Self-Defense in International Relations

Ruchi Anand

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Also by the author

INTERNATIONAL ENVIRONMENTAL JUSTICE: A NORTH-SOUTH DIMENSION

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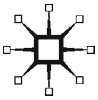

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Preface

Richard Falk

Richard A. Falk is an American professor emeritus of international law at Princeton University, a prolific writer, speaker and activist on world affairs, the author or co-author of more than 20 books and an appointee to two United Nations positions on the Palestinian territories.

Perhaps, the greatest achievement of the otherwise bloody 20th century was to build legal, moral, and political support for an unconditional prohibition on aggressive warfare. Such a prohibition was criminalized after World War II in the course of war crimes trials at Nuremberg and Tokyo of surviving leaders of Germany and Japan. The same idea provided the underpinning of the United Nations Charter, especially the twinned norms of Articles 2(4) and 51, with the former confirming the prohibition on the use of international force as an instrument by states and the latter making a narrow and strictly worded exception for self-defense.

It is notable that international law did not pretend to impose a pacifist ethos on world politics, but it did make the seemingly revolutionary claim that recourse to war was no longer, as it had been for centuries, a matter of discretion for sovereign states. This fine tuning of world order represented a compromise between demilitarizing idealism that aimed to do away with war altogether by getting rid of weapons and a worried realism that acknowledged that war was no longer a rational means to promote national interests but at the same time recognized that powerful states were not ready to give up their military capabilities or to trust international institutions to uphold global security in the event of renewed aggression in the years after 1945.

This set of circumstances also reflected the dramatic impact of atomic weapons on the political consciousness of humanity, as well as the troubling realization that the ideological differences between liberalism and capitalism that had been minimized during the common struggle against fascism were now regaining prominence. This intensifying rivalry between East and West, between a Soviet-led Communist bloc of countries and an American-led liberal democratic coalition quickly became known as the Cold War. In the ensuing decades, a somewhat upbeat interpretation of the role of law would contend that the sharp and dangerous edges of aggressive war were largely avoided due to the weight of the legal inhib-

ition, reinforced by the deterrent strength of the two superpowers. A less positive interpretation, would point to the precariousness of this period, when crises were narrowly averted, which could easily have resulted unimaginable disaster for humanity, suggesting that it was luck not law that avoided World War III.

Arguably, the leadership of the United States was essential throughout this campaign to restrict war without challenging the self-help nature of world order. It was the United States that long championed the effort in international law to prohibit force except for the sake of self-defense. It was the United States that most fervently backed the Nuremberg process of criminalizing the behavior of leaders who did engage in aggressive warfare, officially punished as Crimes Against Peace. It was the United States that drafted and shaped the UN Charter around this core idea of banishing aggressive warfare and offering the victims of aggression a promise of protection in the form of collective security. And it was the United States that reacted to the two most flagrant early instances of post-1945 aggression, the attack by North Korea on South Korea in 1950 and the attack by France, Britain, and Israel on Egypt in 1956. Defending South Korea was in line with Cold War doctrines of containment, and was not widely treated as exhibiting a strong independent commitment to the Charter prohibition on force. But Washington's opposition to the Suez Operation was more impressive as those alleged to be acting in violation of the Charter were among the closest American allies in the wider struggle with the Soviet Union. At least through the 1950s there was reason to be hopeful that the efforts of international law to outlaw aggressive war enjoyed the backing of the most powerful and influential state in the world. It was evident that by and large legal norms of restraint, especially with respect to the two superpowers, were further and crucially reinforced by an awareness that any outbreak of war on a strategic level would almost assuredly result in mutual catastrophe.

Unfortunately, matters began to change for the worse in the 1960s. The United States Government began to pursue a foreign policy that was more and more difficult to reconcile with the prohibition on aggressive force, especially in its dealing with Third World countries. The tipping point was the Vietnam War that persisted for more than a decade, ending in 1975. There was a feeble attempt by US officials to argue that the American response was in keeping with the defense of South Vietnam in the face of aggression from North Vietnam, but the weight of impartial legal commentary regarded the American attacks on North Vietnam as a serious violation of the UN Charter. After

Vietnam, the political atmosphere no longer treated the prohibition on aggressive force as generally supportive of patterns of geopolitical behavior. This decline in the stature of international law was evident in a number of different settings: Israel's use of force against its Arab neighbors; the Soviet long war in Afghanistan starting in 1979; and the encouragement by the United States of Iraq's attack on Iran in 1980. The memories of World War II, both of Nuremberg and Hiroshima, had faded, and important states seemed more inclined to make use of mil-itary force to further their national interests wherever the risks seemed acceptable.

This decline in the stature of international law persisted until the end of the Cold War, and was then abruptly reversed for the next decade. In the 1990s, there was an absence of major strategic or ideological conflict, making the Charter framework again seem responsive to the conditions that prevailed on a global level. Significantly, the American president, George H.W. Bush, associated a 'new world order' in 1990–91 with an effort to persuade the UN Security Council to mandate the use of force to reverse the outcome of an aggressive war resulting in the conquest, occupation, and annexation of Kuwait by Iraq. It was claimed at the time that new global setting again lent, as it had immediately after World War II, political credibility to this struggle against non-defensive uses of international force.

But then came 9/11, and the American response by way of declaring a 'war on terror'. Here were allegedly new circumstances that made the Charter template for 'self-defense' unacceptable. It was claimed by the American president, again and again, that it was not possible to deter such an adversary as Al-Qaeda, and that it was reasonable and necessary to strike first, to wage preemptive war in a manner that was not easily reconcilable with the language of self-defense in Article 51 of the Charter. Such an expansion of self-defense was legally necessary, it was also contended, to address the great potential menace posed by terrorist groups seeking weapons of mass destruction, especially nuclear weapons. Against this doctrinal background, the United States initiated the Afghanistan War, and then the Iraq War. By so doing a debate emerged: on one side were those who insisted that new conditions of conflict and security justified such wars, and on the other side, were those who argued that these wars exhibited a shameless and unnecessary disregard of the rules of international law and the authority of the United Nations that weakened national and global security.

It is at this point that Ruchi Anand's fine book helps us think our way through this complex thicket of norms, ideas, practices, and scholarly

debates. She makes excellent use of both the rationale of jurists for the outlawry of aggressive war and the best thinking of students of international relations with respect to the way power and security work in a world organized around the primacy of sovereign states, but newly afflicted with the rise of non-state actors. Offering a sophisticated presentation of these interacting legal and political perspectives, Anand as scholar and citizen assesses the situation that confronts the world in the early 21st century. Her assessment reaches its climax with a detailed and critical account of the wars in Afghanistan and Iraq, dismissing in both instances the legal justifications advanced in support of recourse by the United States to war. The focus of her academic inquiries is on whether the terrorist threat that emerged on 9/11 validates wars based on an *expansive* doctrine of anticipatory self-defense. Anand's important conclusion is that international law allows anticipatory claims of self-defense, but only when the evidence of imminence is overwhelming, the threat posed is severe, and a proposed recourse to war is persuasive to the other members of the Security Council. This was not the case in the two wars started by the United States after 9/11, especially the Iraq War. In effect, what George W. Bush attempted to justify as 'preemptive war' is more correctly understood, because it does confine itself to situations of imminent threat, as 'preventive war,' which is unacceptably vague and unnecessarily destructive of the legal regime governing claims of self-defense. For this main reason, Anand's challenging thesis is that the combination of this doctrine and the accompanying statecraft of warfare have caused an unwelcome 'erosion of the legal restrains of war' in the period since 2001.

She reaches this conclusion without dwelling on the gruesome disclosures of violations of the laws of war, now amply documented with respect to the treatment of detainees at Guantanamo and Abu Ghraib. Her subject-matter is recourse to war, not the conduct of war, and so it is entirely appropriate not to narrate this second disturbing abandonment of the restraints of international humanitarian law in the period since 9/11.

It would seem that Anand's approach is particularly timely in view of several recent developments. First of all, the Iraq War is now widely understood to be unwinable despite total American military superiority. Secondly, it now seems worth reflecting upon the fact that adherence to international law would have avoided this worst foreign policy disaster in American history; it would appear that the legal framework outlawing aggressive wars or 'wars of choice' might offer a better practical guide to leaders and policy-makers than the war games of Washington think

tanks. Thirdly, it is relevant to notice that in the mid-term elections of 2006, the anti-terrorist approach of the Bush presidency was repudiated by the American people. And fourthly, that it might not be too late to learn from the Spanish response to the Madrid bombings of 2004, the British response to the London bombings of 2005, and the Indian response to the Mumbai bombings of 2006; treating such wrenching provocations as Crimes Against Humanity rather than as acts of war is far more effective, less costly, and much more likely to win international support from public opinion and foreign governments.

Whether persuaded or not by Anand's viewpoint, there is no more important set of questions than the status under international law of war in the face of the rise of non-state actors capable of inflicting devastating harm on even the most powerful of states. It is here that an exposure to this book seems so valuable. It encourages us to think for ourselves about the momentous issues of the day, and provides us with the tools to do so. Ruchi Anand's *Self-Defense in International Relations* deserves the widest possible reading, especially by students whose understanding of the relation of war to security in the 21st century may well determine whether or not it is possible to stop the seemingly perpetual war on terror that President Bush so recklessly launched in response to 9/11.

Acknowledgments

Inspired by my passion for international law and relations, I set out to write about self-defense and the ambiguities inherent in the legal constraints on warfare. I presented a paper entitled "Self-Help in an Anarchical System: A Critical Evaluation of International Law" at an International Political Science Conference called "*International Norms for the 21st Century: Political, Science, Philosophy, Law*" held in Aix-en-Provence, 11–14 September 2003, France. I was on the same panel as Professor Charles W. Kegley Jr. and Prof. Gregory Raymond. Following our panel presentations, Prof. Kegley suggested that I turn the paper I presented into a book. I owe this book project to Prof. Kegley and thank him for his consistent support and positive feedback.

A year after the conference, the book proposal was accepted and I had begun a journey that I never regretted – this book. I was ecstatic and thanked every 'star' that got me to the conference, including my husband Stéphane Monrocq who has always been my best friend, inspiration and cheerleader. Towards the end of the book writing, I was expecting two babies – this book and a baby, Lina Océan Alisha Monrocq, who was born on 9 December 2006.

During the course of my book writing effort, I had many friends, colleagues and family members who wholeheartedly supported my work and helped in every way they could. Special thanks go out to Dr. Dmitri Mitin for having spent time editing and brainstorming various concepts and theories of international relations with me at the very early stages of this book. I thank my dear friend and badminton partner in Valence, Stephanie Viousac, for having been supportive and enthusiastic all the time that I spent writing the book while she was laboring with Stéphane to renovate our home. I thank my parents Raj and Nanah Anand and my extended family – all the Anand's and Monrocq's for their invaluable encouragement, love and support. I owe a great deal to Madame Annie Marbot, our family's "appointed grand-mother" for having taken care of Lina while I was busy toiling to finish this book.

I thank my colleagues and students at the American Graduate School of International Relations and Diplomacy for lively discussions on self-defense.

I owe many thanks to my Palgrave editors, Alexandra Webster, Renée Takken and Shirley Tan for all the work they put in to get this project to finish line.

Last but not the least, I thank Prof. Richard Falk, from whom I have always drawn inspiration and ideas, for having written the Preface (which I like to refer to as the "jewel" in the crown) for this book.

Although the book grapples with several theoretical, legal and political perspectives and issues, the message it seeks to highlight is rather simple, "an eye for an eye makes the whole world blind" – Gandhi.

1
Self-Defense in International Relations

> Theorization of the relationship of international law to the broader political system of which it is a sub-system is of relevance to scholars of international law and international relations… The retention of a power-law dichotomy has effectively blocked moves towards a more sophisticated conceptualization of the significance of international law to international politics… The two disciplines have for the most part remained comfortably disengaged on the subject. And yet, international legal theorists have increasingly recognized their need for greater understanding of the politics of international law and stand to gain much from a fresh theorization of the international law-international politics relationship that subsumes the power-law dichotomy. Such a theorization would offer a more meaningful basis for inter-disciplinary dialogue, the goal of which would be a theory of international politics capable of incorporating legal debate itself.[1]

In light of the ongoing debates surrounding the political and legal implications of preemptive military action, this book provides an examination of some crucial theoretical issues and legal standards constituting the context of that debate. The book offers a multidisciplinary assessment of the concept of self-defense and anticipatory self-defense with the intention of exposing the relationship between power and international law. This is done by scrutinizing the concept of anticipatory self-defense through the dual lens of international relations theory and international law, theory and practice. A study of international law without a discussion of international relations and power politics would be flawed or incomplete.[2]

What we have been witnessing thus far is separation of international relations from that of international law in what Louis Henkin refers to as the "*dialogue de sourds*."[3] Henkin argues that it is not only unfortunate but also destructive for the two disciplines to remain separate. According to Henkin, it is crucial to understand "the system" in order to understand law because "[at] different times the actors, the problems, the law and its influence are all different."[4] Similarly, social sciences must be the basis of international laws that aim to regulate state behavior. In the words of Anne-Marie Slaughter Burley:

> If social science has any validity at all, the postulates developed by political scientists concerning patterns and regularities in state behavior must afford a foundation and framework for legal effort to regulate that behavior.[5]

The realities of the international system help us to better understand the strengths and weaknesses of international law, as international law does not function in a vacuum and is, in fact, a part of the reality of international politics. As William Coplin states, "… international law is a part of political reality and serves as an institutional means of developing and reflecting a general consensus on the nature of international reality."[6]

This book seeks to extend existing discussions and debates on the controversial right to anticipatory self-defense in international law. The US-led war on Iraq has opened up a Pandora's box, full of questions about the possibilities and limitations of the use of anticipatory self-defense, the future of the United Nations and the role of the United States in a post-cold war international order. Existing discussions on the right and exercise of anticipatory self-defense can be extended to deal with the complex relationship of anarchy, (uni) polarity, power, politics and justice. The value of such an analysis of self-defense goes beyond a descriptive account to more policy-oriented prescriptions for the United Nations, the United States and other members of the world community. Discussing the concept of anticipatory self-defense serves as a powerful tool for international law-making, agenda setting and decision-making. This book seeks to demonstrate the arrogant and reckless (mis) interpretation of international law in order to justify illegal maneuvers in international politics, setting dangerous precedent for other states.

Let us consider three specific scenarios, in the realm of the hypothetical.

First, the US decides to wage a preemptive war against Iraq (2003) based on the assumptions that Iraq had weapons of mass destruction that pose a threat to international peace and security. It is established that there is an irrefutable link between the terrorist attacks of September 11 and Saddam Hussein and that the Iraqi government had violated several Security Council Resolutions. This presents an imminent danger to the security of the US and the international community at large. Iraq contests all the above accusations despite which the US starts gearing up for a use of force in the name of preemptive self-defense. Awaiting a potential use of force against it by the US, the Iraqi government decides to preempt. It uses force against the US in the name of self-defense by "preempting a preemption."

Second, consider a scenario involving the right of self-defense in a world charged with nuclear weapons and weapons of mass destruction. On 16 October 2002, the United States announced that North Korea had acknowledged a secret nuclear program following which the US stopped oil shipments to N. Korea. On 22 December 2002, North Korea removed its monitoring devices from its Yongbyon plant and forced US nuclear inspectors to leave North Korea ten days later. On 28 January President Bush urged North Korea to give up its nuclear program, referring to it as an oppressive regime and referring the matter to the Security Council. Following President Bush's demand, a senior Pyongyang official, Ri Kwang-hyok acknowledged that North Korea was capable of attacking "all military personnel and all military commands of the United States in the world" as a self-defense measure. North Korea's neighbors, particularly Japan, concerned at the developments, responded with a threat to use force in self-defense by launching preemptive military action in the event that it found evidence that Pyongyang was planning a missile attack against it. Defense Minister Shigeru Ishiba clarified that it would be "a self-defense measure" if North Korea was going to "resort to arms against Japan."[7] As a response to US pressure on North Korea to dispose off its nuclear program, North Korea flexed its muscle and announced on 10 January 2003 that it was withdrawing from the Nuclear Non-Proliferation Treaty as a measure of self-defense. North Korea asserted that Pyongyang "declares its total freedom from the binding force of the safeguards accord with the International Atomic Energy Agency." North Korea's defiant stand came as a result of leaked Pentagon nuclear papers recommending small-scale precision nuclear weapons to destroy the Weapons of Mass Destruction (WMD) of rogue regimes, North Korea having been identified as one of them. In response to the leaked Pentagon reports, Pyongyang accused the US of "working in real earnest

to prepare a dangerous nuclear war to bring nuclear disasters to our planet and humankind." Pyongyang also warned of "strong countermeasures" in self-defense.[8]

South Korea would want an avoidance of war on the peninsula. More so, it would want close ties with US, Japan and China in order to block North Korea's ambition of gaining political, economic and military concessions that would not be in South Korea's interest. China has a similar standpoint. Strategically, China is aware that a nuclear North Korea could aggravate the possibility of military confrontation on the peninsula. This could prompt South Korea, Japan and perhaps Taiwan to build up nuclear weapons. This in turn would be a tremendous threat to China's security, probably requiring China to divert funds from economic modernization to militarization. While aware of the threats, China is uncomfortable putting direct pressure on Pyongyang.[9] China's ambassador to the UN, Zhang Yan, said, "The only correct and effective approach… is through constructive dialogue and consultations on the basis of equality," without the Security Council getting involved.[10] With the military power and the political will to attack first, North Korea's possession and potential use of nuclear weapons in self-defense presents a threatening scenario to international peace and security with the potential of unleashing wide-scale destruction if war were to break out.

Third, let us consider the case of Iran. On 20 January 2005, US Vice-President Dick Cheney stated in an MSNBC program that Iran is "right at the top of the list" of trouble spots worldwide located by the Bush administration. Vice President Cheney then touched upon the possibility of a preemptive Israeli attack on Iran "if the Israelis became convinced the Iranians had significant nuclear capability." He argued that the US hoped to avoid a war in the Middle East and that the US preferred a solution through diplomatic means.[11] On 10 February 2005, President Khatami made a statement saying, "The Iranian nation is not after a war, violence or clashes, but the world must know that the Iranians will not tolerate any invasion" and condemned US warnings as "psychological warfare" which according to Khatami was consistent with US "expansionist policies." A preemptive strike on Iranian nuclear capabilities by the US or any other ally was called "the most stupid move" by Iranian nuclear negotiator Rowhani while the Iranian Defense Minister Shamkhani brushed aside the possibility of a US attack, saying "Iran is not a small country like Iraq; wherever they attack us, they will be attacked."[12] Official Iranian statements reflecting fearlessness are abundant. Iran claims that it "would respond within 15 minutes to any attack…and it is sharpening its abilities to wage a guerrilla war."[13]

Despite denials for any immediate plan of attack, there has been talk about a possible preemptive destruction of Iran's nuclear installations. Beres, a Professor of international law states, "President Bush has assuredly authorized the Pentagon to prepare plans for the preemptive destruction of that country's developing nuclear installations. Leaving aside the difficult tactical side of such an operation – and whether or not it would actually be helpful to American national security – a prior question arises: 'Would this particular preemption be permissible under international law?'"[14]

Each of the scenarios described above fall in the realm of anticipatory self-defense. What exactly is anticipatory self-defense? In simple terms, anticipatory self-defense is a state's decision to attack another state that is perceived to have aggressive plans, before the latter attacks first. Snyder defines "defense" in terms of "deterrence" and states that "defense means reducing our own prospective costs and risks in the event that deterrence fails." [15]Anticipatory self-defense is anticipating an attack and defending oneself before the attack occurs. Anticipatory self-defense can be preemptive or preventive.[16]

A preemptive war is justified by a *clear and present danger* of an attack by another state, i.e. an imminent threat of an attack (e.g. increasing size of military, acquisition of weapons with the intention of use, threatening activities by troops of an enemy state, belligerent declarations signaling an intention of war, and indicators that clearly show that an attack is close). The logic of a preventive war is to attack now since current enemies that seem to be growing stronger may attack later. The difference between a preemptive and a preventive strike is the lack of an "imminent" threat even if a "distant" threat exists. A preventive preemption, then, is unintelligible since it is not any longer an act of "defense." According to Benjamin Barber:

> Self-defense says: "We are already at war thanks to our enemies: our declaration of war is but a confirmation of an observable condition." Preventive war says: "It is a dangerous world where many potential adversaries may be considering aggression against us or our friends, or may be acquiring the weapons that would allow them to do so should they wish to: so we will declare war on that someone and interdict the possible unfolding of this perilous chain of could-be's and may-be's."[17]

Many scholars have tried to spell out the definitions of preemption and prevention and the differences between the two.

Kegley and Raymond distinguish a preemptive military attack from a preventive military attack as follows:

> A *preemptive* military attack entails the use of force to quell or mitigate an impending strike by an adversary. A *preventive* military attack entails the use of force to eliminate any possible future strike, even when there is no reason to believe that aggression is planned or the capability to launch such an attack is operational. Whereas the grounds for preemption lie in the evidence of a credible, imminent threat, the basis for prevention rests on the suspicion of an incipient, contingent threat.[18]

Van Evera defines these two terms as follows:

> A preemptive mobilization or attack is mounted to seize the initiative, in the belief that the first mover gains an important advantage and a first move by the opponent is imminent. A preventive attack, in contrast, is mounted to engage an opponent before it gains relative strength. The incentive to preempt is two-sided: both adversaries gain by forestalling the other. The incentive to prevent is one-sided: the declining state wants immediate war, while the rising state wants to avert war.[19]

Reiter further clarifies these definitions:

> A war is preemptive if it breaks out primarily because the attacker feels that it will itself be the target of a military attack in the short term. The essence of preemption, then, is that it is motivated by fear, not by greed.[20]

Gaddis proposes the following definitions of preemption and prevention:

> Preemption implied military action undertaken to forestall an imminent attack from a hostile state. Prevention implied starting a war to keep such a state from building the capacity to attack.[21]

Despite the differences between preemption and prevention, the terms are often used interchangeably due to the difficulty with proving "imminent threat." What is common between preventive and preemptive self-defense wars is that both are fought, officially, in the interest of the state.[22] In an interview with John Shirek, NBC (Friday,

Sept. 27, 2002), Donald Rumsfeld, Secretary of Defense, responded to a question about preemptive strike and referred to President Kennedy's action in the Cuban Missile Crisis saying "he decided to engage in preemptive action, preventative action, anticipatory self defense, self defense, call it what you wish."[23] The difference between these terms is, indeed, rather slim.

The debate surrounding anticipatory self-defense has recently been re-ignited following the attacks on US soil on September 11, 2001, and the subsequent National Security Strategy (NSS) formulated and released by the Bush administration on September 11, 2002.[24] The four main themes of the Bush NSS are: 1) the call for preemptive military action against terrorist organizations and aggressor states that seek to develop Weapons of Mass Destruction (WMD); 2) the proclamation of non-tolerance against any state that challenges the global military prowess of the United States; 3) a commitment to multilateral cooperation but also a readiness to act alone, if necessary and 4) the spread of human rights and democracy in the world, especially in Muslim countries.[25] The most controversial of these themes has been the embracing of anticipatory self-defense. The doctrine of preemption, one can argue, has replaced the cold war doctrines of containment and deterrence.

According to the NSS Report:

> We will disrupt and destroy terrorist organizations by… defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the US will constantly strive to entrust the support of the international community, it will not hesitate to act alone, *if necessary, to exercise our right of self-defense by acting preemptively* against such terrorists, to prevent them from doing harm against our people and our country.[26]

The NSS report refers to international law's recognition of the right of self-defense, at the same time claiming that the concept of "imminent threat" needs to be altered in the face of new enemies with unconventional weapons. Reiterating the need for preemptive action in light of new and dangerous threats to US interests, the NSS report reads:

> The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend

> ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

The NSS report affirms that the US will use preemption in order to "eliminate a specific threat to the United States or our allies and friends" with clear actions, measured force and *just cause*. Blurring the line between criterion for preemption and prevention, the NSS Report states that:

> And, as a matter of common sense and self-defense, America will act against (such) emerging threats *before* they are fully formed… (Our) forces will be strong enough to dissuade potential adversaries from pursuing a military build-up in hopes of surpassing, or equaling, the power of the United States.[27]

The US military flexed its military muscle twice in a period of two years against countries that do not, at first glance, appear to be potential adversaries of the US, nor hopeful of surpassing or equaling the military might of the US. On 7 October 2001, the US (with support from the UK, Australia, Canada and the Afghan Northern Alliance) launched a "preventive" invasion of Afghanistan under the gamut of "Operation Enduring Freedom," immediately following attacks on US soil on 9/11. This invasion was waged in order to remove the ruling Taliban and find Osama Bin Laden who was the alleged mastermind of the attacks on US soil. On 20 March 2003, the US, along with the "coalition of the willing" including the UK, started the Iraqi invasion. The main justification was that of "preemption" in light of the threats perceived by the US from the "oppressive" regime of Saddam Hussein who had violated several Security Council Resolutions, was said to possess weapons of mass destruction and was said to have tangible links with terrorist organizations. However, since these threats were not "imminent" according to the various definitions of preemption, the US war on Iraq can be adjudged "preventive" rather than "preemptive." And preventive wars are always "illegal."

Analysts, lawyers, critics and ordinary citizens began posing questions related to the legality and ethics of the US use of force in lieu of peaceful or diplomatic means. There were those that argued that the wars were outright illegal and unethical. Some others argued that the wars were both legal and ethical. Still others questioned whether the wars were legal but unethical, and illegal but ethical.[28] The ethical aspects of the use of force by the US in Afghanistan and Iraq are not the direct focus of this book.

In the past, anticipatory self-defense has been used in four cases namely the Caroline Incident (1837), the Cuban Missile Crisis (1962), The Middle East War (1967) and the Israeli bombing of Osiraq Reactor (1981). The right to self-defense is a controversial issue because although this right is legalized by Article 51 of the UN Charter, its use is paradoxical and may undermine or defeat the very purpose of the international legal mechanisms set up to protect world order. This book teases out the complexities involved in answering whether a more peaceful and harmonious world legal order needs a greater or lesser reliance upon self-help.

Arguing that we need "greater reliance upon self-help" could imply a lack of faith in international law, particularly collective security measures, in contributing to a peaceful and harmonious world order. It could simultaneously imply that states do not have the tendency to peace and harmony, in an anarchical international system, without sanctions and controls present in a centralized form of law. Arguing that we need "lesser reliance upon self help" could imply that we have faith in the international legal structure, particularly collective security measures, to redress violations of rights of States, thereby making their reliance on self-help measures unnecessary. In arguing the latter, we may be assuming that States have a natural tendency to peace and harmony not requiring a centralized legal system to keep their behavior under checks and controls. In both cases, a burning question to ask is "under what conditions can an anticipatory self-defense argument be used and defended by the most powerful country in the world – the United States?" Is the use of self-defense simply a means for protecting its position of primacy in the post-cold war world?

Several arguments are advanced in this book regarding anticipatory self-defense and the US war in Iraq 2003, using a wide spectrum of concepts, themes and tool of analysis. Although broad, these arguments converge to make a compelling case for the importance of the inseparability of international law and international politics.

First, the right of anticipatory self-defense, if abused, is a threat to international peace and security and needs to be understood in the context of the international political context, (i.e. anarchy and polarity) not just legal references because anarchy and polarity affect the way a state views its security and insecurity with respect to the intentions of other states. Second, anarchy affects the prospects of peace and cooperation between states and thereby the success of international legal instruments. States in the anarchical international system of self-help are predisposed to seeking relative gains and are concerned about the problem of cheating that arises from a lack of trust in international

commitments. International institutions such as the United Nations are therefore unable to successfully mitigate the effect of anarchy, thereby the use of self-defense. Unless the international laws regulating the use of force are stringent enough to curtail the misuses of force by great powers, peace will only be a dictated peace.

Third, the current system is unipolar with the US being the most powerful country in the world today after the collapse of the Soviet Union. Unipolarity gives the US the power to choose to violate international law without adequate checks and balances from other states, international organizations or peace groups in order to stop an illegal war. External constraints are insufficient to monitor superpower behavior and use of force.

Fourth, the US waged an illegal preventive war against Iraq, trampling upon major institutional norms, aware that neither international institutions like the United Nations or the international dissenters to the US-led Iraqi invasion could overshadow its calculated national interests. Fifth, despite its illegal use of preventive force, the United States justified the US-led invasion using the framework of international law (i.e. self-defense), democracy, freedom and human rights not owing to its respect for international obligations but due to its need to project itself as a benign superpower that uses its "iron fist with a velvet glove."

Sixth, the US has set a dangerous precedent for other states to replicate. Seventh, the trend of preventive warfare set by its use of force in Afghanistan and Iraq can only change with a change in either US foreign policy (i.e. from unilateralism to multilateralism), in the US attitude towards international law (i.e. greater respect for the principles and treaties of international law) or a change in system (i.e. from unipolarity to bipolarity or multipolarity). Eighth, the US policy of preserving primacy, while trampling on the international law of the use of force, more specifically self-defense, is an effort to preserve and further strengthen its dominant position in world politics. Lastly, the use of self-defense to justify an illegal use of force by a superpower is suspicious owing to the innumerable ways by which a superpower can protect its national interests without disrupting world order or hurting peace. The fate of the United Nations depends precariously on the power politics of the international system.

Neorealist concepts are used in this book to analyze US behavior in the international anarchical system, which is currently unipolar. The neorealist framework helps us to understand the inter-relationship between anarchy, polarity and the US violation of the international

law regarding self-defense. It is not implied that the frequency of the use of force in international relations is necessarily a function of the system polarity but that a unipolar world allows the superpower to abuse international law without any serious international repercussions. This book does not deal with other "levels of analysis" – i.e. individual and state – to the same extent as it does the international level. This book does not claim that neorealist provides the only suitable and accurate framework for analyzing dynamics of war, peace, cooperation and conflict in international relations, but that it is the most useful in understanding US justifications for the US led war in Iraq 2003, and the inability of international law, states opposed to war and public opinion against war to prevent the US use of force.

Many alternative theoretical enterprises provide insight for understanding different aspects of the US war on Iraq 2003. Environmental theories, for instance, bring to light the relationship between a decline in non-renewable resources such as oil and war. This relationship is extremely pertinent in understanding the US strategy of getting a stronghold on Iraq. Feminist theorists expose the invisibility of women in international relations and the impact of war as a result of decisions taken by primarily male policy-makers in a patriarchal world, on women, children and the people that reside on the margins of power. Constructivists would argue that anarchy, unipolarity, and negative images of an Iraq governed by Saddam Hussein are constructs of international society where meaning is given through culture which then acts as norms through ideas and shared knowledge. Marxists would view the US war in Iraq as an organized strategy premeditated to guarantee its complete hegemony by a display of military strength as a part of an imperialist post-cold war project. Post-modernists would forward an epistemological and ideological critique of the relationship between power and knowledge exposing hierarchies and the multiple interpretations of events through deconstruction and double reading. The contributions of theoretical approaches to explain events in international relations are innumerable. However, the goal of this book is not to debate which theory is the best in understanding the war on Iraq 2003. Rather, it is to analyze the relationship of power in international relations and law with an assessment of self-defense in international law.

Chapter 2 discusses the three concepts that constitute the theoretical backdrop of this book, providing the contextual basis for understanding the concept of self-defense in subsequent chapters, namely, 1) Anarchy implying a lack of leadership, an absence of hierarchy, a lack of formal

institutions of governance at the international level and the lack of a legitimate government; 2) Unipolarity, which we witness today with the US being the most dominant state actor in international relations after the collapse of the USSR and the end of the cold war; and 3) The decentralized nature of international law implying that although there are rules that govern all aspects of international law, there are no "teeth" to enforce these rules.

Chapter 3 discusses the prohibitions against the use of force in international law. Chapter 4 highlights the exceptions to the prohibitions on the use of force, including that of self-defense. Chapter 5 analyzes the legality of the US use of force in Afghanistan and Iraq, using the criteria of necessity, immediacy and proportionality in the context of the post-cold war unipolar order. This concluding chapter then delves into an assessment of the implications of anarchy, unipolarity and the nature of international law on the future of international relations, law and world order.

The right of self-defense, as documented and codified in the UN Charter, is an important one in order to protect and ensure the sovereignty and independence of states when collective security measures fail. In a decentralized anarchical system of international law, there will inevitably be circumstances in which states will need to protect their fundamental rights when legal measures fail. Although it is difficult to envisage any legal system without exceptions to the use of force in the form of self-defense, this exceptional right needs to be carefully circumscribed and backed up with an effective forum for determining the discriminate or indiscriminate use of this right. An undefined and unregulated right to self-defense, particularly anticipatory self-defense, could defeat the purpose of the prescribed prohibition to use force under international law. The removal of the prohibition against the use of force would, for obvious reasons have devastating consequences for the peace and harmony of the world order. Yet, too narrow and constrained a right to self-defense may lead the problems of rigidity and excessive dependence on legal texts.

2
International Relations Theory Meets International Law

This chapter explores three characteristics of the international system and their impact on the functioning of international law. Each of these characteristics, namely anarchy, balance of power and polarity, is rooted in neorealist theory and is particularly relevant to understand the implicit logic of self-defense in international relations.

International relations theorists have been particularly interested by the relationship between uncertainty, number of principal players and war proneness in the international system. In light of this, the desirability, possibilities and limitations of the different balances of powers[1] in the international system, (i.e. unipolarity, bipolarity or multipolarity), are explored. The fundamental assumption underlying this discussion is that the international structure affects international outcomes. According to Waltz, "Polarities tell us much about national behaviors and international-political outcomes without revealing the part of the story that resides in the heart of nations."[2]

International conflict is a result of unequal state capabilities and international changes in great power relations. Although the discussion surrounding the relationship between polarity, uncertainty and self-help rests in the domain of international politics, its applicability extends to the discussion surrounding the use of self-defense in international law.

The discussion of the context in which to understand self-defense today revolves around several related questions about the international system.[3] Three of these will be examined in this Chapter. Section 2.1 delves into the meaning and competing interpretations of anarchy in the international system. Section 2.2 discusses the issue of balance of power and system polarity and its implication on international law and relations and Section 2.3 raises the fundamental question "is international law law" in the context of anarchy and balance of power.

2.1 Anarchy: Starting point or end result?

Anarchy is a central concept in studying, understanding and theorizing international relations. According to Robert Art and Robert Jervis "anarchy is the fundamental fact of international relations."[4] Anarchy is a term that has debatable meaning and implications. In the words of George Cornewall Lewis, "anarchy is one of the most vague and ambiguous word in language."[5] According to Brilmayer, "the three competing definitions of anarchy are based on empirical criteria, formal criteria and normative criteria."[6] The empirical criteria, according to Brilmayer, are a lack of leadership, diffused power and an absence of hierarchy among actors on world politics. The formal criteria entail a lack of formal institutions of governance at the international level. By virtue of the normative criteria, anarchy is the lack of a legitimate government.[7]

Hedley Bull, reflecting Carr's conception of the irreconcilability of utopia and reality,[8] asserts that the coexistence of power struggles, conflict, cooperation and solidarity among states, is what makes the international system an "anarchical society."[9] Axelrod and Keohane define anarchy as the "lack of a common government."[10] Oye asserts, "nations dwell in perpetual anarchy, for no central authority imposes limits on the pursuit of sovereign interests."[11] For Gilpin international relations is "a recurring struggle for wealth and power among independent actors in a state of anarchy."[12] In anarchy, according to Art and Jervis:

> no agency exists above individual states with authority and power to make laws and settle disputes. States can make commitments and treaties, but no sovereign power ensures compliance and punishes deviations. This – the absence of a supreme power – is what is meant by the anarchic environment of international politics.[13]

Grieco iterates that international anarchy is "the principle force shaping the motives and actions of states." States in an anarchical international system, according to Grieco, are "preoccupied with power and security, are predisposed towards conflict and cooperation, and often fail to cooperate even in the face of common interests."[14] Due the characteristics of anarchy, Grieco is not optimistic about the effect of international institutions on cooperation between state actors. Mearsheimer echoes this pessimism contending "institutions are basically a reflection of the distribution of power in the world" and "are based on the self-interested calculations of the great powers, and they have no independent effect on state behavior."[15] According to Waltz, the anarchic nature of the international system is the explanation for war.[16]

Hertz reiterates the link between anarchy, insecurity, power accumulation and war.

> Groups or individuals living in [an anarchic society] must be, and usually are, concerned about their security from being attacked, subjected, dominated, or annihilated by other groups and individuals. Striving to attain security from such attack, they are driven to acquire more and more power in order to escape the impact of the power of others. This, in turn, renders the others more insecure and compels them to prepare for the worst. Since none can ever feel entirely secure in such a world of competing units, power competition ensues, and the vicious circle of security and power accumulation is on.[17]

The nature and implications of anarchy, according to Butfoy, is one of the four factors that leads to a security dilemma in an anarchical international system. The additional three factors are "the inherently violent and destructive potential of military capabilities, the politics of identity and interests and a sense of threat."[18] Due to the security dilemma aggravated by anarchy, states seek the ability to defend and protect themselves, making other states insecure. This, in turn, leads to the escalation of mutual fears, thereby increasing the likelihood of self-defense.

The concept of anarchy as a starting point for theorizing international relations has led to many debates regarding the different meanings and implications of anarchy for international law and relations. For example, the neorealist-neoliberal debate stems from their different conceptions of the meaning and implications of anarchy in the international system. For neorealists such as Waltz and Grieco, prospects for international institutions to foster peace and cooperation are bleak, while for neoliberals like Keohane and Axelrod, the central question is "under what conditions will cooperation emerge in a world of egoists without central authority."[19]

While neorealists view anarchy as marked by war, distrust, and power politics, uncontrollable by the reach of international law and institutions, neoliberals focus on the possibilities of cooperation among states despite anarchy. The question arises as to which of these two conceptions of anarchy, neorealist or neoliberal, best explains the context of the US invasion of Iraq in the name of self-defense? The neorealist-neoliberal debate is particularly relevant to discussions that follow in this book because resorting to different notions of anarchy lead us to different explanations to the US use of self-defense in its war against Iraq.

As mentioned earlier, the purpose of this book is not to provide a theoretical analysis of the US war in Iraq but to better understand the nuances of the motivations that led the US to use mechanisms of self-help in a unipolar world. This book explores the legalities and illegalities associated with US action in Iraq and the role of institutions such as the United Nations in responding to US action. It makes a modest attempt at suggesting a way forward through a perspective that knits an analysis of law and politics.

This chapter develops a frame of understanding international politics using mainstream theoretical accounts. After delving into a discussion of the main tenets of realism/neorealism, a discussion of liberalism/neoliberalism follows with the intention of arguing that of the two theoretical accounts, the neorealist conception of anarchy presents a more solid framework for gauging the US use of anticipatory self-defense against Iraq.

A revival of the neorealist-neoliberal debate was seen as the result of the collapse of the Soviet Union, the end of the cold war, and the globalization of the economy. Questions concerning the future of international relations surfaced. Neorealists were fearful of the destabilizing impact of the end of a bipolar distribution of power, possibly leading to instability and greater likelihood of wars. The underlying assumption of neorealists was that bipolarity provided the stability that the anarchical international system lacked. Neoliberals saw the end of the cold war as a reflection of the success of their thesis, i.e. that war and distrust were not inevitable features of the international system and that peace was a possibility as an outcome of shared common goals, values and visions of peace and democracy among states.

This debate regarding the impact of anarchy on the international system re-surfaced following a long period of perceived US predominance in international affairs followed by the collapse of the Soviet Union. It took center-stage following the US claim of self-defense in its war against Iraq in 2003. The concept of "anarchy" took a front-seat in efforts to understanding international relations. Was the US use of anticipatory self-defense a reflection of the anarchical international system we live in? If peace, cooperation and multilateralism can coexist with anarchy, why did the US attack Iraq unilaterally and why did the US, in its claim of self-defense in Iraq, sideline the United Nations? If self-help can be restricted or constrained by trust among nations, why did we not see a diplomatic solution to the threat that Iraq posed to the US? Why did the US resort to force despite the apparent disapproval from sections of the international community of its intent and proposed action against Iraq?

The question that became a central piece in academic discussions was whether the neorealist or the neoliberal conception of anarchy was more accurate in understanding the causes and consequences of the US use of self-defense in Iraq. The answer to this resembles neorealist tenets more closely. Despite its shortcomings, neorealism provides substantial insight in understanding the structure of the international system today and also the behavior of the US in a post-cold war world. It also helps us to understand better the limitations of the United Nations in grappling with uses of force, particularly when it comes from the most powerful country in the international system today.

In the 1970s, neorealism emerged as a response to the challenge of interdependency theory and as a corrective to traditional realism represented by Thomas Hobbes, Hans Morgenthau and Reinhold Niebuhr[20] among others. Some main tenets of classical realism are: 1) human nature is ineradicably bad, egoistic, conflictual and selfish; 2) states are the main actors in international politics; 3) states are unitary and rational actors seeking relative gains in international politics; 4) the international system is anarchic implying a lack of centralized authority, the most central driving force of states is that of survival, national interest and a struggle for power; 5) states cannot trust each other in an international system characterized by anarchy and self-help; 6) international institutions cannot mitigate the effects of anarchy and are unable to foster peace and cooperation between states. Classical realism highlighted the primacy of human nature and power struggles to understand the behavior of nation-states. They focused on first and second image explanations, the first being "Man/Humans" the Second being the internal structure of the state. Neorealism, on the other had focuses on third image explanations rooted in the nature of the international system.

Neorealism came to the forefront when the increase of alliances between states, the emergence of multinational corporations as major actors in international politics, and the decrease of wars led to the questioning of some basic assumptions of classical realism.[21] In order to fill gaps left by the theoretical shortcomings of classical realism, neorealism proposed its revised theory. Although neorealists echo several central tenets of classical Realism (anarchy, state-centric,[22] rationality and power[23] assumptions), they differ from their forerunner in significant ways. Neorealists are more concerned with security and survival than power. Power, for neorealists is a means to achieving security and not an end in itself, as Realists believe. The value of being powerful lies in the security that power brings. However, excess power *vis-à-vis* others can make states less secure as this would cause other states to restore the balance of power by accumulating

arms and aligning against it. The structure impacts the states (or units) differently depending on the number of balancing powers. Variations in the number of balancing powers leads to unipolarity, bipolarity or multipolarity. Waltz contends that bipolarity is the most stable and desirable structural arrangement and cites the cold war example. Balance of power was inevitable according to Waltz "not so much imposed by statesmen on events as it is imposed by events on statesmen."[24] Thus, for neorealists, state action is shaped by the dynamics of the international system, regardless of the form of government or the nature of their leaders. Waltz summarizes the essence of the balance of power theory as follows:

> A balance-of-power theory, properly stated, begins with assumptions about states: They are unitary actors who, at a minimum, seek their own preservation and, at a maximum, drive for universal domination. States, or those who act for them, try in more or less sensible ways to use the means available in order to achieve the ends in view.[25]

Of all the differences between realism and neorealism, the most important difference is their level of analysis. Classical realists focus primarily on the unit level analysis (characteristics of national leaders and the state) when theorizing about international relations. Neorealists argue that phenomena such as war and peace are best explained by a systems level analysis without questioning the explanatory power of unit level analysis. Neorealists argue that in an anarchical system with no "central monopoly of legitimate force," states are preoccupied with security. Due to a lack of central authority to impose order, states are confronted with a "security dilemma" and resort to mechanisms of "self-help" to protect themselves and their vital interests by acquiring weapons and forming alliances with other states.

Waltz, unlike the classical realists, makes a distinction between the principles on which the domestic and international relations are ordered. According to Waltz, while the national arena is "hierarchical, vertical, centralized, heterogeneous, directed and contrived," the international sphere is "anarchic, horizontal, decentralized, homogenous, undirected and mutually adaptive."[26] War, lack of trust and a reliance on power would, according to Waltz, mark such a condition in the international realm. Waltz, in his analysis, warns against adopting an explanation of the outcomes of the international system in terms of the internal workings of the state. He argues that the workings of the

international system cannot be reduced to the internal working of states:

> From attributes one cannot predict outcomes if outcomes depend on the situation of the actors as well as on their attributes…One cannot infer the condition of international politics from the internal composition of states, nor can one arrive at an understanding of international politics by summing the foreign policies and external behavior of states.[27]

As an alternative to the study of the composition of states to explain international behavior, Waltz suggests a structural approach, which focuses on the anarchical nature of the international system. Waltz refers to this focus as third image realism,[28] drawing links between power dynamics of a system and the actions of states:

> Each state pursues its own interests, however defined, in ways it judges best. Force is a means of achieving the external ends of states because there exists no consistent, reliable process of reconciling the conflicts of interests that inevitably arise among similar units in a condition of anarchy.[29]

According to Waltz, structures, such as the international system, vary in three aspects namely "ordering principles, the specification of functions of formally differentiated parts, and the relative capabilities (or power) of the units themselves."[30] Since Waltz assumes that states perform the same function in an international system, the first two dimensions of difference become subsidiary concerns and the relative capabilities of states in an international system to perform their roles become the central concern in studying international relations.

According to Waltz, "there is no automatic harmony" in a competition-ridden anarchical system.[31] "States themselves must choose to obey the rules they created," Mearsheimer adds.[32] Although Waltz does iterate that "world government is the remedy for war," he does not consider such a government attainable because of the inherent suspicion between state actors operating in an anarchical system. In such a system "international institutions are unable to mitigate anarchy's constraining effects on interstate cooperation."[33] Institutions, here, are defined as "a set of rules that stipulate the ways in which states should cooperate and compete with each other. They prescribe acceptable forms of state behavior, and proscribe unacceptable kinds of behavior."[34] These sets of rules are

negotiated by states themselves and are formalized in organizations or institutions. Negotiations display the power politics that are institutionalized in organizations reflecting the security needs of the big powers. According to Mearsheimer, although states can and do cooperate in the competitive anarchical system, their cooperation is severely hampered by "the dominant logic of security competition, which no amount of cooperation can eliminate." According to realists, "genuine peace, or a world where states do not compete for power is not likely."[35]

What makes neorealism particularly relevant to this study is the emphasis it places on the existence of anarchy, balance of power, security dilemma and the quest for security by states. The perception by states in viewing another state's behavior as threatening also plays a crucial role.

A liberal critique of neorealism builds on five propositions namely: 1) states are not the main actors in world politics; 2) states are not unitary and rational actors; 3) states are becoming less and less concerned with power and security; 4) states are not necessarily opposed to cooperation as they view each other as partners, not enemies and 5) institutions promote cooperation. It is important to clarify here that there are many strands of liberalism, for example democratic liberalism, economic liberalism, commercial liberalism and institutional liberalism, to name a few.

The debate between neorealism and neoliberalism revolves around six main themes: the nature and consequence of anarchy, international cooperation, relative versus absolute gains, priority of state goals, intentions versus capabilities, institutions and regimes.[36]

Democratic liberals argue that realists are too preoccupied with power and the structure of the international system without paying attention to the internal characteristics of a state. They argue that democracies are less prone to war than non-democracies owing to the checks and balances that the internal dynamics of a state impose. Economic liberals argue that realists ignore the economic aspects of cooperation and gain and are overly obsessed with power and security. They argue that increasing economic interdependence between states (i.e. in the form of globalization) leads to less chances of war.

As highlighted in preceding pages, realists and neorealists view cooperation, interdependence and institutions with skepticism arguing that these are laden with dynamics of power and power politics. For the purpose of our analysis of the US led war in Iraq 2003, anarchy, as

theorized, by the neorealists is used. Like any theory, realism/neorealism has strengths and weaknesses.

Critics of neorealism have questioned several aspects of its theoretical premises. Some of the criticisms are enunciated in the following paragraphs.

First, neorealism has been criticized for drawing sharp distinctions between the domestic sphere and the international. Milner argues that the distinction between domestic and international spheres is hard to maintain in the sense Waltz conceived it, i.e. "domestically, authority, administration, and law prevail; internationally, it is power, struggle, and accommodation."[37] Milner criticizes Waltz's for not taking into account the influence of the inside (domestic) on the outside (international) power and politics of a state. Milner argues, "in reality, these assumptions seem to depend on other factors, some domestic and some international."[38]

According to Milner, this distinction is the result of using anarchy at the international level as the starting point of theorizing international politics. Milner, unlike Waltz, argues that the international system is similar to the domestic system in the sense that the use of force internationally can be legitimate, just as the use of force in domestic settings. Order, according to Milner, does exist despite anarchy in the international system, and is provided through different means, which may not be formal institutions or law as it is the case in domestic politics. She mentions international institutions and international law as examples of means towards ensuring order in the international system. She also refutes Waltz's notion that anarchy is the lack of centralized authority in an international system, which is decentralized and represented by competing sovereign equals. The neorealist rebuttal to such criticism is that international institutions and law are a reflection of the power politics that dominate the international system and cannot be seen as ensuring an order that is not in conformity with the big powers. The mere presence of an international institution is not adequate to refute the neorealist claim that the international system is anarchical and lacks centralized authority to provide order divorced from the interests of great powers. It is important to point out that although neorealists focus on the international system for an explanation of international relations, Waltz does not discount that domestic level occurrences are important too. He explains:

> A theory is an instrument intended to be useful in explaining what happens in a defined realm of activity. To criticize a theory for its

> omissions is odd because theories are mostly omission…The matters omitted are not neglected when a theory is used…Obviously nobody, realist or otherwise, believes that foreign policy and international politics can be understood without considering what goes on inside states.[39]

Second, neorealism has been criticized for assuming that all states are functionally equal. Milner disagrees that all states are sovereign equals. Waltz, according to Milner, argues "although states are like units functionally, they differ vastly in their capabilities."[40] She argues that "two of Waltz's three central assumptions/ordering principles conflict. It is difficult to assume that all states are equal (the first and second principles) and that all states are not equal as a result of the distribution of their capabilities (the third principle)."[41]

Third, neorealism has been criticized for its pessimistic view on the possibility of cooperation and interdependence. Although Milner credits the notion of an international anarchical system, she contends that Waltz over-emphasizes this notion to a point of ignoring possibilities of cooperation and interdependence between states. For Milner, interdependence is not the opposite of anarchy, nor does it imply the unimportance of power, but that it is "as fundamental to the actors as is anarchy."[42] For Waltz, interdependence and cooperation are clouded by the overarching needs of state security in an anarchical international system. According to Waltz, "states in an anarchic order must provide for their own security; and threats or seeming threats to their security abound." As a result, "preoccupation with identifying dangers and counteracting them becomes a way of life."[43] Alliances among states are possible as a result of some common interests, which is negatively defined as the fear of other states in anarchy. For Waltz, then, competition, conflict and cooperation are a function of system anarchy.

Fourth, neorealism has been criticized for over-reliance on the concept of anarchy in explaining international relations. As for the usefulness of anarchy in theorizing international relations, Milner maintains:

> The recent tendency in international relations theory to view anarchy as the fundamental background condition of international politics underestimates the ambiguity of the concept and lends it an exaggerated importance. While anarchy is an important condition of world politics, it is not the only one. Strategic interdependence among the

> actors is at least fundamental. An exclusive force on anarchy may be overly reductionist.[44]

Lea Brilmayer echoes Milner's critiques of Waltz, particularly concerning his definition of anarchy at the international level and his having ignored relevant similarities between domestic and international politics. Moreover she highlights the relevance of morality in anarchical systems. She explains that, just as citizens, rights in vertical domestic relations cannot be guaranteed protection until the government chooses to resolve the issue; an authoritative mediator or hegemon cannot ensure the rights and interests of smaller states until there is some international political morality. Brilmayer argues that morality is possible in vertical international relations just as it is at the domestic levels. She does not deny that the hegemon may function guided by its own security risks, but does not deny either that the hegemon may be moral. She uses the American example to show how, as a hegemon, it has exercised moral judgment and goals such as democracy and human rights on several occasions.[45] Neorealists contend that whenever there is a clash between national interest or security and morality, the latter will be compromised, never the former. Morality, then, becomes a function of national interest and loses meaning in the context of power politics that prevail over any other international ethics.

Fifth, neorealism has been charged of excessive statism in its theory of international relations. Ashley, one of neorealism's most severe critics, calls neorealism an "orrey of errors" owing to its weaknesses emanating from excessive statism, utilitarianism, positivism, and structuralism.[46] By statism, Ashley means that neorealism is bound to the notion of the state as unitary actor, which Waltz's neorealism accepts as an unproblematic and uncontested starting point. It does not take into account the internal dynamics of the state and this neglect becomes a defense of the interests of dominant members and ruling elite within a state. Waltz's conception of the state does not take into account race, class, gender, or human interests suppressed under the myth of the state ensuring public good through centralized mechanisms. Another problem with Waltz's statism, as pointed out by Ashley, is that the state is taken to be "ontologically prior" to the international system. This implies that one cannot describe international structures "without first fashioning a concept of the state-as-actor."[47] Even the individuality of a state is taken for granted, embedded in the concept of sovereignty. According to Waltz, "to say that a state is sovereign means that it decides for itself how it will cope with its internal and external problems."[48]

Sixth, neorealism has been charged for its inability to explain change in international relations.[49] Ruggie criticizes Waltz's narrow concept of structure and his separation of units from structure. According to Ashley:

> Waltz establishes the independence of the structured whole from the idealized point of view of the lone, isolated state as actor, which cannot alone alter the whole and cannot rely on others to aid it in bringing about change in the whole's deepest structures.[50]

Wendt reiterates this criticism against Waltz for his lack of understanding of interactions between agent and structure arguing that this inability to view the agents and structures being intertwined leads to an incomplete conception of structures that does not account for change. Wendt, a structuration theorist, views agents and structures as "mutually constitutive" or "co-determined entities."[51]

Cox reiterates Ruggie's criticism of Waltz's neorealism not being able to explain change. Cox explains change as a conglomeration of three forces namely, ideas, material capabilities and institutions. Through critical theory and historical materialism Cox problematizes many of Waltz's "givens" rooted in his positivism. In contrast to Waltz, Cox views the reality of human nature, subsequent patterns of social relations, dimensions of power and links between structure and superstructure in a dialectic manner. This, according to Cox, accounts for change and transformation over time. Neorealism, according to Cox, "dismisses social forces as irrelevant, and is not much concerned with differentiating forms of state." It "tends to place a low value on normative and institutional aspects of world order."[52] Neorealism explains change in terms of a change in balance of power in the international system. Waltz's conception that the primary interest of states is to maximize its security undoubtedly reflects a status-quo bias, however, Waltz attempts to explain change in terms of changes in the international system. Waltz explains:

> To say that an international-political system is stable means two things: first, that it remains anarchic; second, that no consequential variation takes place in the number of principal parties that constitute the system. "Consequential" variations in number are changes of number that lead to different expectations about the effect of structure on units, the stability of the system, so long as it remains anarchic, is then closely linked with the fate of its principal members.

> The close link is established by the relation of changes in number of great powers to transformation of the system.[53]

Although Waltz does not explain change in terms of domestic variables, he clarifies that:

> In reality, everything is related to everything else, and one domain cannot be separated from others. But theory isolates one realm from all others in order to deal with it intellectually.[54]

Unlike neorealism, liberal theorists argue that the internal nature of the state (i.e. the domestic level) determine their tendencies towards war and peace. Democratic liberals[55] argue that states based on notions of individual rights, private property and elected representation (i.e. democracies) are fundamentally against war and aggression. Democratic states, according to this school of thought do not go to war, particularly against other democracies, but non-democracies too. Their analysis shows how they relate national institutions as affecting the international sphere. Layne argues that not only do domestic politics shape the international sphere but view the international structure as crucial in shaping domestic politics. Waltz's third image realism, quite the opposite, neither sees the inter-relationship between domestic and international structures, nor believes in the possibility of unconditional peace not guided by self-interest. War, according to Waltz is inevitable in an anarchical society. Sociological liberals[56] would disagree with Waltz's conception of war as unavoidable. They argue that war is avoidable by virtue of the ability of states to learn and as a result of changes in the social class structure over time.

Seventh, neorealism has been blamed for its over-reliance on structure and the concept of state in explaining international relations, thereby divorcing its analysis from historical and social practices and processes that inform politics. Ashley criticizes neorealism for its utilitarianism implying that the state in Waltz's model exists "prior to and independent of larger social institutions" and is seen as an independent source of the ends it seeks. This is partly attributable to the neorealist conception of power divorced from concepts of social power lending to the formulation of states and state interests.[57] Ashley charges Waltz for the totalitarian implications of neglecting "process, practice, power and politics."[58] Denying the process of history, Waltz's conception of anarchy confines all change and movement to a pre-conceived structure. It denies voice to people within the state and reduces them to objects of theory

rather than minds capable of criticizing the existing social orders and formulating theories and action for change.[59]

Despite these criticisms against the neorealist conception of anarchy, it is not without strengths, particularly as a starting point in theorizing international relations. As Waltz explains:

> A theory is a depiction of the organization of a domain and of the connections among its parts. A theory indicates that some factors are more important than others and specifies relations among them.[60]

The aim of theorizing international relations is "to make international politics more intelligible and better understood."[61] While the neorealist theory of international politics with anarchy as one of its central pillars has several shortcomings, it continues to have explanatory power and unquestionable relevance in world politics of today.

Four important factors deserve elaboration in making the case that anarchy, as conceived by neorealists, is important as a starting point for theorizing international law and politics, particularly for an analysis of the US use of self-defense against Iraq.

Firstly, based on the primacy of power politics in the international arena, neorealism brings to the forefront several issues of security, which is an important concern of every state, big or small. Security, here, means security not only in the military and economic sense, but also social, political, and cultural security. And power means capabilities of state not only in the military, economic and technological sense as neorealists conceive, but power also in the sense of political power, cybernetics, social, cultural etc.[62] These elaborations in the neorealist conceptions of security and power provide a better, more holistic explanation of balance of power in the past and present.

Secondly, neorealists conceptualize the international system as being anarchical in the sense of the absence of a centralized central authority unable to ensure interests of all states. Although neoliberals provide examples of international institutions such as international law[63] and American hegemony[64] as representing and providing order to the anarchical system, order does not exist in the international sphere. Order, for neorealists is a function of the existing balance of power between states that try to maximize their power and capabilities *vis-à-vis* each other. This order is a function of the ever-changing balance of powers. Order, in any case does not exist at the international level as it does at the domestic level. There are times when international law may provide aid in restoring a conflict situation with peaceful settlements, but it is

just a manifestation of the dilemma of common interest at that point of time. On other occasions when international law cannot provide and ensure order, it is a manifestation of the dilemma of common aversion.[65]

Explanation of cooperation, conflict, interdependence, institutions and regimes by the logic of dilemma of common aversion and interest helps to understand how and why balance of power takes place and changes over time. What is lacking in such explanations is that there are instances when states may make choices not determined by their unitary and rational existence in an anarchical international sphere but also by the social, political, economic, cultural and other forces operating from within.

Balance of powers takes place in an anarchical international system where cooperation and interdependence are not "as fundamental to actors as anarchy is."[66] Although States function in similar ways seeking to maximize their security and power *vis-à-vis* other actors, they differ in capabilities, which may drive states into temporary alliances to achieve a balance of power. These alliances are never permanent, nor divorced from a state's inherent instinct to self-preservation in a self-help system. Neorealists provide an accurate conception of cooperation:

> states worry that today's friend may be tomorrow's enemy in war, and fear that achievement of joint gains that advantage a friend in the present might produce a more dangerous potential foe in the future.[67]

The concept of relative gains in anarchy is, thus, a more powerful explanation of the concern of states than absolute gains, leading them towards competition and conflict rather than cooperation and interdependence. The same logic of relative gains disallows the prospects of cooperation to get any better through international institutions.

Thirdly, states are, as neorealists argue, still the most important actors in world affairs. The role of other actors and factors such as non-governmental organizations, inter-governmental organizations, pressure groups, labor unions, political parties, international institutions, bureaucracies, people, culture, communities, religion, personalities, groups is undeniable in world affairs today. However, no other actor has (yet) over-ridden the analytical and theoretical significance of the state as an entity to consider in international law and relations. Whether it is in the field of economics, humanitarian issues, trade or

environment, the state is still considered as an undeniably decisive entity in assessing international relations and legalities that may surface thereafter. According to Lipson:

> States are independent actors, as the realist tradition insists, is a durable truth. That their choices are interdependent, at least in their consequences, is equally important. It is precisely the juxtaposition of these competing features that defines the fundamental problems of international relations. Our theories must cope with both.[68]

Fourthly, the neorealist conceptualization of anarchy helps to understand why and how cooperation and interdependence among states takes place and why and how it ends to form new alliances. It argues that cooperation does not necessarily imply a complete 'harmony of interests' but implies a mixture between "complementary and conflicting" interests.[69]

The usefulness of any approach to thinking about international law and politics may be gauged by its potential for describing, explaining, predicting and prescribing events in contemporary international relations. In times when the cold war bipolarity dominated world politics, the neorealist prediction of a bipolar and stable international system did hold true. Although neorealists ignored the internal dynamics of the centers of bipolarity namely the US and USSR, the voices of people within each state and social forces in explaining events on the international plane, neorealism was upheld in terms of the absence of major wars.

Anarchy as a starting point for understanding international law and relations will remain important as long as the international system lacks a centralized world government authority. Neorealism will hold merit for as long as states are the most important actors in international relations, as long as the importance of state sovereignty prevails, and as long as security is the important concern for state survival.

Theories, of course, merely provide an arena for analysis and no one theory necessarily can explain all times and all changes.

> We will never have a single theory of international politics – different perspectives on the world are probably a reasonable expression of the complexities of real life and different value preferences. We may not feel comfortable with those complexities, but surely ambi-

> guity, gray areas and uncertainty are preferable to intellectual orthodoxy.[70]

This study will primarily use the backdrop of the neorealist conception of anarchy and polarity to analyze the meaning and implication of the laws regarding self-defense in international relations. However, since no theory is ever complete in itself, this study will occasionally transcend boundaries between various approaches of international relations (IR). In the following section, a discussion of unipolarity will follow in order to examine the question of the role of international law in the US war on Iraq and US actions in Afghanistan that preceded Iraq.

2.2 System polarity: Impact on international law

Before we proceed with the discussion of the implications of different types of polarity and their impact on war, peace and stability, it is crucial to define the rules in a system characterized by a "balance of power." These rules, as summarized by Morton Kaplan are:

> (1) increase capabilities but negotiate rather than fight; (2) fight rather than fail to increase capabilities; (3) stop fighting rather than eliminate an essential actor; (4) oppose any coalition or single actor which tends to assume a position of preponderance within the system; (5) constrain actors who subscribe to supranational organizational principles; and (6) permit defeated or constrained essential national actors to re-enter the system as acceptable role partners, or act to bring some previously inessential actor within the essential actor classification.[71]

Waltz describes balance of power as follows:

> A balance-of-power theory, properly stated, begins with assumptions about states: They are unitary actors who, at a minimum, seek their own preservation and, at a maximum, drive for universal domination. States, or those who act for them, try in more or less sensible ways to use the means available in order to achieve the ends in view. Those means fall into two categories: internal efforts (moves to increase economic capability, to increase military strength, to develop clever strategies) and external efforts (moves to strengthen and enlarge one's own alliance or to weaken and shrink an opposing one)…. *(To)* the

> assumptions of the theory we then add the condition for its operation: that two or more states coexist in a self-help system, one with no superior agent to come to the aid of states that may be weakening or to deny to any of them the use of whatever instruments they think will serve their purposes.[72]

According to neorealism, stability is a function of the number of influential actors in the international system. Different theorists differ on their perception of the most stable arrangement *vis-à-vis* the number of key players. While some scholars argue that bipolarity (two key players as in the cold war, i.e. USA and USSR) is the most stable arrangement for the international system to ensure "order,"[73] others argue that multipolarity (three or more key players) is the best structural arrangement to ensure "order."[74] Still others argue that unipolarity is the most stable arrangement in the international system ensuring "order."[75] All these debates concern themselves with predictions concerning order without engaging the concept of justice.[76] Justice in the international system, like in any other application, has multiple conceptualizations depending on the level of analysis (individual, state and international system) the type of justice being evaluated (social, political, economic) and the definition of justice. International Order, on the other hand, has a more tangible and measurable way of proving its presence. Order equals system stability. Stability is manifested in an absence of large-scale war and a tendency towards state survival.

Mearsheimer and Waltz argue that bipolarity implies a balance of power, in terms of conventional and nuclear capabilities, leading to a situation where deterrence leads to peace defined as lack of war, which in turn may be defined as system stability. By implication, the lack of bipolarity in the international system would mean elevated chances of war and therefore reduced stability.

According to neorealists, bipolarity is characterized by an absence of shifting alliances, enhanced predictability of state action and greater certainty about the capabilities and resources of the opponent. Waltz summarizes, "Bipolarity offers a promise of peace; nuclear weapons reinforce the promise and make it a near guarantee."[77] According to Mearsheimer, for these very reasons, the cold war era was defined by stability while the post-cold war era would be characterized by instability or increased chances of war. Mearsheimer enumerates four principal reasons why we can expect a bipolar system to be more stable and less war prone than multipolarity. First, he argues that multipolarity is characterized by more "diads of war" than bipolarity. There is only one

"diad of war" in bipolarity as against multiple "diads in a multipolar system." Second, deterrence is more difficult to achieve in a multipolar system due to the ease with which power balance can be disturbed. In bipolarity, like it existed during the cold war, deterrence was relatively easy to achieve due to an approximately equal distribution of power between the balancers. Third, the costs and risks of war under bipolarity are enormous thereby making full-fledged war less likely. Finally, Mearsheimer argues that in bipolarity, as it existed between the USA and USSR during the cold war, the possession of nuclear weapons sustains the balance leaving close to no incentive for war. Mearsheimer who argues that the current lack of bipolarity is threatening for peace also speculates that the system will shift back to bipolarity anytime soon.

Others, such as Kegley and Raymond, question the causation between great power peace, i.e. stability, and bipolarity. They argue that even during the cold war, the system was indeed "crisis-ridden" and that Mearsheimer fails to account for the threats to international peace and security during the cold war years.[78]

How can we define the international anarchical system in terms of its polarity in the post-cold war years? Krauthammer asserts, "Now is the Unipolar Moment."[79] Christopher Layne echoes this point by arguing that the collapse of the Soviet Union "transformed the international system from bipolarity to unipolarity."[80] Many theorists have begun to evaluate the possibilities and limitations of unipolarity. But before we proceed, let us define unipolarity. In the words of Wilkinson:

> There currently exists one superpower, with global reach, capable of conducting or organizing politico-military action anywhere in the world system: the United States of America. Four great powers are recognized as capable of conducting such action at a regional level, and, on a small scale or cooperatively, beyond: France, Britain, Russia, and China; India presses to join the group. This power configuration is as properly termed "unipolarity" as its cold war predecessor was labeled "bipolarity" and its pre-World War II predecessor "multipolarity".[81]

In the post-cold war era, we can argue that the US is the "lonely superpower" in an international system that is unipolar or as Huntington would argue Uni-Multipolar.[82] What does this mean for international law and relations? What implication does this have for US foreign

policy and what foreseeable patterns can be identified? According to Waltz:

> In a bipolar world, two states check and balance each other. In a unipolar world, checks on the behavior of the one great power drop drastically. Unipolarity weakens structural constraints, enlarges the field of action of the remaining great power, and heightens the importance of its internal qualities.

Waltz argues that an international system with a balance of power is similar to a political system which has checks and balances, conversely, an international system which is unable to balance lacks these checks and balances leading to "arbitrary and destructive governance that works for the benefit of the governors than the governed." A "benevolent despot" may be able to tailor its foreign policy strategically for long-term primacy but the power disparities of the international system generate a tendency towards despotism because "superiority fosters the desire to use it."[83] The least stable of all international polarities, a unipolar power may behave with "moderation, restraint and forbearance" which is rarely the case.[84] If it were the case, weaker states would continue to worry about the future behavior of a superpower in an unbalanced system, and would try to increase their strength or find allies in order to balance the system to whatever extent possible. Waltz iterates that "as nature abhors a vacuum, so international politics abhors unbalanced power."[85]

Stephen Walt argues that American Primacy or unipolarity comes with prospects as well as pitfalls that the US should consider in the way it conducts its foreign policy *vis-à-vis* the rest of the world. Among the opportunities, Walt argues that the unipolar status of the US provides security, tranquility, and prosperity, allowing the US to maximize influence. On the other hand, US primacy could lead to declining public and international support with the need for the US to exercise caution in its interactions with other states in the system. Walt argues that since unipolarity comes with its prospects and pitfalls, it is for US foreign policy makers to choose whether they adopt a unilateral approach in international law and relations or a multilateral approach or a combination of both in the form of a metal fist and velvet glove where it would use its power to maintain its primacy but do so in a cautious manner.[86]

In Barren Posen and Ross's "Competing Visions of US Grand Strategy," four alternative foreign policy models are explained namely neo-

isolationism, selective engagement, cooperative security and primacy. "Neo-Isolationism" resembles minimal defensive status-quo realism in which the main issue in international politics is the avoidance of entanglements in the domestic affairs of other states while safeguarding national interest at any cost. A distance balance of power is maintained and the use of force, if the need arises (threat to security, territorial integrity, sovereignty) is limited to self-defense. The focus of foreign policy making is North America, not beyond. In such a model, nuclear proliferation in the world is not a direct US problem.

"Selective Engagement" resembles the traditional balance of power encouraging a discriminate prevention of nuclear proliferation, discriminate intervention and discriminate use of force with the purpose of containing emerging or challenging powers in industrial Eurasia. There is also a move to contain ethnic conflicts when they affect national interest.

"Cooperative Security" is based on the goal of the indivisibility or peace at a global level through the use of interdependence. The goal is an indiscriminate prevention of nuclear proliferation, indiscriminate intervention in ethnic conflicts even through humanitarian interventions. The use of force, in this strategy is frequent with the aim of preserving world peace and dissolving threats to international peace and security.

"Primacy" is the unilateralist approach with maximum realist tendencies. The major issue in world politics to be addressed is the rise of a competitor at the world stage anywhere, challenging the existing order. The preferred world order is hegemonic where there is indiscriminate prevention of nuclear proliferation, yet discriminate intervention in regional conflicts and discriminate humanitarian intervention, if and when necessary.[87] Such an approach is based on the strategy of being a "benign hegemon" so that the US will have global support rather than opposition in its endeavors.

The Pentagon Plan: Prevent the Emergence of a New Rival reflects the US strategy of Primacy in the post-cold war world via two means namely, first, developing tactics to maintain US power and dominance in world politics and second, by taking on the responsibility of "righting wrongs" that directly affect US national interests. The first of these goals is apparent in the following excerpt from The Pentagon Plan:

> First, the US must show the leadership necessary to establish and protect a new order that holds the promise of convincing potential competitors that they need not aspire to a greater role or pursue a

> more aggressive posture to protect their legitimate interests. Second, in the non-defense areas, we must account sufficiently for the interests of the advanced industrial nations to discourage them from challenging our leadership or seeking to overturn the established political and economic order. Finally, we must maintain the mechanisms for deterring potential competitors from even aspiring to a larger regional or global role. An effective reconstitution capability is important here, since it implies that a potential rival could not hope to quickly or easily gain a predominant military position in the world.

The second related goal of "righting the wrongs" involves selectivity based on US national interest. This is clearly highlighted in the Pentagon Report:

> While the U.S. cannot become the world's "policeman," by assuming responsibility for righting every wrong, we will retain the preeminent responsibility for addressing selectively those wrongs which threaten not only our interests, but those of our allies or friends, or which could seriously unsettle international relations. Various types of U.S. interests may be involved in such instances: access to vital raw materials, primarily Persian Gulf oil; proliferation of weapons of mass destruction and ballistic missiles, threats to U.S. citizens from terrorism or regional or local conflict, and threats to U.S. society from narcotics trafficking. It is improbable that a global conventional challenge to U.S. and Western security will re-emerge from the Eurasian heartland for many years to come…There are other potential nations or coalitions that could, in the further future, develop strategic aims and a defense posture of region-wide or global domination. Our strategy must now refocus on precluding the emergence of any potential future global competitor. But because we no longer face either a global threat or a hostile, non-democratic power dominating a region critical to our interests, we have the opportunity to meet threats at lower levels and lower costs – as long as we are prepared to reconstitute additional forces should the need to counter a global threat re-emerge.[88]

The US approach has been that of seeking and maintaining its "primacy" status since the end of the cold war. The Defense Planning Guidance, tailored by Paul Wolfowitz, the US Under-Secretary for Defense Policy from 1989–1993 under George H.W. Bush provided the blueprint for US grand

strategy in the post-cold war era. This grand-strategy reflects an obvious shift from the earlier doctrine of deterrence to a doctrine that warranted direct and unilateral actions if necessary in order to maintain security, democracy and its position as the remaining superpower.

The Bush Doctrine, 2002, following the World Trade Center Attacks of 2001 based itself on similar principles, reaffirming US use of Posen and Ross's strategy of "primacy," which is workable in a post-cold war unipolar world. Analysts such as Wohlforth vehemently defend the position that the system is unipolar[89] at present, and argue that this does not, in fact, pose a threat to world peace and stability.[90] Wohlforth contends that not only is unipolarity durable but also is proven to peace. The most important variable for its durability and ability to provide peace and stability is the failure by the US to do enough. Conversely, neorealists such as Mearsheimer and Waltz argue that unipolarity is the least stable of all systems as it is based on a concentration of power that would invariably cause shifts in the current balance of power. Krauthammer, in line with the arguments of Waltz and Mearsheimer, asserts that unipolarity dramatically aggravates the threat of war. Without rejecting the idea of a balancer emerging in the future, or the system becoming multipolar in time, Krauthammer states that "we are not there yet, nor we will be for decades."[91] We need to understand the system keeping this reality in mind.

The collapse of the Soviet Union, globalization, and the new trend towards American unipolarity may be seen as a transitional state, not very stable, bound to give rise to new powers on the international scene as a result of structural changes, uneven growth rates and the competition that manifests between states. Examples from history document that although there have been many instances of temporary unipolarity, counter-unipolar or counter-hegemonic forces lead to a reordering and change in international politics. For example, in 1660, there was French hegemony, which gave way to newer powers like Austria, Russia and England by 1713. Similarly 1860 saw British hegemony that was later, in 1880 replaced by a European great power system, and then later led to German hegemony.[92]

The question arises regarding the life and times of the American unipolarity and whether it will be, at some point in time, replaced by the emergence of new powers and new balances. According to Krauthammer, "there is but one first-rate power and no prospect in the immediate future of any power to rival it."[93] As a result, the US has followed a foreign policy of securing its dominant position in the world to safeguard its national security and maintain its global position of "primacy."

Mastanduno iterates that we can expect the US security policy to reflect three tendencies in the post-cold war unipolar international system. First, we will find the US "liberated from the confines the bipolar structure, behaving as an 'unconstrained' great power with considerable discretion in its statecraft."[94] Mastanduno gives evidence of such "unconstrained" US behavior in Yugoslavia, Haiti, Bosnia, Iraq and Afghanistan. Second, other major powers will distance themselves from the US in order to balance or prepare to balance the US might. Third, the US will attempt to move towards "strategic independence" (i.e. cooperative arrangements when it helps the US enhance and maintain its current power status) *vis-à-vis* its cold war entanglements to avoid the system transition towards a multipolar system. For the second and third predictions, evidence is not concrete but tendencies may be seen.[95]

Stephen Walt predicts that balancing would only occur as a "balance of threat" in the event that a threat were to arise stemming from the behavior of the prevailing unipolar state, i.e. the US. This implies that US foreign policy will determine the possibility of a rising balancer and that it is in the interest of the US to conduct its international actions in ways that would discourage other states from balancing the power of the US.[96] Mastanduno suggests that the emergence of a balancer state is a function of the "foreign policy behavior of the dominant state"[97] which in turn will be a response to the foreign policy orientations of other states, be they status-quo states, revisionist states or "on-the-fence" states.[98] He claims that in a unipolar international system, with the US as the dominant power, we can then expect three things:

> First, we should expect as the centerpiece of US grand strategy, an effort to prolong the unipolar moment. Second, we should anticipate that the United States will adopt policies of reassurance toward status quo states, policies of confrontation toward revisionist states, and policies of engagement or integration toward undecided states. Third, we should see the United States emphasizing multilateral processes in its foreign policy undertakings.[99]

Neorealists predict that new powers may emerge and change the balance of power and balance of threat. Which of these are status-quo states, revisionist states or "on-the-fence" states? Japan's power today has grown manifold and plays an important role in the international arena but the question that arises is whether it would want to play the role of a balancing superpower. China, some argue is the emerging balancer of US power, growing in economic strength each day. In addition, the European Union is seen as a potential balancer to the US on the international arena. India

presents a potential for superpower status, given its size, geography and growth. The US named "axis of evil," that is to say Iran, Iraq and North Korea, have individually flexed their muscle, ensuring for themselves the "rogue states" status or the revisionist states challenging US authority. Various authors have examined possible contenders for superpower status. Most scholars analyze state actors and international organizations as emerging superpowers or balancers. However, it is yet to be seen whether the new balancer of US unipolarity will be a state or non-state entity, a dispersed grassroots entity or an ideology.

It is crucial to clarify here that the "perception of the United States of the powers and capabilities of states it considers as 'threats' is more significant than the reality of the existence of a threat." For example, in reality, there was no threat to the US from Iraq and its people on whom violence was eventually inflicted by the US in the name of security for the US and the world. The label of "threat" or "rogue state" could simply imply a particular government that holds goals that are inconsistent and incompatible with US ambitions. It is in this sense that the model of "primacy" can be used to understand US behavior in Iraq. The US perceived a relatively weak state as having "flexed" [its] muscle against the security of the US and the stability of the international system.

System polarity, more specifically the current US unipolarity, will provide an important contribution to discussions regarding self-defense in this book. Whatever polarity the system is headed towards, i.e. bipolarity or multipolarity, we cannot but acknowledge unipolarity – the military, economic, political and cultural preponderance of the US – in international relations as it exist today. Its power status in world politics affects its interactions and participation in international mechanisms such as international laws that govern the use of self-defense. As Richard Falk asserts, "International law is both a contemplative academic subject and an active ingredient of diplomatic process in world affairs" and international law, thus, needs to recognize "the context within which law is created and applied or within which legal controversy takes place."[100]

2.3 Is international law law? The principal paradox of self-defense

In the Case of the *SS Lotus* (1927), the Permanent Court of International Justice stated:[101]

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally

> accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common goals.

International law is a decentralized system of law, in the form of rules and principles of conduct, which governs the conduct of states, international institutions, international organizations, international non-state entities and individuals in the international community. These rules and principles derive their legality from a number of sources as outlined in Article 38(c) of the Statute of the International Court of Justice. These sources are customs, treaties, decisions of judicial or arbitral tribunals, works of publicists and decisions of recognized international institutions.

International law, the main principles of which are outlined in the Charter of the UN, provides a framework for the rights and duties of States in an international system. All State parties to the UN Charter are expected to conform to the rules and regulations as set forth by the Charter. Even non-parties to the UN Charter are expected to respect the norms of the international community. In reality, however, this does not always happen because international law, being a decentralized system, does not have adequate "teeth" or enforcement potential. This is attributable to its lack of "compulsory jurisdiction" to ensure that state parties act in accordance with the standards laid down by international law. As a result, at many times in the past, it was unable to consistently protect the rights of States or ensure the performance of duties by States. In light of the inability of the United Nations to protect the sovereign rights of member states, there is a long-drawn debate surrounding the concept of self-defense in international law.[102] At a more basic level, there is a debate surrounding the very nature of international law.[103] Questions such as "is international law law" are based in the critique of international law in comparison (often times) with domestic law.

Unlike the domestic system of law, international law lacks enforcement potential divorced from the will of states to embrace international law.[104] In an international anarchical system, lacking hierarchy or a centralized body to enforce laws, the 192 sovereign states will act to safeguard their national interest, howsoever defined, and will act in accordance with law only when it serves their primordial interests of survival, sovereignty and independence. Kegley and Raymond rightly observe "there is probably no observer of the contemporary international scene who would not argue that self-interest is both a legitimate and necessary

motive for state action."[105] States will not hesitate to violate laws if and when there are important national and political interests at stake. States are unlikely to compromise their national interests at the expense of the inviolability of international laws. Critics of international law, such as Louis Henkin, would then argue:

> there is no place for law where important political interests are at stake. Nations will not – and should not be expected to – submit important disputes to third-party decision in accordance with fixed law. To these critics there cannot be effective law against war or other use of force, and nations should not be expected to observe such law when they desire change hard enough to fight for it.[106]

It is inconceivable that a nation would compromise its security, independence, power and influence in order to play by the rules of international law. For Waltz, international law "lacked independent causal force."[107] It needs to be studied, as Morgenthau had emphasized "within the sociological context of economic interests, social tensions, and aspirations for power, which are the motivating forces in the international field, and which give rise to the factual situations forming the raw material for regulation of international law."[108] For these reasons, analysts are tempted to write off international law as a body of laws that are paralyzed by the realities of the power politics that define the international system at a given point and that determine the effectiveness of the international law. President Bush asked in his speech to the General Assembly on 12 September 2002, "Will the UN serve the purpose of its founding, or will it be irrelevant?"[109]

In Politics Among Nations, Morgenthau clarifies that:

> To recognize that international law exists is, however, not tantamount to asserting that it is as effective a legal system as the national legal systems are and that, more particularly, it is effective in regulating and restraining the struggle for power on the international scene.[110]

Some analysts continue to have faith and optimism in the nature and future of international law. They argue that international law exhibits similar weaknesses to domestic law, and that discarding the merits of international law in terms of the stability and order it lends to the anarchical system, would be misleading. Surely, states are unlikely to sacrifice their national interest, security and independence in the face of international legal norms because as the cliché goes, "international

law is not a suicide pact." However to dismiss the importance of international law in an anarchical society is a mistake. Instead it is crucial to situate discussions of international law in the context of international relations. The balance of power and polarity of the anarchical international system, for example, have an important impact on the effectiveness and functioning of international law.

In the words of Louis Henkin:

> The tendency to dismiss international law reflects impressions sometimes summed up in the conclusion that it is not really law because international society is not really a society: the world of nations is a collection of sovereign states, not an effective body politic which can support effective law. In this judgment are subsumed a number of alleged weaknesses and inadequacies.[111]

Critics of international law have long argued that international law is not law, as it does not have a legislature, executive and judiciary necessary for law to exist and function. Henkin argues that although there is no legislature, international law has constantly changed and evolved with changing needs of the international system; although there is no judiciary, international conflicts are most often settled in conformity with the norms of international jurisprudence; and although there is no legislature for effectively enforcing laws, international law governs and influences international order:

> What matters is not whether the international system has legislative, judicial or executive branches corresponding to those we have become accustomed to seek in a domestic society; what matters is whether international law is reflected in the policies of nations and in relations between nations.[112]

Of course, international relations are always changing and affecting international law and its enforceability. Does this mean that international law is not worthy of analysis and discussion? Does it render international law as hopeless and useless? Or can we study the patterns of how international law renders order, to whatever extent possible in an international system that is anarchical? Joseph Kunz rightly contends:

> The law has necessarily to play an important role, and so has international law. Extremes are always wrong: the truth lies in the golden

middle way. The correct attitude must be equidistant from utopia, from superficial optimism and overestimation and from cyclic minimizing; neither overestimation, nor underestimation: International law is "neither a panacea nor a myth."[113]

2.4 Conclusion

In this chapter, three overarching themes that provide a frame of analysis for a discussion on anticipatory self-defense have been discussed. These themes are anarchy, implying a lack of leadership, an absence of hierarchy, a lack of formal institutions of governance at the international level and the lack of a legitimate government; unipolarity, which we witness today with the US being the most dominant state actor in international relations; and the decentralized nature of international law implying that although there are rules that govern all aspects of international law, there are no "teeth" to enforce these rules. In light of these frames of reference, what sense can we make of preemption or anticipatory self-defense in international law and relations? How do law and politics answer deal with this crucial question of our times? In order to proceed with a discussion on the politics and legality of self-defense in international law and relations, it is crucial to first understand the prohibition of the use of force in international relations as documented by international law.

3
International Law Prohibiting the Use of Force

> Academicians who study either international law or international politics share a dirty little secret: both groups know that the presence of international law is critical for international relations to occur, and both know that the practice of international politics is essential for international law to evolve and function. But each is still reluctant to admit the necessity of the other. The unmentionable fact is that international law and international politics are intertwined in a symbiotic relationship.[1]

3.1 Introduction

In a speech delivered at the United Nations General Assembly in New York on 12 September 2002, President George W. Bush said, "The United States helped found the United Nations. We want the United Nations to be effective, and respectful, and successful. All the world now faces a test, and the United Nations a difficult and defining moment." In the same speech, Bush raised the question of the relevance of the United Nations when he asked, "Will the United Nations serve the purpose of its founding, or will it be irrelevant?"[2] Where can we find answers to this question?

The answer lies, perhaps, in the nature of international politics at the time we ask the question. As early as 1916, Samuel Orth wrote a piece entitled "Law and Force in International Affairs" in which he argues that law is workable only if the conditions that allow law to function exists:

> My suggestion is, then, that the appeal to law, as a substitute for the appeal to force in international matters depends upon the

> existence of those conditions that make law possible: and that these conditions are not so much dependent upon an international organization as upon the spirit and attitudes of the nations themselves.[3]

If we accept that the system polarity at the current moment is "unipolar," does the answer to the question "will the UN be relevant" lie with the United States? Don Kraus, the executive director of the Campaign for UN Reform, responds to the question regarding the relevance of the UN with the answer stating, "Mr Bush, the answer is in your hands." [4]

In an anarchical international order which is unipolar in nature, the unipolar power has an undeniable role to play in determining whether or not the UN will be relevant. The United Nations is unlikely to function as an efficient body if the dominant powers in the world do not agree to be bound by the norms of the UN. The United Nations was not created in, and does not today, function in a vacuum. It functions in an anarchical self-help international system where power and struggle mark the day-to-day events in politics.

With respect to this reality of the international system, Richard Falk raises a fundamental question, "Can the Charter System work without the dominant state in the world adhering to its procedures and restraining rules?"[5] The answer is probably "no" because great powers in an international system that is anarchic enjoy "an exemption from legal accountability with respect to use of force irreconcilable with the UN Charter system" while other states can be held accountable to this system unless protected by an exemption from great powers in the international system, i.e. the United States today.[6] State parties that have the power feel free to use and abuse it whenever they believe their national interests to be at stake. Violations of international law as a consequence of the "deviance on the authority of norms" can create a dangerous precedent that may acquire the status of acceptable practice. Tom Farer warns:

> If the behavior is repeated with some frequency and other states do gradually begin to replicate it, the initial act will begin to appear as a precedent rather than remain forever stigmatized as a delinquency.[7]

A realization that the United Nations is an entity that does not exist above the actors that constitute the international system allow us to quickly ward off the myth of the United Nations as a "halfway house to

world government."[8] Despite the existence of the United Nations, the international system is anarchical. As Farer puts it, "But the world is what it is, a dangerous, unruly, far too lightly managed and policed place."[9]

Sir Hersch Lauterpacht, one of the most prolific legal teachers, historians and judges of all time explains the relationship between war, state, sovereignty and international law when he states that:

> The institution of war fulfilled in International Law two contradictory functions. In the absence of and international organ for enforcing the law, war was a means of self-help for giving effect to claims based or alleged to be based on International Law. Such was the legal and moral authority of this notion of war as an arm of the law that in most cases in which war was in fact resorted to in order to increase the power and possessions of a State at the expense of others… In the absence of an international legislature it was a crude substitute for a deficiency in international organization… War was in law a natural function of the State and a prerogative of its uncontrolled sovereignty.[10]

The success of international law is thus, a function of the push and pulls that the international system, characterized by power politics, exerts. The use of force has, over time, become the means that a State uses for attaining national objectives in the international anarchical system. Politics in the international system constrain the ability of the United Nations to operate in a manner independent of the desires, politics and policies of great powers, the spheres of influence carved out in the system by these great powers. All throughout the cold war, the United Nations acted in response to the dynamics of the bipolar world. Today the United Nations is left searching for its most efficient way to exist and be relevant in the face of a unipolar world. The fluidity of the international system in terms of power politics, system polarity, changing nature of wars and conflicts, threats from new actors on the world stage, the emergence of new concerns in the international arena, all affect the ability of the United Nations to fulfill its prime purpose.

The United Nations, as an organization, in its ideal form was meant to be, in the words of Oran Young:

> 1) a device for regulating relationships of power in the international system; 2) an effector of agreements among the major powers in the system; 3) an instrument for the accomplishment of political change; 4) a tool of partisan interests in world politics; 5) a creator

> of norms and a source of collective legitimization; 6) a contributor to the development of long-term viability for the states and nation-states in the system.[11]

To what extent the United Nations can fulfill these roles are a function of the anarchy, unipolarity and the threats to international peace and security in the current world order. It is also, today, a function of the attitude of the United States towards the United Nations. Thomas Franck goes to the extent of posing the question "is anything left in international law?"[12] His question is situated in the context of President Bush's statement affirming that "America will never seek a permission slip to defend the security of our people."[13] It is, according to Franck, "not merely an admonition that the United States should enter a particular treaty, but a rejection of the idea that American Sovereignty can, in a legal sense, be subject to legal limits or constraints."[14] The UN Charter requires a permission slip from the Security Council to use force, even if it is in the name of national interest and the security of people. The United States seems to be leading the way away from internationalism back to the Thucididean world where "the strong do as they will and the weak do as they must."[15]

The above discussion opens up the question of the "actual role of international law" in world affairs. On the one hand, international law is seen as "a sham, something that international lawyers talk and write about, except perhaps when they want to justify something that they have made up their minds to do in any case."[16] On the other hand, international law is seen as a "potent instrument" that is versatile and strong enough to ensure a code of law that nations, big and small, will follow, setting grounds for peace and security for all. What international law really is, lies somewhere between these two viewpoints.

International law is a powerful tool with the potential of ensuring peace and security for nations. However, its success is highly dependent on three major obstacles namely international politics, international legislation and the power struggle.[17] The first represents a lack of trust, which is the keynote of an anarchical international system creating subsequent problems of good faith. The second is the lack of adequate legislation and administration to actually apply and implement international legislation. The third obstacle is power struggle or "the struggle for material advantage or merely supremacy of choice in all matters." This third obstacle is the most formidable and perhaps incurable obstacle to the application of international law. The United States as the unipolar power in world politics today holds the key to

resolving, to a large extent, all three obstacles cited above. Unipolarity gives the US a privileged position that can be a determining factor for the life or death of international law. According to Franck, the model that the United States has adopted:

> makes global security wholly dependent on the supreme power and discretion of the United States and frees the sole superpower from all restraints of international law and the encumbrances of institutionalized multilateral diplomacy.[18]

The condemnation of the use of force in international relations has the status of *jus cogens* or peremptory norms in international law. *Jus Cogens* are principles of international law considered so deep-seated that no state may disregard them or try to contract out of them through subsequent treaties. Examples of *jus cogens* are the non-use of force, rules against the crimes of genocide, apartheid, torture and slave trade.

The Vienna Convention on the Law of Treaties, 1969 was the first to codify *jus cogens*, and the Vienna Convention of 1986 subsequently confirmed the codification. Article 53 of the Vienna Convention 1969 (also in the 1986 Convention) reads as follows:

> For the purposes of the present Convention, a *peremptory norm* of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which *no derogation is permitted* and which can be modified only by a subsequent norm of general international law having the same character.

The obligation not to use force is a "super-norm."[19] Despite this prohibition, there have been several acts of aggression and wars[20] that have been waged in the last few years, each involving the use of force in some way or form.[21] As Dinstein clearly states, "there is no war in the material sense without some act of warfare" implying the use of armed force.[22] What then is "war?" What is the difference between a "war" and "aggression?" What, in the big picture, is the relationship between these concepts and self-defense in international law, the topic of prime interest to this book?

In the succeeding pages, a discussion on the definitions and laws of war and aggression ensues. It raises the question that Quincy Wright rightly poses, "How can there be a law of war if war is outlawed?"[23] Details of the international law prohibiting the use of force will help us

to better understand the debate in Chapter 4 on whether Article 2(4) is still a viable dictum.

3.2 War and aggression in international law

Article 1 of the General Assembly Resolution (XXIX) 3314 of 1974 defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another state, or in any manner inconsistent with the United Nations Charter, as set out in this definition."[24] It is the "first use of armed force by a state" in violation of the principles laid out in the UN Charter that "constitutes *prima facie* evidence of an act of aggression unless the Security Council determines the act otherwise."[25]

Article 3 of the Resolution on the Definition of Aggression enumerates the acts that qualify as aggression. These acts, mentioned below, are not exhaustive; it is the prerogative of the Security Council to determine additional acts as "acts of aggression" if it deems appropriate:

> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation, by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forced of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.[26]

An *aggressor* then is a state that uses force against another state despite its responsibility not to resort to the use of force. An *aggressor* is a state

that "refuses to accept an armistice proposed in accordance with a procedure which it has accepted to implement its no-force obligation."[27] Preventive, remedial and deterrent measures may be used against an *aggressor* by other member states of the international community that are bound by the obligation to "prevent threats to international peace and security."[28]

The General Assembly Resolution defining aggression states that, "there is absolutely no justification for aggression, be it political, economic, military or otherwise" and that aggression is a "crime against international peace" which "gives rise to international responsibility."[29] In a subsequent Article 7, however, an exception is made to "peoples forcibly deprived" of the right to self-determination, freedom and independence, for example colonized populations, people under racist or oppressive regimes and people under foreign domination. By interpretation, aggression is also justifiable if it is for preemption or self-defense (See section on self-defense in Chapter 4).[30]

What is the difference between an aggression and a state of war? Put simply, the answer is a declaration of war. According to Article 1 of the Hague Convention III, 1907, "hostilities must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war" following which Article 2 urges a notification of the state of war. It reads, "the existence of a state of war must be notified to the neutral Powers without delay."[31] It is important to clarify that "a state of war can exist without active hostilities, and active hostilities may exist without a state of war."[32] It is the declaration of a state of war as stipulated in Article 1 and 2 of the Hague Convention III of 1907 that initiate a period of war in the legal sense.

The term "war" has innumerable meanings, definitions and interpretations.[33] According to Cicero, "war is a contest or contention carried on by force" and Clausewitz defines war as "nothing but the continuation of political intercourse with an admixture of other means."[34] Some definitions, however, bring to light the debates laden in the complex nature of the term "war." Quincy Wright draws a distinction between war in the material sense and war in a legal sense:

> In the *material sense*, war may be considered an act or a series of acts of violence by one government against another, or a dispute between governments carried on by violence. In the *legal sense*, war may be considered as a condition or period of time in which special

> rules permitting and regulating violence between governments prevail, or a procedure of regulated violence by which disputes between governments are settled.[35]

War is an act of force that can differ in terms of degree and kind, legality and illegality.[36] William T. Sherman's "War is Hell," H.G. Well's "If We Don't End War, War Will End Us," Napoleon Bonaparte's "War is the business of barbarians," and Albert Einstein's "You cannot simultaneously prevent and prepare for war," Aristotle's "We make war that we may live in peace" and Marcus Tullius Cicero's "Laws are silent in time of war… The more laws, the less justice… An unjust peace is better than a just war is skeptical of laws" are just the tip of the iceberg of quotations on the subject of war. But, how exactly can we define and identify war?

According to Oppenheim's definition, "War is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases."[37] According to Oppenheim's definition of war, four preconditions of war are:

> (i) there has to be a contention between at least two States;
> (ii) the use of armed forces of those States is required;
> (iii) the purpose must be overpowering the enemy (as well as the imposition of peace on the victor's terms); and it may be implied, particularly from the words "each other," that
> (iv) both parties are expected to have symmetrical, although diametrically opposed, goals.[38]

Each of these criteria needs further clarification. The first component of "war" raises the question of "statehood." What constitutes a state? According to Article 1 of the Montevideo Convention on the Rights and Duties of States 1933:

> The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.[39]

It needs to be clarified here that if two states fulfill the criterion for statehood, non-recognition by one party of an adversary's statehood does not change the nature of laws that apply to warring

factions. Article 3 of the Montevideo Convention clearly iterates that:

> The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.[40]

As Dinstein puts it, "War may actually be the device through which one challenges the sovereignty of the other."[41]

Regarding Oppenheim's second criteria, it is crucial to differentiate between "war in a technical sense" and "war in the material sense." The first sense of war is characterized by a formal *de jure* declaration of war followed by a state of war which may be terminated by a peace treaty or a declaration of the end of war by both parties. This type of war, recognized by the III Hague Convention of 1907 stipulates that hostilities may not commence before the act of declaring war. Article 1 of Opening of Hostilities (Hague III); October 18, 1907 states:

> The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.[42]

Wright clarifies the interpretation of this article. Although the Convention lays down a duty of all parties to declare war, it does not limit the power of a state to commence hostilities without such a declaration. The exercise of power, even without a declaration of war, would amount to an act of war, regardless of the violation of the duty to announce war.[43]

On the other hand, war in the material sense can exist without any formal declaration of war but rather the direct commencement of hostilities leading to *de facto* combat, albeit with intermittent period of cease-fire. With regard to these differences then, a snap in diplomatic ties between two states, intervention in another state to aid rebels or coups, or for that matter a "cold war" do not suffice in order to count as "war." This can be problematic in understanding the nature of war

today. In "When Does War Exist," Quincy Wright clarifies the boundaries of the definition of war:

> War in the legal sense means a period of time during which the extraordinary laws of war and neutrality have superseded the normal law of peace in the relations of states. A state of war may exist without active hostilities, and active hostilities may exist without a state of war.[44]

The third part of Oppenheim's definition raises the issue of distinctions between total wars, limited wars and incidents short of war. Dinstein clarifies that even in cases of unlimited use of force, with limited objectives, i.e. not necessarily aimed at a total victory, war may be said to exist. Vice versa, not every use of force amounts to war; "only a comprehensive use of force does."[45]

The fourth part of Oppenheim's definition of war can also be challenged as warring factions may not necessarily have symmetrical nor diametrically opposed goals. War is more complex a phenomenon than that.

The thin-line between aggression and war makes the question of the legality or illegality of war of utmost importance. Vattel defines *just war* as *bellum justum*, a Grotian dictum, implying that war is "forbidden" except in the case of use as a sanction against a wrongdoing:

> Nature gives men the right to use force when it is needed for the defense and preservation of their rights… War is that state in which we prosecute our rights by force… We may say, therefore, in general, that the foundation of the cause of every just war is an injury, either already received or threatened… war cannot be just on both sides.[46]

For a war to be considered just, it needs to fulfill two criteria of justice namely *jus ad bellum* (justice of war or just cause) and *jus in bello* (justice in war or just means). In order for a war to fulfill criteria ensuring *jus ad bellum,* it should fulfill the following seven requirements. First, war should be a last resort for resolving any dispute, and should only be employed after all other options for peaceful resolution have been explored. Second, a formal declaration of war needs to be made before war starts. Third, the decision to go to war must come from a legitimate authority or a state, not from individuals or groups that do not represent state authority. Fourth, a war must have just cause, i.e. its use of hostilities should be a well justifiable in principles of individual

or collective self-defense or humanitarian intervention. Fifth, a war is just only if there is a realistic probability of an acceptable outcome. Sixth, the peace expected at the end of the war should be preferable to the prevailing situation in the event that there was no war. Seventh, the motive for waging war should be the achievement of peace, not justice because "no war can be just on both sides."[47]

Likewise, in order for a war to fulfill *jus in bello*, the following criteria have been laid down. First, there is the law of *proportionality* meaning that during the course of a war, action is restricted to what is convincingly necessary to realize lawful objectives. Second, the beneficial or good effects of war, i.e. ending war and achieving peace, must be maximized, and the dreadful effects of war, i.e. collateral damage must be curtailed. Third, warring factions must distinguish between combatants and noncombatants (civilians) and ensure that civilians are not directly or deliberately targeted. Finally, laws of war require restraint in dealing with prisoners of war, only allowing punishment to those guilty of serious offenses in the line of duty.

From the definitions of war and aggression; and the criteria for *jus ad bellum* and *jus in bello*, it is evident that the "power of politics" and the "politics of power" could steer and manipulate the interpretation of international law. The "power politics" of international law also helps us to comprehend why countries that are the most powerful, most armed and often most provocative in their foreign policies are the most likely to insist on punishing an "aggressor."[48] Whether it is the law that starts resembling the will of the powerful; or whether the will of the powerful is (obedience to) the law is immaterial in light of the fact that it is near impossible to find a situation when the will of the powerful is not taken into account when rendering law and justice.

What do the definitions of "war" and "aggression" have to do with determining the legality or illegality of self-defense? There exists a rather thin line between "aggression" and "defense." Quoting Honorable James Williams, apologist for the Confederacy, saying "As a war of aggression, we will never wage it except in self defense," Borchard argues that the line between "defense" and "aggression" is rather slippery. Borchard appropriately argues that, "if the status of 'aggressor' is retained in legal instruments, the determination of who is the 'aggressor' is likely to be political in character."[49]

Six principles of the traditional theory of aggression, as laid down by Walzer gives us an idea of the legalist paradigm of just war theory. The legalist paradigm is solely concerned with maintaining the conventions of law and order and rules out all war except those in response to

an act of aggression. All other wars according to this paradigm are a violation of international law. These principles, found in Michael Walzer's "Just and Unjust Wars: A Moral Argument With Historical Illustrations," are as follows:

a. There exists an international society of independent states.
b. This international society has a law that establishes the rights of its members – above all, the rights of territorial integrity and political sovereignty.
c. Any use of force or imminent threat of force by one against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act.
d. Aggression justified two kinds of violent response: a war of self-defense by the victim and a war of law enforcement by the victim and any other member of international society.
e. Nothing but aggression can justify war.
f. Once the aggressor state has been militarily repulsed, it can also be punished.[50]

What we can say without hesitation is that despite the differing definitions of terms such as war, peace, aggression, aggressor, efforts to eliminate war have been, and are manifold ranging from prescriptions tailored to understanding, modifying and changing human nature (environmental, educational and attitudinal modifications), nature of the state (by modifying mechanisms on which a state bases its actions namely sovereignty, nationalism, neutrality, imperialism, democracy, primacy etc) or reforming international society (promoting international organizations, cooperation, networks, law etc). We can see these efforts manifested in the form of "defining responsibility for bringing on a state of war, by defining justifiable self-defense and by providing sanctions for enforcement."[51]

3.3 Prohibitions to the use of force in international law

The end of the First World War was followed by the espousal of the Covenant of the League of Nations in 1919, which brought about a new epoch for regulating the exercise of force by states in international law, legislating several restrictions on the use of force by states, thereby distinguishing between uses of force that were legal and illegal. The Covenant of the League of Nations was instated "in order to promote international co-operation and to achieve international peace

and security by the acceptance of obligations not to resort to war."[52] Article 11 of the Covenant states that:

> Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.[53]

In order to further this end, the League encouraged the peaceful settlement of disputes under Article 12, which states that:

> The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council.[54]

Although a partial attempt at the renunciation of the use of force, the League's Covenant severely restricted the use of force by member states which did not, however, include the US and USSR. The Locarno treaties of 1925 echoed the importance of avoiding reliance on the use of force in international relations except in the case of self-defense. Under Article 2 of this treaty "Germany and Belgium, and also Germany and France, mutually undertake that they will in no case attack or invade each other or resort to war against each other"[55] except in the case of self-defense. Similarly, the General Treaty on the Renunciation of War, also known as the Kellog-Briand Pact, laid overarching restrictions on a state's right to use force in inter-national relations. Article 1 of the Kellog-Briand Pact[56] states that:

> The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

Article 2 goes on to further prohibit war in international relations:

> The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin

> they may be, which may arise among them, shall never be sought except by pacific means.

Again, the only reservation to this treaty's prohibition to the use of force for self-defense that was legislated through diplomatic exchanges concluded prior to its entry into force.[57] Although the Kellog-Briand Pact was unsuccessful in preventing the outbreak of World War II, it condemned resort to war and legislated a renunciation of war as an instrument of national policy. It laid down the foundations for "crimes against peace," which were subsequently expressed in the Nuremberg Charter tribunal as those crimes intended to plan, prepare, initiate or wage a war of aggression or a war which was in violation of international treaties.[58]

The Nuremberg Tribunal states:

> [w]ar is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[59]

The International Criminal Court can exercise jurisdiction over the crime of aggression following the adoption of a provision defining the crime.[60] The Nuremberg Tribunal states that crimes of aggression are in fact the supreme international crime.

After two devastating world wars, the United States and its Allies realized the need to establish an international organization that would enforce a prohibition on the use of force by states. This organization, the United Nations was created in 1945, the principal purpose of which was codified in Article 1 (1) of the UN Charter, which reads as follows:

> To maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of peace, and to bring about by peaceful means, and inconformity with the principles of the justice and international law, adjustment or settlement of

> international disputes or situations which might lead to the breach of peace.

The United Nations Charter explicitly prohibits the use of force. Article 2(4) of the UN Charter reads:

> All member States 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 manner inconsistent with the Purposes of the United Nations.

A step further from the prohibition of recourse to war as stipulated by the Kellog-Briand Pact 1928, Article 2(4) of the United Nations Charter prohibits the threat of force as well as use of force in international relations.

Article 2(3) echoes the limitation on the use of force by member states (and non-members) obligated to respect and abide by restrictions legislated in the UN Charter:

> All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

The United Nations Charter provisions on the use of force are limited and thus subject to tight control. In addition to Article 2(3) and 2(4) detailed above, other mentions and provisions regarding the use of force are enshrined in Article 2(7)[61], 39[62], 41[63], 42[64] and 51[65]. Article 2(4) was the over-arching provision to encompass all forms of aggressive force, the others being more specific provisions for use of force. As we will see in Chapter 4, Article 2(4) has been the subject of much debate regarding whether or not it can really act as a legal norm of restraint for the use of force. The use of unclear and imprecise terms such as "force," "use of force," "territorial integrity" and "political independence" invites a wide variety of interpretations that can take away from the status of 2(4) as a legal norm.

Additional legal documentation, i.e. General Assembly[66] Resolutions, aim at reiterating the prohibitions regarding the use of force in the UN Charter. Some examples are the Declaration on the Strengthening of International Security (16 Dec. 1970)[67] and the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations (18 Nov. 1987).[68]

Chapter 4 of the United Nations Charter details the role and responsibilities of the General Assembly. It also clarifies the relationship between the General Assembly and the Security Council in matters relating to international peace and security. Article 10 of the UN Charter states that:

> The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.[69]

Article 12 of the UN Charter forbids the General Assembly from making recommendations with regard to a dispute already being dealt with by the Security Council, unless the Security Council so requests. However, Article 11(3) authorizes the General Assembly to bring to the attention of the Security Council situations that are likely to threaten international peace and security at any time. The General Assembly Declaration of 1987, for instance, lays down some general norms refraining states from the use of force in their international relations. Although these norms do not trespass the power of the Security Council in specific situations, they contribute to the international law that governs state parties.

> 1. Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or from acting in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and of the Charter of the United Nations and entails international responsibility.
> 2. The principle of refraining from the threat or use of force in international relations is universal in character and is binding, regardless of each State's political, economic, social or cultural system or relations of alliance.
> 3. No consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter.
> 4. States have the duty not to urge, encourage or assist other States to resort to the threat or use of force in violation of the Charter.

5. By virtue of the principle of equal rights and self-determination enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
6. States shall fulfill their obligations under international law to refrain from organizing, instigating, or assisting or participating in paramilitary, terrorist or subversive acts, including acts of mercenaries, in other States, or acquiescing in organized activities within their territory directed towards the commission of such acts.
7. States have the duty to abstain from armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements.
8. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.
9. In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression.
10. Neither acquisition of territory resulting from the threat or use of force nor any occupation of territory resulting from the threat or use of force in contravention of international law will be recognized as legal acquisition or occupation.
11. A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter.
12. In conformity with the Charter and in accordance with the relevant paragraphs of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, States shall fulfill in good faith all their international obligations.
13. States have the inherent right of individual or collective self-defence if an armed attack occurs, as set forth in the Charter.[70]

The limitations on the use of force are found in innumerable sources of international law. Despite these legal restrictions on the use of force, ample examples of the legal and illegal uses of force exist. The legal use of force implies force used in accordance with the exceptions to the

use of force justified by the United Nations (as will be discussed in Chapter 4). It is precisely this distinction between the legality and illegality of the use of force that spins on the politico-legal axis of international law and relations. International law professor and former Director of the UN Legal Division, Oscar Schachter notes:

> Concepts such as "force," "threat of force" or "political independence" embrace a wide range of possible meanings. Their application to diverse circumstances involves choices as to these meanings and assessments of the behavior and intentions of various actors. Differences of opinion are often likely even among "disinterested" observers; they are even more likely among those involved or interested. But these divergences are not significantly different from those that arise with respect to almost all general legal principles.[71]

The extremely thin and flexible line between the politics of the meaning and use of force and the laws governing such uses of force makes the prohibitions on, and the subsequent use or misuse of force extremely relevant. Chapter 4 delves into a discussion of some "legally accepted" exceptions to the prohibition on the use of force.

4
International Legal Exceptions to the Prohibition on the Use of Force

4.1 Introduction

Although the prohibition on the use of force in international relations is widely codified in international law,[1] there exist two exceptions by virtue of which the use of force may be justified.[2] These exceptions are the use of force by the Security Council under Chapter VII in case of a "threat to peace, breach of peace and act of aggression," and the right to use force under Article 51 in individual or collective self-defense.

1. Use of force authorized by Security Council Chapter VII

The Security Council under Chapter VII of the UN Charter is expected to "determine the existence of any threat to peace, breach of peace, or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Articles 41[3] and 42[4] to maintain or restore international peace and security" (Article 39, UN Charter). Usually the measures that the Security Council recommends are called "sanctions." In the past, the UN Security Council has imposed sanctions in several cases such as, Afghanistan,[5] Angola,[6] Ethiopia and Eritrea,[7] Haiti,[8] Iraq,[9] Liberia,[10] Libya,[11] Rwanda,[12] Sierra Leone,[13] Somalia,[14] South Africa,[15] Southern Rhodesia,[16] Sudan[17] and the former Yugoslavia.[18] In the event that sanctions prove to be inadequate in resolving the international problem, the Security Council can resort to the use of force. The United Nations Charter is based on the possibility of the use of collective force dispensable to the UN Organization in the event that there is a threat to international peace and security.

In the case of the intervention in Haiti to restore democratic government, the UN authorized intervention as it "constituted a threat to inter-

national peace and security." The intervention followed the overthrow of Haiti's democratically elected government, the first of its kind in Haiti. Similarly, in Sierra Leone, the UN Security Council authorized the use of force to implement an arms embargo in order to restore the democratically elected government. However, in a series of similar cases where democratic elected leaders were overthrown, in Burma (1990), Nigeria (1993), Niger (1996) and Pakistan (1999), the Security Council did not authorize the use of force or sanctions. What explains this discrepancy?

There have been several instances where the Security Council was not able to make recommendations fast enough to stop harm to the defendant States' immediate sovereign interests. This incapacity of the Security Council has been either due to the veto power in the Council disallowing action in cases where some big power interest is involved, or merely the lack of adequate time for the Security Council to make recommendations for action after an attack has occurred. It is in instances like these that the defendant State is urged to exercise its inherent "right of individual or collective self-defense" until the Security Council responds with legally sanctioned recommendations.

In the case of the First Gulf War of 1990, when Iraq invaded Kuwait (2 August 1990), the US acted with military force on behalf of Kuwait (6 August 1990), as self defense until the Security Council passed a resolution 678 (29 November 1990) sanctioning force to end the conflict and the breach of international law by Iraq.[19]

2. Self-defense

According to Dinstein:

> Self-defence in inter-State relations may be defined as a lawful use of force (principally, counter-force), under conditions prescribed by international law, in response to a previous unlawful use (or, at least, a threat) of force… The thesis of self-defence as a legitimate recourse to force by Utopia is inextricably linked to the antithesis of the employment of unlawful force by Arcadia (its opponent).[20]

Self-defense is a right of all states under general international law and is a legitimate exception to the general prohibition on the non-use of force, as postulated in Article 2(4) of the UN Charter. It is primarily a guarantee for the sovereignty of member states as enshrined in Article 2(1) of the UN Charter. Self-defense as a right of states in the

international system is not a new concept.[21] It is based on customary law, treaty law, general principles of law, judicial decisions and teachings of the most highly qualified publicists.

The "inherent right" of states to self-defense is rooted in two differing schools of thought.[22] The first of these is the traditional naturalist doctrine represented by Grotius, Wolff, Vattel, Ayala, etc. According to Grotius, "the right of self-defense has its origin directly and chiefly in the fact that nature commits to each his own protection."[23] Similarly, Wolff argues that, "each nation is bound to preserve itself…the whole is bound to the individuals to provide for them those things which are required as a competency for life, peace and security."[24] Vattel echoes Wolff's conception of self-defense as a duty by stating that "self-defense against an unjust attack is not only a right which every Nation has, but it is a duty, and one of its most sacred duties."[25]

Although self-defense may be viewed as both a right and a duty, its status is that of a right rather than a duty in international law. In cases of warranted self-defense exercised as a legitimate right, force used was not to be considered an "act of aggression."[26] According to Justice Jackson, American Chief Prosecutor before the Nuremberg tribunal, "exercise of the right of legitimate self-defense – that is to say, resistance to an act of aggression or action to assist a State which has been subjected to aggression shall not constitute a war of aggression."[27] The problem with the exercise of self-defense by a State, whether as a right or duty, is that there is no consensus as to which rights or interests of the state may be protected by self-defense, and therefore, what really is legitimate self-defense.

The second school of thought forwards the case that law cannot supervise self-defense because power is superior to law. Power is superior to law when questions concerning the survival of states arise. In such scenarios, each state must decide what actions are necessary for its self-defense and survival.

The issue of self-defense in international law divides states into those that take a wide view of self-defense and those that adhere to a restricted view of it. States such as the USA and Israel have argued that the use of force in the name of protection of nationals abroad or in response to terrorism can be justified as self-defense measures while states such as France reject such a claim. In the US intervention of Panama in 1989, the US defended its actions to the Security Council by claiming self-defense in protection of American nationals in Panama rather than using the restoration of democracy as its legal justification, although it was one of the US goals.

Self-defense is a permissible type of "armed self-help" which is sanctified in Article 51 of the UN Charter as an "inherent right."[28] Article 51 of the UN Charter reflects, to a large extent provisions to use force set out by Article 15(7) of the League Covenant that envisaged a right of self-defense for member states. Article 15(7) of the Covenant read:

> If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.[29]

Article 51 of the United Nations Charter, similar to Article 15(7) of the Covenant of the League of Nations, legislates an exception to the obligation of States to refrain from the use of force against another State. It reads as follows:

> 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 the measures* necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security (The UN Charter, *emphasis added*).

By interpretation of this article, the use of legitimate force is justified "if an armed attack occurs," "until the Security Council has taken measures." The Charter, however, fails to define what constitutes an "armed attack." A pattern of justification has emerged as a result of state practice involving the use of force. Franck argues that an innovative interpretation of Article 51 results in five situations that can be justified under the gamut of self-defense. These are:

> 1. The Claim that a state may resort to armed self-defense in response to attacks by terrorists, insurgents, surrogates operating from another state;[30]
> 2. The claim that self-defense may be exercised against the source of ideological subversion from abroad;[31]

3. The claim that a state may act in self-defense to rescue or protect its citizens abroad;[32]
4. The claim that a state may act in self-defense to anticipate and preempt an imminent armed attack;[33]
5. The claim that the right of self-defense is available to abate an egregious, generally recognized, yet persistent unredressedwrong, including the claim to exercise the right of humanitarian intervention.[34]

Some of these claims are consistently justified, while others are still not accepted as rightful claims for the use of force justified by self-defense. What, then, delineates a rightful and legally justified use of self-defense from an abuse of the use of force under international law?

Franck, with an implicit faith in the power of *realpolitik* over international law, argues that the use of force by a state is rightfully justified whenever it considers itself threatened by the activities of another state. Franck argues that "no nation, it is safe to suppose, would willingly sit by while another prepares its doom…no nation can have intended, by adherence to Article 51, to have bound itself to sit still while another nation prepares to strike a first, possibly lethal blow."[35] However, conditions apply, whether or not they are respected. On the one side of the continuum is the perceived security of a state, on the other the legality of its act.

In the landmark Case Concerning the Military and Paramilitary Activities in and Against Nicaragua 1986,[36] it was alleged by Nicaragua that the United States was supporting Contras in their war against the government of Nicaragua and was laying mines in the harbors of Nicaragua.[37] Nicaragua argued that these actions by the United States were not in conformity with international law as it was engaging in the illegal use of force, was violating the principle of non-intervention in domestic affairs and was trampling on Nicaragua's right to sovereignty, breaching customary and conventional international law as stipulated in the United Nations Charter and other sources of international law.

The United States pleaded that it was acting in collective self-defense. The United States accused Nicaragua of actively supporting armed groups in certain of the neighboring countries, for example in El Salvador. The United States also charged Nicaragua for cross border military attacks on Costa Rica and Honduras. The Court found that the conditions under which the United States justified its use of collective self-defense were not sufficient in order to use self-defense. The Court found that actions taken by the United States against Nicaragua were neither necessary nor proportional to activities undertaken by Nicaragua. The International Court of Justice ruled in favor of Nicaragua.

In this landmark opinion,[38] the Court exercised its judgment after considering several applicable laws. First, the court took into account the prohibition of the use of force, and the right to self-defense. It ruled that self-defense, individual or collective, is only allowed in response to an "armed attack" which does not, according to the Court, include assistance to rebels. Second, the Court took into account the principle of non-intervention, i.e. the right of each sovereign state to conduct its affairs without any interference from the outside, by other States. Third, the Nicaragua judgment based itself on the principle of state sovereignty; making the case that sovereignty extends to the internal waters and territorial seas of states and also includes airspace above its defined territory. Fourth, the Nicaragua case grappled with humanitarian law arguing that laying mines in the waters of another state, without the state concerned being notified of it, is an unlawful act that breaches principles of humanitarian law. Although, the Nicaragua case primarily concerned the right of collective self-defense, it was a landmark case in addressing the issue of the use of force in international relations. The Court asked the United States to pay 370 million US dollars in reparation to Nicaragua, a sum that never was paid.

Customary international law of self-defense can be traced back to the Caroline incident of 1837. In this case, a US ship called Caroline sailed frequently to the Canadian shores at a time when the Canadians were revolting against the British. It was intended to aid the Canadian rebels in their struggle against the British forces. British forces attacked and destroyed the Caroline, killing two US soldiers. The British claimed that this was a justified act of self-defense. In light of this incident, the US Secretary of State Daniel Webster stated, in a famous and frequently cited quotation, that:

> there must be a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation…[39]

Further he contended that the act in the name of self-defense must be:

> nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it.[40]

The British finally apologized for the incident. In light of the Caroline, three basic tests of justified self-defense are necessity, proportionality and immediacy.

Although controversial and debated, the Caroline case is said to have extended self-defense to include anticipatory self-defense.

Oppenheim explains:

> while anticipatory action in self-defence is normally unlawful, it is not necessarily unlawful in all circumstances, the matter depending on the facts of the situation including in particular the seriousness of the threat and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat; the requirements of necessity and proportionality are probably even more pressing in relation to anticipatory self-defence than they are in other circumstances.[41]

Although the Charter does not specifically deal with the right of anticipatory self-defense, it has been used in the past and has been considered as an extension of the right of self-defense.

Before moving on to the different types of self-defense, a discussion on the three criteria for legitimate self-defense, set forth by the Caroline case follows.

The first is the necessity criterion. Typically, self-defense can be used in three situations, namely, the protection of the political independence of a nation, the protection of the territorial integrity of a nation and for the protection of citizens and property abroad.[42] The legitimacy of the "necessity" clause is established based on an evaluation of the following criteria:

> (1) the nature and magnitude of the threat involved; (2) the likelihood that the threat will be realized unless pre-emptive action is taken; (3) the availability and exhaustion of alternatives to using force; and (4) whether using pre-emptive force is consistent with the terms and purposes of the UN Charter and other applicable international agreements.[43]

There is ample scope for the subjective interpretation of these conditions. The right to self-defense for the protection of a states territorial integrity is a right that is never absolute in nature because, on the one hand, it may be protected by the use of self-defense measures; on the other hand it is subject to the right of self-defense by other states. In recent years, Arab States and Israel have used this right to warrant military campaigns outside their territorial jurisdiction. This criterion has also been used by India and Pakistan outside their territorial juris-

diction and similarly by Britain and France to intervene in Egypt in 1956. States may easily transgress the boundaries of other states while seeking to justify their acts as self-defense measures. This is particularly possible in cases of anticipatory self-defense because a states' judgment is all that matters in undertaking an act of self-defense. Whether or not a threat actually exists, a state may claim anticipatory self-defense after using aggression.

According to Bowett:

> So long as the distinction between illegal violations of a State's right to territorial integrity and prima facie violations justifiable in self-defense rests solely on the subjective judgment of the interested States, then the principle of relativity of rights has only nominal application.[44]

In instances where self-defense is justified for the protection of the political independence of a state, similar subjectivity exists. What constitutes a state? And what states can claim their right to political independence. Since statehood itself is a contested concept, the rights that come with statehood, such as the protection of political independence, become nebulous. Palestine, for instance can claim the right to self-defense for the protection of its political independence, but since it is not a state, it cannot be legally accepted as a state with that right. On the other hand, Israel may make the claim for self-defense to justify its actions against Palestinians as means to protect its political independence. Thus, while some argue that Israel is an aggressor for denying Palestinians their statehood, others argue that the process of Oslo Accords with the Peoples' Liberation Organization (PLO) is injurious to Israel's requirements for survival. Which of these two viewpoints should be used to justify any post-attack or anticipatory self-defense measures, if and when they are undertaken?

Other related questions are: does the necessity criterion hold true for reasons other than the use of real force, i.e. economic imperialism, cultural invasions etc? The more subjective the scope and interpretation of Article 51, the more is its potential for misuse.

The second criterion is proportionality which poses a problem when the acts of the delinquent state are not reciprocated by similar or proportional means. How can judgments of proportionality be made and how objective is the criterion, particularly in cases where the act of self-defense uses different means than the act of or threat of aggression? There are no absolutes in this scenario either. If a delinquent

state commits economic aggression against the defendant state, does the right to self-defense have to be in the form of an attack to the delinquent's economic interests or can there be an active use of force? Similarly, how would the proportionality test hold if the defendant state perceived a possible nuclear threat from a potential aggressor? Would it be fair to use nuclear weapons first, thereby defending the act as anticipatory self-defense, in conformity with the criterion of proportionality? Or would it be legal to use nuclear weapons in response to conventional weapons?[45]

Arguments have been made for Israel to go for nuclear proliferation as a means of anticipatory self-defense against its supposedly hostile neighbors. Its acquisition and proliferation of nuclear arsenal defy norms against the use and assembly of nuclear weapons. Although the threat to its sovereignty, territorial integrity and political independence are not immediate, arguments have been made for the necessity of anticipatory self-defense in the form of procuring nuclear arsenal.[46] How can such actions contribute in preserving peace and harmony in the world order? What, critics ask, happens if there is a 'preemption of preemption' in the form of self-defense? The answer is probably nuclear proliferation and subsequently nuclear catastrophe. According to Brownlie:

> It is possible that in a very limited number of situations force might be a reaction proportionate to the danger where there is unequivocal evidence of an intention to launch a devastating attack almost immediately. However, in the great majority of cases to commit a state to an actual conflict when there is only circumstantial evidence of an impending attack would be to act in a manner which disregarded the requirement of proportionality.[47]

The third criterion for the legal use of self-defense measures is immediacy. This is also a criterion, like necessity and proportionality, which may be misused by delinquent states searching for a reason to use force without legal justification. In many instances immediacy of an aggression is highly questionable. Each of these three criteria is more problematic in cases of self-defense, more so for anticipatory self-defense.

Let us broadly understand two types of self-defense – post-attack and preemptive.

A. Post-attack self-defense

As for post-attack self-defense, there are mainly four possible situations.[48] The first situation is when the delinquent state uses force or

the threat of force in response to which the defendant state reacts in self-defense using similar means of force or threat of force. This situation, the most classic and unproblematic of them all, is one where there exists an authentic threat to the quintessential rights of a state; there exists immediacy of danger, and the paucity or lack of other means of protection for the defendant state.[49]

The second situation is one in which the defendant state uses measures less than force or threat of force in response to the delinquent states use of force or threat of force. This situation cannot easily be characterized as self-defense because the use of measures short of force, such as confiscation of assets, discriminatory legislation against the delinquent state's interests or interests of its nationals do not fall within the context of force. And the right of self-defense, traditionally, exists within the context of force. Such measures not intended to protect the right that was threatened by the delinquent state can be classified as retaliatory or reprisal measures.[50]

The third situation is one where the defendant state uses force or the threat of force in response to the delinquent state using measures less than force or a threat of force. This situation raises the question of proportionality of a self-defense measure. According to Bowett, "the use of force as a reaction to a delict not involving force will scarcely ever be 'proportionate.'"[51] Finally, the fourth situation is where both the delinquent state and the defendant state use measures short of force or the threat of force. Assuming that all other essentials of the right to self-defense are present, this situation can also be one of self-defense.[52]

Although the right to self-defense exists primarily in the context of the use of force, it has not been confined to this context. As long as the defendant states' reaction is appropriate and proportionate, in response to an imminent threat to a state's security, self-defense measures may be justified. It is therefore important to analyze the rights that may be protected under the right to self-defense.

Many questions arise regarding the degree of the real or perceived armed attack, the locale of the armed attack, the target of the attack, the necessity, proportionality and immediacy of a counter-attack,[53] the rights that can be protected through self-defense, and the case in which one state undertakes self-defense measures for another, making the concept of self-defense problematic. Questions also arise regarding the time until when self-defense measures stay legal.[54] Article 51 of the UN Charter does not address most of these complexities.

The degree of flexibility in interpreting actions in accordance with international law, then, remain, subject to the power politics involved

in the decision-making of the Security Council after self-defense measures have been adopted. This ambiguity makes the "inherent right" to self-defense problematic and a means for misusing the provisions of Article 51. Due to the lack of a definition of "aggression," it is difficult to judge when an act of self-defense may be an act of aggression.

Despite the ambiguity regarding the meaning of "aggression," or "armed attack" and uncertainty regarding whether the conditions for self-defense were fulfilled (i.e. immediacy, necessity and proportionality), several instances of self-defense have been documented. It was earlier mentioned that the innovative interpretation of Article 51 results in several situations that can be justified under the gamut of self-defense.

Firstly, self-defense has been used as a justification (despite, at times, strong legal objections) to use force against state-sponsored terrorists and infiltrators. The basis of this usage comes from Article 3(f) and (g) of the Resolution on the Definition of Aggression (See Section on War and Aggression in International Law). The Cases of Israel-Egypt (1956), OAS-Dominican Republic (1960), Israel-Lebanon (1982), US-Nicaragua (1980–86), and Turkey-Iraq (1995) witnessed the use of force against state-sponsored terrorists and infiltrators. The General Assembly Declaration of 1970 on the principles of International Law concerning Friendly Relations and Cooperation Among states in Accordance with the Charter of the United Nations, which was adopted by consensus states that:

> Every State has the duty to refrain from organizing, instigating assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.[55]

This is resonated in Principle 6 of the General Assembly Declaration of 1987 (See Section on Prohibitions on the Use of Force in Chapter 3). Despite explicit mention of the illegality of certain acts (enlisted in the General Assembly Resolutions above), the legality (and illegality) of self-defense is not clearly defined. It is subjective and thus, problematic.

Secondly, self-defense has been used as a justification (despite, at times, strong legal objections) to use force against ideological subversions. Examples of this have been Warsaw Pact-Hungary (1956), US-Dominican Republic (1965), USSR-Czechoslovakia (1968). There is a lack of support

for the right of self-defense and thus, the use of force against states that export ideologies through non-military means.[56]

Thirdly, self-defense has been used as a justification (despite, at times, strong legal objections) to use force in the cases of attacks on citizens abroad. Examples of such instances can be found in Belgium-Congo (1960, 1964), Turkey-Cyprus (1964), US-Dominican Republic (1965), Israel-Uganda (1976), US-Grenada (1983), US-Egypt (1985–86), US-Libya (1986), US-Panama (1989), US-Afghanistan and Sudan (1998). The lawfulness or unlawfulness of these sorts of actions depends on a case-by-case analysis by political and legal institutions.[57]

B. Anticipatory self-defense

Article 51 states that the right of individual or collective self-defense is permitted only "if an armed attack occurs." It fails to legislate the terms on which preemption or anticipatory self-defense is legal. It is by extension, through the customary right of self-defense that states are also accorded the use of anticipatory self-defense measures, not exclusively in response to an armed attack.

There are two schools of thought regarding anticipatory self-defense. One, referred to as the restrictionist school, represented by Brownlie, Henkin and Jessup who argue that Article 51 is the only source of law on the issue of self-defense. If interpreted properly, restrictionists argue, Article 51 prohibits anticipatory self-defense. The second school, referred to as the counter-restrictionists, represented by Bowett, O'Brien, Stone, McDoughal and Beres argue that a different reading of Article 51 allows anticipatory self-defense, particularly in light of the failure of collective security.[58] They argue that international law "is not a suicide pact" and that it is lawful to attack those preparing to attack.

It is safe to draw a balance between the restrictionists and counter-restrictionist school. Although the right to anticipatory self-defense is legal by custom and interpretation, and serves an important function; it must be used with caution since this right to anticipatory self-defense may be severely abused. It may, if left unmonitored, lead to tremendous risks to international peace, in whatever form it exists.[59] Quigley argues, "a broad reading of anticipatory self-defense runs the risk of nullifying the prohibition against force in relations between states."[60] The question really then is, "how broad is too broad?" Within the decentralized Westphalian system of international law we have today, the answer lies in the realm of politics rather than law.

Since the adoption of the United Nations Charter in 1945, the debate surrounding anticipatory self-defense ensued in three major cases namely

the Cuban Missile Crisis (1962), the Six-Day War (1967) and the Israeli attack on Osiraq (1981). The three cases will be discussed in the following pages:

1) Cuban Missile Crisis (1962)

In October 1962, the Soviet Union placed medium and intermediate range ballistic missiles on the island of Cuba, less than 100 miles off the coast of Florida. These ballistic missiles were capable of carrying nuclear weapons, which made their discovery even more of a shock to the United States. Soviet motivations and possible American responses were considered in wake of this crisis. On October 22, 1962, in the wake of the crisis, in a radio and television address to the American people on the Soviet Buildup in Cuba, President John F. Kennedy said:

> Within the past weeks, unmistakable evidence has established the fact that a series of offensive missile sites is now in preparation on that imprisoned island. The purpose of these bases can be none other than to provide a nuclear capability against the Western Hemisphere… This urgent transformation of Cuba into an important strategic base – by the presence of these large, long range, and clearly offensive weapons of sudden mass destruction – constitutes an explicit threat to the peace and security of all the Americans, in flagrant and deliberate defiance of the Rio Pact of 1947, the traditions of this Nation and hemisphere, the joint resolution of the 87th Congress, the Charter of the United Nations, and my own public warnings to the Soviets on September 4 and 13… We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace… Acting, therefore, in the defense of our own security and of the entire Western Hemisphere, and under the authority entrusted to me by the Constitution as endorsed by the resolution of the Congress, I have directed that the following initial steps be taken immediately.[61]

Kennedy ordered seven steps. First, a strict quarantine was ordered on offensive military equipment to Cuba in order to halt an offensive buildup. Second, the President ordered the sustained and increased surveillance of Cuba for continued military buildup following which, further

action would be justified to thwart a threat to the hemisphere. Third, it was decided that if and when a nuclear missile be launched from Cuba against countries of the Western Hemisphere, it would be perceived as an attack by the Soviet Union on the United States, which would immediately require retaliation against the Soviet Union. Fourth, the base at Guantanamo was reinforced as a "necessary military precaution." Fifth, consistent with provisions of the United Nations Charter that allows for Regional Security, an immediate meeting of the Organization of American states was called to discuss the "threat to hemispheric security" requiring "all necessary action." Sixth, an emergency meeting of the United Nations Security Council was called to discuss "this latest Soviet threat to world peace." The lifting of the quarantine would be subject to the "prompt dismantling and withdrawal of all offensive weapons in Cuba, under the supervision of UN observers." Seventh, a direct appeal was made to President Khrushchev "to halt and eliminate this clandestine, reckless and provocative threat to world peace and to stable relations between our two nations."[62]

On October 22, 1962, President Kennedy also sent out a letter to Chairman Khrushchev that read as follows:

> At the same time, I made clear that in view of the objectives of the ideology to which you adhere, the United States could not tolerate any action on your part which in a major way disturbed the existing over-all balance of power in the world. I stated that an attempt to force abandonment of our responsibilities and commitments in Berlin would constitute such an action and that the United States would resist with all the power at its command.[63]

Khrushchev replied on 23 October 1962 with a letter, in which he claimed that its actions in Cuba were "defensive" and "deterrent" in nature:

> We affirm that the armaments which are in Cuba, regardless of the classification to which they may belong, are intended solely for defensive purposes, in order to secure the Republic of Cuba against the attack of an aggressor. I hope that the United States Government will display wisdom and renounce the actions pursued by you, which may lead to catastrophic consequences for world peace.[64]

Khrushchev reiterated the peaceful intentions of the Soviet Union. Following the preliminary exchanges, Khrushchev suggested two proposals

to the US government in a letter dated 27 October 1962. First, the Soviets proposed a pull-out of their missiles from Cuba in exchange for a US guarantee not to invade Cuba or support any invasion. The second proposal called for the withdrawal of US missiles from Turkey in exchange for a Soviet pull-out from Cuba. Khrushchev wrote:

> I therefore make this proposal: We are willing to remove from Cuba the means which you regard as offensive. We are willing to carry this out and to make this pledge in the United Nations. Your representatives will make a declaration to the effect that the United States, for its part, considering the uneasiness and anxiety of the Soviet State, will remove its analogous means from Turkey. Let us reach agreement as to the period of time needed by you and by us to bring this about. And, after that, persons entrusted by the United Nations Security Council could inspect on the spot the fulfillment of the pledges made. Of course, the permission of the Governments of Cuba and Turkey is necessary for the entry into those countries of these representatives and for the inspection of the fulfillment of the pledge made by each side.[65]

President Kennedy delivered a public acceptance of the first proposal, i.e. a US guarantee not to invade Cuba or support any invasion. The second proposal was accepted in private. US Jupiter missiles situated near Izmir in Turkey were removed in exchange for the removal of the Soviet missiles from Cuba. Throughout the fiasco, three draft resolutions forwarded in the Security Council by the US, USSR and Ghana, but never put to vote, remained in the back-seat while the superpowers pursued bilateral negotiations. The Cuban quarantine was lifted on 20 November 1962, putting an end to a nightmarish situation with the potential of exploding into nuclear catastrophe. Having negotiated a settlement, the US and USSR sent out a joint letter to the United Nations Secretary General U Thant thanking him for his involvement in the situation and requesting him to delete this item from the agenda of the Security Council.[66] An analysis of the Cuban Crisis and the use of "self-defense" as a justification for the quarantine brings to the forefront the question of "necessity" – was it "instant, overwhelming, leaving no choice of means and no moment for deliberation?" It also brings to light the complexity of a situation when anticipatory self-defense is used by a superpower. The remaining Security Council watched on in helplessness and panic. The world watched on and the superpowers negotiated with the destiny world peace at their disposal.

2) The Six-Day War (1967)

Israeli military action against the United Arab Republic on 5 June 1967 is referred to as the Six-Day War. Israel used force using the logic of anticipatory self-defense against the Arab states, claiming that the imminent threat to Israel from Arab states was imminent. The war was waged against Syria, Jordan and Egypt as Israel perceived an imminent threat from the three Arab states which it believed would soon coordinate a massive attack on Israel.

Israel destroyed the air forces of Egypt, Jordan, Syria and Iraq on June 5th. It destroyed several Egyptian tanks and Israeli forces reached the Suez Canal, which had been a rather sensitive area since 1956 when the Suez Crisis occurred, and UN troops were brought in to the Middle East. At the same time, Israel had defeated and removed Jordanian forces from the west bank of the Jordan River. Israel captured the Golan Heights from Syria as Israeli forces moved in on Syrian territory. A disastrous defeat for the Arab World and a tremendous blow to Arab morale, the Six-Day War by Israel was justified using the legality of anticipatory self-defense.

Why did Israel perceive a threat from Egypt? Following the Suez Crisis of 1956, when the United Nations had established its military presence in the Middle East, Egyptians asked this UN Emergency Force (UNEF) that had served as a buffer in the Sinai between Israel and Egypt to leave the Suez region, at the same time building-up Egyptian troops in the Suez area and enforcing a naval blockade on Israel in the Gulf of Agaba. This series of events was viewed as a provocation by Israel, which then became convinced of the Egyptian intentions to strike Israel. Thus the Israeli move to use anticipatory self-defense.[67]

The day after Israel and Egypt notified the UN Security Council that an "armed attack" had occurred, the Security Council issued a Resolution 233 of 6 June 1967 in which it did not place any blame on parties involved but instead called upon "the Governments concerned to take forthwith as a first step all measures for an immediate cease-fire and for a cessation of all military activities in the area."[68] In a subsequent resolution brought to the Council by the Soviet Union, the Security Council it reiterated its call for a cease-fire urging "the Governments concerned should as a first step cease fire and discontinue all military activities at 2000 hours GMT on 7 June 1967."[69] As for the Israeli justifications for the use of anticipatory self-defense, the Security Council took no position "but carefully refrained from either apportioning blame or granting exculpation."[70] Nor did the Security Council call for a withdrawal of Israeli forces from the newly occupied lands and captured territories.

Although the Security Council did not make any bold and clear statements embracing the principle of anticipatory self-defense and its use by Israel, they seem to have indirectly legitimized the anticipatory use of force to ensure a states' own survival. In Franck's words:

> This does not amount to an open-ended endorsement of a general right to anticipatory self-defense, but it does recognize that, in demonstrable circumstances of extreme necessity, anticipatory self-defense may be a legitimate exercise of a state's right to ensure survival.[71]

3) Israel-Iraq Osiraq nuclear reactor (1981)

Israel destroyed Iraq's newly constructed nuclear reactor on 7 June 1981 by using the logic of anticipatory self-defense. It was the first ever-preemptive air-strike when several Israeli planes flew into Arab territory and destroyed the Osiraq nuclear reactor that Israel perceived as dangerous to Israel.[72] Israeli action set a dangerous precedent for other states in the region, particularly contributing to nuclear instability. Bennett Ramberg points out that the nature of the target is such that the "radioactive inventories that can be released into the environment are themselves potential weapons of mass destruction."[73] He goes on to heave a sigh of relief,

> Fortunately, the world was spared this radiation specter in the Israeli attack because Iraq's facility was not yet fueled, and even if it had been in operation, contamination resulting from destruction might not have been significant given the small size of the plant. Had the destroyed installation been a nuclear power station, which is not uncommonly more than 60 times larger… severe consequences would have resulted.[74]

Israeli action, driven by Israel's assessment of costs and gains, was undertaken in order to prevent an Iraqi first strike and contributed to Israeli deterrence *vis-à-vis* its Arab neighbors. On the other hand, Israeli action strengthened the perception of Israel by its Arab neighbors as an "aggressor."

Israeli preemptive strike was driven by five indications, circumstantial but perceived as strong by Israel, that Iraq was developing a military nuclear capability. These indicators were:

- first, Iraq's initial desire to purchase the non-economical but plutonium-producing gas graphite power reactor from France;
- second, its purchase of a 70 megawatt (thermal) Material Testing Reactor, an extremely odd move for a nation not involved in the indigenous production of power reactors;

- third, Iraq's insistence that the Osiraq reactor be fuelled by 92 percent enriched weapon grade uranium rather than by less-enriched "Caramel" fuel;
- fourth, its purchase of some 250 tons of natural uranium, which, given the other components of Iraq's nuclear program, makes little sense unless plutonium production was intended; and
- fifth, the acquisition of plutonium-separation 'hot-cell' simulators from Italy.[75]

Israel did not perceive the safeguards provided by the International Atomic Energy Agency as effective enough to provide the safeguards it wanted against an Iraqi first strike. Israeli Ambassador Yehuda Blum claimed that Israel was acting in anticipatory self-defense:

> Israel was exercising its inherent and natural right of self-defense, as understood in general international law and well within the meaning of Article 51 of the (UN) Charter.[76]

The destruction of the Osiraq nuclear reactor served not only the interest of Israeli security but also benefited several Arab states such as Syria, Saudi Arabia and Egypt due to their long rivalry with Iraq. Despite obvious strategic considerations for the three states that would benefit them indirectly, there was strong condemnation of the act in these countries.

The Israeli government expressed its belief that in the event that Saddam Hussein would have acquired nuclear bombs:

> he would not have hesitated to drop them on Israel's cities and population centers… under no circumstance would we allow the enemy to develop weapons of mass destruction against our nation; we will defend Israel's citizens, in time, with all at our disposal.[77]

Israel's Ariel Sharon explained that the introduction of nuclear weapons in the region would be too costly to the survival of the state of Israel and therefore it was the responsibility of Israel to prevent Iraq, which it viewed as a confrontation state, from acquiring access to military nuclear capability.[78]

The debate surrounding the legality (or illegality thereof) of Israeli use of force on Iraq ensued between restrictionist and counter-restrictionist states, between states that saw Israel's action as pure aggression[79] and states that saw Israel's position as anticipatory self-defense. The majority position was, however, highly critical of Israel's actions as it was not a response to an armed attack (a condition required by Article 51), there

was no necessity for self-defense, there was no immediacy of self-protection and that Israel violated Iraq's sovereignty.

> The Security Council strongly *condemned* the military attack by Israel and said that Iraq is entitled to "appropriate redress for the destruction it has suffered."
>
> Resolution 487 (1981)[80]

4.2 The death and re-incarnation of Article 2(4)?

What the UN gives with one hand in terms of prohibitions, it takes back with the other hand as exceptions to the use of force. Can we argue that the exceptions to the use of force in international law kill the basis of Article 2(4) that requires all member states to refrain from "the threat or use of force" against the territorial integrity or political independence of any state?

The debate regarding the prohibition of the use of force has been sharpened by the exchanges between Thomas Franck and Louis Henkin. Thomas Franck in his article "Who Killed Article 2(4) argues that the "exceptions and ambiguities" to the use of force, provided by the Charter, have led to the "deadly erosion" of the rules and led Article 2(4) to the grave.[81] In response to the rather bleak future that Franck predicts for the UN system after the death of Article 2(4), Louis Henkin contends that Article 2(4) lives on and although the prohibitions on the use of force in the UN are far from flawless "its maladies are not necessarily terminal."[82] In a more recent article, John D. Becker suggests that despite the relevance of Article 2(4), it is crucial to modify the criteria for the use of force in order to suitably reflect the realities of the post-cold war and post-911 world.[83]

In this section, a discussion laying out both sides of the debate follows, one that is convinced of the death of Article 2(4) and the other that reflects continued faith in the international law and believes that "there is yet time to prescribe, transplant, salvage, to keep alive at all cost the principal norm of international law in our time."[84]

Franck argues that although the rules for preventing the use of force were "admirable in themselves," they were "predicated on a false assumption: that the wartime partnership of the Big Five would continue, providing the means for policing the peace under the aegis of the United Nations."[85] Franck furthermore contends that:

> Blame for this must be shared by powerful, and even some not-so-powerful, states which, from time to time over the past twenty

> five years, have succumbed to the temptation to settle a score, to end a dispute or to pursue their national interest through the use of force…Having violated it, ignored it, run roughshod over it, and explained it away, can they live without it?[86]

Franck lays down the reasons that contributed to the death of Article 2(4). The first reason is the invalid assumption on which the Security Council is based; second, the impact of small-scale war; third, the effect of potential nuclear warfare; and fourth, the impact of regional organizations as perpetrators of violence.

Franck's first reason is the incompetence of the Security Council in dealing with international peacekeeping. Under the gamut of Chapter VII, more specifically Article 39 of the United Nations Charter, the Security Council is responsible for determining:

> the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.[87]

However, the Security Council is dependent on its members for all procedural or non-procedural matters. Article 27, Chapter V, dealing with the Security Council functions, powers and procedures lay down that:

> (1) Each member of the Security Council shall have one vote.
> (2) Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
> (3) Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members…[88]

As a result of the difficulties posed by the need for conformity by members of the Security Council and more so, the permanent members of the Security Council, it has never been able to conduct a collective enforcement action barring two exceptions. The first exception is the UN action in Korea resulting from the absence of the Soviet Union from the UN Security Council at the time of voting. Since the Korean War, the Security Council has not authorized use of force until the 1991 Gulf War in UN Security Council Resolution 687.[89]

There is an obvious dearth of "successes" for the Security Council when it comes to ensuring peace and security. This incompetence on

the part of the Security Council "has not been exceptional but endemic." As a consequence, "nations have fallen back on their own resources and on military and regional alliances."[90] Use of force outside the United Nations proved to be a solution for states in the face of an incompetent Security Council. Articles 51, 52 and 53 give states the right to use force under "exceptional circumstances." Article 51 deals with the right to individual and collective self-defense if an armed attack occurs until the Security Council has acted to restore peace and security (See detailed discussion of self-defense in the section above). Article 52 states:

> (1) Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
> (2) The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
> (3) The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

Article 53 goes on to state that:

> The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority.

Franck argues that regional organizations have themselves become breeding ground for igniting and sustaining violence rather than helping the Security Council put an end to it. Regional groupings, being more susceptible to *realpolitik* disallow peace to thrive, particularly in the event that a member state of an organization, suspected of being disloyal is threatened with or subject to the use of force by the organization itself, often taking law in its own hands. This has led to the constant ambivalence between regional and global forums as to who is foremost responsible for the maintenance of peace and security at the world stage. A crucial question that is required to presuppose this discussion of regional organizations is the definition of what constitutes a regional organization.

There is no rigid and written definition of what constitutes a regional organization that can avail of the rights enlisted in Article 52 and 53. NATO and Warsaw Pact, perhaps, would be good starting points for defining a regional organization. Even in the case of NATO and Warsaw Pact, the case is not crystal clear. There ensued considerable debate following the Czech settlement 1968 by the Soviet Commonwealth in which case the US claimed that since the Warsaw Pact had not declared itself as a regional entity, it could not claim "peaceful settlement" under the purview of Article 53. Earlier, when the Soviets had attempted to raise the matter of a US invasion of Guatemala, 1954 in the Security Council, the US had clearly used the language of regional action under Article 53 claiming that it acted "to achieve a pacific settlement of the dispute between Guatemala and its neighbors…" and that the United Nations Security Council, nor the Soviet Union should try to stop the US as this would result in "a catastrophe of such dimensions as will gravely impair the future effectiveness both of the United Nations itself and of regional organizations such as the Organization of American states."[91]

Americans seemed to believe that the Organization of American states is the only valid beneficiary of the powers granted to regional organizations as exceptions to Article 2(4), using force under the gamut of "peaceful settlement," "peaceful invasion," (Guatemala) "peaceful occupation" (Dominican Republic) and "peaceful deployment of naval force" (Cuba). This legal loophole in Article 2(4) grew more and more damaging to the intent of the UN as the number of regional organizations grew and considered them as eligible to use Article 52 and 53. The presence of this legal loophole, according to Franck, kills the Charter's resolve to limit the use of force in international relations.

A third argument that Franck makes in defense of his thesis that Article 2(4) is dead is that in a world with the potential for nuclear warfare, neither Article 2(4), nor Article 51 can require a state to be attacked by nuclear weapons before it takes action. Both Article 2(4) and 51 are tailored for scenarios following "an armed attack." Franck surmises that a state would be only rational in taking forceful measures to counter a threat before it manifests in a "real" attack, regardless of the provisions of Articles 2(4) and 51. In final analysis, Franck asserts:

> The prohibition against the use of force in relations between states has been eroded beyond recognition, principally by three factors: 1, the rise of wars of "national liberation"; 2, the rising threat of wars of total destruction; 3, the increasing authoritarianism of regional systems dominated by a super-power. These three factors may, however, be traced back to a single circumstance: the lack of

> congruence between the international legal norm or Article 2(4) and the perceived national interest of states, especially the superpowers.[92]

In response to Thomas Franck's article, Louis Henkin's wrote, "The Report of the Death of Article 2(4) are Greatly Exaggerated." While agreeing with Franck's diagnosis for the problems encountered by Article 2(4) such as "the mistaken original assumption of big-power unanimity; the changing character of war; the loopholes for 'self-defense' and 'regional' action; the lack of impartial means to find and characterize facts; the disposition of nations to take law into their own hands and distort and mangle it to their own purpose," Henkin emphasizes that by solely focusing on the failures of Article 2(4), we tend to ignore the powerful role that Article 2(4) has played in establishing an unspoken norm that makes states less likely to use force. Henkin cites examples of how the occurrences of war have diminished over a period of time and today, even when force is used, rarely do such instances escalate to the scale of warfare. Henkin does not deny that there are countless occasions and causes for war, however, states are more conscious of the fact that they cannot enter war as freely. Henkin further claims that although there are exceptions to the prohibition in the Charter, such as Article 51, 52, 53, these have not really been fatal to the provisions for the non-use of force.[93]

4.3 Anticipatory self-defense and the use of force in international law

Piecing together the jigsaw puzzle pieces of polarity, power, anarchy, aggression, war and self-defense, one can argue that in a unipolar international system, there is likely to be greater unrest and instability than a bipolar system – perhaps even more than the instability that comes with a multipolar system. This instability gains some sort of order through the power differential between the unipolar power and the rest of the world. It is in the interest for the unipolar power to preserve its primacy till its capabilities allow, and in the meantime utilize its power to maneuver the behavior of state actors in the international system to its long-term advantage. Any threats to the power of the unipolar state can be crushed or dissipated by whatever means are appropriate to maintain both hard and soft power.

In the event of an aggression, the relationship of the aggressor state to the unipolar leader makes the difference in terms of how the aggres-

sion is adjudged. When a friend state is aggressor, the aggression is tailored as "self-defense" or an action that resulted from a threat to international peace and security. Here, we can assume that the friend state has indulged in an aggression on another state (not the unipolar power). Backed by the unipolar power, "self-defense" or another plot legitimizing the aggression is used as a justification with a strong backing from the unipolar power. In a case like this, we can hypothesize that the power and security threat facing the aggressor was either a crucial factor affecting the power of the unipolar leader or does not challenge its might in any way. A rational calculation would be to support an unchallenging ally in its needs for security. To what extent the unipolar power will get involved will depend on specific circumstances, to what extent the threat to a friend is a threat to one's own power.

On the other hand, if a non-friendly country, or a country already in the "bad books" of the unipolar leader conducts the aggression (or an act perceived as hostile), the aggression is quickly construed as a threat to international peace and security or is challenged using the framework on international law. If international law, a.k.a. the United Nations, stands divided on the issue, in terms of determining the threat, the preferred ends to achieve and the means to use, the unipolar power has the might and the occasion to flex its muscle and easily intervene in the situation, without the support and backing of the United Nations or allies, shifting the power equilibrium to its advantage and to the disadvantage of the non-friendly state.

It follows then that it is in the best interest to be on "good terms with" the unipolar power if a state does not have the power to face up to the might of the unipolar power, in the event of a confrontation. This power to face up can be in the form of nuclear power, which has the power to deter attacks or terrorist activities, with the power to undermine the soft targets in the unipolar state. In the case that a state acts in a way that threatens, challenges or shifts the current primacy of the unipolar state, the unipolar state can claim self-defense without apology or explanation. Does a unipolar state ever "need" to use self-defense? Can self-defense measures invoked by a unipolar state ever be necessary, immediate or proportionate? In light of these issues, self-defense will be analyzed (in Chapter 5) as justification for the US wars in Afghanistan and Iraq.

5
The Use of Force in Afghanistan and Iraq

> The difference between preemptive war and preventive war is not a matter of semantics. Rather, it is a matter of timing that has implications for whether an act is justified or not. Traditionally, preemption constitutes a "war of necessity" based on credible evidence of imminent attack against which action is justified under international law as enshrined in the self-defense clause (Article 51) of the UN Charter. But the Bush administration has expanded the definition to include actions that more closely resemble preventive war. Preventive wars are essentially "wars of choice" that derive mostly from a calculus of power, rather than the precedent of international law, conventions and practices. In choosing preventive wars, policymakers project that waging a war, even if unprovoked, against a rising adversary sooner is preferable to an inevitable war later when the balance of power no longer rests in their favor.[1]

5.1 Introduction

Michael Walzer defines preventive wars as attacks "that respond to a distant danger, a matter of foresight and choice"[2] while preemptive wars as those that respond to an actual threat that has been issued.[3] What distinguishes preemption from prevention is the prevalence of a "sufficient threat," which in Walzer's words comprises "a manifest desire to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting or doing anything other than fighting greatly magnifies the risk."[4] Prevention differs from preemption, both in terms of timing and motivation.

While a preemptive war is a "war of necessity" based on reliable evidence of a potentially imminent attack that would hurt the national interest of the states, a "preventive" war is a "war of choice" that is motivated by "power politics" rather than an "imminent threat." While preemptive wars *may* be considered legal in international law, a "preventive war" is never legal, rather it violates traditional international law, conventions and practices.

In light if this distinction between preemption and prevention, this chapter will evaluate the nature and legality of the use of force by the US in Afghanistan and Iraq.

In a 2004 interview with the British Broadcasting Corporation's Owen Bennet-Jones at the UN headquarters in New York, Kofi Annan, the Secretary General of the United Nations at that time, said that the US war against Iraq was "not in conformity with the Security Council – with the UN Charter." When asked if the war was illegal, he said, "Yes, I have indicated it is not in conformity with the UN Charter, from our point of view and from the Charter point of view it was illegal."[5] In another interview with the, then, US Secretary of State Colin L. Powell on Fox News Channel's Hannity and Colmes Show, September 17, 2004, Mr. Hannity asked Collin Powell to comment on Kofi Annan's remarks concerning the illegality of war. Collin Powell said:

> My reaction is that the Secretary General was incorrect. We believe that the war was necessary and it rested on sound principles of international law. We have made our case and we have, in our words, moved forward directly with a spirited defense of our position, and of course, it's a position held by Australia and the United Kingdom and all the other members of the coalition. I spoke with the Secretary General and we know that we have different views on this, but our view is clear and our view is based on international law.[6]

One year later, in a speech given to the American Bar Association, Secretary of State Condoleezza Rice said, with reference to the relationship between the US and international law:

> For the United States, an essential element of the rule of law has always been, and still remains, law among nations. We've always respected our international legal obligations and we have led the world in developing new international law. Indeed, this has made America somewhat unique in the world and in world history because

> we try and use our great power not to win glory or imperial gain for ourselves but to establish international rules and norms that we encourage others to follow. After World War II, we negotiated new treaties and built new international institutions for the peaceful resolution of disputes. And today, one of my highest priorities is to transform our great institutions, like the United Nations, to reflect the world as it is in 2005, not as it was in 1945… America is a country of laws. We will always be a country of laws. And we will remain an international leader because we will be committed, not simply to our strength but to our love of liberty, our support for democracy and most of all, our devotion to the rule of law.[7]

In the midst of the clouds surrounding the relationship of the US with the rules of international law, post-9/11, many questions arise.

The first main question that arises is regarding the continued determinacy of law in controlling and prohibiting states, especially powerful states, from the use of force or, on the other hand, the violation of norms to a point that law renders itself meaningless.[8] Law's legitimacy may be sharply undermined if these questions are not addressed immediately and seriously. Not just law's legitimacy but the security of smaller, less powerful states in the international system, is undermined as these states have no choice but to look towards international law as their protector of security in a post-cold war international anarchic system. Does this symbolize the death of international law or the birth of a new lens to study international law?

The *second* question that arises is that of the role of the US in the international system and towards international law. In light of the statement of George Bush declaring that the "United States will never seek a permission slip to defend the security of our people"[9] despite the UN Charter requiring each state to seek a "permission slip" from the UN Security Council, one is reminded of the Thucididean dictum in which "the strong do as they will and the weak do as they must." Following this path will ensure an annihilation of the treaty system as enshrined in the UN Charter and lays down the backbone of international law that guides the relations between states. This path also confirms that American sovereignty will not be "subject to legal limits or constraint" since treaties that limit the use of force by America are seen as "obstacles to American supremacy, to its ability to do whatever it pleases."[10] Such an attitude by the world's sole superpower reflects two tendencies, "One tendency is to overestimate the capacity of naked power to achieve recognition of its own legitimacy by ignoring the law. The

other is to underestimate the capacity of law to adapt to new circumstances while retaining the determinacy that underpins its perceived legitimacy."[11] The difference between the two lies in those that accept the "power of legitimacy" and those that emphasize the "legitimacy of power."[12]

A third question that arises is regarding the need for international relations and law to reassess the current world order and elements of disorder keeping in mind the rising threats and fears of terrorism worldwide. Fourth, the question of whether we need greater or lesser reliance on self-help remedies. More direct questions relate to the issue of self-defense and the implication of the use of self-defense by the US In what cases does the world's superpower need to use self-defense, more so anticipatory self-defense, as a measure to protect its security and sovereignty? Would it ever be able to fulfill the criteria set out by law, i.e. necessity, proportionality and immediacy, in light of the multitude of options that powerful states can use before resorting to force?

Fifth, does the US resort to self-defense set a dangerous precedent for other countries contemplating self-defense to resolve and expedite disputes that they are involved in? Other countries could use the US model of self-defense to justify acts of aggression against their regional opponents. Who is to say that India will not be tempted by the idea of preemptively attacking Pakistan or Russia from attacking Georgia or Turkey with Greece or Israel from attacking Lebanon? If such attacks were to occur, who is to render these acts as lawful or unlawful? Until decisions and appropriate actions are taken to judge the case of the US attacks on Iraq and in Afghanistan, international law remains paralyzed and "without a voice." If these attacks are declared legal in the aftermath, then it is time for a serious revision of the UN Charter to address new threats (i.e. terrorism, WMD), situations (i.e. September 11) and actors (i.e. terrorist organizations and individuals like Bin Laden). Sixth, how will major states react to American power? Will there be a trend towards "balancing" by other states or a balancing coalition or buck-passing? Seventh, What will be the impact of the use of preventive wars on so-called rogue states and on terrorism? Eight, what will be the impact of the US led preventive wars on their own security interests in the long run? The US use of the preemptive doctrine generates more questions than answers.

In Section 5.2, the US use of force in Afghanistan will be analyzed to assess for the legality of the use of force. Section 5.3 deals with a similar assessment for the US use of force in Iraq. The discussion of the legality or illegality of the US use of force in Afghanistan and Iraq is crucial because (in Hedley Bull's words), "when the law is violated, and

a new situation is brought about by the triumph not necessarily of justice but of force, international law accepts this new situation as legitimate and concurs in the means whereby it has been brought about."[13] If this were to happen in the case of norms related to self-defense, the existence of international law will become a mere theoretical enterprise. In Section 5.4, a conclusion that delves into the future of anarchy, balance of power and international law will be laid down with questions for further research.

5.2 US use of force in Afghanistan: Operation enduring freedom

On 11 September 2001, for the first time in the history of the United States of America, suicide attacks of such gravity were conducted on American soil, targeting civilians and killing approximately 3000 innocent people. This was the work of 19 Al-Qaeda terrorists who hijacked four commercial passenger jet airliners and followed a series of events that, according to many, had "changed the world forever."

The Bush administration declared its "war on terrorism" aiming at bringing the perpetrators of 9/11, identified as Osama Bin-Laden and Al-Qaeda, to justice and also preventing the emergence of terrorist networks or "the faceless enemy." Critics have pointed out that a war, in the traditional sense, is "an armed conflict between two or more states" and have questioned whether a "war against terrorism" counts as "war." While critics insist that calling the US led "war against terror," a war, is a misnomer,[14] President Bush has not hesitated once. In a recent declaration regarding US foreign policy, he said, "Make no mistake about it, we are at war."[15]

In Bush's speech (7 October 2001), announcing the opening of attacks on Afghanistan as part of his "war on terror," he said:

> On my orders, the United States military has begun strikes against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. These carefully targeted actions are designed to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime. We are joined in this operation by our staunch friend, Great Britain. Other close friends, including Canada, Australia, Germany and France, have pledged forces as the operation unfolds. More than 40 countries in the Middle East, Africa, Europe and across

> Asia have granted air transit or landing rights. Many more have shared intelligence. We are supported by the collective will of the world.[16]

Since the attacks on the United States were seen to be in confirmity with the Charter of NATO, NATO declared that Article 5 of the NATO agreement[17] would allow NATO to participate in a "hot" war. However NATO explanations for the use of force are inadequate unless it is backed up by the Security Council and the UN Charter. Justification by a regional treaty is subservient to that of the UN Charter. The US led military "Operation Enduring Freedom," changed from an earlier proposal to be called "Operation Infinite Justice." The United States launched this military offensive against Afghanistan with a "preventive" logic, i.e. to prevent future attacks on the US and its allies. The United States thus based its attacks on the international law right of self-defense, documented in the Bush NSS of 2002[18] and reiterated in the NSS of 2006 which lays down that:

> If necessary, however, under long-standing principles of self defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack… This is the principle and logic of preemption. The place of preemption in our national security strategy remains the same.[19]

But with the US campaign against Afghanistan in its seventh year, it is time to ask the question of the legality and validity of the claims of self-defense. Is the US presence in Afghanistan still valid? More pertinently, was it ever valid? What it claims to have achieved is that Al-Qaeda and terrorist safe havens have disappeared, the Taliban were removed from power; and Afghanistan has been democratized. Are all these achievements enough to justify the use of force?

On 7 October 2001, US Ambassador to the United Nations John D. Negroponte reported in a letter to the President of the UN Security Council:

> In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective

> self-defense following armed attacks that were carried out against the United States on September 11, 2001.

The logic behind this declaration was that the attack on the United States on September 11 could be attributed to the Al-Qaeda Organization that was supported by the Taliban regime in Afghanistan. Without showing evidence of the links between September 11 and Afghanistan, the US took the decision to use force in self-defense as a part of its "war against terror." Afghanistan was, and continues to be, scavenged for Al-Qaeda operatives linked to 9/11 and also in search of the perceived mastermind Bin Laden. In the events that followed September 11, state responsibility needed to be established proving that Afghanistan is, in fact, responsible for actions taken by Al-Qaeda (and by implication, the direct link between Al-Qaeda and 9/11 attacks). Did the US have "clear and compelling evidence" that establishes the link between Al-Qaeda or/and the Government of Afghanistan to attacks of September 11? If so, why was such evidence not disclosed to the UN Security Council? The United States has justified its failure to provide evidence of the link between events of September 11 and Al-Qaeda, due to security reasons, i.e. guarding sensitive information. How, then, can a state attack another state, in self-defense, without direct proof of its involvement?[20]

Let us recapitulate what happened in the aftermath of September 11. The United States made two main demands – that members of the Al-Qaeda and Osama Bin Laden be surrendered to the United States authorities and that all terrorist training camps be shut down with the US overlooking and confirming such a shutdown. The Taliban, in response, agreed to try Osama Bin Laden in Afghanistan if there was compelling evidence linking him and his group to the attacks of September 11. Later the Taliban agreed that they would be willing to surrender Osama Bin Laden to a country that is neutral for fair trials.

The US rejected both concessions and instead struck Afghanistan on October 7, 2001 by claiming its right of self-defense. A close reading of Security Council Resolutions 1368[21] and 1373[22] did not call for the US to use "all necessary means" to respond to the terrorist threat seen on September 11. Article 51 is justified in the event that there is an "armed attack." Does "assistance to rebels" constitute an armed attack? Not according to the famous Nicaragua judgment. Claims of newly emerging customary international law, which would accept a broader definition of what constitutes an "armed attack," is weak owing to the lack of *opinio juris* amongst the international community. The only two

states relying on a broader definition of armed attack are the US and Israel and that is not sufficient for *opinio juris*.

Let us further investigate if the act of self-defense by the US met standards of international legality. Recalling the conditions set by the Caroline incident, does the US attack on Afghanistan fulfill criteria of necessity, immediacy and proportionality?

As Brian Foley puts it, "There are no airliners flying from Afghani airports towards American targets, which the US could legally intercept and destroy as an immediate danger. Do the terrorist training camps and Taliban government constitute an immediate threat?"[23] In light of the fact that there was insufficient intelligence and proof of the direct link between the Taliban and 9/11, that the UN Security Council was determined to act against terrorism and called upon all states to help in this cause, there was room for greater proof of necessity of the attacks by the US. Typically self-defense can be used when the imminent threat or danger is still live and continuing. In this case, there was no proof of such danger.

The second criterion immediacy can be determined by reviewing alternative means possible to achieve the US goal of fighting terrorism, particularly in response to September 11. Immediacy demands that there should be "no choice of means" left before the use of force under self-defense. The US did indeed have the choice of means. Firstly, it could have negotiated with the Taliban that offered to turn in Bin Laden to a third and neutral country for trial if adequate proof linked the events of September 11 to Bin Laden. Secondly, the US could have waited for support for a UN led war into Afghanistan. This would have given the US greater legal and moral authority, more than it did by waging a war with coalition forces. It led to the questioning of the power of the United Nations in the face of danger sensed by a superpower. Thirdly, the US could have pursued means without using force, such as those outlined in Resolution 1373 such as working with other states to cut terrorist funding, increase border security etc. In light of the fact that there were available alternative means, even if these could only be tested against time, the US violated the requirement of immediacy.

Finally, when we look at the condition of proportionality it can be asked if over a month of bombing in Afghanistan, without protecting civilian targets, can be justified as reasonable.

The use of self-defense for justifying its 2001 attacks on Afghanistan's territory set some new and dangerous precedents for the future of international law and the power of the United Nations as an actor in current

international relations marked by a unipolar world with one powerful state, the US, taking justice in its own hands.

What we saw in Afghanistan was not just an illegal and unjustifiable use of force in the name of provisions of self-defense in international law (Article 51) but also the justification of "preventive" war against a non-state enemy.

The Bush administration describes changed circumstances that characterize international relations today in order to justify this extended definition of preemption to prevention. The NSS states:

> We must adapt the concept of imminent threat [that justifies preemption] to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means… Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning.

The use of "self-defense" as a justification for the use of force by the United States in Afghanistan, in response to a threat not proven as "imminent," makes the US look like the "bully state" by other states in the international system. The legal restraint on the use of force by states in their international relations becomes a function of the will of the unipolar superpower.

In the following section, a similar legal assessment of the US use of force in Iraq will be conducted to highlight the continued reliance of the US on self-defense as a justification of greater goals of flexing its superpower muscles to dictate geopolitics and control the behavior of states in the way that it wishes.

5.3 US use of force in Iraq: Operation Iraqi Freedom

In the case of the US led invasion of Iraq, the United States made similar claims for self-defense. In a letter dated 20 March 2003, the United States provides explanations for its Iraq attack.

> Coalition forces have commenced military operations in Iraq… Iraq repeatedly has refused, over a protracted period of time, to respond to diplomatic overtures, economic sanctions and other peaceful means, designed to help bring about Iraqi compliance with its obligations to disarm and to permit full inspections of its weapons of mass destruction and related programmes. The actions that coalition forces are undertaking are an appropriate response. They are 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. Further delay would simply allow Iraq to continue its unlawful and threatening conduct.[24]

The United States Administration forwarded several reasons for the attack on Iraq. Firstly, that Iraq was in violation of 16 Security Council Resolutions ever since 1990. The second reason was the Iraqi programme for Weapons of Mass Destruction (WMD) and their alleged possession of ballistic missiles. Thirdly, Iraq was charged by the Bush administration for having ties with terrorists and terrorist organizations. Fourth, the need for regime change in order to bring about a democratic and friendlier government instead of the oppressive regime of Saddam Hussein was discussed.[25]

Just like the US use of force in Afghanistan, it is important to evaluate the legality or illegality of the US war on Iraq, a.k.a. "Operation Iraqi Freedom" in order to better understand US behavior *vis-à-vis* international law and other states. In a unipolar post-cold war international system, one finds that "US vulnerability and US primacy have reinforced tendencies toward a muscular unilateralism in US Foreign Policy."[26] The evidence of US vulnerability and fear are apparent in the speeches made by the Bush administration concerning the war against Iraq. The US continued its "war against terror" rhetoric to open the doors to an invasion in Iraq while a large part of the world watched the world superpower trample over international laws concerning the use of force in international relations.

The US President used primarily two legal arguments to justify the use of force by the US in Iraq.[27] First, Resolution 678 and other existing Security Council Resolutions continued to authorize the use of force against Iraq. According to President Bush, "In the case of Iraq, the Security Council did act, in the early 1990s. Under Resolutions 678 and 687 – both still in effect – the United States and our allies are authorized to use force in ridding Iraq of weapons of mass destruction. This is not a question of authority, it is a question of will."[28] Kofi Annan disagreed with this justification when asked if he considered the US war on Iraq legal. He clearly said that the justification for war by the US was illegal. The second was as such, the war on Iraq was a continuation of the "war on terror" and was legal since it constituted an act of self-defense. In Bush's words:

> We are now acting because the risks of inaction would be far greater. In one year, or five years, the power of Iraq to inflict harm on all free nations would be multiplied many times over. With these capabilities,

> Saddam Hussein and his terrorist allies could choose the moment of deadly conflict when they are strongest. We choose to meet that threat now, where it arises, before it can appear suddenly in our skies and cities… Terrorists and terror states do not reveal these threats with fair notice, in formal declarations – and responding to such enemies only after they have struck first is not self-defense, it is suicide.[29]

Supporting the war in Iraq and its legal justifications, the then Secretary of State Donald Rumsfeld stated that "the only way to prevail in the global war on terrorism is to 'take the battle' to the terrorists… If you know there are terrorists, and you know there's terrorist states – Iraq has been a terrorist state for decades – and you know there are countries harboring terrorists, we believe… you simply have to take the battle to them."[30]

These statements open up the debate regarding whether the legal justifications used by the US are adequate in explaining their use of force.

Let us first look at the main Security Council Resolutions on Iraq since the US and UK insisted that previous Security Council Resolutions justify an attack on Iraq. Those that supported the use of force against Iraq argued that Resolution 678 had not expired and still held validity. Resolution 678 (29 November 1990), "acting under Chapter VII of the UN Charter, authorizes Member States…to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area."[31] Resolution 660 (2 August 1990) condemned the Iraqi invasion and demanded "Iraq's immediate and unconditional withdrawal." Resolution 687 (3 April 1991) declares the end of the Gulf War with a formal ceasefire and establishes the UN Special Commission on Weapons to monitor and supervise the destruction of prohibited weapons and extends sanctions until disarmament is achieved. Resolution 687 "provides for a ceasefire predicated upon Iraq's acceptance of the terms of that resolution, not Iraq's compliance with the terms."[32] And since Iraq had accepted the terms of the ceasefire of Resolution 687, the authorization to use force as embedded in Resolution 678 had expired. Security Council Resolution 1441 (8 November 2002) which "warned Iraq that it will face serious consequences" as a result of its continued violation of its "obligations" did not change the fact that Resolution 687 had superceded Resolution 678 and the decision to pursue further measures had fallen back in the hands of the Security Council and not member states.

The US claimed that existing Security Council Resolutions authorized the use of force by the US and Allied troops. This argument is not only legally flawed but is an outright misuse, manipulation and violation of the norms restricting the use of force by states, in his case the United States, the most powerful country in the world – the sole unipolar superpower.

Let us now examine the second justification that the US gave for its war against Iraq, namely self-defense. Before evaluating the legality of the US use of self-defense, let us first look at certain criteria for a just war (*jus ad bellum*) namely legitimate authority, public declaration, just cause, proportionality, last resort and reasonable hope of success.[33]

The first of these criteria namely legitimate authority raises the question of the legitimate authority for declaring the onset of war. Who should declare war? According to Article 1 (Section 8) of the constitution of the United States affirms, "The Congress shall have power to… declare war." Despite this constitutional power, typically declarations of war have only occurred following Presidential approval or request. Despite the unresolved tension between the Congress and the President as to who should wield most power, a declaration is a necessity for a just war.

In the event that the war involved international forces, military use would need to be legitimized through an international organization or institution. The question of legitimate authority then revolves around what sort of war this was. Was it a war with unanimous international commitment, a UN decision, a UN Security Council decision, a regional or international alliance, an ad hoc coalition or a unilateral action? President Bush seemed to have branded the war as being a "coalition of the willing" when it was nothing more than a war supported by a few nations that supported US military action "out of obligation." It was tantamount to US unilateral action with the support of an ad hoc coalition. However, if there is truth to the fact that the war was indeed a consequence of Iraqi violation of UN Security Council Resolutions, then the UN could be the only legitimate authority to declare war and this was not the case. Thus, either the war was unilateral in nature for which Bush's declaration of war would suffice, or the war was multilateral in nature, in which case the UN should have sanctioned it.[34]

The second criterion is public declaration implying that the authority responsible for declaring war, be it a head of the state or an international organization, is not only obliged to announce its intentions to wage war but also elucidate clearly the conditionalities that are required for bringing an end to the conflict. The intention to use military force by the Bush administration was publicly communicated on

19 March 2003, when President Bush called for the immediate disarming of and abandoning of power by Saddam Hussein and his sons within a time frame of 48 hours. In doing so, President Bush's war on Iraq fulfilled the second criteria for just war.[35]

The third criterion for a just war is just intent or *just cause*. In President Bush's speech on 17 March 2003, announcing the beginning of the war, he said, "Intelligence gathered by this and other governments leaves no doubt that the Iraq regime continues to possess and conceal some of the most lethal weapons ever devised. … The danger is clear: using chemical, biological or, one day, nuclear weapons, obtained with the help of Iraq, the terrorists could fulfill their stated ambitions and kill thousands or hundreds of thousands of innocent people in our country, or any other."[36] This explanation of the intent to go to war came without any proof from the US of a threat that was imminent and in need of self-defense. The just cause of the US war on Iraq was highly doubtful and has only been reaffirmed by a statement by President Bush agreeing that, "it is true that much of the intelligence turned out to be wrong."[37]

The fourth criterion for a just war is proportionality. According to Wester "Proportionality is intended to engage both restraint in the use of deadly force and precision in employing such force… Critics of the case for war argue that Operation Iraqi Freedom violated the Just War ethic because Iraq had not attacked nor threatened to attack the United States or other nations, so no proportional response was indicated. If the threat was genuinely the possible use of weapons of mass destruction, then disarming Iraq's regime seems proportional. Regime change, however, exceeds that measure."[38]

Criterion five is the last resort criterion. This criterion means that force may only be used as a last resort after all other ways of peaceful settlement of the dispute have failed. Wester proclaims, "Something other than going to war can always be done. However, the prudential test is whether or not all reasonable options have been exhausted prior to launching military action."[39] The Bush administration, according to Wester, did not fulfill this. "The 2002 National Security Strategy argues that we face a threat that cannot be managed within the old paradigm, so a new paradigm is created. Preemption based on partial but sufficient evidence that we face clear but not necessarily present danger is this new paradigm. In this view, the danger is so unpredictable and volatile that we must act immediately rather than waiting to act only as a last resort."[40]

The sixth criterion is "reasonable hope of success." Wester contends "the reasonable hope for success is a criterion intended to prevent the

pointless use of military forces that have no chance at victory. In effect, this protects military personnel and nations from authorities who recklessly steer a nation into armed conflict."[41] How reasonable can the hope of success be when the war that the US started against Iraq was part of its "war against terror" which according to President Bush, "will not end until every terrorist group of global reach has been found, stopped and defeated."[42] In response to who qualified as a terrorist, President Bush replied, "If anybody harbors a terrorist, they're a terrorist. If they fund a terrorist, they're a terrorist. If they house terrorists, they're terrorists… If they develop weapons of mass destruction that will be used to terrorize nations, they will be held accountable."[43] How realistic can the chances of success be with a war such as this? President Bush announced, at the USS Abraham Lincoln, San Diego, California on 1 May 2003 that "Major combat operations in Iraq have ended. In the battle of Iraq, the United States and our allies have prevailed. And now our coalition is engaged in securing and reconstructing that country."[44] Three years later, at the eve of year 2008, the US is still in Iraq and still fighting the war against terror with casualties on both sides, civilian and military.

More specific criteria for evaluating the legality of the use of force by the US in self-defense are necessity, proportionality and immediacy, criteria that were laid down by the customary laws that emanated from the *Caroline* incident.

Let us examine the first of these criterion, namely necessity. To recapitulate, Article 51 of the UN Charter reads, "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 the measures necessary to maintain international peace and security" (UN Charter). Clearly, in the case of the US led war on Iraq, the US self-defense was not a response to an "armed attack" by Iraq. It was a response to the threat of a possibleIraqi attack using WMDs.

The existence of these WMD had not yet been proven, nor confirmed. In a statement issued after the war was fought and won, the Chief UN inspector Hans Blix said, "I am obviously very interested in the question of whether or not there were weapons of mass destruction, and I am beginning to suspect there possibly were none."[45] In fact, the Weapons inspectors were still searching for any tangible evidence of WMD when they were pulled out in preparation for war. It can be clearly argued that there was no proven "necessity" yet for the use of force against Iraq.

Self-defense, as we discussed earlier can only be justified if there is a necessity to protect a nation's independence, protect a nation's territorial integrity, and protect citizens and property abroad. None of these requirements were met to justify necessity or immediacy. Besides, the use of force for self-defense should not be extended beyond the point that the Security Council steps in.

The Iraqi case was unique. The US decided that this was a case for self-defense. The US tried to gather support from the permanent members of the Security Council but could not get approval from all the permanent members. France had stated that it would veto any Security Council resolution to use immediate force until it saw proof that Iraq possessed WMDs, which were of immediate and direct threat to the US and the world community. Russia and Germany were also opposed to war. Despite opposition from major and minor powers and world public opinion, the US decided to start war on 20 March 2003. In order to justify war, the US should have first exhausted diplomatic options before waging war. It did not. To answer the question of whether the US led invasion of Iraq is just, we can resort to the two principles of "just cause and just means." Indeed, a good case can be made to justify why the US war has "just cause." However, the US did not respect the principle of just means by attacking Iraq without the approval of the Security Council.[46]

As for the proportionality principle to gauge the validity of self-defense, the US could not make a strong and convincing case because the threat of WMD was responded by an actual attack on the political independence and territorial integrity of Iraq. The danger lies in the possibility of a "preemption of preemption." If, during talks of waging war, Saddam Hussein decided to use his WMD to preempt attacks from the US, it could also be justified by the principles of self-defense. Where, if at all, should the line for preemption be drawn?

5.4 Conclusion

The expanse of the number and types of questions that arise with the recent US attacks is immeasurable. More direct questions of concern related to the issue of self-defense are questions concerning the implication of the use of self-defense by the US, in violation of international legality. US measures of self-defense have set a dangerous precedent for other countries contemplating self-defense to resolve and expedite disputes that they are involved in. Other countries could use the US

model of self-defense to justify acts of aggression against their regional opponents.

Until decisions and appropriate actions are taken to judge the case of the US attacks on Iraq and in Afghanistan, international law remains paralyzed and voiceless. If these attacks are declared legal in the aftermath, then it is time for a serious revision of the UN Charter to address new threats (terrorism, WMD), situations September 11) and actors (terrorist organizations and individuals like Bin Laden).

In a Presidential news conference, President Bush said, "When it comes to our security… We really don't need anybody's permission."[47] What if every other country followed the same dictum? It would be the perfect formula for the scourge of another world war.

In the following Chapter 6, theoretical observations, implications and conclusions will be drawn regarding US behavior in a post-cold war world, the future of international relations and international law, keeping in mind the three theoretical backdrops of this book, namely anarchy, unipolarity and the nature of international law.

6
Conclusion

> … the deficiencies of the American response to September 11 were not a result of stupidity or negligence. These deficiencies are directly a result of a deliberate expansion of US foreign policy goals so as to merge the megaterrorist challenge with pre-existing geopolitical ambitions to exert global dominance… In short, September 11 posed and intensified two severe challenges to world order: the threat of megaterrorism and the threat of global empire-building.[1]

6.1 Introduction

This book provides a multidisciplinary assessment of the concept of self-defense with the purpose of exposing the relationship between power politics and international law. The dual lenses of international relations theory and international law are employed to exhibit the need to combine theory and practice, law and politics, in any assessment of world politics. Any work that neglects this link is doomed to be flawed or incomplete. This study uses the case study of the US use of force in Iraq and Afghanistan to demonstrate the relationship between law and politics in the backdrop of unipolarity.

This study is not a justification for the use of force in Iraq and Afghanistan but rather a critical assessment of the adoption of a neorealist foreign policy embraced by the Bush administration to justify self-defense. An assessment of the impact of anarchy and polarity on law highlights the reasoning behind the build-up to war. It does not address the domestic nor the individual level of analysis as much as it does the international, which is an inherent weakness of the neorealist lens of foreign policy analysis. It is crucial to mention that this book

was written during the period of the Bush administration and thus, the transition to a changed foreign policy under the Obama administration is not accounted for. In any event, because of the heavy reliance of neorealism on the state and international levels of analysis, a change at the individual level should not make too drastic a difference.

The military response by the United States following the attacks on US soil on September 11, 2001 is the largest use of force by any state since the Persian Gulf War in 1991. Trampling over its obligations of *jus ad bellum* and *jus in bello*, abusing its global preponderance and power in a post-cold war international system to its own geopolitical advantage, the US actions in Afghanistan and Iraq raise the validity question of the international law concerning the limits to the use of force in international relations.[2] In both the Afghanistan and Iraqi cases, the United States has "endorsed an expansive view of its rights under *jus ad bellum*, while insisting on a very narrow view of its obligations under *jus in bello*."[3]

The consequences are grave and the impact is still not fully understood. What is quite clear already is that the US use of force in an unlawful manner was not by chance but by strategy. It was part of a strategy of preserving US primacy to shape the geopolitics of the international system in a way that would delay or disallow an emerging balancer and would allow the US to be even more powerful than it already is.

The future of the challenges situated in the international system today, represented by "a dying order and an unborn one"[4] will be greatly influenced by the prevailing system of power politics by which is meant "the interrelationships of the actual centers of political power."[5] This system of "power politics" is inherently incompatible with international law and that is the challenge that the world faces today. Will power dominate the obligations prescribed by international law? Or, as the title of an article by Natsu Taylor Saito questions, "Will Force Trump Legality After September 11?".[6]

According to Waltz, "In international politics, unbalanced politics, unbalanced power constitutes a danger even when it is American power that is out of balance."[7] He argues that just as any powerful state, the United States perceives its actions as being in conformity with peace, justice and over all well being of the world using the jargon of democracy, freedom, and human rights. These goals may be conflictual with other state actors who may, individually or collectively, if circumstances are ideal, balance against the superpower. Until that happens, the superpower will continue to behave in the way that it pleases, even if it is at the expense of aggravating and intimidating other state actors and

even if it is at the expense of trampling over and modifying international laws to meet its foreign policy objectives.[8]

The US grand strategy[9] is typically a function of its position in the international system. How preponderant the US is, how its power translates into control and how long the US can stay on top all depend on the strategy it chooses to employ. International relations theorists have grappled with the question of available strategies for the US as superpower. Of all of these strategies, the US under President Bush chose the strategy of dominion[10] or primacy.[11] The United States aggressively pursued a grand strategy that could prolong its status as a unipolar superpower. It is did so by dictating terms to other states, over-riding the limits set by international law and abusing the unchecked privilege it has in the absence of a powerful balancer.

This strategy, which Stephen Walt refers to as global hegemony, is as follows:

> … in which the United States tries to run the world more or less on its own. In this strategy, the United States sets the agenda for world politics and uses its power to make sure its preferences are followed. Specifically, the United States decides what military forces and weapons other states are allowed to possess and makes it clear that liberal democracy is the only form of government that the United States deems acceptable and is prepared to support. Accordingly, American power will be used to hasten the spread of democratic rule, to deny WMDs to potential enemies, and to ensure that no countries are able to mount an effective challenge to America's position.[12]

Walt makes the case that although this strategy is "undeniably appealing to some Americans," we have to be cautious because the "the history of the past few years also demonstrates how infeasible it is."[13]

In the following Section 6.2, a discussion of unipolarity will be conducted with an analysis of whether a shift of balance of power to bipolarity or multipolarity is possible in the near future. In Section 6.3, a discussion of the implications of US unipolarity and international law will follow with prospects for the future.

6.2 Unipolarity and prospects for a balance of power?

As Benjamin Barber rightly puts it:

> American Hegemony is not in question… America can crush those nations it regards as enemies almost at will. Picking off a random

> terrorist with a missile fired from an unmanned Predator aircraft in a no-name desert here, bringing down an unfriendly regime by military intimidation there, prepared to go to war on a "preventive" basis well before an actual aggression is committed against America most anywhere, the United States is a formidable adversary.[14]

US power, be it military, economic, political, cultural, technological and ideological, is without a challenger or balancer and is one of the realities of today's international system. The unprecedented disparities that this reality brings to the post-cold war world and the shifting global security environment, post-9/11, have placed American power in the limelight. This development has given rise to unprecedented questions regarding the future of the international law and organizations such as the United Nations. This, by implication, means needing to assess the laws that govern the use of force, weapons of mass destruction, terrorism, self-defense, sovereignty, independence, interventionism and terrorism, particularly after the invasions of Afghanistan and Iraq.

Questions regarding the unipolar nature of world politics have also led to some concerning a potential balancer and how other states in the world are responding to American dominance. Dealing with this dominance, the most unrivaled and powerful that the world has ever witnessed, is not an easy task considering that onlooker states have no historical experience in how they could and should fashion a way to deal with the United States. The United States now has the opportunity to exert pressure and influence on the power politics in the international system and the rules of the game.

To oppose the United States, under the Bush administration, implied being a part of the "bad guys" or the rogue states (i.e. Libya, Somalia, Cuba, Venezuela) and in severe cases "the axis of evil" (i.e. Iran, Iraq, North Korea) and to support the US made a state the "good guy", even with an authoritarian or tyrannical regime (i.e. Egypt, Saudi Arabia, Pakistan and Zimbabwe). It is hardly a wonder, then, that it is in the best interest of states to stay under the wings of the US and not have to deal with the burden of balancing which can be costly and risky. It is for this reason that the post-cold war international politics continues to be characterized by unipolarity. A possible shift to bipolarity or multipolarity would be several decades away, if not more.

The US is content in its position of primacy and the other predominant states are not yet ready to balance US power and to shift the system polarity. Each state is now adjusting its foreign and security policies to respond effectively to the undeniable power of the United States of America. Brooks and Wohlforth succinctly and boldly state,

"If today's American primacy does not constitute unipolarity, then nothing ever will. The only things left for dispute are how long it will last and what the implications are for American foreign policy."[15]

A traditional balance of power response is highly unlikely in response to the American unipolarity for several reasons. No individual power is capable of solely balancing the power of the US. Organized together, major powers may have the power to do so but these major powers are unlikely to form an anti-American coalition since they are not adequately challenged by US unipolarity. This may be attributable to the multi-faceted nature of American power that skillfully combines its goal of preservation of US primacy with championing a rule-based order burgeoning principles of democracy, human rights, internationalism and institutionalism.

The sophisticated and conniving US strategy of marrying "power politics" with the rhetoric of a "security community" in which the enemy without a face is not a state anymore but "terrorism," has kept states in the imaginary "security community" more likely to cooperate with and follow the liberal traits of the US led world order rather than challenge the imperialist elements of US strategy. This has guaranteed the United States its place as unchallenged superpower except by the "network of terrorists" that have now, through fear tactics become the common enemy of all peace-loving states that are the "good-guys" in the eyes of Uncle Sam's unipolar prowess. Substantial moves towards transforming the current unipolar order in a traditional balance of power fashion are, hence, non-existent except if we view networks of terrorism, traditionally a non-actor in international relations, as being the potential balancer of US power. As for the weaker states, distancing themselves from, or antagonizing themselves against the superpower, means coming under the suspicion of being the "bad guy" and letting go off all the security and privileges it gets from being close to the powerful state.

We can safely conclude that balancing is neither automatic nor simple in order to constrain the unleashed power of the United States. It is a rather costly proposition and may even be impossible at the moment. If unipolarity is here to stay, can we draw theoretical conclusions regarding unipolarity and the likelihood of the use of force in international relations, particularly the future of self-defense in international law and relations? In the following section a discussion on the impact of US unipolarity on international law, more specifically the law of self-defense will be assessed.

6.3 US unipolarity and international law

In order to restore the prospects of future peace and world order, the United States must play a significant role in mending the damage done to the United Nations authority.

> As the chief architect of the UN Charter, and as the world's most powerful nation – militarily, economically, and politically – the United States has a special responsibility to uphold the founding principles of the United Nations, and to lead the world, not repeatedly to war but in setting international precedents and developing global models for the peaceful resolution of conflict consistent with the rules, principles, and procedures of the UN Charter.[16]

In the past, the United States has shown deep disrespect for international law. According to Krieger, "the United States under the Bush administration has initiated an intense assault on international law in order to pursue short-term and short-sighted interests that avoid, evade, ignore, or violate the standards painstakingly developed by the international community, including the United States, over many decades."[17]

The United States has not hesitated to refuse ratifying several international treaties in order for it not to be bound by international rules, nor held accountable by the international community for any of its actions. Treaties such as the Convention on Discrimination such as the Convention on Discrimination against Women (CEDAW), Convention on the Rights of the Child, International Covenant on Economic, Social and Cultural Rights (CESCR), UN Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol, Comprehensive Test Ban Treaty, Anti Ballistic Missile (ABM) Treaty, Biological and Toxin Weapons Convention (BWC) and Draft Proposal, Chemical Weapons Convention, Mine Ban Treaty, and the Rome Statute of the International Criminal Court are severely incapacitated owing to the non-participation of the US.

Rebutting the power of treaties, which typically reflect the collective will of participant countries, is a way by which the United States rejects any legal constraints to American power and sovereignty, staying miles away from legal restraints on their multidimensional exercise of power, since "treaties are" in a way "obstacles to American supremacy."[18] Interestingly, the United States, as the self-proclaimed sole superpower has not tried to fabricate new rules to serve its interests. It has, at least

up until now, sometimes tried to show how it continues to adhere to old rules and international law, and at other times does not seem to believe that the rules of international law apply to it anymore.[19]

Why such discrepancy? Well clearly, John Bolton's[20] statement can help us understand a bit of this when he said:

> But there is no being out there called the United Nations. There's simply a group of member governments who if they have the political will every once in a while to protect international peace and security, they're able to do it. And I think it would be a real mistake to count on the United Nations as if it's some disembodied entity out there that can function on its own. When the United States leads, the United Nations will follow. When it suits our interest to do so, we will lead. When it does not suit our interest to do so, we will not.[21]

The US has not shied away from interpreting international laws and codes of conduct in a way that best serve its own interests; while simultaneous interpreting the same rules for others quite differently. Barber states, "In a world of interdependence, arrogant unilateralism and knee-jerk opposition to multilateral treaties and international law imperil rather than enhance national security."[22] The hypocrisy by the US as a result of the discrepancy between words and deeds leads to frustration coupled with disrespect for the US, a degree of suspicion as to the intentions of the United States and a precedent for other states to act like the US if need be.

An understanding of world politics today requires an acknowledgement of the new factors in international relations that play a crucial role in understanding, defining and winning wars. Polarity and power continue to inform the discourse of power politics as it has traditionally, but newer forces need to be understood and theorized so that international laws can update themselves to newer realities. Whether the United Nations framework provided by the Charter system continues to be sufficient for laws of war and peace is another question. If not for the rules that it lays down, the UN mechanism provides a framework for a multilateral response to emerging threats in international politics, which seems to have greater legitimacy and acceptance. Addressing threats unilaterally, even if its by the superpower is not the most "rational" policy considering that public opinion matters, what other states think matter and what the superpower does lays down trends for the future. The US is in a position to use its power to establish respect

and acceptance for the international legal machinery, one that it has not enjoyed in the past. An acknowledgement by the US of the strengths of multilateralism and of international law in dealing with threats can do this. Thus far, we have witnessed the US use of "primacy," not multilateralism, nor international law.

Let us look at anticipatory self-defense as a strategy of the Bush administration that not only fails the criterion of "legality" but also fails the test of "universal applicability" or the right of all states to use the same means as the United States. As Barber puts it, "By shooting first and asking questions later, it opens the way to tragic miscalculation. By transgressing international law's traditional doctrine of self-defense, it sets a disastrous example for other nations claiming their own exceptionalist logic."[23] The United States actions in Afghanistan and Iraq become suspicious to other states that view the US as the unipolar power using/abusing the logic of self-defense to justify aggression. It is seen by other states as a way for the superpower to further its own national interests, hidden under the garb of democratic and human rights driven security arguments.

> Bush's preventive war doctrine postulates America's right to take steps against perceived enemies before they actually strike at America. In order for it to gain acceptance outside the United States, we have seen, it must be generalized to meet the Golden Rule standard of "do unto others." Germany, Russia, Pakistan and yes, even Iraq and North Korea, must have the same right to preempt what they perceive as potential or imminent aggression against them by their enemies.[24]

All states, then, must have the same right to preempt imminent threats but do they, in practice? The answer may not be found in the realm of law any more but the geopolitics of a unipolar world led by the United States as superpower. Do they and can they?

The use of force in a (hypothetically) bipolar world would have disallowed the United States from using force in an unrestrained manner, as its bipolar balancer, i.e. the USSR during the cold war, would have balanced it. In a unipolar world, the United States can exercise this right more easily and without the fear of repercussions. However, in a multipolar world with less predictability, the outcome of the use of anticipatory self-defense would largely depend on the distribution of power in the international system. Typically, this situation may be the most unpredictable, if not also the most dangerous.

Similarly, what is the likely outcome if a US ally uses force in a unipolar world? The United States, depending on its politics with the country concerned (i.e. good guy, bad guy/rogue state), would take sides with the ally changing the nature of the power equation without any controls from the other states or the international legal machinery. In a bipolar situation, a US ally's use of force would be considered as a direct threat to the opposing balancer's power and the balancer would support the opposing side and lead to a stalemate, curbing the extent of damage that the use of force could cause. Similarly, in a bipolar system, if a state that is a part of the opposing bloc used force in self-defense, a similar showdown would lead to either a situation of compromise and stalemate or a situation of complete annihilation if the superpowers both got involved. In a unipolar world, the use of force under the garb of anticipatory self-defense by a state labeled as a "rogue state" would be crushed and branded illegal, especially if such force altered the balance or threatened US interests.

What, if at all, would be the future of international law and the United Nations in different scenarios? All throughout the cold war, the UN mechanism and international law had to adjust to the bipolar realities and rivalries, constantly boiling down to a stalemate between superpower confrontations. In a unipolar world, the UN and international law must accommodate itself to the challenge of the unipolar hegemon that seeks primacy not just over states but also over international mechanisms that wish to curtail unleashed power that trample over the basic rights to sovereignty, national independence and equality among sovereign states. The only way that the UN mechanism can survive despite the recent blows to its powers and rules by the US use of anticipatory self-defense in Afghanistan and Iraq is if the United States took the role of the UN seriously, as an important tool that can work in its favor to create or recreate the international system that guarantees US primacy without hurting the security of other states.

In order to remedy the recent blows to the United Nations, particularly in the debate concerning the right of self-defense, the United States:

- should re-instate the Charter paradigm by accepting the Caroline criteria for legalizing self-defense in the future,
- should work with the approval of the UN Security Council in a harmonious rather than discourteous way, and
- should take steps towards the revisions and development of a legal regime that would have authority and power.[25]

At the level of the UN:

- the Security Council should re-assert its power and responsibility to authorize any use of force under Chapter VII,
- the International Court of Justice should adopt a more forceful role relating to the legality of the use of force by states that violate the authority of the Security Council,
- the General Assembly should propose ways and means for states to comply with the Security Council,
- the UN Secretary General should take a more pro-active role under Article 99 of the UN Charter and make an assertion of the exclusive power of the Security Council to authorize the use of force.[26]

The likelihood of the reforms mentioned above will depend heavily on the relationship between the attitude of United States towards the rest of the world and more so, the relationship between the United States and the United Nations. The foreign policy model that the United States pursued under the Bush administration resembled "primacy" with a complete disregard for the United Nations and a simultaneous disregard for the other members of the world community. A change in the right direction will involve a fundamental change in the model of foreign policy pursued by the United States, the most powerful country in the world. This is not likely to happen if the US continues to follow the power-oriented dictums of neorealism privileging the goal of "primacy." A paradigm shift towards another type of foreign policy that prioritizes respect and multilateralism over power and primacy is a pre-requisite to a more conducive relationship between the United Nations and its innumerable laws against the use of force enshrined in international law and the United States. Following a foreign policy informed by the security dilemma of neorealism will disallow such a shift.

The end of the Bush administration and the election of Barack Hussein Obama is reason for hope in the direction of change. What remains common to both Bush and Obama is their opposition to isolationism and in that sense, their internationalism. What they differ on is their approach to foreign policy. While President Obama emphasizes the need for multilateralism and partnership in order to further America's foreign policy priorities, President Bush preferred unilateralism. The United States under President Obama is more likely to play an increasingly active role in international organizations such as the United Nations (UN) without relegating these organizations to being merely extensions of the United States bureaucracy. From a general disregard for the UN and international

law as seen during the Bush administration, the Obama approach is conciliatory and multilateral, at least in theory. Obama continues to emphasize US leadership but in partnership with the UN. As a consequence of President Obama placing an emphasis on multilateralism, diplomacy is likely to precede the use of coercive methods such as military force and economic sanctions. This would require a change in attitude and actions by the US towards its allies and friends as legal equals. This would not mean the end of the quest to maintain military supremacy through bullying and arm-twisting around the world but would entail a shift in emphasis to "soft power" tools such as diplomacy and negotiations. This new attitude would also require shifting the focus of the superpower to some domestic concerns such as the US economy that calls for immediate restoration in the wake of the global financial crisis.

President Obama clearly opposes the unilateral deployment of US military force and as a result, he will rely on armed might only as a last resort and after having engaged allies and friends in a substantive dialogue about how to proceed. The Bush Doctrine of "preemptive" attacks on groups that threaten the power of the United States will most likely be rejected.

The Obama-Biden slogan "Act multilaterally when we can, unilaterally only when we must" coupled with the one to follow, represents a huge shift in the way the United States under President Obama conceives of security, "The United States cannot steal every secret, penetrate every cell, act on every tip, or track down every terrorist – nor should we have to do this alone. This is not just about our security. It is about the common security of all the world." – Barack Obama, Washington, D.C. August 1, 2007.[27]

"Common Security of the world"? That does not sound like a neorealist foreign policy. A shift is taking place. This shift is that from Bush's foreign policy emphasizing "primacy" to one pursued by Obama that seems to be a combination of "selective engagement" and "cooperative security." This shift clearly puts into question the utility of fostering American primacy and unipolarity in an increasingly interdependent world. That the world is symbolized by unipolarity didn't change. That the individual level of analysis cannot change systemic properties of the anarchical order doesn't change. What changes are the attitudes and behaviors of the unipolar country, invariably shifting the way the playing field of the anarchical international order shapes up. This shift, over time, could lend to a shift in the way power politics is conducted.

The hostility-generating unilateralism of President Bush's foreign policy gave rise to anti-American sentiments even among erstwhile friendly

nations. The new tools of the Obama Presidency could repair that damage through negotiations and alliance building. This would not require giving up the all-time American goal of maintaining its position at the top. The ends remain the same – the tools used could change. However, the choice of tools could make or break the continuity of US hegemony and unipolarity.

Whether or not President Obama can put his powerful rhetoric of change into reality is another question. Whether the rest of the world is willing to buy this rhetoric and fall for it is another. The primordial question of an international anarchical system remains the same: does law follow politics, or politics follow law. Presumably, the former.

Discussion Questions – Theoretical Issues

1. Is there a need for international law in an anarchical system driven by security and survival concerns and marked by distrust?
2. Do the answers to questions concerning the efficacy of international law lie in the realm of law, politics or both; and to what extent?
3. How does the international anarchical system impact the use or misuse of self-defense, anticipatory and post-attack?
4. How does unipolarity impact the use or misuse of self-defense?
5. Does the neorealist conception of anarchy help us to better understand the use of self-defense by the United States against Iraq?
6. Does unipolarity give us an explication of the obstacles that the United Nations encounters today?
7. Does unipolarity help us better understand why dissenting powers could not ensure a peaceful settlement of the Iraq issue?
8. If we accept that the system polarity at the current moment is "unipolar," does the answer to the question "will the UN be relevant" lie with the United States?
9. Does a unipolar state ever "need" to use self-defense?
10. Can self-defense measures invoked by a unipolar state ever be necessary or immediate or proportionate?

Discussion Questions – Practice of International Law and Relations

1. If anticipatory self-defense or preemption is justified under international law, is a preemptive attack against the possibility of a preemptive attack legal?
2. What international laws govern the right to use self-defense when it concerns state parties with nuclear weapons and weapons of mass destruction?
3. Did the US use of force in Afghanistan fulfill the criteria of self-defense?
4. Did the US attack on Iraq in the name of preemption fulfill the criteria of self-defense as laid down by international law?

5. When is a use of force legal or illegal?
6. Who can use force in international relations – states, individuals, groups, and organizations?
7. Who decides whether the use of force is legal or illegal?
8. What are the consequences of a legal or illegal use of force? Does the use of force constitute "war?"
9. Is the right to wage war "legal?"
10. When has the use of force fulfilled necessary and sufficient criterion to be legal?
11. Do the ends justify means when force is used in international relations?
12. What is the difference between *jus ad bellum* (justice of war or just ends) and *jus in bello* (justice in war or just means)?
13. What is the distinction between a just war (*bellum justum*) and unjust war (*bellum injustum*)?
14. Is the legality of war (*bellum legale)* more important to ascertain rather than the intrinsic justice or injustice of war?
15. What is the difference between a "war" and "aggression?"
16. What constitutes a "state?"
17. What norms of international law govern a war-like situation between a state and a non-state actor (i.e. terrorist organizations that do not satisfy the criterion for statehood in international law)?
18. How are wars and the subsequent use of force dealt with when it is between two non-state entities or for that matter civil wars being waged as wars for political independence?
19. How can we distinguish the use of force for political liberation from one that is used for terrorism?
20. What delineates a rightful and legally justified use of self-defense from an abuse of the use of force under international law?
21. How can we adjudge the legality of an action, undertaken by a regional organization? Should it be the level of integration? Or the level of power? Or what?
22. How should the standards for qualifying as a regional organization be set?
23. In the event of a dispute between two members of the same regional organization, what rues should govern the dispute?
24. Should the global forum of the United Nations always override decisions taken at the regional levels?
25. If a delinquent state commits economic aggression against the defendant state, does the right to self-defense have to be in the form of an

attack to the delinquent's economic interests or can there be an active use of force?
26. How would the proportionality test hold if the defendant state perceived a possible nuclear threat from a potential aggressor?
27. Should the global forum of the United Nations always override decisions taken at the regional levels?
28. What are the implications of the use of self-defense in the cases of Afghanistan and Iraq on international law and the future of the United Nations?
29. What are the implications of non-state actors (i.e. terrorist organizations) in war decisions?
30. What are the implications of proportionality when faced with the threat of WMD?
31. How can we determine the best way to ensure justice and legality of actions taken in response to threats?
32. How can we tell the difference between a genuine concern and response for new problems of international relations and the narrow national interests of states to wage war for politically driven reasons?

Discussion Questions – Future of International Law

1. How does the right to self-defense impact prospects of international peace and security?
2. Is the international law governing the use of self-defense adequate or does it need revision?
3. Are there any recommendations for tightening the subjectivity of self-defense?
4. What are the implications of the recent use of self-defense by the US? What precedents does it set in international law?
5. Will the United Nations serve the purpose of its founding, or will it be irrelevant?
6. Can the Charter System work without the United States of America obeying its procedures and restraining rules?
7. Is the power of legitimacy greater than the legitimacy of power that comes with the use of force by a superpower, the only one left in a post cold-war international system that continues to be anarchic?
8. Does the US resort to self-defense set a dangerous precedent for other countries contemplating self-defense to resolve and expedite disputes that they are involved in?
9. How will major states react to American power? Will there be a trend towards "balancing" by other states or a balancing coalition or buck-passing?

10. What will be the impact of the use of preventive wars on so-called "rogue states" and on terrorism?
11. What will be the impact of the US led preventive wars on their own security interests in the long run?
12. Do states need greater or lesser reliance on self-help remedies?
13. Does the UN Charter hold validity any longer?
14. What is the law that governs international relations? Is there one?
15. Does the unipolar world allow the United States to take law into its own hands in the name of justice and order?
16. Is the United States the new and sole leader of the anarchical international order we live in?

Appendix

Montevideo Convention on the Rights and Duties of States

Signed at Montevideo, 26 December 1933
Entered into Force, 26 December 1934
Article 8 reaffirmed by Protocol, 23 December 1936

Bolivia alone amongst the states represented at the Seventh International Conference of American States did not sign the Convention. The United States of America, Peru, and Brazil ratified the Convention with reservations directly attached to the document.

Article 1

The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

Article 2

The federal state shall constitute a sole person in the eyes of international law.

Article 3

The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.

The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.

Article 4

States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.

Article 5

The fundamental rights of states are not susceptible of being affected in any manner whatsoever.

Article 6

The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.

Article 7

The recognition of a state may be express or tacit. The latter results from any act which implies the intention of recognizing the new state.

Article 8

No state has the right to intervene in the internal or external affairs of another.

Article 9

The jurisdiction of states within the limits of national territory applies to all the inhabitants.

Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.

Article 10

The primary interest of states is the conservation of peace. Differences of any nature which arise between them should be settled by recognized pacific methods.

Article 11

The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily.

Article 12

The present Convention shall not affect obligations previously entered into by the High Contracting Parties by virtue of international agreements.

Article 13

The present Convention shall be ratified by the High Contracting Parties in conformity with their respective constitutional procedures. The Minister of Foreign Affairs of the Republic of Uruguay shall transmit authentic certified copies to the governments for the aforementioned purpose of ratification. The instrument of ratification shall be deposited in the archives of the Pan American Union in Washington, which shall notify the signatory governments of said deposit. Such notification shall be considered as an exchange of ratifications.

Article 14

The present Convention will enter into force between the High Contracting Parties in the order in which they deposit their respective ratifications.

Article 15

The present Convention shall remain in force indefinitely but may be denounced by means of one year's notice given to the Pan American Union, which shall transmit it to the other signatory governments. After the expiration of this period the Convention shall cease in its effects as regards the party which denounces but shall remain in effect for the remaining High Contracting Parties.

Article 16

The present Convention shall be open for the adherence and accession of the States which are not signatories. The corresponding instruments shall be deposited in the archives of the Pan American Union which shall communicate them to the other High Contracting Parties.

IN WITNESS WHEREOF, the following Plenipotentiaries have signed this Convention in Spanish, English, Portuguese and French and hereunto affix their respective seals in the city of Montevideo, Republic of Uruguay, this 26th day of December, 1933.

Reservations

The Delegation of the United States of America, in signing the Convention on the Rights and Duties of States, does so with the express

reservation presented to the Plenary Session of the Conference on December 22, 1933, which reservation reads as follows:

The Delegation of the United States, in voting "yes" on the final vote on this committee recommendation and proposal, makes the same reservation to the eleven articles of the project or proposal that the United States Delegation made to the first ten articles during the final vote in the full Commission, which reservation is in words as follows:

> "The policy and attitude of the United States Government toward every important phase of international relationships in this hemisphere could scarcely be made more clear and definite than they have been made by both word and action especially since March 4. I [Secretary of State Cordell Hull, chairman of U.S. delegation] have no disposition therefore to indulge in any repetition or rehearsal of these acts and utterances and shall not do so. Every observing person must by this time thoroughly understand that under the Roosevelt Administration the United States Government is as much opposed as any other government to interference with the freedom, the sovereignty, or other internal affairs or processes of the governments of other nations."
>
> "In addition to numerous acts and utterances in connection with the carrying out of these doctrines and policies, President Roosevelt, during recent weeks, gave out a public statement expressing his disposition to open negotiations with the Cuban Government for the purpose of dealing with the treaty which has existed since 1903. I feel safe in undertaking to say that under our support of the general principle of non-intervention as has been suggested, no government need fear any intervention on the part of the United States under the Roosevelt Administration. I think it unfortunate that during the brief period of this Conference there is apparently not time within which to prepare interpretations and definitions of these fundamental terms that are embraced in the report. Such definitions and interpretations would enable every government to proceed in a uniform way without any difference of opinion or of interpretations. I hope that at the earliest possible date such very important work will be done. In the meantime in case of differences of interpretations and also until they (the proposed doctrines and principles) can be worked out and codified for the common use of every government, I desire to say that the United States Government in all of its international

> associations and relationships and conduct will follow scrupulously the doctrines and policies which it has pursued since March 4 which are embodied in the different addresses of President Roosevelt since that time and in the recent peace address of myself on the 15th day of December before this Conference and in the law of nations as generally recognized and accepted."

The delegates of Brazil and Peru recorded the following private vote with regard to Article 11: "That they accept the doctrine in principle but that they do not consider it codifiable because there are some countries which have not yet signed the Anti-War Pact of Rio de Janeiro 4 of which this doctrine is a part and therefore it does not yet constitute positive international law suitable for codification."

Definition of Aggression
United Nations General Assembly Resolution
3314 (XXIX) – 14 December 1974

The General Assembly,

Having considered the report of the Special Committee on the Question of Defining Aggression, established pursuant to its resolution 2330(XXII) of 18 December 1967, covering the work of its seventh session held from 11 March to 12 April 1974, including the draft Definition of Aggression adopted by the Special Committee by consensus and recommended for adoption by the General Assembly,[1]

Deeply, convinced that the adoption of the Definition of Aggression would contribute to the strengthening of international peace and security,

1. Approves the Definition of Aggression, the text of which is annexed to the present resolution;

2. Expresses its appreciation to the Special Committee on the Question of Defining Aggression for its work which resulted in the elaboration of the Definition of Aggression;

3. Calls upon all States to refrain from all acts of aggression and other uses of force contrary to the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations;[2]

4. Calls the attention of the Security Council to the Definition of Aggression, as set out below, and recommends that it should, as appropriate, take account of that Definition as guidance in determination, in accordance with the Charter, the existence of an act of aggression.

2319th plenary meeting

14 December 1974

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[1]Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 (A/9619 and Corr. 1).
[2]Resolution 2625 (XXV), annex.

Annex

Definition of Aggression

The General Assembly,

Basing itself on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace,

Recalling that the Security Council, in accordance with Article 39 of the Charter of the United Nations, shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security,

Recalling also the duty of States under the Charter to settle their international disputes by peaceful means in order not to endanger international peace, security and justice,

Bearing in mind that nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations,

Considering also that, since aggression is the most serious and dangerous form of the illegal use of force, being fraught, in the conditions created by the existence of all types of weapons of mass destruction, with the possible threat of a world conflict and all its catastrophic consequences, aggression should be defined at the present stage,

Reaffirming the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial Integrity,

Reaffirming also that the territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter, and that it shall not be the object of acquisition by another State resulting from such measures or the threat thereof,

Reaffirming also the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,

Convinced that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim,

Believing that, although the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case, it is nevertheless desirable to formulate basic principles as guidance for such determination,

Adopts the following Definition of Aggression:[3]

Article I
Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Explanatory note: In this Definition the term "State":

(a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;

(b) Includes the concept of a "group of States" where appropriate.

Article 2
The First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

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[3]Explanatory notes on Articles 3 and 5 are to be found in paragraph 20 of the Report of the Special Committee on the Question of Defining Aggression (Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 (A/9619 and Corr. 1). Statements on the Definition are contained in paragraphs 9 and 10 of the report of the Sixth Committee (A/9890).

Article 3
Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 4
The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

Article 5
1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

Article 6
Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

Article 7
Nothing in this Definition, and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 8
In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.

Treaty Providing for the Renunciation of War as an Instrument of National Policy

[Kellogg-Briand Pact]

Signed in Paris, August 27, 1928

Entered into force 24 July 1929

The President of the German Reich, the President of the United States of America, His Majesty the King of the Belgians, the President of the French Republic, His Majesty the King of Great Britain Ireland and the British Dominions beyond the seas, Emperor of India, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Poland, the President of the Czechoslovak Republic.

Deeply sensible of their solemn duty to promote the welfare of mankind; Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;

Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty;

Hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavor and by adhering to the present treaty as soon as it comes into force bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy;

Have decided to conclude a treaty and for that purpose have appointed as their respective plenipotentiaries:

The President of the German Reich: Dr. Gustav Stresemann, Minister for Foreign Affairs;

The President of the United States of America: The Honorable Frank B. Kellogg, Secretary of State;

His Majesty the King of the Belgians: Mr. Paul Hymans, Minister for Foreign Affairs, Minister of State;

The President of the French Republic: Mr. Aristide Briand, Minister for Foreign Affairs;

His Majesty the King of Great Britain, Ireland and the British Dominions beyond the seas, Emperor of India: For Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of the League of Nations: The Right Honourable Lord Cushendun, Chancellor of the Duchy of Lancaster, Acting Secretary of State for Foreign Affairs;

For the Dominion of Canada: The Right Honourable William Lyon Mackenzie King, Prime Minister and Minister for External Affairs;

For the Commonwealth of Australia: The Honourable Alexander John McLachlan, Member of the Executive Federal Council;

For the Dominion of New Zealand: The Honourable Sir Christopher James Parr, High Commissioner for New Zealand in Great Britain;

For the Union of South Africa: The Honourable Jacobus Stephanus Smit, High Commissioner for the Union of South Africa in Great Britain;

For the Irish Free State: Mr. William Thomas Cosgrave, President of the Executive Council;

For India: The Right Honourable Lord Cushendun, Chancellor of the Duchy of Lancaster, Acting Secretary of State for Foreign Affairs;

His Majesty the King of Italy: Count Gaetano Manzoi, His Ambassador Extraordinary and Plenipotentiary at Paris;

His Majesty the Emperor of Japan: Count Uchida, Privy Councillor;

The President of the Republic of Poland: Mr. A. Zaleski, Minister for Foreign Affairs;

The President of the Czechoslovak Republic: Dr. Eduard Benes, Minister for Foreign Affairs;

who, having communicated to one another their full powers found in good and due form have agreed upon the following articles:

ARTICLE I

The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution

of international controversies, and renounce it as an instrument of national policy in their relations with one another.

ARTICLE II

The high contracting parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

ARTICLE III

The present treaty shall be ratified by the high contracting parties Named in the preamble in accordance with their respective constitutional requirements, and shall take effect as between them as soon as all their several instruments of ratification shall have been deposited at Washington.

This treaty shall, when it has come into effect as prescribed in the preceding paragraph, remain open as long as may be necessary for adherence by all the other Powers of the world. Every instrument evidencing the adherence of a Power shall be deposited at Washington and the treaty shall immediately upon such deposit become effective as between the Power thus adhering and the other Powers parties hereto.

It shall be the duty of the Government of the United States to furnish each government named in the preamble and every government subsequently adhering to this treaty with a certified copy of the treaty and of every instrument of ratification or adherence. It shall also be the duty of the Government of the United States telegraphically to notify such governments immediately upon the deposit with it of each instrument of ratification or adherence. In faith whereof the respective Plenipotentiaries have signed this Treaty in the French and English languages both texts having equal force, and hereunto affix their seals.

Done at Paris the twenty-seventh day of August in the year one thousand nine hundred and twenty-eight.

Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, A/RES/42/22, 73rd plenary meeting, 18 November 1987

http://www.un.org/documents/ga/res/42/a42r022.htm

The General Assembly,

Recalling its resolution 41/76 of 3 December 1986, in which it decided that the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations should complete a draft declaration on the enhancement of the effectiveness of the principle, including, as appropriate, recommendations on the peaceful settlement of disputes, and submit its final report containing a draft declaration to the General Assembly at its forty-second session,

Taking note of the report of the Special Committee, which met in New York from 9 to 27 March 1987,

Considering that the Special Committee has completed a draft Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations and has decided to submit it to the General Assembly for consideration and adoption,

Convinced of the need for the effective universal application of the principle of refraining from the threat or use of force in international relations and of the importance of the role of the United Nations in this regard,

Convinced also that the adoption of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations should contribute to the improvement of international relations,

1. Approves the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, the text of which is annexed to the present resolution;

2. Expresses its appreciation to the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations for completing its work by elaborating the Declaration;

3. Recommends that every effort should be made so that the Declaration becomes generally known.

ANNEX

Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations

The General Assembly,

Recalling the principle that States 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,

Recalling that this principle is enshrined in Article 2, paragraph 4, of the Charter of the United Nations and has been reaffirmed in a number of international instruments,

Reaffirming the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the Definition of Aggression and the Manila Declaration on the Peaceful Settlement of International Disputes,

Reaffirming the obligation to maintain international peace and security in conformity with the purposes of the United Nations,

Expressing deep concern at the continued existence of situations of conflict and tension and the impact of the persistence of violations of the principle of refraining from the threat or use of force on the maintenance of international peace and security, as well as at the loss of human life and material damage in the countries affected, the development of which may thereby be set back,

Desiring to remove the risk of new armed conflicts between States by promoting a change in the international climate from confrontation to peaceful relations and co-operation and by taking other appropriate measures to strengthen international peace and security,

Convinced that, in the present world situation, in which nuclear weapons exist, there is no reasonable alternative to peaceful relations among States,

Fully aware that the question of general and complete disarmament is of the utmost importance and that peace, security, fundamental freedoms and economic and social development are indivisible,

Noting with concern the pernicious impact of terrorism on international relations,

Stressing the need for all States to desist from any forcible action aimed at depriving peoples of their right to self-determination, freedom and independence,

Reaffirming the obligation of States to settle their international disputes by peaceful means,

Conscious of the importance of strengthening the United Nations system of collective security,

Bearing in mind the universal significance of human rights and fundamental freedoms as essential factors for international peace and security,

Convinced that States have a common interest in promoting a stable and equitable world economic environment as an essential basis for world peace and that, to that end, they should strengthen international co-operation for development and work towards a new international economic order,

Reaffirming the commitment of States to the basic principle of the sovereign equality of States,

Reaffirming the inalienable right of every State to choose its political, economic, and social and cultural systems without interference in any form by another State,

Recalling that States are under an obligation not to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other State,

Reaffirming the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State,

Reaffirming the principle of equal rights and self-determination of peoples enshrined in the Charter,

Reaffirming that States shall fulfil in good faith all their obligations under international law,

Aware of the urgent need to enhance the effectiveness of the principle that States shall refrain from the threat or use of force in order to contribute to the establishment of lasting peace and security for all States,

1. Solemnly declares that:

I

1. Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or from acting in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and of the Charter of the United Nations and entails international responsibility.

2. The principle of refraining from the threat or use of force in international relations is universal in character and is binding, regardless of each State's political, economic, social or cultural system or relations of alliance.

3. No consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter.

4. States have the duty not to urge, encourage or assist other States to resort to the threat or use of force in violation of the Charter.

5. By virtue of the principle of equal rights and self-determination enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

6. States shall fulfil their obligations under international law to refrain from organizing, instigating, or assisting or participating in paramilitary, terrorist or subversive acts, including acts of mercenaries, in other States, or acquiescing in organized activities within their territory directed towards the commission of such acts.

7. States have the duty to abstain from armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements.

8. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain

from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

9. In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression.

10. Neither acquisition of territory resulting from the threat or use of force nor any occupation of territory resulting from the threat or use of force in contravention of international law will be recognized as legal acquisition or occupation.

11. A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter.

12. In conformity with the Charter and in accordance with the relevant paragraphs of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, States shall fulfil in good faith all their international obligations.

13. States have the inherent right of individual or collective self-defence if an armed attack occurs, as set forth in the Charter.

II

14. States shall make every effort to build their international relations on the basis of mutual understanding, trust, respect and co-operation in all areas.

15. States should also promote bilateral and regional co-operation as one of the important means to enhance the effectiveness of the principle of refraining from the threat or use of force in international relations.

16. States shall abide by their commitment to the principle of peaceful settlement of disputes, which is inseparable from the principle of refraining from the threat or use of force in their international relations.

17. States parties to international disputes shall settle their disputes exclusively by peaceful means in such a manner that international peace and security, and justice, are not endangered. For this purpose they shall utilize such means as negotiation, inquiry, mediation, conciliation,

arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice, including good offices.

18. States shall take effective measures which, by their scope and by their nature, constitute steps towards the ultimate achievement of general and complete disarmament under strict and effective international control.

19. States should take effective measures in order to prevent the danger of any armed conflicts, including those in which nuclear weapons could beused, to prevent an arms race in outer space and to halt and reverse it on Earth, to lower the level of military confrontation and to enhance global stability.

20. States should co-operate in order to undertake active efforts aimed at ensuring the relaxation of international tensions, the consolidation of the international legal order and the respect of the system of international security established by the Charter of the United Nations.

21. States should establish appropriate confidence-building measuresaimed at preventing and reducing tensions and at creating a better climate among them.

22. States reaffirm that the respect for effective exercise of all human rights and fundamental freedoms and protection thereof are essential factors for international peace and security, as well as for justice and the development of friendly relations and co-operation among all States. Consequently, they should promote and encourage respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion, inter alia, by strictly complying with their international obligations and considering, as appropriate, becoming parties to the principal international instruments in this field.

23. States shall co-operate at the bilateral, regional and international levels in order to:

(a) Prevent and combat international terrorism;

(b) Contribute actively to the elimination of the causes underlying international terrorism.

24. States shall endeavour to take concrete measures and promote favourable conditions in the international economic environment in order to achieve international peace, security and justice; they will take into account the interest of all in the narrowing of the differences in

the levels of economic development, and in particular the interest of developing countries throughout the world.

III

25. The competent United Nations organs should make full use of the provisions of the Charter of the United Nations in the field of the maintenance of international peace and security with a view to enhancing the effectiveness of the principle of refraining from the threat or use of force in international relations.

26. States should co-operate fully with the organs of the United Nations in supporting their action relating to the maintenance of international peace and security and to the peaceful settlement of international disputes in accordance with the Charter. In particular, they should enhance the role of the Security Council so that it can fully and effectively discharge its duties. In this regard, the permanent members of the Council have a special responsibility under the Charter.

27. States should strive to enhance the effectiveness of the collective security system through the effective implementation of the provisions of the Charter, particularly those relating to the special responsibilities of the Security Council in this regard. They should also fully discharge their obligations to support United Nations peace-keeping operations decided upon in accordance with the Charter. States shall accept and carry out the decisions of the Council in accordance with the Charter.

28. States should give the Security Council every possible type of assistance in all actions taken by it for the just settlement of crisis situations and regional conflicts. They should strengthen the part the Council can play in preventing disputes and situations the continuation of which is likely to endanger the maintenance of international peace and security. They should facilitate the task of the Council in reviewing situations of potential danger for international peace and security at as early a stage as possible.

29. The fact-finding capacity of the Security Council should be enhanced on an ad hoc basis in accordance with the Charter.

30. States should give full effect to the important role conferred by the Charter on the General Assembly in the area of peaceful settlement of disputes and the maintenance of international peace and security.

31. States should encourage the Secretary-General to exercise fully his functions with regard to the maintenance of international peace

and security and the peaceful settlement of disputes, in accordance with the Charter, including those under Articles 98 and 99, and fully co-operate with him in this respect.

32. States should take into consideration that legal disputes should, as a general rule, be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court as an important factor for strengthening the maintenance of international peace and security. The General Assembly and the Security Council should consider making use of the provisions of the Charter concerning the possibility of requesting the Court to give an advisory opinion on any legal question.

33. States parties to regional arrangements or agencies should consider making greater use of such arrangements and agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate, pursuant to Article 52 of the Charter;

2. Declares that nothing in the present Declaration shall be construed as:

(a) Enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful;

(b) Prejudicing in any manner the relevant provisions of the Charter or the rights and duties of Member States or the scope of the functions and powers of the United Nations organs under the Charter, in particular those relating to the threat or use of force;

3. Declares that nothing in the present Declaration could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration;

4. Confirms that, in the event of a conflict between the obligations of Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter will prevail in accordance with Article 103 of the Charter.

Measures to eliminate international terrorism, A/RES/49/60, 84th plenary meeting, 9 December 1994

http://www.un.org/documents/ga/res/49/a49r060.htm

The General Assembly,

Recalling its resolution 46/51 of 9 December 1991 and its decision 48/411 of 9 December 1993,

Taking note of the report of the Secretary-General,

Having considered in depth the question of measures to eliminate international terrorism,

Convinced that the adoption of the declaration on measures to eliminate international terrorism should contribute to the enhancement of the struggle against international terrorism,

1. Approves the Declaration on Measures to Eliminate International Terrorism, the text of which is annexed to the present resolution;

2. Invites the Secretary-General to inform all States, the Security Council, the International Court of Justice and the relevant specialized agencies, organizations and organisms of the adoption of the Declaration;

3. Urges that every effort be made in order that the Declaration becomes generally known and is observed and implemented in full;

4. Urges States, in accordance with the provisions of the Declaration, to take all appropriate measures at the national and international levels to eliminate terrorism;

5. Invites the Secretary-General to follow up closely the implementation of the present resolution and the Declaration, and to submit to the General Assembly at its fiftieth session a report thereon, relating, in particular, to the modalities of implementation of paragraph 10 of the Declaration;

6. Decides to include in the provisional agenda of its fiftieth session the item entitled "Measures to eliminate international terrorism", in order to examine the report of the Secretary-General requested in paragraph 5 above, without prejudice to the annual or biennial consideration of the item.

ANNEX

Declaration on Measures to Eliminate International Terrorism

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations,

Recalling the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the Declaration on the Strengthening of International Security, the Definition of Aggression, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights,

Deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms and manifestations, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and may jeopardize the security of States,

Deeply concerned by the increase, in many regions of the world, of acts of terrorism based on intolerance or extremism,

Concerned at the growing and dangerous links between terrorist groups and drug traffickers and their paramilitary gangs, which have resorted to all types of violence, thus endangering the constitutional order of States and violating basic human rights,

Convinced of the desirability for closer coordination and cooperation among States in combating crimes closely connected with terrorism, including drug trafficking, unlawful arms trade, money laundering and smuggling of nuclear and other potentially deadly materials, and bearing in mind the role that could be played by both the United Nations and regional organizations in this respect,

Firmly determined to eliminate international terrorism in all its forms and manifestations,

Convinced also that the suppression of acts of international terrorism, including those in which States are directly or indirectly involved,

is an essential element for the maintenance of international peace and security,

Convinced further that those responsible for acts of international terrorism must be brought to justice,

Stressing the imperative need to further strengthen international cooperation between States in order to take and adopt practical and effective measures to prevent, combat and eliminate all forms of terrorism that affect the international community as a whole,

Conscious of the important role that might be played by the United Nations, the relevant specialized agencies and States in fostering widespread cooperation in preventing and combating international terrorism, inter alia, by increasing public awareness of the problem,

Recalling the existing international treaties relating to various aspects of the problem of international terrorism, inter alia, the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted in New York on 14 December 1973, the International Convention against the Taking of Hostages, adopted in New York on 17 December 1979, the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988, and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, done at Montreal on 1 March 1991,

Welcoming the conclusion of regional agreements and mutually agreed declarations to combat and eliminate terrorism in all its forms and manifestations,

Convinced of the desirability of keeping under review the scope of existing international legal provisions to combat terrorism in all its forms and manifestations, with the aim of ensuring a comprehensive legal framework for the prevention and elimination of terrorism,

Solemnly declares the following:

I

1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States;

2. Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society;

3. Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them;

II

4. States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, must refrain from organizing, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts;

5. States must also fulfil their obligations under the Charter of the United Nations and other provisions of international law with respect to combating international terrorism and are urged to take effective and resolute measures in accordance with the relevant provisions of international law and international standards of human rights for the speedy and final elimination of international terrorism, in particular:

(a) To refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens;

(b) To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of their national law;

(c) To endeavour to conclude special agreements to that effect on a bilateral, regional and multilateral basis, and to prepare, to that effect, model agreements on cooperation;

(d) To cooperate with one another in exchanging relevant information concerning the prevention and combating of terrorism;

(e) To take promptly all steps necessary to implement the existing international conventions on this subject to which they are parties, including the harmonization of their domestic legislation with those conventions;

(f) To take appropriate measures, before granting asylum, for the purpose of ensuring that the asylum seeker has not engaged in terrorist activities and, after granting asylum, for the purpose of ensuring that the refugee status is not used in a manner contrary to the provisions set out in subparagraph (a) above;

6. In order to combat effectively the increase in, and the growing international character and effects of, acts of terrorism, States should enhance their cooperation in this area through, in particular, systematizing the exchange of information concerning the prevention and combating of terrorism, as well as by effective implementation of the relevant international conventions and conclusion of mutual judicial assistance and extradition agreements on a bilateral, regional and multilateral basis;

7. In this context, States are encouraged to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter;

8. Furthermore States that have not yet done so are urged to consider, as a matter of priority, becoming parties to the international

conventions and protocols relating to various aspects of international terrorism referred to in the preamble to the present Declaration;

III

9. The United Nations, the relevant specialized agencies and intergovernmental organizations and other relevant bodies must make every effort with a view to promoting measures to combat and eliminate acts of terrorism and to strengthening their role in this field;

10. The Secretary-General should assist in the implementation of the present Declaration by taking, within existing resources, the following practical measures to enhance international cooperation:

(a) A collection of data on the status and implementation of existing multilateral, regional and bilateral agreements relating to international terrorism, including information on incidents caused by international terrorism and criminal prosecutions and sentencing, based on information received from the depositaries of those agreements and from Member States;

(b) A compendium of national laws and regulations regarding the prevention and suppression of international terrorism in all its forms and manifestations, based on information received from Member States;

(c) An analytical review of existing international legal instruments relating to international terrorism, in order to assist States in identifying aspects of this matter that have not been covered by such instruments and could be addressed to develop further a comprehensive legal framework of conventions dealing with international terrorism;

(d) A review of existing possibilities within the United Nations system for assisting States in organizing workshops and training courses on combating crimes connected with international terrorism;

IV

11. All States are urged to promote and implement in good faith and effectively the provisions of the present Declaration in all its aspects;

12. Emphasis is placed on the need to pursue efforts aiming at eliminating definitively all acts of terrorism by the strengthening of international cooperation and progressive development of international law and its codification, as well as by enhancement of coordination between, and increase of the efficiency of, the United Nations and the relevant specialized agencies, organizations and bodies.

Review of the implementation of the Declaration on the Strengthening of International Security, G.A. res. 48/83, 48 U.N. GAOR Supp. (No. 49) at 93, U.N. Doc. A/48/49 (1993)

The General Assembly,

Recalling its resolution 2734 (XXV) of 16 December 1970 on the Declaration on the Strengthening of International Security, as well as all its previous resolutions on the review of the implementation of the Declaration,

Bearing in mind the final documents of the Tenth Conference of Heads of State or Government of Non-Aligned Countries, held at Jakarta from 1 to 6 September 1992,

Expressing its firm belief that disarmament, the relaxation of international tension, respect for international law and for the purposes and principles of the Charter of the United Nations, especially the principles of the sovereign equality of States and the peaceful settlement of disputes and the injunction to refrain from the use or threat of use of force in international relations, respect for the right to self-determination and national independence, economic and social development, the eradication of all forms of domination, and respect for basic human rights and fundamental freedoms, as well as the need for preserving the environment, are closely related and provide the basis for an enduring and stable universal peace and security,

Welcoming the recent positive changes in the international landscape, characterized by the end of the cold war, the relaxation of tensions on the global level and the emergence of a new spirit governing relations among nations,

Welcoming also the continuing dialogue between the major Powers, with its positive effects on world developments, and expressing its hope that these developments will lead to the renunciation of strategic doctrines based on the use of nuclear weapons and to the elimination of weapons of mass destruction, thereby making a real contribution to global security,

Expressing the hope that the positive trends that started in Europe, where a new system of security and cooperation is being built through the process of the Conference on Security and Cooperation in Europe, will succeed and be extended to the non-participating Mediterranean countries and encourage similar trends in other parts of the world,

Expressing its serious concern at the threat that could be posed to international peace and security by the resurgence of doctrines of racial superiority or exclusivity and the contemporary forms and manifestations of racism and xenophobia,

Stressing the need for the strengthening of international security through disarmament, particularly nuclear disarmament leading up to the elimination of all nuclear weapons, and restraints on the qualitative and quantitative escalation of the arms race,

Recognizing that peace and security are dependent on socio-economic factors as well as on political and military elements,

Recognizing also that the right and responsibility for making the world safe for all should be shared by all,

Stressing also that the United Nations is the fundamental instrument for regulating international relations and resolving global problems for the maintenance and effective promotion of peace and security, disarmament and social and economic development,

1. *Reaffirms* the continuing validity of the Declaration on the Strengthening of International Security, and calls upon all States to contribute effectively to its implementation;

2. *Also reaffirms* that all States must respect, in their international relations, the principles enshrined in the Charter of the United Nations;

3. *Emphasizes* that, until an enduring and stable universal peace based on a comprehensive, viable and readily implementable structure of international security is established, peace, the achievement of disarmament and the settlement of disputes by peaceful means continue to be the first and foremost task of the international community;

4. *Calls upon* all States to refrain from the use or threat of use of force, aggression, intervention, interference, all forms of terrorism, suppression, foreign occupation or measures of political and economic coercion that violate the sovereignty, territorial integrity, independence and security of other States, as well as the permanent sovereignty of peoples over their natural resources;

5. *Urges* all Governments to take immediate measures and to develop effective policies to prevent and combat all forms and manifestations of racism, xenophobia or related intolerance;

6. *Calls* for regional dialogues, where appropriate, to promote security and economic, environmental, social and cultural cooperation, taking into account the particular characteristics of each region;

7. *Stresses* the importance of global and regional approaches to disarmament, which should be pursued simultaneously to promote regional and international peace and security;

8. *Reaffirms* the fundamental role of the United Nations in the maintenance of international peace and security, and expresses the hope that it will continue to address all threats to international peace and security in accordance with the Charter;

9. *Urges* all States to take further immediate steps aimed at promoting and using effectively the system of collective security as envisaged in the Charter, as well as halting effectively the arms race with the aim of achieving general and complete disarmament under effective international control;

10. *Also stresses* the urgent need for more equitable development of the world economy and for redressing the current asymmetry and inequality in economic and technological development between the developed and developing countries, which are basic prerequisites for the strengthening of international peace and security;

11. *Considers* that respect for and promotion of basic human rights and fundamental freedoms, as well as the recognition of the inalienable right of peoples to self-determination and independence, will strengthen international peace and security, and reaffirms the legitimacy of the struggle of peoples under foreign occupation and their inalienable right to self-determination and independence;

12. *Also reaffirms* that the democratization of international relations is an imperative necessity, and stresses its belief that the United Nations offers the best framework for the promotion of this goal;

13. *Invites* Member States to submit their views on the question of the implementation of the Declaration on the Strengthening of International Security, particularly in the light of recent positive developments in the global political and security climate, and requests the Secretary-General to submit a report to the General Assembly at its fiftieth session on the basis of the replies received;

14. *Decides* to include in the provisional agenda of its fiftieth session the item entitled "Review of the implementation of the Declaration on the Strengthening of International Security".

81st plenary meeting
16 December 1993

Notes

Chapter 1

1 Shirley V. Scott, "International Law as Ideology: Theorizing the Relationship between International Law and International Politics," *European Journal of International Law*, Vol. 5, 1994, pp. 313–325.

2 Richard A. Falk, "The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View" in Karl Deutsch and Stanley Hoffman (eds), *The Relevance of International Law* (Schenkman Publishing Company: 1968), p. 142. Also see, James P. Piscatori, "The Contribution of International Law to International Relations," *International Affairs (Royal Institute of International Affairs 1944–),* Vol. 53, No. 2, April 1977, pp. 217–231; Anne-Marie Slaughter, Andrew S. Tulmello and Stepan Wood, "International Law and International Relation Theory: A New Generation of Interdisciplinary Scholarship," *The American Journal of International Law*, Vol. 92, No. 3, Jul. 1998, pp. 367–397; Kenneth W. Abott, "Modern International Relations Theory: A Prospectus for International Lawyers," *Yale Journal of International Law*, Vol. 14, 1989, pp. 335–411; Harold H. Koh, "Why Do Nations Obey International Law?" 106 *Yale Law Journal*, 1997, pp. 2599–2604, pp. 2632–2659; Keohane, Robert O. (1997) "International Relations and International Law: Two Optics," *Harvard International Law Journal*, 38, 487–502; Coplin, William (1965) "International law and Assumptions about the State System," *World Politics,* 17, 615–634; Beck, Robert J. (1996) "International Law and International Relations: The Prospects of Interdisciplinary Collaboration" in Robert J. Beck, Anthony Clark Arend, and Robert D. Vander Lugt (eds) *International Rules. Approaches from International Law and International Relations* (Oxford: Oxford University Press, 1996), pp. 3–33.

3 Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd Edition (Published for the Council of Foreign Relations: Columbia University Press, 1979). Henkin argues "in relations between nations, the progress of civilization may be seen as movement from force to diplomacy, from diplomacy to law" (page 1).

4 *Ibid*. p. 7.

5 Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda," *The American Journal of International Law*, Vol. 87, No. 2. Apr. 1993, p. 205.

6 William D. Coplin, "International Law and Assumptions About the State System," *World Politics*, Vol. 17, No. 4, 1965, pp. 615–634, p. 633.

7 news.bbc.co.uk/2/hi/asia-pacific/2757923.stm

8 www.cnn.org.www.cnn.com/2003/WORLD/asiapcf/east/01/10/nkorea.pactJan

9 North Korea's Nuclear Weapons Program: US Policy Options, CRS Report for Congress, CRS94-470F, June 1, 1994, By Richard P. Cronin, Coordinator Specialist, Asian Affairs, Foreign Affairs and National Defense Division.

10 news.bbc.co.uk/2/hi/asia-pacific/2757923.stm
11 David E. Sanger, "Cheney Says Israel Might 'Act First' on Iran," BBC, 21 January 2005; Adam Entous, "Cheney Says Iran Tops U.S. List of Trouble Spots," Reuters, 21 January 2005; Paul Richter, "U.S. Adds Israel to the Iran Equation," *Los Angeles Times*, 21 January 2005.
12 "Khatami, Rowhani React to US 'Threats,' Defend Right to Nuclear Program," IRNA, 10 February 2005.
13 Borzou Daragahi, "Iran Readies Military, Fearing A U.S. Attack," *San Francisco Chronicle*, 21 February 2005.
14 Editorials, Op/Ed. http://www.washtimes.com/op-ed/20050724-101302-5685r.htm
15 Glenn H. Snyder, 1988, "Deterrence and Defense" in Robert J. Art and Kenneth N. Waltz (eds) *The Use of Force: Military Power and International Politics*, Third Edition, University Press of America (Lanham, New York, London), pp. 25–43, p. 25. Deterrence, defined by Snyder is "discouraging the enemy from taking military action by posing for him a prospect of cost and risk outweighing its prospective gain," *ibid*. p. 25.
16 Prevention and preemption are rooted in the Latin verbs *praevenire* (to forestall) and *praemere* (to buy before others).
17 Benjamin R. Barber, *Fear's Empire: War, Terrorism and Democracy* (New York & London: W.W. Norton and Company, 2003), p. 108.
18 Kegley, Charles W. Jr. and Gregory A. Raymond, "Preventive War and Permissive Normative Order," *International Studies Perspectives,* 4, No. 4 (November 2003), p. 388.
19 Stephen Van Evera, *Causes of War: Power and the Roots of Conflict* (Ithaca, NY: Cornell University Press, 1999), p. 40.
20 Dan Reiter, "Exploding the Powder Keg Myth: Preemptive Wars Almost Never Happen," *International Security,* 20, No. 2 (Autumn 1995), pp. 6–7.
21 John Lewis Gaddis, *Surprise, Security, and the American Experience* (Cambridge, MA: Harvard University Press, 2004), p. 123.
22 See Pitman B. Potter, 1951, "Editorial Comment: Preventive War Critically Considered," *The American Journal of International Law*, Vol. 45, No. 1. (Jan., 1951), pp. 142–145 and Jack S. Levy, 1987, "Research Note: Declining Power and the Preventive Motivation for War," *World Politics*, Vol. 40, No. 1 (Oct., 1987), pp. 82–107.
23 US Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), News Transcript, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3673
24 On April 14, 1986, Ronald Reagan asserted on national TV that self-defense "is not only our right, it is our duty." This was following the bombing by the United States against the "terrorist facilities" in Libya. See Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London: Routledge, 1993), p. 138.
25 Keir A Lieber, and Robert J. Lieber, 2002. "The Bush National Security Strategy," *US Foreign Policy Agenda, An Electronic Journal of the US Department of State*, Vol. 7, No. 4. 2002, http://usinfo.state.gov/journals/itps/1202/ijpe/pj7-4lieber.htm (5 August 2005).
26 The National Security Strategy of the United States, September 2002, http://www.whitehouse.gov/nsc/nss.pdf, p. 6. (Emphasis added).

27 According to Robert Pauly and Tom Lansford, The Bush Administration's NSS 2002 has its strengths and weaknesses that need to be acknowledged. The strengths of the Bush NSS lie at the level of US security and foreign policy while the weaknesses primarily rest in the domain of the international or collective. First, it lays down the centrality of the "war on terror" for US national security for which it suggests a range of economic, political and military tools. Avoiding any diplomatic ambiguities, the Bush NSS lays down a firm direction and a strategic vision for the US. Second, the Bush NSS of 2002 clearly embraces the doctrine of preemption, even prevention to safeguard its national security and interests. This adjustment may be viewed as strength owing to the events of 9/11. Third, Bush administrations NSS elucidates its willingness to attempt a balance between multilateral and unilateral action in its "war against terror." The NSS Report clearly spells out its will to act "multilaterally whenever possible" and "unilaterally only if absolutely necessary." Fourth, Bush's NSS combines soft as well as hard security issues and makes a conscious effort to use the language of international legal norms to justify its controversial stand regarding the doctrine of preemption. By doing so, the US poses as the wolf wrapped in sheep's clothing. It convinces other states and international organizations, like the UN, of its "good" intentions towards respecting and maintaining international law and order while leaving open the possibility of pursuing its own interests at the expense of law. In terms of weaknesses, first, the Bush NSS 2002 seems ethnocentric. That the US allies would be willing to "defend, preserve and extend peace under American auspices" was a flawed assumption. Allies and adversaries alike now exist in a post cold war world with the United States in a hegemonic position as the world's sole remaining superpower. There is no way that these powers could prevent the United States from doing what it takes to safeguard its own national interests, even if these were at the expense of other states interests. Second, Bush's NSS does not fully acknowledge the differing priorities of countries (i.e. environmental politics being a high priority in many Western European capitals). "This could foster serious discord in transatlantic relations in the short term and perhaps, over the long term as well." See Robert Pauly and Tom Lansford, *Strategic Preemption: US Foreign Policy and the Second Iraq War*, Burlington, VT: Ashgate, 2005, pp. 49–53.

28 Howard Adelman, *Law, Ethics and Preemption: The Case of Iraq,* A Draft paper for presenting at the Socratic Forum at Parliament House in Brisbane, Australia, December 1, 2003 held under the auspices of the Key Center for Ethics, Law, Justice and Governance, Griffith University. pp. 1–9, p. 1. www.gu.edu.au/centre/kceljag/adelman.pdf

Chapter 2

1 See Alfred Vagts and Detlev F. Vagts, "The Balance of Power in International Law: A History of An Idea," *The American Journal of International Law*, Vol. 73, No. 4, 1979, pp. 555–580. In this article, Vagts and Vagts discuss the different kinds of balance of power as distinguished by Inis Claude: "(1) balance as a descriptive term for an existing equilib-

rium of power; (2) balance as a condition of disequilibrium (as in a 'favorable balance of power' or a 'reversal of the balance of power'); (3) balance as a policy of preserving a power equilibrium; (4) balance as a largely automatic system for restoring an equilibrium once disturbed; and (5) balance of power as a symbol for realism – 'he-manness' in the study of international relations." (p. 557). They argue that the third conception of balance of power is the most pertinent for the discourse on international law.

2 Kenneth N. Waltz, "Neorealism: Confusions and Criticisms," *Journal of Politics and Society*, Guest Essay, Vol. XV, Spring 2004, pp. 2–6, p. 5.

3 International relations theorists have utilized the term "international system" in varied manner. Goodman extrapolates three descriptive and theoretical implications of the term system. In the words of J.S. Goodman, "Usage One is System-as-Description. In Usage One, 'system' refers to an arrangement of the actors of international politics in which interactions are patterned and identifiable. Usage Two is System-as-Explanation. In Usage Two, 'system' refers to a particular arrangement in which the nature of the arrangement makes it the major variable to be considered in explaining the behavior of the actors in the international arena. Usage Three is System-as-Method. In Usage Three, 'system' refers to the application of special types of approaches, methodologies, or analytical concepts to the data of international politics." Jay S. Goodman. "The Concept of 'System' in International Relations Theory," *Background,* Vol. 8, No. 4, Feb. 1965, p. 257.

4 Robert J. Art and Robert Jervis, "Anarchy and its Consequences" in Robert J. Art and Robert Jervis, *International Politics: Enduring Concepts and Contemporary Issues*, 6th edition (New York: Longman, 2003), pp. 1–6, p. 1.

5 Quoted in Milner. Helen Milner, "The Assumption of Anarchy in International Relations Theory: A Critique" in David A. Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (Columbia University Press, 1993), p. 143.

6 Lea Brilmayer, *American Hegemony: Political Morality in One-Superpower World* (Yale University Press, 1994), p. 39.

7 *Ibid*. pp. 39–48.

8 Edward H. Carr, *The Twenty Years Crisis 1919–1939* (London: Macmillan, 1940).

9 Der Derian (ed.), *International Theory: Critical Investigations* (New York: NY University Press, 1995), p. 75.

10 Robert Axelrod, and Robert Keohane, "Achieving Cooperation Under Anarchy. Strategies and Institutions" in Oye, Kenneth A. (ed.), *Cooperation Under Anarchy* (Princeton, NJ: Princeton University Press 1986), p. 226.

11 Helen Milner, "The Assumption of Anarchy in International Relations Theory: A Critique" in David A. Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (Columbia University Press, 1993), p. 145.

12 *Ibid*. p. 144.

13 Robert J. Art and Robert Jervis (eds), *International Politics. Enduring Concepts and Contemporary Issues*, 3rd edition (HarperCollins, 1992), p. 1.

14 Joseph M. Grieco, "Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism," *International Organizations*, Vol. 42, No. 3, Summer 1988, pp. 485–507, p. 488.

15 John J. Mearsheimer, "The False Promise of International Institutions," *International Security*, Vol. 19, No. 3 (Winter 1994–1995), pp. 5–49, p. 7.
16 Kenneth Waltz, *Man, the State and War* (Columbia University Press, 1959), p. 237.
17 John H. Herz, "Idealist Internationalism and the Security Dilemma," *World Politics,* 2, No. 2 (January 1950), p. 157.
18 Andrew Butfoy, "Offence-Defence Theory and the Security Dilemma: The Problem with Marginalizing the Context," *Contemporary Security Policy,* 18, No. 3 (December 1997), p. 45.
19 Helen Milner, "The Assumption of Anarchy in International Relations Theory: A Critique" in David A. Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (Columbia University Press, 1993), p. 145.
20 See Thomas Hobbes, *Leviathan,* Edited with an Introduction by C.B. MacPherson (Baltimore: Penguin Books, 1651, 1968). Hans Morgenthau, *Politics Among Nations,* 6th ed. (New York: Alfred Knopf, 1948, l985). Niebuhr, Reinhold, Moral *Man and Immoral Society* (New York: Charles Scribner, 1932). Niccolo Machiavelli*, The Prince* (Chicago: University of Chicago Press, 1513, 1985).
21 In short, some of the assumptions of classical realism are the state centric assumption (that states are the most important actors in international politics), the rationality assumption (that states are rational actors who seek to maximize their power *vis-à-vis* others, the power assumption (that international relations is a "struggle for power") and the conflict assumption (Morgenthau).
22 Although neorealists believe that states are the major actors in international politics, they give more importance to non-state actors than do classical realists.
23 For neorealists, like classical realists, power is central to an analysis of IR. It, however, does not derive from human nature and is not pursued as an end. Rather, it is seen as an instrument for the establishment of balance in the international system.
24 Kenneth Waltz, *Man, the State and War* (New York: Columbia University Press, 1959), p. 209.
25 Kenneth N. Waltz, *Theory of International Politics* (New York: McGraw-Hill, 1983), p. 118.
26 Kenneth Waltz, *Man, the State and War* (New York: Columbia University Press, 1959), p. 104.
27 *Ibid*. pp. 47–48. Although Waltz explains the international system on the basis of structural elements, he draws an analogy between the domestic and international spheres. States, according to him, are comparable to individuals in the Hobbesian state of nature; thus making "conflict and violence" inevitable (Waltz, 1959; p. 163).
28 The *first image realism*, according to Waltz, explains international conflict on the basis of human behavior. The *second image realism* connects international conflicts with the internal structure of state.
29 Kenneth Waltz, *Man, the State and War* (New York: Columbia University Press, 1959), p. 238.
30 Robert O. Keohane, "Realism, Neorealism and the Study of World Politics" in Robert O. Keohane (ed.) *Neorealism and its Critics* (New York: Columbia University Press, 1986), p. 14.

31 Kenneth Waltz, *Man, the State and War* (New York: Columbia University Press, 1959), p. 160.
32 John J. Mearshiemer, "False Promise of International Institutions," *International Security*, Vol. 19, No. 3, Winter 1994–95, pp. 5–49, p. 9.
33 Joseph M. Grieco, "Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism" in David A. Baldwin (ed.) *Neorealism and Neoliberalism: The Contemporary Debate* (Columbia University Press, 1993), p. 116.
34 John J. Mearshiemer, "False Promise of International Institutions," *International Security*, Vol. 19, No. 3, Winter 1994–95, pp. 5–49, p. 8.
35 *Ibid*. pp. 5–49, p. 9.
36 David A. Baldwin, "Neoliberalism, Neorealism, and World Politics" in David A. Baldwin (ed.) *Neorealism and Neoliberalism: The Contemporary Debate* (New York: Columbia University Press, 1993), pp. 4–8.
37 Helen Milner, "The Assumption of Anarchy in International Relations Theory: A Critique" in David A. Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (New York: Columbia University Press, 1993), p. 158.
38 Helen Milner, "International Theories of Cooperation Among Nations: Strengths and Weaknesses," *World Politics*, Vol. 44, No. 3, 1992, pp. 466–496, p. 496.
39 Kenneth N. Waltz, "Neorealism: Confusions and Criticisms," *Journal of Politics and Society*, Guest Essay, Vol. XV, Spring 2004, pp. 2–6, pp. 2–3.
40 Helen Milner, "The Assumption of Anarchy in International Relations Theory: A Critique" in David A. Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (New York: Columbia University Press, 1993), p. 157.
41 *Ibid*. p. 157.
42 *Ibid*. p. 162
43 Kenneth N. Waltz, "The Origin of War in Neorealist Theory," *Journal of Interdisciplinary History*, Vol. XVII, No. 4, Spring 1988, pp. 615–628, p. 619.
44 Helen Milner, "The Assumption of Anarchy in International Relations Theory: A Critique" in David A. Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (New York: Columbia University Press, 1993), p. 167.
45 Lea Brilmayer, *American Hegemony: Political Morality in One-Superpower World* (Yale University Press, 1994), pp. 50–57.
46 Richard K. Ashley, "The Poverty of Neorealism," *International Organization,* Vol. 38, No. 2, Spring 1984, p. 237.
47 *Ibid*. p. 240.
48 Kenneth Waltz, *Theory of International Politics,* 1979, pp. 95–96.
49 Ruggie, John Gerald, "Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis" in Keohane, Robert (ed.) *Neorealism and its Critics* (New York: Columbia University Press 1986), pp. 131–157.
50 Richard K. Ashley, "The Poverty of Neorealism," *International Organization*, Vol. 38, No. 2, Spring 1984, pp. 225–285, p. 255.
51 Alexander E. Wendt, "The Agent-Structure Problem in International Relations Theory," *International Organization,* Vol. 41, No. 3, Summer 1987, pp. 335–370, p. 339.

52 Robert W. Cox, "Social Forces, States and World Orders: Beyond International Relations Theory" in Robert Keohane (ed.) *Neorealism and its Critics* (New York: Columbia University Press, 1986), p. 222.
53 Waltz, Kenneth N. *Theory of International Politics* (Reading, MA: Addison-Wesley, 1979), pp. 161–162.
54 Kenneth N. Waltz, "The Origin of War in Neorealist Theory," *Journal of Interdisciplinary History*, Vol. XVII, No. 4, Spring 1988, pp. 615–628, p. 615.
55 Bruce Russett and William Antholis, "Do Democracies Fight Each Other? Evidence from the Peloponnesian War," *Journal Of Peace Research*, Vol. 29, No. 4, 1992, pp. 415–434. Bruce Russett with Carol R. Ember and Melvin Ember, "The Democratic Peace in Nonindustrial Societies" in Bruce Russett, *Grasping The Democratic Peace: Principles For A Post-Cold War World* (Princeton: Princeton University Press, 1993), pp. 99–118. Bruce Russett and James Lee Ray, "Why the Democratic Peace Proposition Lives" (Response to Cohen 1994). *Review Of International Studies*, Vol. 21, No. 3, July 1995, pp. 319–323. Bruce Russett and William Antholis, "Do Democracies Fight Each Other? Evidence from the Peloponnesian War," *Journal Of Peace Research,* Vol. 29, No. 4, November 1992, pp. 415–434. Bruce Russett, "A More Democratic and Therefore More Peaceful World," *World Futures*, Vol. 29, No. 4, 1990b, pp. 243–263. Michael W. Doyle, "Liberalism and World Politics," *American Political Science Review,* Vol. 80, No. 4, December 1986, pp. 1151–1169. Michael Doyle, "Michael Doyle on the Democratic Peace," *International Security,* Vol. 19, Spring 1995, pp. 180–184. James Lee Ray, *Democracy and International Conflict: An Evaluation of the Democratic Peace Proposition* (University of South Carolina Press, 1998).
56 See John Mueller, *Retreat from Doomsday: The Obsolescence of Major War* (New York: Basic Books, 1989). Stephen Van Evera, *Causes of War: Power and the Roots of Conflict* (Ithaca: Cornell University Press, 1999).
57 Richard K. Ashley, "The Poverty of Neorealism," *International Organization*, Vol. 38, No. 2, Spring 1984, pp. 225–85, p. 244.
58 *Ibid*. p. 258.
59 *Ibid*. p. 258.
60 Kenneth N. Waltz, "The Origin of War in Neorealist Theory," *Journal of Interdisciplinary History*, Vol. XVII, No. 4, Spring 1988, pp. 615–628, p. 615.
61 Scott Burchill and Andrew Linklater (eds), *Theories of International Relations* (St. Martin's Press, 1996), p. 13.
62 For an excellent discussion on "power," see K.J. Holsti, "The Concept of Power in the Study of International Relations," *Background*, Vol. 7, No. 4, 1964, pp. 179–194. Holsti describes power as containing several elements namely influence (a means to an end), capability (when an actor mobilizes its resources to influence another), Relationship (the act of power is also a relationship which over a period of time can be considered a process), and quantity (when compared to the power of another). Holsti argues "power may be viewed from several aspects: it is a means, it is based on capabilities, it is a relationship, and a process, and it can also be a quantity," p. 182.
63 See Helen Milner, "The Assumption of Anarchy in International Relations Theory: A Critique" in David A. Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (Columbia University Press, 1993).

64 See Lea Brilmayer, *American Hegemony: Political Morality in a One Superpower World*, Yale University Press, Reissue Edition, September 25 1996.

65 See Arthur Stein, "Coordination and Collaboration: Regimes in an Anarchic World" in David A. Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (Columbia University Press, 1993), p. 35. Stein, as other neorealists define dilemma of common interest as responsible for regime or institution creation. Dilemma of common interest is when "individualistic self calculation leads states to prefer joint decision making because independent self-interested behavior can result in undesirable or suboptimal outcomes." Similarly, he defines dilemma of common aversion as the opposite!

66 Stein, Arthur (1993). Coordination and Collaboration: Regimes in an Anarchic World. In Baldwin, David A., ed. *Neorealism and Neoliberalism: The Contemporary Debate* (Columbia University Press, 1993), p. 47.

67 Joseph M. Grieco, "Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism" in David A. Baldwin, ed., *Neorealism and Neoliberalism: The Contemporary Debate* (Columbia University Press, 1993), p. 118.

68 Charles Lipson, "International Cooperation in Economic and Security Affairs" in Baldwin, David A., ed. (1993). David A. Baldwin, ed., *Neorealism and Neoliberalism: The Contemporary Debate* (Columbia University Press 1993), p. 80.

69 See Robert Axelrod and Robert O. Keohane, "Achieving Cooperation Under Anarchy: Strategies and Institutions," *World Politics*, Vol. 38, No. 1, 1985, pp. 226–254.

70 Holsti, K.J. *Change in the International System: Essays on the Theory and Practice of International Relations* (Edward Elgar Press, 1991), p. 236.

71 Morton A. Kaplan, "Balance of Power, Bipolarity and Other Models of International Systems," *The American Political Science Review*, Vol. 51, No. 3, Sept 1957, p. 686.

72 Kenneth N. Waltz, *Theory of International Politics* (New York: McGraw-Hill, 1983), p. 118.

73 John Mearsheimer, "Why We Will Soon Miss the Cold War," *Atlantic Monthly*, August 1990, pp. 35–50.

74 Karl Deutsch and J. David Singer, "Multipolar Power Systems and International Stability," *World Politics*, Vol. 16, No. 3, 1964, pp. 390–406.

75 William C. Wohlforth, "The Stability of a Unipolar World," *International Security*, Vol. 24, No. 1, Summer 1999, pp. 5–41. Stephen M. Walt, "American Primacy: Its Prospects and Pitfalls," *Naval War College Review*, Spring 2002, Vol. LV, No. 2, pp. 9–28.

76 Hedley Bull discusses the relationship of "Order" and "Justice" in world politics Discussing the institution of balance of power in international relations, Bull argues, "Here is an institution which offends against everyday notions of justice by sanctioning war against a state whose power threatens to become preponderant, but which has done no legal or moral injury; by sacrificing the interests of small states, which may be absorbed or partitioned in the interests of the balance; or – in the case of its contemporary variant, 'the balance of terror' – by magnifying and exploiting the risk of destruction. Yet this is an institution whose role in the preservation of order in the international system, in the past and at present, is a central one." Hedley Bull, "Order versus Justice" in Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977), pp. 77–98, p. 91.

77 Kenneth N. Waltz, "Neorealism: Confusions and Criticisms," *Journal of Politics and Society*, Guest Essay, Vol. XV, Spring 2004, pp. 2–6, p. 5.
78 Charles W. Kegley and Gregory A. Raymond, "Must We Fear a Post-Cold War Multipolar System?" *Journal of Conflict Resolution,* Vol. 36, No. 3, September 1992, pp. 573–585.
79 Charles Krauthammer, "The Unipolar Moment," *Foreign Affairs*, America and the World 1990/91. www.foreignaffairs.org. http://www.foreignaffairs.org/19910201faessay6067/charles%96krauthammer/the%96unipolar%96moment.html (July 29, 2005).
80 Christopher Layne, "The Unipolar Illusion: Why New Great Powers Will Rise," *International Security*, Vol. 17, No. 4 (Spring 1993), p. 5. Modelski (1974) and Rapkin, Thompson and Christopherson (1979) operationalize polarity by their formula, "1. in a unipolar system, on state controls 50 percent or more of the relative capabilities that matter; 2. in a bipolar world, two states control at least 50 percent of the relative capabilities and each of the two leading actors possess at least 25 percent with no other state controlling as much as 25 percent; 3. in a multipolar system, three or more states each control at least 5 percent of the relative capabilities but no single state controls as much as 50 percent and no two states have as much as 25 percent apiece." William R. Thompson, *On Global War: Historical-Structural Approaches to World Politics* (Columbia, S. Carolina: University of South Carolina Press 1988), p. 209.
81 David Wilkinson, "Unipolarity Without Hegemony," *International Studies Review,* Vol. 1, No. 2, Summer 1999, Prospects for International Relations: Conjectures About the Next Millennium, p. 142.
82 Samuel Huntington, "The Lonely Superpower," *Foreign Affairs,* Vol. 78, No. 2, 1999, pp. 35–49.
83 Kenneth N. Waltz, "Neorealism: Confusions and Criticisms," *Journal of Politics and Society*, Guest Essay, Vol. XV, Spring 2004, pp. 2–6, pp. 4–5.
84 Kenneth N. Waltz, "Evaluating Theories," *American Political Science Review,* Vol. 91, No. 4, 1997, pp. 913–917, p. 915.
85 *Ibid*. pp. 913–917, p. 915. Also see, Kenneth N. Waltz, "America as a Model for the World? A Foreign Policy Perspective," *PS: Political Science & Politics*, December 1991, pp. 667–670; Kenneth N. Waltz, "Letter to the Editor," *International Organization*, Vol. 36, No. 3, Summer 1982, pp. 679–681.
86 Stephen M. Walt, "American Primacy: Its Prospects and Pitfalls," *Naval War College Review*, Spring 2002, Vol. LV, No. 2, pp. 9–28.
87 Barren R. Posen and Andrew L. Ross, "Competing Visions of US Grand Strategy," *International Security*, Vol. 21, No. 3, Winter 1996–1997, pp. 5–53, p. 6.
88 Excerpts From Pentagon's Plan: "Prevent the Re-Emergence of a New Rival," The New York Times March 8, 1992. The italized parts (emphasis added) also appear in Defense Planning Guidance 1992, tailored by Paul Wolfowitz, the US Under-Secretary for Defense Policy from 1989–1993 under George H.W. Bush. Quoted in Barry R. Posen and Andrew L. Ross, "Competing Visions of US Grand Strategy," *International Security*, Vol. 21, No. 3, Winter 1996/97, pp. 33–34.
89 According to Wohlforth, unipolarity is "a structure in which one states capabilities are too great to be counterbalanced…At the same time, capabilities are not so concentrated to produce a global empire or an imperial empire."

William C. Wohlforth, "The Stability of a Unipolar World," *International Security*, Vol. 24, No. 1, Summer 1999, p. 9.

90 *Ibid*. pp. 5–41.

91 Charles Krauthammer, "The Unipolar Moment," *Foreign Affairs*, America and the World 1990/91. www.foreignaffairs.org. http://www.foreignaffairs.org/19910201faessay6067/charles%96krauthammer/the%96unipolar%96moment. html (July 29, 2005).

92 Christopher Layne, "The Unipolar Illusion: Why New Great Powers Will Arise," *International Security*, Vol. 17, No. 4, Spring 1993, pp. 6–51.

93 Charles Krauthammer, "The Unipolar Moment," *Foreign Affairs*, America and the World 1990/91. www.foreignaffairs.org. http://www.foreignaffairs.org/19910201faessay6067/charles%96krauthammer/the%96unipolar%96moment.html (July 29, 2005).

94 Michael Mastanduno, "Preserving the Unipolar Moment: Realist Theories and US Grand Strategy After the Cold War," *International Security*, Vol. 21, No. 4, Spring 1997, p. 56.

95 *Ibid*. p. 56.

96 Steven M. Walt, *The Origin of Alliances* (Ithaca, NY: Cornell University Press 1987), pp. 21–22.

97 Michael Mastanduno, p. 60.

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101 *The Case of the '*SS Lotus', 1927 PCIJ (ser A) No. 10, 18–25. p. 18. Also see Louis B. Sohn, "The Many Faces of International Law," *The American Journal of International Law*, Vol. 57, No. 4, Oct., 1963, pp. 868–870. H. Lauterpacht, "The Nature of International Law and General Jurisprudence," *Economica* No. 37, Aug., 1932, pp. 301–320. Alfred Von Verdross, "On the Concept of International Law," *The American Journal of International Law*, Vol. 43, No. 3, Jul., 1949, pp. 435–440.

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Chapter 3

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1973 Yom Kippur War (Fourth Arab-Israeli War), 1974–1991 Ethiopian Civil War, 1975–1989 Angolan Civil War, 1975–1991 Lebanese Civil War, 1975–1998 War of Independence in East Timor, 1977–1978 Ogaden War, 1977 – Somalian Civil War, 1977–1991 Cambodian-Vietnamese War, 1978 – Wars in Afghanistan, 1978–2005 The Aceh War, 1978–1988 Ugandan Civil War, 1979 Sino-Vietnamese War, 1979–1989 Soviet invasion of Afghanistan, 1979–1992 El Salvador Civil War, 1980–1988 Iran-Iraq War, 1981 Border war between Ecuador and Peru, 1982 Falklands War, 1982 Lebanon War, 1982–1984 Mozambique's Civil War, 1983–2000 Civil War in Sri Lanka, 1983–2005 Second Sudanese Civil War, 1985 Christmas War between Mali and Burkina Faso, 1989–1991 Mauritania-Senegal Border War, 1989–1990 Operation Just Cause, United States invades Panama, 1989–1997, 1990–1991 Gulf War, Liberian Civil War, 1988 – Casamance Conflict, 1992 – Algerian Civil War, 1994 – Zapatista Rebellion in Mexico, 1995 – Second Ugandan Civil War, 1996 – Nepal Civil War, 1998 – Second Congo War, 1999 – Ituri Conflict, 1999 – Second Chechen War, 2001 – War on Terrorism, 2001 – U.S. invasion of Afghanistan, 2001 – Civil War in Côte d'Ivoire, 2003 – Invasion of Iraq, 2003 – Darfur conflict, Sudan 2004 – Haiti rebellion. See http://www.global-security.org/military/world/war/past.htm (Last accessed August 05).

22 Yoram Dinstein, *War, Aggression and Self Defense*, Second Edition (Cambridge: Cambridge University Press, 1994), p. 9.

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24 See also General Assembly Resolution A/RES/46/130,75th plenary meeting, 17 December 1991, *Respect for the Principles of National Sovereignty and Non-Interference in the Internal Affairs of States in their Electoral Processes* reiterates the principle of non-use of force, Article 5 "Urges all States to respect the principle of non-interference in the internal affairs of States and the sovereign right of peoples to determine their political, economic and social system"; Article 6 "Strongly appeals to all States to refrain from financing or providing, directly or indirectly, any other form of overt or covert support for political parties or groups and from taking actions to undermine the electoral processes in any country" and Article 7 "Condemns any act of armed aggression or threat or use of force against peoples, their elected Governments or their legitimate leaders."

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26 *Ibid*. pp. 225–226.

27 Quincy Wright, "The Concept of Aggression in International Law," *The American Journal of International Law*, Vol. 29. No. 3, July 1935, pp. 373–395 (*emphasis added*), p. 395.

28 *Ibid*. p. 395.
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30 See C.G. Fenwick, "War Without a Declaration," *The American Journal of International Law*, Vol. 31, No. 4, October 1937, pp. 694–696, p. 695.
31 Laws of War: Opening of Hostilities (Hague III); October 18, 1907. Entered into Force: 26 January 1910. See http://www.yale.edu/lawweb/avalon/lawofwar/hague03.htm (Last Accessed 24 August 2005). Also See, George Grafton Wilson, "Use of Force and Declaration of War," *The American Journal of International Law*, Vol. 32, No. 1 (Jan., 1938), pp. 100–101
32 Quincy Wright, "When does War Exist?" *The American Journal of International Law*, Vol. 26, No. 2 (Apr., 1932), pp. 362–368, p. 363. Also see, George Grafton Wilson, "Use of Force and War", *The American Journal of International Law*, Vol. 26. No. 2, April 1932, pp. 327–328.
33 Also See William J. Ronan, "English and American Courts and the Definition of War," *The American Journal of International Law*, Vol. 31, No. 4 (Oct., 1937), pp. 642–658; Quincy Wright, "When does War Exist?" *The American Journal of International Law*, Vol. 26, No. 2 (Apr., 1932), pp. 362–368; Benjamin A. Most; Harvey Starr, "Conceptualizing 'War': Consequences for Theory and Research," *The Journal of Conflict Resolution*, Vol. 27, No. 1 (Mar., 1983), pp. 137–159; Theodore S. Woolsey, "The Beginnings of War," *Proceedings of the American Political Science Association*, Vol. 1, First Annual Meeting (1904), pp. 54–68; Edwin M. Borchard, "War" and "Peace," *The American Journal of International Law*, Vol. 27, No. 1 (Jan., 1933), pp. 114–117.
34 See Vincent J. Esposio, "War as a Continuation of Politics," *Military Affairs*, Vol. 18, No. 1, Spring 1954, pp. 19–26, p. 20.
35 Quincy Wright, "Changes in the Conception of War," *The American Journal of International Law*, Vol. 18, No. 4, October 1924, pp. 755–767, p. 762. (emphasis added)
36 Walzer, "Just and Unjust Wars," p. 24.
37 See L. Oppenheim, 2 International Law 202 (7th Edition, by H. Lauterpacht, 1952), quoted in Yoram Dinstein, *War, Aggression and Self Defense*, Second Edition (Cambridge: Cambridge University Press, 1994), p. 4.
38 Yoram Dinstein, *War, Aggression and Self Defense*, Second Edition (Cambridge: Cambridge University Press, 1994), p. 5.
39 Montevideo Convention on the Rights and Duties of States, Signed at Montevideo, 26 December 1933, Entered into Force, 26 December 1934. Available at http://www.taiwandocuments.org/montevideo01.htm (Last accessed August 6, 2005).
40 *Ibid*.
41 Yoram Dinstein, *War, Aggression and Self Defense*, Second Edition (Cambridge: Cambridge University Press, 1994), p. 6.
42 Opening of Hostilities (Hague III); October 18, 1907, Entered into Force: 26 January 1910. Available at http://www.yale.edu/lawweb/avalon/lawofwar/hague03.htm (Last accessed August 6, 2005).
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44 *Ibid*. pp. 362–368, p. 363. Wright argues that "a victim of an act of war, if a recognized state, may always if it wishes, regard the act as instituting a state of war, and if it does, a state of war exists," p. 365.
45 Yoram Dinstein, *War, Aggression and Self Defense*, Second Edition (Cambridge: Cambridge University Press 1994), p. 14.
46 E. de Vattel, The Law of Nations, Quoted in Hans Kelsen, "Quincy Wright's A Study of War and the Bellum Justum Theory," *Ethics,* Vol. 53, No. 3, April 1943, pp. 208–211, p. 209.
47 Walzer, *Just and Unjust Wars*, p. 59. For criterion of Just War, see Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations,* Basic Books 1977, Michael Walzer, *Arguing About War,* Yale University Press, 2004, Jean Bethke Elshtain, ed. *Just War Theory*. Washington Square, New York: New York University Press 2002, Douglas Lackey, *The Ethics of War and Peace* (NY: Prentice-Hall, 1989).
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49 *Ibid*. pp. 114–117, p. 116.
50 Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* (Basic Books, 1992), pp. 61–63.
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52 The Covenant of the League of Nations (Including Amendments adopted to December, 1924). See http://fletcher.tufts.edu/multi/www/league-covenant.html (Last accessed 7 August 2005).
53 *Ibid*.
54 *Ibid*.
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56 *Treaty Providing for the Renunciation of War as an Instrument of National Policy*. Done at Paris, 27 August 1928. Entered into Force, 24 July 1929; for the United States, 24 July 1929. 46 Stat. 2343, T.S. No. 796, 2 Bevans 732, L.N.T.S. 57. In Burns H. Weston, Richard A. Falk and Anthony D'Amato, *Basic Documents in International Law and World Order*, Second Edition (St Paul, Minn.: West Publishing Co., 1990), p. 137.
57 See Note 38. The state was to be the judge regarding its use of self-defense. However, in the case of the Japanese use of force against China in Manchuria 1931, Italy's use of force against Ethiopia in 1935, and Germany's occupation of Bohemia and Moravia in 1939, the League of Nations disregarded arguments made justifying the use of force under self-defense. The restriction on the use of self-defense in these cases points to the increasing role of the international community in assessing the merits of the use of self-defense particularly the need for using force in response to force. The merits of self-defense, particularly if it was anticipatory in nature were to be assessed using definitive criterion as laid out by the Caroline case. (See Section on the Caroline incident). See Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1982), pp. 242–249.
58 Charter of the Nuremberg International Military Tribunal, 8 August 1945. http://www.derechos.org/nizkor/nuremberg/judgment/ncharter.html (Last Accessed 23 August 2005), Article 6.

59 Nuremberg Trial Proceedings, Vol. 22, 217th Day, 30 September 1946. http://www.yale.edu/lawweb/avalon/imt/proc/09-30-46.htm (Last Accessed August 23, 2005).
60 Rome Statute of the International Criminal Court, (UN Doc. A/CONF.183/9, Signed 17 July 1998, Entered into force on 1 July 2002, in accordance with article 126). Article 5(2).
61 Article 2(7) of the UN Charter reads, "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll."
62 Article 39 of the UN Charter reads, "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."
63 Article 41 of the UN Charter reads, "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."
64 Article 42 of the UN Charter reads, "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."
65 Article 51 of the UN Charter, which appears again later in the Chapter, and throughout the book reads, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."
66 Although the General Assembly works towards the progressive development of the codification of international law, it lacks teeth and can only make recommendations to state parties. Working within the rubric of the UN system, the General Assembly recently adopted a text reaffirming the central role of the United Nations in issues of international peace and security (Fifty-eighth General Assembly Plenary 93rd Meeting), which was adopted by a recorded vote of 93 in favor to two against, with 47 abstentions. The two against were the United States and Israel. GA/Press Release 10249.

67 Declaration on the Strengthening of International Security (16 Dec. 1970), A/RES/2734 (XXV), http://www.un.org/Depts/dhl/resguide/resins.htm
68 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations (18 Nov. 1987), A/RES/42/22, http://www.un.org/Depts/dhl/resguide/resins.htm.
69 *United Nations Charter*, www.un.org.
70 A/RES/42/22, 73rd plenary meeting, 18 November 1987, 42/22. Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations.
71 Oscar Schachter, quoted in William Slomanson, *Fundamental Perspectives on International Law*, 3rd Edition (Wadsworth Publishers, 2003), p. 460.

Chapter 4

1 Not only is the prohibition to the use of force legislated in international treaties but is also referred to in various General Assembly Resolutions which are essentially non-binding in nature. See The Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, A/RES/42/22, 73rd plenary meeting, 18 November 1987. See http://www.un.org/documents/ga/res/42/a42r022.htm (Last Accessed 8 August 2005). Article 1 reads "Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or from acting in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and of the Charter of the United Nations and entails international responsibility." Article 2 of this GA Resolution states that, "The principle of refraining from the threat or use of force in international relations is universal in character and is binding, regardless of each State's political, economic, social or cultural system or relations of alliance." The right to the use of force or the threat of force is severely constrained except in the case of self-defense laid down in Article 13, which states that, "States have the inherent right of individual or collective self-defense if an armed attack occurs, as set forth in the Charter."
2 Humanitarian Intervention (*jus ad interventionem*), as an exception to the prohibition against the use of force is highly controversial. That states would misuse such an exception as a pretext to justify aggressive wars has been the biggest concern. Although the moral justification *de lege ferenda* as the basis to use force against a sovereign state is not hard to find, the legal justification *de lege lata* is very difficult to ascertain because the doctrine of humanitarian intervention is not clearly defined.
3 According to Article 41 of the UN Charter, "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations" (UN Charter).

4 According to Article 42 of the UN Charter, "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Member of the United Nations" (UN Charter).
5 S/RES/1510 (2003), S/RES 1386 (2001), S/RES/1413 (2002), S/RES/1444 (2002), S/RES/1368 (2001), S/RES/1373 (2001). See www.un.org
6 S/RES/864 (1993), S/RES/1127 (1997), S/RES/1130 (1997), S/RES/1135 (1997), S/RES 1149 (1998), S/RES 1157 (1998), S/RES/1164 (1998), S/RES 1173 (1998), S/RES/1176 (1998), S/RES/1202 (1998), S/RES/1213 (1998), S/RES (1229), S/RES/1237 (1999), S/RES/1295 (2000). See www.un.org
7 S/RES 1320 (2000), S/RES/1298 (2000), S/RES/1308 (2000). See www.un.org
8 S/RES/841 (1993), S/RES/873 (1993), S/RES/917 (1994), S/RES/944 (1994). See www.un.org
9 S/RES/661 (1990), S/RES/687 (1991), S/RES/712 (1991), S/RES 986 (1995), S/RES/1051 (1996), S/RES/1111 (1997), S/RES/1115 (1997), S/RES/1129 (1997), S/RES/1134 (1997), S/RES/1137 (1997), S/RES/1143 (1997), S/RES/1153 (1998), S/RES/1158 (1998), S/RES/1175 (1998), S/RES/1194 (1998), S/RES/1210 (1998), S/RES/1242 (1999), S/RES/1266 (1999), S/RES/1281 (1999), S/RES1284 (1999), S/RES/1302 (2000), S/RES/1409 (2002), S/RES/1472 (2003), S/RES/1476 (2003). See www.un.org
10 S/RES/1607 (2005), S/RES/1579 (2004), S/RES/1549 (2004), S/RES/1532 (2004), S/RES/1521 (2003). See www.un.org
11 S/RES/748 (1992), S/RES/883 (1993), S/RES/1192 (1998). See www.un.org
12 S/RES/1161 (1998), S/RES/1053 (1996), S/RES/1013 (1995), S/RES/1011 (1995), S/RES/1005 (1995), S/RES/918 (1994). See www.un.org
13 S/RES/1446 (2002), S/RES/1385 (2001), S/RES/1306 (2000), S/RES/1171 (1998), S/RES/1156 (1998), S/RES/1132 (1997). See www.un.org
14 S/RES/1587 (2005), S/RES/1558 (2004), S/RES/1519 (2003), S/RES/1474 (2003), S/RES/1425 (2002), S/RES/1407 (2002), S/RES/1356 (2001), S/RES/751 (1992), S/RES/733 (1992). See www.un.org
15 S/RES/418 (1997), S/RES/421 (1977), S/RES/919 (1994). See www.un.org
16 S/RES/232 (1966), S/RES/253 (1968), S/RES/460 lifted sanctions (1979). See www.un.org
17 S/RES/1591 (2005), S/RES/1556 (2004). See www.un.org
18 Use of Sanctions Under Chapter VII of UN Charter (Last Updated January 2005), See www.un.org
19 UN resolution 678 "authorizes the use of 'all means necessary' after January 15, 1991, to enforce previous UN resolutions, including that requiring Iraqi withdrawal from Kuwait." This was followed by the Persian Gulf Resolution for the "Authorization for Use of Military Force Against Iraq Resolution," January 12, 1991.
20 Dinstein, Yoram, *War, Aggression and Self-Defense* (New York: Cambridge Univ. Press, 1994), pp. 175, 178.
21 In a correspondence respecting the US proposal for the renunciation of war, Mr. Atherton wrote to Sir Austen Chamberlain, UK, on June 23, 1928, "There is nothing in the American draft of an antiwar treaty which restricts or impairs

in any way the right of self-defense. That right is inherent in every sovereign State and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions, to defend its territories from attack or invasion, and it alone is competent to decide whether circumstances require recourse to war in self-defence. If it has a good case, the world will applaud and not condemn its action. Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. In this respect, no treaty provision can to the natural right of self-defence. It is not in the interest of peace that a treaty should stipulate a juristic conception of self-defence, since it is far too easy for the unscrupulous to mould events to accord with an agreed definition." See http://www.yale.edu/lawweb/avalon/kbpact/kbbr.htm#no1 (Last accessed 8 August 2005).

22 Schachter, Oscar, "Self-Defense and the Rule of Law," *The American Journal of International Law*, Vol. 83, 1989, p. 259.

23 Bowett, Derek W. *Self-Defense in International Law* (New York: Praeger, 1958), p. 4.

24 *Ibid*. p. 5.

25 Dinstein, Yoram, *War, Aggression and Self-Defense* (New York: Cambridge Univ. Press, 1994), p. 179.

26 The use of force under the explanation of "self-defense" by both sides of a conflict can never be simultaneously lawful. If one of the conflicting countries is lawfully exercising the right to self-defense, then the other side must be in violation of the "corresponding duty" to not resort to the illegal use of force (Dinstein, 1994), p. 178.

27 Brownlie, Ian, *International Law and the Use of Force by States* (Oxford University Press, 1963), p. 252.

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Chapter 5

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