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LAWLESSNESS WITHIN A FOREIGN STATE AS A LEGAL BASIS FOR UNITED STATES MILITARY INTERVENTION TO RESTORE THE RULE OF LAW

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I. Introduction

> *In the criminal justice system, the people are represented by two separate yet equally important groups: the police who investigate crime and the district attorneys who prosecute the offenders. These are their stories.*[1]

This is the opening line to television's longest running crime series.[2] It presupposes that legitimate governmental authority will maintain law and order. But what happens when fundamental law and order breaks down or ceases to exist? In the international arena, this possibility has become an all too common occurrence as, repeatedly, nations degenerate into lawlessness, creating a situation that threatens international peace

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[1] *See* TNT, Law & Order, http://www.tnt.tv/title/?oid=333808-602 (last visited Feb. 21, 2006).

[2] *See* NBC, Law & Order, http://www.nbc.com/Law_&_Order/about/index.html (last visited Feb. 21, 2006).

and creates conditions for terrorism that threaten the United States and its interests. In these nations, there is no functioning government to control borders, apprehend criminals, or prevent territory from being used as staging bases for terrorist training and terrorist missions.[3]

The rule of law and the maintenance of law and order in foreign states are legitimate policy concerns of the United States government.[4] This article explores the theory that the collapse of law and order within a foreign nation provides a legal basis for intervention using military force to reestablish the rule of law. The rationale behind this theory relies on the customary law of anticipatory self-defense, the United Nations (UN) Charter, and the 1974 UN General Assembly Resolution on Aggression.[5] This article draws the conclusion that lawlessness, as a sole factor, is not sufficient to justify armed intervention for purposes of self-defense. That conclusion changes, however, if additional facts indicate that the lawless state is becoming a sanctuary for terrorist elements. This article argues that the traditional doctrine of self-defense is still the correct measure by which to gauge the actions of the United States. What shifts is the degree of evidence required to meet the imminent threat standard of the law.

This article is not a policy statement recommending a specific course of action; rather, it is designed to further discussion about when the United States may intervene. Although this article takes a unilateral view towards intervention, there is no reason that the legal rationale could not be adopted by a regional organization, by an ad hoc coalition, or by the UN, to authorize early intervention.

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[3] These nations are often referred to as "failed states." The whole notion of a "failed state" is a controversial topic and is discussed at some length in Part III of this article. Ben N. Dunlap, *State Failure and the Use of Force in the Age of Global Terror*, 27 B.C. INT'L & COMP. L. REV. 453, 454 (Spring 2004) (citing Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, FOREIGN POL'Y, Dec. 1992, at 3). *But cf. generally* Ralph Wilde, *The Skewed Responsibility Narrative of the Failed State Concept*, 9 ILSA J. INT'L & COMP. L. 425 (2003).

[4] *See* The National Security Strategy of the United States of America, September 2002, http://www.whitehouse.gov/nsc/nss.html [hereinafter NSS].

[5] G.A. Res. 3314, 29th Sess., U.N. Doc. A/RES/3314 (XXIX) (1974).

II. Background on the Customary Law of National Self-Defense and the Anticipatory Use of Force

A. The Customary Law of National Self-Defense

1. President Jefferson and the Barbary Pirates

It is generally recognized that a nation has the right to defend itself.[6] Historically, the United States' position has been that it has the inherent right to defend itself, its interests, and its people and their property, regardless of where they are located around the world.[7] That notion was enforced early in the life of the Republic when President Thomas Jefferson determined to use force to end the tyranny of the Barbary States, which were exacting huge costs to commerce operating in the Mediterranean Sea.[8]

The Barbary States were a group of small, North African city-states, loosely under the rule of the Ottoman Sultan.[9] They were significant commercial centers but also engaged in commerce raiding.[10] After seizing ships, the states would ransom the crews.[11] If ransoms were paid once, the Barbary Pirates increased the ransoms at the next opportunity.[12] Simultaneously, insurance rates skyrocketed.[13] Alternatively, some nations negotiated peace treaties with each of the Barbary States; not surprisingly, these treaties came at an exceptionally high price.[14] For example, the treaties the United States struck with Tripoli and Algiers in the late 1700s cost approximately $1 million per year.[15] The French and

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[6] 2 HUGO GROTIUS ON THE LAW OF WAR AND PEACE 184 (Francis W. Kelsey trans. 1925) (1646), *in* THE CLASSICS OF INTERNATIONAL LAW (James Brown Scott, ed. 1925) [hereinafter GROTIUS].

[7] "The great object and duty of government is the protection of the lives, liberty and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving." Durand v. Holland, 8 F. Cas. 111, 112 (S.D.N.Y. 1860).

[8] James R. Sofka, The Jeffersonian Idea of Security: Commerce, the Atlantic Balance of Power, and the Barbary War 1785-1805, Address at the Robert H. Smith International Center for Jefferson Studies (July 13, 2004), *available at* http://www.monticello.org/streaming/speakers/sofka.html.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

British willingly paid the high costs because the ransoms freed their navies for duty elsewhere and ultimately decreased the competition for French and British goods by shifting the focus to the fleets of smaller nations.[16]

President John Adams subscribed to the French and British approach to the Barbary States; however, his Secretary of State, Thomas Jefferson, disagreed.[17]

> Thomas Jefferson . . . believed that if a nation wishes to be free and live in peace it must be able to defend itself and be willing to protect its rights. The issue was not whether we preferred war or peace, but whether we would have the option of peace in the absence of a credible ability and willingness to defend our rights.[18]

And from his own pen:

> If it be admitted, however, that war, on the fairest prospects, is still exposed to uncertainties, I weigh against this, the great uncertainty of the duration of a peace bought with money . . . by a nation who, on hypothesis of buying peace, is to have no power on the sea, to enforce an observance of it.[19]

From Jefferson's perspective the United States lost, regardless of whether it paid the ransoms or struck treaties.[20] Failure to pay ransoms or make treaties meant the United States could not do business in the Mediterranean.[21] Paying ransoms or making peace treaties rewarded the misbehavior of the Barbary States, encouraging them to increase their subsequent ransoms and treaty fees.[22] Jefferson did the math; the money used to pay ransoms and fund treaties could be better spent building a

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[16] *Id.*
[17] *Id.*
[18] Robert F. Turner, *State Responsibility and the War on Terror: The Legacy of Thomas Jefferson and the Barbary Pirates*, 4 CHI. J. INT'L L. 121, 127-28 (Spring 2003).
[19] 5 THE WRITINGS OF THOMAS JEFFERSON 366 (Albert Ellery Bergh, ed., 1907).
[20] Sofka, *supra* note 8.
[21] *Id.*
[22] *Id.* As the final insult, often the money paid was used by the Barbary States to purchase new ships with which they could further terrorize the Mediterranean. *Id.*

navy, which could interdict the pirates and open the shipping lanes for the United States.[23]

In 1785, while an Ambassador to France, Jefferson made his first efforts to do something about the problem.[24] His idea was to form an "anti-piratical confederacy" with the weaker states on which the Barbars preyed.[25] The French, however, vetoed the idea.[26] Subsequently, treaties were struck with Tripoli and Algiers, but they devolved as the Barbary States refused to abide by them.[27] A 1793 government commerce report further boosted Jefferson's ideas by concluding that commerce was an essential resource of the nation's defense and that United States commerce was vulnerable at sea.[28] In the waning years of the eighteenth century, Jefferson identified his three primary foreign policy concerns: (1) the United States was militarily weak and therefore vulnerable; (2) the United States economy needed time to develop; and (3) neutrality and independence best secured the United States during the time of European wars.[29]

Thomas Jefferson was elected President of the United States in 1801.[30] With his foreign policy concerns in mind, he pursued a two-tiered philosophy: first, use the economic force of commerce to deal with strong powers (e.g., England and France) by pitting their demand against them by properly valuating the United States' ability to be the source of supply;[31] and second, for dealing with the lesser powers (e.g., Spain and Barbary States), use armed force to defeat their interference with the United States' commerce.[32] This policy explicitly took a prospective view. These states were likely to try and harm United States commerce; therefore, the United States should militarily intervene and "meet the first insult."[33]

President Jefferson wasted no time in taking military action against the Barbars. At his very first cabinet meeting he addressed the issue of

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[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

the Barbary States.[34] The cabinet unanimously concurred that the Navy should be dispatched to protect U.S. commercial shipping in the Mediterranean Sea and make war, if war was declared by the Barbary States on the United States.[35] Although some within the Jefferson administration sought a formal declaration of war, the President opted instead to dispatch a naval fleet under the command of Commodore Richard Dale, with express instructions "to 'chastise' Algiers and Tripoli if they continued to attack American shipping."[36] The fleet set sail on 1 June 1801.[37] As it departed Hampton Roads, the Jefferson Administration was unaware that Tripoli had already declared war on the United States almost three weeks earlier.[38] The American fleet proved highly effective in engaging the ships of the Barbary States, thereby opening the Mediterranean waters to U.S. shipping.[39] Notably, it was almost six months later, in his annual address to Congress, that President Jefferson formally notified Congress of the dispatch of these forces.[40] The record does not indicate that Congress felt in any way that this use of force without a declaration of war or congressional authorization was improper or that the delay in formal notification was inappropriate.[41]

2. The Bombardment of Greytown, Nicaragua

A second incident that ingrained the notion that the President could act in defense of the nation's interests also occurred fairly early in the life of the Republic. It involved the bombardment of Greytown, Nicaragua. On 1 May 1852, at San Juan del Norte (Greytown), the Mosquito government relinquished control of the town to a government

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[34] Turner, *supra* note 18, at 128-29.
[35] *Id*.
[36] STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS, & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW 379 (2d ed. 1997) (quoting Memorandum of the Attorney General on the Authority of the President to Use United States Military Forces for the Protection of Relief Efforts in Somalia, 13 Op. Off. Legal Counsel 8 (Dec. 4, 1992)). Those seeking a written record of Jefferson's thoughts regarding the decision to dispatch forces will be disappointed; apparently he purposefully put little in print. Likely this was purposeful as he was elected on a peace platform and would not have wanted to be on record should the venture have failed. *See* Sofka, *supra* note 8.
[37] Turner, *supra* note 18, at 129.
[38] *Id*. at 124.
[39] *Id*. at 129.
[40] *Id*. at 130.
[41] *Id*.

formed by local residents.[42] This new government came into friction with the Accessory Transit Company (Company), a business composed of U.S. citizens.[43] The government ordered the Company to remove some buildings, but the Company did not comply with the order.[44] The government then sent an armed group who destroyed the buildings.[45] The situation was exacerbated a few days later when one of the Company's superintendents was arrested.[46]

Difficulties between the new government and the Company continued through 1853.[47] On 16 May 1854, an armed band tried to arrest the captain of the Company's steamer on a charge of the murder of a native boatman.[48] The United States' minister to Central America attempted to intervene in the matter and was injured by a mob.[49] The *U.S.S. Cayne*, under the command of Captain (CPT) George H. Hollins, was dispatched to Greytown to demand reparations for the Company's destroyed property and the insult to the United States' diplomat.[50] The authorities at Greytown did not respond to Captain Hollins's demands; therefore, he issued notice that the city would be bombarded, and on 13 July 1854, he leveled the town.[51]

President Franklin Pierce defended the actions of CPT Hollins and issued the following statement regarding the incident and the government of Greytown:

> Not standing before the world in an attitude of organized political society, being neither competent to exercise the rights or discharge the obligations of a government, it was, in fact, a marauding establishment too dangerous to be disregarded and too guilty to pass unpunished, and yet incapable of being treated in any other way than as a piratical resort of outlaws or a camp of savages

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[42] 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 414-15 (1906).
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*

> depredating on emigrant trains or caravans and the frontier settlements of civilized states.[52]

Later in 1854, the government of Nicaragua, representing some of its nationals who lost property in the bombardment, made a demand for payment on the U.S. government.[53] The claim was denied, and in rather harsh diplomatic terms, the government of Nicaragua was told that those who suffered loss were on notice of the pending bombardment and that by staying in Greytown, the United States considered the Nicaraguans associates of the marauding local authorities, and, as such, no less culpable than the Greytown authorities.[54] Further, the Secretary of State castigated the Nicaraguan government for allowing a band of renegades to operate within its territory.[55] Reminding the Nicaraguans of their international duties, he stated,

> It would be a strange inconsistency for Nicaragua to regard the organization at San Juan as a hostile establishment in her territory and at the same time claim the right to clothe with her nationality its members . . . . I infer that the Government of Nicaragua . . . will not hesitate to acknowledge her responsibility to other states for the conduct of the people which she has permitted to occupy that part of her territory.[56]

B. The Anticipatory Use of Force in National Self-Defense

1. Grotius and the Use of Force in Anticipatory Self-Defense

When speaking of the use of force in anticipatory self-defense, the *Caroline* case is usually cited as the seminal case on point.[57] The doctrine, however, has an extensive international law basis that far predates the United States. In terms of modern war theory, Hugo Grotius

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[52] *Id.* at 416.
[53] *Id.* at 417-18 (citing Mr. Marcy, Sec'y of State, to Mr. Marcoleta, Nicaraguan min., Aug. 2, 1854, MS. notes to Cent. Am. I. 62).
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *See* discussion *infra* Part II.B.2.

wrote extensively on the matter during the seventeenth century.[58] By collecting the works of several ancient scholars, philosophers, statesmen, and warriors, he promulgated a legal theory for the justified reasons to initiate a war. Living during an era of significant armed conflict, "Grotius sought to stem the tide of a people's lack of restraint in going to war and prosecuting it with more cruelty and brutality than barbarous forces and invaders."[59] The value that his work has for the modern international law theorist is that "from World War II to the present, these solidarist concepts [just war theory and its different bases for the use of force] have been written into positive treaty law and enshrined in the Pact of Paris of 1928, which outlawed war, the Covenant of the League of Nations, and the Charter of the United Nations."[60]

Grotius concluded there were three justifiable causes of war: "defence, recovery of property, and punishment."[61] He focused extensively on the private right to war as his definition of war was defined by the era in which he lived:

> He conceived of war as armed conflict, including armed conflict between private persons . . . or more precisely, between independent powers at various levels, as well as armed conflict between states or nations, i.e., public war . . . . At the same time he understood war as having essentially the same function and structure as a lawsuit: as a remedy for violation of rights.[62]

From this perspective, Grotius discussed the rights of individual behavior and then built the justifications for a state to resort to the use of force. However, Grotius perceived these rights as being on the same continuum; thus, although modern civilization no longer recognizes private rights to engage in war, it is necessary to understand that in Grotius' jurisprudence, the private right to war informed the notion of,

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[58] Grotius was born in 1583, in the town of Delft, Holland. He was admitted to the bar at The Hague at age sixteen and served in various positions within government. He later escaped from prison and fled to France due to political persecution. KENNETH W. THOMPSON, FATHERS OF INTERNATIONAL THOUGHT: THE LEGACY OF POLITICAL THEORY 69-70 (1994).

[59] *Id*. at 71.

[60] *Id*.

[61] GROTIUS, *supra* note 6, at 171.

[62] A NORMATIVE APPROACH TO WAR: PEACE, WAR, AND JUSTICE IN HUGO GROTIUS 57 (Onuma Yasuaki, ed., 1993) [hereinafter PEACE, WAR, AND JUSTICE].

and acted as a springboard to, the public right of states to engage in war. Notably, once Grotius moved from the private to the public law sector of the continuum, he actually appeared to broaden the bases upon which a state may go to war and how a state may pursue military operations against its enemies.

Writing on the basic premise of the right of self-defense, Grotius remarked,

> If an attack by violence is made on one's person, endangering life, and no other means of escape is open, under such circumstances war is permissible . . . [a]s a consequence of the general acceptance of this principle we showed that in some cases a private war may be lawful. This right of self-defence . . . has its origin directly, and chiefly, in the fact that nature commits to each his own protection, not in the injustice or crime of the aggressor.[63]

Thus, Grotius' basis for the use of force in self-defense was founded in natural law.[64] This is significant because the era in which he lived was dominated by religious thought and ecclesiastical law.[65]

> Most of the wars Grotius sought to regulate by means of law were religious wars in which both sides were striving to achieve their respective aims in the name of God. Appeals to divine law were particularly useless in dealing with religious wars: thus there was no choice but to embark on the task of giving reason a status independent of divine will, removing natural law from theology.[66]

Turning to the anticipatory use of force in self-defense, Grotius articulated what would one day become the *Caroline* formula:

> The danger . . . must be immediate and imminent in point of time . . . . Those who accept fear of any sort as

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[63] GROTIUS, *supra* note 6, at 172.
[64] *Id*.
[65] *See generally* THOMPSON, *supra* note 58, at 72-74.
[66] PEACE, WAR, AND JUSTICE, *supra* note 62, at 28.

> justifying anticipatory slaying are themselves greatly deceived, and deceive others. Cicero said truly . . . that most wrongs have their origin in fear, since he who plans to do wrong to another fears that, if he does not accomplish his purpose, he may himself suffer harm.[67]

Thus, Grotius justified the anticipatory use of force to halt a pending attack, but drew the line at the use of force to prevent a possible attack. He simply was not ready to embrace a "might harm" standard:

> If a man is not planning an immediate attack, but it has been ascertained that he has formed a plot . . . I maintain that he cannot lawfully be killed, either if the danger can in any other way be avoided, or if it is not altogether certain that the danger cannot be otherwise avoided. Generally, in fact, the delay that will intervene affords opportunity to apply many remedies.[68]

Grotius' reasoning alters when he applies the general law principle to the behavior of a state:

> In private war, self-defence is generally the only consideration; but public powers have not only the right of self-defence but also the right to exact public punishment. Hence it is permissible for them to forestall an act of violence which is not immediate, but which seems to be threatening from a distance; not directly - for that . . . would work an injustice - but indirectly, by inflicting punishment for a wrong action commenced but not yet carried through.[69]

This is an important nuance, especially when judging the current Bush Doctrine, which authorizes the use of force preemptively against those who might harm the United States.[70] Grotius does not require the

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[67] GROTIUS, *supra* note 6, at 174.
[68] *Id.* at 174-75.
[69] *Id.* at 184.
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> America will act against such emerging threats before they are fully formed . . . 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

same degree of certainty for a state to act anticipatorily that he requires of a private individual to act anticipatorily. He does not wholly jettison the imminence standard—he still limits the amount of force and the means by which a state may lawfully act—but he clearly conceives of a lower threshold in attaining imminence, thereby justifying forceful action on the part of the target state. Grotius' rationale is not inconsistent. He was creating a normative jurisprudence for dealing with the bases for going to war.[71] His goal was to narrow those bases without negating the right altogether.[72]

It is necessary to first understand Grotius' context and motivation, because when applying his lessons to contemporary issues, failing to understand the background in which those principles were elucidated may result in faulty reasoning in a modern setting. Grotius considered the realities of his day when developing his legal theories; even so, current realities should inform the thinkers of the modern era. For example, Grotius couches the whole self-defense discussion in terms of a nation's "neighbor."[73] The context indicates that he speaks of bordering countries, where, if one nation builds a fortress along the border and there is no treaty between the nations prohibiting such an act, that act would not, by itself, give the other nation a right to invade.[74] Rather, the other nation would have to resort to building its own fortress as a means of defense.[75] What Grotius does not answer is what rights the potential victim has if the fortress is built in violation of a treaty. If it is, is there sufficient cause so that the potential victim may invade as an act of national self-defense? Would action in violation of a treaty provide enough certainty on which the other nation could use force? From a modern perspective, we must question whether this is really a viable standard in the context of transnational threats. For example, Grotius would not allow for wars of liberation of a subject people.[76] Today, the United States, as well as many other nations, would vociferously oppose

> reaches our borders . . . we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists . . . We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.

NSS, *supra* note 4, at cover letter.

[71] THOMPSON, *supra* note 58, at 71.

[72] *Id*.

[73] GROTIUS, *supra* note 6, at 550-51.

[74] *Id.*

[75] *Id.*

[76] *Id.*

that opinion. If then this principle is not adopted, what necessarily binds the United States to Grotius' reasoning with regard to preventive warfare?

Grotius further complicates the analysis by discussing and illustrating a methodology propagated by Polybius regarding "justifiable and persuasive" causes of war. The former are called "pretexts"; the latter are called "causes."[77] Wars lacking either pretext or cause are "wars of savages."[78] They are engagements of war for the mere sport of combat and a lust for danger.[79] Wars that have cause but lack pretext are "wars of robbers."[80] This is the Darwinian concept of the strong shall survive, usually by preying on the weak.[81] But Grotius also finds another unjust cause for war—those wars that may appear on the surface to be justified but upon deeper inspection prove to have an "inadequate" basis.[82] One such basis is "fear of something uncertain"[83] or resorting to war because one is afraid someone else might harm them. This underscores Grotius' thinking that use of force by a state against a potential enemy is not unlawful, so long as the force used is short of war-making.

To summarize Grotius' reasoning, self-defense requires necessity, and necessity means the danger is imminent.[84] Danger is not imminent unless the potential victim is certain of both an attack and the assailant's ability to carry out the attack,[85] and "[t]he degree of certainty required is that which is accepted in morals."[86] Grotius never states whose morals apply to this analysis, so one can only assume that he speaks of that which is generally morally acceptable on an international scale at the time of the pending attack. Grotius does consider the opinion of Aristotle, who noted that moral questions cannot be relegated to a mathematical equation. The determination as to the certainty of an attack hinges largely on the judgment of the leader exercising military authority.[87] Hence, one could argue that Grotius envisioned a sliding

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[77] *Id.* at 546.
[78] *Id.* at 547-48.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id*. at 549.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 557-58.

scale on which the degree of certainty adjusts based on the capabilities of the attacker and the mores of the times. This pliable rationale is not uncommon for Grotius: Professor Yasuaki notes that "Grotius consistently appeals to utility when he encounters difficult issues of critical importance."[88] In other words, even the philosopher must ultimately formulate pragmatic solutions to intractable problems.

Arguably, the decision to use preemptive force is largely a matter of discretion. Grotius did offer some concrete advice in this area: "Where one really must do one of two things, and yet is in doubt whether either is right . . . [he] may choose that which appears to him to be less wrong. For always, when a choice cannot be avoided, the lesser evil assumes the aspect of the good."[89] This begs the question, "What is the lesser evil?" Grotius draws from a jurisprudential philosophy that calculates the lesser evil to be that course of action which does not lead to irreversible results. For example, once inflicted, capital punishment cannot be reversed.[90] Applying this analysis to the question of whether to commit to war in anticipatory self-defense, Grotius would, where there is doubt, side with inaction, for once soldiers are committed to the fight, people will die and that cannot be undone, especially a problem if it is later determined that there was no actual threat.[91] Quoting Cicero, "Since there are two methods of settling a difference, the one by argument, the other by force, and since the former is the characteristic of men, the latter of beasts, we should have recourse to the second only when it is not permitted to use the first."[92] Finally, Grotius cites a caution from Euripides that war is a risky business, and, once started, success is not guaranteed:

> Whenever men proceed to vote on war
> No one reflects that death hangs over him,
> But each destruction for the other plans;
> Had we, when casting votes, with our own eyes
> The funerals beheld, the funerals as we voted,
> Would not have perished war-frenzied Greece.[93]

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[88] PEACE, WAR, AND JUSTICE, *supra* note 62, at 7.
[89] GROTIUS, *supra* note 6, at 557-58.
[90] *Id.* at 560-64.
[91] *Id.* Grotius does offer three alternative methods to resolve such a conflict: (1) call a conference between the parties; (2) seek arbitration; or (3) draw lots. *Id.*
[92] *Id.* at 560 (citing *On Duties*, I [xi. 34]).
[93] *Id.* at 571 (citing *Suppliants*, 481 ff).

So what does Grotius contribute to the question of whether lawlessness in a foreign state may be a basis for military intervention? First, he advocates a principled approach to war-making. Grotius' analytical model is historically tested to produce, to some degree of certainty, a justifiable basis for the resort to arms. Though Just War Theory may no longer be the paradigm by which nations rationalize the use of force, there is still a call for moral legitimacy whenever armed force is used.[94] Anyone answering affirmatively the question posed by this article should likewise elucidate a morally-principled basis for that decision. Second, Grotius conceded that the decision to resort to arms ultimately remains a matter of discretion. Critics of those who choose to intervene with force must do more than criticize the decision to employ arms. There will always be the counter-argument against the use of force, as Grotius proves in his own extensive writings. The critics must demonstrate why a decision to employ arms is an abuse of that discretion, otherwise, the one with the power to commit forces is acting within his legal authority. Third, the exercise of that discretion should be informed both by the collective wisdom of the ages regarding the use of force as well as by the facts and circumstances of the era in which one lives. The rules do not operate in a vacuum, and neither should decision-makers.

2. The Caroline Case

> *It was in the* Caroline *case that self-defence was changed from a political excuse to a legal doctrine.*[95]

In 1837, a rebellion occurred in Canada.[96] Several of the rebel forces fled to the United States and later forcibly occupied Navy Island, a territory belonging to the British and sitting in the Niagara River.[97] The rebel encampment grew until the forces stationed there numbered approximately 1,000 men.[98] The rebellion had such strong support among the American populace living along the United States–Canadian

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[94] *Id.*
[95] R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82 (1938).
[96] 2 THE PAPERS OF DANIEL WEBSTER, SPEECHES AND WRITINGS 1834-1852, at 399 (Charles M. Wiltse, ed., 1988) [hereinafter THE PAPERS OF DANIEL WEBSTER].
[97] *Id*.
[98] MOORE, *supra* note 42, at 409.

border that the U.S. government was unable to prevent its citizens from aiding in the rebels' cause.[99]

The steamer *Caroline* was used to ferry men, arms, and supplies for the rebels on Navy Island.[100] The British response was to mount an expedition to destroy the *Caroline*.[101] On 29 December 1837, they found the boat at anchor on the U.S. side of the Niagara River.[102] The British forces crossed the international boundary, commandeered the vessel, set it on fire, and sent it over Niagara Falls.[103]

The British claimed the raid was an act of national self-defense.[104] Specifically, the British Law Officers opined that Britain was justified in its actions because "it was absolutely necessary as a measure of precaution for the future and not as a measure of retaliation for the past. What had been done previously is only important as affording irresistible evidence of what would occur afterwards."[105]

On 6 February 1838, the British transmitted a declaration justifying their destruction of the *Caroline*.[106] They claimed to have destroyed it because its "piratical character" had been established and that the United States was not able to enforce its laws along the border in question; hence a staging base for the rebels was created that necessitated the destruction of the *Caroline* in order to defend Canada.[107]

Secretary of State Daniel Webster communicated to Lord Ashburton of Britain what has become the hallmark standard for the anticipatory use of force in self-defense. He stated that such a basis only applied in cases where its necessity was "instant, overwhelming, and leaving no choice of means, and no moment of deliberation."[108] Thus, the ancient customary law as stated by Grotius was brought forward and cemented in American law. If, however, that is true, then the whole of his ancient wisdom should be brought forward as well. This should include those parts of the

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[99] Jennings, *supra* note 95, at 82.
[100] THE PAPERS OF DANIEL WEBSTER, *supra* note 96, at 361.
[101] *Id*. at 399-401.
[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] Jennings, *supra* note 95, at 87 (quoting opinion signed by J. Dodson, I. Campbell, R. M. Wolfe, F. O. 83. 2207).
[106] MOORE, *supra* note 42, at 410.
[107] *Id.*
[108] *Id*. at 412 (citing 6 WEBSTER'S WORKS 301-02 (1842)).

jurisprudence that admitted these matters were in large part an act within the discretion of the relevant sovereign, as well as needing to be informed by the facts, circumstances, and mores of the times in which the rules are to be applied. In the current era that would include the means and methods of those individuals who would use the territory of a failed state as a cloak for their preparation of terrorist ambitions.

C. The UN Charter and Its Impact on the Customary Law Analysis of National Self-Defense and the Anticipatory Use of Force

On 25 June 1945, the UN Charter was voted into existence.[109] Central to its purpose was the notion that nations would not resort to force to achieve their foreign policy objectives.[110] In fact, the Charter's preamble specifically cites the previous two world wars as the impetus for the world's nations to come to some agreement so that such tragedies would no longer occur.[111] This "No War" stance was actually the product of a "No War" evolution occurring throughout the early twentieth century. The first effort to attain that goal was the League of Nations as formulated and espoused by President Woodrow Wilson.[112] For several reasons, the League of Nations failed, but on its heels came a treaty that changed the perspective of how many nations, including the United States, would approach war: "The decisive turning point in the development away from the freedom to wage war and towards a universal and general prohibition of war was constituted by the Briand-Kellogg Pact, signed in Paris on 27 August 1928."[113]

The UN Charter was next in the war renunciation lineage. It was an advance on the League of Nations in that member countries "renounced the right not only of resort to war and to measures of force short of war but also of threats of war and acts falling short of it."[114] It also created a worldwide collective security arrangement that was, at least in theory, superior so as to make unilateral resort to arms unnecessary. As Mr.

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[109] STEPHEN C. SCHLESINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS 252-54 (2003).
[110] 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE, DISPUTES, WAR, AND NEUTRALITY 97 (H. Lauterpacht ed., 7th ed. 1952).
[111] U.N. Charter pmbl.
[112] SCHLESINGER, *supra* note 109, at 19-32.
[113] 1 BRUNO SIMMA, THE CHARTER OF THE UNITED NATIONS, A COMMENTARY 116 (2d ed. 2002).
[114] OPPENHEIM, *supra* note 110, at 97.

Stephen Schlesinger notes, "Having endured the most calamitous war in human history, this generation extracted from the human propensity for devastation the right lesson for our time– the need for world organization to oversee and guide state craft toward a peaceful future."[115] Notably, the United States was perceived as having a unique role in maintaining this peace. Senator Thomas Connally, one of the United States' representatives to the UN Conference, said while speaking to the United States Senate, "The United States has a peculiar responsibility. It has a lofty duty to perform in leading the peoples of the earth away from the sword."[116]

1. The UN Charter and the Use of Force

The drafters of the Charter did not completely forsake the use of force. Written into its text is distinct language authorizing force and recognizing the need for self-defense. For example, Article 1 states that the purpose of the UN is to both prevent and *remove* threats to peace and to *suppress* aggression.[117] A threat to peace includes acts of force, "an attitude of unneighborliness and lack of accommodation inimical to the maintenance of international peace and security," violations of international law that do not include use of force, or non-compliance with recommendations from either the Security Council or General Assembly.[118] Logically, removal and suppression may require the use of force; otherwise they could easily be thwarted. Article 42 is an explicit grant of authority to use force to "maintain or restore international peace and security" should measures short of armed intervention prove ineffective.[119] Article 51 recognizes that a nation's right of self-defense survived enactment of the Charter.[120] Thus, the Charter both states and implies that there are times when force may be necessary. Ideally, the UN acts as a collective security arrangement against those threats requiring a unified opposing force with its members rapidly surging to the defense of those nations threatened by aggression. Over time, idealism has given way to realism. The unmistakable truth is that the UN (a collection of wholly diverse nations with several irreconcilable differences) is not "united" at all. From its inception, significant geo-

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[115] SCHLESINGER, *supra* note 109, at xvii.
[116] *Id*. at 81.
[117] U.N. Charter art. 1(1) (emphasis added).
[118] OPPENHEIM, *supra* note 110, at 163.
[119] U.N. Charter art. 42.
[120] *Id.* art. 51.

political forces have virtually paralyzed it from ever offering a true and timely defense of victim states.

a. Article 2

Article 2 goes directly to the heart of the prohibition on the use of force. Article 2(3) states, "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." This subparagraph places an affirmative obligation on states to settle disputes peacefully; however, there is some tempering of this language in its interpretation. This obligation is "to strive for the resolution of a dispute existing between [states] only to the best of their abilities. There is no obligation to reach a specific result."[121]

Article 2(4) says that all UN members agree to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state." The obligation not to use force or the threat of force is not limited by the words "against the territorial integrity or political independence of any State."[122]

> A State would be acting in breach of its obligations . . . if it were to invade or commit an act of force within the territory of another State . . . without the intention of interfering permanently with the territorial integrity of that State. The prohibition of paragraph 4 is absolute except with regard to the use of force in fulfillment of the obligations to give effect to the Charter or in pursuance of action in self-defense consistently (sic) with the provisions of Article 51.[123]

b. Article 51

Article 51 states, "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

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[121] SIMMA, *supra* note 113, at 106.
[122] OPPENHEIM, *supra* note 110, at 154.
[123] *Id.*

Council has taken measures necessary to maintain international peace and security."[124] Article 51 traces its genesis to a compromise made to accommodate both the Latin American states and the Soviet Union.[125] With the pressure of communism growing in several Latin American countries, many of these nations wanted the latitude to create regional security arrangements to fend off threats.[126] After significant negotiations, which almost halted the UN Conference, Article 51 was crafted so as to recognize that each nation retained the right of self-defense, that the right of self-defense was inherent, and that the right could be exercised either individually or collectively.[127] Further, Article 52 was added to promote regional arrangements for the settlement of disputes.[128] In spite of this seemingly clear purpose, this article of the UN Charter has engendered some of the most heated debate regarding the use of force.

2. The Impact of the UN Charter on the Customary Law Regarding the Use of Force, the Right of Self-Defense, and the Anticipatory Use of Force in Self-Defense

In view of the significance of the Charter, the question that naturally follows is how the Charter has affected the customary international law regarding the use of force that was already in place. There seem to be two major schools of thought dividing this issue. The first school sees the Black Letter Law as changing the customary rules by which nations have historically conducted themselves. This school views the Charter as requiring nations to act differently than they had prior to its enactment, sometimes even to their detriment. This school is often technically correct, but wrong in practice, as following its rationale can lead to absurd or disastrous results.

The second school of thought sees the positive enactments as a separate body of law that did not necessarily nullify the concept of state practice under customary law. The rationale of the second school often appears self-serving and, arguably, undermines the Charter's system of

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[124] U.N. Charter art. 51.
[125] SCHLESINGER, *supra* note 109, at 175-92.
[126] *See generally id.* (noting that a few years after the Charter was passed their fears were substantiated when the Soviet Union invaded or assisted in propping up several communist governments in nations around the world.)
[127] *Id.*
[128] *Id.* at 192.

collective security. That said, this school of thought has been effective in countering threats when the UN collective security arrangement was paralyzed or ineffective.

Interestingly, both schools of thought lead to a breakdown in the rule of law, so neither truly has the moral high ground. The former produces contempt for the law by asserting procedure over substance. Victims are often left without meaningful relief, and worse, acts of self-defense are condemned while the initial acts of aggression are not. The second school of thought is not much better. It leads to disrespect for the law by essentially rationalizing virtually every use of force. As such, states using force become a standard unto themselves and the ends are used to justify the means.

a. Impact on Article 2

The initial prohibition on the use of, or threat of use of, force demonstrates the uneasy juxtaposition between the ban on the unilateral use of force and the customary right to use force when a nation perceives it is necessary. The legislative history of Article 2(4)'s prohibition on the use or threat of use of force indicates that small states feared armed intervention by larger states.[129] "Accordingly, an interpretation of Article 2(4) indicates a presumption against unilateral military measures underlying the United Nations Charter as a whole."[130] Some now even consider this prohibition to be customary international law.[131] That presumption, however, is debatable in light of Article 51's explicit recognition of the right to use force in individual self-defense. Also, it seems implausible that this prohibition has risen to the level of customary international law when state practice, since the inception of the Charter, has been quite the opposite.[132] Something cannot be considered customary international law if, in fact, states have not customarily practiced in that manner. Also contradicting this notion is

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[129] Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321, 344-45 (1998) (referencing IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 267 (1963) [hereinafter BROWNLIE]).

[130] *Id.* at 344–45.

[131] SIMMA, *supra* note 113, at 66.

[132] Michael J. Glennon, *Military Action Against Terrorists under International Law: The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 540 (Spring 2002).

the observation that Article 2(4)'s prohibition sits within the greater context of the Charter's collective security arrangement as a means to control the use of force in order to coerce a state's behavior.[133] "Article 2(4) was never an independent ethical imperative of pacifism. . . . It is in the context of the Organization envisaged by the Charter and not as a moral postulate that Article 2(4) acquired its cogency."[134] Thus, attributing meaning to it that was never intended in the first place is disingenuous to the Charter itself.

An idealistic notion of the prohibition on the use of force can lead to absurd results. For example, this mechanical application of Article 2(4) has been argued by some as prohibiting armed force for the purpose of humanitarian intervention,[135] as well as armed intervention for the purpose of noncombatant evacuation.[136] Even if this view is technically correct,[137] it demonstrates the irrationality of a strict application of the Charter's prohibition on the use of force. It essentially creates a legal regime that places civilians at the mercy of rogue states while tying the hands of governments that are capable and willing to intervene. What government can be said to adequately represent the interests of its citizens if it refuses to use force to evacuate them from a dangerous area? Has not such a government forsaken part of its very purpose for existence?[138] If this is indeed the correct interpretation of Article 2(4), did those within the United States who ratified the Charter knowingly cede the United States' sovereignty in this matter? Can the United States, or any other government, accept such an interpretation?

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[133] W. Michael Reisman, *Comment: Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (July 1984).

[134] *Id*.

[135] SIMMA, *supra* note 113, at 130-32.

[136] *Id*. at 799.

> It can be said in summary that State practice is characterized by considerable reluctance to qualify rescue operations involving the use of force as in any case unlawful. This applies at least to the attitude of third States, as well as that of the UN organs, which are thereby possibly giving rise to a corresponding rule of customary international law *in statu nascendi*. As the law stands at present, however, no rule of international law allows rescue operations for the protection of a State's own nationals.

Id.

[137] The author finds it difficult to believe that Senator Connally, Senator Vandenberg, or Secretary of State Stettinius would have agreed to such an interpretation.

[138] *See supra* text accompanying note 7.

The technocrats understand this great dilemma and seek to resolve it by moving the focal point away from the Charter and toward customary international law. For example, Mr. Simma states that if the Security Council fails to intervene in a crisis like a humanitarian disaster or noncombatant evacuation, then a customary international rule of law permitting intervention might emerge as the norm.[139] With regard to the threat of using force, he notes, "State practice reveals a relatively high degree of tolerance towards mere threats of force, one decisive reason for which seems to be that some of the most obvious threats of force are legitimized by the right of self-defense embodied in Article 51 of the UN Charter."[140] He also states, "Threats of force are often tolerated of State practice [because] they play the role of a ritualized substitute for the use of force and, as such, may help to speed up the peaceful settlement of disputes."[141] Thus, the idealists in the first school of thought end up with the realists in the second school of thought. The end is the same; it is the road there that is different. Interestingly, by permitting customary international law to circumvent the Charter to meet a greater moral aim, the road of the technocrats unwittingly erodes the necessity of the very UN body they seek to preserve.

b. Impact on Article 51

Two propositions seem well settled: first, the right of self-defense survived the enactment of the Charter; and second, a victim state's right of self-defense will, at some point, allow the use of armed force against a third party assisting an aggressor or the exercise of force on the territory of a third party who is failing to stop an aggressor.[142] A third debatable

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[139] SIMMA, *supra* note 113, at 130-32. Arguably the intervention into a failed state, as a corollary to Mr. Simma's rationale, would likewise be lawful.

[140] *Id*. at 124.

[141] *Id*.

[142] Mr. Simma writes:

> It is compatible with Art. 51 and the laws of neutrality when a warring State fights hostile armed forces undertaking an armed attack from neutral territory on the territory of the neutral State, provided that the State concerned is either unwilling or unable to curb the ongoing violation of its neutrality.

Id. at 799-800.

Further, he writes,

proposition is that the language of Article 51 is broad enough to allow for self-defense against non-state actors.[143]

> A special situation arises, (sic) if a State is not reluctant but incapable of impeding acts of terrorism committed by making use if its territory. Although such terrorist acts are not attributable to that State, the State victim of the acts is not precluded from reacting by military means against the terrorists within the territory of the other State. Otherwise, a so-called failed State would turn out to be a safe haven for terrorists, certainly not what Arts. 2(4) and 51 of the Charter are aiming at.

Id. at 802.

Mr. Michael Glennon echoes this sentiment,

> If a host state is unable or unwilling to curtail harmful private conduct when that conduct originates from within the host territory, it makes no sense to insist that the victim state remain indifferent to such conduct, effectively sacrificing the integrity of its own territorial sovereignty for that of the host state. Similarly, it does not make sense to permit defensive force against the wrongdoer but not against the wrongdoer's host if the wrongdoer's capability to inflict harm depends upon the indifference of a host government that can curtail that harm by simply withdrawing its hospitality. Acts of omission in such circumstances shade into acts of commission, and aggrieved states should not be faulted for treating them the same.

Glennon, *supra* note 132, at 550.

Although Mr. Carsten Stahn agrees, he would impose one intermediate step: where terrorists operate from the territory of a state that is not participating in the terrorist acts, he would require the injured state to ask the other state to intervene. If that state proved incapable or unwilling to act, then the injured state could take military action in self-defense. Carsten Stahn, *International Law Under Fire: Terrorist Acts as Armed Attacks: The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35, 47 (Summer/Fall 2003).

He also sees this power extending to the interdiction of terrorists:

> The unspoken premise of the September 11 attacks is that terrorist groups shall not receive an 'unwitting shield' from the territorial integrity of a state which is unable or unwilling to put an end to terrorist activity giving rise to an armed attack. The normative corollary of this hypothesis is the emergence of the principle, which posits that the right to territorial integrity must, in some instances, yield to the exercise of another state's right to protect itself and its citizens under the rubric of self-defense.

Stahn, *supra*, at 44.

From that point on, it seems the doctrine of self-defense is an even more contentious issue than the proscription on the use of force in Article 2(4). The sticking point in the debate regarding the ambit of self-defense is that this right was not just another common, ordinary right created by positive law; rather, it was recognized as the "inherent" right of self-defense.[144] This specifically refers to the right as it existed prior to enactment of the Charter, which inevitably sweeps in significant customary international law that predates the Charter and all the discordant opinions that come with it. Thus, the real debate does not center on whether the right exists, but rather when that right emerges and what role the UN, and more specifically the Security Council, plays under the Charter's collective security scheme. This debate has only intensified as terrorists either use or collude with failed states in order to train for and plan attacks, and to evade capture.

On one side of the issue there are those who see the application of force under Article 51 as embedded within the "broader context of collective security" envisioned by the UN Charter, and that the right to use force in self-defense was subordinated to the collective security arrangement created by the Charter. [145] On the other side, there are those who see any derogation of what was customarily considered the "inherent" right of self-defense as nullifying the inherence of that defense, thereby making it little more than a creature of statute.[146] This point of view argues that this historical right was never negotiated away and that it remains at the discretion of the individual nation to determine when it becomes necessary.[147]

The latter opinion is more persuasive. Consider the words of former Secretary of State Frank Kellogg who stated, after concluding the 1928 Kellogg-Briand Treaty that renounced war as an instrument of national policy, that the right to self-defense "is inherent in every sovereign state and implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense."[148] It seems incomprehensible

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[143] Stahn, *supra* note 142, at 36.
[144] Glennon, *supra* note 132, at 554-55.
[145] Stahn, *supra* note 142, at 38-39.
[146] Glennon, *supra* note 132, at 554-55.
[147] *See generally id.* at 539.
[148] *Id.* at 539 n.51 (citing Frank B. Kellogg, Address Before the American Society of International Law (Apr. 28, 1928), *in 22* PROC. AM. SOC'Y INT'L L. 141, 143 (1928)).

that the United States' representatives to the UN Charter Conference, let alone the Congress, would have ever negotiated away or agreed to a treaty that severed this most fundamental sovereign right.

Enveloped within this debate as to when a nation may exercise its right of self-defense is the matter of the anticipatory or preemptive use of force. A plain reading of the Charter's language seems to argue that there is no right to use force in anticipation of attack.

> If Article 51 is . . . read in connection with Article 2(4), the stunning conclusion is . . . that any State affected by another State's unlawful use of force not reaching the threshold of "armed attack", is bound, if not exactly to endure the violation, then at least to respond only by means falling short of the use or threat of force, which are thus totally ineffective. This at first sight unacceptable result is undoubtedly intended by the Charter, since the unilateral use of force is meant to be excluded as far as possible. Until an armed attack occurs, States are expected to renounce forcible self-defence. Because of the pre-eminent position of the S[ecurity] C[ouncil] within the Charter system of collective security, the affected State can . . . merely call upon the S[ecurity] C[ouncil] to qualify the violations of Art. 2(4) as constituting a breach of the peace and to decide on measures pursuant to Arts. 41 or 42.[149]

Going even further,

> An anticipatory right to self-defence would be contrary to the wording of Art. 51 . . . as well as to its object and purpose, which is to cut to a minimum the unilateral use of force in international relations. Since the (alleged) imminence of an attack cannot usually be assessed by means of objective criteria, any decision on this point would necessarily have to be left to the discretion of the State concerned. The manifest risk of abuse of that discretion which thus emerges would *de facto* undermine the restriction to one particular case of the right to self-defence. Therefore, Art 51 has to be interpreted

[149] SIMMA, *supra* note 113, at 790.

> narrowly as containing a prohibition of anticipatory self-defence. Self-defence is thus permissible only after the armed attack has already been launched.[150]

There is some historical substantiation for this point of view, or at least a position that is close to it. While crafting Article 51, the British wanted a broader basis for action than merely "armed attack."[151] "[Secretary of State] Stettinius refused to permit this, contending that a broader phraseology would allow states too great a leeway, including the right of preventive actions, which would legally wreck the organization."[152]

Mr. Simma argues that "this interpretation [of Article 51] corresponds to the predominant State practice, as a general right to anticipatory self-defence has never been invoked under the UN Charter."[153]

> At the time when the UN Charter entered into force the traditional right of self-defence covered not only the case of armed attack, but also many areas of self-help. As a rule of customary law, that right could only have been replaced or amended if, as from a certain moment in time, its voidness or modified existence had been commonly assumed, so that a new rule of law could emerge, based upon the uniform practice of States. Such a development, however, cannot be claimed to have occurred with regard to the right of self-defence. Though the founding members of the UN had at first waived the broad concept of self-defence by adopting Art. 51, subsequent State practice did not confirm that position in such a way as to amount to a uniform pattern of behavior.[154]

Mr. Simma then concludes that State practice does not change Article 51's restrictive use of self-defense; rather, it largely ignores it.[155] To that extent, State practice has not changed the law of Article 51, and the more

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[150] *Id*. at 803-04.
[151] SCHLESINGER, *supra* note 109, at 185.
[152] *Id*.
[153] SIMMA, *supra* note 113, at 803-04.
[154] *Id*. at 805-06.
[155] *Id*.

restrictive view of self-defense is actually the legal test for self-defense actions.[156] This appears to contradict Mr. Simma's early opinion that State practice already conformed with a restrictive interpretation of Article 51.

Professor Michael J. Glennon strongly disagrees with this restrictive view of the right of self-defense. He notes that Article 51 specifically refers to the inherent right of self-defense, and that it would not be impaired by the Charter: "The implication is not only that the right of self-defense existed prior to the ratification of the U.N. Charter, but also that an inherent right continues to exist—unimpaired—after ratification."[157] He then notes that Article 51 tries to limit this "inherent right" to instances where armed attack has already occurred and only to the extent the Security Council has not intervened.[158] He argues that this effectively nullifies the "inherent" character of the right of self-defense, turning it into a creature of positive law.[159] This, Glennon contends, does not reflect state practice and is unrealistic.[160]

For example, he notes that by maintaining a "launch-on-warning" posture during the Cold War, the United States essentially rejected the notion of no anticipatory use of force in self-defense.[161] He also notes that such a position would have required the United States to wait until the Japanese actually dropped bombs on Pearl Harbor before using force against Japan.[162] As a sad corollary to his analogies, American policy-making, at least with respect to al Qaeda, was apparently so timid that it required Al Qaeda flying airplanes into buildings before the United States took significant, forceful action to eliminate them and their Taliban host.

Common sense would likewise seem to argue for retention of the inherent right to act anticipatorily. As with Article 2, a mechanical application of Article 51 could lead to absurd results. If a victim state could not legally use force in defense until after it was attacked, then an aggressor state could essentially do everything necessary to launch an

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156 *Id*.
157 Glennon, *supra* note 132, at 554-55.
158 *Id*.
159 *Id*. Mr. Glennon notes that the French version actually uses the words "*droit naturel*," which implies a form of natural law that supersedes human law. *Id.*
160 *Id*.
161 *Id*. at 552.
162 *Id*.

aggressive war, and the victim state could do little more than hope it had adequately prepared for the onslaught. This is an enormous risk that would likely only embolden aggressors, as they would technically not be in violation of the prohibition on the use of force until after they had launched an attack. Once having done so, it would be difficult to dislodge them from the territorial gains they had seized or from the concessions they had wrung from their victim. Moreover, the general ineptitude with which the UN has dealt with these situations does not bode well that those suffering harm will receive timely and effective redress.

c. Reconciling the Two Viewpoints

At the core of the debate over Articles 2 and 51 is the ever-present struggle between idealism and realism. On one side are those who wish nations *would* forsake armed force as a means of doing business, and on the other side are those who wish nations *could* forsake armed force as a means of doing business. Is there any resolution to this quandary?

Underlying this dilemma is the problem that:

> [t]he existence of an effective system for the peaceful settlement of disputes is one of the main preconditions for a prohibition on war or the use of force to be sufficiently complied with in practice. . . . a significant reason why the prohibition of force is still not satisfactorily heeded is exactly the fact that current international law still lacks a comprehensive and effective system of pacific dispute settlement.[163]

As a practical matter, that "comprehensive and effective system" is a world government, complete with those attributes of government that make it effective (e.g., law enforcement, military assets, independent courts of law with compulsory process, etc.). As long as nations remain sovereign, and as long as sovereign nations remain the mechanism for enforcing the rule of law in the international arena, there will be no ultimate conclusion to this question. And since there generally is an aversion to true world government, then the rules binding states and the

[163] SIMMA, *supra* note 113, at 68.

interpretation of those rules must preserve the latitude necessary for states to act, while ensuring some means of accountability.[164]

One possible solution is found in the rules regarding treaty interpretation: "Under the systematic method of interpretation, the meaning of the norm is ascertained by comparison with other norms set forth in the treaty and by referencing the entire structure of the treaty."[165] Likewise, "When two or more possible interpretations conflict[,] the one that best serves the recognizable purposes of the treaty prevails."[166] This methodology reconciles varying points of view by discovering a rule that serves the intent of the Charter while remaining true to the text as written. Technical adherence to the letter of the law fails to meet the Charter's intent if the result is inaction, defeat, and victimization. Concurrently, overgeneralization that ignores the limits on the use of force is inconsistent with the text of the Charter and defeats the aim of reducing the use of force as a foreign policy tool.

Professor W. Michael Reisman voices an opinion on the use of force that reflects this kind of thinking. He writes,

> A sine qua non for any action . . . is the maintenance of minimum order in a precarious international system. Will a particular use of force enhance or undermine world order? When this requirement is met, attention may be directed to the fundamental principle of political legitimacy in contemporary international politic: the enhancement of the ongoing right of peoples to determine their own political destinies. That . . . point . . . is the main purpose of contemporary international law: Article 2(4) is the means.[167]

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[164] Professor Reisman notes that the realities of world politics has prevented the collective security arrangements as envisioned in the Charter from truly coming into force. Hence force has often been used and often used unilaterally. "The challenge for contemporary lawyers is not to engage in automatic indiscriminate denunciations of unilateral resorts to coercion by states as violations of Article 2(4). They must begin to develop a set of criteria for appraising the lawfulness of unilateral resorts to coercion." Reisman, *supra* note 133, at 643.

[165] Nowrot & Schabacker, *supra* note 129, at 341(citing GEORG RESS, INTERPRETATION IN THE CHARTER OF THE UNITED NATIONS—A COMMENTARY 25 (Bruno Simma et al., eds., 1994)).

[166] *Id*.

[167] Reisman, *supra* note 133, at 643.

He sets out two questions with regard to the use of force, which are designed to meet the letter of the Charter while ensuring fulfillment of its intent: (1) does the use of force maintain the minimum necessary world order; and (2) does the use of force enhance the right of self-determination of the affected people?[168]

He reiterates those principles:

> Each application of Article 2(4) must enhance opportunities for ongoing self-determination. [Some interventions] may serve, in terms of aggregate consequences, to increase the probability of the free choice of peoples about their government and political structure. . . . It is important to remember that norms are instruments devised by human beings to precipitate desired social consequences. One should not seek point-for-point conformity to a rule without constant regard for the policy or principle that animated its prescription, and without appropriate regard for the factual constellation in the minds of the drafters.[169]

The informed rule regarding the use of force under Article 2(4) seeks its norm in context of the reason for creating the UN. That context, as previously stated, was to avoid the human catastrophe of the previous world wars. It was not necessarily an abdication of the right to use force, unilaterally or collectively, when necessitated by world events.

Professor Reisman concludes:

> Coercion should not be glorified, but it is naïve and indeed subversive of public order to insist that it never be used, for coercion is a ubiquitous feature of all social life and a characteristic and indispensable component of law. The critical question . . . is not whether coercion has been applied, but whether it has been applied in support of or against community order and basic policies, and whether it has been applied in ways whose

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[168] *Id.*
[169] *Id*. at 643-44.

> net consequences include increased congruence with community goals and minimum order.[170]

Reisman's charge to international lawyers is "not to engage in automatic indiscriminate denunciations of unilateral resorts to coercion by states as violations of Article 2(4). [But rather] develop a set of criteria for appraising the lawfulness of unilateral resorts to coercion."[171]

Another possible option for resolving the quandary is that espoused by Mr. Michael Glennon. He takes a "let's get real" approach to the whole matter. He accepts that the Charter's use-of-force provisions have never corresponded with state practice, and that there really is no resolution between the two.[172] By way of example, Mr. Glennon notes that 126 of the UN's 189 members have been involved in some type of interstate conflict since the passage of the Charter.[173] Regardless of what these nations labeled their specific intervention, state practice has been to use force where it was deemed necessary to accomplish the foreign policy objective.[174] In essence, Mr. Glennon asks why international law continues to try to fit a square peg into a round hole. "The reality is that Article 51 is grounded upon premises that neither accurately describe nor realistically prescribe state behavior."[175]

Mr. Glennon concludes that a mechanistic application of the Charter's use of force provisions cannot guide responsible policy-making.[176] "No rules will work that do not reflect underlying geopolitical realities. The use-of-force regime set out in the UN Charter failed because the Charter sought to impose rules that are out-of-sync with the way states actually behave."[177]

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[170] *Id*. at 645.
[171] *Id*. at 643.
[172] *See generally* Glennon, *supra* note 132, at 557.
[173] *Id*. at 540.
[174] *Id*.
[175] *Id*. at 549-50.
[176] *Id*.
[177] *Id*.

III. "Lawlessness:" The New Frontier of Intervention

Can lawlessness truly pose an imminent threat? This question must be answered affirmatively to justify the use of anticipatory force in self-defense. The answer should be that lawlessness *alone* does not create a basis for armed intervention. However, a state of lawlessness does have the potential to rise to the level of imminent armed aggression, and at that point, the answer would change to yes.

Although aggression has been historically difficult to define, an attempt was made in the 1974 UN General Assembly Resolution on Aggression. Though the resolution is non-binding, it demonstrates some common understandings within the world community. Of particular importance within this article is how the resolution treats blockades. Aggression includes "[t]he blockage of the ports or coasts of a State by the armed forces of another State."[178] At least if maintained effectively, the blockade is also to be considered "an armed attack."[179] Thus, a blockade can start out as mere aggression and become an armed attack, when in actuality nothing has changed. The behavior of the aggressor state is the same; the difference is the *effect.* At the moment a blockade has been "maintained effectively," it becomes an armed attack.[180] Using a similar rationale, it is possible that a state of lawlessness within a nation has become aggression arising to the level of imminent armed attack if that failed state is supporting terrorism or proves incapable of preventing terrorists from using its territory. The action of the target state is the same—lawlessness. What has altered is its effect—territory used by terrorists or other armed groups to plan and execute missions against other nations, and that effect legitimates an armed response in anticipatory self-defense.[181] Although the measure of imminence is never precise, it seems only logical that the United States may act early to prevent greater harm both to itself, its allies, and the powerless peoples who are directly affected by lawlessness.[182] The descent into the abyss

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[178] G.A. Res. 3314, 29th Sess., U.N. Doc. A/Res/3314 (XXIX) (1974).
[179] *Id.*
[180] *Id.*
[181] SIMMA, *supra* note 113, at 797.
[182] It is not that far from the reasoning justifying humanitarian intervention. To that end the four-part test crafted by the International Commission of Jurists to determine the legality of unilateral, humanitarian intervention may be of some benefit in determining when a situation mandates intervention for self-defense purposes:

1. "Manifest guilt of the target government;

of lawlessness necessarily will have devastating repercussions on the security of the United States and its interests, both at home and abroad, justifying this anticipatory action.

There is now a necessity to consider lawlessness as aggressive behavior that may require the anticipatory use of force. Lawlessness creates a breeding ground for terrorists and gives them maneuver room to plan and train; therefore, early intervention serves the self-defense needs of the United States.

> The concerns . . . about failed states can be summed up in three points. First, their lawlessness allows terrorist organizations to conduct activities without fear of capture or punishment. . . . Second . . . [it] allows terrorist organizations access to resources they need to conduct their activities. . . . Third . . . [it] offer[s] terrorists the cover of state sovereignty.[183]

Thomas Jefferson held a similar perspective with regard to the Barbary States. He observed their behavior on the high seas where there was no effective law enforcement mechanism. "Weakness provokes insult and injury, while a condition to punish it often prevents it. . . . An insult unpunished is the parent of many others.'"[184] He demonstrated a good understanding of human nature and that wisdom should inform policy makers today. A contemptuous spirit for the rule of law breeds more aggressive forms of lawlessness. Like President Jefferson in 1801, the United States will choose in this modern era either to face the danger or bend to its will.

President Theodore Roosevelt adopted this same perspective when spelling out his corollary to the Monroe Doctrine:

> 2. Lack of practical peaceful means to correct the situation;
> 3. Opportunity for the international community to act first;
> 4. Use of only necessary force with accounting to the international community and withdrawal as soon as practical."

Alan Dowty & Gl Loescher, *Refugee Flows as Grounds for International Action*, 21 INT'L SECURITY 43, 63 (Summer 1996).

[183] Dunlap, *supra* note 3, at 460.

[184] Turner, *supra* note 18, at 128 (Letter from Thomas Jefferson to John Jay, Secretary of State for the Continental Congress, Aug. 23, 1785, *reprinted in* 8 THE PAPERS OF THOMAS JEFFERSON 426, 427) (Boyd, Bryan, & Hunter, eds., 1953)).

> Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society . . . may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly . . . to the exercise of an international police power.[185]

This train of thought has found a rebirth in the Bush Doctrine. After the attacks of 11 September 2001, President George W. Bush asserted a new perspective concerning how his administration would defend the United States of America. "The U.S. national security strategy will be based on a distinctly American internationalism that reflects the union of our values and our national interest."[186] This distinction includes an emphasis on powerful deterrence and a pragmatic evaluation of what constitutes an imminent threat, especially when applied to terrorists and states that sponsor them.

> Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness. . . . We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. . . . Weapons can be easily concealed, delivered covertly, and used without warning.[187]

The twist that has brought this strategy such criticism is its commitment to preemption that appears to smack of *preventive* warfare.

> We will disrupt and destroy terrorist organizations by. . . defending the United States, the American people, and

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[185] James Holmes, *Perspectives on U.S. Foreign Policy: Police Power: Theodore Roosevelt, American Diplomacy, and World Order*, 27 FLETCHER F. WORLD AFF. 125, 126 (Winter/Spring 2003) (quoting Theodore Roosevelt, Message of the President to the Senate and the House of Representatives (Dec. 6, 1904).

[186] NSS, *supra* note 4, at 1.

[187] *Id*. at 15. It is the covert nature of staging the attack that demands a redefinition of imminence. The whole point is to prevent an al-Qaeda remix of Brittney Spears's, *Oops! I Did It Again!*

> our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we 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; and denying further sponsorship, support, and sanctuary to terrorists by convincing or compelling states to accept their sovereign responsibilities.[188]

Even in his cover letter to the National Security Strategy, the President indicated that he will look to intervene well ahead of what traditionally has been considered that point at which a threat is imminent, versus that which is speculative:

> Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government . . . . America will hold to account nations that are compromised by terror. . . . The United States and countries cooperating with us must not allow the terrorists to develop new home bases. Together, we will seek to deny them sanctuary at every turn. . . . America will act against such emerging threats before they are fully formed. . . . States, such as Afghanistan, can pose as great a danger to our national interests as strong states. Poverty does not make poor people into terrorists and murderers. Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels within their borders.[189]

One critic is Mr. Carsten Stahn, who embraces the need for anticipatory self-defense, but retains the traditional "imminence of harm" standard.[190] He rejects the Bush Doctrine, which extends the right to use force in anticipatory self-defense where "'sufficient threats' to national security" exist.[191] He sees this extension of the self-defense doctrine as

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[188] *Id*. at 6.
[189] *Id*. at cover letter.
[190] Stahn, *supra* note 142, at 49.
[191] *Id*.

destabilizing to the "world public order," because it undermines the international rule of law.[192] In this criticism, he may have a point. As previously mentioned, preventive warfare has generally been disavowed, as evidenced by Grotius' teachings. Likewise, President Jefferson's intervention against the Barbary Pirates, as well as President Pierce's intervention at Greytown, were based on actual harms being inflicted at the time of armed intervention – these were not speculative threats. That said, the Bush Doctrine makes a strong case that current and future adversaries pose a real harm that no longer neatly fits the traditional notions of imminence. Therefore, this article recommends a retooling of the Bush Doctrine so that it is clearly not a policy of preventive warfare, but rather an appropriate recalibration of the level of certainty required to determine an imminent threat. In other words, it is time to move the counterweight on Grotius' sliding scale of imminence to accurately reflect real-world, real-time threats posed by lawless states and those who use them. The President can do that by clearly stating that lawless states *do* pose an *imminent danger* to the United States. At that point the Bush Doctrine becomes a twenty-first century restatement of the traditional doctrine of anticipatory self-defense, not an apology for preventive warfare.

A. Defining and Establishing a Degree of Proof to Determine a State of Lawlessness or a "Failed State"

The whole notion of declaring a state "failed" is quite contentious. No country wishes to have other nations label them as failed. It also is ripe for abuse because an aggressor nation could essentially define its victim as "failed" and then invade. As Mr. Dunlap notes, "State failure has no legal meaning under international law. States have legal personality that outlives any one regime or government, and their status cannot be terminated by other states."[193] So the concept is fraught with significant legal challenges.

With the sensibilities of failing nations duly noted, it is of no value not to recognize something for what it is. Once a nation can no longer perform the functions of a state, and if internal political influences are

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[192] *Id*.

[193] Dunlap, *supra* note 3, at 470 (citing Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 435 (1999)).

absent to change the situation, it is extreme to expect other nations to merely sit by while the failed state becomes infested with global "ne'er do wells" bent on the destruction of civilization as it is now known.

International law has generally applied three traditional tests to determine statehood: (1) a defined territory and population; (2) the territory and population are under control of the government; and (3) the "capacity to engage in formal relations with other States."[194] The U.S. State Department has expanded on that definition and added a fourth element to the test: (1) "effective control over a clearly defined territory and population;" (2) "organized governmental administration of the territory;" (3) "capacity to act effectively to conduct foreign relations and to fulfill international obligations;" and (4) international recognition.[195]

Since nations apply criteria in determining whether statehood has been attained in the first place, there is no reason why that status cannot be reassessed at a later date, if circumstances warrant it. This position then supports the following definition of a failed state:

> A "failed state" is generally characterized by the collapse or near-collapse of State authority. Such a collapse is marked by the inability of central authorities to maintain government institutions ensure law and order or engage in normal dealings with other governments, and by the prevalence of violence that destabilizes civil society and the economy.[196]

Other writers corroborate that a failed state is one whose government is so weak it cannot maintain territorial integrity, an economic infrastructure, and physical security,[197] and is characterized as being unable to "project power within [its] borders,"[198] or provide "the most

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[194] Memorandum, Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees 16 (Jan. 22, 2002) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201).

[195] *Id*. (citing Eleanor McDowell, *Contemporary Practice of the United States Relating to International Law*, 71 AM. J. INT'L L. 337 (1977)).

[196] *Id*. at 15.

[197] Dunlap, *supra* note 3, at 470.

[198] *Id.* at 458.

fundamental services that make up the state's obligations . . . [to] society: first and foremost [being] physical security."[199]

No burden of proof currently exists as to the amount of evidence needed to consider a state failed. This seems to be a judgment call by those intervening. A mere preponderance of the evidence standard is probably too low, but a beyond a reasonable doubt standard seems too high. A clear and convincing standard is the recommended one. This should insulate decisions from becoming rash and arbitrary, while not bogging them down in a legal quagmire that would essentially nullify the ability to respond.

In arriving at an evidentiary standard, some triggering mechanisms may serve well in identifying failed or failing states. Based on a historical perspective, the following triggering mechanisms are offered:

> 1. Assassination of a head of state or other key senior government leaders followed by an immediate authority vacuum. (Rwanda).
>
> 2. Military coup or other scheme that neutralizes the civilian government and its ability to maintain order. (Grenada, Panama, Haiti).
>
> 3. Checked banditry resulting in the perpetration of mass murder, insurrection, property confiscation, and mass refugee flows. [200] (Rwanda, Sudan, Somalia).

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[199] *Id*.

[200] "Since an elementary justification for the state is its ability to provide reasonable security for its citizens, states that force these same citizens to flee call into question the very basis of their sovereignty." Alan Dowty & Gil Loescher, *Refugee Flows as Grounds for International Action*, 21 INT'L SECURITY 43, 60 (Summer 1996). The third triggering mechanism has already received significant consideration as "[t]he emphasis internationally is . . . shifting 'from humanitarian obligations to legal obligations not to harm other states by imposing burdens of unmanaged refugee flow.'" *Id*. at 51 (citing JACK I. GARVEY, THE NEW ASYLUM SEEKERS: ADDRESSING THEIR ORIGIN, *in* DAVID MARTIN, ED., THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S 187 (1988)). The customary law doctrine of the abuse of rights, as discussed in the writings of both Oppenheim and R. Yewdall Jennings, conceives a basis for intervention to halt refugee flows. *Id*. at 54-58. Essentially, the doctrine holds that a state may not exercise its rights so as to injure other nations. Once a nation does exercise its rights so as to injure another nation, the other nation may intervene to halt the injury. *Id*. This principle is readily apparent in refugee flows. A state acts, or fails to act, so as to create a refugee flow to its neighbor. The neighbor state now is faced with all the costs and responsibilities

Adopting a set of triggering mechanisms could provide some lead time in bringing the matter before the UN and appropriate regional bodies, so that there is a least a good faith attempt to make it a collective security operation. Adopting these mechanisms might also create an incentive for a failing state to look closely at its governing affairs as the specter of the entry of foreign troops to restore law and order would be very real.

B. Who Has the Authority to Declare that a State of Lawlessness Exists?

In this area of analysis, there are essentially two schools of thought. One school leaves the authority to declare a state of lawlessness in the hands of individual nations and the other school leaves it in the hands of the UN. Not surprisingly these two schools of thought mirror those of the exercise of self-defense and the anticipatory use of force.

The first school reflects the thinking of President Teddy Roosevelt.

> When a government failed to discharge its legal obligations towards foreign nations and its own citizens, the local great power might rightfully intervene in its affairs, even those affairs normally thought to be within the government's own jurisdiction. To cope with anarchy, each great power thus would exercise a kind of legal jurisdiction in its geographic neighborhood. Yet, this did not bestow on great powers a license for wanton military adventurism or territorial aggrandizement. The police power had to be deployed judiciously and in self-denying fashion.[201]

For the advocates of this position,

> The purpose . . . was not total defeat of an enemy nation, but "to restore normal government or to give the people a better government than they had before, and to establish peace, order, and security on as permanent a

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associated with absorbing the refugee flow. Thus, the neighbor state can act so as to stem the flow, and, arguably, can do so in a preemptive manner so as to ensure a refugee crisis does not occur. *Id.*

[201] Holmes, *supra* note 185, at 129.

> basis as practicable." [ ] "There must be instilled in the inhabitants' minds the leading ideas of civilization, the security and sanctity of life and property, and individual liberty."[202]

The strength of this position is that it is more efficient and timely. It does not subject a nation's defense to the inevitable politicking of the UN and the Security Council. Furthermore, it actualizes the inherence of a nation's right to act in its own defense without prior recourse or permission from an international body.

On the other side of the issue, advocates state that military force with a long-term and significant impact on the governance of a nation not directly involved in an armed attack, should be taken only upon a UN authorized mission under the Charter's Article 39 authority to counter-threats to peace and security.[203] They perceive this as a lawful preventive use of force, rather than an Article 51 action in self-defense, which they contend can only be used in response to actual armed attack.[204] Mr. Stahn sees this as the appropriate place for interventions such as Operation Iraqi Freedom.[205]

The benefit of this position is that it places the use of force against terrorists under the supervision of the UN Security Council.[206] This is considered desirable because: (1) it creates oversight and accountability if force must be used in self-defense; (2) it gives the Security Council the opportunity to exercise the UN's authority under a Chapter VII peace enforcement mission; (3) it may obviate the need for the use of force in self-defense; and (4) it legitimizes any use of force that goes beyond the mere needs of self-defense.[207]

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[202] *Id.* at 139 (quoting U.S. MARINE CORPS, SMALL WARS MANUAL: UNITED STATES MARINE CORPS 1940, at 11-14 (Ronald Shaffer, 2d ed.)).
[203] Stahn, *supra* note 142, at 41.
[204] *Id*.
[205] *Id*.
[206] *Id*.
[207] *Id*. Mr. Dunlap is another who advocates this position. He would support intervention in failed states only after a UN Security Counsel resolution finding that a country is a failed state and authorizing intervention so as to avoid establishing a customary rule of international law regarding invasion on a "failed state" basis. Dunlap, *supra* note 3, at 470. His concerns appear to be legitimacy and accountability. *Id.* at 472-73. Unfortunately, he does not address the generally abysmal record of UN intervention. If nations could trust that the UN would act in a timely and sufficient manner, then there would be little use for the doctrine of preemption and the need for

The authority should simultaneously rest in the hands of both. Notice to the UN fulfills the United States' treaty obligation and demonstrates a commitment to the rule of law and the desire for the peaceful settlement of disputes. However, the UN cannot become, or continue to be, an obstacle. We must be realistic; those bent on attacking the United States are usually not looking to peacefully settle their disputes. These persons are often extremists with homicidal tendencies and imaginations of world dominance and vindication of what they see as the greater good. Observance of legal formalities does not necessarily impress them nor does it deter them. Likewise, obsessing over the integrity of the failed state that is either colluding with or powerless to stop the terrorists fails to grasp that self-defense is no defense if not exercised in a timely manner.

IV. Conclusion

The lawless state will continue to present the United States and the international community significant challenges. The United States should stand by its policy to support the rule of law. Although lawlessness may not by itself be a basis for armed intervention, it is a strong precursor to a predictable result. Inaction is an inadequate solution. Now is the time to formalize an intervention strategy that adequately protects the United States and its interests. The customary law of self-defense and the anticipatory use of force are sufficient legal bases, even in the modern era of the UN Charter. It is time to heed the call of Professor Reisman, and stop bickering about the resort to force, and instead develop the criteria needed to appraise the appropriate use of coercion.[208]

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individual states to intervene. History has proven the converse to be true. The UN is essentially a fractious body of competing states with divergent interests. This often paralyzes the armed intervention process. In fact, it some times even stymies the emplacement and enforcement of economic sanctions. Rogues in failed states should not find sanctuary in the disputes of international jurists arguing the finer points of international peace and security while never concluding what the lawful course of action actually is.

[208] Reisman, *supra* note 133, at 643.