THE FOG OF LAW: SELF-DEFENSE, INHERENCE, AND INCOHERENCE IN ARTICLE 51 OF THE UNITED NATIONS CHARTER

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I. INTRODUCTION

On a hot afternoon in July 2001, one of those rare, revealing scenes played out in Washington that seemed to convey, in one memorable moment, more than volumes of explanatory commentary and analysis. Testifying before the Senate Foreign Relations Committee was William J. Perry, Secretary of Defense during the Clinton Administration. His topic was the ABM Treaty. Toward the end of his testimony, almost as an aside, Perry presented a brief proposal. As a backstop to a missile defense system, he suggested the United States should establish a policy "that we will attack the launch sites of any nation that threatens to attack the U.S. with nuclear or biological weapons."[1]

While Perry did not elaborate on the idea, its logic is compelling. An adversary considering the development of such weapons will have less incentive if it is aware that its effort ultimately will come to naught. But implementing the policy would present a slight problem, noted neither by Perry nor by any Senator: it would plainly violate Article 51 of the United Nations Charter,[2] which permits defensive use of force only in

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1. *The Administration's Missile Defense Program and the ABM Treaty: Hearing Before the Senate Comm. on Foreign Relation*, 107th Cong. 88 (2001) (statement of U.S. Secretary of Defense William J. Perry).

2. Article 51 provides as follows:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a

response to an armed attack.

Why would senior American officials openly consider such a proposal in complete indifference to its violation of the Charter? Because, I have suggested, international "rules" concerning use of force are no longer regarded as obligatory by states.[3] Between 1945 and 1999, two-thirds of the members of the United Nations—126 states out of 189—fought 291 interstate conflicts in which over 22 million people were killed.[4] This series of conflicts was capped by the Kosovo campaign in which nineteen NATO democracies representing 780 million people flagrantly violated the Charter. The international system has come to subsist in a parallel universe of two systems, one *de jure*, the other *de facto*. The *de jure* system consists of illusory rules that would govern the use of force among states in a platonic world of forms, a world that does not exist. The *de facto* system consists of actual state practice in the real world, a world in which states weigh costs against benefits in regular disregard of the rules solemnly proclaimed in the all-but-ignored *de jure* system. The decaying *de jure* catechism is overly schematized and scholastic, disconnected from state behavior, and unrealistic in its aspirations for state conduct.

The upshot is that the Charter's use-of-force regime has all but collapsed. This includes, most prominently, the restraints of the general rule banning use of force among states, set out in Article 2(4).[5] The same must be said, I argue here, with respect

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> Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51. Similarly, when the *Washington Post* reported that the President "promised preemptive strikes against any terrorists plotting to attack the United States," no mention was made of the likely Charter violation. Mike Allen, *From Both Sides, Promises to Fight On: Bush Says Hardest Part Is Ahead*, WASH. POST, Nov. 22, 2001, at A1.

3. *See* MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO (2001).

4. Monty G. Marshall, *Assessing the Societal Impact of War, in* FROM REACTION TO CONFLICT PREVENTION: OPPORTUNITIES FOR THE U.N. SYSTEM (Fen Osler Hampson & David Malone eds., forthcoming 2001). *See also* Center for Systemic Peace, *Major Episodes of Political Violence, 1946-1999, at* http://www.members/aol.com/cspmgm/cspframe.htm (Oct. 1, 2000).

5. *See* GLENNON, *supra* note 3. Article 2(4) provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner

to the supposed restraints of Article 51 limiting the use of force in self-defense. Therefore, I suggest that Article 51, as authoritatively interpreted by the International Court of Justice, cannot guide responsible U.S. policy-makers in the U.S. war against terrorism in Afghanistan or elsewhere.[6]

II. THE ILLOGIC OF ARTICLE 51: AN ANLAYSIS OF THREE COROLLARIES

In one sense, the conclusion that Article 51 has no practical force follows *a fortiori* from my earlier argument: If there is no authoritative general prohibition of use of force, it makes no sense to consider the breadth of a possible exception. Yet an examination of Article 51 reveals a measure of inconsistency, illogic, and, indeed, incoherence that provides independent grounds for questioning its importuned restraints in decisions concerning use of force. The received interpretation of Article 51 consists in hopelessly unrealistic prescriptions as to how states should behave. Its more concrete sub-rules illustrate why policymakers have come to ignore the Charter's use-of-force regime in fashioning how states behave. In this Part, I discuss three of those subrules.

A. Corollary #1—Providing Weapons and Logistical Support to Terrorists Does Not Constitute an "Armed Attack"

The meaning of the term "armed attack" as used in Article 51 was authoritatively determined by the International Court of Justice in *Nicaragua v. United States of America*.[7] The Court there

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inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, para. 4.

6. Indonesia, for example, reportedly is the site of an Al Qaeda training camp. *See* Peter Finn & Pamela Rolfe, *Spain Holds 8 Linked to Sept. 11 Plot*, WASH. POST, Nov. 19, 2001, at A1; Raymond Bonner & Jane Perlez, *Qaeda Moving Into Indonesia, Officials Fear*, N.Y. TIMES, Jan. 23, 2002, at A1. Iraq is reported to have run a camp that has trained Islamic terrorists from across the Middle East in rotations of five or six months since 1995. *See* Chris Hedges, *Defectors Cite Iraqi Training for Terrorism*, N.Y. TIMES, Nov. 8, 2001, at A1. The United States has identified Iraq, North Korea, Libya, Syria, and Iran as countries developing germ warfare programs in violation of treaty obligations but declined to say whether any had assisted Osama bin Laden in acquiring such weapons. *See* Judith Miller, *U.S. Publicly Accusing 5 Countries of Violating Germ-Weapons Treaty*, N.Y. TIMES, Nov. 19, 2001, at B1.

7. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). Under Article 59 of the Statute of the I.C.J., decisions of the Court are not binding. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, June 26, 1945, art. 59 [hereinafter STATUTE OF THE I.C.J.]. But judicial decisions in general constitute a

confronted the argument that Nicaragua had carried out an armed attack against El Salvador. The argument was used to justify the use of defensive force by third countries assisting El Salvador (namely, the United States). Nicaragua's armed attack, it was contended, consisted in providing weapons and other support to rebels seeking to overthrow the Salvadorian government. The Court rejected the argument. "[W]hile the concept of an armed attack includes the despatch by one State of armed bands into the territory of another State," the Court concluded, "the supply of arms and other support to such bands cannot be equated with armed attack."[8] "[A]ssistance to rebels in the form of the provision of weapons or logistical or other support" does not constitute an armed attack.[9] Active, not passive, support—an actual "sending" of "armed bands, groups, irregulars or mercenaries," or "substantial involvement therein"—is necessary to meet the armed attack requirement.[10]

Lest it be thought that the Court's view is aberrational, it should be pointed out that commentators had earlier taken the same position, and it has never been disavowed by the United Nations. Ian Brownlie, for example, writing as early as 1963, opined:

> Since the phrase 'armed attack' strongly suggests a trespass it is very doubtful if it applies to the case of aid to revolutionary groups and forms of annoyance which do not involve offensive operations by the forces of a state. Sporadic operations by armed bands would also seem to fall outside the concept of "armed attack."[11]

Others have even suggested that great powers may be precluded from using force in response to such attacks while lesser states may suffer no such disability.[12]

Following the September 11 terrorist attacks in the United

"subsidiary means for the determination of rules of law" under Article 38 thereof. STATUTE OF THE I.C.J. art. 38. All U.N. members are *ipso facto* parties to the Statute. *See* U.N. CHARTER art. 93, para. 1.

8. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. at 126-27.

9. *Id.* at 103-04.

10. *Id.*

11. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 278-79 (1963). *See also* Quincy Wright, *Intervention, 1956*, 51 AM. J. INT'L. L. 257, 271 (1957).

12. *See, e.g.*, J.E.S. Fawcett, *Intervention in International Law, A Study of Some Recent Cases*, 103 RECUEIL DES COURS 343, 363 (1962) ("[A]rmed bands . . . may constitute no threat at all to a powerful state but their operations may well amount to an 'armed attack' upon a militarily weak or politically unstable state.").

States, the U.N. General Assembly "strongly condemn[ed] the heinous acts of terrorism" but declined to characterize the acts as an "armed attack" under Article 51.[13] The Security Council also condemned the attacks in two resolutions that contained preambular language recognizing the inherent right of self-defense.[14] But the Council stopped short of authorizing the use of force, which the United States did not seek and probably did not want.[15]

The implications for the war against terrorism are clear. Use of force against the Taliban government of Afghanistan was, under the Court's construction of Article 51 in its *Nicaragua* opinion, unlawful. For that matter, if the government of Afghanistan had directly provided the terrorists with airplane tickets, funds for flight lessons, and the box cutters used to hijack the aircraft that crashed into the World Trade Center and the Pentagon, or if the Afghan government had provided the anthrax spores used to contaminate the American postal system, such support still would not constitute an armed attack, and use of force against the Afghan government would therefore not have been permitted. Indeed, the entire approach of the United States in fighting terrorism—refusing to distinguish between terrorists and those who harbor them, which has come to be called the "Bush Doctrine"[16]—is

13. G.A. Res. 56/1, 56th Sess., U.N. Doc. A/Res/56/1 (2001), http://www.un.org/documents/ga/res/56/a56r001.pdf.

14. *See* S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001), http://www.un.org/Docs/scres/2001/res1368e.pdf; S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001), http://www.un.org/Docs/scres/ 2001/res1373e.pdf.

15. In 1986, when the United States attacked Libya in response to the bombing of a Berlin night club in which two American servicemen were killed, *see Seeking the Smoking Fuse*, TIME, Apr. 21, 1986, at 22, the United States argued that its "preemptive" action was justified under Article 51, *see* Address of U.S. Representative Vernon Walters Before the U.N. Security Council, U.N. SCOR, 41st Sess., 2674th mtg. at 13-18, U.N. Doc. S/PV.2674 (1986). President Ronald Reagan, in an address to the nation, said the "preemptive action" was "fully consistent with Article 51 of the United Nations Charter." Address to the Nation on the United States Air Strike Against Libya, 1 PUB. PAPERS 468, 469 (Apr. 14, 1986). Only the veto of the United States, however, joined by Britain and France, prevented the Security Council from adopting a resolution that would have condemned the American response as a violation of the U.N. Charter. *See* Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901, 921-22 (1986). Nine Council members voted for the measure. *See U.S. Rebukes Thailand Over U.N. Libya Vote*, N.Y. TIMES, Apr. 23, 1986, at A7.

16. *See* Michael J. Glennon, *Forging a Third Way to Fight: "Bush Doctrine" for Combating Terrorism Straddles Divide Between Crime and War*, LEGAL TIMES, Sept. 24, 2001, at 68. On September 11, 2001, President Bush announced that the U.S. "will

outlawed by this precept to the extent that it precludes any use of force against states that only passively provide a safe harbor for terrorists and avoid substantial involvement in the terrorists' activities. Had information that has subsequently come to light been available to the United States at the time force was initially deployed against Afghanistan, it is conceivable that a "substantial involvement" test could have been met. Press reports filed after the commencement of U.S. attacks suggest a symbiotic relationship between Al Qaeda and Afghanistan's Taliban government,[17] and perhaps even active participation of the government in planning Al Qaeda's attacks on the United States,[18] that might imply substantial governmental involvement in "sending" Al Qaeda units to the United States. But unless the U.S. government had such

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make no distinction between the terrorists who committed these acts and those who harbor them." Address to the Nation on the Terrorist Attacks, 37 WEEKLY COMP. PRES. DOC. 1301, 1301 (Sept. 11, 2001). On September 20, 2001, he announced in a speech to a joint session of Congress that, "[f]rom this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime." Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1349 (Sept. 20, 2001). He later elaborated:

> America has a message for the nations of the world: If you harbor terrorists, you are terrorists. . . . If you train or arm a terrorist, you are a terrorist. If you feed a terrorist or fund a terrorist, you're a terrorist, and you will be held accountable by the United States and our friends.

Allen, *supra* note 2, at A1.

17. The situation that prevailed in Afghanistan prior to U.S. action seemed, at a minimum, to reverse the traditional formula of state-sponsored terrorism: Afghanistan was a terrorist-sponsored state. The *Washington Post* has reported that the head of Al Qaeda, Osama bin Laden, provided Afghanistan's ruling Taliban regime with over $100 million in cash during the last five years.

> Bin Laden has also given the Taliban military equipment, training and some of his best fighters for the battle against the Northern Alliance, the opposition coalition trying to topple the Taliban. When bin Laden first moved to Afghanistan from Sudan, he gave the fledgling Taliban militia $3 million at a critical time in the country's civil war, and he was closely involved in the Taliban's subsequent ascent to power.

Bob Woodward, *Bin Laden Said to 'Own' The Taliban: Bush Is Told He Gave Regime $100 Million*, WASH. POST, Oct. 11, 2001, at A1.

18. Days after the fall of Kabul, "a flight-simulator computer program, a list of flight schools in the United States and documents describing chemical, biological and nuclear warfare and referring to the Qaeda organization were found" in two houses there. David Rohde, *In 2 Abandoned Kabul Houses, Some Hints of Al Qaeda Presence*, N.Y. TIMES, Nov. 17, 2001, at A1. One of the houses in which documents were found belonged to the ministry of defense of the Taliban government. *See id.* "Throughout both houses were scattered green and yellow forms in Arabic labeled 'Al Qaeda Ammunition Warehouse.' . . . The apparent Al Qaeda presence in a Taliban defense ministry building suggested that Osama bin Laden's organization and the radical Islamic government were closely linked." *Id.*

evidence in hand at the time it moved against the Afghan government, that evidence (like incriminating evidence uncovered as the result of an unlawful search or seizure under U.S. law) would be irrelevant under accepted international jurisprudence.

B. Corollary #2—Defensive Use of Force To Overthrow a Government That Provides a Safe Haven to Terrorists is Disproportionate Per Se and Unlawful

Proportionality refers to the requirement that force used in self-defense be no greater than the evil necessitating that force. Although the text of Article 51 makes no reference to proportionality, that concept has been regarded as implicit in the notion of self-defense. In the *Nicaragua* case, the International Court of Justice indicated that pre-existing requirements of proportionality survived the adoption of Article 51 and continue to govern the defensive use of force.[19] The Court proceeded to find that the limits imposed by principles of proportionality were exceeded by the acts carried out by the United States.[20] Indeed, it seemed to say that such acts, however invasive, could *never* be proportionate to the provocation: "Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua," it concluded, no level of aid could under any circumstances justify attacks on Nicaragua's ports and oil installations.[21]

Again, the implications of this reasoning for American action in Afghanistan and elsewhere are clear. The principle of proportionality, so construed, would necessarily prohibit action broader than the action undertaken in the *Nicaragua* case in response to a provocation that is less substantial than the provocation posed in the *Nicaragua* case. Specifically, if the United States' action against Nicaragua (attacks on its ports and oil installations) necessarily constituted a disproportionate response to Nicaragua's action against El Salvador (the provision of arms and assistance to anti-government rebels),

19. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (June 27).

20. *Id.* at 122.

21. *Id.*

then an even graver action against Afghanistan (invasion and the overthrow of its government) necessarily constitutes an even more disproportionate response to its lesser delict (passively providing a safe haven for terrorists but not supplying arms or other support). Proportionality, by this logic, never permits overthrowing a government merely because it provides a safe haven to terrorists. Again, lest it be thought that the Court's reasoning was somehow novel or unprecedented, it should be noted that the Court's view is consistent with that of commentators.[22]

C. Corollary #3—Anticipatory Self-Defense Is Not Permitted Because No "Armed Attack" Has Occurred

The text of Article 51 explicitly requires an "armed attack" as a pre-condition to the use of defensive force. Its terms contrast, in their asymmetry, with the terms of Article 2(4). Article 2(4) prohibits not only the use of force but also the "threat of" force. Article 51, however, makes no reference to the "threat" of force; under the Article, no threat of force (or of an armed attack, which presumably is different) by one state justifies the use of defensive force by another. The intent of the Charter's framers was to make acceptable uses of force readily distinguishable from unacceptable uses of force. Drawing the line at the precise point of an armed attack, an event the occurrence of which could be objectively established, served the purpose of eliminating uncertainty.[23]

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22. *See, e.g.*, BROWNLIE, *supra* note 11, at 279 ("[A] right to resort to force against various forms of indirect aggression cannot be derived from Article 51 if the requirement of proportionality is strictly observed. Indirect aggression and the incursions of armed bands can be countered by measures of defence which do not involve military operations across frontiers."). The overthrow of the Iraqi government was an illegitimate and unjust aim, Michael Walzer has written, unnecessary for achieving the objective of expelling Iraq from Kuwait. *See* MICHAEL WALZER, JUST AND UNJUST WARS (2d ed. 1992). *See also* Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L. L. 391, 405 (1993) ("It appears that more was done than was proportionate to expelling Iraq from Kuwait."); Mary Ellen O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait*, 15 S. ILL. U. L.J. 453, 479 (1991) (noting that the Security Council "authorized force only to liberate Kuwait").

23. During the first three decades after the Charter's ratification, the United States appears not to have challenged the proposition that Article 51 permits use of force only in response to an actual armed attack. *See, e.g., The President's Proposal on the Middle East: Hearings Before the Senate Comm. on Foreign Relations and the Senate Comm. on Armed Services*, 85th Cong. 6-7, 27-28 (1957) (statement of U.S. Secretary of State John Foster Dulles). During the Cuban Missile Crisis,

Arguments that the Charter permits anticipatory self-defense are unpersuasive. It has been suggested, for example, that the phrase "if an armed attack occurs" does not mean "only if an armed attack occurs."[24] The suggestion is that armed attack is but one of several factual bases that might permit defensive use of force. But the possibility of multiple, unspecified bases for the use of force other than armed attack would swallow up the "armed attack" limit and render pointless the singularity of its enumeration. So, too, with the argument that an attack actually begins before its physical manifestations occur. The contention is that the planning, organization, and logistical preparation are, properly conceived, part of the actual armed attack.[25] This argument would render chimerical the armed attack requirement as well, because an attack would then begin not with bullets and bombs but with pencils and paper, possibly deployed months or even years before actual hostilities. Nothing in the *travaux préparatoires* suggests that the plain language of Article 51 does not convey precisely the meaning that was intended.[26] "The fair reading of Article 51 is persuasive," Louis Henkin has written, "that the Charter intended to permit unilateral use of force only in a very narrow and clear circumstance, in self-defense if an armed attack occurs."[27]

American officials declined to rely upon Article 51, claiming instead that the quarantine of Cuba was justified under Article 52. *See* Abram Chayes, *The Legal Case for U.S. Action on Cuba*, 47 DEP'T ST. BULL., Nov. 19, 1962, at 763-65. In supporting the U.N. Security Council resolution that condemned Israel's 1981 raid on an Iraqi nuclear reactor, however, the U.S. representative did not address the scope of self-defense under Article 51 or the claim of Israel that it acted in self-defense. *See* U.N. SCOR, 36th Sess., 2288th mtg. at 3-5, U.N. Doc. S/PV. 2288 (1981). During recent years, however, the United States came implicitly to question that proposition. *See supra* note 15 (describing the U.S. claim of authority to use preemptive force in its 1986 attack on Libya). In the "Bush doctrine," the United States explicitly rejected the notion that defensive force can be used only in response to an armed attack. *See* Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WKLY. STANDARD, Jan. 28, 2002, at 24.

24. *See* JULIUS STONE, AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION 44 (1958); D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 187-92 (1958).

25. *See, e.g.*, C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 498 (1952).

26. *See* BROWNLIE, *supra* note 11, at 278.

27. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 295 (2d ed. 1979). *See also* BROWNLIE, *supra* note 11, at 278 ("[T]he view that Article 51 does not permit anticipatory self-defense is correct and . . . arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence."); 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 156 (H. Lauterpacht ed., 7th ed. 1952) ("[T]he Charter confines the right of armed self-defence to the case of an

The United States has not found it necessary in the current crisis to argue the permissibility of anticipatory self-defense. Use of force by the United States has thus far been undertaken solely in response to attacks that have already occurred, namely, the September 11 assaults on the World Trade Center and the Pentagon. The legislation enacted by Congress on September 14, 2001, authorizing the use of force notably excluded approval to use force to preempt further attacks[28] even though such authority had been requested by the White House.[29] Still, in a letter to the United Nations Security Council, the United States left open the possibility that force would also be used against states that had not participated in the September 11 attacks.[30] The use of preemptive force is implicit in the "Bush Doctrine."[31] Discussion continues over whether anthrax spores that contaminated the U.S. mails were provided by the Iraqi government, and debate continues within and without the U.S. government over whether the Iraqi government should be removed through the use of force as a state sponsor of terrorism (even if Iraq had not been the source of the spores). The implication for American policy-makers is nonetheless clear: should Iraq or some other nation threaten to attack the United States with weapons of mass destruction, or

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armed attack as distinguished from anticipated attack or from various forms of unfriendly conduct falling short of armed attack."). Philip Jessup has stated:

> Article 51 of the Charter suggests a further limitation on the right of self-defense: it may be exercised only "if an armed attack occurs.". . . This restriction in Article 51 very definitely narrows the freedom of action which states had under traditional law. A case could be made out for self-defense under the traditional law where the injury was threatened but no attack had yet taken place. Under the Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened.

PHILIP C. JESSUP, A MODERN LAW OF NATIONS 165-66 (1952).

28. Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224 (2001).

29. *See* Helen Dewar & Juliet Eilperin, *Emergency Funding Deal Reached; Hill Leaders Agree to Work Out Language on Use of Force*, WASH. POST, Sept. 14, 2001, at A30.

30. "The letter put the Security Council on notice that the United States might be forced to retaliate against other state sponsors of terrorism if it turned up new evidence, stating, 'We may find that our self-defense requires further action with respect to other organizations and other states.'" Elaine Sciolino & Patrick E. Tyler, *Saddam Hussein: Some Pentagon Officials and Advisers Seek to Oust Iraq's Leader in War's Next Phase*, N.Y. TIMES, Oct. 12, 2001, at B6.

31. *See supra* note 16.

should a non-state actor operating from within its territory do the same, use of force to pre-empt such an attack would not be permissible under the U.N. Charter.

III. THE GAP BETWEEN ARTICLE 51 AND THE REALITY OF STATE BEHAVIOR

The temptation always exists, upon discovering that "the law is an ass," to strain for ways of avoiding that conclusion, to argue that results so fundamentally incompatible with sound policy cannot possibly be correct. The lure to do so is especially strong in international law, where analytic tools have been dulled by decades of result-oriented commentary to the point where the distinction between *lex lata* and *lex ferenda*, between the law as it is and the law as one would like it to be, is often non-existent. Whole "schools" have arisen that implicitly conjoin the two.[32] Predictably, Article 51 has not escaped efforts to rationalize international law's illogic.[33] But its manifest failings do not justify an exercise to save Article 51 that requires buying into the same self-referential analytic methods[34] that account for its incoherence. The reality is that Article 51 is grounded upon premises that neither accurately describe nor realistically prescribe state behavior. To ignore that dissonance ill serves efforts to develop a realistic, workable legalist order to govern the use of force. I suggest acknowledging the unhappy conclusion that these three corollaries[35] are part and parcel of Article 51, that each of these

32. *See* Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943) (outlining "policy-oriented jurisprudence").

33. *See, e.g.*, Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559 (1999); W. Michael Reisman, *Legal Responses to International Terrorism: International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 17 (1999).

34. *See* GLENNON, *supra* note 3, at 49-60.

35. They are not the only corollaries that have been urged to follow from Article 51. It has been contended, for example, that principles of necessity precluded the United States from acting against Afghanistan after a delay of three weeks because the American response did not meet criteria announced by Secretary of State Daniel Webster in the *Caroline* case. Britain, Webster wrote, was required to "show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation." 2 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW 412 (1906). By this logic, use of force against Iraq following its invasion of Kuwait was also unlawful, inasmuch as that action was not commenced for some months afterwards, as was use of force against Japan following Pearl Harbor, which also was delayed by some months.

three corollaries prohibits or significantly constrains legitimate and reasonable actions that sensible states might take in their self-defense, and that none can guide responsible American policy-making in the war against terrorism.

The first corollary, in refusing a state the right to use force against a safe-harbor state following terrorist attacks launched from such a state, ignores the reality that the use of force against safe-harbor states may, in certain situations, be the only means available to a victim state to terminate the pernicious use of force against it—force that might, in every respect, represent the equivalent of state-sponsored force. In such circumstances there is, as the "Bush Doctrine" posits, no reason to distinguish between the two.[36] The whole purpose of permitting a state to use force to defend itself from attack is to prevent massive injury. That injury is no less significant if private rather than public wrongdoers inflict it. In contemporary times, non-state actors are as capable of inflicting widespread injury as many state actors. If a host state is unable or unwilling to curtail harmful private conduct when that conduct originates from within the host state's territory, it makes no sense to insist that the victim state remain indifferent to such conduct, effectively sacrificing the integrity of its own territorial sovereignty for that of the host state. Similarly, it does not make sense to permit defensive force against the wrongdoer but not against the wrongdoer's host if the wrongdoer's capability to inflict harm depends upon the indifference of a host government that can curtail that harm simply by withdrawing its hospitality. Acts of omission in such circumstances shade into acts of commission, and aggrieved states should not be faulted for treating them the same.

The second corollary, in counseling that any use of force against such a safe-haven government is per se disproportionate, turns the principle of proportionality inside out. This corollary insists that *any* use of force against a safe-haven state, however restrained, is necessarily excessive in relation to *any* terrorist threat that might thereby be forestalled, however great. The proper application of the notion of proportionality is directed at ensuring a sensible calibration of means to ends that will necessarily vary from one situation to the next, not at

36. *See supra* note 16.

imposing a rigid test of per se invalidity that mandates a fixed conclusion even as facts vary. The mistaken application of this principle seems to flow from the supposition that use of force, being unlawful *ab initio* against a safe-haven state, necessarily renders that force excessive and therefore "disproportionate." But international law has long insisted upon the complete disjunction of *jus ad bellum* from *jus in bello*—i.e., upon keeping the rules concerning *when* force can be used completely separate from the rules concerning *what* force can be used. In traditional international jurisprudence, rules concerning how a war can be fought can, and must, be honored even though the war is fought for illicit ends, and wars fought for permissible ends still cannot be fought by illicit means. The plain illogic of this second corollary derives from conflating the two, from supposing that an impermissible object necessarily renders impermissible any amount of force employed in its pursuit. That conclusion cannot follow; if it did, the whole idea of proportionality would be rendered empty, with its standards met or defeated not by an independent measurement and assessment but by conclusions reached at the outset concerning the permissibility of the use of force.

The one advantage of the Court's ill-conceived treatment of proportionality is that it avoids an even more serious charge to which the principle lies open, namely, that proportionality is uselessly elastic in its capacity to justify any amount of force in any circumstance (or, on the other hand, to preclude any amount of force in any circumstance).[37] But, at least in wartime, this crippling malleability is unavoidable. Waging war is bound to be disproportionate if the provocation is an isolated armed attack.[38] To justify the vanquishing of Japan following Pearl Harbor, it was necessary either to regard the limits of proportionality as effectively waivable at the discretion of an aggrieved state that chooses to wage full-scale war, or to regard proportionality as permitting the wholesale destruction of enemy forces and occupation of its homeland in response to a manifestly lesser intrusion. Even the most elastic of principles would snap between the pull of these alternatives. But the

37. Dinstein, in a masterpiece of understatement, writes that "[i]t is not always easy to establish what proportionality entails." YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 184 (3d ed. 2001).

38. *Id.* at 208.

analytic confusion is still greater. In wartime, the provocation is not simply an isolated armed attack. The provocation is an ongoing series of attacks that repeat in a retaliatory cycle that makes war a succession of deadly provocations. In this chain of attacks and counter-attacks, no answer possibly can be given to the question that underpins all proportionality analysis: proportional to *what*?

As though this were not enough, proportionality is at war with deterrence. Whereas proportionality counsels that harm returned should not exceed harm received, deterrence warns that harm returned *should* exceed harm received, for the greater the disproportionality, the greater the chance of avoiding harm to either party by avoiding conflict altogether. Tit-for-tat equivalence is a strategy ill-conceived for maintaining a comprehensive peace.

The third corollary, ruling out anticipatory self-defense, fights a losing battle with common sense. In its actions if not in its words, the United States rejected this corollary *de facto* throughout the Cold War by maintaining a launch-on-warning option in response to the threat of nuclear attack.[39] Had the third corollary been in effect at the time of Pearl Harbor, it would have insisted that the United States wait until bombs actually fell before using defensive force. No rational decision-maker can be expected to exercise such restraint. And few have, as Israeli officials demonstrated when Israel destroyed an Iraqi nuclear plant in 1981 when it believed Iraq was manufacturing a nuclear device.[40] Waiting for an aggressor to fire the first shot may be a fitting code for television westerns, but it is unrealistic for policy-makers entrusted with the solemn responsibility of safeguarding the well-being of their citizenry. If a state has developed the capability of inflicting substantial harm upon another, indicated explicitly or implicitly its willingness or intent to do so, and to all appearances is waiting only for the opportunity to strike, preemptive use of force is

39. *See* BRUCE G. BLAIR, STRATEGIC COMMAND AND CONTROL: REDEFINING THE NUCLEAR THREAT (1985).

40. The act was condemned by the U.N. Security Council. *See* S.C. Res. 487, U.N. SCOR, 36th Sess., at 10, U.N. Doc. S/INF/37. American efforts did, however, succeed in blocking inclusion of the word "aggression" in the Resolution. *See* Reisman, *supra* note 33, at 17. *See generally* TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR (1996).

justified. Admittedly, that line is not bright. Mistakes may be made. It is better, however, that the price of those mistakes be paid by states that so posture themselves than by innocent states asked patiently to await slaughter.[41]

IV. SOURCES OF THE CONFLICT BETWEEN ARTICLE 51 AND THE REALITY OF STATE BEHAVIOR

In searching for the sources of the conflict between the reality of state behavior and the command of Article 51, an obvious starting point is the text of Article 51. The Article professes that neither Article 51 itself, nor anything else in the U.N. Charter, "shall impair" the inherent right of a state to act in self-defense in response to an armed attack.[42] The implication is not only that an inherent right to self-defense existed prior to ratification of the U.N. Charter, but also that an inherent right continues to exist—unimpaired—after ratification. But Article 51 then proceeds to do precisely what it says it will not and cannot do. It begins by adding an explicit "if": if an armed attack has not yet occurred, a state's inherent right to preempt that attack is removed.[43] Then, Article 51 adds another, implicit "if": if the Security Council takes "measures necessary to maintain international peace and security" following an armed attack, Article 51 not only impairs the inherent right of self-defense but in fact extinguishes it because the right exists only "until" the Security Council takes such measures.[44] Lest any doubt exist that the right to self-defense is impaired, the Article proceeds to assert that it is the Security Council, not the state acting in its own self-defense, that prevails in the event of a conflict between the two; according to the Article, the defending state's report to the Security Council "shall not in any way affect the authority of the Security Council . . . to take at any time such

41. For an elaboration of this paragraph, see Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WKLY. STANDARD, Jan. 28, 2002, at 24.

42. U.N CHARTER art. 51.

43. "Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs." U.N. CHARTER art. 51.

44. U.N. CHARTER art. 51. The inherent right of self-defense may be impaired even if the Security Council takes *no* measures. The Council may conclude that peace and security are best maintained by doing nothing, in which case its purposeful inaction could have the effect of precluding a state from using force to defend itself.

action as it deems necessary . . . ."[45] Thus the right to self-defense, supposedly protected from impairment by the Charter, is permitted under the actual text of Article 51 to be impaired to the extent the Security Council chooses to impair it (but the right of course remains inherent).[46]

A second source of the conflict between Article 51 and the reality of state behavior is the Article 51 jurisprudence of the International Court of Justice. With the Security Council accorded the power to carve down the scope of states' "inherent" right to self-defense, it comes as no surprise that the Court should itself have felt no compunction about taking its own slice out of the right, as it did in the *Nicaragua* case. What is good for the executive goose apparently is good for the judicial gander. What is surprising is that the Court announced its chosen impairment *ipse dixit*, without undertaking the faintest effort at marshaling support from state practice. The Court is empowered, in deciding disputes submitted to it, to apply "international custom, as evidence of a general practice accepted as law."[47] The application of customary international law thus requires at least minimal deference to what states have actually done, as a means of determining precisely what, in the real world, states regard as law. Yet the Court deigned to cite nary an instance in which *any* state—let alone a "very widespread and representative" group of states (the test it had earlier prescribed for finding custom[48])—had actually adhered to the new limits it announced on defensive rights. It doubtless steered clear of the touchy question of state practice because state practice concerning use of force demonstrates precisely the opposite of what the Court strained to conclude. So many states have used force with such regularity in so wide a variety of situations that it can no longer be said that any customary norm of state practice constrains the use of force. Had the

45. U.N. CHARTER art. 51. A member state is required to "accept and carry out" decisions of the Security Council. U.N. CHARTER art. 25.

46. Some of this is cursorily considered by the *Nicaragua* Court in a quick sweep over the language of Article 51. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 102-03, 105 (June 27). But one is left to ask why it goes to the trouble: If a customary right is still available to states, as the *Nicaragua* Court assures us it is, what is the point of parsing the precise wording of Article 51? *See* BROWNLIE, *supra* note 11, at 279.

47. STATUTE OF THE I.C.J. art. 38, para. 1, subpara. b.

48. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

Court approached the issue with a modicum of intellectual honesty, it would have rested its opinion on other doctrines of customary international law that counseled abstention in dealing with the gap in the law that the Court strove so mightily to ignore.[49]

Again, the *Nicaragua* Court's aversion to empirical data and its concomitant predilection for abstract moralizing trace in part to the language of the Article that it professed to interpret. In the official French text of Article 51, the phrase "inherent right" is rendered "*droit naturel.*"[50] This remarkably revealing French version of the Article sounds of natural law, of eternal right and wrong, of law that precedes rules made by human beings, of a higher law not susceptible of human modification. The French text conjures a rule that trumps any positivist norm that may seemingly supplant it—including any that may flow from years of non-compliant practice. Had the International Court of Justice convened on Mt. Sinai, received the Official Construction of Article 51, and revealed it to the unlettered practitioners of *realpolitik* ensconced in state capitals worldwide, its *diktat* would have made perfect sense.

But its distaste for actual state practice makes no sense for a Court that claims to have taken "inherent" to refer merely to a right that derives from customary international law and which remained unaffected by the adoption of the U.N. Charter. Such a meaning renders the right no different from any other positive right exercised by states, whether grounded in custom or treaty. Every prior right that states brought to the bargaining table in San Francisco—every right the exercise of which is limited by the U.N. Charter—is in this sense an "inherent" right, whether regulated or left untouched by the U.N. Charter. There is nothing special about the pre-existing right to self-defense. The decision not to "impair" the right to self-defense

49. The doctrine of desuetude, for example, recognizes that treaties may become ineffective as a consequence of non-observance. *See* GLENNON, *supra* note 3, at 60-62. *Non liquet* means "it is not clear"; the doctrine of *non liquet* refers to an insufficiency in the law, to the conclusion that the law does not permit deciding a case one way or the other. *See id.* at 63. The "freedom principle" insists that a state remains free to act unless another state has met a burden of persuasion by establishing that some clear principle of international law prohibits the act in question. *See id.*

50. LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 346 (3d ed. 1969).

was thus not, in the Court's reading of the term, dictated at all by the right's "inherent" character. It flowed, instead, from the decision of the U.N. Charter's framers that state action in this realm was simply better left unregulated. Implicit in the Court's approach, therefore, was the belief that the right is adventitious, and the proposition, long ago rejected by the United States,[51] that the right to self-defense *can* be constricted by treaty. Implicit in its approach, in other words, was the need to look at what states actually do in order to see whether the right in fact remained complementary in addition to those guaranteed by the text of the U.N. Charter. This the Court declined do.

V. CONCLUSION

It is easy to conclude that the problem with Article 51 is that the Article is simply "an inept piece of draftsmanship."[52] But the problem is far more profound than a mere inability to come up with the right words. Form reflects substance. The problem is, again, that no consensus exists within the international community as to what constitutes "aggression," as failed efforts to define that term have revealed year after year.[53] From the San Francisco conference that framed the U.N. Charter[54] to the Rome conference that established the International Criminal Court,[55] "aggression" has eluded the best-laid

51. The right of self-defense, Secretary of State Frank Kellogg said, "is inherent in every sovereign state and implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense." Frank B. Kellogg, Address Before the American Society of International Law (Apr. 28, 1928), *in* 22 PROC. AM. SOC'Y INT'L L. 141, 143 (1928).

52. MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 234 (1961).

53. "[There] is a core difficulty which explains the futility hitherto of so many efforts to define international 'aggression' in terms of simply criteria. The simplicity of the notion of 'aggression' . . . dissolves, as we approach it closely, into a welter of many-faceted and multi-dimensional problems of international law and politics." STONE, *supra* note 24, at 19.

54. The San Francisco conference abandoned efforts to define aggression at the urging of the United States. The United States "took the position that a definition of aggression cannot be so comprehensive as to include all cases of aggression and cannot take into account the various circumstances which might enter into the determination of aggression in a particular case." 5 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 22, at 740 (1965).

55. The signatories to the Rome treaty criminalized aggression even though

international efforts to define it. The few "successes" have been even greater failures.[56] There is no point in trying to devise a legal-sounding formula for an exception if no agreement exists on the scope of the concept of "aggression" that lies at the heart of the general rule. Aggression and self-defense are opposite sides of the same coin.[57] "This is our world," Paul Kahn has observed, "and speaking the language of law is not going to make it any different."[58]

This article has therefore attempted merely to suggest what the rules are *not,* not what the rules *should be.* The rules are not what the U.N. Charter says they are. What the rules should be depends entirely upon what the rules *can* be. No rules will work that do not reflect underlying geopolitical realities. The use-of-force regime set out in the U.N. Charter failed because the Charter sought to impose rules that are out-of-sync with the way states actually behave. A new use-of-force regime that does work will have to rest far more firmly upon actual patterns of practice that reveal, with solid empirical evidence, what regulation of force is possible and what is not. Deontological rules that flow from imaginary *droits naturel* are doomed to failure. There is no use in telling ghost stories, Holmes said, to people who do not believe in ghosts.[59]

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they were unable to agree on its meaning. *See* Rome Statute of the International Criminal Court, July 17, 1998, art. 5, U.N. Doc. A/CONF.183.9.

56. Under many of the definitions proposed over the years, wholly reasonable and justifiable actions undertaken by states in their own defense, such as use of force by the United States in Afghanistan, could qualify as aggression. In 1974, for example, the U.N. General Assembly defined aggression as "the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Declaration." G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 143, U.N. Doc. A/9631 (1974). The Resolution finds that "[t]he first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression." *Id.* Enumerated specifically as an act of aggression is "[t]he invasion or attack by the armed forces of a State of the territory of another State . . . ." *Id.* Note that an attack by terrorists harbored or actively supported or equipped by a state would not, under this definition, constitute an act of aggression. Only the actual "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries" would qualify as aggression under the Resolution. *Id.* Article 2 of the Resolution does imply, however, that other, unspecified acts may also constitute aggression. *See id.*

57. "Express recognition by treaty of this inalienable right [to self-defense] . . . ," Secretary of State Frank Kellogg said, "gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side." Kellogg, *supra* note 51, at 143.

58. Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order,* 1 CHI. J. INT'L L. 1, 18 (2000).

59. Oliver Wendell Holmes, Jr., Dr. S. Weir Mitchell: Remarks at a Tavern Club

At this point, the consensus within the international community on underlying values is not sufficient to sustain an authentic legalist regime that would subordinate the use of force to pre-agreed limits. One person's terrorist remains another's freedom fighter.[60] What is considered justified humanitarian intervention in one part of the world is a seen as a violation of state sovereignty in another. What is self-defense to one state is aggression, armed reprisal, armed attack, intervention, or forcible counter-measures to another. No advance in the art of legal drafting can bridge the enormous gulf that divides the international community over what constitutes acceptable use of force. Any linguistic formula that purported to do so would necessarily consist of a chain of endlessly contested weasel words. Perhaps that chasm will narrow as more active phases of the war against terrorism wind down. The conclusion of great conflicts of the past presented possibilities at Vienna, Versailles, and San Francisco to re-shape the contours of international legalist institutions.[61] Even if no comprehensive re-integration or formal revision of the legalist order occurs, patterns of cooperation that develop in prosecuting the war on terrorism can still congeal gradually and incrementally into post-war legalist regimes. In the meantime, however, states will continue to judge for themselves what measure of force is required for their self-defense—action that is appropriate, it must always be borne in mind, not because defense is permitted by the U.N. Charter, but because defense is necessary for survival and survival is intrinsic in the very fact of statehood.[62]

Dinner (Mar. 4, 1900), *in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 48, 48-49 (Richard A. Posner ed., 1992).

60. Defining terrorism has proven no less intractable a task than defining aggression. In S.C. Res. 1373, *supra* note 14, the Security Council imposed broad requirements upon member states to prevent and suppress the financing of terrorism—without ever defining what constitutes "terrorism."

61. *See generally* G. JOHN IKENBERRY, AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS (2001).

62. *See* MCDOUGAL & FELICIANO, *supra* note 52, at 250; BOWETT, *supra* note 24, at 184-86 (1958); HANS KELSEN, GENERAL THEORY OF LAW AND STATE 339 (Anders Wedberg trans., 1945). So firm has been the belief that the right of self-defense may not be circumscribed that, during the negotiation of the Kellogg-Briand Peace Pact of 1928, Secretary of State Kellogg observed that there was no need to state it expressly in the terms of the Pact; even the adoption of texts that seem inconsistent with exercise of the right, he said, do not preclude reliance upon it. Telegram from Frank B. Kellong, Secretary of State, to the Ambassador in France (Apr. 23, 1928), *in* 1 FOREIGN REL. U.S. 34, 36-37 (1928).