

COMMENT

THE UNITED NATIONS CHARTER'S COLLECTIVE SECURITY FRAMEWORK IN THE TWENTY-FIRST CENTURY: A CASE STUDY OF THE UNITED STATES' USE OF FORCE IN PAKISTAN

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I. INTRODUCTION

On September 11, 2001, al-Qaeda launched a massive attack against the United States, killing over 3,000 people and thrusting the United States, along with the rest of the world, into an era widely defined by terror. The United States reacted by attacking al-Qaeda in Afghanistan and, subsequently, the Taliban-controlled government of that country. Over time, many of the al-Qaeda and Taliban fighters in Afghanistan fled to Pakistan. From within Pakistan, these groups have consistently launched attacks against civilians and soldiers in Pakistan and Afghanistan. The Pakistani government has been unable, and/or unwilling, to deter these attacks. As the attacks continue against United States soldiers and officials in Afghanistan and spread throughout Pakistan, the question arises: can the United States lawfully use force against these groups in Pakistan?

This Comment attempts to answer this question and uses the current situation in Pakistan to analyze the effectiveness of the United Nations “collective security” framework embodied in the United Nations Charter. This Comment argues that the Charter’s current broad prohibition on the use of force by Member States, coupled with its collective security framework, is untenable in the global environment of the 21st century. Through an analysis of the current conflict in Pakistan and Afghanistan, this Comment will show that the United States’ use of force in Pakistan (primarily through the use of remote-operated drones) is unlawful under prevailing interpretations of the United Nations Charter. What follows is a suggested re-interpretation of Article 2(4)’s prohibition on the use of force that would allow a Member State, or a coalition of Member States, to use force under narrowly-defined circumstances. The goal is that the United Nations will embrace this re-interpretation of the Charter, therefore maintaining its legitimacy as an adaptable international organization and curbing the disturbing trend towards unchecked unilateral use of force.

Section II of this Comment briefly states the history of United States involvement in Afghanistan and Pakistan. Section III analyzes the history of the law on recourse to war, the current framework of the United Nations Charter’s prohibition on the use of force, and its collective security framework. This Section outlines the general principles underlying these ideas as well as their practical effectiveness and the self-defense exception

under Article 51. Section IV applies prevailing views on the use of force under the United Nations Charter to the United States' use of force in Pakistan and suggests a re-interpretation of Article 2(4) that would authorize the use of force under the authority and guidance of the United Nations system. Section V demonstrates other benefits that would derive from this new interpretation of Article 2(4), including, *inter alia*, situations involving humanitarian interventions and preemptive use of force against unstable nuclear states. Lastly, Section VI concludes that the proposed new reading of Article 2(4) is favorable to its current interpretation and adds the caveat that any use of force is an extremely serious undertaking and should not be recommended except in the most necessary circumstances.

II. HISTORY OF RECENT UNITED STATES INVOLVEMENT IN AFGHANISTAN AND PAKISTAN

A. AFGHANISTAN

In 1996, following decades of political and social turmoil in the country, Osama bin Laden arrived in Afghanistan.¹ He ingratiated himself with the Taliban leader, Mullah Omar, by providing Omar with money, fighters, and ideological guidance.² While in Afghanistan, bin Laden successfully expanded his transnational terrorist organization, al-Qaeda.³ This was facilitated by the Pakistani Inter-Services Intelligence (ISI)—Pakistan's military intelligence agency—and extremist training camps in Afghanistan that had been used to train Pakistani Kashmiri insurgents.⁴ The ISI had historically close ties to the Taliban and used land in Afghanistan to train Kashmiri militants.⁵ The Taliban conveyed these training camps to

1. See AHMED RASHID, *DESCENT INTO CHAOS: THE U.S. AND THE DISASTER IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA* 9-15 (Penguin Books 2009). Following a bloody coup, the Soviet Union invaded Afghanistan in 1979. *Id.* at 9. With funding and training provided by the CIA and Pakistan's Inter-Services Intelligence, the Afghan Mujahedin (the Afghan resistance movement) fought against the Soviet occupation until the Soviet Union withdrew in 1989. *Id.* at 9-11. This left a power vacuum and, by 1994, the country deteriorated into civil war. *Id.* at 11-12. The Taliban, a group of religious students, were able to take advantage of discontent with the warring factions of the Mujahedin, and consolidated power in 1996. *Id.* at 13-14.

2. *Id.* at 15; see HAFEEZ MALIK, *US RELATIONS WITH AFGHANISTAN AND PAKISTAN: THE IMPERIAL DIMENSION* 90-91 (2008).

3. See RASHID, *supra* note 1, at 15.

4. *Id.*; see RIZWAN HUSSAIN, *PAKISTAN AND THE EMERGENCE OF ISLAMIC MILITANCY IN AFGHANISTAN* 202-04 (2005).

5. RASHID, *supra* note 1, at 15; see Sumit Ganguly, *Pakistan's Never-Ending Story*, *FOREIGN AFF.*, Mar./Apr. 2000, at 2 (“[T]he intelligence agency [ISI] remains deeply involved with the Taliban in Afghanistan and supports some of the more vicious Islamist groups, such as the Harkat ul-Mujahideen, in their terrorist activities in Kashmir. . . . Unfortunately, the ISI's work is nudging Pakistan toward the West's list of terrorist states.”); Bruce Riedel, *Al Qaeda Strikes Back*, *FOREIGN AFF.*, May/June 2007, at 24 (“The Pakistani army and the ISI have tolerated and

bin Laden,⁶ essentially giving al-Qaeda the entire country as a base of operations.⁷

In 1998, bin Laden launched two major attacks against the United States: the bombings of the U.S. embassies in Kenya and Tanzania, which killed 224 people and wounded nearly 5,000.⁸ The United States responded by putting diplomatic pressure on the Taliban to hand over bin Laden and urged Pakistan to do the same.⁹ Pakistan's ISI openly backed the Taliban, providing them with over 100 Pakistani soldiers to manage artillery in the Taliban's ongoing struggle with the Northern Alliance (multiple Afghan tribes united against the Taliban).¹⁰ The United Nations Security Council passed Resolution 1267 in 1999, calling for the Taliban to surrender bin Laden to the United States and to stop providing sanctuary for terrorist networks.¹¹ The Taliban ignored the resolution; subsequently in 2000, al-Qaeda struck again by bombing the USS Cole.¹² Meanwhile, the Taliban grew more confrontational with the international community by, for example, openly defying U.N. demands and resolutions.¹³ Then, on September 9, 2001, al-Qaeda operatives, dressed as Belgian journalists, assassinated the leader of the Northern Alliance, Ahmad Shah Massoud.¹⁴ Two days later, al-Qaeda struck the United States.¹⁵

The United Nations Security Council responded, on September 12, by issuing a resolution condemning the terrorist attacks of 9/11 and calling on the international community to prevent and suppress all terrorist acts.¹⁶ On September 28, the Security Council issued another resolution deciding that all Member States shall freeze the assets of all persons who commit,

sponsored terrorism for the last two decades"); Scott D. Sagan, *How to Keep the Bomb from Iran*, FOREIGN AFF., Sept./Oct. 2006, at 45 ("[T]he notorious Inter-Services Intelligence (ISI) [] has intimate ties to both the Taliban and jihadist groups fighting in Kashmir.").

6. RASHID, *supra* note 1, at 15-16.

7. *Id.*

8. RASHID, *supra* note 1, at 16.

9. *Id.*

10. *Id.* at 17. The Northern Alliance was a military-political organization composed largely of warlords and tribal warriors united against the Taliban. See MALIK, *supra* note 2, at 91 (referring to Pakistan as the "'patron saint of the Taliban.'").

11. See S.C. Res. 1267, ¶¶ 1-2, U.N. Doc. S/RES/1267 (Oct. 15, 1999). Resolution 1267 actually mandates that the Taliban hand Bin Laden over to any country where he has been indicted, but specifically mentioned the United States. See *id.* ¶ 2; RASHID, *supra* note 1, at 18.

12. RASHID, *supra* note 1, at 17-18.

13. See *id.* at 18.

14. *Id.* at 21-22.

15. See *id.* at 22.

16. S.C. Res. 1368, ¶¶ 1, 4, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

attempt to commit, or participate in the commission of terrorist acts.¹⁷

The United States initially responded to the attacks of 9/11 by sending a team of CIA agents to Afghanistan to aid the Northern Alliance and prepare for a ground assault against the Taliban.¹⁸ On September 18, 2001, Congress passed a joint resolution entitled "Authorization for Use of Military Force."¹⁹ This resolution authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001"²⁰ On October 7, 2001, the United States attacked the Taliban by launching fifty cruise missiles and dozens of laser-guided bombs at thirty-one military targets.²¹

The United Nations Security Council, meanwhile, issued a resolution on November 14 that, while expressing support for the people of Afghanistan and condemnation for both al-Qaeda and the Taliban, failed to mention the United States' military action in Afghanistan.²² It was not until December 20 that the Security Council issued a resolution regarding the use of force in Afghanistan, establishing an International Security Assistance Force to assist in the maintenance of security in and around Kabul.²³ The resolution, however, failed to recognize the United States' use of force in Afghanistan which, at that point, had commenced over two months earlier.²⁴ Meanwhile, al-Qaeda and much of the Taliban were escaping to the East along the border with Pakistan.²⁵

B. PAKISTAN

Following 9/11, Pakistan urged the United States to delay any attack so that it could attempt to convince the Taliban to relinquish bin Laden.²⁶ Instead, the ISI delayed and met with Mullah Omar numerous times only to agree on future meetings.²⁷ The ISI began to actively support the Taliban

17. S.C. Res. 1373, ¶ 1, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

18. RASHID, *supra* note 1, at 62-64.

19. S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

20. *Id.* § 2(a).

21. RASHID, *supra* note 1, at 62-64.

22. S.C. Res. 1378, U.N. Doc. S/RES/1378 (Nov. 14, 2001).

23. S.C. Res. 1386, ¶ 1, U.N. Doc. S/RES/1386 (Dec. 20, 2001).

24. *See generally* S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001).

25. MALIK, *supra* note 2, at 196.

26. *Id.* at 187-88; RASHID, *supra* note 1, at 77.

27. RASHID, *supra* note 1, at 77. Furthermore, there were leaks to the CIA that Pakistani General Ahmad had encouraged Mullah Omar to resist an American attack rather than hand over bin Laden. *Id.*

by supplying them with money and arms.²⁸ Pakistani officials justified these actions on fear of a pro-India Northern Alliance government in Afghanistan.²⁹ This sort of duplicity continued throughout the United States offensive in Afghanistan.³⁰ Meanwhile, the United States worked to placate Pakistan, hoping for a strategic partner in the war against the Taliban.³¹

Yet Pakistan was unwilling to lose the support of Islamic militants, many of which were vital to Pakistani interests in Kashmir. In the meantime, al-Qaeda and other extremist groups became so comfortable in the Federally Administrated Tribal Areas (FATA) that they began to establish militant training camps there.³²

28. RASHID, *supra* note 1, at 77-78; Riedel, *supra* note 5, at 31 (“Many senior Pakistani politicians say privately that they believe Pakistan’s Inter-Services Intelligence (ISI) still has extensive links to bin Laden; some even claim it harbors him.”); Barnett R. Rubin, *Saving Afghanistan*, FOREIGN AFF. JAN./FEB. 2007, at 57, 58 (“Intelligence collected during Western military offensives in mid-2006 confirmed that Pakistan’s Inter-Services Intelligence (ISI) was continuing to actively support the Taliban leadership.”).

29. RASHID, *supra* note 1, at 78.

30. *See generally id.*

31. *Id.* at 90-93. In November 2001, Pakistan became worried as hundreds of ISI officers and soldiers aiding the Taliban were trapped in the city of Kunduz in Afghanistan as the United States and Northern Alliance surrounded the city. *Id.* Desperate, President Musharraf of Pakistan called President Bush and asked for a U.S. bombing pause and the opening of an air corridor so that Pakistani aircraft could extract his officers. *Id.* Bush and Vice President Cheney agreed, but the operation was to be kept top secret. *Id.* On November 16, Northern Alliance commander Mohammed Habel reported, “Last night two planes, perhaps Pakistani, landed at Kunduz airport and we think they evacuated Pakistanis and Arabs from there.” *Id.* (quoting Northern Alliance spokesman Mohammed Habel). In reality, the ISI was conducting a much bigger operation, extracting ISI officers, Taliban commanders, as well as al-Qaeda commanders. *Id.* While 5,000 to 7,000 Taliban were believed to be in the Kunduz garrison, only 3,300 actually came out. *Id.* at 90-93. As a senior U.S. diplomat said,

At the time nobody wanted to hurt Musharraf, and his prestige with the army was at stake. The real question is why Musharraf did not get his men out before. Clearly the ISI was running its own war against the Americans and did not want to leave Afghanistan until the last moment.

Id. at 92. The New York Times reported:

The claims, which could not be verified, are the latest by the Northern Alliance that Pakistani planes had landed in Kunduz to rescue Pakistani militants trapped there. A Taliban official recently confirmed that Pakistani planes had evacuated some Pakistani and Arab fighters, and refugees and surrendering Taliban soldiers have made similar statements. The Pakistani government has denied the report.

Dexter Filkins, *Taliban Foes Say Kunduz Is Theirs*, N.Y. TIMES, Nov. 26, 2001, <http://www.nytimes.com/2001/11/26/world/a-nation-challenged-stronghold-taliban-foes-say-kunduz-is-theirs.html>; *see* HUSSAIN, *supra* note 4, at 225-26; Seymour M. Hersh, “*The Getaway*”, NEW YORKER, Jan. 28, 2002, available at http://www.newyorker.com/archive/2002/01/28/020128fa_FACT.

32. *See* RASHID, *supra* note 1, at 92; Sean D. Murphy, *The International Legality of U.S. Military Cross-Border Operations from Afghanistan into Pakistan* 6 (The George Washington Univ. Law School, Working Paper No. 451, 2009) (on file with author). The western-most



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Although Pakistan's President Musharraf followed through on some promises,³³ the failure of his regime to cooperate with the United States in good faith, either in Afghanistan or in preventing al-Qaeda operatives from

portion of Pakistan bordering Afghanistan represented as the shaded area in the graphic on the next page. The graphic appears in SETH G. JONES, COUNTERINSURGENCY IN AFGHANISTAN 45 (2008), available at http://www.rand.org/pubs/monographs/2008/RAND_MG595.pdf.

33. See RASHID, *supra* note 1, at 153-54. These promises included going after al-Qaeda operatives and successfully capturing a number of high-level al-Qaeda militants including Khalid Sheikh Mohammed. Kamran Khan, *Alleged Sept. 11 Planner Captured in Pakistan; U.S. Hails Raid as a 'Blow' to Terrorism*, WASH. POST, March 2, 2003, at A1. Khalid Sheikh Mohammed was named in the 9/11 Commission Report as the principle architect behind the 9/11 attacks. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 153-56 (2004).

seeking refuge in Pakistan, extended for the duration of his presidency.³⁴ Rather than attempt to eliminate extremist militants from FATA, the ISI was working behind the scenes to support the Taliban.³⁵ Consequently, the CIA began to monitor the ISI even more closely.³⁶ The situation, however, was exacerbated by a constitutional crisis that ended with Musharraf's resignation and the assassination of former prime minister, Benazir Bhutto.³⁷

On September 6, 2008, Asif Ali Zardari, Benazir Bhutto's widower, won the Pakistani presidency.³⁸ Zardari has taken a more aggressive stance than his predecessor against the Taliban in the western regions of Pakistan. As an incentive, in March 2009, President Barack Obama announced that Pakistan would no longer receive a "blank check" from the United States but would have to show it was fighting the Taliban in good faith.³⁹ Zardari responded with one of Pakistan's largest military offensives to date.⁴⁰ However, Pakistan's military actions against the Taliban and al-Qaeda have been anything but consistent.⁴¹

The army has "oscillated between fighting militants and making deals that, typically, give militants the run of their areas in return for a promise (rarely kept) of good behaviour."⁴² Meanwhile, in areas such as South and

34. See generally RASHID, *supra* note 1; Daniel Markey, *A False Choice in Pakistan*, 86 FOREIGN AFF., July/Aug. 2007, at 85 ("The past six decades of on-again, off-again bilateral cooperation have undermined Pakistani confidence in long-term U.S. partnership."); DAVID E. SANGER, *THE INHERITANCE* 234 (2009) ("In 2002, Musharraf . . . arrest[ed] 2,000 suspected militants After he had 'milked' the arrests for publicity, he quietly ordered all of the prisoners released.")

35. See RASHID, *supra* note 1, at 155, 219-39; see also SANGER, *supra* note 35, at 244-46 (detailing a conversation between a Pakistani intelligence officer and the American Director of National Intelligence, John Michael McConnell).

36. RASHID, *supra* note 1, at 221.

37. *Id.* at 374; see Pamela Constable & Emily Wax, *Bhutto Calls On Musharraf To Resign*, WASH. POST, Nov. 14, 2007, at A1; Carlotta Gall & Jane Perlez, *Reduced Power For Musharraf, Now a Civilian*, N.Y. TIMES, Nov. 29, 2007, at A1; Jane Perlez, *Musharraf Out, Leaving Factions to Vie For Power*, N.Y. TIMES, Aug. 19, 2008, at A1; Griff Witte, *Musharraf Declares Emergency Rule in Pakistan*, WASH. POST, Nov. 4, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/03/AR2007110300214.html>; Griff Witte, *Musharraf Ends 6-Week Emergency Rule*, WASH. POST, Dec. 16, 2007, at A28.

38. Jane Perlez & Salman Masood, *Bhutto's Widower, Viewed as Ally by U.S., Wins the Pakistani Presidency Handily*, N.Y. TIMES, Sept. 7, 2008, at A6.

39. *Pakistan and the Taliban: A Real Offensive, or a Phoney War?*, ECONOMIST, May 2, 2009, at 24.

40. On April 28th, the Pakistan army launched an offensive in the Buner valley, just sixty miles or so from Islamabad, killing over fifty militants in the first two days of fighting. *Id.*

41. See Greg Jaffe & Peter Finn, *After War Leak, Anger but No Calls for Change; Officials and Experts Largely Dismiss Impact on Afghan Conflict*, WASH. POST, July 27, 2010, at A1.

42. *Pakistan and the Taliban*, *supra* note 39, at 24.

North Waziristan, the leaders of the Pakistani Taliban are thought to welcome and support al-Qaeda's core leadership.⁴³ It is alleged that al-Qaeda aids the Taliban militants in crossing the border, through advice and manpower, to attack United States and NATO forces in Afghanistan.⁴⁴

The United States has used drones to target both members of the Taliban and al-Qaeda within Pakistan's border.⁴⁵ While Pakistani authorities have occasionally protested, there is speculation that Pakistan may have made a secret deal with the United States allowing these strikes.⁴⁶ The United States, however, has never confirmed nor denied the drone strikes.⁴⁷

The Predator, an "unmanned combat aerial vehicle" (UCAV), or "drone," is one of the most technologically-advanced and widely used weapons in modern warfare.⁴⁸ It is completely pilotless and controlled by an operator on the ground.⁴⁹ Although drones were originally used solely for reconnaissance, they were eventually armed with one hundred pound Hellfire missiles.⁵⁰ This allowed the operator on the ground to fire on enemy combatants while safe within the confines of a military base.⁵¹ The low risk to American lives, coupled with the relatively cheap cost of manufacturing drones, has led to a dramatic increase in their use since 2005.⁵²

Following the inauguration of President Barack Obama in January

43. *Pakistan and the Taliban*, *supra* note 39, at 25; *see* Murphy, *supra* note 32.

44. *See* *Pakistan and the Taliban*, *supra* note 39, at 25.

45. *See*, P.W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21ST CENTURY 33 (2009).

46. *See* Karen DeYoung & Joby Warrick, *Pakistan and U.S. Have Tacit Deal On Airstrikes*, WASH. POST, Nov. 16, 2008, at A1.

47. *See id.*

48. The MQ-1 Predator, manufactured by General Atomics Aeronautical Systems, has a wingspan of forty-nine feet, a length of twenty-seven feet, can fly operationally at the height of 25,000 feet, can hold up to 450 pounds of AGM-114 Hellfire missiles, and costs approximately \$4.5M (missiles not included). Information Regarding the Predator RQ-1 and Other Unmanned Aerial Vehicles, AIRFORCE-TECHNOLOGY.COM, <http://www.airforce-technology.com/projects/predator/> (last visited Jan. 29, 2010); *see* SINGER, *supra* note 45, at 33.

49. SINGER, *supra* note 45, at 32-36.

50. *Id.*

51. Currently, the United States Air Force operates drones in Afghanistan from Creech Air Force Base in Indian Springs, Nevada. *See* Greg Jaffe, *Drone Pilots Rise on Winds of Change in Air Force; The Venerable Aviator May Take a Back Seat to Invulnerable Technicians Working on the ground*, WASH. POST, Feb. 28, 2010, at A1.

52. *See* SINGER, *supra* note 45, at 33. For the cost of one F-22 fighter jet, one could purchase between about eighty-five Predators. *Id.* Between June 2005 and June 2006, UCAVs carried out "2,073 missions, flew 33,833 hours, surveyed 18,490 targets, and participated in 242 separate raids." *Id.* at 35.

2009, the drone program has expanded in both size and scope, moving from Afghanistan into Pakistan. Whereas there were three drone strikes in Pakistan in 2007 and thirty-four in 2008 under President Bush, there were as many as forty-three between January 2009 and October 2009 under President Obama.⁵³

The use of the drones in Pakistan, however, has raised numerous issues. Scholars question whether use of unmanned drones as a tactical weapon against enemy combatants in Pakistan, where the U.S. is not officially at war, is legal under international law.⁵⁴ For instance, scholars question whether the drone strikes create too many civilian casualties in violation of the Geneva Conventions or whether the United States has any lawful right to use force on Pakistani soil. Furthermore, Pakistani officials have occasionally protested the strikes as a violation of their nation's territorial sovereignty.⁵⁵

The legality of the United States' use of drones against members of al-Qaeda and the Taliban within Pakistan is largely determined by the United Nations Charter. To understand the legality of the use of force under the Charter and the ideals that the Charter aims to achieve, one must understand the law of the use of force prior to the 1945 drafting of the Charter.

III. UNITED NATIONS COLLECTIVE SECURITY FRAMEWORK

A. BEFORE THE UNITED NATIONS CHARTER

The laws of war under international law can be divided into two categories: *jus ad bellum* and *jus in bello*. *Jus ad bellum* refers to the laws concerning the justifications for engaging in war; *jus in bello* concerns the limits to the conduct of the hostilities.⁵⁶ Modern *jus ad bellum* is based on the United Nations Charter; however, Articles 2(4) and 51 stem from centuries of custom and practice.⁵⁷

53. Peter Grier, *Drone Aircraft in a Stepped-up War in Afghanistan and Pakistan*, CHRISTIAN SCI. MONITOR, Dec. 11, 2009, <http://www.csmonitor.com/USA/Military/2009/1211/Drone-aircraft-in-a-stepped-up-war-in-Afghanistan-and-Pakistan>.

54. See generally Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed.) (forthcoming), available at <http://ssrn.com/abstract=1501144>.

55. See David Ignatius, *Moment of Truth in Pakistan*, WASH. POST, May 3, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/01/AR2009050102824.html>.

56. See MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE 433-45 (Foundation Press, 2nd ed., 2009) (2005). Modern *jus in bello* is largely derived from the Hague Convention of 1907, the Geneva Conventions of 1949, and their Additional Protocols of 1977. These Conventions deal with such subjects as who may be targeted in a military campaign and how prisoners of war are to be treated.

57. See generally O'CONNELL, *supra* note 56.

In ancient Rome, recourse to war was formally decided by *jus fetiales*, or *fetiale law*.⁵⁸ The *fetiales* were a college of priests who established a code regarding the proper means and reasons for going to war.⁵⁹ The idea of the “just war” arose from the code of the *fetiales*.⁶⁰

The early Christians developed the next major advance in just war theory. Early Christianity was defined largely by pacifism, but as Christianity gained political power as the primary religion in Western Europe, the need to engage in force became unavoidable.⁶¹ The inherent contradiction posed by the idea of Christian warfare was ostensibly reconciled by St. Augustine in the 4th and 5th centuries, when he revived the Roman notions of *bellum justum*—*justified warfare*.⁶² While expressing the view that war is always lamentable, he determined that the purposes of some wars were to alleviate wrongs suffered at the hands of ruthless adversaries and were therefore just.⁶³ St. Thomas Aquinas further developed St. Augustine’s ideas in the 13th century. He provided three conditions for a just war: (1) the war had to be conducted by a public authority, (2) there had to be a “just cause” for the war, and (3) there had to be a right intention to promote good and avoid evil.⁶⁴

St. Thomas Aquinas’ just cause was not specific enough to prevent sovereigns from using it to justify any conceivable cause for war. In fact, throughout the next six centuries, just cause was used to legitimize the use of force in many controversial situations.⁶⁵ However, the notions that both sides of the same conflict could justify their use of force based on a just cause led international law to somewhat of a dead end.⁶⁶ For a time, it was believed that war was beyond the reaches of international law.⁶⁷ This theory largely ended during the first half of the 20th century.

58. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 59 (3d ed. Cambridge Univ. Press 2001) (1988).

59. *Id.* at 60-61.

60. *Id.* The legendary orator “Cicero satiated that it may be gathered from the code of the *fetiales* that no war is considered just, unless it is preceded by an official demand for satisfaction or warning, and a formal declaration of war has been made.” *Id.* Yet, in reality, the *fetiales* were more puppets of the politicians than any sort of independent council of scholars.

61. *Id.*

62. *Id.*

63. *Id.*

64. DINSTEIN, *supra* note 58, at 59.

65. Some examples of this include the Crusades, Europe’s colonization of Africa, and the conquest of the Americas.

66. DINSTEIN, *supra* note 58, at 62.

67. *Id.* at 63; see T.J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 272 (G.E. Sherman ed., 4th ed. 1916).

In response to the massive destruction caused by World War I, states began to reject the just war doctrine.⁶⁸ In 1928, the Kellogg-Briand Pact was ratified by a number of countries.⁶⁹ The Pact announced the contracting parties' "frank renunciation of war as an instrument of national policy."⁷⁰ Furthermore, they "condemn[ed] recourse to war for the solution of international controversies."⁷¹

The Pact, however, had major shortcomings. For instance, it provided no alternative to war, no exceptions to the renunciation of recourse to war, no prohibition of the use of force falling short of war, and no indication of the consequences for a country's recourse to war.⁷² Failure to address these issues likely contributed to a second world war just eleven years later.⁷³ Arguably the most notable international response to World War II was the adoption of the United Nations Charter in 1945.⁷⁴

B. THE UNITED NATIONS CHARTER

The United Nations Charter (the Charter) was signed in 1945 in San Francisco.⁷⁵ As much as it may be said to reflect the idealized shift in thinking that followed World War II, it equally reflected the very real socio-political situation of the time. The Charter conceives of a post-war society through the total prohibition of war and the prescription of collective action

68. See THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 10-11 (2002).

69. Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter *The Kellogg-Briand Pact*]. These countries included Australia, Belgium, Canada, Czechoslovakia, France, Germany, India, the Irish Free State, Italy, Japan, New Zealand, Poland, South Africa, the United Kingdom and the United States. *Id.*

70. *Id.* prmb., art. 1.

71. *Id.*

72. See generally *id.*

73. Prior to World War II, state positivism was the dominant theory underlying international law. State positivism was based on the supposition that States were absolutely sovereign and answerable to no higher authorities. See MARK W. JANIS & JOHN E. NOYES, *INTERNATIONAL LAW* 104-15 (3d ed. 2006). Therefore, the only legal constraints on a State were those into which it chose to enter, such as treaties with other States. See generally *id.* Following World War II, the international legal community largely rejected state positivism. See generally *id.* Having witnessed the atrocities and mass destruction caused by both World War II and the Holocaust, the legal community realized a horrible consequence of legal positivism (the ability of a state to systematically exterminate its own citizens) and determined that the scope of international law must extend beyond legal positivism. See generally *id.* This is widely reflected in the Nuremberg Trials, in which the International Military Tribunal held Nazi war criminals to certain basic natural laws embodied only in the Kellogg-Briand Pact. See *id.* at 370-76.

74. See generally U.N. Charter.

75. *Id.*

against those who initiate war.⁷⁶ It also created a Security Council of five permanent members, essentially the major global powers at the time,⁷⁷ with each member being granted a veto vote on any Security Council resolution.⁷⁸

1. ARTICLE 2(4): PROHIBITION OF THE USE OF FORCE

Article 2(4) of the U.N. Charter provides that all Members of the U.N. “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.”⁷⁹

Many international law scholars, as well as the International Court of Justice, view Article 2(4) as an absolute prohibition against the use of force, the only exceptions being when force is authorized by the Security Council, or when force is used in self-defense under Article 51.⁸⁰ Indeed, this is how the text is usually interpreted—as an absolute prohibition against the use of force.⁸¹ Even when states have defended military action against other states, they often seek to find some self-defense justification in Article 51 rather than reading exceptions into Article 2(4).⁸²

This was likely the intention of the signatories in San Francisco.⁸³ The originally proposed text of Article 2(4) read: “All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization.”⁸⁴ Under the belief that it would strengthen the prohibition

76. U.N. Charter preamble.

77. U.N. Charter art. 23. These permanent Security Council members include the United Kingdom, the United States, France, the Soviet Union (now the Russian Federation), and China. *Id.*

78. U.N. Charter art. 27, para. 1.

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

80. U.N. Charter art. 51; *see, e.g.*, Louis Henkin, Mary Ellen O’Connell, Thomas Franck, and Michael N. Schmitt.

81. *See generally* Louis Henkin, *The Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 37 (1989).

82. For example, in response to a nightclub bombing in Germany that killed one American serviceman and injured nearly 200 patrons, the United States launched a missile strike on a residence of Libyan leader Col. Muammar Colonel Gaddafi, and President Reagan described the missile strike as “fully consistent with Art. 51 [self-defense] of the U.N. Charter.” *See* Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus ad Bellum: A Normative Framework*, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 157, 157, 163 (Michael N. Schmitt & Jelena Pejic eds., 2007) (quoting President Ronald Reagan, Address to the Nation (Apr. 14, 1986), in *DEP’T ST. BULL.*, June 1986, at 1-2).

83. *See* FRANCK, *supra* note 68, at 12.

84. *Id.*; *see* Ivan Shearer, *A Revival of the Just War Theory?*, *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 1, 8-9 (Michael N. Schmitt & Jelena Pejic eds.,

on the use of force, the Australian delegation proposed an amendment adding the words “against the territorial integrity or political independence of any member state,” which was subsequently adopted.⁸⁵

While unintended, this added language created possible loopholes to Article 2(4). It can be argued that, unless a nullity, the added text of Article 2(4) actually limits the prohibition of the use of force to specific instances.⁸⁶ This may create an acceptable means of using force when the Security Council is either unable or unwilling to authorize collective action. A few scholars argue that Article 2(4) should be read in a flexible manner (similar to a “plain meaning” construction) to allow states to use force which is not technically “against the territorial integrity or political independence” of a given state.⁸⁷ According to various legal scholars, the territorial integrity of a State is not violated unless the State using force is attempting to annex some physical portion of the State’s territory.⁸⁸

This would allow legal intervention in cases of humanitarian disasters, various nuclear proliferation scenarios, as well as suppression of transnational terrorism.⁸⁹ If, however, Article 2(4) is given its current broad reading, States would not be entitled to legally use force in any of these cases unless they were responding in self-defense to an armed attack or were authorized by an often paralyzed Security Council.⁹⁰

2007).

85. FRANCK, *supra* note 68, at 12; Shearer, *supra* note 84, at 8.

86. *See* FRANCK, *supra* note 68, at 12.

87. Shearer, *supra* note 84, at 10-11.

88. Anthony D’Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT’L L. 516, 520 (1990). D’Amato asserts:

[T]he U.S. forcible intervention in Panama did not violate Article 2(4) because the United States did not act against the “territorial integrity” of Panama: there was never an intent to annex part or all of Panamanian territory, and hence the intervention left the territorial integrity of Panama intact. Nor was the use of force directed against the “political independence” of Panama: the United States did not intend to, and has not, colonized, annexed or incorporated Panama. Before and after the intervention, Panama was and remains an independent nation.

Id.; *see* JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW 131 (1990); Jordan J. Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 WHITTIER L. REV. 711, 716-17 (1986); Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT’L L.J. 145, 166-67 (2000); *see also* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 141-45 (1979) (stating that Israel could plausibly argue that the raid on Entebbe in Uganda was not a use of force against the political independence or territorial integrity of Uganda nor inconsistent with any purpose of the United Nations); Jean Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights, and International Law*, in RIGHT v. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 19, 25-33 (1989) (arguing that territorial integrity under Article 2(4) is not the same as territorial inviolability).

89. Shearer, *supra* note 84, at 11.

90. *See infra* Part III.B.3.

According to one legal scholar, there are two methodologies for allowing more exceptions to Article 2(4).⁹¹ Option I creates certain exceptions within the words of Article 2(4) that allows force when it is not against the territorial integrity or political independence of a state.⁹² Thus, if the use of force is not in furtherance of a plan to annex the territory of another state or to influence that State's political structure/makeup, then it is not prohibited under Article 2(4).

Option II continues to read Article 2(4) narrowly but allows certain uses of force to be justified after the fact.⁹³ Under Option II, the use of force would be presumptively illegal but may be ruled as justified or necessary by an international tribunal afterwards.⁹⁴

This latter approach appears consistent with the view of Abraham D. Sofaer, former Legal Advisor to the U.S. State Department, who argues for a measure of legitimacy, rather than legality, in determining whether use of force should be applied.⁹⁵ Sofaer does not go so far as to read such uses of force as legal under the Charter but argues that certain uses of force, if legitimately motivated and carried out, should be justified as "legitimate."⁹⁶ Of course, this interpretation would result in murky guidelines as to when the use of force would be tolerated. There would undeniably be numerous cases in which a government may hide its true motives or fabricate excuses after exercising its use of force. In other words, there would rarely be a clear-cut case of justified use of force.⁹⁷

Furthermore, if Option II initially holds the use of justifiable force illegal, nothing would stop a State from using force against the territorial integrity or political independence of another state with some declaration of justification (whether legitimate or not) after the fact. Option I, on the other hand, would still hold any use of force that violates territorial integrity or

91. See Carsten Stahn, *Enforcement of the Collective Will After Iraq*, 97 AM. J. INT'L L. 803, 816 (2003); Shearer, *supra* note 84, at 9-10 (citing Carsten Stahn, *Enforcement of the Collective Will After Iraq*, 97 AM. J. INT'L L. 804, 816 (2003)).

92. Stahn, *supra* note 91, at 816; see Shearer, *supra* note 84, at 9-10 (citing Stahn, *supra* note 91, at 816).

93. Stahn, *supra* note 91, at 816; see Shearer, *supra* note 84, at 9-10 (citing Stahn, *supra* note 92, at 816).

94. Stahn, *supra* note 91, at 816; see Shearer, *supra* note 84, at 9-10 (citing Stahn, *supra* note 92, at 816).

95. Abraham Sofaer, *The Best Defense? Preventive Force and International Security*, FOREIGN AFF., Jan./Feb. 2010, at 109-18.

96. See *id.* at 117.

97. For example, if the use of force against Iraq in 2003 were measured under a legitimacy rubric today, we still wouldn't know definitively if the United States was justified in using force a decade after the fact.

political independence illegal *and* unjustified.

Yoram Dinstein insists that the last phrase of Article 2(4) provides the *absolute* prohibition: “or in any other manner inconsistent with the Purposes of the United Nations.”⁹⁸ He argues that this phrase acts as a catchall to preclude any attempt to justify the use of force, as war and the use of force are generally inconsistent with the Charter.⁹⁹ According to Dinstein, Article 2(4) is “inseparable” from Article 2(3), and those two consecutive paragraphs must be read together.¹⁰⁰ Article 2(3) reads: “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”¹⁰¹ Therefore, any use of force that is not authorized by the Security Council under Chapter VII or that fails to fall within Article 51 would be inconsistent with Article 2(3).¹⁰²

This argument assumes that the use of force is *per se* at odds with international peace and security. Although one might be led to believe that “force” is necessarily opposed to “peace” in theory, it is hardly tenable to argue that a single shot taken to end genocide cannot be in pursuit of international peace and security. The drafters of the United Nations Charter recognized this when placing the responsibility to maintain “international peace and security” in the Security Council and granting it the power to use force as a means to fulfill this responsibility.¹⁰³ Therefore, while Article 2(3) should not be read in conjunction with Article 2(4) as to prohibit all uses of force, it should be read as limiting such uses of force that comply with the literal terms of Article 2(4) to those that are actually in pursuit of “international peace and security.”

98. DINSTEIN, *supra* note 58, at 82-83.

99. *Id.*; see U.N. Charter art. 1, para. 1-3 (stating that the purposes of the U.N. are “[t]o maintain international peace and security,” “[t]o develop friendly relations among nations,” and “[t]o achieve international cooperation in solving international problems”).

100. DINSTEIN, *supra* note 58, at 82.

101. U.N. Charter art. 2, para. 3.

102. See *infra* Part III.B.1. As this Comment discusses below, however, Dinstein does devise a means for expanding the narrowly-read prohibition on the use of force, but he does so based on Article 51’s right of self-defense, not on Article 2(4). See DINSTEIN, *supra* note 58, at 312. The International Court of Justice (I.C.J.), likewise, has rejected an expansive reading of Article 2(4). See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter *The Nicaragua Case*]; *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168 (Dec. 19) [hereinafter *The Congo Case*]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter *The Wall Case*]. Although there is some indication that members of the bench would like to revisit certain aspects of self-defense as against non-state combatants. See *The Nicaragua Case*, 1986 I.C.J. 14 (Schwebel, J., dissenting).

103. See U.N. Charter art. 24, para. 1; U.N. Charter art. 42.

Additionally, there has been a growing awareness for the need for flexibility in Article 2(4) regarding humanitarian intervention. In December 2001, the International Commission on Intervention and State Sovereignty released its report, entitled "The Responsibility to Protect," which seemed to revive some of the aspects of the just war doctrine.¹⁰⁴ The Report urged the Security Council to act on its allotted duties under Chapter VII of the U.N. Charter.¹⁰⁵ The Report further warned that the Security Council's consistent failure to authorize collective action, where warranted, could lead to one of two scenarios: (1) either states will use force even when not for "just" reasons; or (2) if states do act, and they act responsibly and successfully, the U.N. system will be undermined or unilateral state action will prove to be more effective and responsible than the Security Council or the U.N. system itself.¹⁰⁶

Both scenarios are highly undesirable, but the latter should provide an impetus, either for the Security Council to act more responsibly under its Chapter VII duties, or for U.N. institutions, such as the General Assembly and the International Court of Justice, to give Article 2(4) a more flexible reading. In paragraph 4.16 of the Report, the Commission stated, "While there is no universally accepted single list, in the Commission's judgment all the relevant decision making criteria can be succinctly summarized under the following six headings: *right authority, just cause, right intention, last resort, proportional means and reasonable prospects.*"¹⁰⁷ These six criteria may easily be compared to the criteria composing "just war" prior to World War II.¹⁰⁸

Although the Report by the International Commission on Intervention and State Sovereignty addresses a serious deficiency in the U.N.'s collective security system (intrastate genocide), it fails to mention other seemingly justified but currently prohibited uses of force, such as transnational terrorist organizations or highly unstable nuclear regimes.¹⁰⁹

104. See INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), available at <http://iciss.ca/pdf/Commission-Report.pdf>. The International Commission on Intervention and State Sovereignty was an independent international body with a mandate of one year designed to help bridge the two concepts of the international community's responsibility to act in the face of massive violations of humanitarian norms and respect for the sovereign rights of states. The Commission completed its work during the 2000/2001 Assembly year and presented its report to the U.N. Secretary-General, Kofi Annan, and the international community. See *About the Commission*, INT'L COMMISSION INTERVENTION & STATE SOVEREIGNTY, <http://iciss.ca/mandate-en.asp> (last visited Apr. 4, 2011).

105. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 104, at 22-27.

106. *Id.* at 1-3.

107. *Id.* ¶ 4.16.

108. See Shearer, *supra* note 84, at 5-6.

109. See DANIEL H. JOYNER, INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS

It is for this reason that the U.N. should read an exception into the text of Article 2(4).

2. CHAPTER VII: SECURITY COUNCIL POWERS

The Security Council is a fifteen-member organ of the United Nations that consists of five permanent members and ten non-permanent members who rotate every two years.¹¹⁰ Under Article 2(4) of the Charter, the Security Council is charged with the responsibility of maintaining international peace and security in accordance with the purposes and principles of the U.N.¹¹¹ However, all substantive decisions of the Security Council must have the votes of at least nine members, including the unanimous agreement of the five permanent members.¹¹² That is to say, if any one of the five permanent members votes against a decision, it cannot pass. This is often referred to as the “veto power.”¹¹³

Although the Security Council was created as an institution built upon the cooperation of the major global powers, it soon fell into paralysis due in large part to the veto power and the Cold War.¹¹⁴ Rather than cooperating to pass resolutions to address issues of global peace and security, the United States and Soviet Union often used the veto to further their own interests in the Cold War.¹¹⁵ Between 1945 and 1991 (when the Cold War ended), the number of resolutions passed by the Security Council per year rarely exceeded twenty, and the number of vetoes used each year often exceeded five.¹¹⁶ By contrast, the number of resolutions passed per year since 1991 has consistently exceeded fifty, and the number of vetoes used has only

OF MASS DESTRUCTION 351-52 (2009).

The post-September 11 climate of concern regarding international terrorism and the proliferation of WMD, and the resulting change in emphasis in many powerful states' national security policies to counterproliferation strategies in disharmony with the Charter system, foreshadows a continuation of this increased incidence of powerful states' use of force against less powerful states. . . . As these high-profile breaches of international use of force law continue to occur over the protestation of the majority of states, they will do more and more damage to the perceived credibility not only of international use of force law and the U.N. Charter system, but to the rest of the formal corpus of international law as well.”

Id.

110. U.N. Charter art. 23, para. 1.

111. U.N. Charter art. 24, para. 1-2.

112. U.N. Charter art. 27, para. 3.

113. See SYNDEY D. BAILEY & SAM DAWS, *THE PROCEDURE OF THE U.N. SECURITY COUNCIL* 4 (3d ed. 1998).

114. See Peter Wallensteen & Patrik Johansson, *Security Council Decisions in Perspective, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 17, 17 (David M. Malone ed., 2004).

115. See FRANCK, *supra* note 68, at 21.

116. See Wallensteen & Johansson, *supra* note 114, at 18 fig.2.1.

occasionally been more than one.¹¹⁷

Although the Security Council has been significantly more active following the end of the Cold War, there have still been significant threats to international peace and security for which the Security Council has failed to act. For instance, the Security Council was unable to stop the genocide in Rwanda in 1994, during which 500,000 to 1,000,000 people were killed.¹¹⁸ This, along with serious setbacks in Bosnia,¹¹⁹ led the Secretary-General of the U.N. to conclude that neither the Security Council nor the Secretary-General had the capacity to “deploy, direct, command and control [enforcement] operations . . . except perhaps on a very limited scale.”¹²⁰

The idealized system created by the Charter, which prohibited the use of force and prescribed collective action by the Security Council, failed to address four major “seismic developments” that were already in progress in 1945: (1) the Cold War which, because of the veto power of both the United States and Soviet Union, froze the Security Council’s ability to act collectively; (2) the ingenuity with which states were able to bypass the prohibition of the direct use of force, for example, by covertly meddling in civil wars; (3) the major technological advances in military weaponry, such as the nuclear weapon; and (4) the rising public consciousness of the importance of basic human rights.¹²¹

The Cold War hindered the idealized vision of the Charter for obvious reasons. The veto power, whether used by the United States or by the Soviet Union, paralyzed the Security Council’s ability to enforce the prohibition on the use of force through collective action. In addition, the Charter’s rigid prohibition of the *direct use of force* fails to account for the ability of States to bypass direct force. For instance, it failed to address state-sponsored and/or covert support for non-State combatants throughout

117. See Wallensteen & Johansson, *supra* note 114, at 18 fig.2.1. However, it is worth noting that even the *threat of a veto* can effectively stop a would-be resolution before ever coming to a vote.

118. *Rwanda: How the Genocide Happened*, BBC NEWS, Dec. 18, 2008, <http://news.bbc.co.uk/2/hi/africa/1288230.stm>.

119. Although a U.N. peace-keeping force had been in Bosnia since 1992, Bosnia and Herzegovina reached full-scale warfare by 1995. Mats Berdal, *Bosnia*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 451, 451 (David M. Malone ed., 2004). While a stronger military response was being debated, the U.N. failed to take any forceful action for the duration of the war, which ended in November, 1995. See *id.* at 451, 453, 459-64.

120. Secretary-General, *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, ¶ 77, U.N. Doc. A/50/60 - S/1995/1 (Jan. 3, 1995), available at <http://www.un.org/Docs/SG/agsupp.html>; see David M. Malone, *Introduction to THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 1, 6 (David M. Malone ed., 2004).

121. FRANCK, *supra* note 68, at 21.

the world. The third oversight, advances in military weaponry, highlights the devastating consequences of what may happen if a state waits until it has been attacked before invoking a legal right to self-defense.¹²² The fourth development, global awareness of human rights, exposes the international illegality of using force to halt major human rights abuses within another state.¹²³

In theory, Chapter VII of the Charter could easily solve each of these complications. Specifically, this Chapter enables the Security Council to use force or other measures if it determines certain actions to be threats to international peace.¹²⁴ For example, if the Security Council determines that State A's possession of a nuclear weapon is a threat to the peace, it may intervene. If it determines that State B is conducting a genocidal campaign that is a threat to international peace, it may intervene. This interpretation presumes, however, that the Security Council will work effectively and cooperatively, when in reality, the veto power and the potential for national rivalries have made it institutionally unsound. The Security Council's ineffectiveness coupled with the narrowly defined right to self-defense provides very limited exceptions to the prohibition on the use of force.¹²⁵

3. ARTICLE 51: INHERENT "RIGHT" TO SELF-DEFENSE

Article 51 of the U.N. Charter states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense *if an armed attack* occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . ."¹²⁶ It has been widely accepted that Article 51 requires a number of conditions to be met in order for the use of force to qualify as legal self-defense.¹²⁷ First, there must be an "armed attack" against a Member State; second, the use of force in self-defense must be necessary; third, the use of force must be proportionate to the necessity of the use of force; and fourth, the use of force must be taken with some

122. In the case of a nuclear attack, the "victim" State may be fatally wounded before being able to legally use force against the attacking State.

123. For instance, the genocides in Rwanda and Darfur illustrate these human rights abuses. *Rwanda*, *supra* note 118.

124. U.N. Charter ch. VII.

125. *See* U.N. Charter art. 2, para. 4; U.N. Charter art. 51.

126. U.N. Charter art. 51 (emphasis added).

127. *See* DINSTEIN, *supra* note 58, at 208-12; Schmitt, *supra* note 82, at 172; Letter from H.S. Fox, Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty, to Daniel Webster, Secretary of State of the United States (Mar. 12, 1841), in 29 BRITISH AND FOREIGN STATE PAPERS, 1840-1841, at 1126, 1129 (1857); *see also* HENKIN, *supra* note 88; Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 903 (2002).

degree of immediacy.¹²⁸

a. Armed Attack

Most argue that an armed attack must be an attack that “involves a ‘significant’ amount of force.”¹²⁹ The International Court of Justice (I.C.J.), for instance, in the *Nicaragua Case*, set a fairly high standard for an armed attack that would warrant self-defense.¹³⁰ Nicaragua brought suit against the United States for providing the Contras with military and paramilitary support against the Nicaraguan government.¹³¹ The United States argued that it was acting in collective self-defense along with El Salvador against the Nicaraguan government who, the United States contended, provided guerillas in El Salvador with arms and logistical support against the government of El Salvador.¹³² The I.C.J. rejected the United States’ argument of self-defense, stating that the concept of armed attack does not include assistance to rebels in the form of providing weapons and logistics.¹³³ The I.C.J. further noted that “it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.”¹³⁴

Yoram Dinstein concurs with the I.C.J. that a minimum threshold of force must be met to amount to an armed attack.¹³⁵ He further acknowledges that a gap exists between Article 2(4)’s prohibition on all use of force and Article 51’s armed attack provision, so that it is conceivable that State A may violate Article 2(4) through the use of *some* force against State B but not enough to amount to an *armed attack* so that State B may resort to self-defense.¹³⁶ In this case, State A would be violating Article 2(4), but State B would be prohibited from taking any forceful actions against State A in order to deter further “small-scale” attacks. This is particularly troubling because, taken to one extreme, it could mean that a State or group could consistently mount small-scale attacks that do not amount to an armed attack, therefore leaving the victim State legally unable

128. See generally O’Connell, *supra* note 127.

129. O’Connell, *supra* note 127, at 889.

130. *Id.* at 891.

131. *The Nicaragua Case*, *supra* note 102, ¶ 20. The Contras were an assortment of rebel groups opposing Nicaragua’s Sandinista Junta of National Reconstruction (FSLN) government following the 1979 overthrow of Anastasio Somoza Debayle’s dictatorship. See generally REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-422, S. REP. NO. 100-216, at 3 (1987).

132. H.R. REP. NO. 100-422, S. REP. NO. 100-216, at 19 (1987).

133. *The Nicaragua Case*, *supra* note 102, ¶ 195.

134. *Id.* ¶ 191.

135. See DINSTEIN, *supra* note 58, at 173.

136. *Id.* at 174.

to respond with force in self-defense. It is for this reason that Dinstein rejects the distinction between small-scale armed attacks and larger ones.¹³⁷ He argues that, unless the use of force truly falls below the threshold of minimum importance, it should not matter how small they are—they are still armed attacks.¹³⁸ This would fill the gap between Article 2(4)'s prohibition on the use of all force and Article 51's armed attack exception. However, the majority of scholars still agree that only a "significant" armed attack can trigger the right to self-defense.¹³⁹

b. Question of Non-State Actors

Another issue is whether the right to self-defense is applicable against *anyone* who mounts an armed attack or against only *States* that attack. The text of Article 51 contains no literal requirement that the attacking party be a State.¹⁴⁰ As of yet, however, the I.C.J. has failed to recognize a right of self-defense against non-State actors. In an advisory opinion, the I.C.J. noted that "Article 51 of the Charter . . . recognizes the existence of an inherent right of self-defense in the case of armed attack by *one State against another State*."¹⁴¹ In that case, Israel claimed a right of self-defense as a response to repeated terrorist attacks, which the I.C.J. rejected because Israel failed to impute those attacks to a foreign State.¹⁴² The Court reiterated this distinction in the *Case Concerning Armed Activities on the Territory of the Congo (The Congo Case)*, in which the Democratic Republic of the Congo brought suit against Uganda for armed incursions into Congo's territory.¹⁴³ The Court rejected a claim of self-defense by Uganda against non-State combatants from within Congo's territory.¹⁴⁴

Many, including some members of the I.C.J. itself, have recently questioned whether its rejection of a right to self-defense arising from an armed attack by non-State actors is too rigid an interpretation of Article 51. In *The Wall Case*, Judge Kooijmans rejected the majority's position, citing

137. DINSTEIN, *supra* note 58, at 174, 176.

138. *Id.* at 176 ("[U]nless the scale and effects are trifling, below the *de minimis* threshold, they do not contribute to a determination whether an armed attack has unfolded. There is certainly no cause to remove small-scale armed attacks from the spectrum of armed attacks.").

139. MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS 280-295 (2d ed. 2009); *The Nicaragua Case*, *supra* note 102.

140. U.N. Charter art. 51.

141. *The Wall Case*, *supra* note 102, at ¶ 139 (emphasis added). The Court considered the legality of an Israeli wall built surrounding and infringing on Palestinian territory. *Id.* The advisory opinions of the I.C.J. are non-binding. See U.N. Charter art. 96.

142. See *id.* ¶¶ 139, 142.

143. *The Congo Case*, *supra* note 102, ¶ 1.

144. *Id.* ¶ 147. There was also some question of whether Uganda had actually suffered from an armed attack before entering into Congo territory. See *id.* ¶ 146.

the fact that Article 51 has no requirement that a State be the originator of the armed attack.¹⁴⁵ Judge Kooijmans also noted that the Security Council has treated terrorist attacks as armed attacks.¹⁴⁶ In particular, he expressed a desire that the Court reconsider its rationale in the *Nicaragua Case* for recognizing a right of self-defense only when in response to an armed attack perpetrated by or on behalf of a State.¹⁴⁷

The question of whether a terrorist attack should be considered an armed attack is complicated, as terrorist attacks vary in both technique and scale. Furthermore, terrorist attacks, depending on where they occur, can either be infrequent or continuous. Michael N. Schmitt argues that it is more appropriate to treat terrorist attacks as a continuous attack rather than separate and distinct events.¹⁴⁸ Under this theory, if a terrorist organization attacks State A in three or four separate places at different (although relatively continuous) times, State A would engage in self-defense for those combined attacks rather than separately for each individual attack.

What happens when a non-State group, acting neither for a State nor created by a State, commits an armed attack from within a State? Yoram Dinstein theorized an answer to such a situation, where some sort of non-State group (i.e., a transnational terrorist organization) launches an armed attack on State A and then hides within the territory of State B.¹⁴⁹ In this case, two fundamental principles of international law collide: State A's right to self-defense and State B's territorial sovereignty.¹⁵⁰ Dinstein conceived a framework known as "extra-territorial law enforcement" in which both principles may be accommodated.¹⁵¹

145. *The Wall Case*, *supra* note 102, at 230 (separate opinion of Judge Kooijmans, ¶ 35).

146. *Id.* at 230 (separate opinion of Judge Kooijmans, ¶ 35); *see id.* at 215 (separate opinion of Judge Higgins, ¶ 33); *see id.* at 242 (declaration of Judge Buergenthal, ¶ 6); *see generally* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) ("*Reaffirming also* its unequivocal condemnation of the terrorist attacks which took place in New York, Washington D.C and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts . . ."); S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) ("*Unequivocally condemns* in the strongest terms the horrifying terrorist attacks . . . and regards such acts . . . as a threat to international peace and security . . .").

147. *The Congo Case*, *supra* note 102, at 313 (separate opinion of Judge Kooijmans, ¶ 26).

148. Schmitt, *supra* note 82, at 175.

149. DINSTEIN, *supra* note 58, at 213-17.

150. Territorial sovereignty is a well-accepted principle of international law. *See* Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, para. 112 (Can.) ("[I]nternational law places great importance on the territorial integrity of nation states . . ."); 3 E. DE VATTEL, *THE LAW OF NATIONS THE PRINCIPLES OF LAW* 3-7, 11 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758) ("[E]ach Nation should be left to the peaceable enjoyment of that liberty which belongs to it by nature.").

151. *See* DINSTEIN, *supra* note 58, at 213-17.

In the unusual circumstance in which a terrorist organization (or other non-State group) launches an armed attack against State A and then retreats to territory within State B, State A could seek to exercise its right of self-defense against the group, even on State B's territory. State A must first demand action by State B and allow sufficient time for State B to respond. If State B, on whose territory the terrorist organization retreated, is able and begins to eliminate the threat of the terrorist organization to State A, then State A may not lawfully use force on State B's territory. If State B, however, is either unable or unwilling to eliminate the organization's threat to State A, then State A would be able to exercise its right of self-defense by using force against the organization on State B's territory.

This theory appears to accommodate both territorial integrity and the right of self-defense within the framework of state responsibility. However, such a theory is ripe for abuse as there is no neutral arbiter to decide when a particular state has failed to eliminate a threat to the point that an outside state may use force on its territory. This determination, under Dinstein's theory, is left in the hands of the involved states themselves, who may have any number of ulterior motives to use force within another state's borders.

c. Necessity, Proportionality, and Immediacy

Once an armed attack occurs, Article 51 recognizes the victim State's right to use force in self-defense.¹⁵² This right, however, is not unqualified. It must conform to the standards of the "inherent" right of self-defense as defined by general international custom and practice.¹⁵³ Assuming the right is identified (i.e., an armed attack has occurred), the victim state must act out of necessity; it must act proportionately to the threat; and it must act immediately.¹⁵⁴

Necessity means that use of force against an aggressor is required to eliminate the threat of another attack or more harm to the state (or its nationals or property abroad).¹⁵⁵ Necessity requires that there is no possible option other than force to deter an armed attack.¹⁵⁶ For instance, if economic sanctions or threats would work, then use of force is not necessary. Furthermore, if law enforcement measures alone are not capable of deterring or defeating the threat or ongoing attack, the use of force may

152. See *supra* Part III.B.3. As previously mentioned, there is some question as to whether this right pertains to non-State actors.

153. See Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 889-90 (2002).

154. See Schmitt, *supra* note 82, at 171.

155. See Henkin, *supra* note 81, at 37; O'Connell, *supra* note 127, at 903.

156. See Henkin, *supra* note 81, at 37.

be necessary.¹⁵⁷ If the threat ceases to exist immediately following the armed attack, then any use of force by the victim state would amount to a reprisal and would, therefore, be unlawful.¹⁵⁸

The requirement that a State act proportionally is misleading. It does not insist that the force used by the victim state be *proportional* to the armed attack in scale.¹⁵⁹ Rather, it means that the use of force by the victim state must be proportional to the amount of force *necessary to repel the threat*.¹⁶⁰ If small scale military action would successfully deter the threat of future attacks, a massive military invasion would be disproportionate.¹⁶¹

The final requirement of *immediacy* can also be misleading. Immediacy signifies that there must not be an undue “time-lag” between the armed attack and the exercise of self-defense.¹⁶² As Dinstein explains, some degree of delay may be due to the diplomatic negotiations likely to be triggered. The democratic process, in particular, would probably prevent the victim state from acting instantly with force.¹⁶³ He suggests that the requirement of immediacy be subject to a reasonableness test, because it is unlikely that a state exerting its right of self-defense would wait an

157. See Henkin, *supra* note 81, at 37.

158. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 46 (July 8) (“[A]rmed reprisals in time of peace[] are considered to be unlawful.”); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., U.N. Doc. A/8082 (Oct. 24, 1970) (“States have a duty to refrain from acts of reprisal involving the use of force.”). Of course, it is rarely the case that the aggressor immediately ceases to be a threat following an armed attack, and, more likely than not, it is fairly certain that the victim state will be acting out of necessity following an armed attack if sanctions and warnings do not work.

159. See DINSTEIN, *supra* note 58, at 208.

160. Schmitt, *supra* note 82, at 172; see Murphy, *supra* note 32; Henkin, *supra* note 81, at 45 (“[S]elf-defense includes a right both to repel the armed attack and to take the war to the aggressor state in order effectively to terminate the attack and prevent a recurrence.”). If State A actively employs terrorists to bomb a busy airport in State B, State B would not have to act proportionally to the armed attack (i.e., use an equivalent amount of force on a busy airport in State A). Rather, State B would only be permitted to use enough force to eliminate the threat of State A mounting another armed attack. If the armed attack is small and is only carried out by a rogue faction of State A’s government, State B would be acting disproportionately by overthrowing State A’s government as a whole. The rationale behind the requirement of proportionality seems to be to keep governments from using small or inconsequential armed attacks as a pretense for total invasion. If the threat of another armed attack can be eliminated short of overthrowing the aggressor state’s government, then no further force may be used. See *Naulilaa* (Port. v. Ger.), 2 R.I.A.A. 1012 (Special Arbitral Trib. 1928).

161. See Schmitt, *supra* note 82, at 172.

162. See DINSTEIN, *supra* note 58, at 212-13; Schmitt, *supra* note 82, at 172.

163. DINSTEIN, *supra* note 58, at 212-13.

unreasonable amount of time to act.¹⁶⁴ If a state does wait an unreasonably long time before pursuing its right to self-defense, there may be other motives that could become apparent at a later time. A more controversial question, however, is whether the victim State may use preventive or preemptive force in self-defense.

IV. LEGALITY OF THE UNITED STATES' USE OF FORCE IN PAKISTAN

A. NON-STATE ACTORS WITHIN AN UNSTABLE STATE

Before delving into the legality of the United States' use of force in Pakistan, the issue must be properly framed. The United States has not used and is not currently using force against the government of Pakistan. Nor has the United States used force against a proxy of the government of Pakistan. That is to say, because Pakistan has not openly supported either al-Qaeda or the Taliban in opposition to the United States, it cannot be said that the United States is using force against a Pakistani-sponsored group. Rather, the United States is using drones to carry out targeted attacks on non-State actors—members of the Taliban and al-Qaeda hiding in Pakistan. Although there has not been a public agreement between Pakistan and the United States regarding these strikes, there remains the question of whether there is a secret or implicit understanding between the two governments.

Since late 2001, when members of al-Qaeda and the Afghan-Taliban crossed the border into Pakistan, they have grown increasingly comfortable there and orchestrated more frequent and larger attacks against both military and civilian targets.

B. SECURITY COUNCIL AUTHORIZATION?

Although the Security Council has categorized terrorist acts as “serious threats to peace and security” on multiple occasions,¹⁶⁵ there has not been a resolution authorizing the use of force against terrorists, or other non-State actors, within Pakistan.

C. SELF-DEFENSE ARGUMENT

Because it has been established that the United States is not using force against the government of Pakistan, but against non-State actors, the

164. See DINSTEIN, *supra* note 58, at 212-13.

165. S.C. Res. 1904, U.N. Doc. S/RES/1904 (Dec. 17, 2009); S.C. Res. 1822, U.N. Doc. S/RES/1822 (June 30, 2008); S.C. Res. 1787, U.N. Doc. S/RES/1787 (Dec. 10, 2007); S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006); *see* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

first legal obstacle that the United States must overcome is whether an armed attack by a non-State actor can trigger the right to self-defense under Article 51. Although Article 51 does not specifically stipulate that an armed attack must be made by another State, the I.C.J. has interpreted it as requiring some concrete nexus between a State and the attacking party. In *The Wall Case*, the Court rejected Israel's argument that it suffered an armed attack that triggered the right to self-defense at the hands of non-State actors.¹⁶⁶ Because the attacks were not sufficiently imputed to the Hamas government, the Court rejected any right to affirmatively exercise self-defense. Though that opinion was merely advisory, and therefore non-binding, the Court re-iterated its position in the contentious *Congo Case*.¹⁶⁷

Imputation to a State notwithstanding, it must be determined whether the United States' use of drones in Pakistan is in response to "an armed attack" against the United States. Rather than engaging in self-defense against al-Qaeda for 9/11, the United States may be seen as engaging in self-defense for the 1998 bombings of United States embassies in Tanzania and Kenya, the 2000 bombing of the USS Cole, the various attacks on 9/11, and all subsequent attacks on American nationals, domestic and abroad.

The United States, supposedly acting in self-defense against al-Qaeda, demanded that Afghanistan hand over al-Qaeda to prevent further attacks on the United States.¹⁶⁸ Afghanistan refused.¹⁶⁹ This refusal would initiate Dinstein's "extraterritorial law enforcement" theory. Because the Taliban government of Afghanistan refused to eliminate the threat to the United States,¹⁷⁰ Afghanistan partially forfeited its territorial sovereignty.¹⁷¹ The United States was then able to exercise its right of self-defense against al-Qaeda, which the Taliban forcefully resisted.¹⁷²

In a number of strategic missteps, the United States failed to prevent

166. *The Wall Case*, *supra* note 102, ¶¶ 139, 142.

167. *The Congo Case*, *supra* note 102, ¶¶ 146-47.

168. *See* RASHID, *supra* note 1, at 62-64.

169. *See id.*

170. Some even argue that the Taliban developed such close links to al-Qaeda that it essentially became responsible for the acts of al-Qaeda. *See, e.g.*, O'Connell, *supra* note 128, at 901.

171. *See* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9); S.S. Lotus Case (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 4, 88 (Moore, J., dissenting) ("[I]t is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people.").

172. The Taliban resisted the United States by force, thereby giving the United States a right to use self-defense against the Taliban's unlawful use of force. Additionally, it is conceivable that al-Qaeda was so enmeshed in the Taliban government that the attacks themselves could have been imputed to the Taliban through al-Qaeda. *See* RASHID, *supra* note 1, at 62-64.

significant numbers of Taliban,¹⁷³ al-Qaeda, and other militants from escaping into Pakistan's FATA. Since 2001, the Pakistani government has been unable to control the spread of Islamic extremism in the FATA or to quell the ensuing attacks by such groups.¹⁷⁴ There have been subsequent al-Qaeda attacks planned and executed since 9/11, including many suicide attacks resulting from the activities of the Taliban and other extremist groups originating in the FATA.¹⁷⁵ This is likely due, in part, to the inability of the government to combat such extremism. However, it may also be caused by the unwillingness of Musharraf to isolate the Islamic extremists who support the Kashmiri cause against India.

For purposes of determining who launched which attacks, it is important to differentiate between the Pakistani Taliban and al-Qaeda. Although al-Qaeda is often suspected of providing logistical support, arms, and soldiers to the Pakistani Taliban, it has been the Pakistani Taliban, not al-Qaeda, that has been attacking American and NATO troops in Afghanistan.¹⁷⁶ Al-Qaeda cannot be held directly responsible for these attacks. Conversely, the Pakistani Taliban likely had no involvement in the planning or execution of 9/11 or any of the preceding attacks on the United States.

Therefore, the United States would have to be seen as exercising its right of self-defense on two groups for two distinct sets of armed attacks. In the case of al-Qaeda, the United States would be exercising its right of self-defense for the combined attacks beginning in 1993 with the first bombing of the World Trade Center and ending with the attacks on 9/11. As for the Pakistani Taliban, the United States would have to be exercising its right of self-defense for the multiple and continuing attacks on American and NATO troops within Afghanistan.

Even if the United States was justified in utilizing self-defense in the first place, it would still have to do so within the parameters of *necessity*, *proportionality*, and *immediacy*. This analysis is threat-specific rather than geocentric. The focus is not on *where* the self-defense is taking place (Pakistan), but on *whom* the self-defense is aimed towards. Therefore, the *necessity*, *proportionality*, and *immediacy* analysis must be done separately for both al-Qaeda and the Pakistani Taliban.

173. See generally RASHID, *supra* note 1.

174. See Barnett R. Rubin & Ahmed Rashid, *From Great Game to Grand Bargain*, FOREIGN AFF., Nov./Dec. 2008, at 31.

175. David Ignatius, *Moment of Truth in Pakistan*, WASH. POST, May 3, 2009, at A21.

176. See Murphy, *supra* note 32, at 30, 44.

1. AL-QAEDA

Necessity means that force is required to deter more attacks as opposed to sanctions or diplomatic pressure.¹⁷⁷ Al-Qaeda has an established record of perpetrating violent attacks of massive proportion against government and civilian targets. It is an accepted policy of al-Qaeda to use lethal force against both military and civilian targets.¹⁷⁸ The idea that al-Qaeda would be willing to cease these attacks through diplomatic pressure is very unlikely. However, there has not been another major successful attack by al-Qaeda against the United States since 9/11. This is attributable to various security measures, military operations, criminal investigations, and international cooperative efforts.¹⁷⁹ The use of force is, therefore, not necessary, as of the present day, to deter further attacks by al-Qaeda against the United States.

Proportionality analysis measures the force used in self-defense against the force actually necessary to deter further attacks.¹⁸⁰ As al-Qaeda is conducting a continuous attack on the United States, the amount of force used by the United States must be proportionate to the amount of force necessary to prevent subsequent attacks.¹⁸¹ The problem with using force in self-defense against al-Qaeda is the temporal and spatial displacement of al-Qaeda from Afghanistan to Pakistan following 2001. While the initial

177. See Schmitt, *supra* note 82, at 171.

178. The World Islamic Front stated:

On February 23, 1998, Osama bin Laden and four other Islamist leaders, co-signed and issued a fatwa (binding religious edict) calling on Muslims to kill Americans and their allies: “[T]he ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque [in Jerusalem] and the holy mosque [Mecca] from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim. This is in accordance with the words of Almighty Allah, ‘and fight the pagans all together as they fight you all together,’ and ‘fight them until there is no more tumult or oppression, and there prevail justice and faith in Allah.’”

JIHAD AGAINST JEWS AND CRUSADERS: WORLD ISLAMIC FRONT STATEMENT (Feb. 23, 1998), available at <http://fas.org/irp/world/para/docs/980223-fatwa.htm>; see Interview with Osama bin Laden by John Miller, *Afg.* (May 26, 1998), transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/interview.html>.

179. The attempted bombing of a commercial airliner over Detroit by Abdul Farouk Abdulmutallab, a Nigerian man with confessed links to al-Qaeda, was not detected by security officials and was only unsuccessful due to faulty ignition of an incendiary device located in Abdulmutallab's undergarments. See Andres Cala, *U.S. Homeland Security Chief Meets Europe Counterparts*, *N.Y. TIMES*, Jan. 22, 2010, at A1. Whether this should be treated as “successful,” as far as deceiving US security, or “unsuccessful,” as far as the failure of the bomb to actually detonate, is subject to debate. See Michael Leahy & Spencer S. Hsu, *Nigerian Arrested in Failed Jet Attack; Suspect Claims Al-Qaeda Link; White House Calls Incident an Attempted Act of Terrorism*, *WASH. POST*, Dec. 26, 2009, at A1.

180. See Schmitt, *supra* note 82, at 172; DINSTEN, *supra* note 58, at 208-12.

181. See Schmitt, *supra* note 82, at 172.

attack on al-Qaeda in Afghanistan was likely a proportionate response to 9/11 and the preceding attacks, the pursuit of al-Qaeda into Pakistan almost a decade later seems disproportionate.¹⁸² Some would argue that al-Qaeda's retreat to Pakistan is within the "theater of war," as there has not been a break in the fight against al-Qaeda since the initial invasion of Afghanistan.¹⁸³ However, proportionality is measured on the significance of the threat posed by the group. Al-Qaeda, as a global organization, remains one of the largest threats to the United States. Whether that threat emanates from the al-Qaeda members in Pakistan, however, is questionable.

Many note that al-Qaeda is not one singular organization with a headquarters in a particular location and a specific hierarchical structure.¹⁸⁴ Rather, it is a loosely connected group of cells throughout the world with common ideologies.¹⁸⁵ Therefore, the question is whether the use of military force in Pakistan is proportionate to the threat created by those members of al-Qaeda *within Pakistani territory*. While it is hard to be certain of the exact mechanisms through which al-Qaeda plans its attacks, the defining feature of al-Qaeda's structure since 2001 has been its fragmentation.¹⁸⁶ It is unlikely that the al-Qaeda members *in Pakistan* have the capacity to perpetrate another armed attack of significant scale against the United States. Furthermore, the United States has been able to deter any large-scale armed attacks by al-Qaeda through its national security policies, law enforcement measures, and the military campaign in Afghanistan. Therefore, the drone strikes against al-Qaeda members in Pakistan are disproportionate to the threat they pose of launching an armed attack.¹⁸⁷

Immediacy means that the United States needed to have acted in self-defense within a reasonable amount of time following an armed attack.¹⁸⁸ With regard to al-Qaeda, the United States responded with massive military

182. See Murphy, *supra* note 32, at 40-41.

183. See generally Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237 (2010).

184. See *id.* at 241-42; MICHAEL D. MAPLES, CURRENT AND PROJECTED NATIONAL SECURITY THREATS TO THE UNITED STATES 8 (2007), available at <http://armed-services.senate.gov/statemnt/2007/February/Maples%2002-27-07.pdf> ("In 2006, al-Qaida remained a loose network, broadly defined by the strategic objective of re-establishing their version of an Islamic caliphate, and unified by a common ideology rooted in the violent rejection of Western influence, especially in traditionally Islamic countries.").

185. See generally MAPLES, *supra* note 184.

186. See *id.*; Jason Burke & Paddy Allen, *The Five Ages of Al-Qaeda*, GUARDIAN, Sept. 11, 2009, <http://www.guardian.co.uk/world/interactive/2009/sep/10/al-qaida-five-ages-terror-attacks>.

187. If one were to argue that an attack on any member of al-Qaeda should be proportionate to the threat that the organization as a whole poses, then such members could be attacked with military force regardless of whether they live in rural Pakistan or downtown London.

188. See DINSTEIN, *supra* note 58, at 212-13; Schmitt, *supra* note 82, at 172-75.

power less than a month after the 9/11 attacks. There has been no temporal break in the fighting in Afghanistan which has now carried over into Pakistan. Therefore, the requirement of immediacy is satisfied.

2. TALIBAN

In regard to the Taliban (both Afghan and Pakistani), the cross-border attacks on United States and NATO troops are on-going. This must be the basis of any right to self-defense rather than 9/11 or any of the preceding attacks attributed to al-Qaeda.

Unlike al-Qaeda, the Taliban do not have an avowed purpose to attack the United States or any other country.¹⁸⁹ Rather, they are fighting against the foreign occupation of Afghanistan by NATO and the United States. Therefore, the necessity of the use of force is significantly different against the Taliban than against al-Qaeda.¹⁹⁰ The Taliban, however, continues to attack U.S. and NATO troops, as well as civilian and military targets within Pakistan.¹⁹¹ This comes after repeated attempts to negotiate a cease-fire.¹⁹² While the use of force in self-defense may appear necessary due to the Taliban's refusal to cease its attacks on U.S. targets in Afghanistan, it must be noted that such necessity could decrease significantly as members of the Taliban agree to negotiate and to curtail attacks.¹⁹³

The drone attacks on the Taliban in Pakistan are not proportionate to deter the threat of future attacks. Although the Taliban is actively and continuously conducting cross-border attacks on the United States,¹⁹⁴ these attacks are small in scale and often low in casualties. Since the attacks themselves are minimal, surely a massive military invasion of the FATA or NWFP (North-West Frontier Territories)¹⁹⁵ in Pakistan would be disproportionate to the threat posed by future attacks. The use of drones (military bombing aircraft), likewise, is not proportionate. Drone strikes,

189. See Dexter Filkins, *U.N. Aide Seeks Revision Of Terrorist List for Talks*, N.Y. TIMES, Jan. 25, 2010, at A8.

190. See Pamela Constable, *Pakistan Seeks Role as Mediator in Possible Taliban-Afghan Peace Talks*, WASH. POST, Jan. 28, 2010, at A15.

191. Rod Nordland & Abdul Waheed Wafa, *Bomber Strikes Near U.S. Base in Afghanistan*, N.Y. TIMES, Jan. 27, 2010, <http://www.nytimes.com/2010/01/27/world/asia/27afghan.html>.

192. The Pakistani government has been the most eager to negotiate a ceasefire. However, as noted above, the Taliban has taken full advantage of the Pakistani government's adherence to the cease-fire, advancing towards Islamabad and continuing suicide attacks. See *Pakistan and the Taliban*, *supra* note 39, at 42.

193. See Mark Landler & Helene Cooper, *U.S. Wrestling With Prospect of Offering Olive Branch to the Taliban*, N.Y. TIMES, Jan. 27, 2010, at A10; Jane Perlez, *Pakistan Is Said to Pursue Role in Afghan Talks*, N.Y. TIMES, Feb. 10, 2010, at A1.

194. See Nordland & Waheed Wafa, *supra* note 191.

195. See *supra* map, p. 163.

while targeting individual Taliban members, often result in more civilian deaths than target deaths.¹⁹⁶

The requirement of immediacy is easily satisfied by the drone strikes against members of the Taliban in Pakistan. Considering that the attacks are continuous, the United States may use force against the Taliban at any time. If the attacks were to stop, however, and the United States waited a few years before using force in self-defense, it would be acting unlawfully. In this case, the United States is using force during the continuous attacks, thereby eliminating any debate over the of immediacy question.

The drone strikes against the Taliban in Pakistan are likely an unlawful exercise of self-defense. Although immediate, they are not proportionate and not necessary to deter future attacks as the United States and the Afghan governments are actively considering negotiations with the Taliban.¹⁹⁷ Furthermore, the drone strikes are not necessary to deter future attacks, and the use of military force is not proportionate to the threat posed by al-Qaeda members in Pakistan. In sum, the use of drones in Pakistan against either al-Qaeda or the Taliban is likely unlawful as an exercise of Article 51's right to self-defense.

In sum, the vast jurisprudence of international law on the right to self-defense strongly suggests that the United States' use of force in Pakistan is not a lawful exercise of self-defense.¹⁹⁸ Even if one accepts the minority position that attacks attributable to non-state actors can trigger the right to exercise self-defense, neither al-Qaeda in Pakistan nor the Pakistani Taliban have mounted such significant armed attacks as to warrant the use of military force in Pakistan. Furthermore, the use of military force against either al-Qaeda in Pakistan or the Pakistani Taliban is both unnecessary and disproportionate to their respective threats. Simply put, the United States has an immense uphill battle in proving that the use of drones in Pakistan is a lawful exercise of the right to self-defense. This leaves the world facing a conundrum: absent Security Council authorization, the United States cannot lawfully use force to eliminate the home-base of one of the largest threats to international peace and security, but instead must wait for that threat to mature and launch a significant armed attack to trigger the lawful right to self-defense—this is a scenario most would like to avoid.

196. David Kilcullen & Andrew McDonald Exum, *Death From Above, Outrage Down Below*, N.Y. TIMES, May 17, 2009, at WK13 (“50 civilians for every militant killed, a hit rate of 2 percent . . .”).

197. See Scott Wilson, *Obama, Karza Clear the Air*, WASH. POST, May 13, 2010, at A1.

198. See *supra* Part III.B.3.

D. NEW INTERPRETATION OF ARTICLE 2(4): A NECESSITY

If the U.N. remains inflexible with respect to Article 2(4), the world will ultimately reject Article 2(4) and, eventually, the U.N. as a whole. This failure to adapt will lead to Member States' disillusionment with the U.N. as an effective mechanism for collective action. Just war doctrine will be resurrected, and with it, an increase in unchecked warfare. If the U.N. does, however, adopt a more flexible reading of Article 2(4), which better reflects reality, the U.N. can preserve its own legitimacy and limit the application of just war doctrine to a neutral standard.

The *institutional defects* of the Security Council to responsibly and effectively authorize collective action should not be overlooked due to a period of high Security Council activity. There will likely be, in the future, the possibility of a Security Council stalemate resulting from the veto power of the five permanent members. The better solution, which would avoid unnecessary suffering throughout the world and preserve the U.N.'s credibility, is for the U.N. to give a narrow reading to Article 2(4). Failure to do so will show an institutional inflexibility that ignores the dire and complicated circumstances of an evolving global society. If the U.N. consistently reads Article 2(4) to prohibit the use of force against a transnational terrorist organization hiding in the territory of weak states, a genocidal regime, or a highly unstable nuclear state, it is likely that the world will begin (and arguably has already begun) to ignore the U.N. and act against international law out of necessity.

In the absence of Security Council action, a State should be permitted to use force so long as it does not violate the literal terms of Article 2(4) and in such a way that, under Article 2(3), "international peace and security, and justice, are not endangered."¹⁹⁹ What is and is not a "just" use of force is a question that could be determined by the International Court of Justice.²⁰⁰ In turn, the I.C.J. would look to a global consensus as evidenced by a General Assembly resolution. For example, if ninety percent of the General Assembly votes for the collective use of force by a coalition of states, that would be evidence of a just use of force. In contrast, if only twenty-five percent vote for use of force, evidence of a just use of force is significantly weaker.

199. U.N. Charter art. 2, para. 3.

200. The I.C.J. may give an advisory opinion at the request of the General Assembly or Security Council. U.N. Charter art. 96(a). Advisory opinions, however, are not binding. *Id.* Additionally, the I.C.J. may hear contentious cases brought before it by any party to the dispute. *See* Statute of the International Court of Justice arts. 65-68, June 26, 1945, 59 Stat. 1055, 3 Bevans 1153.

Articles 11, 13, and 14 of the Charter provide that the General Assembly may consider, issue reports on, and make recommendations regarding situations or disputes in furtherance of international peace and security.²⁰¹ Article 12, on the other hand, prohibits the General Assembly from making any unsolicited recommendations regarding a dispute or issue that the Security Council is currently considering.²⁰² This should not, however, preclude the General Assembly from making such a recommendation either *before or after* the Security Council has considered the issue. Once the General Assembly has issued a recommendation, it could be used by the I.C.J. as evidence of a just use of force.

Under a flexible reading of Article 2(4), the I.C.J. would look to these recommendations in order to determine if the use of force is just. If so, the I.C.J. would decide whether the use of force violates the literal terms of Article 2(4); specifically, whether the use of force violates the “territorial integrity or political independence” of any State or is inconsistent with the Purposes of the Charter.²⁰³ The I.C.J. may, of course, look to other considerations and circumstances affecting the specific use of force at issue and may determine whether the use of force is still just depending on those factors. However, the Court should give considerable weight to the General Assembly’s recommendation that the use of force be authorized as just.

It should be noted, however, that such a use of force under Article 2(4) would likely have to fit within the parameters of such principles as necessity and proportionality, in a manner similar to the use of force in self-defense under Article 51. These principles would, of course, be defined by a different standard than Article 51’s necessity, which is premised on self-defense, whereas necessity in the context of Article 2(4) would be premised on international peace and security.²⁰⁴ Internal genocide illustrates the difference between the two standards of necessity. Surely no external State could argue that the internal genocide of one State necessitates the use of force in self-defense. In contrast, there may exist a good argument that the mass extermination of citizens necessitates the use of force on the genocidal

201. U.N. Charter arts. 11, 13, 14.

202. U.N. Charter art. 12.

203. U.N. Charter art. 2, para. 4. The General Assembly, similarly to the Security Council, must act in accordance with the Purposes of the Charter. The use of force, where not authorized by the Security Council, may still be within the Purposes of the Charter if it furthers the goals of international peace and security, friendly relations among the Member States, and international cooperation. It may be argued that the use of force is never in accordance with the goal of maintaining international peace. This, however, could not have been the intent of the Drafters because it would have created an inherent contradiction in the Security Council, who may authorize the use of force, but must exercise its functions in accordance with the Purposes of the Charter. *See* U.N. Charter art. 1; U.N. Charter art. 11; U.N. Charter art. 24, para. 2.

204. *See* U.N. Charter art. 1(1).

State in furtherance of international peace and security.²⁰⁵

Rather than argue for a flexible interpretation of Article 2(4), scholars such as Thomas Franck, W. Michael Reisman, and Michael N. Schmitt advocate for a loose reading of the right to self-defense under the U.N. Charter and warn of similar consequences for the U.N. if it remains inflexible.²⁰⁶ The right to self-defense, however, would only cover certain instances of the use of force.²⁰⁷ States would still be compelled to violate Article 2(4) to use force in prohibited situations not covered as self-defense.²⁰⁸ This would be the case in a humanitarian intervention and likely the case when a serious threat is posed by an unstable nuclear regime. Over time, this would have the same effect as an uncompromising reading of Article 2(4), which would undermine the U.N. and lead to an unchecked revival of the just war doctrine. An expanded reading of the right to self-defense is not enough to keep states from intervening where seemingly justified. Such unilateral action would serve only to undermine the U.N. system.

The United States' use of force in Pakistan *should not* be seen as a violation of Article 2(4). The drafters and signatories of the Charter did not anticipate the existence of transnational terrorist organizations with the means to carry out armed attacks of substantial scale.²⁰⁹ They did not envision the scenario in which a non-State actor would launch attacks on states from within another State's territory without that State's support or

205. The exact definitions and parameters of "necessity" and "proportionality" as applicable to the use of force under Article 2(4) is beyond the scope of this Comment. For a more thorough discussion of what may constitute a just use of force, see generally MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (1977).

206. Thomas M. Franck, *Rethinking Collective Security*, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 21, 24-25 (Michael N. Schmitt & Jelena Pejic eds., 2007); W. Michael Reisman & Andrea Armstrong, *Claims to Pre-emptive Uses of Force: Some Trends and Projections and Their Implications for World Order*, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 79, 108-12 (Michael N. Schmitt & Jelena Pejic eds., 2007); see Schmitt, *supra* note 82, at 162-95.

207. Even if Article 51 was read expansively, a lawful use of force in the name of self-defense would still be limited to those scenarios in which there is a clear "armed attack" triggering the right to self-defense.

208. Even if they were seemingly justifiable (as in the scenario in which one state is on the verge of launching a nuclear attack on another, weaker and defenseless state), the state using force would still be in technical violation of international law.

209. A terrorist attack is distinguished by three qualities: violence (whether actual or threatened), a "political" objective (however conceived), and an intended audience (typically though not exclusively a wide one). ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* 141 (1993); see MYRA WILLIAMSON, *TERRORISM, WAR AND INTERNATIONAL LAW: THE LEGALITY OF THE USE OF FORCE AGAINST AFGHANISTAN IN 2001* 68-70 (2009) (stating that experts in the study of terrorism cannot agree on a definition of terrorism).

consent.

Today, al-Qaeda presents a substantial threat to not only the United States but also to many states throughout the world. While they must rely on a loosely-connected group of operatives and “cells” throughout the world, it is evident that the western regions of Pakistan provide al-Qaeda with its strongest base of support for planning attacks, spreading propaganda, and recruiting and training militants.²¹⁰ In addition, al-Qaeda has found support in western Pakistan from other extremist groups.²¹¹

The Pakistani government has proven to be both unable and unwilling to eliminate or substantially diminish al-Qaeda’s stronghold within its borders.²¹² Consequently, al-Qaeda’s presence in Pakistan has become a threat to global peace and security. Not only is al-Qaeda able to provide support to the Taliban in executing attacks within Pakistan and Afghanistan, it is also able to continue its worldwide recruitment of militants in other countries, often making those countries less stable or secure.²¹³

Thus, the Security Council should authorize the use of force against terrorist organizations seeking refuge in western Pakistan because they pose a legitimate threat to global peace and security. So far, however, the Security Council has been either unable or unwilling to do so. Under a conventional reading of Article 2(4), this leaves only the use of force under the right of self-defense permissible.²¹⁴ If no particular State has the right and/or ability to successfully exercise force in self-defense against al-Qaeda in Pakistan, Article 2(4) would prohibit the use of force by any State other than Pakistan.²¹⁵ With Pakistan’s inability to eliminate the threat to global security from within its borders, the threat continues and more countries are likely to be the subjects of hostilities by al-Qaeda militants operating out of Pakistan. This is a highly undesirable scenario and absent U.N. action it would likely lead to the unauthorized use of force by other States out of the necessity to eliminate or diminish the threat posed by the Pakistan-based al-Qaeda. This would violate current interpretations of Article 2(4) and discredit the U.N. as a responsible and effective system of collective action.

If Article 2(4) is read more flexibly to allow for the use of force when it would not violate territorial integrity or political independence of any

210. See generally RASHID, *supra* note 1; *Pakistan and the Taliban*, *supra* note 39, at 24.

211. One of the most notable of these groups is the “Pakistani Taliban.” See generally RASHID, *supra* note 1.

212. See *supra* Part II.B.

213. See Robert F. Worth, *U.S. to Join Talks on Helping Yemen Gain Stability*, N.Y. TIMES, Jan. 27, 2010, at A11.

214. See *supra* Part III.B.1.

215. See *id.*

State, then the U.N. can retain its credibility, and global peace and security can be better defended. Such a reading of Article 2(4) would permit the United States, absent a right of self-defense, to exercise the use of force within Pakistani territory against al-Qaeda operatives if they constitute a threat to global peace and security.²¹⁶ While arguments can be made that they do constitute such a threat, the U.N. could retain control of this determination by allowing force if the General Assembly (absent Security Council authorization) votes, by a substantial majority, to authorize the use of force. This way, the U.N. is able to control the use of force outside of self-defense and Security Council authorization, as well as determine when force should be authorized using the General Assembly vote as a measure of global consensus. Therefore, unlike the just war doctrine, which previously devolved into a highly subjective determination of when war was justified, the U.N. can provide the necessary standard by which to determine when the use of force truly is justified.

In Pakistan, under a literal reading of Article 2(4), which provides exceptions to the prohibition on the use of force, the matter of whether al-Qaeda, and other terrorist organizations operating from within Pakistan, are a threat to global peace and security may be put before the General Assembly. The General Assembly would then be able to vote as to whether such a use of force should be authorized.

V. OTHER BENEFITS OF A NEW READING OF ARTICLE 2(4)

A. HUMANITARIAN INTERVENTION: CAN WE AFFORD TO WAIT?

1. RWANDA

On April 6, 1994, a private jet carrying Rwandan President Juvenal Habyarimana was shot down by rockets fired from the ground.²¹⁷ The death of the Hutu leader sparked violent confrontations between ethnic Hutus and Tutsis in Rwanda, leading to one hundred days of Tutsi genocide at the hands of the Hutu majority.²¹⁸ Roughly 800,000 Tutsi and moderate Hutu died as a result of the violence.²¹⁹ Meanwhile, the international community watched, either unable or unwilling to intervene with force in order to end the bloodshed.²²⁰

216. And, of course, if the General Assembly recommends to authorize the use of force.

217. Josh Kron, *Extremist Officials Blamed in '94 Rwanda Assassination*, N.Y. TIMES, Jan. 12, 2010, at A6.

218. *Id.*

219. *Id.*

220. Deborah Kobak, *Rwanda: Never Again?*, in *BREAKING THE CYCLE: A FRAMEWORK FOR CONFLICT INTERVENTION* 149 (Roderick K. Von Lipsey ed., 1997).

The United Nations' response to the crisis was particularly problematic. With roughly 2,500 United Nations Assistance Mission for Rwanda (UNAMIR) peace-keeping troops in Rwanda under a mandate to enforce a cease-fire and assist the Rwandan government in implementing a peace settlement, the Secretary-General offered three options to the Security Council: (1) change the UNAMIR mandate so that adequate troops would be provided to "coerce the opposing forces into a cease-fire, and to attempt to restore law and order and put an end to the killings,"²²¹ (2) reduce the UNAMIR force from 2,500 troops to 270, or (3) withdraw all UNAMIR troops.²²² The Security Council chose option (2), pulling all but 270 UNAMIR troops from Rwanda.²²³ This occurred for a number of political reasons, among them the United States' hesitancy to commit troops to another humanitarian intervention so soon after failing in Somalia.²²⁴

On May 17, 1994, the U.N. agreed to adopt Security Council Resolution 918, authorizing the deployment of 5,500 U.N. peace-keeping troops (UNAMIR II).²²⁵ However, just like UNAMIR I, UNAMIR II was only given a peace-keeping mandate that prevented the troops from using force to protect themselves or the civilian population.²²⁶ Eventually, the French government decided to unilaterally intervene, launching a military operation named Operation Turquoise, which sent 2,500 Marines and Foreign Legion troops to Rwanda.²²⁷ On June 22, the Security Council passed Resolution 929, authorizing Operation Turquoise retroactively and calling for the French to remain in Rwanda for two months, after which the UNAMIR II force would be assembled, equipped, and granted a mandate under Chapter VII to use necessary force.²²⁸ In the end, it was the military successes of the Rwandan Patriotic Front (RPF) that ended the genocide, not any external force or pressure from international actors.²²⁹

2. DARFUR

After the genocide in Rwanda, many international actors exclaimed

221. Milton Leitenberg, *Rwanda 1994: International Incompetence Produces Genocide*, PEACEKEEPING & INT'L REL. (Nov./Dec. 1994), at 7; see Kobak, *supra* note 215, at 201.

222. Kobak, *supra* note 220, at 201.

223. *See id.*

224. *See id.*

225. *Id.*; see generally S.C. Res. 918, U.N. Doc. S/Res/918 (May 17, 1994).

226. Kobak, *supra* note 220, at 160-61, 163.

227. *Id.* at 163.

228. *Id.*; see generally S.C. Res 929, U.N. Doc. SC/Res/929 (June 22, 1994).

229. Jonathan C. Randal, *Rebels Take Chief Cities in Rwanda; French Forces Declare Protection Zone After Capital, Butare Fall*, WASH. POST, July 5, 1994, at A1.

“never again!”²³⁰ Never again would they allow a situation such as the one in Rwanda to develop.²³¹ Never again would they allow killings on such massive scales.²³² Never again would they stand idly by as such killings continued unfettered.²³³ Yet by early 2004 (only ten years after Rwanda), the world was having déjà vu, this time in Western Sudan.²³⁴

Angered by the alleged neglect of the Sudanese central government, two opposition groups, the Sudan Liberation Movement and the Justice and Equality Movement, launched a number of attacks on government military posts in the Darfur region of Western Sudan in 2003.²³⁵ The government retaliated, sending proxy militias, known as the “Janjaweed,” drawn from Darfur’s indigenous Arabs to suppress the groups.²³⁶ Improvised explosives were dropped out of Russian aircraft transports indiscriminately onto villages in Darfur.²³⁷ The Janjaweed, on horseback and camel, proceeded to systematically attack every village in its way, killing and raping the indigenous Africans, and burning what remained of the villages.²³⁸ Displaced survivors fled to police-controlled areas.²³⁹ These areas, however, were patrolled by the Janjaweed, who attacked those they found wandering outside, often raping the women.²⁴⁰ By early 2004, as many as 80,000 people had been killed and more than one million displaced.²⁴¹

As was the case with Rwanda, the international community was reluctant to intervene.²⁴² It was not until September 2004 that the United States officially recognized what was happening in Darfur as “genocide.”²⁴³ In January 2005, the central government of Sudan concluded the Comprehensive Peace Agreement, which allowed for the presence of

230. See generally Lee Feinstein, *Darfur and Beyond: What Is Needed to Prevent Mass Atrocities*, in BEYOND HUMANITARIANISM: WHAT YOU NEED TO KNOW ABOUT AFRICA AND WHY IT MATTERS 100 (Princeton N. Lyman & Patricia Dorff eds., 2007).

231. See generally *id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. See generally Feinstein, *supra* note 230.

237. *Id.* at 102-03. It is widely believed that these aircraft were operated by the Sudanese government. *Id.*

238. *Id.* at 103.

239. *Id.*

240. *Id.*

241. *Id.*

242. Feinstein, *supra* note 230, at 104.

243. *Id.*

United Nations peacekeeping troops in southern Sudan.²⁴⁴ Meanwhile, the Security Council passed a number of “powder-puff” resolutions, threatening the killers in Darfur with further resolutions.²⁴⁵ By the end of 2006, nearly 250,000 had died and more than 3 million out of six million Darfuris had been displaced.²⁴⁶ It was not until July 31, 2007, that the Security Council approved a resolution creating a joint United Nations-African Union peacekeeping force for deployment in Sudan.²⁴⁷ This peacekeeping team (UNAMID) was authorized with Chapter VII powers to use force in self-defense and in defense of civilians.²⁴⁸ In response, the Sudanese government refused the participation of any non-African troops, delayed allocating land to the UNAMID force, demanded the right to disable the force’s communications during “security operations,” and refused any night flights.²⁴⁹

Just as the Security Council was reluctant to intervene in Rwanda in 1994, they are equally deadlocked on the situation in western Sudan. The most difficult obstacle to overcome is China’s extreme reluctance to harm its economic interests in Sudan.²⁵⁰ The United States, more interested in a cooperative economic relationship with China, is thus disinclined to take a harder stance on the issue of Darfur. While the attacks have decreased dramatically in both frequency and intensity since 2004, the United Nations estimates that as many as 300,000 people have died as a direct result of the atrocities, with smaller incidents of armed attacks occurring as recently as January 10, 2010.²⁵¹

244. Feinstein, *supra* note 230, at 104.

245. See Gerald Caplan, *From Rwanda to Darfur: Lessons Learned?*, in GENOCIDE IN DARFUR: INVESTIGATING THE ATROCITIES IN THE SUDAN 171, 176 (Samuel Totten & Eric Markusen eds., 2006).

246. See Feinstein, *supra* note 230, at 103.

247. S.C. Res. 1769, U.N. Doc. S/RES/1769 (July 31, 2007).

248. *Id.*

249. Opheera McDoom, *Few Are Optimistic About New Darfur Peacekeeping Force*, WASH. POST, Dec. 31, 2007, at A12.

250. China is a principal buyer of Sudanese oil. *China: Sudan Prosecution Opposed*, N.Y. TIMES, July 16, 2008, at A9. The Chinese government has warned on multiple occasions that it might veto any resolutions proposing significant sanctions on the Sudanese government, and any resolution proposing an oil embargo. See Warren Hoge, *U.N. Council Approves Penalties in Darfur*, N.Y. TIMES, Mar. 30, 2005, at A6; Steven R. Weisman, *Powell Says Rapes and Killings in Sudan Are Genocide*, N.Y. TIMES, Sept. 10, 2004, at A3; Steven R. Weisman, *Crisis in Sudan Resists Simple Solutions*, N.Y. TIMES, Aug. 8, 2004, at A6; see also Caplan, *supra* note 245.

251. See Andrew Heavens, *Lead Peacekeeper No Longer Sees Active War in Darfur*, WASH. POST, Aug. 28, 2009, at A17; cf. U.N. Secretary-General, *Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur*, U.N. Doc. S/2010/50 (Jan. 29, 2010).

3. LESSONS LEARNED

Approximately 1.1 million people died due to the genocides in Rwanda and Darfur, separated by only ten years. While the Security Council or the United Nations as a whole could not have prevented all 1.1 million deaths, many might have been saved by the earlier use of force on the part of the international community. The Rwandan genocide was allowed to continue largely unfettered for one hundred days, before ultimately ending at the hands of a domestic rebel group, the Rwandan Patriotic Front.²⁵² The atrocities in Darfur, though mostly occurring in 2004, have continued to this day with little to no international interference. Even with the UNAMID force's presence, now at nearly eighty percent of its full force,²⁵³ the Sudanese government retains the ability to significantly curtail the force's activities.

Two major lessons can be learned from the United Nations' involvement in both Rwanda and Darfur: (1) the Security Council is institutionally inept at stopping or preventing human rights abuses on a massive scale, and (2) in the face of Security Council inactivity, intrastate atrocities will either continue unfettered or be stopped by the unilateral use of force by a Member State in violation of Article 2(4). Under the popular interpretation of Article 2(4), an absolute prohibition of the use of force, the Security Council's institutional defectiveness, in the case of genocide, leads to either massive human casualties, on one hand, or frequent violations of the United Nations Charter on the other. While the former result is clearly abhorrent, the latter presents a dangerous trend that would de-legitimize the United Nations system and, possibly, multilateral cooperation on the whole.

If Article 2(4) is read literally, barring only those uses of force that violate territorial integrity or political independence, unilateral or multilateral uses of force for purposes of humanitarian interventions would not necessarily violate the United Nations Charter, even without the authorization of the Security Council. That is to say, if civilians are systematically killed on a massive scale in the next few months, and it appears that the Security Council is deadlocked to do anything to quell the violence, a state or coalition of willing states will not be barred by international law from using force to stop the killings. Not only might states be quicker to act when they perceive their actions as legally valid under the Charter, but these actions out of necessity, when taken, would not be seen as violating the Charter and therefore would not undermine the legitimacy of the United Nations.

252. See Randal, *supra* note 229.

253. See U.N. Secretary-General, *supra* note 251.

B. ROGUE STATES & WMDs: A DANGEROUS COCKTAIL

Another development that has become more pronounced in the past few decades and poses a dilemma for an expansive interpretation of Article 2(4)'s prohibition on the use of force is the proliferation of nuclear weapons in threatening and unstable states. Similar to humanitarian interventions, the issue of nuclear weapons and Article 2(4) pits legality against necessity. In September 2003, then-United Nations Secretary General, Kofi Annan, addressed the General Assembly, stressing the gravity of the issue:

[A]n "armed attack" with weapons of mass destruction could be launched at any time, without warning, or by a clandestine group. . .

Rather than wait for that to happen, [States] argue, States have the right and obligation to use force pre-emptively, even on the territory of other States, and even while weapons systems that might be used to attack them are still being developed.

According to this argument, States are not obliged to wait until there is agreement in the Security Council. Instead, they reserve the right to act unilaterally, or in ad hoc coalitions. This logic represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last fifty-eight years. . . .

. . . .

Excellencies, we have come to a fork in the road. This may be a moment no less decisive than 1945 itself, when the United Nations was founded.²⁵⁴

The simple matter is that states are not willing to suffer a catastrophic nuclear armed attack that would trigger the right of self-defense before using force. Rather than wait until a nuclear warhead is airborne, the use of force against nuclear facilities in a highly unstable or belligerent state should not be viewed as necessarily violative of Article 2(4).

Currently, there are at least five states that threaten global peace and security with nuclear technology. While each presents varying degrees of danger for different reasons, the fact remains that any one of them could catapult the world into its first nuclear war with devastating human casualties.

North Korea has been the most confrontational of the nuclear states.

254. Kofi Annan, U.N. Secretary-General, The Secretary-General Address to the General Assembly (Sept. 23, 2003) [hereinafter Secretary-General Address], *available at* <http://www.un.org/webcast/ga/58/statements/sg2eng030923>.

Having pulled out of the Non-Proliferation Treaty (NPT) in 2003,²⁵⁵ it has persistently ignored United Nations resolutions, even testing nuclear weapons in 2006 and 2009.²⁵⁶ Currently, North Korea has about ten nuclear bombs and has tested long-range missiles capable of carrying a nuclear warhead.²⁵⁷ As is widely known, the North Korean government is a dictatorship controlled by Kim Jong Il. The combination of nuclear weapons, non-compliance with the NPT or international resolutions, and a seemingly unstable dictator creates a recipe for potential disaster.

However dangerous North Korea appears, many have argued that it is unlikely that it will use a nuclear weapon any time in the foreseeable future.²⁵⁸ Kim Jong Il would have his countrymen believe that North Korea could and should wipe South Korea from the face of the map. However, North Korea receives and relies on massive amounts of aid from South Korea to keep from spiraling further into poverty.²⁵⁹ On the other side, South Korea has little incentive to stop aid to the North, as the total collapse of the North would have devastating economic consequences for South Korea.²⁶⁰ Finally, Kim Jong Il's priority is to remain in power. A nuclear attack on another state will result in a massive attack on North Korea—something that will surely end his reign.

The more pressing concern associated with a nuclear North Korea is the proliferation of nuclear materials to other states. North Korea has been accused of selling nuclear technology to countries such as Syria, who now has a nuclear reactor that closely resembles North Korea's reactor at Yongbyon.²⁶¹ Even if North Korea is unlikely to use their arsenal, the proliferation of nuclear technology to other countries only amplifies the likelihood of *some* state eventually using a nuclear weapon.

255. Seth Mydans, *Threats and Responses: Nuclear Standoff*, N.Y. TIMES, Jan. 10, 2003, at A1. The Treaty on the Non-Proliferation of Nuclear Weapons has three core purposes (often referred to as "pillars"): non-proliferation of nuclear weapons to non-nuclear states, nuclear disarmament of nuclear states, and the right to peacefully use nuclear technology. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483; 729 U.N.T.S. 161 [hereinafter NPT].

256. Mydans, *supra* note 255; David E. Sanger, *North Korea Says It Tested a Nuclear Device Underground*, N.Y. TIMES, Oct. 9, 2006, at A1; Thom Shanker & William J. Broad, *Seismic Readings From North Korea Blast Appear to Point to a Small Nuclear Test*, N.Y. TIMES, May 26, 2009, at A6.

257. Graham Allison, *Nuclear Disorder: Surveying Atomic Threats*, 89 FOREIGN AFF., Jan./Feb. 2010, at 74.

258. See Andrei Lankov, *Staying Alive: Why North Korea Will Not Change*, 87 FOREIGN AFF., Mar./Apr. 2008, at 9.

259. *Id.* at 9.

260. *Id.*

261. David E. Sanger, *Bush Administration Releases Images to Bolster Its Claims About Syrian Reactor*, N.Y. TIMES, Aug. 25, 2008, at A6.

One such state that may have profited from North Korean nuclear technology is the Islamic Republic of Iran. Unlike the other states discussed in this section, Iran does not yet have a nuclear weapon, but many experts view this as inevitable.²⁶² Iran does, however, have a stockpile of over 3,000 pounds of low-enriched uranium—a necessary ingredient for both peaceful nuclear energy and a nuclear weapon.²⁶³ To produce a nuclear weapon, the uranium would have to be highly enriched uranium (HEU).²⁶⁴ After enrichment, given the amount of uranium that Iran currently has, the state could build at least two Hiroshima-type nuclear bombs.²⁶⁵

Iran has maintained that it is merely pursuing a peaceful nuclear energy program and has no interest in nuclear weapons.²⁶⁶ But a history of deceiving the International Atomic Energy Agency, coupled with intelligence reports of a secret nuclear weapons research and design program strongly, suggests that Iran is seriously considering developing nuclear weapons.²⁶⁷

Like North Korea, there is the additional danger that Iranian nuclear materials could fall into the wrong hands. Although the government in Tehran may not intentionally supply nuclear materials to terrorist organizations, they may nevertheless leak out through the Iranian Revolutionary Guard Corp (Revolutionary Guards). The Revolutionary Guard recruits young “true believers” to join, subjects them to ideological indoctrination (but not to psychological-stability testing), and gives them responsibility for securing production sites for nuclear materials.²⁶⁸ Furthermore, the Revolutionary Guard is indirectly controlled by Ali Khamenei, the supreme ideological leader of Iran, who appoints the commander of the Revolutionary Guard.²⁶⁹ Hence, even if the central

262. See Scott D. Sagan, *How to Keep the Bomb From Iran*, 85 FOREIGN AFF., Sept./Oct. 2006, at 45 (“A U.S. official in the executive branch anonymously told The New York Times in March 2006, ‘The reality is that most of us think the Iranians are probably going to get a weapon, or the technology to make one, sooner or later.’”).

263. Allison, *supra* note 257.

264. See, Pablo Adelfang and Ira Goldman, *From High to Low*, available at <http://www.iaea.org/Publications/Magazines/Bulletin/Bull481/htmls/heu.html> (last visited June 27, 2011).

265. *Id.*

266. *Id.*

267. See generally James M. Lindsay & Ray Takeyh, *After Iran Gets the Bomb: Containment and Its Complications*, 89 FOREIGN AFF., Mar./Apr. 2010, at 33; Joby Warrick & Scott Wilson, *Iran Might be Seeking Nuclear Arms Capability*, WASH. POST, Feb. 19, 2010, at A8.

268. See Sagan, *supra* note 262, at 53.

269. Akbar Ganji, *The Latter-Day Sultan: Power and Politics in Iran*, 87 FOREIGN AFF., Nov./Dec. 2008, at 45-46.

government in Tehran did not wish to release nuclear materials or technology to terrorist groups, units of the Revolutionary Guard could decide to lend a helping hand to their “ideological comrades,” and supply terrorist groups with nuclear materials.

Perhaps an even greater fear regarding unstable nuclear states is not that they themselves will use nuclear weapons (as serious a concern as that may be, states are more confident in their diplomatic and economic mechanisms to contain or dissuade nuclear states from using nuclear force), but that they may leak nuclear technology, or worse yet, nuclear materials to terrorist groups. Nowhere is this fear more justified than in Pakistan. In December 2008, the congressional Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism issued its report to Congress, stating, *inter alia*, that “[w]ere one to map terrorism and weapons of mass destruction today, all roads would intersect in Pakistan.”²⁷⁰

Pakistan, like both India and Israel, is not a signatory to the NPT.²⁷¹ Pakistan has, however, openly declared that it possesses nuclear weapons and has tested them as early as 1988.²⁷² In the past decade or so, Pakistan has grown increasingly unstable, an occurrence of which al-Qaeda and the Taliban have taken full advantage, entrenching themselves in Pakistan’s lawless FATA region.²⁷³ In October 2009, extremist militants wearing Pakistani army uniforms seized the government’s military headquarters in Rawalpindi.²⁷⁴ Had they instead breached a nuclear weapons storage facility (which is less heavily guarded than a military headquarters), they could have stolen the fissile core of a nuclear weapon.²⁷⁵

In 2004, the “founder” of Pakistan’s nuclear program, A.Q. Khan, was arrested for selling nuclear weapons technology to various countries, including Iran, North Korea, and Libya.²⁷⁶ The director-general of the International Atomic Energy Agency (IAEA), Dr. Mohamed ElBaradei, subsequently visited Libya to inspect the scale and complexity of Khan’s

270. WORLD AT RISK: THE REPORT OF THE COMMISSION ON THE PREVENTION OF WEAPONS OF MASS DESTRUCTION PROLIFERATION AND TERRORISM, at xxiii (2008), *available at* <http://www.scribd.com/doc/8574914/World-at-Risk-The-Report-of-the-Commission-on-the-Prevention-of-WMD-Proliferation-and-Terrorism-Full-Report>.

271. NPT, *supra* note 255.

272. Pakistan made this declaration following a nuclear test by India in 1974.

273. *See supra* Part II.B.

274. Jane Perlez, *Pakistani Soldiers Retake Army Headquarters*, N.Y. TIMES, Oct. 11, 2009, at A1.

275. *See Allison, supra* note 257, at 78.

276. *See id.* at 79.

black-market operation.²⁷⁷ He referred to what he found as a “Wal-Mart of private-sector proliferation.”²⁷⁸ The main reason that Khan was caught and his operation halted was not because of IAEA investigations, but because the leader of Libya, Muammar el-Qaddafi, invited the IAEA inspectors to his country, pledging to dismantle his nonconventional weapons program.²⁷⁹ What is most startling is that the IAEA may not have caught on to Khan, had it not been for Libya, until after many other countries (and possibly terrorist groups) had acquired the technology to develop nuclear weapons programs.

Although Pakistan’s inability to control and safely secure its nuclear weapons technology or materials is the most terrifying aspect of their nuclear weapons program, state-use of nuclear weapons is also not entirely far-fetched. Pakistan and India have viewed each other as bitter rivals since Pakistan’s independence from India in 1947.²⁸⁰ This rivalry has continued into the realm of nuclear weapons.²⁸¹ In 1999, then-General Pervez Musharraf sent Pakistani troops into Indian-Kashmir for the first time since 1971, believing that India would quickly cede control for fear of Pakistan’s nuclear arsenal.²⁸² Instead, the world condemned Musharraf’s actions, ending in a humiliating apology by then-President Omar Sharif.²⁸³ In 2002, India and Pakistan again went to the brink of war—a war that could have turned nuclear in the blink of an eye.²⁸⁴ In 2008, following an attack by a terrorist group with links to the Pakistani government that killed 173 people in Mumbai, Indian Prime Minister Manmohan Singh explicitly warned Pakistan that the next major terrorist attack, supported or sponsored by Pakistan, would trigger a heavy military response.²⁸⁵

This leads to the discussion of the next dangerous nuclear power—India. Although India has much more control over its nuclear arsenal than Pakistan, its rivalry with Pakistan could easily lead India to be the first nuclear state to use a nuclear weapon since World War II. Although India has not been as brazen as Pakistan in its military incursions, it too is not a

277. Mark Landler & David E. Sanger, *Pakistan Chief Says It Appears Scientists Sold Nuclear Data*, N.Y. TIMES, Jan. 24, 2004, <http://www.nytimes.com/2004/01/24/world/pakistan-chief-says-it-appears-scientists-sold-nuclear-data.html?src=pm>.

278. See Allison, *supra* note 257, at 79.

279. Landler & Sanger, *supra* note 277.

280. See generally RASHID, *supra* note 1.

281. *Id.* at 41-43. India first tested a nuclear weapon in 1974; Pakistan followed suit in 1988. Neither country is a signatory to the Non-Proliferation Treaty. See NPT, *supra* note 255.

282. See RASHID, *supra* note 1, at 42.

283. *Id.*

284. See Allison, *supra* note 257, at 78.

285. *Id.*

party to the NPT, and therefore is not subject to IAEA regulation or disarmament provisions. Furthermore, India shares a border with Pakistan. This is significant because border tensions are more likely to lead to a higher frequency of military incidents than may be the case with two non-bordering rival states, such as the United States and the Soviet Union during the Cold War. The common border also means that any instability in Pakistan could instantly affect security in India. Even if these statements deter the Pakistani government, terrorist groups with long-standing ties to the government or the government's ISI (intelligence agency) may not be.²⁸⁶

The fact that India is a close ally of the United States has little bearing on its designation as a dangerous nuclear state. Considering the scale of destruction caused by the detonation of a single nuclear weapon, let alone the immediate military consequences of such an attack, every state that is somewhat likely to use a nuclear weapon should be considered dangerous. It only takes that one use of a nuclear weapon to kill hundreds of thousands indiscriminately, encouraging more vulnerable states to pursue nuclear weapons programs, thereby triggering military and possibly nuclear responses by other countries, ushering in an age of nuclear warfare on a horrible and massive scale. With this in mind, both India and Israel, two close allies of the United States, should be considered dangerous nuclear states.

Israel has long been the target of animosity from the various Arab states surrounding its borders. In order to counter the constant threat of military incursion from neighboring states and the threat of terrorist attacks from within the Palestinian territories as well as from abroad, Israel has a very large and developed military.²⁸⁷ Furthermore, Israel has a history of being particularly aggressive towards perceived threats.²⁸⁸ For instance, in 2007, Israel was widely suspected of launching a strike against a partially constructed Syrian nuclear reactor (recall that North Korea is suspected of providing Syria with the designs for the reactor, and evidence was found that A.Q. Khan trafficked nuclear technology to Syria).²⁸⁹

The combination of Israel's perceived need to strike preemptively and

286. One such group is the Lashkar-e-Taiba who perpetrated the Mumbai attacks. Pamela Constable, *A Reemergence in the Heart of Pakistan; Conservative Sunni Movements Appeal to Religious Sentiment*, WASH. POST, Feb. 11, 2010, at A16.

287. See *The World Fact Book*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html> (last visited May 24, 2011).

288. Steven Erlanger, *Israel Silent on Reports Of Bombing Within Syria*, N.Y. TIMES, Oct. 15, 2007, at A8.

289. *Id.*

a confrontational Iran could lead to devastating results.²⁹⁰ Iran has denounced the United States as the “Great Satan,” denied the occurrence of the Holocaust, and called for Israel’s obliteration.²⁹¹ If Iran acquires a nuclear weapon, Israel will continue to regard Iran as an existential threat to Israel that “must be countered by any means possible, including the use of nuclear weapons.”²⁹² Iran’s possession of a nuclear weapon would give both states an incentive to strike first—Iran to avoid a strike on its newly acquired arsenal, and Israel to keep Iran from using that arsenal.²⁹³

In short, a nuclear Israel is inherently dangerous (especially as a non-signatory to the NPT). However, it becomes much more dangerous if Iran acquires nuclear weapons. Given Iran’s proximity to and public stances toward Israel, Israel would be compelled to use force against a nuclear Iran; nothing would deliver a more direct message of deterrence to the blatantly anti-Israeli region than a nuclear strike against an Iranian nuclear arsenal. Of course, this strategy could backfire with devastating consequences. Rather than deter, an Israeli nuclear attack on Iran could lead other countries in the region, namely Turkey, Egypt, and Saudi Arabia, to “go nuclear” in a rush. Such a rapid nuclear proliferation would all but destroy the NPT and any hope for a non-nuclear world.

To be clear, this Comment is not calling for the preemptive use of nuclear force against dangerous nuclear states. Rather, this Comment is calling for the recognition that the use of conventional force to prevent a catastrophic nuclear use of force may be necessary in certain instances, and should not be read as a *per se* violation of Article 2(4)’s prohibition on the use of force. Under the current reading of Article 2(4), as prohibitive of all uses of force not in self-defense or authorized by the Security Council, a state would have to wait until attacked by a nuclear state before lawfully using force in self-defense. Of course, such an armed attack could mean hundreds of thousands of deaths (likely civilian) before the victim state could lawfully use force to counter the nuclear state’s attack.

One option is to subscribe to an expanded notion of self-defense, including pre-emptive self-defense. This, however, has negative consequences. First, such an expanded reading would not apply to only nuclear states. Reading Article 51’s right of self-defense to include

290. To be more precise, Israel has been aggressive in an expansive view of self-defense, using the doctrine of preemptive self-defense against perceived threats to national security. *See id.*

291. *See* Lindsay & Takeyh, *supra* note 267, at 35, 38 (nothing that although Iran has made these stances well known, it has avoided a direct military confrontation with either the United States or Israel).

292. Lindsay & Takeyh, *supra* note 267, at 35, 38.

293. *Id.* at 39.

preemptive self-defense cannot legitimately pertain only to nuclear attacks. There is no mention of any such language in Article 51. Therefore, a reading of Article 51 to include preemptive self-defense must apply to any form of anticipated armed attack. This reading, as Israel has shown in 2007 and as the United States has shown in its invasion of Iraq in 2003, can be abused in the name of state-interest.²⁹⁴ Second, a reading of self-defense that includes preemptive self-defense still may not be able to prevent a nuclear attack by an unstable state. As Kofi Annan expressed in 2003, weapons of mass destruction can be launched at any time, without warning.²⁹⁵ Furthermore, as the IAEA learned from Dr. A.Q. Khan, inspections may not reveal massive and complex weapons programs or black-markets for nuclear proliferation. If a state such as North Korea or a terrorist group who has acquired nuclear technology from Pakistan decides tomorrow to launch a nuclear attack against the United States, we may not know its origin until the dust has settled and hundreds of thousands are dead.

Rather, a literal reading of Article 2(4) that does not prohibit the use of force nor violate territorial integrity or political independence should be used to justify attacks on nuclear facilities or arsenals of highly unstable states before those nuclear weapons can be used. Of course, this would not be positive law requiring the use of such force, but if enough evidence has been obtained and policy considerations warrant the use of such force, Article 2(4) should not prohibit the resulting strikes. The line will be hard to draw, when and where to strike against nuclear facilities or arsenals, but that is a discussion for policy-makers and foreign affairs experts. It may very well be that the evidence suggests that none of the above-mentioned states, as of yet, has become so dangerous and unstable as to warrant a strike. But when the day comes that the dangers associated with a certain nuclear regime are too high to ignore, Article 2(4) should not stop a state from using force to disarm such a regime of its nuclear weapons.

IV. CONCLUSION: A CAUTIONARY NOTE

An interpretation of Article 2(4) that would provide for certain exceptions to the prohibition of the use of force would be preferable to an expansive interpretation of Article 51. In addition to authorizing the use of force against transnational terrorist organizations, such an interpretation would preserve the U.N.'s legitimacy, curb future human rights abuses of massive scale, and possibly prevent nuclear catastrophe. Under such a reading, if a State's use of force does not literally violate another State's

294. See Erlanger, *supra* note 288.

295. See Secretary-General Address, *supra* note 254.

territorial integrity or political independence, and is supported by a majority vote in the General Assembly, it would likely be lawful. This would account for the many complicated scenarios unanticipated by the drafters of the U.N. Charter.²⁹⁶ It would also allow for the use of force when the Security Council is paralyzed, and no right to self-defense exists. This approach would be better suited for the complicated global environment that exists today.

Because the use of force should always be regarded as a measure of last resort, it is critical that authorization to use force is carefully regulated. For instance, the use of force under Article 2(4) should be considered lawful only if the General Assembly votes by a substantial majority in favor of force *and* the I.C.J. recognizes the lawful use of force in an actual dispute.

In Pakistan, as anti-American sentiment is running particularly high, the use of drones should be carefully evaluated. Although the laws of war accept a certain small percentage of civilian casualties when an enemy combatant is targeted, there would be *no* civilian casualties if measures short of the use of force were effective.²⁹⁷ If there is any chance that law enforcement or any other measures are able to deter the threat posed by the Pakistani Taliban, al-Qaeda, or both, then those actions should be taken and exhausted before considering the use of force.²⁹⁸

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296. Including transnational terrorist organizations, unstable nuclear regimes, and humanitarian interventions.

297. *See generally* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

298. *See* Karen DeYoung, *Karzai Talks of Reconciliation*, WASH. POST, Jan. 29, 2010, at A10 (Karzai stating, “[w]e must reach out to all of our countrymen, especially our disenfranchised brothers [the Taliban].”).