

THE SECURITY COUNCIL AND SELF-DEFENCE: WHICH WAY TO GLOBAL SECURITY?

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Article 51 of the Charter prescribes that all States, if attacked, retain the inherent right of self-defence. But until now it has been understood that when States go beyond that, and decide to use force to deal with broader threats to international peace and security, they need the unique legitimacy provided by the United Nations.

Now, some say this understanding is no longer tenable, since an “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, they 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.

My concern is that, if it were to be adopted, it could set precedents that resulted in a proliferation of the unilateral and lawless use of force, with or without justification.

But it is not enough to denounce unilateralism, unless we also face up squarely to the concerns that make some States feel uniquely vulnerable, since it is those concerns that drive them to take unilateral action. We must show that those concerns can, and will, be addressed effectively through collective action.

Excellencies, we have come to a fork in the road. (...)

Now we must decide whether it is possible to continue on the basis agreed then, or whether radical changes are needed.¹

Introduction

It was the very aim of the UN Charter to severely limit unilateral military action, and to place decisions on the use of force primarily in the collective hands of the Security Council. But the less the Security Council is able (or is seen to be able) to deal with

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¹ Kofi Annan, Address to the General Assembly, New York, 23 September 2003; at <http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm>.

international crises, the more do the norms that constrain unilateral use of force come under pressure. This dynamic has played out on numerous occasions, for example with respect to “humanitarian intervention” in Kosovo,² or, to use more recently promoted terminology, the “responsibility to protect.”³ Propelled by the events of 11 September 2001, an even more charged debate is now underway about the new security threats that face the world, about the linkages between these threats and failing or ‘rogue’ states that trample the human rights of their own populations, and about the ability of international law to meet the multi-faceted challenges posed by these phenomena. The US-led intervention in Iraq further fuelled discussions on the adequacy of the Charter framework and the proper scope for unilateral use of force.⁴ Indeed, some governments and political leaders have explicitly challenged the legal *status quo*. Most notably, in its 2002 *National Security Strategy*, the US government asserts that the confluence of weapons of mass destruction (WMD), global terrorist networks and rogue states requires that it be able to use force preventively to eliminate emerging threats.⁵ The British Prime Minister, Tony Blair, has also spoken of the need to adjust international law in the light of the complex new threats, including their linkages to humanitarian crises. In a March 3, 2004 speech he said of Iraq:

It may well be that under international law as presently constituted, a regime can systematically brutalise and oppress its people and there is nothing anyone can do, when dialogue, diplomacy and even sanctions fail, unless it comes within the definition of a humanitarian catastrophe (though the

² See eg. Editorial Comments, “NATO’s Kosovo Intervention,” (1999) 93 *AJIL* 824-862.

³ International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, December 2001; at www.dfaity-maeci.gc.ca/iciss-ciise/report-en.asp.

⁴ See eg. contributions to “Agora: Future Implications of the Iraq Conflict,” (2003) 97 *AJIL* 553-642; and to (2003) 14 *EJIL* 209-378.

⁵ National Security Strategy of the United States of America (September 2002), at 13-16; at www.whitehouse.gov/nsc/nss.pdf [hereinafter NSS].

300,000 remains in mass graves already found in Iraq might be thought by some to be something of a catastrophe). This may well be the law, but should it be?⁶

Other governments have been more circumspect,⁷ but many do not appear to have great appetite for a significant redrawing of the boundaries for unilateral military action.⁸ G77 governments are on record as resisting a more interventionist approach, notably in the humanitarian context.⁹ Nonetheless, the question of international law reform is plainly on the table, not least at the United Nations. In his fall 2003 speech to the General Assembly, UN Secretary-General Kofi Annan announced the creation of a high level “Panel on Threats, Challenges and Change” to squarely face the normative and policy tensions in the Charter framework. The panel was mandated to: (i) examine today’s global threats and future challenges to international peace and security, including the connections between them; (ii) identify the contribution that collective action can make in addressing these challenges; and (ii) recommend the changes necessary to ensure

⁶ “PM warns of continuing global terror threat,” 5 March 2004; at www.number-10.gov.uk/output/page5461.asp [hereinafter Sedgefield Speech]. See also *infra*, note 67 and accompanying text.

⁷ See *eg.* Colleen Swords (Legal Adviser to the Canadian Department of Foreign Affairs and International Trade), Address to Canadian Bar Association Conference on International Law, Ottawa, June 5, 2003 (concluding that it is “too early to draw definite conclusions, but there are clearly some challenges for public international law and foreign policy apparent from the debates and events of the past months”) (on file with author).

⁸ The Security Council debates surrounding the 2003 invasion of Iraq suggest that many governments are reluctant to endorse a more interventionist legal course. Some governments specifically stated their views on the state of international law, concluding that the invasion violated international law. See *eg.* Legal Department of the Ministry of Foreign Affairs of the Russian Federation, “Legal Assessment of the Use of Force Against Iraq,” (2003) 52 *ICLQ* 1059; and Statement of the Swiss Federal Council of 20 March 2003, quoted in Philippe Sands, “International Law and the Use of Force,” in U.K. House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the War Against Terrorism, Vol. II: Oral and written evidence*, Seventh Report of Session 2003-04 (29 July 2004), Ev 91, at Ev 96 (para. 31).

⁹ See *eg.* *Declaration of the Group of 77 South Summit*, Havana, Cuba, 10-14 April 2000; at www.g77.org/Docs/Declaration_G77Summit.htm [hereinafter Havana Declaration]. In this document the group, which comprises 133 states, declared: “We reject the so-called “right” of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law.” (at para. 54). See Michael Byers, “The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq,” (2002) 13 *EJIL* 21, at 28.

effective collective action, including a review of the principal UN organs.¹⁰ The panel's report was published in December 2004.¹¹ It contains a number of important observations on the international legal framework and suggestions for the reform of the collective security system, which I will address at relevant points in this paper.

One may say that the current debate is simply one more in a series of similar bouts of questioning, prompted by this or that crisis, and likely to fade with the memory of the event. However, the combination of the developments since the unprecedented terrorist attacks of September 11th, 2001 and the norm entrepreneurship by leading states suggests that we are indeed at a fork in the road. I agree with the Secretary General's assessment that we "must decide whether it is possible to continue on the basis agreed [in the UN Charter], or whether radical changes are needed."¹² The important point is that, either way, the consensus on the international framework governing the use of force must be renewed. States that see the need for a radically new framework clearly bear the onus of making the case for change, and forging consensus on new norms. But this does not mean that states that see the compact enshrined in the UN Charter as sound can simply rest on the *status quo*. The continuing validity of the Charter framework too must be asserted, and embraced by international society.

¹⁰ See UN Press Release SG/A/857, "Secretary General Names High-Level Panel to Study Global Security Threats, and Recommend Necessary Changes," 4 November 2003; at www.un.org/News/Press/docs/2003/sga857.doc.htm. The panel is expected to report in December 2004.

¹¹ See *A more secure world: our shared responsibility*, Report of the High-level Panel on Threats, Challenges and Change, UN. Doc. A/59/565 (29 November 2004); at <http://www.un.org/secureworld> [hereinafter HLP Report].

¹² Annan, *supra*, note 1.

I want to address the underlying question - whether or not the international use of force framework requires change - in several steps. I begin with an assessment of the role of the Security Council and of the adequacy of the collective security system that it anchors. I then turn to the debate on the adequacy of the existing self-defence regime. First, I address the question whether states should be entitled to preventive self-defence. Second, I examine whether the concept of armed attack and attendant rules of attribution must expand to allow states to defend themselves against terrorist attacks. Third, I turn to the question whether the right to self-defence should be adjusted to reflect the linkages between security issues, humanitarian issues, and states' profiles as 'rogue' or 'failing,' linkages that have been stressed in the recent discussions. Finally, I consider the boundaries between states' right to self-defence and Security Council authority drawn in Article 51, boundaries that would be tested far more frequently if the scope of permissible self-defence were to expand.

A. The Security Council and the Adequacy of the Collective Security System

In his address to the General Assembly of September 2002, President George W. Bush called on the United Nations to face up to the threat posed by Iraq. He issued a pointed challenge:

All the world now faces a test, and the United Nations a difficult and defining moment. Are Security Council resolutions to be honored and enforced, or cast aside without consequence? Will the United Nations serve the purpose of its founding, or will it be irrelevant?¹³

With these remarks, the President fanned the debate on the role and performance of the Security Council.¹⁴ As is well known, the Security Council did not adopt a resolution to

¹³ President George W. Bush, Address to the United Nations General Assembly, September 12, 2002; at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>.

specifically authorize the military intervention in Iraq that was undertaken several months after the President's address. And yet, the United Nations and its Security Council have clearly not become irrelevant. Indeed, if anything, the developments leading up to and following the Iraq intervention demonstrate that the Council continues to provide an indispensable forum for the mutual engagement of states, and for deliberation and justification.

Notwithstanding widespread dissatisfaction with its performance over the years, the Security Council has maintained a unique ability to lend legitimacy to international action, including the use of force.¹⁵ This ability derives from the manner in which collective process and substantive assessment are blended in the Council's work.¹⁶ As a matter of process, multilateral checks are imposed on purely self-serving arguments.¹⁷ Rather than permitting unilateral assessments of threats to international peace and security, a discipline was imposed by demanding that a range of states with different social, cultural and political traditions be convinced of the reality of the threat at hand and the utility of forceful intervention.¹⁸ As a matter of substance, a proposed action must

¹⁴ See *eg.* Michael J. Glennon, "Why the Security Council Failed," (May/June 2003) 82 *Foreign Affairs* 16. And see Edward C. Luck, "The End of an Illusion" and Anne-Marie Slaughter, "Misreading the Record" in E.C. Luck, A.-M. Slaughter, and I. Hurd, "Stayin' Alive: The Rumors of the UN's Death Have Been Exaggerated" (July/August 2003) 82 *Foreign Affairs* 201.

¹⁵ See Adam Roberts and Benedict Kingsbury, "The UN's Roles in International Society," in A. Roberts & B. Kingsbury eds., *United Nations, Divided World* (New York: Oxford University Press, 1993) 1, at 57.

¹⁶ See Michael Barnett, "Bringing in the new world order: liberalism, legitimacy, and the United Nations," (1997) 49/4 *World Politics* 526, at 539-43 (reviewing different conceptions of the interplay between procedural and substantive legitimacy of UN action).

¹⁷ See Ian Johnstone, "Security Council Deliberations: The Power of the Better Argument," (2003) 12 *EJIL* 437, at 454. And see Craig Scott, "Interpreting Intervention," (2001) *Canadian Yearbook of Int'l L.* 333, at 337.

¹⁸ See Andreas Paulus, "Antimonies of Power and Law: A Comment on Robert Kagan," (2003) 4/9 *German L.J. (online ed)*, at 16-8; at www.germanlawjournal.com/article.php?id=313.

satisfy a blend of legal, prudential and political assessments.¹⁹ The interplay between collective process and substantive considerations in decisions on the use of force is complex. While Security Council endorsement is an important indicator of legitimacy, it is not sufficient in and of itself. The considerations that animate an individual decision also must resonate with widely shared understandings of international society, and must be attentive to legal norms.²⁰ For example, it is not clear that, on identical facts, the mere formality of a ‘second resolution’ would have legitimized the Iraq intervention. As many observers have noted, in the case of Iraq, the Council actually functioned as intended when, on the available evidence, it declined to authorize a full-scale war against Iraq.²¹ Conversely, the Council’s inaction on Kosovo and the Rwandan genocide, while formally its prerogative, is widely seen as having damaged its credibility.²²

The frustration and tension that were evident during the Security Council debates over Iraq may have helped strengthen the resolve for institutional change. It is in part this hope that animates the decision of the Secretary-General’s High Level Panel to offer suggestions for Security Council reform. Of course, the panel also responded to other pressures, such as the campaigns of certain states for permanent seats and long-standing grievances regarding inadequate representation of large parts of the world on the

¹⁹ See Johnstone, *supra*, note 17, at 452-3 (on the interplay between political and legal factors in Security Council decision-making).

²⁰ See Barnett, *supra*, note 16, at 541-2.

²¹ See *eg.* Thomas M. Franck, “What Happens Now? The United Nations After Iraq,” (2003) 97 *AJIL* 607, at 616; Vaughn Lowe, “The Iraq Crisis: What Now?” (2003) 52 *ICLQ* (2003) 859, at 867.

²² For a detailed discussion, see Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Ithaca: Cornell University Press, 2002).

Council.²³ In its report, the panel outlines two options for Security Council enlargement to a membership of twenty-four states.²⁴ The first option envisages six new permanent seats, along with three additional two-year seats. The second option entails the creation of a new category of eight four-year renewable-term seats, along with one additional two-year seat. The veto power would remain the sole prerogative of the current permanent members. The panel refrained from recommending changes to the Council's voting rules, suggesting only that permanent members "pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses."²⁵

The panel is to be commended for arriving at concrete reform proposals. Nonetheless, change may prove elusive. To achieve meaningful reform, significant concessions would have to be made by a range of states, most notably by the permanent members. But even if one assumes that these ideas could be acceptable to a majority of permanent members, they would likely be highly problematic for the United States, notably in view of its domestic political dynamics.²⁶

And yet, as difficult as institutional reform may be, there is no plausible alternative to the collective legitimization of the use of force through the Security Council, be it inside or outside the United Nations.²⁷ Given its diffuse decision-making authority, the General

²³ On the Security Council reform debate and its difficulties, see *eg.* David M. Malone, "The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the UN Charter," (2003) 35 *New York U J Intl L* 487.

²⁴ HLP Report, *supra*, note 11, at paras. 250-254. The panel also recommends that any new composition of the Council be reviewed again in 2020. *Id.*, at para. 255.

²⁵ *Ibid.*, at para. 256. The panel further proposes the introduction of a system "indicative voting" prior to final votes, so as to enhance the transparency and accountability of the Council. *Id.*, at paras. 257-258.

²⁶ See Malone, *supra*, note 23, at 514, 516.

²⁷ See Barnett, *supra*, note 16, at 540-541.

Assembly lacks an appropriate sense of responsibility in actions relating to the use of force. *Ad hoc* ‘coalitions of the willing’ often lack neutrality and therefore legitimacy. Suggestions that a more permanent ‘coalition of liberal democratic states’ might serve as a supplementary decision-making body to authorize the use of force when the Security Council is paralyzed are also problematic.²⁸ Developing states have long fought the notion that there is a core group of ‘civilized states’ that provides the sole model for states that seek international credibility. The idea also undermines the pluralist aspirations of international law, and the diversity of its sources. A banding together of a coalition of democratic states would only further poison international relations.

However, the human rights records and internal legitimacy of regimes are not beyond international scrutiny. Human rights regimes call states to account, albeit less forcefully than many advocates would wish. These modest human rights gains must be brought to bear on the functioning of the UN system itself, and must shape its ethos. If the UN is to uphold all of its purposes, not only those related to the preservation of international peace and security, the principle of sovereign equality requires tempering. States with egregious human rights records should be excluded from some UN bodies, and in some extreme cases, from the UN itself. UN members should develop minimum standards of human rights and governmental legitimacy to flesh out Article 4 of the UN Charter. Articles 5 and 6, which allow for the suspension of membership or expulsion of a state

²⁸ See eg. Anne-Marie Slaughter, “Notes from the President: A Fork in the Road,” *American Society of Intl L Newsletter* (2003:Sept/Oct) 1, at 4 (suggesting a ‘caucus of democracies’ or other ‘alternative fora of discussion in the UN, and perhaps ultimately of legitimation for action taken by some sub-set of UN actors’); and Allen Buchanan and Robert O. Keohane, “The Preventive Use of Force: A Cosmopolitan Institutional Perspective,” (2004) 18 *Ethics & International Affairs* 1, at 17-8, 33 (on the need to design institutions governing the use of force so as to ensure ‘moral reliability,’ and suggesting that one option would be the creation of a ‘rule-governed, treaty-based, liberal democratic coalition whose functions would include the authorization of preventive force’).

that has persistently violated the principles contained in the Charter, should sometimes be applied.²⁹

Furthermore, where human rights abuse escalates into grave crisis, such as large scale ethnic cleansing or genocide, the Security Council must be able to mobilize international action. It is increasingly argued that, in such extreme cases, the principle of non-intervention must yield to a “responsibility to protect” particularly threatened populations.³⁰ In its 2001 report, the Canadian sponsored International Commission on State Sovereignty and Intervention (ICISS) outlines a constructive proposal.³¹ The report emphasizes the overriding importance of a wide spectrum proactive measures and assistance to local governments in discharging their responsibility to protect, as well as of non-forcible forms of pressure. But it also offers a set of carefully crafted threshold criteria for recourse to military means where “serious and irreparable harm occurring to human beings, or imminently likely to occur.” These criteria offer a plausible starting point for developing guidelines to assist the Security Council in determining when a humanitarian crisis constitutes a threat to international peace and security, and in deploying force when it is needed for human protection.³² Clearly, such guidelines

²⁹ See Tracey A. Basler, “Keep Your Friends Close, and Your Enemies... Iraq: A Case Study of the Expulsion Provision of the United Nations Charter,” (2003) 9 *New England J Intl & Comparative L* 259.

³⁰ See eg. Joelle Tanguy, “Redefining Sovereignty and Intervention,” (2003) 17/1 *Ethics & International Affairs* 141. For recent government commentary, see eg. Jack Straw, “Shaping a Stronger United Nations,” Speech at Chatham House, 2 September 2004. See also “Canadian Non-Paper on *The Responsibility to Protect* and the Evolution of the United Nations’ Peace and Security Mandate: Submission to the UN High Level Panel on Threats, Challenges and Change,” (May 2004) paras. 4.1-4.2; at http://www.dfait-maeci.gc.ca/canada_un/HLP_submission-en.asp [hereinafter Canadian Non-Paper].

³¹ ICISS, *supra*, note 3.

³² On the idea of guidelines see also Canadian Non-Paper, *supra*, note 30, at 5.1-5.3; Tony Blair, “Doctrine of the International Community,” Speech to the Economic Club of Chicago, 22 April 1999, cited in Straw, *supra*, note 30 (suggesting a renewed focus on the guidelines for humanitarian intervention proposed by Tony Blair in his 1999 speech); (Dutch) Advisory Council on International Affairs (AIV) & Advisory Committee on Issues of Public International Law (CAVV), *Humanitarian Intervention* (2000), at 27-32

would not be a miracle cure for lacking political will, nor for political differences. However, they would help discipline deliberations and demand focused justification of the need for military intervention, its appropriateness and its likelihood of success.³³ The ICISS report also addresses questions of “right authority” and identifies the Security Council as the most appropriate body for decisions on military intervention for human protection purposes.³⁴ To enable Council action, the ICISS suggests that permanent members agree to a “code of conduct” for the use of the veto concerning actions needed to stop or avert a significant humanitarian crisis. Essentially, in matters that do not involve its vital national interests, a permanent member would “not use its veto to obstruct ... what would otherwise be a majority decision.”³⁵

It is not clear that it will be possible to overcome the deep-seated concerns that many developing countries have with respect to the notions of a responsibility to protect and the concept of humanitarian intervention.³⁶ It remains to be seen whether the developments since September 11th have served to soften the long-standing resistance to the idea, or

(recommending the development of an assessment framework). While the British, Canadian, and Dutch governments thus seem to be supportive of guidelines, resistance to the proposal is not limited to developing countries, or Russia and China. On the hesitant attitude of the United States, see Jane Stromseth, “Rethinking humanitarian intervention: the case for incremental change,” in J.L. Holzgrefe & R.O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003) 232, at 263-264.

³³ See also AIV & CAVV, *ibid.*, at 27-28. For a more skeptical assessment of the utility of guidelines, see Stromseth, *ibid.*, at 263-267.

³⁴ ICISS, *supra*, note 3, at xii, 47-55. However, the ICISS report also reminds the Security Council that “if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation.” *Id.*, at xiii.

³⁵ *Ibid.*, at xiii, 51.

³⁶ Many weaker states fear the premise of redefining sovereignty that underlies both the notion of humanitarian intervention and the idea of a responsibility to protect. See Shashi Tharoor, “Humanitarian Intervention: Principles, Problems and Prospects,” Presentation the Wilton Park Conference *Humanitarian Intervention? How Can We Do Better?* Wilton Park, UK, February 19-23, 2001; at <http://web.gc.cuny.edu/icissresearch/Wilton.Park.Tharoor.htm> (quoting President Bouteflika of Algeria, calling sovereignty “our last defense in an unequal world”). See also Havana Declaration, *supra*, note 9.

have reinforced it. Furthermore, the most recent debates about the crisis in Darfur suggest that resistance to a more assertive international approach also continues to come from permanent members of the Security Council, notably Russia and China. Their stance on Sudan casts doubt on the feasibility of institutional reforms, such as the ICISS proposal regarding the use of the veto in the humanitarian context.

Nonetheless, the report of the UN High Level Panel draws extensively on ICISS' recommendations. The panel specifically endorses "the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort."³⁷ Indeed, in building on the ICISS criteria, the panel outlines "five basic criteria of legitimacy" for the Council to consider in making decisions on the use of military force, be it to deal with external threats to states' security or to address grave humanitarian crises within states. These criteria, which the panel suggests should be "embodied in declaratory resolutions of the Security Council and the General Assembly," are: seriousness of threat, proper purpose, last resort, proportional means and balance of consequences.³⁸ The panel also took up the ICISS suggestions regarding the exercise of the veto. As already noted in the context of Security Council reform, the panel recommends that veto-bearing members refrain from blocking Council action in situations involving genocide and large-scale human rights abuses.

³⁷ HLP Report, *supra*, note 11, at para. 203.

³⁸ *Ibid.*, at paras. 207-208. For a discussion of the idea of over-arching criteria for decisions on the use of military force, see Gareth Evans, "When is it Right to Fight?" (2004) 46 *Survival* 59.

B. The Adequacy of the Existing Self-Defence Regime

What, at cursory glance, might look like a straightforward and sensible division of powers between the Security Council and individual states is, of course, inextricably and uneasily intertwined. Fundamental normative and legal policy issues are embedded in the push and pull between the aspiration of collective security and assertions of individual security needs. The less the Security Council is perceived to address such individual concerns, the more there is pressure to loosen the constraints on states' right to self-defence. There are various strands to the current debate on the adequacy of the existing self-defence regime. I canvass four of the central issues.

1. A Right to Preventive Self-Defence?

Pursuant to the “inherent right of individual or collective self-defence” expressed in Article 51 of the *Charter*, states may use force to respond to an “armed attack.” Customary international law that exists in parallel with the *Charter* permits anticipatory action to the extent that it is necessary to prevent an imminent attack.³⁹ In light of the continued questioning of the validity of this latter conclusion, it is important that the UN High Level Panel report simply observes that “a threatened State, according to long-established international law, can take military action as long as the threatened attack is

³⁹ This position is taken by a large number of states and has wide support among international lawyers. See Memorandum prepared by Christopher Greenwood, “The Legality of Using Force Against Iraq,” in U.K. House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the War Against Terrorism*, Second Report of Session 2002-03 (24 October 2002) Ev 17, at Ev 20. Greenwood refers to the policies of the United Kingdom and of a “large number of other governments (including those of the USA, France, other NATO states and the former USSR),” and to the views of prominent international lawyers, including several former Presidents of the International Court of Justice. See also Swords, *supra*, note 7. Nonetheless, the legality of anticipatory self-defence does remain contested. See *eg.* Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963), at 257-261; Albrecht Randelzhofer, “Article 51,” in B. Simma *et al.*, eds., *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 2002) 788, at 803.

imminent, no other means would deflect it and the action is proportionate.”⁴⁰ These parameters of the customary law right of anticipatory self-defence were first enunciated in the 1842 *Caroline* incident between Britain and the United States. In a letter to his British counterpart, U.S. Secretary of State Daniel Webster described anticipatory self-defence as strictly limited to cases involving “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”⁴¹ The criteria for the limitation of anticipatory self-defence – and self-defence generally speaking – that were outlined in the *Caroline* case remain valid today.⁴² Thus, although customary law does extend the margin of appreciation surrounding the right to self-defense, it does not allow for entirely self-serving claims. There must be convincing evidence of a future attack.⁴³ The fact that anticipatory self-defense must be assessed against the criteria of necessity and proportionality imposes further external measures of evaluation.

Permissible anticipatory self-defence does not encompass “threat pre-emption” or, for greater clarity, a purely “preventive” war. This conclusion is widely shared among legal

⁴⁰ HLP Report, *supra*, note 11, at para. 188 (emphasis in original).

⁴¹ Letter from Daniel Webster to Lord Ashburton, Aug. 6, 1842, 2 *Digest of International Law* (J.B. Moore, ed., 1906) 412.

⁴² On the continuing relevance of the *Caroline* formula, see Nico Schrijver, “Responding to International Terrorism: Moving the Frontiers of International Law for ‘Enduring Freedom’?” (2001) XLVIII *NILR* 271, at 283. See also Greenwood, *supra*, note 39. An illustration of the continuing validity of the *Caroline* principle is found in states reactions to Israel’s 1981 bombing of the Osiraq reactor. While the bombing was condemned as illegal, many states’ responses suggest that anticipatory action meeting the *Caroline* test could have been lawful. See *eg.* the Canadian response, reproduced in (1982) 20 *Can. Y.B. Int’l L.* 303. See also U.K. House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the War Against Terrorism*, Second Report of Session 2002-03 (24 October 2002), at para. 257.

⁴³ See *eg.* Mary-Ellen O’Connell, “The Myth of Preemptive Self-Defence,” Task Force on Terrorism Papers (American Society of International Law, 2002) at 9; at <http://www.asil.org/taskforce/oconnell.pdf> (stressing the need for clear evidence of a pending attack).

scholars and government lawyers,⁴⁴ and is echoed in the High Level Panel report.⁴⁵ In this context, it is also important to note that threat pre-emption, as outlined in the 2002 US *National Security Strategy*,⁴⁶ is not an expansion by analogy of an existing category. It is the launching of a new concept, one that cannot provide any effective normative guidance. Threat pre-emption, or preventive war, may superficially seem to be a legal norm, but it is actually no norm at all because it leaves the assessment of danger entirely in the hands of a self-interested actor, the state claiming the right to pursue a preventive war. In addition, a right to preventive war actually has the perverse effect of turning “rival states into potential threats to each other by permitting preventive invasion of potential adversaries based on risk calculations whose indeterminacy makes them inherently unpredictable by the adversary.”⁴⁷

In any case, threat pre-emption is an unnecessary concept. The existing concept of “imminent attack” is sufficiently flexible to accommodate those instances in which individual states must act to defend themselves against pending terrorist attacks or tangible threats posed by WMD, always assuming the existence of credible and clear evidence.⁴⁸ The Legal Adviser to the US State Department, William Taft IV, appeared to

⁴⁴ See *eg.* O’Connell, *ibid.*, at 2, 11; Greenwood, *supra*, note 39; Franck, *supra*, note 21, at 618-620. And see *eg.* Lord Goldsmith, Statement in the U.K. House of Lords, 21 April 2004, cited in Sands, *supra*, note 8, at Ev 92-93 (“...international permits the use of force in self-defence against an imminent attack but does not authorize the use of force to mount a pre-emptive strike against a threat that is more remote”); Swords, *supra*, note 7 (observing that “given the quite divergent views of governments, it seems unlikely that any of the views could be considered as representing state practice sufficient to have evolved into customary international law”).

⁴⁵ HLP Report, *supra*, note 11, at paras. 188-191. The panel couches this conclusion in suitably diplomatic terms, but the implication is clear.

⁴⁶ NSS, *supra*, note 5.

⁴⁷ See David Luban, “Preventive War,” (2004) 32 *Philosophy & Public Affairs* 207, at 227.

⁴⁸ See Miriam Sapiro, “The Shifting Sands of Preemptive Self-Defense,” (2003) 97 *AJIL* 599, at 605; Sands, *supra*, note 8, at Ev 93.

share this assessment in a memorandum written prior to the Iraq intervention.⁴⁹ He brought the controversial concept of ‘pre-emptive strike’ within the “traditional framework,” stressing that “a preemptive use of proportional force is justified only out of necessity.”⁵⁰ He added that “necessity includes both a credible, imminent threat and the exhaustion of peaceful remedies.” Indeed, “[w]hile the definition of imminence must recognize the threat posed by weapons of mass destruction and the intentions of those who possess them, the decision to undertake any action must meet the test of necessity... in the face of overwhelming evidence of an imminent threat, a nation may take preemptive action to defend its nationals from unimaginable harm.”⁵¹ However, in light of the reference to “unimaginable harm,” it is important to underline Taft’s emphasis on the need for “overwhelming evidence of an imminent threat.” If the emphasis were to shift to the possibility of “unimaginable harm” or “catastrophic attack,”⁵² there would in fact be a move from anticipatory self-defence to preventive self-defence. Beyond the fundamental questions about preventive self-defence that were raised above, efforts to circumscribe it primarily with reference to the possibility of unimaginable harm or catastrophic attack raise further concerns. As the U.K. Foreign Affairs Committee observed in a July 2004 report:

Since a potentially catastrophic attack ... is by its very nature out of all proportion, a proportional response could potentially be catastrophic in its own right. As a result, quantifying and even

⁴⁹ William H. Taft IV, “Memorandum: The Legal Basis for Preemption,” 18 Nov 2002; at www.cfr.org/publication.php?id=5250 [hereinafter ‘Memorandum’]. But see also William H. Taft IV & Todd F. Buchwald, “Preemption, Iraq, and International Law,” (2003) 97 *AJIL* 557 (offering a more open-ended conception of the legality of pre-emptive strikes).

⁵⁰ Taft, Memorandum, *ibid*, at 1.

⁵¹ *Ibid.*, at 3.

⁵² See Daniel Bethlehem, “International Law and the Use of Force: The Law as It is and as It Should Be,” in U.K. House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the War Against Terrorism, Vol. II: Oral and written evidence*, Seventh Report of Session 2003-04 (29 July 2004), Ev 100, at Ev 107.

curtailing a state's right to a 'proportional' response ... is a major challenge for the international legal system.⁵³

To conclude this brief overview of the preventive war debate, Article 51 and complementary customary law remain broadly adequate to delimit unilateral military responses to security threats. They strike a fundamentally appropriate balance between competing values and policies, including domestic political and cultural autonomy, and the need to limit the exposure of civilian populations to war. The Security Council's collective process remains the most appropriate forum for deliberation and legitimation of responses to more remote security threats. While those responses will sometimes have to involve military intervention, more often than not inspection regimes, counter-proliferation efforts or international counter-terrorism commitments will be both more appropriate and more effective. And in all these cases, a collective response will be far stronger than actions by individual states or *ad hoc* coalitions.

Perhaps not surprisingly, these are also the conclusions of the UN High Level Panel report. It denies the need for and appropriateness of a "rewriting or reinterpretation of Article 51," suggesting that Security Council authority under Chapter VII of the UN Charter is broad enough to deal with situations where the use of force may be required "not just reactively but preventively and before a latent threat becomes imminent."⁵⁴ As noted earlier in the discussion of the collective security system, the panel proposed

⁵³ U.K. House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the War Against Terrorism*, Vol. I, Seventh Report of Session 2003-04 (29 July 2004) at 141 (para. 427).

⁵⁴ HLP Report, *supra*, note 11, at paras. 192, 194. See also paras. 193-198.

specific criteria for the Council to consider in making decisions on the use of military force, including in circumstances of preventive action.⁵⁵

2. Armed Attack and Non-State Actors

Although the overall balance struck by the self-defense regime remains adequate, some specific changes are needed. An initial question is whether terrorist attacks as such can constitute armed attacks within the meaning of Article 51, or whether such attacks must by definition be those of another state. While the wording of Article 51 does not explicitly include the latter requirement, it has been commonly understood to be implicit.⁵⁶ The International Court of Justice confirmed this reading in its recent Advisory Opinion on the Israeli Separation Barrier.⁵⁷ But the requirement of a state attack is increasingly contested, notably in light of Security Council resolution 1368 (2001), which “reaffirmed” the right to self-defence in the context of the terrorist attacks of September 11, 2001.⁵⁸

However, it is one question whether the right to self-defence can be exercised against terrorist attackers or not. Another is the question of the circumstances in which force can be used in or against another state to defend against a terrorist attack.⁵⁹ Since inter-state

⁵⁵ See *supra*, note 37 and accompanying text.

⁵⁶ See Frédéric Mégret, “‘War’? Legal Semantics and the Move to Violence,” (2002) 13 *EJIL* 361, at 379.

⁵⁷ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, at para. 139.

⁵⁸ See U.N. Doc. S/RES/1368, 12 September 2001, preamble. See also *ibid.*, Separate Opinion of Judge Higgins, at para. 33; and Separate Opinion of Judge Buergenthal, para. 6. See also Thomas M. Franck, “Terrorism and the Right to Self-Defence,” (2001) 95 *AJIL* 839, at 840; Schrijver, *supra*, note 42, at 285.

⁵⁹ See also Schrijver, *ibid.*, at 285-286. Carsten Stahn, “Nicaragua is dead, long live Nicaragua - the Right to Self-defence under Art. 51 UN Charter and International Terrorism,” in C. Walter et al, eds., *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Berlin: Springer Verlag, 2003), at 24-28 [Cited to <http://www.edoc.mpi.de/conference-on-terrorism/present/stahn.pdf>].

force may be used only in self-defence, military action against another state will require that the state is implicated in the relevant attack. And it is precisely with respect to the nature of the link between the target state of a self-defence action and perpetrators of attacks, such as terrorists, that certain adjustments to the self-defence regime are required. The *Nicaragua* decision of the International Court of Justice required agency, assessing the use of force within the framework of state-responsibility.⁶⁰ State practice and *opinio juris* since September 11th suggest that a shift away from this approach is underway.⁶¹

Given the dangers of global terrorism, the issue of state support cannot be adequately addressed within the framework of state responsibility, which envisages non-forceful countermeasures.⁶² Instead, when a state is supporting terror, either directly or through acquiescence, the appropriate framework is that of self-defense. Of course, the threshold requirement of an armed attack or an imminent threat must remain applicable. Further, in establishing the necessary link between terrorists and a state for the purposes of self-defence, while proof of agency should no longer be required, one would need to show more than that terrorists are found on the state's territory.⁶³ 'Harbouring' terrorists should not be a reason to invoke self-defense unless it amounts to at least tacit approval

⁶⁰ See *Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v United States of America*) (Merits), ICJ Reports (1986) 14 [hereinafter *Nicaragua*]. For a good overview on the traditional interplay between the law of self-defence and the law of state responsibility, see Mégret, *supra*, note 56, at 381-384.

⁶¹ See eg. Steven R. Ratner "Jus ad Bellum and Jus in Bello after September 11," (2002) 96 *AJIL* 905, at 908-10; Stahn, *supra*, note 59, at 5-12, 24-25.

⁶² *The Corfu Channel Case (Merits)*, ICJ Reports (1949) 4, at 22-3; International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (adopted at the 53rd session, November 2001), Arts. 49-50. See generally Greg Travalio & John Altenburg, "State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility and the Use of Military Force," (2003) 4 *Chicago J Intl L* 97, at 102-111.

⁶³ See Schrijver, *supra*, note 42, at 286 (cautioning against undue loosening of the required link).

of terrorist attacks.⁶⁴ Proof of direct support or at least tacit approval should be required. Tacit approval could be shown by a refusal to apprehend and to hand over terrorist suspects that have been identified within the borders of a state. States without any effective government may be an exception. In cases of 'state failure', the simple presence of terrorists may be enough to justify a carefully targeted armed response, addressed at the terrorists alone. This approach would indeed involve a limited extension of self-defense to resist the armed attacks or imminent attacks of non-state actors, but only in the rare situations where state authority is absent.

The evidentiary requirements outlined above closely parallel the more general considerations that restrict self-defence to actions that are both necessary and proportionate. Military action is permissible only when no other reasonable way exists to remove the terrorist threat. Unless the threat is grave and imminent, force cannot be used unless the harbouring state has been given the opportunity to remove the threat from its territory.⁶⁵ In addition, the level of support provided to terrorist organizations by a harbouring state determines the proportional and thus permissible military response. If a state merely allowed its territory to be used but provided no active support, defensive use of force would be limited to targeting the terrorist threat itself, rather than attacking the harbouring state or its infrastructure. However, if the harbouring state provided significant material or logistical support, the facilities and personnel directly engaged in providing that support could be subject to defensive action.⁶⁶

⁶⁴ See Travalio & Altenburg, *supra*, note 62, at 111-113.

⁶⁵ *Ibid.*, at 112-114.

⁶⁶ *Ibid.*, at 112.

3. *Self-Defence and Issue Linkage*

The debate over responses to global terrorism has raised difficult questions about the interplay of security concerns, human rights, democratic governance, and the use of force. In his March 2004 speech at Sedgefield, Tony Blair put it as follows:

September 11th was for me a revelation. What had seemed inchoate came together. ... From September 11th on, I could see the threat plainly. Here were terrorists prepared to bring about Armageddon. Here were states whose leadership cared for no-one but themselves; were often cruel and tyrannical towards their own people; and who saw WMD as a means of defending themselves against any attempt external or internal to remove them and who, in their chaotic and corrupt state, were in any event porous and irresponsible with neither the will nor capability to prevent terrorists who also hated the West, from exploiting their chaos and corruption....

Containment will not work in the face of the global threat that confronts us. The terrorists have no intention of being contained. The states that proliferate or acquire WMD illegally are doing so precisely to avoid containment. Emphatically I am not saying that every situation leads to military action. *But we surely have a duty and a right to prevent the threat materialising; and we surely have a responsibility to act when a nation's people are subjected to a regime such as Saddam's.* Otherwise, we are powerless to fight the aggression and injustice which over time puts at risk our security and way of life.⁶⁷

It can hardly be denied there are linkages amongst humanitarian crises, repressive regimes, collapsing states, terrorism and international security threats. It is equally clear that, effective policy responses must carefully consider and address these linkages. However, when it comes to military interventions, it remains crucial that they be justified on grounds that relate to the problems that one is seeking to alleviate.⁶⁸ Neither effective decision-making on the use of force nor international law is aided by merging all of these issues. In particular, great caution is warranted in importing such issue linkage into the self-defence regime, as the US *Security Strategy* appears to propose by 'profiling' threatening states through a blend of human rights, governance, and security criteria.⁶⁹

⁶⁷ Sedgefield Speech, *supra*, note 6 (emphasis added).

⁶⁸ See Lowe, *supra*, note 21, at 861.

⁶⁹ NSS, *supra*, note 5, at 13-16 (describing the features of a 'rogue state' and outlining a doctrine of preemption). But see Ruth Wedgwood, "The Fall of Saddam Hussein: Security Council Mandates and

At the level of public rhetoric, linkages were also made in the *ex post facto* justifications for the Iraq war, blending self-defense, global security, pro-democracy and liberation arguments.⁷⁰ Although the legal justification for the war was based on a set of Security Council resolutions,⁷¹ the parallel public rhetoric could be read as part of an effort advocating new parameters for self-defence. Judging from his Sedgefield speech, it would seem that the British Prime Minister is at the very least asking whether such new parameters are required.⁷²

To reiterate, the questions raised by complex issue linkages are clearly important ones. However, in the context of the rules on the use of force, there is great danger that, when issues are merged into a global super-threat, war is too easily justified as defensive and placed beyond challenge. The contours of the ‘threat’ that demanded response become unclear, and categories of justification are merged, confused and ultimately disabled.

Legal norms are typically applied by analogy to a broader framework of norms and to past practices that circumscribe plausible interpretation.⁷³ Legal norms are not self-

Preemptive Self-Defense,” (2003) 97 *AJIL* 576, at 584 (suggesting that the Security Strategy is merely “a political doctrine, not a legal exegesis”).

⁷⁰ See generally George W. Bush, Address to the UN General Assembly, 23 September 2003; at www.whitehouse.gov/news/releases/2003/09/20030923-4.html; Tony Blair, “PM thanks troops in Iraq,” 29 May 2003; at www.number-10.gov.uk/output/Page3781.asp.

⁷¹ See eg. Permanent Representative of the United States of America to the United Nations (JD Negroponte), ‘Letter to the President of the United Nations Security Council’, 20 Mar 2003, UN Doc S/2003/351; at www.un.int/usa/s2003_351.pdf. The letter relies primarily on Security Council authorization and makes only vague reference to self-defense, suggesting that the actions of coalition forces were “necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area.”

⁷² This question has also been pursued by academic commentators, notably in the United States. See eg. Buchanan and Keohane, *supra*, note 28; Lee Feinstein & Anne-Marie Slaughter, “A Duty to Prevent,” (2004) 83/1 *Foreign Affairs* 136.

⁷³ See Lowe, *supra*, note 21, at 861-864 (speaking of ‘coherence’ of a given claim with existing law).

applying, but neither are they infinitely malleable.⁷⁴ It is not enough that ‘an argument’ can be made; the argument must have the power to convince. But to discharge their evaluative function and to impose justificatory discipline, legal categories must retain relative normative clarity and coherence. That is exactly why international law requires more specific, testable claims and why the continuing validity of the legal framework of self-defence must be reaffirmed. It is crucial, therefore, to maintain the distinctions among the questions that international law currently asks, and the justifications it requires. Is a given war justified as self-defense? Is a state claiming a threat to international peace and security that would normally require Security Council action?⁷⁵ I would add a third question: is there a “responsibility to protect” particularly threatened populations in a third state?

I highlight the latter question again in this context because the issues raised by the responsibility to protect include not just the difficult question of how one might enable the Security Council to deploy force for human protection when it is needed.⁷⁶ As just suggested, we confront a significant danger that clarity of purpose and the necessary ability of legal norms to demand justification will be lost if we allow the merging of all use of force justifications into one overarching security threat. Thus, although there are good reasons to worry about the potential scope of humanitarian intervention, and its

⁷⁴ Johnstone, *supra*, note 17, at 448-50, 475-6.

⁷⁵ It would appear that the British government is advocating that the issue linkages raised by contemporary security threats be considered in this context, and that the avenues for collective intervention be improved. See Straw, *supra*, note 30.

⁷⁶ See *supra*, notes 30-38 and accompanying text.

possible abuse,⁷⁷ here too we seem to be at a crossroads. If no legal adjustments are made to provide for a carefully circumscribed responsibility to intervene, even wider and more dangerous claims may be advanced. Though hard, identifying the precise parameters for intervention is preferable to blending humanitarian and security justifications.⁷⁸ It is for this reason alone that the endorsement by the UN High Level Panel of criteria for assessing the appropriateness of military intervention is to be welcomed.⁷⁹

4. The Right to Self-Defence and Security Council Authority: Article 51

One issue that has received relatively less attention in the most recent round of debates than the big questions about the scope of the right to self-defence is that of the connections between states' right to self-defence and the collective security system. Article 51 requires states to immediately report measures taken in exercise of their right to self-defence to the Security Council, and reaffirms the Council's authority "to take at any time such action as it deems necessary in order to maintain or restore international peace and security." More importantly, Article 51 underlines the primary position of the Security Council by placing an explicit limit on the right to self-defence.⁸⁰ Under Article 51, nothing shall impair states' inherent right to self-defence "until the Security Council has taken measures necessary to maintain international peace and security." Based on the

⁷⁷ See eg. Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (2002) at 171-172 (commenting on the use of force by states without Security Council authorization). And see U.K. House of Commons Foreign Affairs Committee, *supra*, note 53, at 142.

⁷⁸ For a detailed discussion, see Jutta Brunnée & Stephen J. Toope, "Slouching Towards New Just Wars: International Law and the Use of Force after September 11," (2004) 51 *NILR* 363, at 385-390.

⁷⁹ See *supra*, notes 36-37, 55, and accompanying text.

⁸⁰ Schrijver, *supra*, note 42, at 281. And see Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2000) at 93 (adding that a further goal of the Charter was to "centralize the use of force under UN control").

wording of Article 51 and the broader purposes of the Charter, some observers suggest that the right to self-defence ceases once the Security Council has taken any measures to maintain peace and security.⁸¹ For the majority of commentators, the correct interpretation of Article 51 is that the right to self-defence does not end simply when the Security Council has undertaken measures, but only when these measures have had the effect of restoring peace and security.⁸² According to Thomas Franck, while this reading does not accord with the text Article 51, it has become accepted practice that the Security Council and states acting under Article 51 can have concurrent powers.⁸³

For the many years during which the Security Council was hampered by Cold War tensions, the requirements of Article 51 may have been largely the object of academic interest.⁸⁴ However, the Council's active engagement in the crisis following Iraq's invasion of Kuwait put the practical ramifications of the Article 51 requirements into the spotlight.⁸⁵ In its resolution 661 (1990), the Security Council specifically affirmed "the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter."⁸⁶ Through this preambular statement, the Council made clear that the right to self-defence was not pre-

⁸¹ See, in particular, Abram Chayes, "The Use of Force in the Persian Gulf," in L.F. Damrosch & D. J. Sheffer, eds., *Law and Force in the New International Order* (Boulder: Westview Press, 1991) at 5-6. And see Randelzhofer, *supra*, note 39, at 804 (note 154).

⁸² See *eg.* Franck, *supra*, note 58, at 841-842; Malvina Halberstam, "The Right to Self-Defense once the Security Council takes action," (1996) 17 *Mich. J. of Int'l. L.* 229, at 231; D.W. Greig, "Self-Defence and the Security Council: What does Article 51 require?" (1991) 40 *Int'l. & Comp. L.Q.* 366, at 389; Thomas K. Plofchan, Jr., "Article 51: Limits on Self-Defense," (1992) 13 *Mich. J. of Int'l. L.* 336, at 343; E.V. Rostow, "Until What? Enforcement Action or Collective Self-Defense," (1991) 85 *AJIL* 506, at 511.

⁸³ Franck, *supra*, note 77, at 49-50.

⁸⁴ Randelzhofer, *supra*, note 39, at 804 (calling the relevant requirements "almost devoid of practical significance").

⁸⁵ See *eg.* Oscar Schachter, "United Nations Law in the Gulf Conflict," (1991) 85 *AJIL* 452; R. Yoxall, "Iraq and Article 51: A Correct Use of Limited Authority," (1991) 25 *Int'l. Lawyer* 967. And see sources cited in *supra*, note 81.

⁸⁶ U.N. Doc. S/RES/661, 6 August 1990, preamble.

empted by its involvement in the matter, nor by the sanctions it imposed through the resolution.

Because of the difficulties in determining whether the Security Council has “taken measures necessary to maintain international peace and security,” it is obviously preferable that the Council provide a specific statement on the continuation of the self-defence right. Thus, in the case of the Kuwait crisis, it was clear that the United States and the United Kingdom could act in collective self-defence of Kuwait until the Council specifically authorized, in resolution 678 (1990), the use of force to expel Iraq from Kuwait.⁸⁷ By contrast, in the latter resolution, the Council did not provide a clear statement on whether the authorization to use all necessary means displaced or supplemented the relevant states’ right to self-defence.⁸⁸ The resolution thus invited the argument that Chapter VII measures could “co-exist with the “inherent” right of a state and its allies to defend against an armed attack,” until collective measures “have had the effect of restoring international peace and security.”⁸⁹ Even if one agrees with Thomas Franck’s conclusion that this interpretation leads to a sensible result,⁹⁰ it raises an array of thorny issues as to the scope of the right to self-defence. To name but one issue in the case at hand, in face of Security Council authorized military measures to expel Iraq from Kuwait, to what extent could self-defence measures still meet the requirement of necessity?

⁸⁷ U.N. Doc. S/RES/678, 29 November 1990, para. 2. And see Gray, *supra*, note 80, at 93-94.

⁸⁸ The resolution merely reaffirmed a series of prior resolutions, including resolution 661. Resolution 678, *ibid.*, preamble.

⁸⁹ Franck, *supra*, note 58, at 841. But see Schrijver, *supra*, note 42, at 281-282.

⁹⁰ Franck, *ibid.*

The importance of a clear Security Council statement was illustrated again following the terrorist attacks of September 11th. Immediately after the attack, the Council recognized “the inherent right of individual or collective self-defence in accordance with the Charter” in its resolution 1368 (2001).⁹¹ In specifically reaffirming that right in resolution 1373 (2001),⁹² the Council then made clear that the array of counter-terrorism measures it mandated in that resolution did not displace the right to self-defence. However, it is also worth noting that, unlike the forcible measures contemplated in resolution 678, the measures required by resolution 1373 were of a general, preventative nature and not aimed specifically at removing the threat to international peace and security posed by Al-Qaida and the Taliban.⁹³ In any case, it was clear that, notwithstanding the Security Council’s being seized of the matter, the United States and allied countries were entitled to use force in self-defence, to the extent that the requirements of that right were otherwise met.⁹⁴

And yet, the Afghanistan intervention too ultimately raised questions pertaining to the Article 51 requirements. After the initial campaign against the Taliban and the establishment of an interim administration for Afghanistan, Security Council resolution 1386 did authorize the creation of an International Security Assistance Force (ISAF) “to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas.”⁹⁵ The resolution also authorized the member states participating in

⁹¹ *Supra*, note 58.

⁹² U.N. Doc. S/RES/1373, 28 September 2001, preamble.

⁹³ Schrijver, *supra*, note 42, at 282; Franck, *supra*, note 58, at 841.

⁹⁴ For a detailed discussion of the latter question, see Mary-Ellen O’Connell, “Evidence of Terror,” (2002) *J. Conflict & Security L.* 19.

⁹⁵ U.N. Doc. S/RES/1386, 20 December 2001, para. 1.

ISAF “to take all necessary measures to fulfil its mandate.”⁹⁶ This resolution, while it reaffirmed resolutions 1368 and 1373, did not specifically re-confirm the right to self-defence. Thus, in view of the opaque terms of ISAF’s mandate and its authority to use force, there is room for debate on whether or not resolution 1386 provided for all necessary measures.⁹⁷ The answer to question is of considerable importance, given its implications for the scope of the American and allied states’ right to use force in Afghanistan.

I have offered a relatively detailed account of the questions raised by Article 51 because they would assume heightened importance if the scope of states’ right to self defence were indeed to expand. So long as the right to self-defence remains bounded by reasonably tight requirements, questions regarding its co-existence with the collective authority of the Security Council, while by no means uncomplicated, would seem to be manageable. In any case, there would only be a relatively limited range of circumstances in which individual states’ right to defend themselves would cut into the much broader realm of threats to international peace and security. However, to the extent that self-defence expands into what is now the exclusive domain of the collective security system, Article 51 is likely to become another fault-line in the debate on authority to use force. Claims of preventive self-defence and claims that blend humanitarian and security issues with self-defence arguments are most likely to raise this spectre.

⁹⁶ *Ibid.*, para. 3.

⁹⁷ See Eric P.J. Myjer & Nigel D. White, “The Twin Towers Attack: An Unlimited Right to Self-Defence?” (2002) 7 *J. Conflict & Security L.* 5, at 13.

It has been suggested that the Article 51 balancing between self-defence and Security Council authority could actually be a mechanism for Charter adaptation. Specifically, the suggestion is that Security Council pronouncements on the existence of the right to self-defence could serve to manage a “controlled extension” of the right to self-defence to address the circumstances of individual cases.⁹⁸ As the preceding two examples illustrate, there is a constructive role for Security Council pronouncements on states’ right to self-defence in certain circumstances. That role arises when states have a right to self-defence according to the existing legal requirements. In such circumstances it is important for the Council to clarify when, notwithstanding its involvement, individual states can continue to take military measures necessary to defend themselves.

However, were the Council to affirm the existence of a right to self-defence in circumstances where a right to self-defence has not traditionally existed, it could undermine rather than improve the collective security system.⁹⁹ If, in such circumstances, the Council resorted to affirmations of self-defence rights to extricate itself from the need to authorize collective measures, it would progressively write itself out of the collective security business. Sooner rather than later, Security Council confirmations of the right to self-defence would be cast as affirmations of the expansion of states’ unilateral entitlement to resort to force.

Given the dynamics in the Council, it may be unlikely that its pronouncements would stray significantly beyond the accepted scope of self-defence. Nonetheless, it is

⁹⁸ See Stahn, *supra*, note 59, at 22.

⁹⁹ See also the caveats made by Stahn, *ibid.*, at 22-23.

important to note that the Council has so far avoided slipping on this slope. In the case of Iraq's invasion of Kuwait in 1990, its pronouncements pertained to a clear cut case of self-defence. Resolution 1368 has invited more debate on whether or not the Council merely offered a generic reference to the right to self-defence,¹⁰⁰ confirmed its assessment that sufficient links existed between Al-Qaeda and the Taliban regime to attribute the September 11th attacks to the latter within established parameters,¹⁰¹ or endorsed a new, more open-ended right to self-defence against terrorist attacks.¹⁰² Certainly in retrospect, given the evidence confirming significant Al-Qaeda and Taliban links and confirming that further attacks were planned,¹⁰³ it seems fair to conclude that resolution 1368, and its reaffirmation in resolution 1373, remained on sufficiently solid ground. Finally, in the case of the 2003 invasion of Iraq, an explicit self-defence argument was not advanced,¹⁰⁴ and relevant Security Council resolutions do not contain even a generic reference to states' inherent right to self-defence.¹⁰⁵

Conclusion

Radical change to the Charter framework on the use of force must be resisted as both unnecessary and unwise. The balance between individual and collective authority to resort to military force remains fundamentally sound. Limited adjustments to the requirements of a link between the target state of defensive action and perpetrators of

¹⁰⁰ See Randelzhofer, *supra* note 39, at 802 (noting that the resolution both condemned the terrorist attacks as a threat to peace and security, and recognized states inherent right to self-defence).

¹⁰¹ See *eg.* O'Connell, *supra*, note 94; Stahn, *supra*, note 59, at 9-11.

¹⁰² See *supra*, note 58 and accompanying text. And see Derek Jinks, "State Responsibility for the Acts of Private Armed Groups," (2003) 4 *Chicago J Int'l L* 83, at 85 (note 8), 89; Franck, *supra*, note 58, at 842; Stahn, *supra*, note 59, at 21 (in note 78).

¹⁰³ See *eg.* O'Connell, *supra*, note 94, at 30-32.

¹⁰⁴ See sources cited in *supra*, note 71.

¹⁰⁵ See, in particular, U.N. Doc. S/RES/1441 (2002), 8 November, 2002.

attacks are required to adapt the rules on self-defence to the fact that terrorist networks are a major source of attacks today. But the sweeping claim that the existing legal regime on self-defense cannot accommodate global terrorism and new security threats vastly overstates the issues at hand. It also distracts from the real issues by suggesting that only the use of force can solve problems that actually require far more complex responses. The Security Council remains the most appropriate forum for deliberation and legitimization of responses to more remote security threats or humanitarian emergencies. At the end of the day, the only way to global security is a collective one. But if the collective security system is to meet the attendant challenges, the consensus on the international framework governing the use of force must be renewed. The report of the High Level Panel on Threats, Challenges and Change offers a good starting point for that renewal. States must now engage with the report and work towards agreement on the merits of its recommendations.