instances of rightful self-defense remained intact.<sup>15</sup>

The more popular justification acknowledges the infringement of Article 2(4), but claims that forcible rescue missions are justified as self-defense under Article 51. Here, too, we find two divergent lines of argument. One argues that attacks against nationals are “armed attacks” against their country of origin,<sup>16</sup> an argument allegedly reinforced by the fact that “population” is one of statehood’s main prerequisites.<sup>17</sup> The other maintains that the “inherent” right of self-defense referred to in Article 51 incorporates pre-Charter customary international law on self-defense. The word “inherent,” in this formulation, preserved the then-existing law on self-defense, including the forcible protection of nationals abroad.<sup>18</sup>

Lastly, some argue that it is correct that the Charter outlawed any use of force not explicitly permitted, but that the malfunctioning of the multilateral system had permitted pre-Charter self-defense rules to come back into force.<sup>19</sup>

## 2. Assessment

Using force against another state in order to protect nationals violates Article 2(4). The *travaux préparatoires*<sup>20</sup> contradict any assumption that the authors of the U.N. Charter wanted to limit the ban on the use of force by including this phrase. The references to “territorial integrity” or “political independence” were an attempt to provide illuminating examples, and inserted mainly at the behest

<sup>15</sup> See, e.g., The Lord Chancellor, Egypt, House of Lords (Nov. 1, 1956), 199 HANSARD cc1243–1365, c1351, <http://hansard.millbanksystems.com/lords/1956/nov/01/egypt> [https://perma.cc/G3CS-8QM8].

<sup>16</sup> Supporters of this theory took heart from the fact that in its judgment in the Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v Iran), Judgment, 1980 I.C.J. 3, ¶¶ 57, 91 (May 24), the ICJ twice described the seizure of the embassy as an “armed attack.” However, the ICJ also described the events as “an assault,” *id.* ¶ 18, and an “attack,” ¶¶ 17, 25, indicating that the court was using the terms in a non-legal meaning. See Mitchell Knisbacher, *The Entebbe Operation: A Legal Analysis of Israel’s Rescue Action*, 12 J. INT’L L. & ECON. 57, 75–78 (1977); Wingfield, *supra* note 11, at 468.

<sup>17</sup> Strebel, *supra* note 11, 703.

<sup>18</sup> Day, *supra* note 11, at 50; Knisbacher, *supra* note 16, at 64–65; Kristen Eichensehr, *Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues*, 48 VIR. J. INT’L L. (2008) 451, 465, 468–69 (2008); D’Angelo, *supra* note 11, at 500 (explaining that supporters of this interpretation claim that the phrase “armed attack” in Article 51 was only meant to be an example); Rex J. Zedalis, *Protection of Nationals Abroad: Is Consent the Basis of Obligation?*, 25 TEX. INT’L L.J. 209, 238–44 (1990) (Zedalis disagrees with the notion that the “traditional” right of self-defense included the protection of nationals abroad. Rather, he argues, states viewed this right as distinct from self-defense.)

<sup>19</sup> D’Angelo, *supra* note 11, at 491–98; Margo, *supra* note 11, at 320–21; Jean Raby, *The Right of Intervention to Protect Nationals: Reassessing the Doctrinal Debate*, 30 LES CAHIERS DE DROIT 441, 460–62 (1989).

<sup>20</sup> *Travaux préparatoires* contain the legislative history of an international treaty. They are meant to document the negotiations and deliberations which preceded the adoption of each paragraph or article of a treaty. As such, they are referred to in order to aid the interpretation of a treaty’s wording.

of smaller, weaker states that felt their independence required an iron-clad guarantee without thereby intending to limit the scope of the ban.<sup>21</sup> Any other interpretation is irreconcilable with the U.N. Charter's overriding aim, reflected in the preamble and in Article 1(1), of outlawing the use of force as far as possible.<sup>22</sup> The Charter's drafters, having just experienced the devastation of WWII, were well aware of the dangers posed by a return to pre-war gunboat diplomacy.<sup>23</sup>

Not surprisingly, the ICJ and the General Assembly have also rejected the restrictive interpretation of Article 2(4).<sup>24</sup> As far back as 1949, in the *Corfu Channel Case*, the ICJ, responding to Britain's argument that its "*Operation Retail*"<sup>25</sup> had not threatened . . . the territorial integrity nor . . . political independence of Albania," declared:

The United Kingdom has stated that its object was to secure the mines as quickly as possible for fear lest they should be taken away by the authors of the minelaying or by the Albanian authorities: this was presented either as a new and special application of the theory of intervention, by means of which the intervening State was acting to facilitate the task of the international tribunal, or as a method of self-protection or self-help. The Court cannot accept these lines of defence. It can only regard the alleged right of intervention as the manifestation of a policy of force which cannot find a place in international law.<sup>26</sup>

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<sup>21</sup> Zedalis, *supra* note 18, at 222–24; Ian Brownlie, *The Use of Force in Self-Defence*, 37 BRIT. Y.B. INT'L 183, 232–37, 236 n.2. See also IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 265–68 (1963); Edward Gordon, *Article 2(4) in Historical Context*, 10 YALE J. INT'L L. 271, 276 (1985); C. H. M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 493 (1952); Thomas R. Kift, *Self-Defense and Self-Help: The Israeli Raid on Entebbe*, 4 BROOK. J. INT'L L. 43, 52 (1978); D'Angelo, *supra* note 11, at 499; Oscar Schachter, *International Law in the Hostage Crisis: Implications for Future Cases in AMERICAN HOSTAGES IN IRAN: THE CONDUCT OF A CRISIS* 325, 330 (Paul H. Kreisberg ed., 1985).

<sup>22</sup> Jeffrey A. Sheehan, *A Response to Paust*, 2 FLETCHER F. WORLD AFF. 92, 92–93 (1978).

<sup>23</sup> Zedalis, *supra* note 18, at 222; Schachter, *supra* note 21, at 330; MICHAEL HAKENBERG, DIE IRAN-SANKTIONEN DER USA WÄHREND DER TEHERANER GEISELAFFÄRE AUS VÖLKERRECHTLICHER SICHT 240 (1988).

<sup>24</sup> *Corfu Channel (U.K. v Alb.)*, Judgment, 1949 I.C.J. 4 (Dec. 15); Nicaragua, *supra* note 9, ¶¶ 187–201 (finding customary international law on the use of force to be, in essence, identical to the Charter provisions). Although General Assembly resolutions are not legally binding, they do at least indicate *opinio juris* within the international community. Important in this context are the *Declaration on Inadmissibility of Intervention in Domestic Affairs of States and Protection of Their Independence and Sovereignty* (G.A. Res. 2131 (XX) (Dec. 21, 1965)), the *Declaration 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), (Oct. 24, 1970)), and the *Definition of Aggression* (G.A. Res. 3314 (XXIX) (Apr. 12, 1974)).

<sup>25</sup> The U.K. had secured mines within Albanian territorial waters against the express wishes of the Albanian government.

<sup>26</sup> *Corfu Channel*, *supra* note 24, at 4, 34–35 (quoting the ICJ's summary of the judgment at 3).

There is also nothing to support the notion that Article 2(4) did not apply to the use of force in self-defense. It is true that states retain the rights not surrendered under a treaty as long as that treaty does not expressly regulate an area of the law.<sup>27</sup> The U.N. Charter, however, clearly intends to regulate the use of force in international relations. Article 2(4) stipulated a ban on the use of force; Article 51 contains one of the few exceptions to this prohibition.<sup>28</sup> By agreeing to Article 2(4), and by allowing only a few exceptions to this prohibition, member states of the U.N. renounced, in their conduct with other member states, all other customary rights to use force they may have had before the U.N. Charter came into force. Logic also militates against the contrary approach. Should pre-Charter customary international law on self-defense have remained undisturbed by the U.N. Charter, this would lead to the paradoxical situation that self-defense against an “armed attack,” the most severe form of aggression, would be subject to more stringent rules<sup>29</sup> than the use of force in response to other, lesser forms of aggression, which traditionally sufficed.<sup>30</sup>

Furthermore, the ICJ, in its 1986 judgment in the *Nicaragua Case*, came to the conclusion that customary international law on the use of force also stipulates that only a state that has been “the victim of an armed attack” can exercise forceful self-defense.<sup>31</sup> Accordingly, any “non-regulated” customary international law on self-defense is now closely aligned with Charter law.

The arguments, according to which forcible rescue missions are justified under Article 51, are similarly unconvincing. Without an exact analysis of the individual incident, attacks against nationals cannot automatically be interpreted as an attack against the respective home state. At a time when many immigrants spend decades living and working abroad and some states have reverted to selling citizenship, the formerly strong identification of a person with his state of citizenship has in some cases weakened.<sup>32</sup> Moreover, terrorist and other attacks

<sup>27</sup> BOWETT, *supra* note 12, at 184–93.

<sup>28</sup> Brownlie, *The Use of Force in Self-Defence*, *supra* note 21, at 239–41; BROWNLIE, INTERNATIONAL LAW, *supra* note 21, at 269–75.

<sup>29</sup> This situation especially applies to the role of the U.N. Security Council.

<sup>30</sup> YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 185 (2005). *But see* BOWETT, *supra* note 12, at 184. Compare BOWETT with Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633–34 (1984).

<sup>31</sup> Nicaragua, *supra* note 9, ¶¶ 187–201, especially ¶ 195.

<sup>32</sup> Eichensehr, *supra* note 18, at 470; Zedalis, *supra* note 18, at 235–36. That it is no longer justified to automatically identify a citizen with his/her state is also evidenced by numerous schemes on offer across the world that enable wealthy foreigners to obtain citizenship in exchange for large sums of money. See, e.g., *Citizenship by Investment Malta*, MALTA IMMIGRATION (2018), <http://www.maltaimmigration.com/> [<https://perma.cc/Z7BU-6VU5>]; see *Grant of the Cypriot Citizenship to Non-Cypriot Entrepreneurs/Investors Through the “Scheme for Naturalization of Investors in Cyprus by Exception,”* REPUBLIC OF CYPRUS, MINISTRY OF INTERIOR (Oct. 24, 2018), <http://www.moi.gov.cy/moi/moi.nsf/All/36DB428D50A58C00C2257C1B00218CAB> [<https://perma.cc/U54J-5RKW>]). On the other hand, the UAE has paid the Republic of Comoros large sums of money to rid itself of potential citizens. In return, the Comoros granted citizenship to thousands of stateless UAE residents the UAE did not wish to naturalize. See Atossa Araxia

against foreigners are frequently indiscriminate and occur irrespective of the victims' nationality—rather, the attackers' wish to generally target “westerners” or “foreigners” often seems the prevailing motive. That such indiscriminate attacks against nationals are not sufficient to assume an attack against their home state(s) is indicated by how the ICJ justified its conclusion in the *Oil Platforms Case* that there had been no armed attack by Iran against the United States:

There is no evidence that the minelaying alleged to have been carried out by the *Iran Ajr*, at a time when Iran was at war with Iraq, was aimed specifically at the United States; and similarly it has not been established that the mine struck by the *Bridgeton* was laid with the specific intention of harming that ship, or other United States vessels.<sup>33</sup>

As for nationals' general risk of exposure to (civil) war conditions in the host country, however, even pre-WWII international law did not permit their forcible protection. As Amos Hershey pointed out in 1927 the “mere danger of injury to the lives or property of foreigners affords no grounds for intervention, inasmuch as aliens, unless in case of discrimination against them, can claim no special exemption from the ordinary risks run by nationals during times of riot, insurrection, or civil war.”<sup>34</sup> Furthermore, equating an attack on a national with an attack on the national's home state ignores the territorial aspect of the threshold “armed attack” which demands an attack on another state's sovereign territory.<sup>35</sup>

Arguing that Article 51 in fact expressly confirmed the validity of pre-Charter customary international law is, if anything, even less convincing. Adopting such a broad interpretation can hardly be reconciled with the ICJ's view of Article 51.<sup>36</sup> The incorporation of pre-WWII customary international law on self-defense in the Charter in the word “inherent” would render the prohibition on the use of force meaningless.<sup>37</sup> Prior to 1945, there were many instances when the use of force in self-defense was justified, without an “armed attack” having occurred. Why then include the phrase in Article 51?<sup>38</sup> Consequently, the ICJ, in 1949 already,

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Abrahamian, *Who Loses When a Country Puts Citizenship Up for Sale?*, N.Y. TIMES (Jan. 5, 2018), <https://www.nytimes.com/2018/01/05/opinion/sunday/united-arab-emirates-comorans-citizenship.html> [https://perma.cc/ERA7-AGQ3].

<sup>33</sup> *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161 (Nov. 6), ¶ 64.

<sup>34</sup> AMOS S. HERSHEY, *THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATION* 239 (2d ed. 1927). During the Suez Crisis in 1956, the legal advisers to the British Government took the same view. See Geoffrey Marston, *Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government*, 37 INT'L COMP. L. Q. 773, 805, 813 (1988) (quoting minutes of Nov. 1, 1956, drawn up by the Legal Adviser at the Foreign Office (FO 371/119164 (FE 14211/2357)); and letter by the former President of the I.C.J. Lord McNair to the Lord Chancellor of Nov. 4, 1956 (LO 2/825)).

<sup>35</sup> Hakenberg, *supra* note 23, at 225; Zedalis, *supra* note 18, at 235–36.

<sup>36</sup> *Corfu Channel*, *supra* note 24, at 4, 34–35; Nicaragua, *supra* note 9, ¶¶ 187–201.

<sup>37</sup> Beyerlin, *supra* note 11, at 219–21; Hakenberg, *supra* note 23, at 240.

<sup>38</sup> Brownlie, *The Use of Force in Self-Defence*, *supra* note 21, at 239–41 (arguing that between 1920 and 1945, the right of self-defense in international law had become so “vague,” it seemed highly

implicitly rejected the continuing application of the more generous, pre-Charter customary international law on the use of force. In response to a British claim of “self-help,” reconcilable with pre-Charter customary international law, the court declared:

The United Kingdom Agent, in his speech in reply, has further classified “Operation Retail” among methods of self-protection or self-help. The Court cannot accept this defence either. Between independent States, respect for territorial sovereignty is an essential foundation of international relations.<sup>39</sup>

Article 51 explicitly limits the right to use force in self-defense to instances where “an armed attack occurs.”<sup>40</sup> Had its authors wanted to include other previously recognized cases of self-defense in Article 51, there is no reason they could not have done so explicitly.<sup>41</sup>

Some have suggested that the inclusion of the phrase “an armed attack occurs” was due only to some Latin American states’ wish to preserve the legality of regional security treaties without any other meaning attached to the phrase.<sup>42</sup> This would, however, imply that the Charter’s drafters were unaware of the wording’s consequences—an implication that should be treated with caution, considering it is those putting forward the argument who are attempting a *contra legem* interpretation. Yoram Dinstein’s argument, too, is very convincing: it would be “counter-logical” to assume that the right of self-defense against the most severe form of aggression—an “armed attack”—was subject to the restrictions in Article 51, while the apparently “inherent” broader customary right of self-defense was not subject to such limitations.<sup>43</sup> Certainly, during its drafting, the U.S. position on

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unlikely the Charter framers would have wished to preserve a customary right so indeterminate). See also BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES*, *supra* note 21, at 269–75; Beyerlin, *supra* note 11, at 221–23; Hakenberg, *supra* note 23, at 230–31; Krift, *supra* note 21, at 52.

<sup>39</sup> Corfu Channel, *supra* note 24, at 35.

<sup>40</sup> Kelly J. Malone, *Preemptive Strikes and the Korean Nuclear Crisis: Legal and Political Limitations on the Use of Force*, 12 PAC. RIM L. & POL’Y J. 807, 832–33 (2003).

<sup>41</sup> W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT’L L. 525, 532–33 (2006); Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT’L COMP. L. Q. 963, 964 (2006); Anthony D’Amato, *Israel’s Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM. J. INT’L L. 584, 587–88 (1983).

<sup>42</sup> Istvan Pogany, *Nuclear Weapons and Self-Defence in International Law* in Istvan Pogany (ed.), *Nuclear Weapons and International Law*, 72 (1987); Niaz A. Shah, *Self-Defence, Anticipatory Self-Defence and Pre-emption: International Law’s Response to Terrorism*, 12 J. CONFLICT & SECURITY L. 95, 99–100 (2007).

<sup>43</sup> DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE*, *supra* note 30, at 185.

Article 51 was clear: “We did not want exercised the right of self-defense before an armed attack had occurred.”<sup>44</sup>

A “revival” of pre-Charter customary law on self-defense can also be ruled out, as there is no rule in international law whereby rights or obligations eliminated by treaty are resurrected automatically as a consequence of a treaty or treaty provision being found wanting in practice.<sup>45</sup> Accordingly, in 1949, the ICJ rejected the argument that states may resort to “self-help” as a result of the U.N.’s ineffectiveness.<sup>46</sup> There is also no evidence that those who drafted the Charter were as optimistic, as far as the functioning of the U.N.’s collective organs is concerned, as the argument’s proponents claim.<sup>47</sup> By the time the Charter was finalized, the war-time allies were already alienated from one another, and the Cold War had begun.<sup>48</sup> An attempt to apply a kind of *rebus sic stantibus* doctrine<sup>49</sup> is consequently unjustifiable. Therefore, any resort to force proscribed by the Charter has not been automatically resurrected as a result of the U.N.’s collective system malfunctioning.

### 3. State Practice

Since WWII, there have, nevertheless, been countless occasions in which states have relied on their alleged right to forcibly protect nationals. As if to underline the reason for outlawing this aspect of self-defense in the first place, history has repeated itself: just as Hitler’s justification for invading Czechoslovakia in 1938 in order to protect Germans living there and Japan’s claims to protect Japanese in China in 1931<sup>50</sup> had almost nothing to do with reality, the mostly

<sup>44</sup> U.S. Dep’t of State, Foreign Relations of the United States: Diplomatic Papers, 1945, General: The United Nations 818 (May 20, 1945).

<sup>45</sup> The contrary view was also rejected by Britain’s Attorney General and Solicitor General at the time of the Suez invasion. Writing on Oct. 12, 1956 (LCO 2/5760), they declared: “It cannot, in our opinion, be said that Egypt has so far committed any act which would justify the use or threat of force by the United Kingdom in self-defence. *The failure of the Security Council to take an effective decision will not in itself alter this.*” (emphasis added); quoted by Marston, *supra* note 34, at 792; Derek William Bowett, *Collective Self-Defence Under the Charter of the United Nations*, 32 BRIT. Y.B. INT’L L. 154–58 (1955–1956).

<sup>46</sup> Corfu Channel, *supra* note 24, at 4, 35 (emphasis added).

<sup>47</sup> John A. Perkins, *The Right of Counterintervention*, 17 GA. J. INT’L & COMP. L. 171, 225–26 (1987).

<sup>48</sup> *Id.* at 225–26; Hakenberg, *supra* note 23, at 230.

<sup>49</sup> See, e.g., Vienna Convention on the Law of Treaties art. 62 (1969).

<sup>50</sup> Adolf Hitler, *Wir wollen gar keine Tschechen!*, (Sept. 26, 1938), <https://www.ns-archiv.de/krieg/1938/tschechoslowakei/wollen-keine-tschechen.php> [<https://perma.cc/7T7V-BAMN>]. In the speech, Hitler claimed that thousands of Germans living in Czechoslovakia were being forced to flee to Germany, while their possessions were being burned to the ground by the Czechoslovakians. This behavior had necessitated German intervention. *Statement Issued by the Japanese Government on September 24, 1931, in Regard to the Recent Incident in Manchuria*, 12 League of Nations O. J. (1931) 2280–81. In this statement the Japanese government refers to “unpleasant incidents” in Manchuria and Mongolia. Attacks against the Japanese railway in South Manchuria and against Japanese railway guards had necessitated the deployment of Japanese troops: “Hundreds of thousands of Japanese residents were put in jeopardy. In order to forestall an imminent

western states that relied on such a right put forward spurious claims that convinced nobody, except perhaps their own populations.

In 1956, the United Kingdom justified its intervention in Egypt during the Suez Crisis on that basis,<sup>51</sup> as did Belgium regarding the Congo (1960, 1964),<sup>52</sup> the United States regarding Lebanon (1958),<sup>53</sup> the Congo (1964),<sup>54</sup> the Dominican Republic (1965)<sup>55</sup> and Cambodia (the Mayaguez incident in 1975),<sup>56</sup> Israel regarding Uganda (Entebbe, 1976)<sup>57</sup> and Germany regarding Somalia (1977).<sup>58</sup> While the German intervention in Somalia<sup>59</sup> and the joint American/Belgian intervention in the Congo in 1964 took place with the respective state's consent<sup>60</sup> and therefore did not amount to "forcible" protection, almost all other interventions had ulterior motives.<sup>61</sup>

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disaster, the Japanese army had to react promptly." See also Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* 168, 179–80 (2005).

<sup>51</sup> The Lord Chancellor, *Egypt*, *supra* note 15, at c1350; Message from Prime Minister Eden to President Eisenhower (Oct. 30, 1956), United States Department of State, 16 FOREIGN RELATIONS OF THE UNITED STATES, 1955–1957, 871–72; Wingfield, *supra* note 11, at 444–46, further mentions the U.K. threats of intervention in Iran (1946, 1951) and Egypt (1952), which were, among other things, also officially justified on the basis of protecting nationals.

<sup>52</sup> As far as the 1960 intervention is concerned, see 1960 U.N.Y.B. 54, Belgian Representative at the UN; *Summary of Events in the Congo on 24 Nov 1964*, CIA (Nov. 24, 1964), <https://www.cia.gov/library/readingroom/docs/CIA-RDP80T01471R000100030015-3.pdf> [<https://perma.cc/JJ9Q-LEUC>] (hereinafter *Summary of Events*).

<sup>53</sup> *Statement by the President Following the Landing of United States Marines at Beirut*, The Am. Presidency Project, UC SANTA BARBARA (Jul. 15, 1958), <https://www.presidency.ucsb.edu/documents/statement-the-president-following-the-landing-united-states-marines-beirut> [<https://perma.cc/36HY-TD97>].

<sup>54</sup> *Summary of Events*, *supra* note 52; Lillich, *Forcible Protection of Nationals Abroad: The Liberian 'Incident' of 1990*, *supra* note 11, at 206; Zedalis, *supra* note 18, at 245.

<sup>55</sup> *Johnson Orders Troops to Dominican Republic*, THE HISTORY CHANNEL (Apr. 28, 1965), <https://www.history.com/speeches/johnson-orders-troops-to-dominican-republic> [<https://perma.cc/GK3D-4H88>].

<sup>56</sup> *Statement by the President on the SS Mayaguez* (May 15, 1975), THE WHITE HOUSE, FORD LIBR. MUSEUM, <https://www.fordlibrarymuseum.gov/library/document/0248/whpr19750515-013.pdf> [<https://perma.cc/77UB-PYXP>]; Lillich, *Forcible Protection of Nationals Abroad: The Liberian 'Incident' of 1990*, *supra* note 11, at 217 n.86.

<sup>57</sup> Statement by Israel's U.N. Representative (Herzog) before the Security Council on 9 July 1976, U.N. Security Council Official Records, 1939th meeting, July 9, 1976, ¶¶ 55–139, <https://digitallibrary.un.org/record/86947> [<https://perma.cc/77CD-Q8HU>].

<sup>58</sup> Statement by German Government Spokesman Bölling, SWR2 (Oct. 18, 1977), <https://www.swr.de/swr2/wissen/archivradio/archivradio-raf/-/id=2847740/did=2444850/nid=2847740/y7fast/index.html> [<https://perma.cc/29WV-SDDU>]; 8 Deutscher Bundestag Plenarprotokoll 50 (daily ed. Oct. 20, 1977) (statement of Pres. Carstens) <http://dip21.bundestag.de/dip21/btp/08/08050.pdf> [<https://perma.cc/MHZ6-RVQ4>] (p. 3755); Beyerlin, *supra* note 11, at 226.

<sup>59</sup> Hakenberg, *supra* note 23, at 235, fn. 829.

<sup>60</sup> *Id.*

<sup>61</sup> See Wingfield, *supra* note 11, at 446–50 (Suez and the Dominican Republic); Gabriel Kolko, *Another Century of War?* 27 (2002) (Lebanon); Beyerlin, *supra* note 11, at 227 (Congo); Krift, *supra* note 21, at 58 (Dominican Republic); Jordan J. Paust, *Entebbe and Self-Help: the Israeli*

This becomes obvious when two of the above incidents are examined in more detail. When the United Kingdom intervened in Egypt during the 1956 Suez crisis, it justified its actions, among other things, by invoking the necessity to protect its nationals.<sup>62</sup> Meanwhile, however, the British Ambassador to Egypt, Trevelyan, described the true situation of British nationals in Egypt even after the initiation of hostilities as follows:

We were concerned with the possible breakdown of public security. . . . Only once was the situation uncertain . . . . However, the crowd eventually dispersed and otherwise all was peaceful. Not even extra police were posted. The passers-by showed no interest in us. I had been out in my conspicuous car with the flag flying on 1 November, and on foot on 2 November, just before we shut up, and no one appeared even to notice me.<sup>63</sup>

As then U.K. Prime Minister Anthony Eden acknowledged in his memoirs, in truth, the intervention was mainly motivated by the wish to overturn Egypt's decision to nationalize the Suez Canal and to topple Egypt's President Nasser.<sup>64</sup>

Similarly, President Lyndon Johnson justified the 1965 U.S. intervention in the Dominican Republic after unrest had broken out there as follows: "I have ordered the Secretary of Defense to put the necessary American troops ashore in order to give protection to hundreds of Americans who are still in the Dominican Republic and to escort them safely back to this country."<sup>65</sup> Meanwhile, Chairman of the Joint Chiefs of Staff General Earle Wheeler described the intervention's true aims as follows in orders to General Bruce Palmer Jr., the commander of U.S. forces: "Your announced mission is to save U.S. lives. Your unannounced mission is to prevent the Dominican Republic from going Communist. The President has stated that he will not allow another Cuba—you are to take all necessary measures to accomplish this mission."<sup>66</sup>

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*Response to Terrorism*, 2 FLETCHER F. WORLD AFF. 86, 91 (1978) (Mayaguez); D'Angelo, *supra* note 11, at 504 (Mayaguez).

<sup>62</sup> The Lord Chancellor, *Egypt*, *supra* note 51, at c1243, c1350; Message from Prime Minister Eden to President Eisenhower, *supra* note 51, at 871–72.

<sup>63</sup> HUMPHREY TREVELYAN, *THE MIDDLE EAST IN REVOLUTION* 120–21 (1970).

<sup>64</sup> See Anthony Eden, *The Memoirs of the Rt. Hon. Sir Anthony Eden: Full Circle* 426–27, 430–32, 465, 543 (1960).

<sup>65</sup> *Statement by the President Upon Ordering Troops into the Dominican Republic*, *supra* note 55.

<sup>66</sup> United States Department of State, "Dominican Republic; Cuba; Haiti; Guyana," 32 FOREIGN RELATIONS OF THE UNITED STATES, 1964–1968, Doc. 43. This had been preceded by a discussion during which U.S. President Johnson is to have said the following: "I want U.S. to feverishly try to cloak this with legitimacy. We cannot stand with our hand in our pocket and let Castro win. Military get ducks in a row. Diplomats see if we can do anything to get observers in here or troops from other Latin American countries. We are willing to do whatever is necessary to put the pistols down. We will have one of 3 dictators: 1) U.S., 2) Moderate dictator, 3) Castro dictator," *id.* at Doc. 42.



The only exception widely accepted as a genuine case of forcible protection of nationals abroad is the Israeli action in Entebbe, Uganda:<sup>67</sup> on June 27, 1976, four pro-Palestinian terrorists hijacked an Air France plane with 248 passengers and 12 crew on board. The hijackers forced the plane to land in Entebbe and demanded the release of prisoners held in Israel, France, Germany, and other states. Subsequently, the hijackers set most of the hostages free, but detained all passengers of Israeli origin or with Jewish-sounding names. The crew stayed behind voluntarily. Just before the terrorists' ultimatum expired, the Israeli government decided to free the hostages by force without obtaining Ugandan consent.<sup>68</sup> The rescue operation was completed within 58 minutes of Israeli troops landing in Entebbe, and the freed hostages arrived in Israel on July 4, 1976.<sup>69</sup> Despite some evidence of Ugandan collusion with the terrorists,<sup>70</sup> Israel took no further action beyond the hostages' rescue.<sup>71</sup> Nevertheless, despite this dubious overall record, the United States again reverted to this justification when invading Grenada (1983)<sup>72</sup> and Panama (1989).<sup>73</sup> Both invasions were condemned in General Assembly Resolutions as illegal by a large majority of states<sup>74</sup> due in part to serious doubts concerning the true situation of U.S. citizens in the countries concerned.<sup>75</sup>

Despite the doubtful legality of forcible rescue missions and the oft-realized risk of fabrication, the prohibition of such actions faced such an incessant assault that, by the 1990s, the law had become indeterminate. As Robert Lillich, a long-standing supporter of the right to rescue nationals abroad,<sup>76</sup> points out, only the Cuban Ambassador to the U.N. objected to the U.S. intervention in Liberia in August 1990 in order to evacuate about 1700 foreign and U.S. citizens without the

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<sup>67</sup> Zedalis, *supra* note 18, at 245.

<sup>68</sup> See ISRAELI DEFENSE FORCE, 1976 OPERATION ENTEBBE, <https://www.idf.il/en/minisites/wars-and-operations/1976-operation-entebbe/> [<https://perma.cc/N8B8-U8HD>]; Beyerlin, *supra* note 11, at 213–15.

<sup>69</sup> “1976 Operation Entebbe,” *supra* note 68.

<sup>70</sup> See Margo, *supra* note 11, at 307–09; Krift, *supra* note 21, at 43–46.

<sup>71</sup> See 1976 OPERATION ENTEBBE, *supra* note 68; Beyerlin, *supra* note 11, 213–15.

<sup>72</sup> See Joint Statement by President Reagan of the United States and Prime Minister Charles of Dominica (Oct. 25, 1983), <https://www.c-span.org/video/?101120-1/joint-statement-grenada-invasion> [<https://perma.cc/656R-QRUC>].

<sup>73</sup> See Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on United States Military Action in Panama (Dec. 21, 1989), <http://www.presidency.ucsb.edu/ws/index.php?pid=17973> [<https://perma.cc/SE3X-ACBZ>]; Lillich, *Forcible Protection of Nationals Abroad: The Liberian ‘Incident’ of 1990*, *supra* note 11, at 206.

<sup>74</sup> G.A. Resolution 38/7 (Nov. 2, 1983) (Granada) (voting 108:9:27); G.A. Resolution 44/240 (Dec. 29, 1989) (Panama) (voting 75:20:40).

<sup>75</sup> Lillich, *Forcible Protection of Nationals Abroad: The Liberian ‘Incident’ of 1990*, *supra* note 11, at 222.

<sup>76</sup> See, e.g., Robert Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325–51 (1967).

government's or the rebel groups' consent.<sup>77</sup> Similarly, Steven Day mentions the rescue of foreign nationals from Mogadishu, Somalia by U.S. forces in early 1991,<sup>78</sup> and Kristen Eichensehr adds the interventions in the Central African Republic (1996) and Sierra Leone (1997) which were widely ignored.<sup>79</sup> Michael Byers and Andrew Thomson provide further comparable examples of mainly French interventions in the 1990s and 2000s that were only (occasionally) criticized for having been too massive.<sup>80</sup> When the state concerned is in upheaval, the issue of legality may not even be raised.<sup>81</sup> By 2008, contrary to the former Soviet Union's legal reasoning that a right to forcibly rescue nationals abroad did not exist, Russia was justifying its intervention in Georgia on that basis.<sup>82</sup> This had been preceded by the Russian authorities' decision to grant Russian citizenship to any citizen in the two break-away republics who applied for it.<sup>83</sup>

#### 4. Conclusion

By the mid- to- late 1990s the law on forcible rescue missions had become uncertain. This was due to the fact that almost exclusively western states had repeatedly invoked this justification when intervening abroad. This justification was rarely based on fact. The dangers inherent to the concept, amply evidenced by Hitler's and Japan's actions prior to WWII, have resurfaced. Protecting nationals abroad has become an easy excuse for intervention.

It is not surprising that now other states, such as Russia, are similarly inclined to invoke this justification on dubious grounds. In fact, Russia has shown how easily such a right can be abused: granting citizenship to other states' citizens before invoking the right to forcibly protect them.<sup>84</sup> Needless to say, as the state practice outlined above clearly illustrates, it is only the relatively powerful states

<sup>77</sup> See Lillich, *Forcible Protection of Nationals Abroad: The Liberian 'Incident' of 1990*, *supra* note 11, at 206–13, 221–23; Day, *supra* note 11, at 45; Wingfield, *supra* note 11, at 460.

<sup>78</sup> Day, *supra* note 11, 45–46; GAZZINI, *supra* note 11, at 170–71, fn. 311.

<sup>79</sup> Eichensehr, *supra* note 18, at 466.

<sup>80</sup> See MICHAEL BYERS, *WAR LAW: INTERNATIONAL LAW AND ARMED CONFLICT* 58 (2005); Andrew W. R. Thomson, *Doctrine of the Protection of Nationals Abroad: Rise of the Non-Combatant Evacuation Operation*, 11 WASH. U. GLOBAL STUD. L. REV. 627, 657 (2012).

<sup>81</sup> BYERS, *supra* note 80; GAZZINI, *supra* note 11, at 170–71, 173–74; CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 129 (2008).

<sup>82</sup> See Dmitry Medvedev, Transcript of the Meeting of the Russian President with the Members of the International Valdai Club (Sept. 12, 2008), <http://en.kremlin.ru/events/president/transcripts/1383> [<https://perma.cc/EKM8-P8JZ>]; *Q & A: Conflict in Georgia*, BBC NEWS (Nov. 11, 2008), <http://news.bbc.co.uk/2/hi/europe/7549736.stm> [<https://perma.cc/ULH6-3X5B>].

<sup>83</sup> See Russian Federation: Legal Aspects of War in Georgia, THE LAW LIBRARY OF CONGRESS, <https://www.loc.gov/law/help/russian-georgia-war.php> [<https://perma.cc/M682-YYJV>] (referring to Abkhazia and Ossetia).

<sup>84</sup> See Jean-Christophe Peuch, *Georgia/Russia: Naturalization Issue Further Strains Relations*, RADIO FREE EUROPE (June 13, 2002), <https://www.rferl.org/a/1099988.html> [<https://perma.cc/RL2X-GGTU>]; C.J. Chivers, *Threat of Civil War Is Turning the Abkhaz into Russians*, N.Y. TIMES (Aug. 15, 2004), <http://www.nytimes.com/2004/08/15/world/threat-of-civil-war-is-turning-the-abkhaz-into-russians.html> [<https://perma.cc/J9Q2-DK5R>].

that can afford to forcibly protect their nationals. Weaker, developing states do not have the necessary resources. A selective right to use force is being established, accessible only to the privileged few.

### ■ Terrorist Attacks

At first it was mainly Israel and then the U.S. that relied on self-defense under Article 51 when responding to terrorist attacks. Initially limited in its application to cases when the host state could plausibly be accused of supporting the terrorists, the right of self-defense has more recently been invoked to justify attacks even on states that cannot be accused of collusion with terrorists located there. The main impetus for this was the 9/11 al-Qaeda attack on the United States.

Despite the consensus after WWII that self-defense was only justified against attacks imputable to a state, the incessant erosion of this rule by western states and Israel, especially since 2001, means the law has become indeterminate.

#### 1. Terrorist attacks justify the use of force in self-defense

Both the U.S. and the U.K. justified their attack on Afghanistan in 2001, following the 9/11 al-Qaeda terrorist attacks against the United States, as (collective) self-defense under Article 51.<sup>85</sup> Many jurists and, some claim, the U.N. Security Council supported this view.<sup>86</sup> They argue that Article 51 only—if at all—requires an armed attack that meets the scale and gravity criteria the ICJ has developed.<sup>87</sup> Whether terrorists carry out an attack on their own or the attack is imputable to a state is irrelevant in this context.<sup>88</sup> Again the alleged retention of

<sup>85</sup> See Letter from the Permanent Representative of the United States of America to the United Nations, Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001), <http://www.undocs.org/s/2001/946> [<https://perma.cc/BX3B-6FG9>]; Letter from Stewart Eldon, Chargé d’Affaires, U.K. Mission to the U.N. in New York, to the President of the Security Council, S/2001/947 (Oct. 7, 2001), <http://www.hamamoto.law.kyoto-u.ac.jp/kogi/2005kiko/s-2001-947e.pdf> [<https://perma.cc/MY2W-SN3S>]; Ben Smith & Arabella Thorp, *The Legal Basis for the Invasion of Afghanistan* 3–4, HOUSE OF COMMONS LIBRARY (Feb. 26, 2010), <http://researchbriefings.files.parliament.uk/documents/SN05340/SN05340.pdf> [<https://perma.cc/A74J-P7U4>].

<sup>86</sup> This argument is based on Resolutions 1368 and 1373, which were adopted by the U.N. Security Council in the aftermath of the al-Qaeda attacks on the United States in 2001, in respect of the use of force against Afghanistan. See *Eine juristische Hilfskonstruktion dient als Grundlage*, STUTTARTER ZEITUNG 4 (Dec. 5, 2015) (referring to the German government’s justification of German involvement in the use of force in Syria against ISIS); Yoram Dinstein, “Terrorism and Afghanistan,” *The War in Afghanistan: A Legal Analysis*, 85 INT’L L. STUD. 43, 46 (2009); LINDSAY MOIR, REAPPRAISING THE RESORT TO FORCE: INTERNATIONAL LAW, JUS AD BELLUM AND THE WAR ON TERROR 53–54 (2010); Nicholas Rostow, “Before and After: The Changed U.N. Response to Terrorism Since September 11th,” 35 CORNELL J. INT’L L. 475, 481 (2002); Jane E. Stromseth, *New Paradigms for the Jus Ad Bellum?*, 38 GEO. WASH. INT’L L. REV. 561, 566 (2006).

<sup>87</sup> See Nicaragua, *supra* note 9, ¶ 191; Oil Platforms, *supra* note 33, ¶ 64.

<sup>88</sup> See Tom Ruys & Sten Verhoeven, *Attacks by private actors and the right of self-defence*, 10 J. CONFLICT & SEC. L. 289, 311 (2005); Sean D. Murphy, *Terrorism and the Concept of ‘Armed Attack’ in Article 51 of the U.N. Charter*, 42 HARV. INT’L L.J. 41, 51 (2002); Carsten Stahn, *Terrorist*

pre-Charter customary international law is said to support the argument: the *Caroline* incident of 1837 allegedly confirms a right to self-defense against terrorist attacks.<sup>89</sup> While some then rely on a literal reading of Article 51, as it does not mention the necessity of state involvement, others accept that the Charter's drafters did not envisage massive terrorist attacks and therefore only considered another state as a possible originator of an armed attack. They then, however, claim that the capabilities of modern terrorists now enable and justify a literal interpretation of Article 51.<sup>90</sup> Others acknowledge that terrorist attacks not imputable to a state do not justify the use of force under Article 51, but that modern terrorists' vastly-improved capabilities since WWII led customary international law to evolve to permit the use of force against states on whose territory terrorists are located, irrespective of any collusion.<sup>91</sup>

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*Acts as 'Armed Attack': The Right to Self-Defense, Article 51 (1/2) of the U.N. Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF., 35, 35–36 (2003); Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 534–35 (2002); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559, 564 (1999); Wilmschurst, *supra* note 40, at 969–70.

<sup>89</sup> In 1837, the American ship *Caroline*, which Canadian rebels had commandeered, was set on fire by British troops while moored in American territorial waters, and two people were killed. The Americans subsequently demanded compensation from the British, who in return claimed to have acted in self-defense. Although the question of whether the British had acted in self-defense was contentious between the two states, the fact the Canadian rebels were non-state actors was, judging by the notes, obviously not deemed relevant. Some therefore conclude that the Anglo-American exchange of notes confirms that the right of self-defense has always also been available in response to attacks carried out by non-state actors. See Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond* *supra* note 88, at 535; W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUSTON J. INT'L L. 3, 42–46 (2000); Guy B. Roberts, *Self-Help in Combatting State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals*, 19 CASE W. RES. J. INT'L L. 243, 268–69 (1987); Wilmschurst, *supra* note 40, at 970; DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 30, at 248–49. For extracts of the notes exchanged between Britain and the United States in 1841/1842, see [http://avalon.law.yale.edu/19th\\_century/br-1842d.asp](http://avalon.law.yale.edu/19th_century/br-1842d.asp) [<https://perma.cc/B8Y8-FZ8K>].

<sup>90</sup> See Stuart G. Baker, *Comparing the 1993 Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT'L & COMP. L. 99, 107–08 (1995); Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 156 (2000); Rein Müllerson, *Jus ad Bellum: plus ça change (Le Monde) or plus la même chose (Le Droit)?*, 7 J. OF CONFLICT & SEC. L. 149, 171–79 (2002); Erin L. Guruli, *The Terrorism Era: Should the International Community Redefine Its Legal Standards on Use of Force in Self-Defense?*, 12 WILLAMETTE J. INT'L L. & DISP. RES. 100, 108–09 (2004); Franklin Berman, *The U.N. Charter and the Use of Force*, 10 SING. YEAR BOOK INT'L L. 9, 10–11 (2006); Shah, *supra* note 42, at 104–11; Stahn, *supra* note 88, at 41–43.

<sup>91</sup> In its letter to the U.N. on Sept. 20, 2014, Iraq did not even mention Syria when justifying its and the United States' use of force against ISIS targets in Syria, U.N. Doc. S/2014/691. See also Olivier Corten, *The Military Operations Against the 'Islamic State' (ISIL or Da'esh) – 2014*, in *THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH* 873, 881, 889–95 (Tom Ruys, Olivier Corten & Alexandra Hofer eds., 2018) (analyzing the broad understanding of self-defense adopted by, for example, the United States, Germany, and France regarding Syria and ISIS bases in Syria).

## 2. Assessment

Leaving aside the problem that there is no consensual definition of the term “terrorist,”<sup>92</sup> it is not possible to subsume terrorist attacks under the term “armed attack” in Article 51 when they are not imputable to a state. As some who support the contrary view acknowledge, the Charter’s drafters would not have deemed it necessary to specify possible perpetrators of an “armed attack,” as it would have seemed self-evident that only a state could initiate such an attack. The different wording in Article 2(4) is due to the fact that non-state actors, such as secessionist insurgents, can conceivably resort to the banned use of force.<sup>93</sup>

A purely textual interpretation of Article 51 is also difficult to reconcile with the Charter’s aims. Allowing the use of force in self-defense against a state not involved in an “armed attack,” simply based on the perpetrators’ location, necessarily not only undermines the Charter’s aim of preserving peace, but also threatens the concepts of sovereign equality and sovereignty.<sup>94</sup> Since an armed attack by a non-state actor would automatically trigger the right of self-defense, the victim state would be justified in ignoring another state’s sovereignty by attacking presumed “terrorist bases” on that state’s territory (with all the resulting risks of civilian casualties, etc.). This could occur even when the attacked state could not be accused of any wrong-doing whatsoever and would run the risk of turning a major terrorist attack into a war, thus possibly furthering the terrorists’ cause.<sup>95</sup> Application of a purely textual understanding of Article 51 to the India-Pakistan conflict, as far as the troubles in Kashmir are concerned, should give any adherent of the opposite view pause for thought.<sup>96</sup>

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<sup>92</sup> It suffices to refer to that often-quoted statement “One man’s terrorist is another man’s freedom fighter,” in order to pinpoint the complexities surrounding the topic. See also Mohamed R. Hassanien, *International Law Fights Terrorism in the Muslim World: A Middle Eastern Perspective*, 36 DENV. J. INT’L L. & POL’Y 221, 247 (2008); Ben Saul, *DEFINING TERRORISM IN INTERNATIONAL LAW* 2, 5, 50, 188 (2006); Noelle Quénivet, *The World After September 11: Has It Really Changed?*, 16 EURO. J. INT’L L. 561, 562–64 (2005).

<sup>93</sup> Hassanien, *supra* note 92, at 249; Richard H. Heindel, Thorsten V. Kalijarvi & Francis O. Wilcox, *The North Atlantic Treaty in the United States Senate*, 43 AM. J. INT’L L. 633, 645 (1949); BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES*, *supra* note 21, at 278–79.

<sup>94</sup> See Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EURO. J. INT’L L. 993, 997 (2001); Travalio, *supra* note 90, at 179–80.

<sup>95</sup> See Ian Johnstone, *The Plea of ‘Necessity’ in International Legal Discourse: Humanitarian Intervention and Counterterrorism*, 43 COLUM. J. TRANSNAT’L L. 337, 369 (2005); Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT’L L. 537, 542–43, 556 (1999); Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT’L L. 415, 438 (1969); W. Michael Reisman, *International Legal Dynamics and the Design of Feasible Missions: The Case of Afghanistan, The War in Afghanistan: A Legal Analysis*, 85 INT’L L. STUD. 59, 70–71 (2009) (referring to the dangers inherent to Afghan-Pakistan conflicts).

<sup>96</sup> Steven R. Ratner, *Jus Ad Bellum and Jus In Bello After September 11*, 96 AM. J. INT’L L. 905, 917–18 (2002).

The argument that, based on the *Caroline* incident of 1837, a strict interpretation of Article 51 is unjustified is similarly unconvincing. As the Anglo-American exchange of notes demonstrates, the two states neither discussed, nor even mentioned the phrase “armed attack,” a consequence of the fact that an “armed attack” was not a prerequisite of self-defense in 1837. The views on self-defense expressed by the British and American representatives in 1841–1842 can therefore have no bearing on the interpretation of the phrase “armed attack.” The much more generous view of self-defense in existence prior to the Charter was not confirmed by the Charter, but rather severely restricted by it.<sup>97</sup>

Past state practice and *opinio juris* also confirm that Article 51 requires an “armed attack” to be attributable to a state.<sup>98</sup> Prior to the terrorist attacks of September 11, 2001, most states advocated exactly that.<sup>99</sup> As even Judge Kooijmans of the ICJ—despite arguing that changes in the law may have taken place in the aftermath of 9/11—acknowledged in his separate opinion in the *Wall* case, the view that an “armed attack,” as understood in Article 51, had to be carried out by another state had been “the generally accepted interpretation for more than

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<sup>97</sup> Jörg Kammerhofer, *The Armed Activities Case and Non-State Actors in Self-Defence Law*, 20 LEIDEN J. OF INT’L L. 89, 99 (2007). Kammerhofer argues that the emphasis put on the *Caroline* incident in the context of self-defense against non-state actors is an attempt to make us “believe that a statement on the law on the use of force made in 1842 is still correct despite the developments over the last 165 years.” He correctly views this as “not corroborated in any way.” See also MOIR, *supra* note 86, at 47; Ruys & Verhoeven, *supra* note 88, at 311; Sean D. Murphy, *Terrorism and the Concept of ‘Armed Attack’ in Article 51 of the U.N. Charter*, *supra* note 88, at 46, 51; Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond* *supra* note 88, at 534–35; Stahn, *supra* note 88, at 35–36; Stromseth, *New Paradigms for the Jus Ad Bellum?*, *supra* note 86, at 566. It follows that, for example, Antonio Cassese only mentions the *Caroline* case once in his more-than-500-page textbook on international law—and merely as an example of traditional, pre-WWI law on “forcible intervention.” ANTONIO CASSESE, *INTERNATIONAL LAW* 298 (2005).

<sup>98</sup> These are relevant criteria as confirmed by Article 31(3)(b) of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties art. 31(3)(b), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

<sup>99</sup> See J. Wouters & F. Naert, *Shockwaves through International Law after 11 September: Finding the Right Responses to the Challenges of International Terrorism*, in *LEGAL INSTRUMENTS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM, A TRANSATLANTIC DIALOGUE* 411, 432 (C. Fijnaut, J. Wouters & F. Naert eds., 2004); Yutaka Arai-Takahashi, *Shifting Boundaries of the Right of Self-Defence—Appraising the Impact of the September 11 Attacks on Jus Ad Bellum*, 36 INT’L L. 1081, 1087 (2002); Eric P. J. Myjer & Nigel D. White, *The Twin Towers Attack: An Unlimited Right to Self-Defence?*, 7 J. CONFLICT & SEC. L. 5, 7 (2002); Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law* *supra* note 94, at 997; MOIR, *supra* note 86, at 47–48, 52 (although personally disagreeing with this interpretation of Article 51, Moir acknowledges that the ICJ’s judgment in the *Nicaragua Case* “was probably justified in light of the practice of states, and of the Security Council.”)

fifty years.”<sup>100</sup> Notably, the United States, the International Law Commission,<sup>101</sup> and NATO<sup>102</sup> took this position.

The Foreign Relations Committee of the U.S. Senate, when reporting on the North Atlantic Treaty to the full Senate prior to ratification, defined the term “armed attack” in Article 5 of the North Atlantic Treaty as follows:

The committee notes that article 5 would come into operation *only when a nation* had committed an international crime *by launching an armed attack* against a party to the treaty [emphasis added].<sup>103</sup>

Three staff members on the U.S. Senate Committee on Foreign Relations concurred with this assessment in a subsequent article, elaborating further:

But what is an armed attack? Does any violence perpetrated upon any member or upon any of its nationals constitute an armed attack under the Treaty? Since the principal objective of the Treaty is to safeguard the security of the North Atlantic area, only such armed attacks as threaten that security are contemplated. *This rules out violence of irresponsible groups and refers, as Article 51 of the Charter clearly contemplates, to an armed attack of one state against another.* Purely internal disturbances and revolutions are not included [emphasis added] . . . .<sup>104</sup>

Similarly, the Definition of Aggression, passed unanimously by the General Assembly, defined an act of aggression as follows:

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<sup>100</sup> Legal Consequences of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 35 (July 9) (separate opinion by Koopmans, J.). See also John F. Murphy, *Afghanistan: Hard Choices and the Future of International Law*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS*, 79, 98–99 (Michael N. Schmitt ed., 2009); GAZZINI, *supra* note 11, at 139.

<sup>101</sup> See Int’l Law Comm’n, Rep. on the Work of Its Thirty-Second Session, U.N. Doc. A/67/10, at 52–53 (1980). However, the International Law Commission was more hesitant in its 2001 Report. See Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 75 (2001).

<sup>102</sup> See Press Release, NATO, The Alliance’s Strategic Concept, NATO Press Release NAC-S (99) 65 (Apr. 24, 1999). Note paragraph 24 and 10 (“Security,” “Deterrence and Defence”), in particular. The way the Concept’s paragraph 24 is phrased evidences that terrorist attacks were not seen as “armed attacks” covered by Articles 5 and 6 of the Washington Treaty: “*Any armed attack* on the territory of the Allies, from whatever direction, *would be covered by Articles 5 and 6 of the Washington Treaty*. However, Alliance security must also take account of the global context. *Alliance security interests can be affected by other risks of a wider nature, including acts of terrorism, sabotage and organised crime, and by the disruption of the flow of vital resources.*” (emphasis added).

<sup>103</sup> *Executive Report of the Committee on Foreign Relations*, U.S. Senate, Report No. 8, 81st Congress, 1st session, June 6, 1949; reprinted in 20 *Department of State Bulletin* 787, at 789 (1949).

<sup>104</sup> Heindel, Kalijarvi, & Wilcox, *supra* note 93, at 645.

Aggression is *the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State* [emphasis added]. . . .<sup>105</sup>

This obviously reflects widespread consensus on the necessity of state attribution. That Resolution 3314 did not define the term “armed attack” is irrelevant in this context, as there can be no serious doubt that an “armed attack,” as understood in Article 51, is the most serious act of aggression.<sup>106</sup>

The resolution, passed in 1974, refutes any contemporaneous argument that interpreted Article 51 in such a way so as to include attacks carried out by non-state actors, as States would not have wanted to exclude some manifestations of “armed attacks” under Article 51 from the definition of aggression.<sup>107</sup> Article 3(g) of the Definition supports this argument: it explicitly deals with non-state actors and declares their actions to be acts of aggression *only* in those cases when they have been “sent by or on behalf of a State,” or when another state is otherwise “substantially involved.”

Negating the necessity of state participation in an “armed attack” would thus lead to the unsatisfactory conclusion that terrorist attacks would qualify as “armed attacks” under Article 51, but would not be “acts of aggression” under the unanimously passed Definition of Aggression.

Some argue that the 1974 resolution is outdated and has been overtaken by events.<sup>108</sup> However, by 1974, terrorists had already steadily been strengthening their capabilities. Up to now, not one state has repudiated or disowned the Resolution, generally viewed as reflective of customary international law. Although not directly relevant, the state parties to the Rome Statute of the ICC, in their Resolution of June 11, 2010, again relied on Article 3(g) of the Definition of Aggression in their attempt to define the respective crime.<sup>109</sup>

The ICJ, too, has indicated that an armed attack under Article 51 must be imputable to a state.<sup>110</sup> In the 1986 *Nicaragua* case the ICJ had the opportunity to deal with the use of force by non-state actors, when it had to decide whether U.S. support for the Nicaraguan rebels, the Contras, in their armed struggle against the Nicaraguan government, amounted to an “armed attack.” *Inter alia*, the Court declared:

<sup>105</sup> G.A. Res. 3314 (XXIX), annex, Definition of Aggression (Dec. 14, 1974).

<sup>106</sup> See GRAY, *supra* note 81, at 199–200; Wouters & Naert, *supra* note 99, at 431; Arai-Takahashi, *supra* note 99, at 1084.

<sup>107</sup> See Roberts, *Self-Help in Combatting State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals*, *supra* note 89, at 263.

<sup>108</sup> Reisman, *International Legal Responses to Terrorism*, *supra* note 89, at 39.

<sup>109</sup> *Review Conference of the Rome Statute*, RC/Res. 6, The Crime of Aggression, Annex I, Article 2, <https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf> [<https://perma.cc/3HCD-RNDB>].

<sup>110</sup> MOIR, *supra* note 86, at 24–25; Johnstone, *supra* note 95, at 367–68.



In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack . . .

There appears now to be *general agreement* on the nature of the acts which can be treated as constituting armed attacks . . . . This description, contained in Article 3 paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law . . .

But 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*. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States [emphasis added] . . .<sup>111</sup>

By relying on Article 3(g) of the Definition of Aggression, when interpreting the term “armed attack,” the Court emphasized that state involvement was necessary for sufficiently grave acts, committed by “armed bands,” to be classified as “armed attacks.”<sup>112</sup>

As far as the *Nicaragua* judgment of 1986 is concerned, some again argue that subsequent events overtook the court’s view.<sup>113</sup> However, in recent rulings, the ICJ appears to confirm its earlier view. In its 2004 advisory opinion on the legality of the Israeli-constructed wall on occupied Palestinian territory, the ICJ declared: “Article 51 of the Charter thus recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.”<sup>114</sup> Although this statement leaves little room for doubt as to the ICJ’s view—and was certainly understood that way by the dissenting judges<sup>115</sup>—some argue that the ICJ’s statement should not be taken literally, as the Court was dealing specifically

<sup>111</sup> *Nicaragua*, *supra* note 9, ¶ 195.

<sup>112</sup> See Sean D. Murphy, *Terrorism and the Concept of ‘Armed Attack’ in Article 51 of the U.N. Charter*, *supra* note 88, at 44. See also GRAY, *supra* note 81, at 200; Arai-Takahashi, *supra* note 99, at 1084; Kammerhofer, *supra* note 97, at 105, 107, 109; Lobel, *supra* note 95, at 541.

<sup>113</sup> Johnstone, *supra* note 95, at 370; Guruli, *supra* note 90, at 115; Reisman, *International Legal Responses to Terrorism*, *supra* note 89, at 39; Travalio, *supra* note 90, at 173–74.

<sup>114</sup> Legal Consequences of a Wall in the Occupied Palestinian Territory, *supra* note 100, ¶ 139 (summary of advisory opinion).

<sup>115</sup> See Legal Consequences of a Wall in the Occupied Palestinian Territory, *supra* note 100, ¶ 33 (separate opinion by Higgins, J.), ¶ 35 (separate opinion by Kooijmans, J.), ¶ 6 (declaration of Buergenthal, J.).

with alleged incidents originating from territory occupied by Israel itself.<sup>116</sup> Based on the clarity of the Court's statement, however, that argument is unconvincing.<sup>117</sup>

Its 2005 judgments in the *Armed Activities* cases also imply that the ICJ continues to be unwilling to re-interpret Article 51.<sup>118</sup> The Court rejected Uganda's claim of self-defense against attacks carried out by a Ugandan rebel group, probably partly based in the Democratic Republic of Congo (DRC).<sup>119</sup> It declared:

It is further to be noted that, while Uganda claimed to have acted in self-defence, it *did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC*. The "armed attacks" to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. *The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression* [emphasis added] . . . .<sup>120</sup>

Some have concluded that the ICJ had not taken a clear position on Article 51, because Uganda's statements regarding its justification had, as the Court emphasized, been contradictory, and Uganda had not been able to prove many of its allegations against the DRC. This argument holds that a statement by the Court elsewhere in the judgment confirms the view that it did not specifically deal with "armed attacks" carried out by non-state actors:<sup>121</sup>

Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.<sup>122</sup>

The Court, however, made this statement after having just rejected Uganda's claim of self-defense in the previous paragraph due to a lack of imputability to the DRC. Despite accepting that many of the attacks relied on by

<sup>116</sup> See Dinstein, "Terrorism and Afghanistan," *The War in Afghanistan: A Legal Analysis*, *supra* note 86, at 46; Johnstone, *supra* note 95, at 374-75; Berman, *supra* note 90, at 10; Ruys & Verhoeven, *supra* note 88, at 305; GAZZINI, *supra* note 11, at 184.

<sup>117</sup> See John F. Murphy, *Afghanistan: Hard Choices and the Future of International Law*, *supra* note 100, at 99; Ruys & Verhoeven, *supra* note 88, at 305.

<sup>118</sup> See Kammerhofer, *supra* note 97, at 89, 96, 105.

<sup>119</sup> Kammerhofer, *supra* note 97, at 91.

<sup>120</sup> *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 146.

<sup>121</sup> See Dinstein, "Terrorism and Afghanistan," *The War in Afghanistan: A Legal Analysis*, *supra* note 86, at 49; GRAY, *supra* note 81, at 202; John F. Murphy, *Afghanistan: Hard Choices and the Future of International Law*, *supra* note 100, at 99; Berman, *supra* note 90, at 10.

<sup>122</sup> *Armed Activities Case*, *supra* note 120, ¶ 147.

Uganda had taken place,<sup>123</sup> and that the rebels were perhaps partly operating from Congolese territory,<sup>124</sup> the Court, nevertheless, found no “armed attack.” Furthermore, its reliance on Article 3(g) of the Definition of Aggression strongly suggests that the Court still regards an attack’s imputability to a state as a necessary requirement of any claim under Article 51. Statements made by the dissenting judges confirm this interpretation.<sup>125</sup> In conclusion, it would seem that as late as 2005 the ICJ still maintained that an attack must be attributable to a state for it to be an “armed attack” under Article 51.<sup>126</sup>

The U.N. Security Council’s reaction to the 9/11 attacks also did not confirm an Article 51 situation. Since the United States and the U.K. decided not to proceed on the basis of a U.N.-approved military intervention in Afghanistan, the Security Council did not have the chance to express its views on the actual use of force.<sup>127</sup> There is not one Security Council resolution that explicitly declares the attack on Afghanistan to be in accordance with Article 51.<sup>128</sup> In Resolutions 1368 and 1373, the Security Council “recognized” and “reaffirmed” the right of self-defense in the aftermath of 9/11.<sup>129</sup> However, both were adopted prior to the initiation of hostilities on October 7, 2001. The Security Council could obviously not declare that any action the United States undertook subsequently would conform to Article 51.<sup>130</sup>

Furthermore, the resolutions did not even mention Afghanistan as a possible target.<sup>131</sup> The phrases the Security Council employed in reaction to 9/11 were markedly different from the language in Resolution 661, authorizing the use of force against Iraq. There, the Security Council declared it was “[a]ffirming the inherent right of individual or collective self-defense, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter. . . .”<sup>132</sup>

Tom Ruys and Sten Verhoeven have pointed out that the Security Council, in Resolutions 1368 and 1373, avoided any explicit reference to an “armed attack,”

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<sup>123</sup> *Id.* ¶¶ 132–133.

<sup>124</sup> *Id.* ¶ 135.

<sup>125</sup> *Id.* ¶ 20–32 (separate opinion by Kooijmans, J.). To some extent, *see also id.* ¶ 8–14 (separate opinion of Simma, J.).

<sup>126</sup> Kammerhofer, *supra* note 97, at 112–13.

<sup>127</sup> *See* note 85.

<sup>128</sup> John Quigley, *The Afghanistan War And Self-Defense*, 37 VAL. U. L. REV. 541, 553–54 (2002–2003); GRAY, *supra* note 81, at 206–07; Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law* *supra* note 94, at 996; Myjer & White, *supra* note 99, at 9–13; Quénavivet, *supra* note 92, at 576.

<sup>129</sup> S.C. Res. 1368 (Sept. 12, 2001); S.C. Res. 1373 (Sept. 28, 2001).

<sup>130</sup> *See* Wouters & Naert, *supra* note 99, at 446.

<sup>131</sup> *See* MOIR, *supra* note 86, at 53; Kammerhofer, *supra* note 97, at 99–100; Quigley, *The Afghanistan War And Self-Defense*, *supra* note 128, at 549.

<sup>132</sup> S.C. Res. 661 (Aug. 6, 1990).

and instead only mentioned a “threat to international peace and security.”<sup>133</sup> This implies the Council—far from confirming an Article 51 situation—was in truth “hesitant in accepting the right of self-defense in response to attacks by private actors.”<sup>134</sup> W. Michael Reisman has gone even further, and claims that the language used by the Security Council, especially in Resolution 1368, actually “kept” terrorist acts “from falling under Article 51’s right of self-defense.”<sup>135</sup>

Overall, interpreting Article 51 as requiring an attack’s imputability to a state, so that a victim state can resort to the use of force in self-defense, is much more in line with the U.N. Charter’s aims and principles than the contrary view. Letting an armed attack by non-state actors suffice greatly endangers world peace and raises serious issues as far as sovereignty and sovereign equality are concerned.<sup>136</sup> Overwhelming state practice prior to 9/11 confirms that most states adhered to this restrictive view of Article 51.

When ignoring its restrictions, states have invariably relied on Article 51, thus hampering the creation of new customary international law. The lack of concurrent *opinio juris* means that the use of force against a state where terrorists are based has not become legal. States claiming adherence to Article 51 cannot be in the process of creating new customary international law.

### 3. State Practice

Despite this, predominantly western states and Israel have persistently used force against other states where terrorists have been located. They have resorted to force in three circumstances: first, when they have accused the other state of either letting its officials carry out a terrorist attack, or of instructing a non-state actor to do so; second, they have directly targeted alleged terrorist bases in the other state; and, third, the most far-reaching response, they have responded to a terrorist attack by not only attacking the alleged terrorist bases, but also institutions of the state in which the terrorists were located, on occasion including actual regime change. For the discussion here the first context is irrelevant, as the state using force claimed it was responding to a terrorist attack imputable to the attacked state,<sup>137</sup> thus enabling

<sup>133</sup> Ruys & Verhoeven, *supra* note 88 at 312 (quoting S.C. Res. 1368, ¶ 1 (Sept. 12, 2001); S.C. Res. 1373, Preamble (Sept. 28, 2001)).

<sup>134</sup> See Ruys & Verhoeven, *supra* note 88, at 312; Sean D. Murphy, *Terrorism and the Concept of ‘Armed Attack’ in Article 51 of the U.N. Charter*, *supra* note 88, at 46. He makes a similar point in respect of G.A. Res. 56/1 (2001), as do Wouters & Naert, *supra* note 99, at 446, and Mikael Nabati, *International Law at a Crossroads: Self-Defense, Global Terrorism and Preemption (A Call to Rethink the Self-Defense Normative Framework)*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 771, 780 (2003).

<sup>135</sup> See Reisman, *International Legal Dynamics and the Design of Feasible Missions: The Case of Afghanistan*, *supra* note 95, at 64–65.

<sup>136</sup> See Kammerhofer, *supra* note 97, at 105, 110.

<sup>137</sup> The main cases of forceful responses to “state terrorism” are the Israeli attack on Egypt in 1956 (Suez). See MOIR, *supra* note 86, at 26; Travalio, *supra* note 90, at 164. The 1986 U.S. attack on Libya in reaction to the bombing of a discotheque in Berlin, frequented mainly by U.S. service men.

the tentative, although contentious,<sup>138</sup> conclusion that an armed attack had occurred. Therefore, only the two other situations, where a terrorist attack imputable to the attacked state was at least very much in doubt, will be examined.

As for attacking terrorist bases in other states, it was Israel that initiated the push against international law: beginning in the late 1940s and 1950s, Israel routinely attacked alleged terrorist bases in Egypt, Jordan, Syria, and Lebanon.<sup>139</sup> In 1985 Israel destroyed the PLO Headquarters in Tunisia in response to the killing of three Israelis off the coast of Cyprus, claiming it was acting in self-defense.<sup>140</sup> Similarly, South Africa and Southern Rhodesia attacked ANC “terrorist” bases in Angola<sup>141</sup> and Mozambique.<sup>142</sup> Only in 1998 did the United States join the fray: in response to the bombing of the U.S. embassies in Kenya and Tanzania, which the United States blamed on al-Qaeda, it launched cruise missile attacks on alleged terrorist bases in Afghanistan and on a chemical factory in Sudan that was allegedly producing chemical weapons and partly owned by Osama Bin Laden.<sup>143</sup> The United States justified these actions as self-defense.<sup>144</sup>

Prior to 2001, the use of force not only against terrorists, but also against the “host” state, was rare. Again, it was Israel and later Turkey that claimed such action was justified. In 1968 Israel launched an air raid on Beirut airport in 1968 in retaliation for a terrorist attack carried out in Athens against an Israeli plane.<sup>145</sup> In 1982, Israel justified its invasion and occupation of parts of Lebanon before the Security Council on the basis of that state “being unwilling or unable to prevent the harbouring, training and financing of PLO terrorists . . .” so that Lebanon had to be “prepared to face the risk of Israeli countermeasures.”<sup>146</sup> Generally, Israel justified

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*See* Khanya Motshabi, *International Law and the United States Raid on Libya*, 104 S. AFR. L.J. 669, 672 (1987); Reisman, *International Legal Responses to Terrorism*, *supra* note 89, at 31–32. The U.S. attack on Iraq in 1993, as a consequence of a failed assassination attempt on former U.S. President Bush Senior while he was visiting Kuwait. *See* Reisman, *International Legal Responses to Terrorism*, *supra* note 89, at 35; Baker, *supra* note 90, at 99.

<sup>138</sup> Although the respective attacks may well have been imputable to a foreign state, it is controversial whether the military response was “necessary” to end an ongoing attack, and whether the initial attacks by Libya and Iraq were sufficiently grave to be classified as “armed attacks” under Article 51. For Libya, *see* Motshabi, *supra* note 137, at 677–78; Baker, *supra* note 90, at 112; Wouters & Naert, *supra* note 99, at 430.

<sup>139</sup> This was mainly in response to *fedayeen* attacks initiated from bases in those states.

<sup>140</sup> Ruys & Verhoeven, *supra* note 88, at 292; GRAY, *supra* note 81, at 195–96.

<sup>141</sup> Ruys & Verhoeven, *supra* note 88, at 292–93; GRAY, *supra* note 81, at 136–37.

<sup>142</sup> S.C. Res. 411 (June 30, 1976).

<sup>143</sup> Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT’L L. 161, 161–63 (1999); Reisman, *International Legal Responses to Terrorism*, *supra* note 89, at 47–49; Lobel, *supra* note 95, at 537; Travalio, *supra* note 90, at 145.

<sup>144</sup> Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, *supra* note 143, at 162–63; Reisman, *International Legal Responses to Terrorism*, *supra* note 89, at 47–49; GRAY, *supra* note 81, at 197.

<sup>145</sup> Falk, *The Beirut Raid and the International Law of Retaliation*, *supra* note 95, at 416; GRAY, *supra* note 81, at 195.

<sup>146</sup> 1982 U.N.Y.B. 434.

its actions against Lebanon as self-defense,<sup>147</sup> but the international community did not approve.<sup>148</sup> Turkey's repeated incursions into northern Iraq in the 1990s in an attempt to combat Kurdish terrorists (the PKK) there, also did not garner much international support, certainly not as far as their legality was concerned.<sup>149</sup> Notably, Turkey did not even attempt to justify its actions in Iraq on the basis of Article 51, nor did it report its incursions to the Security Council.<sup>150</sup>

The relatively clear legal situation, whereby a terrorist attack not imputable to another state does not justify the use of force in self-defense began to unravel, once the United States decided to ignore this restriction. The 1998 missile attacks on allegedly al-Qaeda-related targets in Afghanistan and Sudan heralded a change in attitude. As the Congressional Research Service (CRS), analyzing the 1998 U.S. airstrikes on Afghanistan and Sudan, concluded:

the fact remains that this is the first time the U.S. has . . . (2) launched such a strike within a territory of a state which presumably is not conclusively, actively and directly to blame for the action triggering retaliation . . .<sup>151</sup>

In its Report of 1 September 1998, dealing explicitly with the 1998 airstrikes, the CRS stated that "[s]uch a policy: (1) undermines the rule of law, violating the sovereignty of nations with whom we are not at war . . ."<sup>152</sup>

This concern was reiterated in its Report of 13 September 2001, which listed one of the "risks" of the use of "military force" against terrorists as the "perception that U.S. ignores rules of international law."<sup>153</sup>

Nevertheless, western attitudes had begun to change in the 1990s. While the international community in the past had routinely condemned Israel's,<sup>154</sup> South

<sup>147</sup> 1982 U.N.Y.B. 435; Wouters & Naert, *supra* note 99, at 427; Falk, *The Beirut Raid and the International Law of Retaliation*, *supra* note 95, at 429 (referring to 1968).

<sup>148</sup> Lebanon (1968): U.N. S.C. Res. 262 (1968); Falk, *The Beirut Raid and the International Law of Retaliation*, *supra* note 95, at 416–17; GRAY, *supra* note 81, at 195; Lebanon (1982): U.N. S.C. Res. 501, 508, 509, 516, 520 (all 1982); G.A. Res. ES- 7/5 (1982); Reisman, *International Legal Responses to Terrorism*, *supra* note 89, at 52–53; GAZZINI, *supra* note 11, at 192, fn. 52; DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 30, 247–48.

<sup>149</sup> GRAY, *supra* note 81, at 139–43.

<sup>150</sup> GRAY, *supra* note 81, at 141.

<sup>151</sup> RAPHAEL F. PERL, CONG. RESEARCH SERV., 98-733F, TERRORISM: U.S. RESPONSE TO BOMBINGS IN KENYA AND TANZANIA: A NEW POLICY DIRECTION? 3 (1998); The National Security Archive, *Volume I: Terrorism and U.S. Policy*, Chapter II, Document 6, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/index1.html> [https://perma.cc/3LFM-68X7].

<sup>152</sup> *Id.* at 4.

<sup>153</sup> RAPHAEL F. PERL, CONG. RESEARCH SERV., IB95112, TERRORISM, THE FUTURE, AND U.S. FOREIGN POLICY 8 (2001); National Security Archive *supra* note 151, Document 1.

<sup>154</sup> "Terrorist bases:" U.N. S.C. Res. 106 (1955), 111 (1956), 171 (1962); 573 (1985); attacks on the "host state:" U.N. S.C. Res. 262 (1968); 501, 508, 509, 516, 520 (all 1982).

Africa's,<sup>155</sup> and Southern Rhodesia's conduct,<sup>156</sup> the reaction to the 1998 U.S. airstrikes was muted. The Security Council did not heed a request by Sudan and others to discuss the matter.<sup>157</sup> While it is correct, as Gray has pointed out, that states supportive of the U.S. were "careful not to adopt the U.S. doctrine of self-defense,"<sup>158</sup> it is also true that these states did not offer criticism either.<sup>159</sup> Although there were some states that declared the attacks on Afghanistan and Sudan to be illegal<sup>160</sup> and the Non-Aligned Movement issued a critical statement,<sup>161</sup> this was the beginning of the law's erosion.

The true watershed moment, however, was Operation Enduring Freedom, the U.S.-/U.K.-led attack on Afghanistan in the aftermath of 9/11. Military action not only targeted terrorist bases and some civilian/military installations in the host country (as had been the case with previous Israeli actions), but openly followed a regime change agenda. Operation Enduring Freedom set a precedent not easily contained. Despite the military action's doubtful legality,<sup>162</sup> international reaction was positive or non-committal,<sup>163</sup> which led some to conclude that this had created new customary international law "instantaneously."<sup>164</sup> Since the attack on

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<sup>155</sup> U.N. S.C. Res. 475 (1980); many further Resolutions on South African incursions into Angola were passed, such as U.N. S.C. Res. 387 (1976); 428 (1978); 447, 454 (both 1979); statements released by the U.K. Representative to the *International Conference for Immediate Independence of Namibia* on July 8, 1986 and by the U.K. Foreign Office on Aug. 13, 1986; see 57 BRIT. Y.B. INT'L L. (1986) 621–22; Ruys & Verhoeven, *supra* note 88, at 293.

<sup>156</sup> U.N. S.C. Res. 411 (1976).

<sup>157</sup> Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, *supra* note 143, at 165; Ruys & Verhoeven, *supra* note 88, at 295; GRAY, *supra* note 81, at 197.

<sup>158</sup> GRAY, *supra* note 81, at 197.

<sup>159</sup> BYERS, *supra* note 80, at 63.

<sup>160</sup> Iran, Iraq, Libya, Yemen, Russia; see Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, *supra* note 143, at 164; Ruys & Verhoeven, *supra* note 88, at 295; BYERS, *supra* note 80, at 63; Lobel, *supra* note 95, at 538 (adding China and U.N. Secretary General Kofi Annan to the critics of the 1998 airstrikes).

<sup>161</sup> *Durban Final Document*, NAM XII Summit, Durban (South Africa), Sept. 2–3, 1998, ¶ 159, [http://cns.miis.edu/nam/documents/Official\\_Document/12th\\_Summit\\_FD\\_Durban\\_Declaration\\_1998.pdf](http://cns.miis.edu/nam/documents/Official_Document/12th_Summit_FD_Durban_Declaration_1998.pdf) [<https://perma.cc/PU7V-9E2H>].

<sup>162</sup> The author has discussed this in detail in Patrick Terry, *The War in Afghanistan - Was the use of force legal and/or wise?*, 9 NEW ZEALAND Y.B. INT'L L. 69 (2011).

<sup>163</sup> Only Iran and Iraq openly condemned the military action as unlawful. See Statement by the North Atlantic Council, Press Release 124 (2001), Sept. 12, 2001, <http://www.nato.int/docu/pr/2001/p01-124e.htm> [<https://perma.cc/D8M9-WN XD>]; OAS Resolution RC.24/RES.1/01, Sept. 21, 2001, [http://avalon.law.yale.edu/sept11/oas\\_0921a.asp](http://avalon.law.yale.edu/sept11/oas_0921a.asp) [<https://perma.cc/972Y-TANC>]; Sean D. Murphy, *Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter*, *supra* note 88, at 48–49; Stahn, *supra* note 88, at 35; Johnstone, *supra* note 95, 370–71; Ratner, *supra* note 96, at 909–10; GRAY, *supra* note 81, at 193, 206; MOIR, *supra* note 86, at 64–65, and fn. 96; Ruys & Verhoeven, *supra* note 88, at 297; Arai-Takahashi, *supra* note 99, at 1094–95. Ratner adds Sudan, North Korea, Cuba, and Malaysia to the critics of the attack on Afghanistan. Ratner, *supra* note 96, at 909–10.

<sup>164</sup> Johnstone, *supra* note 95, at 372; Arai-Takahashi, *supra* note 99, at 1093–95, 1098–1101; Müllerson, *supra* note 90, at 181–82.

Afghanistan, the number of cases when states have claimed a right to self-defense when combatting terrorists has increased exponentially.

In 2002, Russia launched airstrikes against alleged Chechen terrorist bases located in Georgia, justified on the grounds of self-defense.<sup>165</sup> Ironically, it was the United States that criticized Russia for this, although agreeing there were terrorist bases in Georgia,<sup>166</sup> and that Georgia had not dealt with the threat emanating from them, despite undisputed repeated Russian warnings.<sup>167</sup> In reaction to the Russian airstrikes, the United States nevertheless declared it “deplored the violation of Georgia’s sovereignty,”<sup>168</sup> and later informed the Russian government that it took “strong exception to the possibility of Russian military intervention against Chechen rebels in Georgia” in the future.<sup>169</sup> Conversely, in 2003, when Israel launched airstrikes against Islamic Jihad bases in Syria,<sup>170</sup> the United States limited itself to calling for restraint<sup>171</sup> though the international reaction was still overwhelmingly negative.<sup>172</sup>

By 2006, when Israel responded to a Hezbollah attack on Israeli soldiers and previous rocket attacks by launching a massive military campaign against Lebanon, the international community’s reaction was becoming increasingly divided. Israel had explained its actions as follows:

Israel views the sovereign Lebanese Government as responsible for the action that originated on its soil and for the return of the abducted soldiers to Israel. Israel demands that the Lebanese Government implement U.N. Security Council Resolution 1559. However, there is no doubt that Hizbullah, a terrorist organization operating inside Lebanon, initiated and perpetrated today’s action; Israel will act against it in a manner required by its actions . . . The international

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<sup>165</sup> GRAY, *supra* note 81, at 230–31.

<sup>166</sup> Anatol Lieven, *The Secret Policemen’s Ball: The United States, Russia and the international order after 11 September*, 78 INT’L AFF. 245, 252 (2002). This is also confirmed by former U.S. Secretary of State, Condoleezza Rice, in her memoirs. CONDOLEEZZA RICE, NO HIGHER HONOR: A MEMOIR OF MY YEARS IN WASHINGTON 99 (2011).

<sup>167</sup> David Gollust, *U.S. Urges Russian Restraint on Georgia*, VOICE OF AMERICA (Aug. 28, 2002), <https://www.voanews.com/a/a-13-a-2002-08-28-17-us-66826807/374598.html>

[<https://perma.cc/U2EN-M32N>]; Nick Paton Walsh, *British anti-terror units to train Georgian army: MoD and secret service help to fight rebels linked to al-Qaida*, GUARDIAN, Nov. 21, 2002, at 17; Ian Traynor, *Kidnap suspects abound in notorious Pankisi Gorge*, GUARDIAN, Nov. 8, 2002, at 3; GRAY, *supra* note 81, at 230–31.

<sup>168</sup> Nick Paton Walsh, *U.S. rebukes Russia for Pankisi raid*, GUARDIAN, Aug. 26, 2002, at 12.

<sup>169</sup> *U.S. warns Russia over Georgia Strike*, BBC NEWS (Sept. 13, 2002), <http://news.bbc.co.uk/1/hi/world/europe/2254959.stm> [<https://perma.cc/K4F3-YG7D>].

<sup>170</sup> GRAY, *supra* note 81, at 236.

<sup>171</sup> GRAY, *supra* note 81, at 236–37.

<sup>172</sup> Press Release, Secretary General, Secretary-General Strongly Deplores Israeli Air Strike on Syrian Territory, U.N. Press Release (Oct. 7, 2003), <http://www.unis.unvienna.org/unis/pressrels/2003/sgsm8918.html> [<https://perma.cc/HFC6-P43S>]; GRAY, *supra* note 81, at 236–37.



community understands that every country, including Israel, must act aggressively against enemy targets such as Hizbullah.<sup>173</sup>

While Arab and other predominantly Muslim states, as well as China, Venezuela,<sup>174</sup> and the Non-Aligned Movement<sup>175</sup> did condemn the attack on Lebanon as a violation of international law, western states focused on the need for any use of force to be proportionate and called on Israel to halt attacks on civilian targets.<sup>176</sup> Since then, numerous such events have occurred: on related grounds, Ethiopia intervened in Somalia in 2006/2007,<sup>177</sup> Colombia bombed alleged FARC bases in Ecuador in 2008,<sup>178</sup> Turkey repeatedly entered Iraqi and Syrian territory to combat

<sup>173</sup> Press Release, *Special Cabinet Communique: Hezbollah attack*, ISR. MINISTRY OF FOREIGN AFF. (July 12, 2006), <http://www.mfa.gov.il/MFA/PressRoom/2006/Pages/Special%20Cabinet%20Communique%20-%20Hizbullah%20attack%2012-Jul-2006.aspx> [https://perma.cc/6RQS-STL3].

<sup>174</sup> GRAY, *supra* note 81, at 238; *Venezuela Recalls Ambassador From Israel*, WASH. POST (Aug. 3 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/03/AR2006080301386.html> [https://perma.cc/J3H8-NF23]; Final Communiqué of the Annual Coordination Meeting of Ministers of Foreign Affairs of Member States of the Organization of the Islamic Conference, Sept. 25, 2006, ¶ 32, [https://digitallibrary.un.org/record/590516/files/A\\_61\\_622\\_S\\_2006\\_959-EN.pdf?version=1](https://digitallibrary.un.org/record/590516/files/A_61_622_S_2006_959-EN.pdf?version=1) [https://perma.cc/79PK-MJE2].

<sup>175</sup> 14th Summit Conference of Heads of State or Government of the Non-Aligned Movement, Havana, Cuba, 11th to 16th of September, 2006, Final Document, NAM 2006/Doc. 1/Rev. 3, ¶ 142, [http://cns.miis.edu/nam/documents/Official\\_Document/14NAMSummit-Havana-Compiled.pdf](http://cns.miis.edu/nam/documents/Official_Document/14NAMSummit-Havana-Compiled.pdf) [https://perma.cc/9GHU-2PSY]; GRAY, *supra* note 81, at 243.

<sup>176</sup> Press Release, Security Council, Security Council Debates Escalating Crisis Between Israel, Lebanon; U.N. Officials Urge Restraint, Diplomacy, Protection of Civilians, U.N. Press Release SC/8776 (July 14, 2006), <https://www.un.org/press/en/2006/sc8776.doc.htm> [https://perma.cc/K2NL-AMFL]; GRAY, *supra* note 81, at 238; for U.S. and German reactions, *see, e.g., In quotes: Lebanon reaction*, BBC NEWS (July 13, 2006), [http://news.bbc.co.uk/2/hi/middle\\_east/5175886.stm](http://news.bbc.co.uk/2/hi/middle_east/5175886.stm) [https://perma.cc/3XAG-8X6N]; for British reaction, *see Britons warned on Lebanon crisis*, BBC NEWS (July 14, 2006), [http://news.bbc.co.uk/2/hi/uk\\_news/politics/5180116.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/5180116.stm) [https://perma.cc/X6LT-VHN9].

<sup>177</sup> Despite apparently having sent troops to Somalia as early as summer 2006, Ethiopia continued denying this until December 2006. Ethiopia then claimed to have acted in self-defense, without, however, ever reporting its actions to the Security Council as Article 51 requires. GRAY, *supra* note 81, at 244, 248, 250.

<sup>178</sup> *Ecuador pulls diplomat from Bogota*, CNN (Mar. 2, 2008), <http://edition.cnn.com/2008/WORLD/americas/03/02/chavez.colombia/index.html?iref=allsearch> [https://perma.cc/WCD6-NRKZ]; Tom Ruys, *Quo Vadis Jus ad Bellum?, A legal analysis of Turkey's Military Operations Against the PKK in Northern Iraq*, 9 MELB. J. INT'L L. 334, 357–58 (2008).

alleged Kurdish terrorists (2008,<sup>179</sup> 2011,<sup>180</sup> 2015,<sup>181</sup> and ongoing<sup>182</sup>), and Kenya entered Somali territory (2011).<sup>183</sup> The United States is also pursuing a relentless drone war (“targeted killings”), whereby the United States claims the right to kill alleged terrorists extra-judicially in, among other states, Afghanistan, Pakistan, Yemen, and Somalia.<sup>184</sup> Israel, the U.K., and Pakistan have followed this example.<sup>185</sup> Meanwhile, Israel now routinely attacks targets in Syria, without any noteworthy international reaction.<sup>186</sup>

Indeed, the manifold outside interventions during the Syrian civil war have illustrated the collapse of the prohibition on the use of force against states unwillingly harboring terrorists. Based on the right of self-defense, many states have launched military attacks against ISIS in Syria (and Iraq), partly with, partly without those governments’ consent—among them Iran, Russia, the United States, the U.K., Turkey, Australia, Canada, France, the Netherlands, Morocco, and Jordan. Up to 60 states purportedly support the western-led military campaign against ISIS

<sup>179</sup> Ruys, *supra* note 178; GRAY, *supra* note 81, at 142–43.

<sup>180</sup> Sebnem Arsu, *Turkey vows to keep up attacks on militants in Iraqi Kurdistan*, INT’L HERALD TRIB., Aug. 24, 2011, 3; Justin Vela, *Turkey launches raid into Iraq after an attack by Kurdish rebels*, INDEP., Oct. 20, 2011, 34; *Iraqi Politicians Condemn Turkish Bombing of Iraqi Kurds*, RADIO FREE EUROPE (Aug. 20, 2011), <https://www.refworld.org/topic,50ffbce5307,50ffbce5574,4e5cdbd6c,0,RFERL,COUNTRYNEW%20S,TUR.html> [<https://perma.cc/9VBE-GNV9>]; Karzan Kanabi, *Turkey-PKK clashes may reignite civil war, says Kurdish presidency*, AK NEWS, Aug. 18, 2011; Sebnem Arsu, *Turkey vows to pursue Kurdish attackers*, INT’L HERALD TRIB., Oct. 20, 2011, 4.

<sup>181</sup> *Streit um türkische Truppen im Irak*, DEUTSCHE WELLE (Dec. 6, 2015), <http://www.dw.com/de/streit-um-t%C3%BCrkische-truppen-im-irak/a-18897402> [<https://perma.cc/D39J-P3DR>].

<sup>182</sup> Issio Ehrich, *Intervention in Syrien und im Irak, Türkei macht Außenpolitik mit der Haubitze*, N-TV (Nov. 2, 2016), <http://www.n-tv.de/politik/Ankara-macht-Aussenpolitik-mit-der-Haubitze-article18987571.html> [<https://perma.cc/Q4MJ-TFS8>]; *Afrin Offensive: Turkey Warns Syria Against Helping Kurds*, BBC NEWS (Feb. 19, 2018), <http://www.bbc.com/news/world-middle-east-43107013> [<https://perma.cc/8FKE-LGKP>].

<sup>183</sup> *Kenianische Armee rückt in Somalia vor*, FRANKFURTER ALLGEMEINE ZEITUNG, Oct. 19, 2011, 6; Daniel Howden, *Kenya plans fresh assault in Somalia after hostage dies*, INDEP., Oct. 20, 2011, 39.

<sup>184</sup> Jack Serle, Jessica Purkiss, *Drone Wars: The full data*, BUREAU OF INVESTIGATIVE JOURNALISM (Jan. 1, 2017), <https://www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data> [<https://perma.cc/5N6K-2A6V>].

<sup>185</sup> Siobhan O’Grady, *The U.S. and Israel aren’t the only countries killing people with drones*, FOREIGN POLICY (Sept. 8, 2015), <http://foreignpolicy.com/2015/09/08/the-u-s-and-israel-arent-the-only-countries-killing-people-with-drones/> [<https://perma.cc/M4E9-TREH>].

<sup>186</sup> See, e.g., *Israelische Luftwaffe attackiert Ziele in Syrien*, ZEIT ONLINE (Mar. 17, 2017), <http://www.zeit.de/gesellschaft/zeitgeschehen/2017-03/nahe-osten-syrien-israel-luftangriffe-grenzgebiet-buergerkrieg-syrische-armee> [<https://perma.cc/HGY6-EXR9>]; *Golanhöhen: Israel bombardiert Ziele in Syrien*, ZEIT ONLINE (June 24, 2017), <http://www.zeit.de/politik/ausland/2017-06/israel-angriff-golanhoechen-syrien-panzer-beschuss-militaer> [<https://perma.cc/63JZ-SNWA>]; Patrick Wintour, *Israel has launched countless strikes in Syria. What’s new is Russia’s response*, GUARDIAN, (Apr. 9, 2018), <https://www.theguardian.com/world/2018/apr/09/israel-has-launched-countless-strikes-in-syria-whats-new-is-russias-response> [<https://perma.cc/9WLV-EBLG>].

targets in Syria.<sup>187</sup> In May 2017, NATO decided to join the military action.<sup>188</sup> Turkey meanwhile justifies its massive intervention in Syria on the basis of fighting Kurdish terrorists.<sup>189</sup>

The legality of these massive interventions has only rarely been discussed. Security Council Resolution 2249<sup>190</sup> was so ambivalent that it can be read to support the use of force against ISIS in Syria without the Syrian government's consent, while also supporting the accusation that such use of force remains illegal.<sup>191</sup> It is therefore consistent with this ambiguity that the 2017 U.S. National Security Strategy declares: "The U.S. military and other operating agencies will take direct action against terrorist networks and pursue terrorists who threaten the homeland and U.S. citizens regardless of where they are."<sup>192</sup>

#### 4. Conclusion

The use of force against states in response to terrorism not imputable to them is increasingly tolerated, if not legal, even in cases where there is no evidence of any collusion. Needless to say, this also causes the deaths of many civilians who, as "collateral damage," have no connection whatsoever to the terrorist attacks. Even "targeted killings" have led to the deaths of many innocent victims.<sup>193</sup>

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<sup>187</sup> See U.S. DEPARTMENT OF STATE, THE GLOBAL COALITION TO DEFEAT ISIS, <https://www.state.gov/s/seci> [<https://perma.cc/46YL-ABLC>]. In letters to the U.N., states have relied on Article 51 to justify their intervention in Syria. See, e.g., Letter dated June 7, 2016 from Belgium to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/523; Letter dated Dec. 10, 2015 from Germany, U.N. Doc. S/2015/946; Letter dated Sept. 9, 2015 from Australia, U.N. Doc. S/2015/693; Letter dated July 24, 2015 from Turkey, U.N. Doc. S/2015/563; Letter dated Mar. 31, 2015 from Canada, U.N. Doc. S/2015/221; Letter dated Nov. 25, 2014 from the U.K.,

U.N. Doc. S/2014/851; Letter dated Sept. 23, 2014 from the United States, U.N. Doc. S/2014/695.  
<sup>188</sup> Bethan McKernan, *NATO to join the US-led coalition against ISIS fighting in Iraq and Syria*, INDEP. (May 25, 2017), <https://www.independent.co.uk/news/world/europe/nato-us-coalition-isis-iraq-syria-donald-trump-jens-stoltenberg-brussels-visit-a7755751.html> [<https://perma.cc/P7S2-JHYX>].

<sup>189</sup> *Türkei wirft Frankreich Terrorunterstützung vor*, SÜDDEUTSCHE ZEITUNG (Mar. 30, 2018), <http://www.sueddeutsche.de/politik/syrien-konflikt-tuerkei-wirft-frankreich-terrorunterstuetzung-vor-1.3926576> [<https://perma.cc/DAQ5-KJ48>].

<sup>190</sup> U.N. S.C. Res. 2249 (2015).

<sup>191</sup> Dapo Akande, Marko Milanovic, *The Constructive Ambiguity of the Security Council's ISIS Resolution*, EJIL TALK! (Nov. 21, 2015), <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> [<https://perma.cc/UZ32-QMGP>].

<sup>192</sup> THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 11 (2017), <http://nssarchive.us/wp-content/uploads/2017/12/2017.pdf> (emphasis added) [<https://perma.cc/K4WW-94WW>].

<sup>193</sup> Conor Friedersdorf, *The Obama's Administration's Drone-Strike Disassembling*, ATLANTIC (Mar. 14, 2016), <https://www.theatlantic.com/politics/archive/2016/03/the-obama-administrations-drone-strike-disassembling/473541/> [<https://perma.cc/TMX7-RVAL>]; Marjorie Cohn, *Trump is Killing Record Numbers of Civilians*, HUFFINGTON POST (Nov. 1, 2017), [https://www.huffingtonpost.com/entry/trump-is-killing-record-numbers-of-civilians\\_us\\_59f9cc1be4b0412aab840c87](https://www.huffingtonpost.com/entry/trump-is-killing-record-numbers-of-civilians_us_59f9cc1be4b0412aab840c87) [<https://perma.cc/QF3C-2E9M>].

Furthermore, the cart has been put before the horse, in that the international community has not been able to agree on a unified definition of what constitutes terrorism. This has opened the door to abuse. Past interventions, allegedly conducted in response to terrorism, have had significant ulterior motives, such as Ethiopia's intervention in Somalia and Uganda's and Rwanda's intervention in Congo. The lack of agreement on who is a terrorist also poses explosive questions: based on Turkish President Erdogan's classification of the Gülen movement as a terrorist organization,<sup>194</sup> he would, from his point of view, presumably be justified in taking military action against the United States, where that group's leader resides. In fact, Erdogan has already issued a warning to France because of its alleged support for Kurdish terrorists.<sup>195</sup>

Again a loophole has appeared for the powerful to overwhelm the weak; depending on its place in the hierarchy of power, a state will be able to define what and who it views as a terrorist and will subsequently be able to impose its view on other, weaker states, based on dubious legal grounds.

Some may argue that there is no superior way of combatting terrorism. Although this is beyond the scope of this article, the lack of respect the West has shown towards international law in the "War on Terror" is remarkable; had they so wished, the United States and the U.K. would have most likely gained U.N. Security Council authorization for an attack on Afghanistan, though probably minus regime change. Similarly, the Security Council may have approved action against and in Syria, had the West not overplayed its hand in Libya, following Resolution 1973, and gone far beyond the authorization.<sup>196</sup>

### ■ *Armed Reprisals*

States, reacting to terrorist attacks by using force against another state, have invariably relied on the right of self-defense. Nevertheless, victim states have usually only initiated a military campaign once the terrorist attack had already occurred. This has been difficult to align with Article 51, which demands that an armed attack must be occurring in order to trigger the right of self-defense. Furthermore, one of the requirements of rightful self-defense is that the response must be "necessary" to end an ongoing attack. Punitive action is therefore impermissible. Nevertheless, some politicians have referred to "retaliation" as a justification for using force against other states. As Shane Darcy has pointed out, the precise meaning of the term "retaliation" in international law has remained

<sup>194</sup> *Türkei: Erdogan lässt Gülen-Bewegung als Terror-Gruppe einstufen*, ZEIT ONLINE (May 31, 2016), <http://www.zeit.de/politik/ausland/2016-05/tuerkei-recep-tayyip-erdogan-terrorismus-fethulla-guelen> [https://perma.cc/7ZUH-4KHJ].

<sup>195</sup> See note 186.

<sup>196</sup> See Patrick C. R. Terry, *The Libya intervention (2011)—Neither lawful, nor successful*, 48 COMP. & INT'L L.J. OF S. AFRICA 162–182 (2015).

nebulous.<sup>197</sup> Frequently, therefore, “retaliation” and “reprisal” are used interchangeably. However, when force is employed, the term “armed reprisal” has become the most “legally recognizable concept,”<sup>198</sup> which also includes retaliation.

### 1. Armed reprisals have become legal again

Most claiming a resurrection of the right to armed reprisals argue that post-WWII state practice has led to the revival of the originally outlawed practice. Many then argue that armed reprisals, rather than a distinct right to use force, are just another facet of self-defense.<sup>199</sup>

As early as 1972, Derek Bowett claimed:

Not surprisingly, as states have grown increasingly disillusioned about the capacity of the Security Council to afford them protection against what they would regard as illegal and highly injurious conduct directed against them, they have resorted to self-help in the form of reprisals and have acquired the confidence that, in so doing, they will not incur anything more than a formal censure from the Security Council. The law on reprisals is, because of its divorce from actual practice, rapidly degenerating to a stage where its normative character is in question.<sup>200</sup>

Only Israel has so far openly invoked a right of armed reprisal: Israel justified its attack on the airport of Beirut in 1968 as “retaliation” for the Lebanese government’s alleged support of terrorism.<sup>201</sup> Many decades and alleged instances of armed reprisal later, this view is gaining increasing support.<sup>202</sup>

### 2. Assessment

There is widespread agreement that the U.N. Charter outlaws “armed reprisals” in retaliation against a previous illegal act by another state.<sup>203</sup> This view

<sup>197</sup> See Shane Darcy, *Retaliation and Reprisal*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 879, 879–80 (Marc Weller ed., 2015).

<sup>198</sup> Darcy, *id.* at 881–82.

<sup>199</sup> See generally James Larry Taulbee, John Anderson, *Reprisal Redux*, 16 CASE W. RES. J. INT’L L. 309 (1984); Jeffrey Allen McCredie, *The April 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisal?*, 19 CASE W. RES. J. INT’L L. 215, 238–39, 241 (1987); Baker, *supra* note 90.

<sup>200</sup> See Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT’L L. 1, 2 (1972).

<sup>201</sup> See Falk, *The Beirut Raid and the International Law of Retaliation*, *supra* note 95.

<sup>202</sup> See generally Michael A. Newton, *Reconsidering Reprisals*, 20 DUKE J. COMP. & INT’L L. 361 (2010); DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 30, at 245, 250; Christian J. Tams, *The Use of Force against Terrorists*, 20 EURO. J. INT’L L. 359 (2009).

<sup>203</sup> For a general definition of “armed reprisal,” see *Responsabilité de L’Allemagne à Raison des Dommages Causes dans les Colonies Portugaises du Sud de L’Afrique (Portugal v. Germany)*, 2 R. INT’L ARB. AWARDS 1011 (1928) [the Naulilaa Case]. See also *Portugal v. Germany (The Naulilaa Case)*, 4 ANN. DIG. 526 (Special Arbitral Tribunal 1928); Motshabi, *supra* note 137, at 675;

is shared by the overwhelming majority of scholars,<sup>204</sup> the U.N. Security Council,<sup>205</sup> the General Assembly,<sup>206</sup> and the ICJ,<sup>207</sup> and is often repeated by many states.<sup>208</sup>

### 3. State Practice

No state besides Israel<sup>209</sup> has so far officially admitted carrying out an armed reprisal or even claimed that a right to armed reprisal still exists in international law. Furthermore, the Security Council and the General Assembly have routinely condemned states that have invoked self-defense, but were suspected of an armed reprisal.<sup>210</sup>

The battle against terrorism has, however, increasingly seen states revert to what amounts to armed reprisals, while officially relying on Article 51. It does not require much effort to argue that the U.S. attacks on Libya in 1986,<sup>211</sup> on Iranian

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ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE, BEYOND THE U.N. CHARTER PARADIGM* 42 (1995).

<sup>204</sup> Andrew Garwood-Gowers, *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, *Did the ICJ Miss the Boat on the Use of Force?*, 5 MELB. J. INT'L L. 241, 250 (2004); Wilmschurst, *supra* note 40, at 969; Motshabi, *supra* note 137, at 681; McCredie, *supra* note 199, at 238–39; BYERS, *supra* note 80, at 5; GAZZINI, *supra* note 11, at 168–69; AREND & BECK, *supra* note 203, 42–43; BOWETT, *supra* note 12 at 13–14; BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES*, *supra* note 21, at 265, 281–82; Michael J. Kelly, *Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSNAT'L L. & POL'Y 1, 2, 12 (2003–2004).

<sup>205</sup> S.C. Res. 101 (Nov. 24, 1953), 106 (Mar. 29, 1955), 111 (Jan. 19, 1956), 188 (Apr. 9, 1964).

<sup>206</sup> G.A. Res. 2625 (XXV), at 1, Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations.

<sup>207</sup> Nicaragua, *supra* note 9, ¶ 191 (quoting G.A. Res. 2625 (XXV) (including the prohibition on reprisals) while describing it as an expression of *opinio juris* in regard of customary international law).

<sup>208</sup> See, e.g., Statement from the British Foreign Office (Sept. 26, 1956), *quoted in* BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES*, *supra* note 21, at 282; Statement from the Office of the Legal Advisor to the U.S. State Department of 1979, *quoted in* W. Michael Reisman, *The Raid on Baghdad: Some Reflections on its Lawfulness and Implications*, 5 EURO. J. INT'L L. 120, 126 (1994).

<sup>209</sup> Falk, *The Beirut Raid and the International Law of Retaliation*, *supra* note 95.

<sup>210</sup> For Israel, see S.C. Res. 101 (Nov. 24, 1953); S.C. Res. 106 (Mar. 29, 1955); S.C. Res. 111 (Jan. 19, 1956); S.C. Res. 262 (Dec. 31, 1968); and S.C. Res. 573 (Oct. 4, 1985). For U.K., see S.C. Res. 188 (Apr. 9, 1964). For South Africa, see S.C. Res. 475 (Aug. 20, 1980); S.C. Res. 387 (Mar. 31, 1976); S.C. Res. 428 (May 6, 1978); S.C. Res. 447 (Mar. 28, 1979); and S.C. Res. 454 (Nov. 2, 1979). South African actions in four neighboring states in the 1980s were also condemned by the majority of states on the Security Council in a 12:2:1 vote in May 1986 (the U.K. and the U.S. vetoed the resolution because they opposed sanctions).

<sup>211</sup> Roberts, *Self-Help in Combatting State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals*, *supra* note 89, at 286–88; Mary Ellen O'Connell, *The Popular But Unlawful Armed Reprisal*, 44 OHIO N. U. L. REV. 325, 341–42 (2018). The raid on Libya was condemned in G.A. Res. 41/38, Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the aerial and naval military attack against the Socialist People's Libyan Arab Jamahiriya by the present United States Administration in April 1986 (1986) (79:28:33 votes).

oil platforms in 1988,<sup>212</sup> and on Iraq in 1993<sup>213</sup> were armed reprisals. In each case, the attack the United States was responding to had been concluded, time had elapsed before force was deployed, and the United States provided no compelling evidence that further attacks were imminent. The 1998 attacks on Afghanistan and Sudan,<sup>214</sup> which even the Congressional Research Service describes as “retaliation,”<sup>215</sup> justify a similar conclusion. Operation Enduring Freedom, initiated in 2001, is the most massive armed reprisal so far, as implicitly confirmed by U.K. Prime Minister Blair in his memoirs.<sup>216</sup> Since then, there have been numerous such instances.<sup>217</sup>

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<sup>212</sup> Oil Platforms, *supra* note 33, at 294 (Elaraby, J., dissenting); *id.* at 222–23 (Rigaux, J., separate opinion); Reisman, *The Raid on Baghdad: Some Reflections on its Lawfulness and Implications*, *supra* note 208, at 126 (stating that while the action against Iranian oil platforms was, “described as self-defense, the much more plausible view is that it was an act of reprisal.”); Djamchid Momtaz, *Did the Court Miss an Opportunity to Denounce the Erosion of the Principle Prohibiting the Use of Force?*, 29 YALE J. INT’L L. 301, 310–11 (2004). *But see* Abraham D. Sofaer, International Law and the Use of Force, at the American Society of International Law Annual Meeting (April 20–23, 1988), in PROCEEDINGS OF THE ANN. MEETING (AM. SOC’Y OF INT’L L.), April 1988, at 420, 424 (disagreeing).

<sup>213</sup> See generally Paulina Starski, *The U.S. Airstrikes Against the Iraqi Intelligence Headquarters – 1993 in THE USE OF FORCE IN INTERNATIONAL LAW, A CASE-BASED APPROACH* 504, 523–24 (Tom Ruys, Oliver Corten & Alexandra Hofer eds., 2018); Reisman, *The Raid on Baghdad: Some Reflections on its Lawfulness and Implications*, *supra* note 208. See O’Connell, *supra* note 211, at 342.

<sup>214</sup> See Newton, *supra* note 202, at 368; O’Connell, *supra* note 211, at 343–45.

<sup>215</sup> See generally CONG. RESEARCH SERV., *supra* note 151.

<sup>216</sup> See TONY BLAIR, *A JOURNEY: MY POLITICAL LIFE*, 356 (2010) (“Partly as a result of this, I thought it essential that the battle we were about to embark upon was not simply a war to punish . . . Yes, the cause was the attack on the Twin Towers, but once engagement began, it couldn’t just be retaliation, a reprisal, a redress of wrong done to us.”). Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, And Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL’Y 539, 546–49 (2001–2002); Quigley, *The Afghanistan War And Self-Defense*, *supra* note 128, at 556–57; Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, *supra* note 94, at 998; Myjer & White, *supra* note 99, at 8, 11–12; Wouters & Naert, *supra* note 99, at 434–37, 461; GRAY, *supra* note 81, at 2; and Kelly, *supra* note 204, at 2, 12, 19–22, 36. Kelly acknowledges that reprisals were outlawed by the U.N. Charter and that the United States was careful to adopt a legal position in response to 9/11 that was in accordance with Article 51. He then, however, argues that the United States had gone to great lengths to justify the war on Afghanistan in terms that were also concordant with the classical definition of a “reprisal.” Kelly implies that the United States is attempting to re-introduce reprisals as a possible legal justification for the use of force. See also GAZZINI, *supra* note 11, at 183–84, 203–04. In 1981, President Reagan’s “promise[d]” terrorists “swift and effective retribution.” Richard Halloran, *Swift U.S. Retribution for Terrorists Called Doubtful*, N.Y. TIMES (Feb. 3, 1981), <https://www.nytimes.com/1981/02/03/us/swift-us-retribution-for-terrorists-called-doubtful.html> [https://perma.cc/BUC4-4U75.] See Roberts, *Self-Help in Combatting State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals*, *supra* note 89, at 282–86 (arguing in favor of the legality of reprisals, because their “prohibition . . . may run the risk of leaving much state conduct unregulated.”).

<sup>217</sup> See MOIR, *supra* note 86, at 28–29; O’Connell, *supra* note 211, at 345–49.

#### 4. Conclusion

The number of such instances has led some to conclude that the right of self-defense has “adapted” to the modern phenomenon of massive terrorist attacks.<sup>218</sup> Although states have so far remained steadfast in their rejection of armed reprisals, states’ actions have increasingly circumvented the prohibition. The appearance of terrorist groups, such as al-Qaeda, has reinforced states’ wish to resort to punitive measures and led to a situation whereby it is no longer out of the question that states might officially claim a right of reprisal. Some have concluded that the United States is, in fact, actively promoting the idea of legalizing armed reprisals in international law.<sup>219</sup>

The prohibition on the punitive use of force faces further erosion due to relatively novel arguments that the United States and its allies may be justified in using force against states such as Iran, North Korea, or Syria for their violations of arms control treaties.<sup>220</sup> The use of force to enforce treaties is closely aligned with the idea of punitive military action, with a prior treaty violation punished by a military attack. Although few scholars and states now support this argument, the attack on Syria in April 2018 seems to evidence a change in attitude. Many argued that the Syrian government’s alleged violation of the ban on chemical weapons justified the use of force.<sup>221</sup> Only the relatively powerful states, however, can even contemplate using force to punish and/or enforce treaties in the certainty of never

<sup>218</sup> Newton, *supra* note 202.

<sup>219</sup> Kelly, *supra* note 204, at 2, 12, 19–22, 36; GAZZINI, *supra* note 11, at 183–84, 203–04.

<sup>220</sup> See generally Jordan Paust, *U.S. Use of Limited Force in Syria Can be Lawful Under the U.N. Charter*, JURIST-FORUM (Sep. 10, 2013), <http://www.jurist.org/forum/2013/09/jordan-paust-force-syria.php> [<https://perma.cc/DL4Z-DCPQ>]; Anthony D’Amato, *The Meaning of Article 2(4) in the U.N. Charter* (Sep. 6, 2013) (Nw. Pub. L. Res. Paper No. 13-30), <http://ssrn.com/abstract=2321806> [<https://perma.cc/VQ24-3B6P>]. They argue that such “treaty enforcement” would not necessarily contravene Article 2(4). Frederik Pleitgen, Tom Cohen, *‘War-weary’ Obama says Syria chemical attack requires response*, CNN (Aug. 30, 2013), <http://edition.cnn.com/2013/08/30/world/europe/syria-civil-war/> [<https://perma.cc/SS7W-C352>]; *U.S. Secretary of State Kerry Makes Statement on Syria*, REUTERS (Aug. 30, 2013), <http://www.reuters.com/article/2013/08/30/us-syria-crisis-kerry-transcript-idUSBRE97T0RR20130830> [<https://perma.cc/5KFC-E44U>]; *Obama says U.S. has ‘obligation’ to act on Syria, cites intel findings*, FOX NEWS (Aug. 30, 2013), <https://www.foxnews.com/politics/obama-says-us-has-obligation-to-act-on-syria-cites-intel-findings> [<https://perma.cc/95JV-2VKU>].

<sup>221</sup> *Merkel befürwortet Militärschlag gegen Syrien*, SPIEGEL ONLINE (Apr. 14, 2018), <http://www.spiegel.de/politik/ausland/syrien-angela-merkel-befuerwortet-westliche-luftangriffe-a-1202925.html> [<https://perma.cc/ZN6E-YJFS>]. Beyond the three states that participated in the strikes (United States, U.K., France), many other states issued supportive statements (among them Germany, Canada, Turkey, Israel, the European Union and NATO), based also on Syria’s alleged violation of the ban on chemical weapons. For a very critical view of the legality of the airstrikes, see Wissenschaftliche Dienste [Research Service], *Deutscher Bundestag: Völkerrechtliche Implikationen des amerikanisch-britisch-französischen Militärschlags vom 14. April 2018 gegen Chemiewaffeneinrichtungen in Syrien*, <https://www.bundestag.de/blob/551344/f8055ab0bba0ced333ebcd8478e74e4e/wd-2-048-18-pdf-data.pdf> [<https://perma.cc/K7KS-NZ64>] (Ger).



being victims of such enforcement action themselves, despite their own manifold violations of international law.

Most proponents of “forcible” arms control, however, prefer to rely on a different “emerging” justification of the use of force: preventive self-defense.

### ■ Preventive Self-defense

The proliferation of weapons of mass destruction (“WMD”) has led to a surge in the number of scholars and politicians who argue either that preventive self-defense is legal under international law; that it is in the process of becoming legal; or that it should be legal. Although the concept of preventive self-defense had been developed earlier, the Bush Administration provided a breakthrough. In two National Security Strategies,<sup>222</sup> the Administration claimed that “pre-emptive” self-defense against “rogue states” that were developing WMD and could possibly attack the United States at some point in the future comported with international law.<sup>223</sup> Although the Obama Administration did not explicitly repeat such claims, it never repudiated them either.<sup>224</sup> In fact, prior to the conclusion of the Iran nuclear treaty,<sup>225</sup> the Obama Administration viewed the use of force against Iran as an option to halt the alleged nuclear weapons program.<sup>226</sup> This option may be under consideration again by the Trump Administration, now that it has repudiated that treaty.<sup>227</sup>

<sup>222</sup> See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 14 (2002) (hereinafter NSS 2002); THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 20 (2006) (hereinafter NSS 2006).

<sup>223</sup> NSS 2002, *supra* note 222, at 14-5.

<sup>224</sup> See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 22 (2010) (hereinafter NSS 2010). Although the Obama Administration’s NSS of 2010 no longer mentioned preventive self-defense, neither did it explicitly repudiate it. In contrast, Guantanamo is described as “one of [violent extremists’] most potent recruitment tools” (22). The section on “Use of Force” does not actually specify any legal criteria at all.

<sup>225</sup> Joint Comprehensive Plan of Action, ¶ 21 (iv), July 14, 2015 (hereinafter JCPOA).

<sup>226</sup> See Barack Obama, President, Remarks by the President to the U.N. General Assembly (Sep. 25, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/09/25/remarks-president-un-general-assembly> [https://perma.cc/RR96-DQPC]; *Obama says Iran nuclear row ‘larger’ than Syria crisis*, BBC NEWS (Sep. 15, 2013), <https://www.bbc.com/news/world-middle-east-24102723> [https://perma.cc/85K4-CVEX]; *Panetta: U.S. may have to use force against Iran*, JERUSALEM POST (Nov. 1, 2013), <http://www.jpost.com/Iranian-Threat/News/Panetta-US-may-have-to-use-military-force-against-Iran-330373> [https://perma.cc/2WEA-YYV4]. See generally Patrick C.R. Terry and Karen S. Openshaw, *Nuclear Non-Proliferation and ‘Preventive Self-Defence’: Why Attacking Iran Would Be Illegal*, 51 CANADIAN Y.B. INT’L L. 165 (discussing the legality of a potential attack on Iran in detail).

<sup>227</sup> See Ariana Tabatabai, *The Bolton threat to the Iran nuclear deal*, BULLETIN OF THE ATOMIC SCIENTISTS (Mar. 29, 2018), <https://thebulletin.org/bolton-threat-iran-nuclear-deal11645> [https://perma.cc/3Z5Z-VNPU].

# 1. Preventive self-defense as a necessary response to the danger of WMD

Some of the arguments employed to justify the use of force in “preventive” self-defense are identical to those put forward in defense of forcible rescue missions: allegedly, preventive self-defense would not violate Article 2(4), because an intervention to destroy WMD capabilities neither infringes on a state’s independence nor contradicts U.N. principles.<sup>228</sup>

Proponents of the legality of preventive self-defense usually contend that it is just an aspect of anticipatory self-defense. “Anticipatory self-defense” refers to the use of force in order to repel an attack that is imminent. As stated by U.S. Secretary of State Daniel Webster in 1841, in relation to the *Caroline* incident of 1837, a state is permitted to use force in order to counter an attack that has not yet commenced provided there exists “a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation.” They then argue that the legality of anticipatory self-defense, as part of pre-Charter customary international law, has remained unaffected by the U.N. Charter.<sup>229</sup>

Similar to arguments in favor of forcible rescue missions, some scholars claim that Article 51 had confirmed pre-Charter customary international law on self-defense.<sup>230</sup> As anticipatory self-defense was lawful prior to the Charter, it has remained so. State practice and *opinio juris* since 1945 allegedly confirm this.<sup>231</sup> The *Caroline*’s “imminence” criterion, however, now requires adjustment to enable states to respond to dangers inherent to WMD.<sup>232</sup> A state cannot be expected to wait until such weapons are about to be launched before responding.<sup>233</sup> A reasonable

<sup>228</sup> See D’Amato, *Israel’s Air Strike Upon the Iraqi Nuclear Reactor*, *supra* note 41, at 585.

<sup>229</sup> See Jane E. Stromseth, *Law and Force after Iraq: A Transitional Moment*, 97 AM. J. INT’L L. 628, 637–38 (2003); Charles Pierson, *Preemptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom*, 33 DENVER J. INT’L L. & POL’Y 150, 155–57 (2004); Malone, *supra* note 40, at 813; Graham, *supra* note 6, at 7.

<sup>230</sup> See Marston, *supra* note 34, 795–96, 800. See also Day, *supra* note 11, at 50.

<sup>231</sup> See Gregory A. Raymond and Charles W. Kegley, *Preemption and Preventive War in THE LEGITIMATE USE OF MILITARY FORCE, THE JUST WAR TRADITION AND THE CUSTOMARY LAW OF ARMED CONFLICT*, (Howard M. Hensel ed., 2008), 101–02; Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, *supra* note 6, at 513–14.

<sup>232</sup> See Stromseth, *Law and Force after Iraq: A Transitional Moment*, *supra* note 229, at 638; Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT’L L. 576, 582 (2003); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT’L L. 563, 573 (2003); Marshall Silverberg, *International Law and the Use of Force: May the United States Attack the Chemical Plant at Rabta?*, 13 B.C. INT’L & COMP. L. REV. 53, 58 (1990); Mark E. Newcomb, *Non-Proliferation, Self-Defense, and the Korean Crisis*, 27 VAND. J. TRANSNAT’L L. 603, 620 (1994).

<sup>233</sup> See Stephen G. Rademaker, *Use of Force after 9/11*, 5 CHI. J. INT’L L. 461, 461–62 (2005).

interpretation of “imminence” must take modern weapons technology into account.<sup>234</sup>

Some supporters of preventive self-defense—as envisaged by the Bush doctrine—admit its incompatibility with current international law.<sup>235</sup> Based on the ineffectiveness of the non-proliferation regime and the enormous danger inherent to “rogue states” acquiring WMD, they argue that international law on the use of force requires amendment so that states can confront these new challenges.<sup>236</sup> “Forcible counter-proliferation”<sup>237</sup> must become legal if states refuse to forsake WMD. Not only can this increase the world’s safety, but it can also enforce the rule of law by compelling states to adhere to the non-proliferation regime.<sup>238</sup> When vital national security issues are at stake, states cannot be expected to refrain from the use of force.<sup>239</sup> Some even argue that state practice and especially *opinio juris* evidence the emergence of a new norm allowing “forcible counter-proliferation” or preventive self-defense.<sup>240</sup>

## 2. Assessment

From a legal perspective, these arguments are unconvincing. I previously discussed why the restrictive interpretation of Article 2(4) is not feasible. Furthermore, taking out another state’s WMD capability can only be described as infringing on that state’s sovereignty.

When evaluating forcible rescue missions, I explained why it cannot be argued that Article 51 had preserved pre-Charter customary international law on self-defense, including the right to anticipatory self-defense. While the reliance on

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<sup>234</sup> See Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, *supra* note 232, at 584 (suggesting that, in a “teleological understanding of Article 51,” force may be required to prevent attack by state and non-state actors).

<sup>235</sup> See Joel R. Paul, *The Bush Doctrine: Making or Breaking Customary International Law?*, 27 HASTINGS INT’L & COMP. L. REV. 457, 469 (2004).

<sup>236</sup> See Pierson, *supra* note 229, at 174–75; Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, *supra* note 6, at 484; *see also* Silverberg, *supra* note 232, at 86–87; Newcomb, *supra* note 232, at 631–33.

<sup>237</sup> Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, *supra* note 6, at 483, 517–27 (criteria for use of force).

<sup>238</sup> See Louis René Beres and Yoash Tsiddon-Chatto, *Reconsidering Israel’s Destruction of Iraq’s Osiraq Nuclear Reactor*, 9 TEMP. INT’L & COMP. L.J. 437, 439 (1995); *see also* Pierson, *supra* note 229, at 171. *But cf.* Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, *supra* note 6, at 497 (noting reluctance of states to deliver threatened punishment, significant roles of other counterproliferation strategies, and limitations of threatening force).

<sup>239</sup> See Beres & Tsiddon-Chatto, *supra* note 238, at 438; *see also* Newcomb, *supra* note 232, at 618.

<sup>240</sup> See Paul, *supra* note 235, at 469; *see also* Guruli, *supra* note 90, at 122; Pierson, *supra* note 229, at 177.

the *Caroline* incident itself may well be problematic,<sup>241</sup> there is nevertheless widespread agreement that anticipatory self-defense was lawful under pre-Charter customary international law.<sup>242</sup> I also discussed why the *Caroline* formula cannot provide a reliable interpretation of Article 51, which requires an armed attack.<sup>243</sup> Furthermore, even advocates of the contrary view acknowledge that preventive self-defense does not meet the *Caroline* imminence criterion.<sup>244</sup> Their demand that international law must adjust to modern WMD capabilities<sup>245</sup> is itself insufficient to amend the law. In fact, the lack of state practice in invoking even the lesser right of anticipatory self-defense disproves the development of new customary international law permitting the more expansive right of preventive self-defense.

Lastly, the doctrine of preventive self-defense no longer allows a proper distinction between defensive and offensive military action. The notion of “preventive war”—in which the use of force is aimed not at eliminating an obvious and defined threat, but at removing a regime regarded as posing a future threat—points to a wider problem: can such a use of force correctly be described as defensive at all? The term preventive self-defense is contradictory, as the relevant use of force is not defensive, but clearly offensive.<sup>246</sup>

### 3. State Practice

There is little evidence of state practice on preventive self-defense. The concept has found support, however, in both the United States and other countries.

<sup>241</sup> Some scholars question the *Caroline* incident’s relevance regarding anticipatory self-defense and claim that the destruction of the *Caroline* was not anticipatory, but an action in self-defense during an ongoing armed conflict. See DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 30, at 184–85; Paul, *supra* note 235, at 463.

<sup>242</sup> See e.g., Malone, *supra* note 40, at 809–10 (quoting Hugo Grotius as saying in 1625 that: “self-defence is to be permitted... also in advance, where ‘the deed may be anticipated.’”). Raymond and Kegley mention the 1807 “bombardment of Copenhagen” as an example when the U.K. claimed it was acting in anticipatory self-defense. Raymond & Kegley, *supra* note 231, at 100–01. Terry D. Gill, *The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention and Immediacy*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES: ESSAYS IN HONOUR OF YORAM DINSTEIN (Michael N. Schmitt & Jelena Pejic eds., 2007) 113, 121, cites the International Military Tribunals in Nuremberg and Tokyo (1945) as confirming the basic legality of anticipatory self-defense. Gill also mentions the British destruction of the French fleet in 1940, *id.* at 129–32, an example also relied upon by W. Thomas Mallison and Sally V. Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?*, 15 VAND. J. TRANSNAT’L L. (1982) 417, 422–23. See also Donald R. Rothwell, *Anticipatory Self-Defence in the Age of International Terrorism*, 24 U. QUEENSL. L.J. 337, 339–40 (2005).

<sup>243</sup> See *supra* pp. 18–19.

<sup>244</sup> Cited in Jack S. Levy, *Preventive War and Democratic Politics*, 52 INT’L STUD. Q. 1, 5 n.19 (2008). See also James Mulcahy & Charles O Mahony, *Anticipatory Self-Defence: A Discussion of the International Law*, 2 HANSE L. REV. 231, 236 (2006).

<sup>245</sup> See NSS 2002, *supra* note 223, at 15.

<sup>246</sup> Whitley R. P. Kaufman, *What’s Wrong with Pre-emptive War?*, JOINT SERV.’S CONF. ON PROF. ETHICS (January 27–28, 2005), <http://isme.tamu.edu/JSCOPE05/Kaufman05.html> [https://perma.cc/3DN3-D25Z].

The threat to use force against states attempting to acquire or use WMD is becoming so commonplace that the ban on such military actions is eroding.

Only rarely have states invoked the less controversial right to anticipatory self-defense. While the United States and Israel have quite frequently stated that they were using force with the additional aim of “preempting future attacks,” this has been in circumstances when attacks against U.S. or Israeli interests had taken place.<sup>247</sup> The question that arises in such instances is whether the use of force is warranted on the basis of self-defense, or whether it in fact amounts to an armed reprisal.<sup>248</sup>

There have been only three well-known instances<sup>249</sup> in which states using force could plausibly have claimed to be acting in “anticipatory” self-defense: the U.S. blockade of Cuba during the Cuban Missile Crisis in 1962,<sup>250</sup> the Israeli attack on Egypt—initiating the Six-Day War—in 1967,<sup>251</sup> and the 1981 Israeli attack on the Iraqi nuclear reactor at Osiraq.<sup>252</sup> The U.S. naval blockade of Cuba in 1962<sup>253</sup> and the 1967 Israeli attack on Egypt<sup>254</sup> must also be discounted as affirming state practice and *opinio juris* in favor of anticipatory self-defense, because in both instances the states concerned did not justify their actions on that basis. The United States justified its blockade of Cuba to prevent Russia from delivering missiles *not* on the grounds of self-defense under Article 51, but by invoking regional security arrangements under Chapter VIII of the U.N. Charter,<sup>255</sup> a point emphasized by the

<sup>247</sup> See Reisman & Armstrong, *supra* note 41, at 527; GRAY, *supra* note 81, at 131–32. *But see* Rothwell, *supra* note 242, at 343–45 (suggesting U.S. raid on Libya in 1986 as case of anticipatory self-defense).

<sup>248</sup> Following various incidents in the Persian Gulf related to the Iran–Iraq War, a US-flagged merchant vessel was hit by an (allegedly) Iranian missile in October 1987. In 1988, the U.S. attacked Iranian oil platforms and justified this as self-defense, arguing that the action was necessary to “prevent future attacks.” Reisman, *The Raid on Baghdad: Some Reflections on its Lawfulness and Implications*, *supra* note 208, at 126.

<sup>249</sup> GRAY, *supra* note 81, at 131. She mentions a fourth case: the Iraqi attack on Iran in 1980. Iraq originally relied on “preventive” self-defense. However, as she points out, Iraq subsequently justified its actions as a response to a prior attack by Iran.

<sup>250</sup> See Rademaker, *supra* note 233, at 465; Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, *supra* note 232, at 584; Newcomb, *supra* note 232, at 623–25; Mallison & Mallison, *supra* note 242, at 423–24.

<sup>251</sup> See Raymond & Kegley, *supra* note 231, at 102; Gill, *supra* note 242, at 134–39; Pierson, *supra* note 229, at 165–67; Newcomb, *supra* note 232, at 621.

<sup>252</sup> See ISRAELI MINISTRY OF FOREIGN AFFAIRS, STATEMENT BY THE GOVERNMENT OF ISRAEL ON THE BOMBING OF THE IRAQI NUCLEAR FACILITY NEAR BAGHDAD- 8 JUNE 1981, <http://www.mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook5/Pages/26%20Statement%20by%20the%20Government%20of%20Israel%20on%20the%20Bo.aspx> (last visited Oct. 27, 2018) [<https://perma.cc/9HVY-WK38>].

<sup>253</sup> See John Quigley, *Israel's Destruction of Iraq's Nuclear Reactor: A Reply*, 9 TEMP. INT'L & COMP. L.J. 441, 441 (1995); D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, *supra* note 41, at 588 fn. 19; Pierson, *supra* note 229, at 163. *But see* GAZZINI, *supra* note 11, at 149–50.

<sup>254</sup> See GRAY, *supra* note 81, at 130–31; GAZZINI, *supra* note 11, at 150.

<sup>255</sup> See OAS authorization. Resolution of the *Council of the Organization of American States* (Oct. 22, 1962), 47 DEPT. STATE BULL. 722 (1962) (invoking Article 6 of the Rio Treaty, which did *not*

Legal Adviser to the U.S. State Department.<sup>256</sup> In 1967, Israel claimed that it was acting in self-defense because Egypt's previous actions had amounted to an armed attack on Israel.<sup>257</sup> International reaction to Israel's actions can be described as being, at best, inconclusive.<sup>258</sup>

Only when Israel attacked the Iraqi nuclear reactor in 1981 to prevent Iraq from obtaining nuclear weapons did it rely on anticipatory self-defense.<sup>259</sup> The Security Council unanimously condemned the Israeli actions.<sup>260</sup> Much has been made of the fact that not every state supporting this Security Council resolution (e.g., the United States) had explicitly renounced the right of anticipatory self-defense during the debate, and some see this as an implicit acceptance of the concept.<sup>261</sup> In fact, more correctly, Israel's attack on Iraq must be viewed as "preventive" self-defense because Iraq was allegedly in the process of developing nuclear weapons and an armed attack on Israel was certainly not "imminent."<sup>262</sup>

Further examples of "preventive" self-defense are the 2003 war in Iraq and the 2007 Israeli attack on Syria. One of the reasons given for the invasion of Iraq by the "coalition of the willing" in March 2003 was Saddam Hussein's continued research into and stockpiling of WMDs.<sup>263</sup> Not only did this allegation later prove to be untrue, but the United States was the only state in the coalition to base its legal justification on, *inter alia*, preventive self-defense,<sup>264</sup> while the other states relied

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require an "armed attack"); Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, *supra* note 232, at 584; GRAY, *supra* note 81, at 131; GAZZINI, *supra* note 11, at 149–50.

<sup>256</sup> Abram Chayes, *The Legal Case for U.S. Action on Cuba*, 47 DEPT. STATE BULL. (1962) 763–65.

<sup>257</sup> 1967 U.N.Y.B. 167. The Israeli justification is reported as follows: "After Egyptian forces had attacked on 5 June, Israel had defended itself under Article 51 of the United Nations Charter"; similarly, the *Knesset Lexicon* describes contemporary Israeli warnings that Egyptian blocking of the Straits of Tiran would be "justification for acts of war." THE KNESSET, SIX DAY WAR (2008), [http://www.knesset.gov.il/lexicon/eng/six\\_days\\_eng.htm](http://www.knesset.gov.il/lexicon/eng/six_days_eng.htm) (last visited Oct. 27, 2018) [<https://perma.cc/CR7S-GRF7>]. See GRAY, *supra* note 81, at 130–31; Quigley, *Israel's Destruction of Iraq's Nuclear Reactor: A Reply*, *supra* note 253, 442–43 (challenging this narrative).

<sup>258</sup> Both the Arab and the Soviet bloc states condemned the Israeli attack as "aggression." Paul, *supra* note 235, at 466. Gazzini describes international reaction as "consistently negative." GAZZINI, *supra* note 11, at 150. See also 1967 U.N.Y.B., *supra* note 257, at 167.

<sup>259</sup> See STATEMENT BY THE GOVERNMENT OF ISRAEL ON THE BOMBING OF THE IRAQI NUCLEAR FACILITY NEAR BAGHDAD- 8 JUNE 1981, *supra* note 252; D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, *supra* note 41, at 587–88; GRAY, *supra* note 81, at 133.

<sup>260</sup> S.C. Res. 487 (1981).

<sup>261</sup> See Pierson, *supra* note 229, at 167–68; Christian Henderson, *The Bush doctrine: from theory to practice*, 9 J. CONFLICT & SEC. L. 3, 8 fn. 41 (2004). See also Pogany, *supra* note 41, at 73–74 (noting that the representatives of the US, U.K., Sierra Leone and Niger accepted, at least implicitly, anticipatory self-defense as legal).

<sup>262</sup> See 1981 U.N.Y.B. 277.

<sup>263</sup> See Rademaker, *supra* note 233, at 462–63.

<sup>264</sup> Thomas M. Franck, *What Happens Now? The United Nations after Iraq*, 97 AM. J. INT'L L. 607, 611 (2003) (noting that this justification enjoyed support in only the U.S. and by the British Attorney General); Malone, *supra* note 40, at 816; Rademaker, *supra* note 233, at 462–65 (U.S. justification);

on “implied authorization” by the Security Council and past Security Council Resolutions.<sup>265</sup> The majority of states reacted negatively to the war against Iraq,<sup>266</sup> but the United States was able to provide a list of 49 states that supported it.<sup>267</sup>

The 2007 Israeli attack on an alleged Syrian nuclear reactor seems to confirm a change of view. On September 6, 2007, Israel carried out an attack on what is believed to have been a Syrian nuclear reactor. Syria acknowledged the attack had taken place and denounced Israel for its actions, but denied that a nuclear reactor had been hit, instead claiming that an unused military building had been destroyed.<sup>268</sup> In his memoirs, former President Bush confirms the attack and adds that there had been prior discussions between Israel and the United States, with the two states failing to reach agreement on whether action was necessary.<sup>269</sup> Israel never provided an official justification for its use of force against Syria, and for

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Paul, *supra* note 235, at 474 (no evidence); Graham, *supra* note 6, at 13 (U.S. justification); GRAY, *supra* note 81, at 182.

<sup>265</sup> S.C. Res. 678 (1990) authorized the use of force against Iraq in the aftermath of the Iraqi invasion of Kuwait. Jeremy Greenstock, *Letter dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/2003/350 (Mar. 21, 2003). The U.K.’s official justification only mentioned Resolutions 1441, 678, and 687 as the legal basis for the use of force. Gerry Simpson, *The War in Iraq and International Law*, 6 MELB. J. INT’L L. 167, 173–75 (2005); Franck, *What Happens Now? The United Nations after Iraq*, *supra* note 264, at 611–14; Rothwell, *supra* note 242, at 349; GAZZINI, *supra* note 11, at 221; BYERS, *supra* note 80, at 79; *see also* Henderson, *The Bush doctrine: from theory to practice*, *supra* note 261, at 10.

<sup>266</sup> In 2004, U.N. Secretary-General, Kofi Annan, declared: “From our point of view and the U.N. Charter point of view, it was illegal” (quoted in Colum Lynch, *U.S., Allies Dispute Annan on Iraq War*, *The Washington Post* (Sep. 17, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A25685-2004Sep16.html?noredirect=on> [<https://perma.cc/Z7CK-638E>]). In a case before the German Federal Administrative Court (*Bundesverwaltungsgericht*), the court, in 2005, expressed “grave doubts” as to the legality, under international law, of the attack on Iraq by the U.S. and the U.K. as both governments “could not rely on authorization by the Security Council,” nor on Article 51. *Bundesverwaltungsgericht*, Urteil/Judgment, June 21, 2005, *BVerwG 2WD 12.04*, Leading Principle 6, <http://www.bverwg.de/entscheidungen/pdf/210605U2WD12.04.0.pdf> [<https://perma.cc/N7EY-HXXL>]. *See also* *War would be illegal*, *GUARDIAN* (Mar. 7, 2003), <https://www.theguardian.com/politics/2003/mar/07/highereducation.iraq> [<https://perma.cc/X42V-9DSW>]; TOM BINGHAM, *THE RULE OF LAW*, 122–124 (2010); PHILLIPE SANDS, *LAWLESS WORLD*, 174, 258–275 (2006); Hanspeter Neuhold, *Law and Force in International Relations – European and American Positions*, 64 *ZAÖRV* 263, 276–278 (2004); GRAY, *supra* note 81, at 135; GAZZINI, *supra* note 11, at 221.

<sup>267</sup> *See* Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, *supra* note 232, at 577 (citing a “White House Information Sheet”); GRAY, *supra* note 81, at 183.

<sup>268</sup> David E. Sanger & Mark Mazzetti, *Israel Struck Syrian Nuclear Project, Analysts Say*, *N.Y. TIMES* (Oct. 14, 2007), [http://www.nytimes.com/2007/10/14/washington/14weapons.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2007/10/14/washington/14weapons.html?pagewanted=all&_r=0) [<https://perma.cc/5RTP-99YD>]; *see also* Erich Follath & Holger Stark, *The Story of ‘Operation Orchard’: How Israel Destroyed Syria’s Al Kibar Nuclear Reactor*, *DER SPIEGEL* (Nov. 2, 2009), <http://www.spiegel.de/international/world/the-story-of-operation-orchard-how-israel-destroyed-syria-s-al-kibar-nuclear-reactor-a-658663.html> [<https://perma.cc/283Q-S7C7>].

<sup>269</sup> *See* GEORGE W. BUSH, *DECISION POINTS*, 420–22 (2010).

some time even refused to acknowledge that it had taken place.<sup>270</sup> Owing to Israel's silence and Syria's denials as to the nature of the site destroyed, there was almost no international reaction. Apart from Syria, only North Korea condemned Israel's actions.<sup>271</sup>

Despite little evidence of state practice, there is growing evidence of support for the notion that anticipatory self-defense is covered by Article 51 and some evidence of support for the concept of preventive self-defense. As far as anticipatory self-defense is concerned, widespread support of its legality<sup>272</sup> allowed the U.N. Secretary General to conclude in 2005 that "[i]mmminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened."<sup>273</sup> At the same time, the imminence criterion is increasingly being undermined. For example, the U.K. Attorney General has set out the following criteria for judging "imminence":

- The nature and immediacy of the threat;
- The probability of an attack;
- Whether the anticipated attack is part of a concerted pattern of continuing armed activity;
- The likely scale of the attack and the injury, loss or damage likely to result therefrom in the absence of mitigating action; and
- The likelihood that there will be other opportunities to undertake effective action in self-defence that may be expected to cause less serious collateral injury, loss or damage.<sup>274</sup>

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<sup>270</sup> See Amir Oren, *IDF lifts censorship of Sept. 6 IAF strike on target inside Syria*, HAARETZ (Oct. 2, 2007), <https://www.haaretz.com/1.4981064> [<https://perma.cc/K8MN-N4ZK>].

<sup>271</sup> Benny Avni, *North Korea Denounces Alleged Israeli Attack on Syria*, NEW YORK SUN (Sept. 13, 2007), <http://www.nysun.com/foreign/north-korea-denounces-alleged-israeli-attack/62581/> [<https://perma.cc/JJM4-27J5>].

<sup>272</sup> See Wilmshurst, *supra* note 40, at 964

<sup>273</sup> REPORT OF THE SECRETARY-GENERAL, IN LARGER FREEDOM: TOWARDS DEVELOPMENT, SECURITY AND HUMAN RIGHTS FOR ALL ¶ 124 (2005), [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/59/2005](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/59/2005) [<https://perma.cc/L357-6749>]. The U.K. Attorney General, in 2017, declared: "Like many other states, the long-standing U.K. view is that Article 51 of the U.N. Charter does not require a state passively to await an attack, but includes the 'inherent right'—as it's described in Article 51—to use force in self-defence against an 'imminent' armed attack, referring back to customary international law." Jeremy Wright, U.K. Attorney General, *The Modern Law on Self-Defence*, Address before the International Institute for Strategic Studies, London (Jan. 11, 2017), in *EJIL TALK!* (Jan. 2017), <https://www.ejiltalk.org/the-modern-law-of-self-defence/> [<https://perma.cc/64SU-SL88>].

<sup>274</sup> Wright, *supra* note 273.



These putative criteria provide enormous leeway to any state contemplating the use of force. Unsurprisingly, the U.K. was one of the states willing to adopt the United States' arguments.<sup>275</sup> Various national security strategies<sup>276</sup> evidence implicit support for preventive self-defense, while Israel and Australia<sup>277</sup> have officially backed the American concept.

#### 4. Conclusion

Although incompatible with Article 51 and not supported by sufficient state practice, a tendency is discernible whereby the United States and some of its allies, such as the U.K., Australia, and Israel are attempting to establish preventive self-defense as yet another legal recourse to the use of force.

The disadvantages and dangers of this strategy are manifold. The main weakness of "forcible counter-proliferation" is its ability to undermine stability in international relations and the rule of law.<sup>278</sup> Its supporters seem to believe that it is possible to restrict the legality of such actions to cases where the United States or close allies deem them necessary—which is unrealistic and incompatible with sovereign equality.<sup>279</sup>

Once preventive self-defense is legal, there is no reason why India could not decide that it is necessary to preventively strike Pakistan, which possesses nu-

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<sup>275</sup> In a 2002–03 report on the war against terrorism, the U.K. House of Commons Select Foreign Affairs Committee was of the opinion: "... that the notion of "imminence" should be reconsidered in the light of new threats to international peace and security—regardless of whether the doctrine of pre-emptive self-defence is a distinctively new legal development. We recommend that the Government work to establish a clear international consensus on the circumstances in which military action may be taken by states on a pre-emptive basis." Select Committee on Foreign Affairs, Second Report, 2002–3, HC 196, ¶ (t) (U.K.), <https://publications.parliament.uk/pa/cm200304/cmselect/cmfaaff/81/8102.htm> [<https://perma.cc/5NFB-HX54>].

<sup>276</sup> See Reisman & Armstrong, *supra* note 41, at 540–46, claiming that implicit acceptance of pre-emptive self-defense can be found in the national security strategies and/or statements made by officials of the following states: Japan, United Kingdom, China, France, India, Israel, North Korea, Russia, Taiwan, and Iran.

<sup>277</sup> See Guruli, *supra* note 90, at 119; Reisman & Armstrong, *supra* note 41, at 538–40 (quoting a 2002 statement made by Australian Prime Minister John Howard); Henderson, *The Bush doctrine: from theory to practice*, *supra* note 261, at 10.

<sup>278</sup> Some of the concept's proponents may actually want to achieve this. See Reisman & Armstrong, *supra* note 41, at 548–50; Quigley, *Israel's Destruction of Iraq's Nuclear Reactor: A Reply*, *supra* note 253, at 444; Mallison & Mallison, *supra* note 242, at 444–46; Shah, *supra* note 42, at 112 (pointing out the similarities of the theory to German arguments preceding WWI); Henderson, *The Bush doctrine: from theory to practice*, *supra* note 261, at 22; GAZZINI, *supra* note 11, at 221–22; BYERS, *supra* note 80, at 76.

<sup>279</sup> Paul, *supra* note 235, at 458, describes the concept as "not a doctrine of law" but "simply a unilateral assertion of power."

clear weapons (or vice versa). Extended to other WMD, there are many more volatile situations which would seemingly justify the use of force<sup>280</sup> and today's ally is often tomorrow's "rogue state," and vice versa (Iran and Iraq being prime examples).<sup>281</sup> Many western proponents of preventive self-defense also seem to believe that a state viewed by the United States and its allies as "rogue" is universally recognized as such, which is not the case.<sup>282</sup> To others, the rule of law seems to be equivalent to U.S. rule, a view often confirmed when U.S. actions are claimed to have created new international law without any analysis of the practice or views of other states.<sup>283</sup> It is, however, unlikely that other powerful states, such as China, Russia, or India will accept this U.S.-centric view. In conclusion, "preventive" self-defense is not lawful, nor should it be. Nevertheless, many western states seek to undermine its ban.

### III. Humanitarian and Pro-democracy Interventions

The other attempt at undermining the ban on the use of force owes more to liberal than to right-wing political thought. Based on the universality of human rights, advocates of these allegedly legitimate or legal uses of force argue that state sovereignty is no longer unconditional. Rather, sovereignty entails state responsibility, namely the responsibility to treat its citizens in accordance with international human rights standards. If a state fails to do so, other states may forcefully intervene to restore those citizens' human rights. Most advocates of "humanitarian interventions" want to limit the use of force to cases when a state commits gross human rights violations or is unwilling or incapable of stopping such crimes.

Based on the "democratic peace theory," according to which democracies do not go to war against other democracies,<sup>284</sup> and that a democratic system of government is likely to ensure respect for human rights, some want to expand this concept to include so-called "pro-democracy" interventions.<sup>285</sup> These permit

<sup>280</sup> See Christian M. Henderson, *The 2006 National Security Strategy of the United States: The Pre-emptive Use of Force and the Persistent Advocate*, 15 TULSA J. COMP. & INT'L LAW 1, 28 (2007); Paul, *supra* note 235, at 458; GRAY, *supra* note 81, at 186; Shah, *supra* note 42, at 103–04; BYERS, *supra* note 80, at 76.

<sup>281</sup> See, e.g., Winston P. Nagan and Craig Hammer, *The New Bush National Security Strategy and the Rule of Law*, 22 BERKELEY J. INT'L L. 375–438, 429 (2004).

<sup>282</sup> See Paul, *supra* note 235, at 475; BYERS, *supra* note 80, at 76.

<sup>283</sup> See GRAY, *supra* note 81, at 134; Franck, *What Happens Now? The United Nations after Iraq*, *supra* note 264, at 619–20.

<sup>284</sup> The theory is also sometimes referred to as the "liberal peace theory" whereby democracies with a free market economy are less likely to engage in military conflict with other democracies, as politicians in democracies are more accountable to their electorate and therefore try to avoid the risk of military casualties. Due to the free market economy, such states are also wealthier, making war a less attractive option. See Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205, 213 (1983); Anne-Marie Slaughter, *International Law in a World of Liberal States* 6 EUR. J. INT'L L. 503, 509 (1995).

<sup>285</sup> See Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 604 (1992); Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*,

outside intervention when democratic governments are “overthrown” and perhaps even the removal of an existing undemocratic government. These arguments also align right-wing interventionists’ regime change agenda, often justified with the need to spread democracy, with international law.<sup>286</sup>

### ■ Humanitarian Intervention/Responsibility to Protect (R2P)

According to supporters of humanitarian interventions, the U.N. Charter seems to contain an inherent contradiction.<sup>287</sup> On the one hand, Article 2(1) and Article 2(7) safeguard every state’s sovereignty and contain the general principle of non-intervention in the internal affairs of another state. On the other hand, one of the purposes of the U.N., according to Article 1(3), is “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>288</sup> Furthermore, Articles 55–56 emphasize the importance of human rights and fundamental freedoms.<sup>289</sup> The 1948 Universal Declaration of Human Rights, the 1948 Convention for the Prevention and Punishment of the Crime of Genocide, the 1966 Conventions on Civil and Political Rights and on Economic, Social and Cultural Rights, and the 1975 Convention against Torture have further strengthened the international commitment to human rights.<sup>290</sup>

The conflict between the traditional concept of state sovereignty and the more modern idea of the universality of human rights has been increasingly resolved in favor of the latter:<sup>291</sup> the “sovereign’s sovereignty” has evolved into the “people’s sovereignty.”<sup>292</sup> Therefore, if a state does not fulfil its international legal obligations under international human rights law, other states, as a last resort, must

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84 AM. J. INT’L L. 516, 516–24 (1990); Steven Wheatley, *Democracy in International Law: A European Perspective*, 51 INT’L & COMP. L. Q. 225, 233 (2002).

<sup>286</sup> See William Kristol & Robert Kagan, *Toward a Neo-Reaganite Foreign Policy*, 75 FOREIGN AFF. 18, 19 (1996); David Bosco, *What Divides Neocons and Liberal Interventionists*, FOREIGN POLICY (Apr. 9, 2012), <https://foreignpolicy.com/2012/04/09/what-divides-neocons-and-liberal-interventionists/> [https://perma.cc/D35Z-5LPG].

<sup>287</sup> See, e.g., Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1752–56 (2000); Oana Florina Pop, *Between Non-Intervention and the Protection of Human Rights: A Moral Argument in Defense of Humanitarian Intervention*, 7 CENT. EUR. U. POL. SCI. J. 68, 69 (2012).

<sup>288</sup> U.N. Charter art. 1, ¶ 3.

<sup>289</sup> U.N. Charter art. 55–56.

<sup>290</sup> THOMAS G. WEISS, HUMANITARIAN INTERVENTION 25–30 (2016); see also NICHOLAS J. WHEELER, SAVING STRANGERS 41–45 (2002); Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, in HUMANITARIAN INTERVENTION, ETHICAL, LEGAL AND POLITICAL DILEMMAS 93, 93–129 (J. L. Holzgrefe & Robert O. Keohane eds., 2003); Mertus, *supra* note 287, at 1771–75.

<sup>291</sup> WEISS, *supra* note 290, at 21–30; Louis Henkin, *Human Rights and State Sovereignty*, 25 GA J. INT’L & COMP. L. 31, 34–45 (1995); Mertus, *supra* note 287, at 1763–69.

<sup>292</sup> See Kofi Annan, *Two Concepts of Sovereignty*, THE ECONOMIST (Sept. 16, 1999), at 49–50; WEISS, *supra* note 290, at 27, 30–33, 130–33; Pop, *supra* note 287, at 51.

be permitted to intervene forcefully. However, the use of force can only be justified if a state's citizens are threatened by "conscience-shocking" harm, such as mass killings or ethnic cleansing, if all other means to stop the crimes being committed have been unsuccessful, and if the intervention is the appropriate way to halt the atrocities.<sup>293</sup> There is some controversy as to whether the intervener must be acting mainly on humanitarian grounds or whether a positive humanitarian end result is sufficient.<sup>294</sup> There is also disagreement on whether humanitarian interventions can be justified without Security Council authorization. Many argue that "coalitions of the willing" may act unilaterally, if the Security Council fails to react in a timely fashion.<sup>295</sup>

The International Commission on Intervention and State Sovereignty (ICISS) aimed to develop criteria for interventions during human rights crises. In its 2001 Report it outlined the concept of the "Responsibility to Protect" (R2P)<sup>296</sup> according to which a state's sovereignty is contingent on its ability and/or willingness to fulfil its duties towards its citizens. A state's failure to do so can justify military intervention if the following criteria are met: 1) there must be a "just cause" for such an intervention, i.e. "large scale loss of life" or "large scale ethnic cleansing"; 2) the use of military force must be the last resort; 3) proportional means must be employed; 4) any military action must have "reasonable prospects"; 5) the intervening state must have the "right intention", i.e. "the primary purpose of the intervention must be to halt or avert human suffering"; and 6) the U.N. Security Council or other appropriate bodies (such as the General Assembly) must authorize the intervention.<sup>297</sup> Subsequently, the General Assembly approved the concept of R2P, while refraining from naming specific criteria for action.<sup>298</sup>

Although many celebrate the fact that, by 2015, the vast majority of states had accepted the concept of R2P, many advocates of humanitarian intervention dispute the validity of the last two criteria. Some argue that it is unrealistic to expect states to make sacrifices purely on humanitarian grounds so that the intervening state's motivation should not be taken into account when judging the intervention's

<sup>293</sup> WEISS, *supra* note 290, at 139–40; WILLIAMS, *supra* note 4, at 62–63, 166; Mertus, *supra* note 287, at 1780.

<sup>294</sup> See WHEELER, *supra* note 290, at 21–52; *see also* Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107, 107–41 (2006) (arguing that states using humanitarian aims as a pretext for intervention may actually lead to positive results by forcing them to conduct an intervention in a more humanitarian fashion and by obliging them to alleviate human suffering in the target states even if that was not their true goal).

<sup>295</sup> See Harold H. Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 1004–15 (2006); Peter Tzeng, *Humanitarian Interventions at the Margins: An Examination of Recent Incidents*, 50 VAND. J. INT'L L. 415, 420–31 (2017) (distinguishing between "humanitarian intervention" and R2P, based solely on whether Security Council authorization was granted).

<sup>296</sup> INT'L COMM. ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (Dec. 2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [<https://perma.cc/RP9C-8VZM>].

<sup>297</sup> *Id.* at 29–37, 47–55.

<sup>298</sup> G.A. Res. 60/1, ¶ 138 (Oct. 24, 2005).

legality as long as it ended human suffering.<sup>299</sup> However, the main criticism is levelled against the requirement of Security Council authorization. Many argue—based, too, on more recent events in Syria—that the Security Council’s paralysis should not deter states from intervening to protect human beings from atrocities. State practice allegedly evidences the existence of the right to intervene in other states on humanitarian grounds or, at least, provides reason to assume its “emergence.”<sup>300</sup>

# 1. Assessment

Whether the Security Council may authorize the use of force in cases of humanitarian crises will not be discussed in detail. It has wide discretion when assessing whether a specific situation is a threat to international peace and security.<sup>301</sup> Furthermore, Security Council authorization of such interventions, though not entirely unproblematic, does not endanger the rule of law in international relations as much as the unilateral use of force. I will therefore only analyze the legality of non-authorized unilateral or multilateral humanitarian interventions.

The use of force on the grounds of “humanitarian intervention” without Security Council authorization is not permitted under the Charter.<sup>302</sup> Article 2(4) prohibits the use of force and Article 51 exceptionally permits states to unilaterally resort to the use of force.<sup>303</sup> Despite the emphasis put on human rights in the U.N. Charter, the fact that neither it, nor the Genocide Convention explicitly permits the unilateral use of force in cases of massive human rights violations, disallows any contrary interpretation. The tension between a state’s sovereignty and the emphasis put on human rights was not resolved by including another exception to Article 2(4).

ICJ jurisprudence indicates that this interpretation of the Charter is correct. In response to the United States’ claim that its support of the rebel group, the Contras, was also justified due to the Nicaraguan government’s violation of human rights, the court declared in 1986:

In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use

<sup>299</sup> WHEELER, *supra* note 290, at 37–40.

<sup>300</sup> WHEELER, *supra* note 290, at 16–17; WEISS, *supra* note 290, at 140–41, 167; Mertus, *supra* note 287, at 1779.

<sup>301</sup> Certainly, the U.N. Security Council has concluded in the past that essentially internal situations can constitute a threat to the peace. *See, e.g.*, S.C. Res. 253 (May 29, 1968) (Rhodesia); S.C. Res. 794 (Dec. 3, 1992) (Somalia); S.C. Res. 841 (June 16, 1993) (Haiti); S.C. Res. 688 (Apr. 5 1991) (Iraqi Kurds); S.C. Res. 819 (Apr. 16, 1993) (Balkans); S.C. Res. 918 (May 17, 1994) (Rwanda); WEISS, *supra* note 290, at 36–37.

<sup>302</sup> The necessity of U.N. Security Council authorization was also emphasized by the General Assembly in G.A. Res. 60/1 at ¶ 139; WEISS, *supra* note 290, at 142–44.

<sup>303</sup> *See* U.N. Charter art. 2, ¶ 4; art. 51.

of force could not be the appropriate method to monitor or ensure such respect...The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States...<sup>304</sup>

Many General Assembly resolutions reflect the ICJ's strict view of the prohibition on outside intervention in another state's affairs.<sup>305</sup> In summary, a unilateral right of humanitarian intervention does not yet exist.

## 2. State Practice

Adherents of the opposite view, nevertheless, claim that state practice evidences, if not the existence, then the emergence of a norm in customary international law permitting humanitarian intervention. Support for the notion that humanitarian intervention is permissible when approved by the Security Council, though widespread,<sup>306</sup> is not relevant to this discussion, as the issue at stake is whether such action is permissible without Council approval.

Advocates of unilateral humanitarian interventions usually acknowledge that such a right has been developing only since the end of the Cold War. However, three major cases of previous purported humanitarian interventions are routinely cited in support of the concept: 1) the 1971 Indian intervention in what was then East Pakistan (now Bangladesh); 2) the 1979 Vietnamese intervention in Cambodia; and 3) the 1979 Tanzanian intervention in Uganda.<sup>307</sup>

The humanitarian situation in East Pakistan in 1971 was dire.<sup>308</sup> There had been tensions between East and West Pakistan for a long period of time which escalated in 1971. In an attempt to suppress alleged secessionist ambitions in East Pakistan, the Pakistan military intervened on a massive scale, engaging in a campaign of widespread torture and killings. By some estimates, the conflict resulted in over a million deaths,<sup>309</sup> and millions of Bengalis fled across the

<sup>304</sup> Nicaragua, *supra* note 9, ¶¶ 267, 268.

<sup>305</sup> See, e.g., G.A. Res. 2131 (XX) (1965); G.A. Res. 2625 (XXV) (1970). The latter *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*, is generally viewed as reflective of customary international law. See also Nicaragua, *supra* note 9, ¶¶ 202, 205.

<sup>306</sup> G.A. Res. 60/1, ¶ 138–39.

<sup>307</sup> WHEELER, *supra* note 290, at 55–136; WEISS, *supra* note 290, at 47.

<sup>308</sup> INTERNATIONAL COMMISSION OF JURISTS, THE EVENTS IN PAKISTAN, 1971, A LEGAL STUDY BY THE SECRETARIAT OF THE INTERNATIONAL COMMISSION OF JURISTS 15–45 (1972), <https://www.icj.org/wp-content/uploads/1972/06/Bangladesh-events-East-Pakistan-1971-thematic-report-1972-eng.pdf> [<https://perma.cc/L3VL-HTFV>]; WHEELER, *supra* note 290, at 55–77.

<sup>309</sup> WHEELER, *supra* note 290, at 74; Mark Dummett, *Bangladesh War: The Article That Changed History*, BBC NEWS (Dec. 16, 2011), <https://www.bbc.com/news/world-asia-16207201> [<https://perma.cc/L3VL-HTFV>] (citing estimates of between 300,000 and 3 million deaths).

border.<sup>310</sup> India was allegedly supporting the Bengali opposition, and in December war broke out between India and Pakistan. At the end of the conflict East Pakistan became independent as the new state of Bangladesh. Many argue that the Indian intervention was humanitarian in nature, as it was intended to stop the massive bloodshed in the neighboring country.<sup>311</sup> India itself, however, justified its military action on the grounds of self-defense. It claimed that Pakistan was guilty of “refugee aggression,” permitting India to use force in response.<sup>312</sup> Most states, including the U.S. and China, rejected India’s justifications<sup>313</sup> and the General Assembly, by an overwhelming majority, passed a resolution calling for an immediate ceasefire.<sup>314</sup>

Following repeated border incidents, varying in severity, Vietnam attacked Cambodia in late 1978. The Cambodian Pol Pot government was overthrown and a new government installed with Vietnamese support. The Pol Pot regime was atrocious on any scale:<sup>315</sup> it is estimated that 1–2 million of Cambodia’s 6-million population died on the notorious killing fields.<sup>316</sup> Furthermore, there were around 300,000 political killings between 1975 and 1978.<sup>317</sup> The Cambodian regime’s crimes shake the human conscience. Vietnam, however, justified its actions instead on the grounds of self-defense, while also claiming that a Cambodian revolutionary movement had toppled Pol Pot.<sup>318</sup> The U.S. and its allies, the Association of Southeast Asian Nations, and the Non-Aligned Movement condemned Vietnamese actions.<sup>319</sup>

Lastly, in 1979 Tanzania invaded Uganda and overthrew Idi Amin. The Amin government’s human rights record was appalling. According to estimates, his regime was responsible for widespread torture and around 300,000 deaths.<sup>320</sup> Tanzania’s military action, however, was in response to Uganda’s invasion of Tanzania in October 1978 which resulted in Ugandan forces occupying the Kagera

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<sup>310</sup> INTERNATIONAL COMMISSION OF JURISTS, *supra* note 308, at 39–40; WHEELER, *supra* note 290, at 58.

<sup>311</sup> WHEELER, *supra* note 290, at 55–77.

<sup>312</sup> 1971 U.N.Y.B. 147, U.N. Sales No. E.73.I.1; WHEELER, *supra* note 290, at 60–61.

<sup>313</sup> Sajit Gandhi (ed.), *The Tilt: The U.S. and the South Asian Crisis of 1971*, NATIONAL SECURITY ARCHIVE (Dec. 16, 2002), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB79/> [<https://perma.cc/X87V-PRUS>]; 1971 U.N.Y.B. 147–48.

<sup>314</sup> G.A. Res. 2793 (XXVI) (1971).

<sup>315</sup> WHEELER, *supra* note 290, at 78–110.

<sup>316</sup> WHEELER, *supra* note 290, at 78; Kevin Doyle, *Vietnam’s Forgotten Cambodian War*, BBC NEWS (Sep. 14, 2014), <https://www.bbc.com/news/world-asia-29106034> [<https://perma.cc/93SN-AMNL>].

<sup>317</sup> *Id.*

<sup>318</sup> WHEELER, *supra* note 290, at 85.

<sup>319</sup> 1979 U.N.Y.B. 272–75, U.N. Sales No. E.82.I.1; WHEELER, *supra* note 290, at 89–100.

<sup>320</sup> Michael T. Kaufman, *Idi Amin, a Brutal Dictator of Uganda, Dies at 80*, N.Y. TIMES (Aug. 16, 2003), <https://www.nytimes.com/2003/08/16/international/africa/idi-amin-a-brutal-dictator-of-uganda-dies-at-80.html> [<https://perma.cc/4DS6-5MKC>]; WHEELER, *supra* note 290, at 111.

Salient.<sup>321</sup> Tanzania then, however, not only expelled Ugandan troops, but actually overthrew the Amin government. Tanzania's president justified its regime change agenda on the basis of legitimate defense against the previous Ugandan aggression.<sup>322</sup> In contrast to Vietnam, Tanzania escaped strong international condemnation. As Nicholas Wheeler has explained, Tanzania benefitted from both its "insulation from superpower geopolitics," and the widespread feeling that Uganda had initiated the military conflict.<sup>323</sup>

These summaries suffice to demonstrate that none of these frequently cited examples of "humanitarian intervention" created "new" law. Not once did the intervening state explicitly claim a right to intervene on humanitarian grounds, despite all three situations arguably justifying such a claim. Furthermore, a majority of states condemned two of the interventions, disallowing the assumption that a legal precedent had been set.

Following the end of the Cold War, there have been a number of cases when the Security Council has arguably authorized the use of force for humanitarian reasons. Examples include the 1992 US-led intervention in Somalia,<sup>324</sup> and, much more recently, the 2011 western- and Arab-led intervention in Libya.<sup>325</sup> While these episodes are certainly part of a trend within the international community to classify severe human rights crises as a threat to international peace and security, they do not serve as precedents as far as non-authorized humanitarian interventions are concerned.

Regarding these non-authorized interventions, it is again the West that has set the major precedents. The Security Council did not explicitly authorize the establishment of safe havens in Iraq in order to protect Kurdish citizens, and the subsequent establishment of a no-fly-zone to protect Shiite citizens of Iraq in 1991 and 1992 by the United States, U.K., and, in the first case, France and the Netherlands. In Resolution 688, the Security Council, not acting under Chapter VII, had described the "repression of the Iraqi civilian population" as a threat to "international peace and security."<sup>326</sup> This was markedly different from Resolution 794, authorizing the Somalia intervention, which stated:

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<sup>321</sup> John Darnton, *Rubble and the Dead Mark Invaded Region of Tanzania*, N.Y. TIMES (Nov. 23, 1978), <https://www.nytimes.com/1978/11/23/archives/rubble-and-the-dead-mark-invaded-region-of-tanzania-civilian-deaths.html> [<https://perma.cc/G4SC-TH9R>]; WHEELER, *supra* note 290, at 113.

<sup>322</sup> John Darnton, *Amin's Rule in Uganda Imperiled As Tanzanian Force Nears Capital*, N.Y. TIMES (Mar. 5, 1979), <https://www.nytimes.com/1979/03/05/archives/amins-rule-in-uganda-imperiled-as-tanzanian-force-nears-capital.html> [<https://perma.cc/4E7X-FD94>]; WHEELER, *supra* note 290, at 117–22.

<sup>323</sup> WHEELER, *supra* note 290, at 122, 130–32.

<sup>324</sup> S.C. Res. 794 (Dec. 3, 1992).

<sup>325</sup> S.C. Res. 1973 (Mar. 17, 2011); WEISS, *supra* note 290, at 200–02.

<sup>326</sup> S.C. Res. 688, ¶ 1 (Apr. 2, 1991).



Acting under Chapter VII of the Charter of the United Nations authorizes the Secretary-General and Member States . . . to use all necessary means to establish . . . a secure environment for humanitarian relief operations . . .<sup>327</sup>

Nevertheless, the intervening states claimed to be acting in “support of Resolution 688.” In the latter case, U.K. Foreign Secretary Hurd claimed the intervention was based on “extreme humanitarian need” which legally justified it.<sup>328</sup> There was little international criticism.<sup>329</sup>

The Report of the ICISS does mention two other interventions undertaken by African regional military forces that it sees as possible precedents of unilateral interventions, the 1990 ECOMAG intervention in Liberia and the 1997 ECOWAS intervention in Sierra Leone.<sup>330</sup> The Security Council authorized neither. However, in both cases the respective governments requested the intervention, though the requests’ legitimacy is contentious.<sup>331</sup> Furthermore, in both cases the interveners did not rely on humanitarian grounds to justify their actions.<sup>332</sup>

The true milestone was NATO’s 1999 intervention in Kosovo. Kosovo was a province within Serbia. About 90% of the population was ethnic Albanian, 10% ethnic Serb.<sup>333</sup> Beginning in the late 1980s, the Serbs conducted severe discrimination against the Albanian population. This led to Albanian resistance that, as of 1996, included a bombing campaign carried out by the Kosovo Liberation Army (KLA).<sup>334</sup> The Serbs reacted with indiscriminate attacks.<sup>335</sup> In 1998/1999, 2,000–3,000 civilians were killed and about 200,000–300,000 ethnic Albanians were “expelled from their homes.”<sup>336</sup> On January 15, 1999, Serb paramilitary forces committed a massacre in Racak, killing 45 civilians.<sup>337</sup> In February 1999, the

<sup>327</sup> S.C. Res. 794, ¶ 10 (Dec. 3, 1992).

<sup>328</sup> THE RESPONSIBILITY TO PROTECT, *supra* note 296, at 166–67.

<sup>329</sup> *Id.* at 167.

<sup>330</sup> *Id.* at 166.

<sup>331</sup> *Id.* at 166.

<sup>332</sup> HUMAN RIGHTS WATCH, LIBERIA, WAGING WAR TO KEEP THE PEACE: THE ECOMOG INTERVENTION AND HUMAN RIGHTS (Jun. 1993), <https://www.hrw.org/reports/1993/liberia/#3> [<https://perma.cc/5TMB-ZXXR>]; OLIVIER CORTEN, HUMAN RIGHTS, INTERVENTION AND THE USE OF FORCE, 99–100 (Philip Alston & Euan Macdonald eds., 2008); HUMAN RIGHTS WATCH, NIGERIA’S INTERVENTION IN SIERRA LEONE (1997), <https://www.hrw.org/reports/1997/nigeria/Nigeria-09.htm> [<https://perma.cc/Z7YS-DJTF>]; Letter from Permanent Rep. of Nigeria to the U.N., U.N. Doc. S/1998/123 (Feb. 13, 1998).

<sup>333</sup> SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 445 (2003).

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 445; *NATO’s Role in Relation to the Conflict in Kosovo*, NATO (Jul. 15, 1999), <https://www.nato.int/kosovo/history.htm> [<https://perma.cc/NUX2-X6Q8>] (citing more than 1,500 deaths and 400,000 “forced . . . from their homes.”).

<sup>337</sup> POWER, *supra* note 333, at 446.

United States and its allies organized a peace conference in Rambouillet, which was unsuccessful.<sup>338</sup>

While the Security Council had passed resolutions describing the situation in Kosovo as a threat to international peace and security, there was no agreement on whether the use of force was necessary. Security Council authorization was therefore unlikely.<sup>339</sup>

On March 23, 1999 NATO decided to act unilaterally and, on March 24, 1999, launched an air campaign. NATO's Secretary General justified the use of force as follows:

All efforts to achieve a negotiated, political solution to the Kosovo crisis having failed, no alternative is open but to take military action. We are taking action following the Federal Republic of Yugoslavia Government's refusal of the International Community's demands:

- Acceptance of the interim political settlement which has been negotiated at Rambouillet;
- Full observance of limits on the Serb Army and Special Police Forces agreed on 25 October;
- Ending of excessive and disproportionate use of force in Kosovo.

As we warned on the 30 January, failure to meet these demands would lead NATO to take whatever measures were necessary to avert a humanitarian catastrophe . . . This military action is intended to support the political aims of the international community. It will be directed towards disrupting the violent attacks being committed by the Serb Army and Special Police Forces and weakening their ability to cause further humanitarian catastrophe.<sup>340</sup>

International reaction divided along traditional lines. NATO member states, among them the United States, the U.K., Germany, and France, declared the use of force to be legal under international law.<sup>341</sup> U.K. Prime Minister Blair articulated this new policy as follows: "The most pressing foreign policy problem we face is to identify the circumstances in which we should get actively involved in other people's conflicts. Non-interference has long been considered an important principle of international order . . . [a]cts of genocide can never be a purely internal

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<sup>338</sup> *Id.* at 447-48.

<sup>339</sup> WHEELER, *supra* note 290, at 261.

<sup>340</sup> Javier Solana, *Press Release 040*, NATO (Mar. 23, 1999), <http://www.nato.int/docu/pr/1999/p99-040e.htm> [<https://perma.cc/X48H-F7VA>]

<sup>341</sup> KAREN DONFRIED, CONG. RESEARCH SERV., RL30114, KOSOVO: INTERNATIONAL REACTIONS TO NATO AIR STRIKES (1999).

matter.”<sup>342</sup> Russia and China, on the other hand, condemned the intervention as unlawful, as did some other states, such as Namibia.<sup>343</sup>

Beyond the intervention in Kosovo, examples of unilateral humanitarian intervention have remained rare. The British intervention in Sierra Leone in May 2000 is the only subsequent precedent for unilateral humanitarian intervention sometimes mentioned. The British dispatched troops in order to evacuate British and other foreign citizens, but these troops remained in the country in order to stabilize the situation. International reaction to the British intervention was muted or positive. However, the British troops were also complying with a request by the state’s recognized government.<sup>344</sup>

Nevertheless, despite this paucity of affirmative state practice in support of unilateral humanitarian interventions, western governments claim that such a right now exists. In 2013, the U.K. Ministry of Defence claimed:

If there is no U.N. Security Council Resolution for action, the U.K. would still be permitted under international law to take exceptional measures in order to alleviate a humanitarian catastrophe. The U.K.’s position is that such a legal basis is available, under the doctrine of humanitarian intervention, provided three conditions are met . . .<sup>345</sup>

The 2010 National Security Strategy of the United States contains the following statement:

The United States is committed to working with our allies, and to strengthening our own internal capabilities, in order to ensure that the United States and the international community are proactively engaged in a strategic effort to prevent mass atrocities and genocide. In the event that prevention fails, the United States will work both multilaterally and bilaterally to mobilize diplomatic, humanitarian, financial, and—in certain instances—military means to prevent and respond to genocide and mass atrocities.<sup>346</sup>

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<sup>342</sup> Tony Blair, *Transcript of his speech held before the Economic Club in April 1999*, PBS (Apr. 22 1990), [http://www.pbs.org/newshour/bb/international-jan-june99-blair\\_doctrine4-23/\[https://perma.cc/7WZD-HUVS\]](http://www.pbs.org/newshour/bb/international-jan-june99-blair_doctrine4-23/[https://perma.cc/7WZD-HUVS]).

<sup>343</sup> DONFREID, *supra* note 341.

<sup>344</sup> *Sierra Leone Timeline*, BBC NEWS (Aug. 30, 2000), <http://news.bbc.co.uk/2/hi/africa/741070.stm> [https://perma.cc/536J-9PBW]

<sup>345</sup> UNITED KINGDOM MINISTRY OF DEFENCE, INTERVENTION: WHEN, WHY AND HOW? (Nov. 28, 2013), <https://publications.parliament.uk/pa/cm201314/cmselect/cmdfence/writev/intervention/int10.htm> [https://perma.cc/T928-2LFD].

<sup>346</sup> NSS 2010, *supra* note 224, at 48.

No mention of U.N. authorization is made, an omission repeated in the 2015 National Security Strategy,<sup>347</sup> which generally emphasizes that the United States “will pursue multilateral sanctions, including through the U.N., whenever possible, but will act alone, if necessary.”<sup>348</sup> Furthermore, the United States has also intermittently relied on humanitarian reasons to justify its attacks on ISIS forces in Iraq and Syria, although, these actions are part of the broader “war on terror,” generally justified on self-defense grounds. Explaining two military strikes conducted in Iraq in 2014, President Obama stated:

Today I authorized two operations in Iraq—targeted airstrikes to protect our American personnel, and a humanitarian effort to help save thousands of Iraqi civilians who are trapped on a mountain without food and water and facing almost certain death.<sup>349</sup>

It seems as if the Trump Administration is following its predecessor’s course. Following reports, according to which Syrian President Assad had deployed chemical weapons against his own population, the United States, in April 2017, conducted a missile strike against the Syrian military airbase from which the chemical attack had been launched.<sup>350</sup> Secretary of State Tillerson issued a statement justifying the action as follows: “To be clear, our military action was a direct response to the Assad regime’s barbarism.”<sup>351</sup> Similarly, speaking prior to the American-British-French attack on Syria in April 2018, following another alleged deployment of chemical weapons by the Syrian government, President Trump said, “This is about humanity. We’re talking about humanity. It can’t be allowed to happen.”<sup>352</sup> The British government explicitly invoked a right to humanitarian intervention to justify its airstrikes.<sup>353</sup>

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<sup>347</sup> THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 22 (2015).

<sup>348</sup> *Id.* at 23.

<sup>349</sup> Barack Obama, *Statement by the President*, THE WHITE HOUSE (Aug. 7, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/08/07/statement-president> [<https://perma.cc/D5Y8-LVFT>].

<sup>350</sup> Michael Gordon, Helene Cooper, & Michael Shear, *Dozens of U.S. Missiles Hit Air Base in Syria*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/world/middleeast/us-said-to-weigh-military-responses-to-syrian-chemical-attack.html> [<https://perma.cc/DD4B-XWU6>].

<sup>351</sup> Rex W. Tillerson, U.S. Secretary of State, Remarks at a Press Availability (Apr. 11, 2017), in U.S. DEPARTMENT OF STATE, Apr. 2017, <https://www.state.gov/secretary/20172018tillerson/remarks/2017/04/269693.htm> [<https://perma.cc/QKE4-9E77>].

<sup>352</sup> *Trump vows quick response to ‘heinous’ gas attack in Syria*, IRISH TIMES (Apr. 9, 2018), <https://www.irishtimes.com/news/world/middle-east/trump-vows-quick-response-to-heinous-gas-attack-in-syria-1.3455544> [<https://perma.cc/PCV5-HHVR>].

<sup>353</sup> *Syria air strikes: The U.K. government’s legal position in full*, BBC NEWS (Apr. 14, 2018), <http://www.bbc.co.uk/news/u.k.-43768145> [<https://perma.cc/H73C-H72E>].

As was to be expected, others have also begun resorting to humanitarian reasons for intervention. President Putin explained his decision to intervene in Crimea in 2014, among other things, as follows:

We proceed from the conviction that we always act legitimately. I have personally always been an advocate of acting in compliance with international law. I would like to stress yet again that if we do make the decision, if I do decide to use the Armed Forces, this will be a legitimate decision in full compliance with both general norms of international law, since we have the appeal of the legitimate President, and with our commitments, which in this case coincide with our interests to protect the people with whom we have close historical, cultural and economic ties. Protecting these people is in our national interests. This is a humanitarian mission.<sup>354</sup>

The African Union seems to permit humanitarian interventions explicitly when authorized by that organization. Article 4(h) of its Constitutive Act states:

The Union shall function in accordance with the following principles: . . . h. The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.<sup>355</sup>

However, it is not certain this includes the right to use force.<sup>356</sup> The African Union has not yet authorized such an intervention, but most scholars argue that Article 4(h) permits military intervention.<sup>357</sup> That such an intervention is recommended and its modalities decided by the Peace and Security Council<sup>358</sup>—

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<sup>354</sup> President Vladimir Putin, *Vladimir Putin answered journalists' questions on the situation in Ukraine*, OFFICIAL INTERNET RESOURCES OF THE PRESIDENT OF RUSSIA (Mar. 4, 2014), <http://en.kremlin.ru/events/president/news/20366> [<https://perma.cc/NH8F-7WA9>], quoted in Okelsander Merezhko, *Crimea's Annexation by Russia- Contradictions of the New Russian Doctrine of International Law*, 75 ZAÖRV 167, 190 (2015).

<sup>355</sup> Org. of African Unity [OAU] Constitutive Act of the African Union art. 4(h).

<sup>356</sup> Compare Hurd, *supra* note 5, at 300 (supporting this right to use force) with WEISS, *supra* note 290, at 176 (opposing it).

<sup>357</sup> See Gabriel Amvane, *Intervention pursuant to article 4(h) of the Constitutive Act of the African Union without United Nations Security Council authorisation*, 15 AFR. HUM. RIGHTS L.J. 282, 282 (2015); Ben Kioko, *The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention*, 85 INT'L REV. RED CROSS 807 (2003); Dan Kuwali, *The African Union and the Challenges of Implementing the "Responsibility to Protect"*, THE NORDIC AFRICA INSTITUTE (Mar. 2009), [https://www.files.ethz.ch/isn/105531/2009\\_4.pdf](https://www.files.ethz.ch/isn/105531/2009_4.pdf) [<https://perma.cc/9WFP-U6EP>]; Vassilis Pergantis, *Strange Bedfellows, Exploring the Relationship between R2P and Art. 4 (h) of the African Union Constitutive Act with Regard to Military Intervention*, 6 GLOBAL RESP. TO PROTECT 295 (2014).

<sup>358</sup> Protocol Relating to the Establishment of the Peace and Security Council of the African Union arts. 6(d), 7(1)(e).

supported by the African Standby Force<sup>359</sup>—strongly implies that military intervention is envisaged. If so, the relationship between the Act’s Article 4(h) and Article 53 of the U.N. Charter seems ambiguous, as the latter would seem to require Security Council authorization of enforcement action by a regional organization.<sup>360</sup>

In summary, although there is so far not much evidence of state practice in favor of humanitarian intervention without Security Council approval, many, especially Western, states maintain that unilateral interventions comply with international law.

### 3. Conclusion

There is a discernible tendency within the international community to accept that massive human rights abuse within a state can pose a threat to international peace and security. This can then be the basis for Security Council action under Chapter VII, which includes the authorization to use force.

There is much less evidence of state practice and *opinio juris* in favor of unilateral humanitarian intervention. Nevertheless, Western states, foremost among them NATO member states, maintain that such interventions are legal under international law. Again, the scope for abuse is obvious. Leaving it to the individual state to decide when an intervention is justified on humanitarian grounds opens up many opportunities for manipulation. As the interventions in Liberia and Sierra Leone demonstrate, humanitarian reasons can often be a cover for much less benign motives. Furthermore, past “humanitarian interventions,” whether authorized by the Security Council or not, have rarely achieved their purported goal. For example, the 1999 NATO intervention in Kosovo is seen by many as having initiated a massive Serbian campaign of ethnic cleansing, which resulted in more than one million ethnic Albanians fleeing into neighboring countries.<sup>361</sup> Similarly, the use of force against human rights abusers can lead to states subsequently disintegrating, with very little appetite on the part of the interveners to become involved in the difficult, but necessary, chore of state-building. This difficulty is clearly illustrated by interventions in Iraq and Afghanistan, which were not humanitarian in nature, but also by the supposedly humanitarian intervention in Libya in 2011, which

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<sup>359</sup> *Id.* arts. 2(2), 13(1), & 13(3)(c).

<sup>360</sup> See Hurd, *supra* note 5, at 300 (pointing out that a literal understanding of the U.N. Charter, which does not permit forceful humanitarian intervention, would also prohibit any such intervention in subsequent regional treaties [Article 103]).

<sup>361</sup> Michael Mandelbaum, *A Perfect Failure: NATO’s War Against Yugoslavia*, 78 FOREIGN AFF. 2, 3 (1999); HUMAN RIGHTS WATCH, THE CRISIS IN KOSOVO (2000), <https://www.hrw.org/reports/2000/nato/Natbm200-01.htm> [<https://perma.cc/3WL7-69UF>] (noting that the Yugoslav Foreign Ministry claimed there were around 2,000 civilian deaths, that NATO unofficially referred to “less than 1,500,” and that HRW itself could verify around 500).

created a post-Gaddafi-situation in which, according to the U.N., the human rights situation is worse than before.<sup>362</sup>

Lastly, the concept of humanitarian intervention is just another facet of Western states' attempt to reconcile mostly self-serving goals with international law. Adherents cannot convincingly explain why it is justified to intervene in Libya, while ignoring the situation in the DRC, Darfur, and South Sudan. Similarly, the emphasis put on the deplorable situation in Syria is less understandable when considering the fact that the dire situation in Yemen is not only ignored, but that the Saudi interveners who bear considerable responsibility for that humanitarian crisis are supported by Western weapons and intelligence.<sup>363</sup> The argument that intervening in some cases is better than not intervening at all provides an easy excuse that simply attempts to mask such interventions' true strategic objectives. As such, the right of humanitarian intervention leads to yet another weakening of the ban on the use of force on spurious grounds. This also helps explain attempts by African states to enable regional interventions in humanitarian crises: the wish to pre-empt Western states trying to impose their will on the continent.

### ■ *Pro-democracy Intervention*

In the 1990s, some legal scholars, exclusively in the West, began arguing that a new right had emerged or was emerging, which permitted the use of force against states deprived of democratic governance.<sup>364</sup> Based on the fact that 100 states claim to be "democratic," non-democratic governments allegedly have lost legitimacy within the international community.<sup>365</sup> As the sovereignty of states has morphed into the sovereignty of the states' population, intervention in order to remove the undemocratic governments of other states is permitted. Some proponents want to limit the right of intervention to cases of tyranny, others to cases

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<sup>362</sup> See Office of the U.N. High Commissioner for Human Rights in Libya, Annual Report of the Office of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/31/47 (Feb. 15, 2016), [https://www.ohchr.org/Documents/Countries/LY/A\\_HRC\\_31\\_47\\_E.pdf](https://www.ohchr.org/Documents/Countries/LY/A_HRC_31_47_E.pdf) [<https://perma.cc/5RVL-VNfy>]; HUMAN RIGHTS WATCH, LIBYA: EVENTS OF 2017 (2018), <https://www.hrw.org/world-report/2018/country-chapters/libya> [<https://perma.cc/YSV5-NR4Q>].

<sup>363</sup> See Patrick Wintour, *U.K. dangerously complicit in Yemen crisis, says ex-Tory minister*, GUARDIAN (Nov. 21, 2017), <https://www.theguardian.com/world/2017/nov/21/un-urges-saudi-arabia-to-allow-urgent-aid-supplies-into-yemen> [<https://perma.cc/L6Y5-8N9R>]; Lauren Gambino, *Yemen war: senators push to end U.S. support of Saudi Arabia*, GUARDIAN (Feb. 28, 2018), <https://www.theguardian.com/world/2018/feb/28/yemen-saudi-arabia-war-us-support-senator-push-to-end> [<https://perma.cc/VG3Q-97WU>].

<sup>364</sup> See Fox, *supra* note 285; D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, *supra* note 285; Wheatley, *supra* note 285.

<sup>365</sup> See David Wippman, *Pro-democratic intervention by invitation*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 293–94 (Gregory H. Fox & Brad R. Roth eds., 2000) (noting loss of legitimacy for states where elected government has been ousted).

when a democratically elected government has been overthrown in a coup.<sup>366</sup> As early post-Cold War optimism proved premature, the concept became less popular.

However, following the 2011 intervention in Libya, interest in the concept of “pro-democratic” interventions has resurfaced in the West.<sup>367</sup> Some have recently argued that R2P cannot realistically be implemented without an active regime-change agenda, thereby legitimizing forceful regime change.<sup>368</sup> Others have suggested including “freedom of expression” as a human right that, if violated, justifies intervention under R2P.<sup>369</sup>

### 1. The right of pro-democratic intervention

Proponents argue that, in international human rights law, a new right emerged or is in the process of emerging: the right to democratic governance. According to Thomas Franck, whose thoughts were ground-breaking in this respect, this right had evolved based on three pillars: 1) the development of the right to self-determination into a universally applicable right as confirmed by the ICCPR, which grants all peoples the right to “free, fair and open participation in the democratic governance freely chosen by each state”; 2) the right to freedom of expression, which is guaranteed by the ICCPR (monitored by the Human Rights Committee), the European Convention on Human Rights, the American Charter on Human Rights, and the African Charter on Human and Peoples’ Rights as a prerequisite of democracy; and, lastly, 3) the right to electoral participation, first articulated in Article 21 of the Universal Declaration of Human Rights, reinforced by Article 25 of the ICCPR, Article 5 of the OAS Charter, and Article 3 of Protocol 1 to the European Human Rights Convention.<sup>370</sup> He further asserts that General Assembly Resolutions, such as 45/150 and 46/137, have further strengthened this

<sup>366</sup> D’Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, *supra* note 285 (discussing intervention in case of tyranny); Wippman, *supra* note 365, at 293–327 (discussing right to intervene at invitation by an elected government ousted in a coup).

<sup>367</sup> See Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT’L L. 355 (2012); Claus Kress & Benjamin Nussberger, *Pro-democratic intervention in current international law: the case of The Gambia in January 2017*, 4 J. ON USE FORCE & INT’L L. 239 (2017); Hannah Woolaver, *Pro-democratic Intervention in Africa and the “Arab Spring”*, 22 AFR. J. INT’L & COMP. L. 161 (2014); Nesam McMillan & David Mickler, *From Sudan to Syria: Locating “Regime Change” in R2P and ICC*, 5 GLOBAL RESP. TO PROTECT 283 (2013); Müge Kinaicioglu, *Forcing Democracy: Is Military Intervention for Regime Change Permissible?*, 1 ALL AZIMUTH 28 (2012); Pierre Thielbörger, *The Status and Future of International Law after the Libya Intervention*, 4 GOETTINGEN J. INT’L L. 11, 33–38 (2012); Jure Vidmar, *Democracy and Regime Change in the Post-Cold-War International Law*, 11 N.Z. J. PUB. & INT’L L. 349 (2013).

<sup>368</sup> See Markus P. Beham & Ralph R.A. Janik, *A ‘Responsibility to Democratise’? The ‘Responsibility to Protect’ in light of Regime Change and the ‘Pro-Democratic’ Intervention Discourse*, in BEYOND RESPONSIBILITY TO PROTECT, GENERATING CHANGE IN INTERNATIONAL LAW 53–70 (Richard Barnes & Vassilis Tzevelekos eds., 2016).

<sup>369</sup> See William Magnuson, *The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law*, 43 VAND. J. TRANSNAT’L L. 255 (2010).

<sup>370</sup> Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 56–77 (1992).



right.<sup>371</sup> Reisman argues that these pillars evidence “popular sovereignty” which has become “the basis for international endorsement of the elected government.”<sup>372</sup>

While Franck acknowledges that many states still dispute a right to democratic governance, permitting intervention,<sup>373</sup> Gregory Fox claims the right already exists.<sup>374</sup> Some who claim such a right exists argue that other states are therefore permitted to intervene in undemocratically or tyrannically governed states.<sup>375</sup> One argument is that such interventions do not violate Article 2(4). Far from threatening a state’s “territorial integrity or political independence,” the intervention served to protect that state’s population against its illegitimate government.<sup>376</sup> Others rely on the allegedly evolving interpretation of “sovereignty” I outlined above: pro-democratic interventions cannot violate another state’s sovereignty, but occur in support of that sovereignty.<sup>377</sup>

## 2. Assessment

There are no grounds on which to base the assumption that pro-democracy interventions are legal. A restrictive interpretation of Article 2(4), which is always referred to when trying to justify using force, is unconvincing and has been rejected by the ICJ.<sup>378</sup>

Furthermore, the alleged right to democratic governance lacks coherence. There is no universal agreement on the term “democracy.” It is unclear what is meant, beyond allowing elections to take place that can plausibly be claimed to be free and fair. Even among adherents of the opposite view, there is no agreement on its scope. The almost exclusively Western advocates of the right usually equate democracy with “liberal democracy” as practiced in the United States.<sup>379</sup> This implies a limited view of “democracy,” as it entails a free market economy not subject to popular sovereignty.<sup>380</sup> Fox and Georg Nolte, meanwhile, want to restrict

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<sup>371</sup> *Id.* at 64–65.

<sup>372</sup> W. Michael Reisman, *Sovereignty and human rights in contemporary international law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 242 (Gregory H. Fox & Brad R. Roth eds., 2000).

<sup>373</sup> Franck, *The Emerging Right to Democratic Governance*, *supra* note 370, at 77–79.

<sup>374</sup> Fox, *supra* note 285, at 606–07; *see also* Wheatley, *supra* note 285, at 232; Ndiva Kofele-Kale, *The Global Community’s Role in Promoting the Right to Democratic Governance and Free Choice in the Third World*, 11 LAW & BUS. REV. AM. 205, 210–14 (2005).

<sup>375</sup> *See* D’Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, *supra* note 285, at 520–52; Fox, *supra* note 285, at 590–96.

<sup>376</sup> U.N. Charter art. 2(4); D’Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, *supra* note 285, at 520–22.

<sup>377</sup> *See* Fox, *supra* note 285, at 590–96.

<sup>378</sup> Nicaragua, *supra* note 9, ¶¶ 257–269.

<sup>379</sup> Franck, *The Emerging Right to Democratic Governance*, *supra* note 370, at 88–89; Kofele-Kale, *supra* note 374, at 234–38; Wheatley, *supra* note 285, at 226–27.

<sup>380</sup> Elizabeth A. Wilson, *People Power and the Problem of Sovereignty in International Law*, 26 DUKE J. COMP. & INT’L L. 551, 577–79 (2016).

the right to “substantive” democracy,<sup>381</sup> meaning a state may be required to bar the election of an undemocratic party as future generations’ right to democratic governance must be protected irrespective of current majorities.<sup>382</sup>

Not only do the majority of states not support these interpretations, but they also risk turning the claimed right to democratic governance into an obligation to be like the West, reminiscent of colonial civilizing efforts. Fox and Nolte discredit their own reasoning when arguing that the Algerian dictatorship upheld democracy by cancelling elections in 1992, which the Islamist opposition was expected to win.<sup>383</sup> As Brad Roth has observed, that basically meant that Algerians should not be granted the right to political participation as long as they “persist” in voting “the wrong way.”<sup>384</sup> These arguments also ignore the many states that continue to hold the view that Western-style democracy is incompatible with their Muslim or Asian societies.

Furthermore, the question of how to determine popular will in a state subject to an intervention remains hazy. While it may be feasible to reinstall a toppled, democratically elected government, the situation in states with very little experience of democracy is much more difficult. As developments in post-war Libya and Iraq have shown, there is more to democracy than handing people a ballot. The intervening state may well interpret the people’s will more in accordance with its own rather than with the local population’s wishes.

The legal arguments are also tenuous. For example, the above-mentioned General Assembly Resolution 45/151 emphasizes that “there is no single political system or single model for electoral processes equally suited to all nations.”<sup>385</sup> U.N. election monitoring has never been justified on the basis of a right to democratic governance, and the U.N. has even rejected some observer missions on the ground that election monitoring in sovereign states was not its task, lacking an invitation from the government.<sup>386</sup> The treaties cited in support of a right to democratic governance were supported by many undemocratic states, such as Saudi Arabia or the Soviet Union, undermining the claim that such a right was intended.<sup>387</sup>

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<sup>381</sup> Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT’L L.J. 1, 38 (1995).

<sup>382</sup> *Id.* at 14–21, 59–66.

<sup>383</sup> *Id.* at 6–9, 55–56.

<sup>384</sup> Brad R. Roth, *Democratic Intolerance: Observations on Fox and Nolte*, 37 HARV. INT’L L.J. 235, 237 (1996).

<sup>385</sup> G.A. Res. 45/151 (Dec. 18, 1990)

<sup>386</sup> Franck, *The Emerging Right to Democratic Governance*, *supra* note 370, at 75–76.

<sup>387</sup> See, e.g., Voting Record for G.A. Res. 217, Universal Declaration of Human Rights (Dec. 8, 1948), United Nations Bibliographic Information System (last accessed Nov. 1, 2018), <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=14O243550E15G.60956&profile=voting&uri=full=3100023~!909326~!676&ri=1&aspect=power&menu=search&source=~!horizon> [https://perma.cc/R6T5-A939] (indicating that the USSR voted for the Universal Declaration of Human Rights).

Furthermore, the early post-Cold War optimism regarding the triumph of liberal democracy proved premature. Almost thirty years later one could well argue that democracy is actually in retreat in many parts of the world. Military coups in states such as Thailand or Egypt, the rise of an authoritarian government in Venezuela, and the almost complete lack of progress as far as democracy is concerned in most of the Arab world, seem to indicate that many countries have come to regard stability as preferable to a democratic system of government.

Lastly, the ICJ has rejected the notion that the political system of a state is subject to outside interference. In the *Nicaragua Case* the ICJ stated that “[t]he court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the grounds that the latter has opted for some particular ideology or political system.”<sup>388</sup>

In conclusion, from a legal perspective, there is very little ground for the assumption that a right of pro-democratic intervention exists.

### 3. State Practice

At the outset, it should be noted that the African Union does provide a mechanism for sanctions in cases of “unconstitutional change of government.” It, however, does not appear to explicitly permit military interventions.<sup>389</sup> This is also true of ECOWAS.<sup>390</sup>

There is some state practice that proponents of the right of intervention invariably refer to. In this context, the events in Haiti (1991-1994) are often mentioned.<sup>391</sup> The elected government of President Aristide was overthrown in a military coup in September 1991. The international community moved fast to condemn these developments and the General Assembly passed a resolution that stated that the “replacement of the constitutional President of Haiti” was “illegal.”<sup>392</sup> Because the military regime refused to step down, the U.N. Security Council imposed an embargo on Haiti in 1993, and in 1994, after Aristide had requested it, authorized the use of force “to . . . facilitate the departure . . . of the military leadership.”<sup>393</sup> However, Resolution 940 explicitly mentions the request for intervention by the ousted president and the humanitarian situation within the country, which indicates that the Security Council was hesitant to justify the

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<sup>388</sup> Nicaragua, *supra* note 9, ¶¶ 257–269.

<sup>389</sup> African Charter on Democracy, Elections and Governance art. 46, Jan. 30, 2007; *see also* Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government (AHG/Decl.5 (XXXVI)).

<sup>390</sup> Comm. of W. Afr. States, Protocol on Democracy and Good Governance, ECOWAS Doc. A/SP1/12/01 (Dec. 2001).

<sup>391</sup> *See, e.g.*, Tesón, *supra* note 290, at 113.

<sup>392</sup> G.A. Res. 46/7, ¶ 1 (Oct. 11, 1991).

<sup>393</sup> S.C. Res. 940, ¶ 4 (July 31, 1994).

intervention based solely on restoring democracy.<sup>394</sup> The argument that the intervention served to implement the Haitians' popular will is also undermined by the fact that the international community's framework that allowed Aristide to return also forced him to retire upon completion of his term and modify his left-leaning economic policies, without any input from Haitian voters.<sup>395</sup> Whether this intervention really implemented the Haitian people's will is therefore questionable.<sup>396</sup>

Some refer to the U.S. interventions in Grenada in 1983 and in Panama in 1989 as further evidence of pro-democratic interventions.<sup>397</sup> The United States did not justify its intervention in Grenada on those grounds. In fact, a legal advisor to the U.S. government stated that the intervention was not based on a "broad doctrine of 'humanitarian intervention.'"<sup>398</sup> Furthermore, the General Assembly condemned the invasion by a large majority.<sup>399</sup>

During the 1989 invasion of Panama, President George H.W. Bush did mention the goal of "restoring democracy" as one of four reasons for intervening.<sup>400</sup> Meanwhile, the U.S. Ambassador to the U.N. justified the intervention on the basis of Article 51. However, he, too, repeatedly emphasized the United States' goal of a democratic Panama.<sup>401</sup> Again, the General Assembly condemned the U.S. invasion.<sup>402</sup>

Another oft-cited example is the 1998 ECOWAS intervention in Sierra Leone following the 1997 ouster of the elected president of the country in a military coup. After milder measures failed to convince the military leadership to stand down, ECOWAS troops intervened and reinstalled the elected president. At various meetings African leaders called for the restoration of the "legitimate government." The Foreign Minister of Nigeria, the main contributor to and leader of the ECOWAS intervention, declared, "This is not interference . . . Nigeria is going to ensure that peace, stability and a legitimate government are restored in Sierra

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<sup>394</sup> *Id.* ¶ 6.

<sup>395</sup> Richard Falk, *The Haiti Intervention: A Dangerous World Order Precedent for the United Nations*, 36 HARV. INT'L L.J. 341, 352–53 (1995).

<sup>396</sup> Wilson, *supra* note 380, at 577–78.

<sup>397</sup> Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329, 339 (1995); D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, *supra* note 285, at 523–24.

<sup>398</sup> BYERS, *supra* note 80, at 87.

<sup>399</sup> G.A. Res. 38/7 (Nov. 2, 1983).

<sup>400</sup> Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on United States Military Action in Panama, *supra* note 73.

<sup>401</sup> U.N. SCOR, 49th Sess., 2899th mtg. at 32–35, U.N. Doc. S/PV.2899 (Dec. 20, 1989), 32–35 [https://undocs.org/S/RES/959\(1994\)](https://undocs.org/S/RES/959(1994)) [<https://perma.cc/7QTC-C8QN>].

<sup>402</sup> G.A. Res. 44/240 (Dec. 29, 1989).

Leone.”<sup>403</sup> This non-authorized use of force was subsequently endorsed by the Security Council.<sup>404</sup> At first sight this would therefore seem to be an example of a multilateral pro-democratic intervention without prior authorization, but the fact that the intervention’s main initiator, the Nigerian government, was itself a military dictatorship that had come to power in a coup against an elected president in 1983, severely undermines such an assumption. Byers and Chesterman argue that the subsequent endorsement by the U.N. Security Council may well have intended to ensure no new right of unilateral intervention was created.<sup>405</sup>

Following presidential elections in late 2010, the president of Ivory Coast, disputing the results, refused to step down. Most international observers, organizations, and states believed the leader of the opposition had won the run-off. By March 2011, civil war had erupted and supporters of the outgoing president attacked U.N. peacekeeping forces that had been in the country since 2004. U.N. forces, joined by France, counter-attacked forces loyal to the outgoing president. France declared “it had joined the operation in Ivory Coast at the request of the United Nations, with the intent of ‘neutralizing heavy weapons that are used against the civilian population and United Nations personnel in Abidjan.’”<sup>406</sup> U.N. Secretary General Ban Ki-moon emphasized “that the United Nations was ‘not a party to the conflict.’”<sup>407</sup>

Some argue the 2011 intervention in Libya, authorized by the Security Council, was a pro-democratic intervention.<sup>408</sup> However, U.N. Security Council Resolution 1973 does not mention such a goal.<sup>409</sup> Furthermore, the fact that undemocratic states, such as Qatar and the United Arab Emirates were involved in the intervention and it was supported by Saudi Arabia,<sup>410</sup> undermines this proposition.

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<sup>403</sup> HUMAN RIGHTS WATCH, NIGERIA’S INTERVENTION IN SIERRA LEONE, (1997), [https://www.hrw.org/reports/1997/nigeria/Nigeria-09.htm#P580\\_151290](https://www.hrw.org/reports/1997/nigeria/Nigeria-09.htm#P580_151290) [<https://perma.cc/K4XF-KEYC>] (quoting Tom Ikimi, Nigerian Foreign Minister, Statement at the Organization of African Unity Assembly of Heads of State and Government (1997)).

<sup>404</sup> S.C. Res. 1162 (Apr. 17, 1998).

<sup>405</sup> Michael Byers & Simon Chesterman, ‘You, the People’: *Pro-Democratic Intervention in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 259, 290 (Gregory H. Fox & Brad R. Roth eds., (2000)).

<sup>406</sup> Adam Nossiter, *Strikes by U.N. and France Corner Leader of Ivory Coast*, N.Y. TIMES (Apr. 4, 2011), [http://www.nytimes.com/2011/04/05/world/africa/05ivory.html?\\_r=1](http://www.nytimes.com/2011/04/05/world/africa/05ivory.html?_r=1) [<https://perma.cc/UYW9-8M6Q>].

<sup>407</sup> *Id.*

<sup>408</sup> Thielbörger, *supra* note 358, at 33–38.

<sup>409</sup> S.C. Res. 1973 (Mar. 17, 2011).

<sup>410</sup> Clifford Krauss, *For Qatar, Libyan Intervention May Be a Turning Point*, N.Y. TIMES (Apr. 3, 2011), <http://www.nytimes.com/2011/04/04/world/middleeast/04qatar.html> [<https://perma.cc/5Y9J-777X>]; Julian Borger, *Libya no-fly resolution reveals global split in UN*, THE GUARDIAN (Mar. 18, 2011), <https://www.theguardian.com/world/2011/mar/18/libya-no-fly-resolution-split> [<https://perma.cc/V65W-WY5A>] (referring to the involvement of Qatar and the UAE in the Libyan intervention); Patrick Cockburn, *The Arab Spring Reported and Misreported: Foreign Intervention in Libya and the Last Days of Gaddafi*, THE INDEPENDENT (Apr. 20, 2016), <https://www.independent.co.uk/voices/the-arab-spring-reported-and-misreported-foreign->

The far-from-democratic outcome of the intervention further renders a pro-democracy rationale unconvincing.

Another highly-relevant example of state practice in favor of pro-democratic interventions is the situation in the Gambia in early 2017. In December 2016, the president of the Gambia, Yahya Jammeh, lost the presidential election to his opponent, Adama Barrow. While at first acknowledging defeat, Jammeh later refused to step down.<sup>411</sup> The international community condemned this action and called on Jammeh to respect the election result.<sup>412</sup> The African Union and ECOWAS emphasized that “all necessary measures” would be taken in order to ensure adherence to the election result.<sup>413</sup> ECOWAS then demanded that Jammeh stand down by January 19, 2017 or face military intervention by ECOWAS, which deployed troops at Gambia’s borders.<sup>414</sup> On January 19, 2017, Barrow was sworn in as the new president of the Gambia and immediately called for international support.<sup>415</sup> This call was swiftly followed by the Security Council passing Resolution 2337, in which it supported the African Union and ECOWAS stance and endorsed Barrow as the new president, but did not authorize the use of force.<sup>416</sup> Members of the Senegalese ECOWAS contingent, nevertheless, crossed into the Gambia, allegedly by mistake.<sup>417</sup> On January 21, 2017, Jammeh left the Gambia and no further military intervention was required. There was little international opposition to ECOWAS’ actions.<sup>418</sup>

Though some have attempted to classify this intervention as intervention by invitation of the government, based on the newly inaugurated president’s request,

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intervention-in-libya-and-the-last-days-of-colonel-a6992726.html [https://perma.cc/65ZU-GXB6] (referring to Saudi Arabian support for the Libyan intervention).

<sup>411</sup> *Gambia talks fail as President refuses to step down*, BBC NEWS (Jan. 14, 2017), <https://www.bbc.com/news/world-africa-38621092> [https://perma.cc/M4WJ-S6L7].

<sup>412</sup> U.N. S.C. President, *Statement by the President of the Security Council*, ¶ 5, U.N. Doc. S/PRST/2017/19 (Dec. 21, 2016).

<sup>413</sup> Afr. Union, *Communiqué*, ¶ 12, AU Doc. PSC/PR/COMM.(DCXLIV) (Dec. 12, 2016), [www.peaceau.org/uploads/psc.comm.gambia.12.12.2016.pdf](http://www.peaceau.org/uploads/psc.comm.gambia.12.12.2016.pdf) [https://perma.cc/4PK3-Z627] Econ. Community of W. Afr. States., *Fiftieth Ordinary Session of the ECOWAS Authority of Head of State and Government*, ¶ 38 (h) (Dec. 17, 2016), [https://www.ecowas.int/wp-content/uploads/2016/12/Communiqu%C3%A9-Final\\_50th-Summit\\_Abuja\\_Dec-16\\_Eng.pdf](https://www.ecowas.int/wp-content/uploads/2016/12/Communiqu%C3%A9-Final_50th-Summit_Abuja_Dec-16_Eng.pdf) [https://perma.cc/WU4Y-2ZC3].

Notably, ECOWAS brought these decisions to the attention of the UN. See Letter dated 19 December 2016 from the Chargé d’affaires of the Permanent Mission of Senegal to the United Nations addressed to the President of the Security Council, U.N. Doc S/2016/1089, (Dec. 28, 2016), <http://undocs.org/en/S/2016/1089> [https://perma.cc/5VCU-TDRG].

<sup>414</sup> See *Gambia’s President Jammeh refuses to leave office as deadline passes*, BBC NEWS (Jan. 19, 2017), <https://www.bbc.com/news/world-africa-38672840> [https://perma.cc/B3ZB-EQWG].

<sup>415</sup> Ruth Maclean, *Troops Enter the Gambia After Adama Barrow is Inaugurated in Senegal*, GUARDIAN (Jan. 19, 2017), <https://www.theguardian.com/world/2017/jan/19/new-gambian-leader-adama-barrow-sworn-in-at-ceremony-in-senegal> [https://perma.cc/XRA4-ZWC7].

<sup>416</sup> S.C. Res. 2337 (Jan. 19, 2017).

<sup>417</sup> Dionne Searcy, *Why Democracy Prevailed in Gambia*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/world/africa/gambia-barrow-democracy-africa.html> [https://perma.cc/R3GK-667U].

<sup>418</sup> *Id.*

this argument seems doubtful, as ECOWAS issued its threat to use force before Barrow's invitation.<sup>419</sup> It could be argued that the Security Council subsequently endorsed the previous threat to use force in Resolution 2337.<sup>420</sup> Certainly, the statements made by the U.K. and the Russian representatives in the Security Council indicated a willingness to accept an invitation to intervene by Barrow as legitimate.<sup>421</sup> This legitimacy, however, was derived from an election, not from Barrow having been in power.

President Trump's threat to intervene militarily in the Venezuelan crisis in August 2017 is another potential application of the alleged right of pro-democratic intervention. In this context, the White House emphasized that President Trump would not even speak to the Venezuelan president before "democracy is restored."<sup>422</sup> As seems to be increasingly the case, the U.S. government offered no legal justification for the threat to use force.

There is little evidence of pro-democratic interventions in state practice. Nevertheless, following the 2011 intervention in Libya, the putative right once again seems to be gaining support in the West and the threat by African states to use force in the Gambia in 2016/2017 is difficult to classify in any other way.

#### 4. Conclusion

Pro-democratic interventions are a putative new rule in international law that has found little official support among states. The triumphalism of the early 1990s, when some were already announcing the end of history,<sup>423</sup> has been replaced with realism. Coup d'états once again have become more frequent, and several states that are nominally still democratic are moving towards a form of government that Hungarian Prime Minister Viktor Orbán has approvingly described as "illiberal."<sup>424</sup> Nevertheless, the right of pro-democratic interventions still has supporters in the West, as seen during the 2011 crisis in Libya.<sup>425</sup>

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<sup>419</sup> See *supra* note 414.

<sup>420</sup> S.C. Res. 2337, *supra* note 398, ¶ 6.

<sup>421</sup> Edith M. Lederer, U.N. *Adopts Resolution Backing Gambia's New President Barrow*, AP NEWS (Jan. 19, 2017), <https://apnews.com/44fe8d11a7134ad084794fb450c95556/un-adopts-resolution-backing-gambias-new-president-barrow> [<https://perma.cc/3VWH-SET4>].

<sup>422</sup> Ben Jacobs, *Trump Threatens Military Option in Venezuela as Crisis Escalates*, GUARDIAN (Aug. 12, 2017), <https://www.theguardian.com/world/2017/aug/11/donald-trump-venezuela-crisis-military-intervention> [<https://perma.cc/6AAA-36T9>].

<sup>423</sup> See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

<sup>424</sup> Viktor Orbán, Hungarian Prime Minister, Speech at Balványos Free Summer University and Youth Camp (July 26, 2014) (transcript available at <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>) [<https://perma.cc/F2SH-TDX8>].

<sup>425</sup> Payandeh, *supra* note 367, at 388; Thielbörger, *supra* note 367, at 33–38; Beham & Janik, *supra* note 368, at 8–11.

It is, however, a justification completely at odds with the principles of sovereign equality and non-intervention in the internal affairs of another state.<sup>426</sup> The oft-repeated “Democratic Peace” argument<sup>427</sup> applies only to relations between democracies. Many liberal democracies, such as the United States or the U.K., resort to military force frequently, while other more authoritarian states, such as China, in the past have been much less likely to do so. Furthermore, democracies, such as the United States and the U.K., have been willing to actively, though covertly, support the overthrow of democratically elected governments that pursued policies incompatible with their goals.<sup>428</sup>

The scope for double standards is enormous. While the West is closely allied with authoritarian, despotic states such as Saudi Arabia, Bahrain, and the United Arab Emirates, it heavily criticizes deficiencies in Iran’s political process—which at least does involve elections with a limited choice. While deploring Russia’s political development or the crisis in Venezuela, the West is happy to support the overthrow of the democratically elected president of Egypt and the removal of Honduras’ president, and ignores the military coup in Thailand.

Therefore, a right to pro-democratic intervention appears to be no more than an attempt to legitimize the overthrow of governments whose policies do not align with the West’s priorities. Given the precedent of previous ostensibly pro-democracy interventions, we may soon witness western states justifying self-serving interventions on the grounds of protecting “democracy.”

#### IV. Conclusion

Right-wing interventionists and liberals across the West have converged and are in the process of shattering the far-reaching ban on the use of force introduced after WWII. Attempts at modifying the law on self-defense are in danger of rendering the far-reaching ban on the use of force ineffective. This in turn encourages states to increasingly seek military solutions to crises, as a plausible excuse can always be found. Neither the imminence criterion nor the “armed attack” threshold are seen as obstacles to an ever-expanding right to resort to the use of force. Combined with further exceptions in cases of humanitarian crises or possibly even “illegitimate” governments, these developments are in danger of recreating a situation reminiscent of the era prior to WWI—a situation in which international law no longer effectively regulates the use of force. Not only does this

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<sup>426</sup> Vidmar, *supra* note 367, at 358.

<sup>427</sup> *Id.* at 354–57.

<sup>428</sup> For example, the United States actively supported the overthrow of Guatemala’s president in 1954 and Chile’s in 1973. The United States and the U.K. actively engineered the overthrow of Mossadeq’s government in Iran in 1953. More recently, the United States tolerated and even encouraged the removal of the president of Honduras (2009) and of President Morsi of Egypt (2013). The United States also supported the unsuccessful coup attempt against President Chavez in Venezuela (2002). All these governments were democratically elected. *See generally* Christian Crandall, Owen Cox, Ryan Beasley & Mariya Omelicheva, *Covert Operations, Wars, Detainee Destinations, and the Psychology of Democratic Peace*, 62 J. CONFLICT RESOLUTION 929 (2018).



allow states to revert to war in an increasing number of cases, but it also encourages states to aggressively increase their military expenditure in order to avert an outside intervention, thus increasing the likelihood of conflict.

A legal system, whether domestic or international, can only function when there are few and narrow exceptions to the general rules. Once the floodgates are opened by allowing ever more ill-defined exceptions, often based on fabricated or at least dubious facts, the basic and general rule of law breaks down. The result is a return to an increasingly lawless 19<sup>th</sup> century-like rule of the powerful, accompanied by anarchic tendencies within the international community. As the attacks in Syria in 2017 and April 2018, both generally supported in the West, illustrate, the West is increasingly prepared to completely ignore international law when resorting to the use of force.<sup>429</sup> Not surprisingly, this dismissive attitude of the law is being exploited in places as disparate as the Arab peninsula, the territory of the former Soviet Union, and large parts of Africa. Gunboat diplomacy seems to be resurgent. The question remains whether the West will not live to regret being the main initiator of this development.

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<sup>429</sup> Roger Sollenberger, *Would a Syria Strike Be Legal? Does it Even Matter Anymore?*, PASTE MAG. (Apr. 11, 2018), <https://www.pastemagazine.com/articles/2018/04/would-a-syria-strike-be-legal-does-it-even-matter.html> [<https://perma.cc/YNT2-CEXF>].