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### Jus Ad Bellum in the Age of WMD Proliferation

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**Jus ad Bellum in the Age of WMD Proliferation**

Daniel H. Joyner

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## *JUS AD BELLUM* IN THE AGE OF WMD PROLIFERATION

DANIEL H. JOYNER\*

This Article will discuss the normative question of what should be the character of the rules and institutions of international law covering international uses of force, in the age of proliferation of weapons of mass destruction (WMD) technologies. It will posit that international use of force law is currently in a state of crisis, precipitated by the proliferation of WMD technologies and the revised set of national security calculations, which determine when and why states choose to use force internationally, that have been thrust upon states as a result. It will review a number of options which have been proposed for changing the substance of international laws and institutions which currently regulate this area, in order to make them responsive to this change in international security realities, and more effective and useful to states. However it will conclude that none of these proposals truly grasps the nettle of the problems facing states in the post-proliferated age, and the challenge of designing and maintaining effective and supportable rules and institutions in this area. It will argue that more fundamental changes to the character of these rules and institutions are necessary if they are to fulfill a needed role in providing standards for international behavior in this most vital area of international relations. Using both international legal theory and international relations theory, it will argue specifically that international law regulating uses of force should be deformalized, and maintained not as legally binding rules, but as politically persuasive norms. This change in the character of rules in this area, it will be argued, would help to preserve the integrity of the rest of the formal corpus of international law, while accomplishing virtually the same results in influencing state behavior and in normativizing international relations in this area, as do the current formal rules of the *jus ad bellum*.

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A word on the intent of this Article before proceeding. The analysis and proposals in this Article are the result of long deliberation regarding the crisis moment which the *jus ad bellum* currently faces largely as a result of WMD proliferation. The resulting analysis and proposals will no doubt be considered by some to be somewhat revolutionary, and perhaps even radical. While they are indeed intended to be new and challenging, it will be argued that they are in fact based upon sound theoretical underpinnings, to be found in both international legal theory and international relations theory. It will further be argued that they are a rational product of a realistic assessment of the current crisis and its consequences for international legal regulation in this area.

It cannot be overemphasized that the proposals contained herein are not intended to undermine international law. Quite the contrary, they are specifically intended to bring the character of international law in the area of international uses of force into harmony with the reality of the modern security landscape which states face, and thus ultimately to strengthen the formal corpus of international law generally. With regard specifically to the *jus ad bellum*, the deformalization thesis advanced herein should be understood not simply as a normative regression, but rather as a tactical normative retreat made necessary by fundamental changes in circumstance. This normative direction could, and should, be reversed in the future when the infrastructure of the international legal system is better able to provide effective regulation in this most sensitive and important area of international relations.

## I. PROLIFERATION, PREEMPTION AND USE OF FORCE LAW

### A. *Crisis? What Crisis?*

The first issue for consideration in this analysis is whether in fact there is currently a crisis in international use of force law, brought about by WMD proliferation and changed security realities for states. Some would doubtless reject this as an alarmist position and maintain that while the instruments and means of international violence have certainly changed since the United Nations Charter (U.N. Charter or Charter), the primary source of governing international law in this area, was founded in 1945, the considerations that states must undertake when deciding to use force internationally have not fundamentally changed since that time, and therefore no urgent change to existing law is required. This conclusion indeed was apparently reached by the United Nations Secretary-

General's High-Level Panel on Threats, Challenges and Change in its 2004 report entitled "A More Secure World: Our Shared Responsibility."<sup>1</sup> In its report, the High-Level Panel found that there was no need either for re-writing or re-interpreting Article 51 of the U.N. Charter on self-defense, or for fundamentally changing the role of the U.N. Security Council (Security Council or Council) as the sole authorizer of international uses of force other than those justified by reference to Article 51, including those purposed in addressing WMD threats. To quote from the report, "[t]he short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to."<sup>2</sup>

However, this static approach seems at odds with the stated opinion of the Secretary-General himself, who in September of 2003 expressed this crisis to the U.N. General Assembly as follows:

All of us know there are new threats that must be faced—or, perhaps, old threats in new and dangerous combinations: new forms of terrorism, and the proliferation of weapons of mass destruction.

. . . .

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

Now, some say this understanding is no longer tenable, since an "armed attack" with weapons of mass destruction could be launched at any time, without warning, or by a clandestine group. Rather than wait for that to happen, they argue, States have the right and obligation to use force pre-emptively, even on the territory of other States, and even while weapons systems that might be used to attack them are still being developed. According to this argument, States are not obliged to wait until there is agreement in the Security Council. Instead, they reserve the right to act unilaterally, or in ad hoc coalitions.

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1. The Secretary-General, *A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges, and Change*, ¶¶ 192, 198, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/report.pdf> [hereinafter *A More Secure World*]; see also Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415, 419-20 (2007) (arguing that the threats of weapons of mass destruction and modern terrorism can be addressed utilizing the existing international framework of the U.N. Security Council).

2. *A More Secure World*, *supra* note 1, ¶ 190.

This logic represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last fifty-eight years.

.....

We have come to a fork in the road. This may be a moment no less decisive than 1945 itself, when the United Nations was founded.<sup>3</sup>

As indicated in these remarks, the fundamental challenge to U.N. Charter law which the Secretary-General perceived has been most saliently presented in the context of debates regarding the legality of anticipatory, or preemptive self-defense in situations where states feel that they are threatened by a target state or non-state actor's development, possession or threat of use of WMD. Former Secretary-General Annan's remarks above were of course made during the 2003 diplomatic standoff over whether, and on what legal justification, to use force against Iraq in order to forcibly disarm it of its suspected WMD stockpiles. However, debates regarding the use of preemptive force to prevent states and non-state actors "of concern" from developing and using WMD have not been limited to the case of Iraq. Indeed, an even more recent example of such a preemptive use of force was presented by Israel's September 6, 2007 unilateral attack upon a site in Syria, which was later claimed to be a nuclear reactor site, constructed with the help of North Korea.<sup>4</sup>

### B. *Counterproliferation*

The post-September 11 international security climate has seen a general shifting in the policy positions of the United States and a number of other relatively powerful states, toward an increased emphasis on proactive and often unilateral or small-coalition-based strategies of "counterproliferation," and away from more multilateral and diplomacy-based efforts of "non-proliferation." While non-proliferation efforts have classically depended upon diplomacy and upon individual state implementation of treaty law and of rules agreed in other normative regimes of both a formal and informal character, counterproliferation efforts are generally designed to forcefully preclude specific actors from obtaining WMD-related materials and technologies or to degrade and destroy

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3. U.N. GAOR, 58th Sess., 7th plen. mtg. at 2-3, U.N. Doc. A/58/PV.7 (Sept. 25, 2003), available at <http://www.un.org/webcast/ga/58/statements/sg2eng030923>.

4. See Robin Wright, *N. Koreans Taped At Syrian Reactor; Video Played a Role in Israeli Raid*, WASH. POST, Apr. 24, 2008, at A1.; David E. Sanger, *Video Links North Koreans to Syria Reactor, U.S. Says*, N.Y. TIMES, Apr. 24, 2008, at A14.

an actor's existing WMD capability. Such counterproliferation efforts include interdiction of suspected transfers of sensitive items, and preemptive acts of force against either actual or potential possessors of WMD.<sup>5</sup>

While a shift toward counterproliferation policies can be seen in the statements of officials of a number of states, notably including Russia, Japan, India, Israel, Australia and the United Kingdom, it has been most formally adopted by the United States in its stated foreign and security policy.<sup>6</sup> In both the September 2002 National Security Strategy document and the December 2002 National Strategy to Combat Weapons of Mass Destruction document, U.S. policymakers signaled a significant shift in WMD-related policies toward counterproliferation principles. As stated in the latter document:

We know from experience that we cannot always be successful in preventing and containing the proliferation of WMD to hostile states and terrorists. . . .

. . . .

Because deterrence may not succeed, and because of the potentially devastating consequences of WMD use against our forces and civilian population, U.S. military forces and appropriate civilian agencies must have the capability to defend against WMD-armed adversaries, including in appropriate cases through preemptive measures.<sup>7</sup>

The National Security Strategy document discussed the concept of preemption further thus:

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5. See Jason D. Ellis, *The Best Defense: Counterproliferation and U.S. National Security*, 26:2 WASH. Q., 115, 115-17 (Spring 2003); Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT'L L. 507, 520 (2005); Robert S. Litwak, *The New Calculus of Pre-emption*, 44:4 SURVIVAL 53, 55 (Winter 2002).

6. See Sammy Salama and Karen Ruster, *A Preemptive Attack on Iran's Nuclear Facilities: Possible Consequences*, CENTER FOR NONPROLIFERATION STUDIES, Sept. 9, 2004, <http://cns.mii.edu/stories/040812.htm>; *India Mulls 'Pre-Emptive' Pakistan Strike, Cites U.S. Iraq War Precedent*, AGENT FRANCE PRESS, Apr. 11, 2003, available at [http://www.fromthewilderness.com/free/ww3/041403\\_india.html](http://www.fromthewilderness.com/free/ww3/041403_india.html); *Israel's Plans for Iran Strikes*, JANE'S, July 16, 2004, [http://www.janes.com/security/international\\_security/news/jid/jid040716\\_1\\_n.shtml](http://www.janes.com/security/international_security/news/jid/jid040716_1_n.shtml); Mari Yamaguchi, *Japan Mulling Action over N. Korea Missiles*, ASSOCIATED PRESS, July 10, 2006, <http://www.cbsnews.com/stories/2006/07/10/ap/world/mainD8IP0DUO0.shtml>; Kim Murphy, *Russia Asserts Military Options*, L.A. TIMES, Oct. 11, 2003, at A6; Tony Blair, Prime Minister, Speech on the Threat of Global Terrorism (Mar. 5, 2004), available at <http://www.number10.gov.uk/Page5461>; Dan Murphy, *Terror-preemption talk roils Asia*, CHRISTIAN SCIENCE MONITOR, Dec. 5, 2002, at 6, available at <http://www.globalpolicy.org/wtc/analysis/2002/1205preemption.html>.

7. White House, National Strategy to Combat Weapons of Mass Destruction 2-3 (2002), available at [www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf](http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf).

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile attacks by our adversaries, the United States will, if necessary, act preemptively . . . . [I]n an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.<sup>8</sup>

The place of the doctrine of preemption in U.S. counterproliferation policy was confirmed in the 2006 National Security Strategy document, which specifically sought to justify the doctrine on the basis of a right to preemptive self-defense in international law. The document states as follows:

Meeting WMD proliferation challenges also requires effective international action . . . . Taking action need not involve military force. . . . If necessary, however, under long-standing principles of self-defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack.<sup>9</sup>

One of the recent policy manifestations of this doctrinal shift toward preemptive action to deal with WMD threats is to be found in the Proliferation Security Initiative (PSI), a program involving some fifty states at various levels of cooperation in logistic, law enforcement, and military efforts aimed at interdicting WMD-related items and technologies in transit, most often over the sea lanes.<sup>10</sup> The PSI is essentially a set of principles mandating proactive efforts to arrest proliferation in WMD-related materials at its most vulnerable point: during shipment and before such materials can be integrated into WMD development programs. PSI interdictions are ongoing, and tend to involve the stopping and searching of vessels suspected of carrying WMD related technologies from origins or to destinations of concern to PSI participants, and the confiscation of any such materials found. The PSI has been defended by its proponents, chief among whom is John Bolton, the

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8. White House, National Security Strategy of the United States of America 15 (2002), available at [www.whitehouse.gov/nsc/nss.html](http://www.whitehouse.gov/nsc/nss.html).

9. White House, National Security Strategy of the United States of America 22-23 (2006), available at <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>.

10. See generally Joyner, *supra* note 5; Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526 (2004).



former U.S. Under Secretary of State, as being justified by reference to principles of self-defense in international law.<sup>11</sup>

Concerns regarding state use of preemptive force against other states and non-state actors, however, are not limited to the actions of the West or to developed states. There are real concerns that recent rhetoric by major powers legitimizing counterproliferation-oriented preemption will strengthen the resolve of a number of other states to apply the doctrine to their own regional conflicts. Indian Foreign Minister Yashwant Sinha was quoted in 2003 as stating that India had “a much better case to go for preemptive action against Pakistan than the United States has in Iraq,” referencing the threat posed to India by Pakistan’s nuclear arsenal.<sup>12</sup> Israel has also expressed alarm over recent statements by Iranian President Mahmoud Ahmadinejad that Israel should be “wiped off the map,” leading to concern that Israel will act preemptively against Iran to degrade its capacity to produce nuclear weapons, following a pattern of preemptive uses of force, which Israel followed in 1967 against Egypt, in 1981 against Iraq, and in 2007 against Syria.<sup>13</sup>

Indeed, the degree to which the idea of dealing with WMD proliferation concerns by recourse to preemptive attacks has become a familiar and decreasingly broad conceptual leap generally in international society, was recently amply illustrated by the speed at which media outlets from around the world turned from questioning whether Iran’s file would be referred by the International Atomic Energy Agency to the Security Council, to a race to confirm which states had not yet taken the idea of military force to deal with Iran “off the table.”<sup>14</sup>

### C. International Use of Force Law

However, as former Secretary General Annan’s comments above express, this trend in policy emphasis upon preemptive, forceful counterproliferation actions does not sit easily with existing international use of force law, with the U.N. Charter as its cornerstone. According to the system for use of force regulation established in

11. See Greg Sheridan, *US Free to Tackle N Korea*, THE AUSTRALIAN (NEW SOUTH WALES METRO EDITION), July 9, 2003, at 1.

12. *India Mulls ‘Pre-Emptive’ Pakistan Strike*, *supra* note 6, at 1.

13. See *Israel’s Plans for Iran Strikes*, JANE’S, July 16, 2004, [http://www.janes.com/security/international\\_security/news/jid/jid040716\\_1\\_n.shtml](http://www.janes.com/security/international_security/news/jid/jid040716_1_n.shtml); Wright, *supra* note 4, at A1; Sanger, *supra* note 4, at A14; Salama and Ruster, *supra* note 6.

14. See Ashton Carter & William Perry, *The Case for a Preemptive Strike on North Korea’s Missiles*, TIME, July 8, 2006, <http://www.time.com/time/world/article/0,8599,1211527,00.html>.

the Charter, which for its parties comprises binding international law superseding all other treaty commitments, there are only two legal justifications for an international use of force which violates the territorial integrity of another state.<sup>15</sup> The first is a recognition of the “inherent right to self-defense” under Article 51 of the Charter, and the second is authorization of force by the U.N. Security Council under a resolution passed using the authority granted to the Council in Chapter VII of the Charter. Since the Security Council has not been used successfully as a forum in which anticipatory, or preemptive, uses of force against WMD threats have been authorized (a subject to which consideration will return later in this Article), the only arguable legal basis for such actions has been a reliance upon the self-defense provisions of Article 51.<sup>16</sup>

These provisions allow for temporary, unilateral recourse to force “if an armed attack occurs” against a member of the United Nations. Although the plain meaning of these terms would seem to restrict such a use of force in self-defense to a case in which an armed attack by another state or non-state actor has taken place or at least has commenced,<sup>17</sup> the recognition that Article 51 functions

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15. See IAN BROWNLIE, *INTERNATIONAL LAW & THE USE OF FORCE BY STATES* 265, 268 (1963) (explaining that both the inherent right to self-defence and the authorization of force by the U.N. Security Council under a resolution passed using the authority granted the Council in Chapter VII of the Charter); ANTHONY R. AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* 31 (1993) (detailing four explicit justifications for the use of force, including “force used in self-defence” and “force authorized by the United Nations Security Council”); THOMAS FRANCK, *RECOURSE TO FORCE* 2-3 (Cambridge University Press) (2002) (explaining the “collective use of force at the behest of the Security Council” and the actions of a state taken “in self-defense against any military aggression”).

16. DANIEL H. JOYNER, *INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION* ch. 3 (2009).

17. See Michael Byers, *Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change*, 11 J. POL. PHIL. 171, 172 (2003) (“[A]ccording to traditional means of treaty interpretation, the words ‘if an armed attack occurs[,]’ [as found in Article 51,] preclude any right to preemptive action.”); THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 38 (Bruno Simma et al. eds., 2002) (“Therefore Art. 51 has to be interpreted narrowly as containing a prohibition of anticipatory self-defence. Self-defence is thus permissible only after the armed attack has already been launched.”); BROWNLIE, *supra* note 15, at 273 (“[W]here the Charter has a specific provision relating to a particular legal category, to assert that this does not restrict the wider ambit of the customary law relating to that category or problem is to go beyond the bounds of logic. Why have treaty provisions at all? . . . It is submitted that a restrictive interpretation of the provisions of the Charter relating to the use of force would be more justifiable and that even as a matter of ‘plain’ interpretation the permission in Article 51 is exceptional in the context of the Charter and exclusive of any customary right of self-defence.”); see also Yoram Dinstein, *WAR, AGGRESSION AND SELF-DEFENCE* (3rd ed. 2001); AHMED M. RIFAAT, *INTERNATIONAL AGGRESSION: A STUDY OF THE LEGAL CONCEPT* 125 (1979); see generally Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT’L L. 590 (2003). Further, The Vienna Convention

simply to recognize an already existing “inherent right” of states has led many commentators to the conclusion that this language in Article 51 worked a retention of the rights of self-defense obtaining under pre-Charter customary law for U.N. Charter signatories.<sup>18</sup>

In classical customary international law, the right of a state to use force in a preemptive manner, to anticipate an attack which had not yet commenced but which was imminently threatened, enjoyed broad support among states and was a firmly established legal right. However, by the mid-nineteenth century the right of anticipatory self-defense as a matter of customary international law was

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on the Law of Treaties specifies that the plain (ordinary) meaning of a treaty provision, in context and in the light of its object and purpose, is to be given preeminence in interpretation. Art. 31, May 23, 1969, 1155 U.N.T.S. 332. Supplementary means of interpretation, including preparatory work of the treaty, can only be employed when the foregoing analysis of ordinary meaning leaves the meaning ambiguous or obscure or “leads to a result which is manifestly absurd or unreasonable.” *Id.* art. 32.

18. See MYRES S. McDOUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND PUBLIC ORDER* 235 (1994) (“It is of common record in the preparatory work on the Charter that Article 51 was not drafted for the purpose of deliberately narrowing the customary-law permission of self-defense against a current or imminent unlawful attack by raising the required degree of necessity. . . . [I]t was made quite clear . . . that the traditional permission of self-defense was not intended to be abridged and attenuated but, on the contrary, to be reserved and maintained.”); D.W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 185 (1958) (“It is . . . fallacious to assume that members have only those rights which the Charter accords to them; on the contrary they have those rights which general international law accords to them except in so far as they have surrendered them under the Charter. . . . [T]he view of Committee I at San Francisco was that this prohibition [Article 2(4)] left the right of self-defense unimpaired.”). Although addressing a different substantive question, the International Court of Justice, in a 1986 decision, concluded that:

Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defence, and it is hard to see how this can be other than of a customary nature, . . . . Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the ‘armed attack’ which, if found to exist, authorizes the exercise of the ‘inherent right’ of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which ‘subsumes and supervenes’ customary international law. It rather demonstrates that in the field in question, . . . customary international law continues to exist alongside treaty law.

Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (June 27). The ICJ opinion does not, however, establish a rule for circumstances in which there is clear conflict between custom and treaty law. *Id.* (illustrating how the scope of the U.N. Charter is not all-inclusive with respect to use of force). In such a situation it could still be argued that the treaty constitutes a special and separate regime and that for treaty signatories a conflict between treaty law and customary law must be resolved with the treaty rule being given priority.

circumscribed by several substantive limiting principles: imminence, necessity, and proportionality.<sup>19</sup>

The correspondence between U.S. Secretary of State Daniel Webster and British officials during the famous *Caroline* incident is widely understood as offering a correct iteration of customary international law pertaining at the time:

Mr. Webster to Mr. Fox (April 24, 1841)

It will be for . . . [Her Majesty's] government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.<sup>20</sup>

Ian Brownlie has suggested that state practice between 1841 and 1945 served to limit even further the flexibility of the principle of anticipatory self-defense, leaving it in a tenuous state of existence at the time of the drafting of the U.N. Charter.<sup>21</sup> This position would seem to be supported through even more recent events, such as the 1981 preemptive attack by Israel against a suspected Iraqi nuclear weapons site at Osirak. Resolution 487 of the U.N. Security Council, which was adopted unanimously, denounced the incident as a "clear violation of the Charter of the United Nations" notwithstanding Israel's believable (and later validated) claim regarding Iraq's clandestine WMD program and its connection to the site.<sup>22</sup> As Christine Gray has observed:

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19. See BROWNIE, *supra* note 15, at 257-64 (elaborating upon the principles of necessity and proportionality in customary international law); MALCOLM SHAW, INTERNATIONAL LAW 1024-25 (5th ed. 2003); Military and Paramilitary Activities, 1986 I.C.J. at 362 (dissenting opinion of Judge Schwebel) (arguing that the *Caroline* criteria are exclusively applicable to cases of anticipatory self-defense).

20. THE PAPERS OF DANIEL WEBSTER, DIPLOMATIC PAPERS 43 (Kenneth E. Shewmaker et al. eds., 1983). The *Caroline* was a U.S. registered steamer hired to ferry provisions across the Niagara river to supply Canadian rebels taking part in the insurrection against British colonial rule of Canada in 1837. On December 29, several boatloads of British soldiers came across the river onto the U.S. side and set fire to the *Caroline*, dragged her into the river current, and sent her blazing over Niagara Falls, killing one man in the process. The ensuing diplomatic correspondence between U.S. and U.K. officials has come to be regarded as a reliable statement of contemporary customary international law on self defense.

21. IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 701-02 (6th ed. 2003).

22. See Anthony D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 AM. J. INT'L L. 584, 585-86 (1983); Louis Rene Beres and Yoash Tsiddon-Chatto, "Sorry" Seems to be the Hardest Word, THE JERUSALEM POST, Jun. 9, 2003, at 08B. On September 6, 2007, Israeli warplanes attacked and destroyed a site in Syria which was later claimed to be a nuclear reactor site, constructed with the help of North Korea. See Wright, *supra* note 4, at A1;

[T]he actual invocation of the right to anticipatory self-defence in practice is rare. States clearly prefer to rely on self-defence in response to an armed attack if they possibly can. In practice they prefer to take a wide view of armed attack rather than openly claim anticipatory self-defence. It is only when no conceivable case can be made that there has been an armed attack that they resort to anticipatory self-defence. This reluctance expressly to invoke anticipatory self-defence is in itself a clear indication of the doubtful status of this justification for the use of force. States take care to try to secure the widest possible support; they do not invoke a doctrine that they know will be unacceptable to the vast majority of states. Certain writers, however, ignore this choice by states and argue that if states in fact act in anticipation of an armed attack this should count as anticipatory self-defence in state practice. This is another example of certain writers going beyond what states themselves say in justification of their action in order to argue for a wide right of self-defence.<sup>23</sup>

.....

A few of these commentators seem prepared to treat any US action as a precedent creating new legal justification for the use of force. Thus they use US actions as shifting the Charter paradigm and extending the right of self-defence. The lack of effective action against the USA as a sanction confirms them in this view. But the vast majority of other states remained firmly attached to a narrow conception of self-defence . . .<sup>24</sup>

.....

The clear trend in state practice before 9/11 was to try to bring the action within Article 51 and to claim the existence of an armed attack rather than to argue expressly for a wider right under customary international law.<sup>25</sup>

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Sanger, *supra* note 4, at A14. Information about the attack and the site has been difficult for the general public to discern, as both Israel and Syria have been less than forthcoming about the incident. Some details came to public light in April of 2008, when U.S. intelligence services gave a briefing to the U.S. Congress on the event. Due to the paucity of confirmed facts regarding the site and the attack, international opinion has at the time of this writing been difficult to gauge. Some have argued that the absence of formal censure by states has amounted to a tacit acquiescence to the strike. However, the lack of certainty regarding the details of the site and the attack likely make such assessments premature. Leonard S. Spector and Auner Cohen, *Israel's Airstrike on Syria's Reactor: Implications for the Nonproliferation Regime*, 38 ARMS CONTROL TODAY 15 (2008).

23. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE, 130 (2nd ed. 2004)

24. *Id.* at 134.

25. *Id.* at 133; see also Christine Gray, *The Principle of Non-Use of Force*, in THE UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW 33 (Colin Warbrick & Vaughan Lowe eds., 1994) (exploring the role of U.N. resolutions with regard to the use of force in international relations); Christine Gray, *The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force After Nicaragua*, 14 EUR. J. INT'L L. 867 (2003) (discussing the International Court of Justice's cautious approach to use of force cases). For contrasting opinions on the subject of state practice in the area of anticipatory self-defense, see gener-

However, the right to anticipatory self-defense, as limited by imminence, necessity, and proportionality, is considered by many international lawyers to remain a valid doctrine in customary international law, and to be a right upon which even U.N. Charter members may rely.<sup>26</sup>

The problem in the context of counterproliferation-oriented preemptive uses of force, however, is that this policy, as expressed by the United States and other states, and as carried out in practice in some recent cases, calls for uses of force against states and non-state actors within other states who are simply developing or are in possession of WMD, without the existence of an immediate threat that such weapons will be used against the state pursuing the policy of preemption. Imminence, again, is a key criterion which must be satisfied in order to justify a self-defensive action by reference to the customary law right of anticipatory self-defense. Therefore, an implementation of this policy, in which unilateral international force is used by a state prior to actual armed attack, against state or non-state actors that simply possess or are developing WMD, without the existence of a meaningful threat to use such weapons which satisfies the criteria set out in the *Caroline* case, does not satisfy the requirements for justification under either the text of Article 51 or the customary right of anticipatory self-defense which it arguably incorporates, and therefore constitutes a violation of U.N. Charter Article 2(4).<sup>27</sup>

Notwithstanding this legal incongruity, the policy of counterproliferation-oriented preemption continues to be seen by a number of states as a necessary, final option to be used against WMD threats when no other tools appear to be working.<sup>28</sup> The idea that states must, per the text of Article 51 or the restrictive interpretation of anticipatory self-defense prescribed by customary law, wait for a WMD attack to have already taken place against them, or at least for indisputable evidence of a threat of use of WMD against them which leaves them “no choice of means and no moment for deliberation” before they are allowed to act in self-defense, is to the

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ally AREND & BECK, *supra* note 15; A. Mark Weisburd, *USE OF FORCE* (1997) (examining third-state reactions to various alleged uses of force in self-defense). R

26. See ELIZABETH WILMSHURST, CHATHAM HOUSE, *PRINCIPLES OF INTERNATIONAL LAW ON THE USE OF FORCE BY STATES IN SELF-DEFENCE* 4 (2005), available at [http://www.chathamhouse.org.uk/research/international\\_law/current\\_projects/](http://www.chathamhouse.org.uk/research/international_law/current_projects/).

27. See JOYNER, *supra* note 16. R

28. In addition to statements supporting preemptive use of force made by U.S. officials, officials from Russia, Australia, the United Kingdom, Japan, India, and Israel have made relevant statements. See sources cited *supra* note 6. R

minds of many policymakers a wholly unrealistic notion, and unworkable in practice.

This then exposes the heart of the problem facing modern states in their desires both to vigorously pursue policies seen as necessary to their national security, and at the same time to support and comply with international law, and comprises the cause of the current crisis in international use of force law. The U.N. Charter, now nearly sixty years old, is in the minds of many policymakers in states that are shifting their emphasis toward counterproliferation, an anachronism; a set of norms which, if accurately reflective of the principled universe which states inhabited within the context of the evolution of military technology and geopolitics in 1945, is currently unfit for the task of providing a set of workable and supportable principles for governing this most sensitive area of international relations.

These policymakers point not only to the proliferation of WMD technologies themselves, which have worked an evolution in the instruments of violence and the amount of damage that can be done in a single “armed attack,” but also to the emergence of sophisticated non-state actors whom, it is feared, will be able to use these weapons, changing the rules on where states must look to predict and manage threats, as well as the effectiveness of classical doctrines such as deterrence and containment for managing these threats.<sup>29</sup> These doctrines, while employed with some success in inter-state security tensions, seem likely to be largely ineffective against the fluid assets and operative networks of international non-state actors, and particularly those driven by extreme ideological motives.<sup>30</sup> As Daniel Poneman has explained:

Obviously, deterrence depends on having a return address which one can target and send an opponent a response to that which has just been received. However, terrorists do not often leave return addresses. Moreover, deterrence depends on a particular view of human nature. If you read Hobbes’s *Leviathan*, you understand that, at the least, you need a minimal sense of

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29. See George W. Bush, U.S. President, Remarks in Address to the Nation (Mar. 17, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/print/20030317-7.html>; see also George W. Bush, U.S. President, Speech at West Point Graduation Ceremony (June 1, 2002), available at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>; Tony Blair, Prime Minister, U.K., Remarks on Release of Iraq Dossier (Sept. 24, 2002), in *GUARDIAN*, Sept. 24, 2002, <http://www.guardian.co.uk/world/2002/sep/24/iraq.speeches> (discussing what was thought to be the threat of Iraqi WMD).

30. See generally DEREK D. SMITH, *DETECTING AMERICA: ROGUE STATES AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION* (2006) (discussing the limits of deterrence as used against rogue states).

self-preservation to rely upon if you expect notions of deterrence to obtain. In a terrorist context—in which, if not the leaders, then certainly the cannon fodder they send in to do the suicide bombings and therefore are not driven by the desire for self-preservation—you can no longer count on deterrence.<sup>31</sup>

While some observers might characterize these views regarding the threat posed by WMD and the anachronistic character of existing international use of force law as extreme and reactionary, or perhaps even paranoid, the fact remains that many policymakers in counterproliferation-oriented states genuinely believe that it is necessary for the security of their states that they are able to use force preemptively against these new threats before they develop the qualities of demonstrable immediacy necessary to square such actions with existing use of force law. Moreover, it is clear that a number of these states will continue to act in pursuance of these beliefs, and of counterproliferation policies of preemption, regardless of the formal, technical requirements of international law.

This, then, is the heart of the crisis: a significant number of states now believe that their vital national security interests require them to act in a manner that is in breach of the laws governing international uses of force laid down in the U.N. Charter. This is not a temporary policy shift, nor are actions taken in pursuance of counterproliferation policies isolated or extraordinary events. Policies of counterproliferation-oriented preemptive use of force are a part of a systematic rethinking within a significant number of states about the security environment in which states find themselves, and the policy options those states feel they must maintain in order to defend themselves against modern threats, and to pursue their essential interests internationally.<sup>32</sup> This is a revision of thought that is likely to persist and mature within these states, and it is likely that, as WMD proliferation inevitably spreads and becomes more intimately a part of the security concerns of a growing number of states, those states too will arrive at the conclusion that traditional

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31. Daniel B. Poneman, *A New Bargain*, in *ATOMS FOR PEACE: A FUTURE AFTER FIFTY YEARS?* 177, 179-180 (Joseph F. Pilat ed., 2007).

32. See M. Elaine Bunn, *Force, Preemption, and WMD Proliferation*, in *COMBATING WEAPONS OF MASS DESTRUCTION: THE FUTURE OF INTERNATIONAL NONPROLIFERATION POLICY* 156, 156-58 (Nathan Busch & Daniel Joyner eds., 2009) (outlining U.S. strategy changes); Ellis, *supra* note 5, at 122, 129, 130, Litwak, *supra* note 5, at 1, 59, 73; JASON D. ELLIS & GEOFFREY D. KIEFER, *COMBATING PROLIFERATION: STRATEGIC INTELLIGENCE AND SECURITY POLICY* (2004) (providing a “candid assessment of the inherent intelligence challenges, policy trade-offs, and operational considerations central to America’s long-standing quest to prevent and ultimately manage WMD proliferation and to defend against an adversary’s use of such weapons”).



non-proliferation efforts based in multilateralism and diplomacy, and utilizing strategies such as deterrence and containment, are not wholly sufficient to deal with these realities. They will likely conclude, as others have done, that policies of preemptive use of force against states and non-state actors that threaten them with WMD, and who will not sufficiently respond to or be managed by these classic strategies, are a necessary addition to the policy options at their disposal.

Therefore, at the heart of the current crisis in international use of force law is a continuing, and likely increasing gap between the provisions of existing law and the perceptions of a significant number of important states of the realities of the international political issue area that law is meant to regulate—a classic gap between law and reality caused by the law simply lagging behind the dynamics of technological and geo-political change.<sup>33</sup> Such a situation, in which the law is seen by its subjects to be out of touch with the “on the ground” realities of the decisions and actions it is intended to govern, in any area of the law, is simply unsustainable, and as in any other area of law the result of this gap is decreasing confidence in the law and its institutions of maintenance, a decreasing perception of the validity of the law, increasing antagonism toward the law, and resultant non-compliance with the reason-offending rules.<sup>34</sup> This indeed was one of the fundamental reasons underlying the decision by Western powers to invade Iraq in 2003, and is the reason that fears abound regarding future acts of force outside of the U.N. Charter use of force system by counterproliferation-oriented states, in places like Iran and North Korea.

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33. See Michael J. Glennon, *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, 549-58 (2002); Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260, 260 (1940); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 2 (2002); Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 629 (2003); Robert F. Turner, *Operation Iraqi Freedom: Legal and Policy Considerations*, 27 HARV. J.L. & PUB. POL'Y 765, 792-93 (2004); Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576, 583 (2003); John C. Yoo & Will Trachman, *Less Than Bargained for: The Use of Force and the Declining Relevance of the United Nations*, 5 CHI. J. INT'L L. 379, 381-82 (2005). See generally Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, WASH. Q., Spring 2003, at 89 (assessing the lawfulness of the Bush doctrine and its approach to the evolving threats and capabilities of terrorist adversaries); Richard N. Gardner, *Neither Bush nor the "Jurisprudes"*, 97 AM. J. INT'L L. 585 (2003) (arguing that U.S. policy surrounding the 2003 Iraq invasion illustrates the need for a different approach to use of force issues in the international community).

34. See Glennon, *supra* note 33.

D. *Disproportionate Significance?*

Still, it is certainly true that only relatively powerful states would consider engaging in a counterproliferation-oriented preemptive use of force. This is of course because only a relatively few states in the world have the capacity to project power through military force internationally, with confidence that they will be able to successfully withstand responsive uses of force against them.

Some will no doubt argue as a consequence of this fact, that there are simply too few states anxiously concerned with this issue, and willing to act in furtherance of preemptive strike policies, for it to be cited as the cause of a "crisis" in international use of force law.

It should be borne in mind, however, that while numerically in the minority, these powerful actors are a disproportionately important subset of states to consider with regard to the current status and future character and substance of international use of force law for a number of interconnected reasons. Firstly, among this subset are many states who, correctly or not, feel particularly threatened by the possibility of WMD attacks against them. For some states this is due to longstanding regional inter-state disputes, the parties to which have or are in the process of developing WMD arsenals.<sup>35</sup> For other states, this is because of aspects of their political or cultural identity, or their international influence and activity, which they perceive have increased the likelihood of asymmetric attacks against them by terrorists and other, particularly non-state, actors using WMD.<sup>36</sup> This fact of perceived particular threat, together with the above mentioned capacity of such states to act internationally in pursuance of a broad understanding of their vital national interests, produces a peculiar and important subset of states that are both most likely to want to have the legal option to engage in counterproliferation-oriented preemptive acts of force, and at the same time most likely to have the power and influence in international relations to either alter or opt-out of treaties, as well as to employ the means of creation of customary law, in order to bring about such desired legal changes.<sup>37</sup>

In addition to their disproportionate motivation for and influence in changing relevant sources of law, these powerful actors are

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35. See *India Mulls 'Pre-Emptive' Pakistan Strike*, *supra* note 6; *Israel's Plans for Iran Strikes*, *supra* note 6.

36. See, e.g., Blair, Remarks on Release of Iraq Dossier, *supra* note 29 (discussing such perceived threats against the U.K.).

37. See MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES 35-40 (1999).

of particular importance in considering the future of international use of force law because they are among the relatively few states in the world against whom the horizontal enforcement mechanisms of international law—i.e. issue linkaging, diplomatic or economic pressuring, or direct military force—are unlikely to be effective should they alternatively decide that acting in a way that is formally in breach of the law is in their vital national interests, even if the majority of states recognize the action as illegal.<sup>38</sup> The 2003 Iraq intervention is, again, a perfect example of this ability.

For all of these reasons, it is argued herein that it is possible for the perceptions and actions of a relatively small subset of powerful states to form the basis for a crisis in international use of force law. It is further submitted, in agreement with former Secretary-General Annan's statements, that the current state of international use of force law is indeed a state of crisis, the resolution of which is of fundamental importance to the future of the United Nations and to the U.N. Charter system for use of force regulation.

In his September 2003 remarks to the General Assembly, the Secretary-General went on to discuss the founding ideals of the U.N. Charter and to conclude, "[n]ow we must decide whether it is possible to continue on the basis agreed then, or whether radical changes are needed. And we must not shy away from questions about the adequacy, and effectiveness of the rules and instruments at our disposal."<sup>39</sup> There are indeed a number of possibilities for reform or amendment of relevant provisions of use of force law and the organs of the United Nations, many of which have been proposed and discussed at length by others as alternatives for bridging the gap and bringing the law into harmony with the realities of international security concerns, though none of the proposals has met with generalized approval among members of the United Nations.<sup>40</sup> This Article will proceed by reviewing the most

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38. See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1860-72 (2002) (predicting and discussing when states might violate or comply with international laws and norms); Harold Hongju Koh, Review Essay, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645-58 (1997). Cf. Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 187-204 (1993) (discussing generally possible motives for non-compliance and what determines an acceptable level of compliance with treaties and norms).

39. U.N. GAOR, 58th Sess., 7th plen. mtg. at 3, U.N. Doc. A/58/PV.7 (Sept. 23, 2003), available at <http://www.un.org/webcast/ga/58/statements/sg2eng030923>.

40. See, e.g., Yehuda Z. Blum, *Proposals for UN Security Council Reform*, 99 AM. J. INT'L L. 632 (2005) (discussing 2004 U.N. panel recommendations for strengthening the U.N.); Inocencio Arias, *Humanitarian Intervention: Could the Security Council Kill the United Nations?*, 23 FORDHAM INT'L L.J. 1005, 1026 (2000) (listing possible solutions to reform the U.N. veto

noteworthy of these proposals, on the subjects of the composition and decisionmaking processes of the Security Council, and the construction and application of the law on self-defense contained in Article 51.

It will then go on, however, to propose a somewhat different and more revolutionary path which the international community could choose to take in reforming the provision of international norms in the area of international uses of force. This proposal would involve a change to the fundamental character of the norms governing uses of force, to make them more practically useful to states and more in keeping both with the demands of states for greater flexibility in responding to threats, and with what will be argued to be a more correct understanding of the proper role of international norms in this specific area of international relations. This analysis will be based upon an understanding drawn from international legal theory that international law, in its current evolutionary state, is better able to regulate some areas of international relations through formal law than others; and the corollary understanding that some areas of international relations are better given normative underpinning and standardization through the use of informal, non-binding norms.

The proposal will seek to use understandings from international relations literature, particularly from the sub-field of liberal institutionalism, to show that such informal norms can still have a significant influence upon state action, and can be of significant aid to states in overcoming the hindering forces of anarchy in international politics through the facilitation of cooperation. In fact, it will argue that these norms can accomplish in the area of use of force law virtually everything that formal rules can accomplish, without causing the unnecessary negative collateral effects for the rest of the formal corpus of international law which have been occasioned by its breach by powerful states in highly publicized and splashy instances of state interest non-alignment.

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system); FRANCK, *supra* note 15, at 4-5; THE U.N. SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY (David Malone ed., 2004) (providing a history of the Security Council and attendant reform efforts); BARDO FASSBENDER, U.N. SECURITY COUNCIL REFORM AND THE RIGHT OF VETO (1998) (describing various proposals for U.N. reform); REFORMING THE UNITED NATIONS: THE STRUGGLE FOR LEGITIMACY AND EFFECTIVENESS (Joachim Müller ed., 2006) (setting forth a history of U.N. reform efforts).

## II. POSSIBILITIES FOR CHANGE

A. *The Security Council*

Among proposals for amendment to the provisions and procedures of the U.N. Charter system for use of force regulation, none has been more discussed than the idea of amending the makeup and decisionmaking procedures of the Security Council in order to make it a more credible, supportable and effective body in the exercise of its authority granted under the U.N. Charter.<sup>41</sup> These proposals essentially recognize that the 1945 political accord which provided for a ten-member rotating membership of the Security Council, plus the allocation of permanent member status and special veto rights to five specific states on the Council, is both unsatisfactory of modern ideas of democratic representation in international organizations, and unreflective of modern realities of states' power and influence.

Proposals for amendment of the Security Council have been many and varied, but can be categorized in summary as proposals for changing (a) the size of the Council; (b) the membership of the Council; (c) the identity of permanent members of the Council (if any); (d) the powers of permanent members; and (e) the procedures for Council decisionmaking.

One set of proposals for changing the size and membership of the Security Council was made by the 2004 High-Level Panel (Panel) Report.<sup>42</sup> The Panel concluded that a decision to enlarge the Security Council's membership was "a necessity," and that it should be guided primarily by principles of increased democratic representation of U.N. members, particularly from the developing world, and of accountability in decisionmaking. Realization of these principles, it argued, was necessary for the Council to be seen as a legitimate, credible body in taking decisions regarding international uses of force.<sup>43</sup>

The Panel produced two proposals for amendment to the size and composition of the Security Council, involving a distribution of seats among four regional areas: Africa, Asia and Pacific, Europe, and the Americas. Under Model A, six new permanent seats on the Council would be created along with three two-term non-permanent seats, resulting in a revised overall Council mem-

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41. See, e.g., FASSBENDER, *supra* note 40, at 221-76; Blum, *supra* note 40, at 633-44.

42. *A More Secure World*, *supra* note 1, ¶¶ 248-53.

43. *Id.* ¶ 250.

bership of 24 states, evenly divided among the four geographic regions. (See Figure A)<sup>44</sup>

<i>Regional area</i>	<i>No. of States</i>	<i>Permanent seats (continuing)</i>	<i>Proposed new permanent seats</i>	<i>Proposed two-year seats (non-renewable)</i>	<i>Total</i>
Africa	53	0	2	4	6
Asia and Pacific	56	1	2	3	6
Europe	47	3	1	2	6
Americas	35	1	1	4	6
<b>Totals model A</b>	<b>191</b>	<b>5</b>	<b>6</b>	<b>13</b>	<b>24</b>

As an alternative construction, under Model B no new permanent seats would be created, but eight four-year renewable-term seats and one two-year non-permanent seat would be created, and divided evenly among the four regions. (See Figure B)<sup>45</sup>

<i>Regional area</i>	<i>No. of States</i>	<i>Permanent seats (continuing)</i>	<i>Proposed four-year renewable seats</i>	<i>Proposed two-year seats (non-renewable)</i>	<i>Total</i>
Africa	53	0	2	4	6
Asia and Pacific	56	1	2	3	6
Europe	47	3	2	1	6
Americas	35	1	2	3	6
<b>Totals model B</b>	<b>191</b>	<b>5</b>	<b>8</b>	<b>11</b>	<b>24</b>

Although the Panel’s Model A proposed the creation of new permanent seats on the Council, it did not provide for veto powers for those new permanent members, to equal the powers coincident with permanent member status under the existing Charter structure. Indeed, neither model provided for either expansion of veto powers or circumscription of the existing veto powers of permanent members. However, proposals from other sources have included alternatives for revoking the veto rights of permanent members entirely, or for establishing new decisionmaking rules for the Council which would mediate the effect of permanent members’ veto, such as by allowing a supermajority of the Security Council to override the veto of one of the permanent members, or requiring the Council to take up a measure for “second consideration” if it was first defeated by only one permanent member’s veto.

44. Figures A and B reprinted from *A More Secure World*, *supra* note 1, ¶¶ 252-53.

45. *Id.* at ¶ 253.

In such a case of second consideration, the measure would only be defeated by the votes of two permanent members.<sup>46</sup> These and other proposals for amending the distribution of power among Security Council members, and for changing the Council's voting procedures, have been primarily aimed at improving the efficiency of Security Council decisionmaking, and at decreasing instances of stalemate in the Council and resultant inaction in the face of threats.

A number of these proposals for amendment of the Security Council and its decisionmaking procedures have received substantial political support, particularly on the issue of enlargement of the Security Council. A number of alternative plans have been put forward, and variously endorsed by groups of states, including some existing permanent Council members.<sup>47</sup> There was some significant hope that the issue of Security Council enlargement would be made part of the formal agenda for the United Nations' 2005 World Summit. However, this hope, as most hopes for progress in United Nations reform efforts at the World Summit, was not realized.<sup>48</sup>

Even if politically possible, however, the problems with this entire line of thinking in the counterproliferation-oriented preemption context are several and fundamental. For the Security Council to fill the role of authorizer, through its Chapter VII powers, of counterproliferation-oriented preemptive uses of force, it would have to be a forum in which member states were comfortable in sharing highly sensitive intelligence information, in order to convince fellow Council members to support their application for authorization. It would further have to be a body among whose members there is likely to be substantial agreement regarding the sources and characteristics of threats warranting preemptive uses of force, so as to make states confident that efforts to work through the Council would likely be successful and worth the transactions

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46. See Arias, *supra* note 40, at 1026.

47. See *UN Debates New Security Council*, BBC News, July 12, 2005, <http://news.bbc.co.uk/1/hi/world/americas/4673977.stm>.

48. See *U.N. Reform Agenda Watered Down*, CNN, Sept. 14, 2005, <http://edition.cnn.com/2005/us/09/14/un.reform/index.html>. Secretary General Annan observed that "[t]he big item missing is non-proliferation and disarmament. This is a real disgrace . . . when we are all concerned with weapons of mass destruction and that they may get into the wrong hands." *Id.* (alteration in original).

costs and inevitable risks of intelligence leaking to the target entity involved.<sup>49</sup>

However, the Security Council does not meet either of these criteria as it is currently structured, and, more to the point, none of the proposals which have been offered for amending it would serve to substantially address these limitations of the institutional capacity of the Council to act in such cases. The intelligence which states collect on WMD threats of a nature which causes them such serious concern as to warrant a decision to use preemptive military force is intelligence of the highest sensitivity, and will have been collected through means the secrecy of which the collecting state will protect at all costs. Information of this sensitivity will simply not be shared by states with a group as diverse as the Security Council, no matter who the collecting state is. Sharing of intelligence of this degree of sensitivity sometimes occurs between the closest of allies, for functional purposes, but would never be shared either openly or confidentially to the general membership of the Council or to U.N. staff. The risk of leakage to the target state, and general risks of divulgence of sources and methods, is simply too great with insufficient likely gain from the effort. Although there have been proposals for the establishment of safeguards and confidence-building processes for sharing of intelligence within the U.N.<sup>50</sup>, none of these are likely to satisfy states when dealing with information of this level of sensitivity. An expanded Security Council membership, made regionally even more diverse, would further decrease the likelihood of sensitive information being shared, and thus further diminish the feasibility of the Security Council's filling a meaningful role in authorizing counterproliferation-oriented preemptions.

The second institutional limitation the Security Council faces in this area again lies in the diversity of states comprising the Council's membership, and is the fact that members of the Security Council differ fundamentally at times in their perception and appreciation of WMD threats. Both the case of Iraq in 2003, as well as the ongoing case of Iran are salient examples of such a divergence of views regarding both the existence and degree of imminence of WMD threats. In both cases it became clear to those

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49. *See generally* SIMON CHESTERMAN, LOWY INSTITUTE FOR INTERNATIONAL LAW, SHARED SECRETS: INTELLIGENCE AND COLLECTIVE SECURITY (2006), available at [http://iilj.org/research/documents/chesterman\\_shared\\_secrets\\_2006.pdf](http://iilj.org/research/documents/chesterman_shared_secrets_2006.pdf) (examining the possibilities and difficulties of sharing intelligence in the context of collective security).

50. *See id.* at 32-38.



permanent members of the Council that wished to pursue forceful action under the authority of Chapter VII of the Charter, that that view was not shared by other permanent members of the Council. Thus, in both cases, those wishing to pursue such forceful action, elected to pursue that action outside of the Charter framework.<sup>51</sup>

Although the Security Council acts as a body empowered with special legal rights, such disagreements and resultant inability to act as a body and to use those rights, are reminders that the Council is primarily an international political body, made up of states with divergent and often conflicting interests and world views. The expectation that such a group of states would in a consistent manner substantially agree in their perception of threats, so as to give states confidence that applications to the Council for preemptive force against WMD threats will likely find approval by nine members of the Council including all five permanent members, has little foundation. This fact argues against the prudential soundness of the reliance placed upon the Security Council, as a body with the capacity to act as an authorizer of preemptive uses of force, by the 2004 High-Level Report as reflected in the Panel's statement quoted above.<sup>52</sup> Again, proposals for increasing the size of the Council and the number and diversity of its membership, would only serve to exacerbate this problem further, and would make the possibility of such consistent agreement less, not more, likely, and thus further compromise the Council's ability to fulfill such a role.

It is argued herein that proposals for reform of the Security Council and its procedures, with a purpose in making the Council better able to function as an authorizer of counterproliferation-oriented preemptive uses of force, fail entirely to grasp the nettle of the serious institutional limitations upon the Council's capacity to act in this role. As shown above, the proposals which enjoy the broadest political support, i.e. those for enlarging and diversifying the Council's membership, would in fact produce effects retrograde to these aims. The 2004 High-Level Panel's Report emphasis upon such amendment, and not upon more fundamental change to the underlying rules of international use of force law, it is therefore submitted, is largely misplaced.<sup>53</sup>

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51. See Dafna Linzer, *U.S. Urges Financial Sanctions on Iran*, WASH. POST, May 29, 2006, at A1; JOYNER, *supra* note 16.

52. See *A More Secure World*, *supra* note 1, ¶190 ("The short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to.")

53. See *id.*

B. *Article 51*

The other most frequently discussed area for possible amendment to the U.N. Charter system of use of force law, particularly in consideration of the concerns some states have regarding WMD proliferation and international terrorism, and the need for preemptive acts to address these threats, is the U.N. Charter law on self-defense, contained in Article 51.<sup>54</sup> This provision and its relevance to debates regarding counterproliferation-oriented preemptive uses of force, including the argued inclusion from customary law of a right of anticipatory self-defense within its broader interpretation, have been discussed above. As concluded through that discussion, Article 51, even with its broader interpretation to include the customary law right of anticipatory self-defense, is not sufficient to legally justify preemptive strikes of the sort prescribed by some powerful states' national counterproliferation policies.

The question of amendment thus becomes, is there some other formulation of the right of self-defense which might be agreed by states through amendment to the U.N. Charter or authoritative process of interpretation of that document, or through the development of a more expansive right of anticipatory self-defense in customary law, which would at once allow states the normative and procedural flexibility they desire to legally justify unilateral acts of force against developing WMD threats, while at the same time preserving an objectively verifiable rule of law on the subject of self-defense in international law?

The strength of Article 51 as currently textually constructed is its clarity, in establishing a "bright line" rule for unilateral self-defense, requiring there to be an *ex ante* "armed attack" against a state before it may invoke its temporary right of unilateral self-defense and use force against the state or non-state actor that has attacked it in order to repel the current attack and prevent further attacks. This standard, although still controversial in the details of its interpretation and application, does establish a fairly workable standard in principle, that is capable of objective, independent determination by other states *ex ante*, and by authoritative arbiters *ex post*. However, this clarity and definition also comprise the weakness of Article 51, as its provisions are applied to the modern realities some states feel are present in their security calculations,

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54. Cf. MICHAEL W. DOYLE, *STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT* 30-42 (Stephen Macedo ed., 2008) (discussing a variety of remedies for the Security Council to address issues of preemptive acts).

and particularly with regard to the threat of use of WMD as discussed above.

In considering possibilities for amendment to Article 51, states with counterproliferation-oriented preemptive strike policies likely would wish for either formal amendment or authoritative re-interpretation through subsequent state practice, to produce a right of anticipatory self-defense which allows for a preemptive attack when a state has evidence (perhaps even if only circumstantial, and likely not open to review by other states) of WMD development or possession by another state or non-state actor, and a reasonable basis in fact (perhaps comprised largely by historical antipathy, and prior examples of aggressive acts or “ties” to terrorist organizations) to suspect that those WMD might be used to threaten them at some point in the future. This standard sounds vague and indeterminate because it is vague and indeterminate, but in reality it is the sort of normative construction that would be necessary in order to justify the preemptive acts of force contemplated by some national counterproliferation policies and official statements.<sup>55</sup> This level of vagueness and subjectivity with regard to evidentiary standards, burden of evidentiary production, perception of threat and imminence of threat, is precisely what would be required in order to give such states the legal flexibility they would need to pursue such policies.

However, flexibility and vagueness in law on the one hand, and predictability and verifiability in law on the other, are very difficult to engineer simultaneously into the same legal provision.<sup>56</sup> As the vagueness and subjectivity of the right of self-defense increases through such flexible construction, so the ability of other states to judge *ex ante*, and authoritative arbiters to judge *ex post* the compliance of the action with the normative standard, decreases in measure. In a similar variance, as this ability of third parties to adjudge the compliance of a self-defending state’s action with the applicable international legal standard decreases, so in proportion

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55. For an example of such a statement, see THE WHITE HOUSE, THE NATIONAL STRATEGY OF THE USA 15 (2002), available at <http://www.whitehouse.gov/nsc/nss/2002/index.html> (“We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”).

56. See generally TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW (2000) (arguing that vagueness and indeterminacy in the law fail to create predictability and verifiability, frustrating the rule of law); OBJECTIVITY IN LAW AND MORALS (Brian Leiter ed., 2000) (exploring the idea that vagueness in law can lead to an increase in the role of morality in interpreting the law, which in turn questions the objectivity of law).

does the character of that standard as a rule of law.<sup>57</sup> As conceded above, the existing law of self-defense contained in Article 51 is, despite being an overall workable standard in principle, controversial enough in its discrete application to facts. Increasing the level of normative vagueness and subjectivity of its provisions would serve only to exacerbate this problem.

Added to this problem of effective norm construction, is the institutional problem within the international legal system of the relative absence of practical means of authoritative adjudication of disputes, including those regarding use of force law generally and self-defense law in particular.<sup>58</sup> This problem is of course essentially the product of the voluntary jurisdictional basis of international judicial bodies such as the International Court of Justice (ICJ), and the election by many states not to accede to the compulsory jurisdiction of the ICJ.<sup>59</sup> This ability of states to avoid the jurisdiction of international judicial bodies on questions of self-defense law has significantly hampered the development of authoritative interpretations of the provisions of Article 51 and their consistent application, notwithstanding the fact that they are, as previously discussed, relatively straightforward. An expansive and more flexible rule of anticipatory self-defense will only increase controversies regarding the correct interpretation of the law, as an authoritative interpreter is effectively absent.

The difficulty of satisfactory rule construction in the area of self-defense, and the international legal system's incapacity to adjudicate self-defense rules effectively, taken together, make reliance on amendment of Article 51 to include a broader, more flexible right of anticipatory self-defense unlikely to be the answer to the crisis caused by powerful states' desires to pursue policies of counterproliferation-oriented preemption in disharmony with existing international use of force law.

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57. See generally Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553 (2001).

58. See Charles Lipson, *Why are Some International Agreements Informal?*, 45 INT'L ORG. 495, 505-506 (1991) (discussing the relative absence of authoritative adjudication of disputes). See generally Gray, *supra* note 25 (discussing the International Court of Justice's reluctance to adjudicate authoritatively in use of force cases).

59. See DANIEL JOYNER, *INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION* (forthcoming 2009).

### III. DEFORMALIZATION

#### A. *Overstretching*

Neither amendment of the Security Council's membership or its procedures, nor reconstitution or reinterpretation of self-defense law under Article 51 seem to hold much promise for meaningful resolution of the crisis caused by the gap between law and reality at the nexus of states' counterproliferation policies and international use of force law. Indeed there seem to be no real prospects for amendment to the Charter, or to related customary law on the use of force that could address effectively both the desires of states with counterproliferation policies for normative flexibility, and the requirements of those interested in international law as a legal system for such amended provisions governing use of force to possess the important rule-of-law characteristics of predictability and objective verifiability.

It is argued herein that this crisis, which appears to be un-resolvable through amendment to the formal sources of international use of force law, exposes in salient fashion an underlying but long-ignored truth about the *jus ad bellum*. This is that, at the current state of evolution of its sources and institutions of adjudication and enforcement, international law as a legal system simply doesn't have either the normative or structural tools necessary to govern this area of international interaction, i.e. international use of force by states, in a credible and supportable way.

This truth was obscured for forty-five years by the coincident, coterminous existence in international politics of bi-polar power dynamics and the possession by the two Cold War powers of nuclear arsenals, which produced an antagonistic but relatively stable international security situation because of the powerful escalating dynamic of mutually assured destruction.<sup>60</sup> This dynamic, which could be triggered by even the most minor initial transgression between a superpower and the client state of the other superpower (for example the Cuban Missile Crisis of 1962), kept serious international conflicts in any way involving powerful states to a minimum.<sup>61</sup>

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60. See Kenneth Waltz, *More May be Better*, in SCOTT D. SAGAN & KENNETH N. WALTZ, *THE SPREAD OF NUCLEAR WEAPONS* 3, 7 (2nd ed. 2003).

61. See LYLE GOLDSTEIN, *PREVENTIVE ATTACK AND WEAPONS OF MASS DESTRUCTION: A COMPARATIVE HISTORICAL ANALYSIS* 14 (2006); Erich Weede, *Extended Deterrence, Superpower Control, and Militarized Interstate Disputes, 1962-1976*, 26 J. PEACE RES. 7, 10 (1989).

This, of course, was also the founding ideal of the United Nations: the prevention of uses of force by powerful states against less-powerful states. The prevention of war between powerful states themselves was of course the ultimate objective of the Charter framers, who had lived through the devastation of two world wars involving armed conflict between powerful states, but they recognized that wars initiated between powerful states are rare because of the high costs involved and resulting deterrent effect. They realized that, as in the case of the previous two world wars, conflict between powerful states is more often precipitated by powerful states' conflict with and use of force against less powerful states and non-state actors which, because of alliances with other powerful states or the threat of further spread of influence and power which might eventually threaten them, draws other powerful states into the conflict and results in powerful states being pitted against each other.<sup>62</sup>

Because of this empirical record of superpower stability during the Cold War, many lauded the success of the U.N. Charter system for use of force regulation as having had a causal effect in producing this result.<sup>63</sup> The change to the empirical data produced after the fall of the Soviet Union in the 1990s however, during which uses of force by powerful states against less powerful states became more frequent, casts significant doubt upon such attributions of success to the United Nations system.<sup>64</sup> This increase in the frequency of armed conflicts involving powerful states argues strongly that the attribution of causation to the United Nations use of force system as having been a primary independent variable affecting the relatively inactive period of powerful state use of force during the Cold War, was in fact a specious claim, and that the observed reluctance of powerful states to use force during this period was more

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62. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 17, at 119-20 (discussing indirect force and asserting that Art. 2(4) extends to indirect force); GOLDSTEIN, *supra* note 61, at 44-45; David M. Malone, *Introduction to THE U.N. SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY*, *supra* note 40, at 1-13 ("The Council initially viewed its role as preventing a third world war. As the Cold War came to define global politics, the Council moved to tackle prevention of regional conflicts (often between client states or proxies of the superpowers) from spilling into a global conflagration.").

63. See Charles Kegley & Gregory Raymond, *International Legal Norms and the Preservation of Peace, 1820-1964: Some Evidence and Bivariate Relationships*, 8 INT'L INTERACTIONS 171, 180-82 (1981) (providing empirical data regarding superpower stability); H.K. Tillema & J.R. Van Wingen, *Law and Power in Military Intervention*, 26 INT'L STUD. Q. 220 (1982).

64. See DOYLE, *supra* note 54, at 24-25. See generally MARY KALDOR, *NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA* (2001); GOLDSTEIN, *supra* note 61; John J. Mearns, *Why We Will Soon Miss the Cold War*, THE ATLANTIC, August 1990, at 35.

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validly explained by larger contextual geopolitical forces and not by the effect of international use of force law upon state behavior.<sup>65</sup>

The post-September 11 climate of concern regarding international terrorism and the proliferation of WMD, and the resulting change in emphasis in many powerful states' national security policies to counterproliferation strategies in disharmony with the U.N. Charter system, foreshadows a continuation of this increased incidence of powerful states' use of force against less powerful states. Large-scale actions similar to the 2003 Iraq intervention, as well as smaller-scale breaches of sovereignty as per the Proliferation Security Initiative, will likely continue to occur in coming decades in the name of counterproliferation, as powerful states try to slow the inevitable spread of WMD to states and non-state actors of concern to them.<sup>66</sup> As these high-profile breaches of international use of force law continue to occur over the protestation of the majority of states, they will do more and more damage to the perceived credibility not only of international use of force law and the U.N. Charter system, but to the rest of the formal corpus of international law as well.

Thus, it is argued herein that international lawyers and governments must finally come to terms with the reality of the structural

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65. See Joseph Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485, 491 (1988); John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SEC. 5, 14, 33 (1994). This is not to say that use of force law as codified in the U.N. Charter has no effect as an independent variable upon state action. See IAN HURD, *AFTER ANARCHY: LEGITIMACY & POWER IN THE UNITED NATIONS SECURITY COUNCIL* 6, 13, 14 (2007). Rather, it is to say that use of force law was not a significant independent variable producing Cold War stability. The argument will be made herein that international norms can matter, even in the area of international use of force, although norms of a hard law character are inappropriate for regulation of this area currently. In summary, the argument herein is that soft law will matter as an independent variable in this area as much as any norms can matter in this area currently.

66. GOLDSTEIN, *supra* note 61, at 155

Reconsidering the possible constraints on a given superior power, note that in the post-Cold War world, the United States is not likely to be limited by an adversary's conventional strength, as was often the case in the Cold War. . . . Nor is the proliferator likely to find effective alliance partners, since there is no longer any alternative superpower. These two conditions are the defining elements of the post-Cold War international system. We must consider that only norms and geography are left to constrain the United States from fighting a series of volatile counterproliferation wars. These conditions existed before 11 September 2001, and before the articulation of the Bush Doctrine. The September 11 terror attacks appear to have significantly weakened norms in U.S. political culture that discourage preventive attack. Therefore, the post-September 11 world has witnessed a further exaggeration of the instability resulting from radical asymmetry in WMD rivalries. The U.S. military has been working for well over a decade at digesting the lessons of the early 1990s, actively preparing for contests with regional adversaries.

*Id.*

capacities and limitations of the international legal system in the area of use of force regulation, and rigorously and honestly reassess what international use of force law can and cannot be expected to accomplish, as well as the costs to the perceived credibility of the rest of the formal corpus of international law which will be sustained through continued unwarranted excess in these expectations. It is argued that this crisis moment reveals fundamental problems with the application of the formal sources of international law to this area of international interaction, and that a more elemental reconceptualization of the prudential character and attributes of international norms regulating uses of force is required.

It must be remembered that international use of force law is a relatively late development in the history of international law, only reaching its maturity in a broad, multilateral prohibition on the use of force as part of the post-World War II renaissance of reliance upon international norms and institutions, after the profound skepticism regarding the effectiveness of the Kellogg-Briand Pact and the League of Nations during the late inter-war years.<sup>67</sup> As with a number of the other new projects which expanded exponentially the range of international interaction covered by international law during this time (e.g. international criminal law and international human rights law), international use of force law was an idealistic extension of the formal sources of international law, born from the hope of using international standards of behavior to dissuade states from engaging in the sorts of actions which, in the words of the U.N. Charter Preamble, had “twice in our lifetime . . . brought untold sorrow to mankind . . . .”<sup>68</sup>

It was hoped that, as with the other more traditional areas of international legal coverage, even unwilling states would self-interestedly comply with these rules because of the expectations of the broader international community and resulting issue linkages to their economic prosperity, and because of the power of the states which had established the U.N. Charter and which took the five permanent seats on the Security Council. However, this was by far

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67. See Gerry Simpson, *The Situation on the Legal Theory Front: The Power of Rules and the Rule of Power*, 11 EUR. J. INT'L L. 439, 448-49 (2000). See generally STEPHEN NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 288, 314-56 (Cambridge University Press 2005) (setting forth a broad discussion of the U.N. Charter in the post-war context).

68. U.N. Charter pmbl. See generally Oscar Schachter, *The UN Legal Order: An Overview*, in *THE UNITED NATIONS AND INTERNATIONAL LAW* 3 (Christopher Joyner ed., 1997) (discussing the development of use of force law, including examples of the use of international standards or norms to dissuade the proliferation on WMD).



the furthest extension of the idea of regulating international behavior through binding legal norms, and would be the greatest test of the horizontal pressing forces which had been relatively effective in producing compliance with international rules governing navigation and trade by sea, diplomatic relations, and territorial acquisition and boundaries for centuries.<sup>69</sup>

The post Cold War history of powerful state uses of force, and particularly that history since September 11, 2001, culminating in the present crisis between law and reality on the subject of counter-proliferation-oriented preemption, is evidence that this most sensitive area of international relations has exceeded the regulating capacity of the formal sources of international law, and the normative and structural limitations of international law as a legal system.<sup>70</sup> The absence both of effective and reliable means for adjudication of disputes by international judicial bodies and of effective vertical enforcement mechanisms upon powerful states, while not crippling to the effective regulation of these other areas of international interaction through the sources of international law and horizontal pressure and issue-linkage-based compliance forces, renders international use of force law both normatively and structurally incapable of effectively regulating its subject matter. In sum, international use of force law is simply an overstretching of the competencies of formal international law.

### B. *International Legal Theory*

To explain this conclusion further, it will be necessary to briefly review a number of prominent jurisprudential theories on the validity of international law. The oldest of these, and one which still provides the underpinning for many fundamental rules of international law, is the idea that the validity of legal rules is based upon principles existing apart from human creation, and discoverable by human reason, whether emanating from the divine or simply inherent in the natural order of human society.<sup>71</sup> This natural

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69. See ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS 149-50, 164 (2008). See generally Chayes & Chayes, *supra* note 38 (discussing generally possible motives for compliance and non-compliance); Koh, *supra* note 38.

70. See GOLDSTEIN, *supra* note 61, at 155 (discussing U.S. policy after 09/11).

71. See generally M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE (7th ed. 2001) (discussing natural law); Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUR. J. INT'L L. 269, 273-74 (2001) (discussing enlightenment naturalism); INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS (Robert J. Beck, et al. eds., 1996) (discussing various rules of international law); RICHARD TUCK, THE RIGHTS OF WAR AND PEACE (1999) (discussing natural rights and duties).

law tradition was the sole conception of legal validity of both domestic and international law up until the nineteenth century, and is most prominently associated with scholars from antiquity including Cicero and St. Augustine, then with medieval scholastics including notably Thomas Aquinas, then with later medieval and enlightenment scholars including Hugo Grotius and Samuel von Pufendorf.

While subject to significant variations in theme through the centuries, the basic idea of this school of jurisprudential thought is that the validity of law or of a legal system in its entirety is based upon the harmony of the substantive rules themselves with higher principles of the *jus naturale*. While not wholly representative of all variations of natural law theory, the Thomist maxim *lex injustia non est lex* gives an indication of this connection between the substance of law and principles of justice or morality contained in the *philosophia perennis*, commonly associated with natural law theory. It is from this natural law foundation that international law incorporated fundamental rules such as *pacta sunt servanda*, or the obligation to comply with treaty commitments, as well as a host of other “general principles of law recognized by civilized nations.”<sup>72</sup>

The empirical revolution in the scholarly sciences in the nineteenth century contributed to the maturation, and eventual dominance over natural law theory, of legal positivism. Legal positivism, as developed by Jeremy Bentham and John Austin, and as revised particularly with regard to international law by Georg Jellinek and Heinrich Triepel, holds that the primary validity of international law is based in the processes of its creation, and not upon the conformity of its substance with higher principles of morality.<sup>73</sup> Positivism severed the necessary connection of law with justice, and focused inquiries concerning validity upon the consent of sovereign states, expressed either explicitly or implicitly, to be bound to international obligations.<sup>74</sup> Legal positivism accepts only such

72. Statute of the International Court of Justice art. 38(1).

73. See GEORG JELLINEK, *ALLGEMEINE STAATSLHRE* (3rd ed. 1914); HEINRICH TRIEPEL, *VOLKERRECHT UND LANDSRECHT* (1899); FREEMAN, *supra* note 71, at 201-08 (discussing Bentham and Austin); Hall, *supra* note 71, at 282-84 (discussing Jellinek and Triepel); *Legal Positivism*, in *INTERNATIONAL RULES*, *supra* note 71, at 52; TUCK, *supra* note 71.

74. See generally M.D.A. FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* (7th ed. 2001) (discussing natural law); Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 *EUR. J. INT'L L.* 269, 273-74 (2001) (discussing enlightenment naturalism); *INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* (Robert J. Beck, et al. eds., 1996) (discussing various rules of international law); RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE* (1999) (discussing natural rights and duties).

empirically verifiable processes, and objectively discernible rules created as a result thereof, as having the character of international law.

Earlier positivist writings, and particularly those of John Austin, further required consistent and reliable sanctions from a hierarchical sovereign as punishment for breach of rules, as a definitional requirement for validity of a legal system. It was on this subject that, according to Austin, international law failed as a legal system, and was classed by him simply as a form of “positive morality.”<sup>75</sup> Later positivists, culminating in the work of H.L.A. Hart, rejected this narrow view of the role of coercion in the requisite characteristics of a valid legal system. According to Hart there is a meaningful difference to be had between the validity of rules which states are *obliged* (i.e. coerced) to obey, and the validity of those which they are *obligated* (i.e. normatively bound) to obey. Hart focused his inquiries into validity upon the obligations of states and not upon rules which force alone—which Hart equated to rules enforced by gangsters—motivates them to obey. Nevertheless, Hart concluded that because international law was composed only of primary, substantive rules, and lacked important secondary or structural/institutional rules regulating the administration of the primary rules, it was not a valid legal system, but rather simply a collection of valid legal rules.<sup>76</sup>

Notwithstanding the doubts of some influential positivist writers regarding the validity of international law, either as a legal system or simply as legal rules, and despite the lingering presence of rules of international law which could only be explained by reference to natural law theory,<sup>77</sup> positivism from the late nineteenth century, and continuing to the present time, became the primary theory which international lawyers used to validate their legal science.<sup>78</sup> Pursuant to positivism’s focus on the process of law creation, international lawyers grounded the validity of the sources of international law upon state consent, and found this consent to be present (although at times through tortured logical processes) in rules created by treaties, customary law, and general principles.

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75. John Austin, *The Province of Jurisprudence Determined*, in *THE GREAT LEGAL PHILOSOPHERS* 336, 351 (Clarence Morris, ed., 1971).

76. H.L.A. Hart, *THE CONCEPT OF LAW* 213-37 (2nd ed., 1994).

77. Including the doctrine of *pacta sunt servanda*, which mandates observance of treaty commitments, and rules of customary international law and general principles of law, only the manifestations and not the substance of which can be explained by legal positivism. See Hall, *supra* note 71, at 285-86, 298-99.

78. See Morgenthau, *supra* note 33.

In his earlier writings, before turning his back on international law and playing a founding role in developing realist political thought after World War II, Hans Morgenthau developed a theory which, although ostensibly rejecting positivism out of hand as the primary theory of validity of international law, incorporated both elements of natural law and Austinian legal positivism to form what Morgenthau referred to as a “functionalist theory” of international law.<sup>79</sup> In his functionalist theory, Morgenthau criticizes legal positivism as being at once both too narrow and too broad to fully explain the validity of international law. Too narrow because it does not include recognition of “ethico-legal” principles and other considerations (e.g. *pacta sunt servanda*) which are a part of the corpus of international law. Too broad because it mandates the inclusion in the corpus of international law of rules which have been enacted by states through positivist processes, but that are not in harmony with the actual practice of states.

He identifies this excessive breadth as a gap between law and reality, in which the law recognizes rules which states create through consent, but with which they do not in fact comply, and is critical of international lawyers for having allowed such a gap to come into existence. As he wrote in 1940:

If an event in the physical world contradicts all scientific forecasts, and thus challenges the assumptions on which the forecasts have been based, it is the natural reaction of scientific inquiry to reexamine the foundations of the specific science and attempt to reconcile scientific findings and empirical facts. The social sciences do not react in the same way. They have an inveterate tendency to stick to their assumptions and to suffer constant defeat from experience rather than to change their assumptions in the light of contradicting facts. This resistance to change is uppermost in the history of international law. . . . Instead of asking whether the devices were adequate to the problems which they were supposed to solve, it was the general attitude of the internationalists to take the appropriateness of the devices for granted and to blame the facts for the failure.<sup>80</sup>

Morgenthau rather proposes a theory of validity which takes into account the relationship of law with wider social and political forces which form the context in which states exist. This theory, he argues, has the ability not only to make legally valid those ethico-legal principles which are accepted as law by states, but which positivism cannot countenance, but also to exclude from the formal

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79. See generally *id.* (setting out this theory).

80. *Id.* at 260.

corpus of valid international law those rules which positivism does sanction, but which are not observed by states.

Whereas natural law focused on the substance of rules and positivism focused on the processes of rule creation, Morgenthau's functionalism places primacy upon the application of rules of law to state practice, and particularly upon the capacity of the legal system to consistently and predictably enforce compliance with substantive legal rules.<sup>81</sup> As he states:

A rule of international law does not, as positivism was prone to believe, receive its validity from its enactment into a legal instrument, as, for instance, an international treaty. There are rules of international law which are valid, although not enacted in such legal instruments, and there are rules of international law which are not valid, although enacted in such instruments. . . . A rule, be it legal, moral, or conventional, is valid when its violation is likely to be followed by an unfavorable reaction, that is, a sanction against its violator. An alleged rule, the violation of which is not followed by such a sanction, is a mere idea, a wish, a suggestion, but not a valid rule.<sup>82</sup>

Each of these jurisprudential theories, which can only be briefly summarized here, has persuasive power in partially explaining the

81. See the more recent re-iteration of this idea in Guzman, *A Compliance-Based Theory of International Law*, *supra* note 38. Additional scholarship on the issue of the relationship between international law and state compliance includes GUZMAN, *HOW INTERNATIONAL LAW WORKS*, *supra* note 69; ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) (discussing strategies for managing compliance); MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998) (discussing the influence of transnational advocacy networks in international politics); Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT'L L. 143 (2001) (arguing that "international law can continue to be used instrumentally to enhance international cooperation"); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988) (discusses "why states obey laws in the absence of coercion"); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005) (explaining why states commit to and comply with treaties, and how treaties influence or fail to influence state behavior); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999) (contending that states enforce international human rights law through a transnational legal process); Koh, *supra* note 38 (exploring the motivations underlying compliance and non-compliance with international law).

82. Morgenthau, *supra* note 33, at 276. This does at first glance look like a simple restatement of Austin, but it differs in important ways. First, Austin would not have recognized the legal validity of ethico-legal principles as Morgenthau does. Second, Austin would not have accepted the sanctions Morgenthau discusses as genuine sanctions, as they do not necessarily flow vertically downwards from a sovereign. Rather, Morgenthau accepts Triepel's identification of the sovereign in the international legal order as being the community of states. He thus accepts horizontal sanctions as providing for the definitional element of enforcement in functionalist theory.

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validity of modern international law. Natural law still is the only theory that can account for the foundational rule of *pacta sunt servanda* as well as the binding nature of both customary law and general principles of law.<sup>83</sup> Legal positivism, however, importantly removes the primary explanation for the sources of international law from the subjectivity of natural law's metaphysical underpinnings and grounds validity in state consent, analogously in accord with mature domestic legal systems.

However, on the question of prudential areas of coverage for the formal corpus of international law and the potential problem of overstretching identified above, Morgenthau's functionalism is most useful. This is because, as is evident from the continuing necessity of appealing to natural law to account for validity of some fundamental aspects of its normative structure, international law, if a legal system at all, is in its embryonic developmental stages as compared to mature domestic legal systems.<sup>84</sup> At this stage of its evolution, care must be taken not to relegate to the coverage of formal international law those areas of international interaction which are beyond the capacity of the sources and structures of the international legal system to regulate effectively. Doing so, as argued above, will only damage the credibility and perceived legitimacy of the legal system as a whole, and thereby slow or potentially permanently derail its evolutionary progress.

In keeping with the functionalist approach advocated by Morgenthau, therefore, the overstretching argument above with regard to *jus ad bellum* can be restated as follows. The non-compulsory jurisdiction of judicial bodies and horizontal enforcement processes which international law has always depended upon to produce compliance can be expected to work well in relatively low politics areas, where expectations of reciprocity are strong and the likely cost of compliance is fairly low. Within this category may be grouped most of the traditional areas of international legal coverage. However, these enforcement processes should not be expected to work well in high politics areas, where issues concern vital national survival and prosperity interests, and where the expectation of reciprocity is dubious and costs of compliance are potentially high. The paradigmatic example of such an issue area

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83. See Hall, *supra* note 71, at 298-99.

84. See OLIVER WENDELL HOLMES, *The Nature of International Law, in LAW AND PEACE IN INTERNATIONAL RELATIONS* 27, 54 (Hans Kelsen ed., 1942).

in the latter category is state use of international force, particularly in self-defense.<sup>85</sup>

It is important to clarify that most areas of international law, i.e. particularly those part of the formal corpus of international law before World War II, do qualify as valid law even under Morgenthau's functionalist criteria. In most of these areas it is realistic to expect some meaningful sanction (including loss of trust and reputation, issue linkaging, economic sanctions, and military force at the most extreme) albeit horizontally, which is likely to produce compliance.<sup>86</sup> But it is important to understand that these forces are likely to produce compliance in these areas *because states are not far away from compliance to begin with*, meaning the cost of compliance, even when states think their short-term interests are better served by breaching, is seen to be outweighed by the long-term benefits of compliance, and thus they are more easily pressured into line. Again, in these areas the political and economic stakes in each instance are relatively low and the cost of compliance with the relevant international rules is also relatively low. These factors, along with an expectation of reciprocal compliance by other states which, along with their own compliance results in the efficiencies designed to be produced by the normative regime, are likely to provide sufficient bases for choosing to comply.

Use of force as an issue area candidate for international legal coverage presents a very different set of decisionmaking calculi for states when considering compliance, however. The above listed horizontal pressuring forces shouldn't be expected to produce compliance with incongruous international rules by a state considering using force, if that state considers that its vital national interests of security and prosperity are at stake and can only be safeguarded through the use of force. This is particularly true if the state is powerful, and can therefore expect to deter and at the extreme resist the application of such sanctions, up to and including military force, imposed by other states. In such a case, the state will reasonably consider that the cost of compliance with the rule (when its judgment is that doing so will threaten its vital national interests) will be too great to be offset by long-term benefits of compliance. This is particularly the case in such areas of high

85. See Guzman, *A Compliance-Based Theory of International Law*, *supra* note 38, at 1883.

86. See GUZMAN, *HOW INTERNATIONAL LAW WORKS*, *supra* note 69, at 9, 33 (arguing that reputation, reciprocity, and retaliation concerns "provide states with an incentive to comply with international legal studies"); Chayes & Chayes, *supra* note 38, at 203 (providing several examples); Guzman, *A Compliance-Based Theory of International Law* *supra* note 38, at 1886-87; Koh, *supra* note 38.

politics and national sovereignty sensitivity, because states will not expect other states to reciprocally comply in similar situations, but will expect those states also to breach in furtherance of their perceived vital self-interest. Thus, there is not the reasonable expectation in reciprocity producing the efficiencies the system was designed to produce—in this case international peace and security—that there is in lower-politics areas.<sup>87</sup>

The unlikelihood of the normatively indeterminate, horizontal pressure forces of the international legal system producing compliance, particularly by powerful states in the area of state uses of force, therefore results in the invalidity of international use of force law, according to Morgenthau's critique.

### C. *Hard and Soft International Law*

Eric Posner and Jack Goldsmith's recent book entitled "The Limits of International Law" approaches the question of the limitations of international law as a legal system from a very different direction—that of international relations theory and specifically rational choice analysis.<sup>88</sup> They argue that international law is essentially epiphenomenal, that it is the product of states' interests and power, and that it does not meaningfully influence state action except through the limited role of defining the relationship between states at any given moment which has been agreed upon as optimal for states' coordination or cooperation. They reject any "noninstrumental" (e.g. belief that compliance is the most legitimate option or is required by concerns of moral principle, including the greater good) considerations for state compliance with international law. According to their model, since states will only comply with international law when they perceive it to be in their interests to do so, expectations for the usefulness of international law in influencing state behavior and in producing positive results in international interactions beyond what states feel is justified by their short-term interests to achieve, should be modest.

Posner and Goldsmith's model is quite a strict version of rationalism, and shares with other rational choice literature the fundamental flaw of insufficiently clarifying the distinction between short

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87. See ROBERT SCOTT & PAUL STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* 19-20 (2006).

88. ERIC POSNER & JACK GOLDSMITH, *THE LIMITS OF INTERNATIONAL LAW* (2005). *But see* GUZMAN, *HOW INTERNATIONAL LAW WORKS*, *supra* note 69, at 12-13 (using a rational choice model to argue that international law does affect state behavior and plays an important role "in facilitating cooperation among states").



term and long term, or micro and macro state interests, and of failing to consider the impact of this distinction upon their analysis, in this case of the usefulness of international law.<sup>89</sup> Their conclusion that international law should not be expected to cause states to act contrary to their interests is produced because of their very narrow definition of state interest, which essentially only includes short term or micro state interests, and excludes longer term or macro state interests such as interests in order, peace, and prosperity. It is these macro interests which states have traditionally sought to secure through the development of international law, and which states have traditionally been willing to sacrifice their short term interests to achieve. International law can therefore better be explained as having a reflective, two-way relationship of causal effect, in that it is created out of states' long term interests, but also serves to reflect these long term or macro interests back upon international interactions in order to limit states' actions which seek to serve short term or micro interests undermining of these original long term or macro interests.

However, this generalized discussion of state interests with regard to international law highlights precisely another significant circumscription of the explanatory power of Posner and Goldsmith's model. In furnishing their "comprehensive analysis of international law" Posner and Goldsmith make no distinction in the operation of international law, and the role of states' power and interest in that operation, as between substantive areas of its coverage. As discussed previously, the interest calculations involved in state decisionmaking can be substantially different depending on which set of issues form the context for that decision. This is because the issue context will be largely determinate of both the nature and scope of the state interests involved, which in turn determines the cost-benefit calculus for states, as well as states' expectations of reciprocity. Posner and Goldsmith's generalized treatment of the role of states' power and interest in the operation of international law makes for a much less sophisticated explanatory theory than one which takes account of the differences between the highly varied international issue areas combined under international law's regulatory remit, and their particular

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89. See Robert Cryer, *The Limits of Objective Rationalism*, 82 INT'L AFF. 183, 185-86 (2006) (book review) (criticizing Posner and Goldsmith's approach to distinguishing short and long-term interests); Martti Koskeniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 455 (1996); ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999).

respective requirements for and susceptibilities to international normative regulation.

The only literature in international relations which has attempted to explain the operation of international norms in a manner capable of distinguishing between substantive areas of international interaction is the excellent legalization thesis developed by Robert Keohane, et al. in a special issue of *International Organization* in 2000, and particularly as applied by Kenneth Abbott and Duncan Snidal in their article entitled "Hard and Soft Law in International Governance."<sup>90</sup> The legalization thesis posits that formalization, or legalization, in the structure of international institutions can be separated into at least three broad sub-categories—obligation, precision, and delegation—the sum of the relative presence of each being the functional determinant of the degree of legalization present in the regime. As described by Keohane, et al.:

"Legalization" refers to a particular set of characteristics that institutions may (or may not) possess. These characteristics are defined along three dimensions: obligation, precision, and delegation. *Obligation* means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are *legally* bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. *Precision* means that rules unambiguously define the conduct they require, authorize, or proscribe. *Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.<sup>91</sup>

The legalization thesis essentially advances the idea that formalization or legalization of international interactions happens along a spectrum, with the place of any particular issue-specific regime along that spectrum being determined by the relative presence in the international norms addressing that regime of these three determinants, and not according to the rigid law/non-law distinction imposed by classical international legal theory.<sup>92</sup>

Abbott and Snidal proceed to apply this thesis by reviewing the advantages and disadvantages of hard law (i.e. legally binding commitments), as compared to soft law (i.e. non-legally binding com-

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90. See generally Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. (SPECIAL ISSUE) 421 (2000).

91. Robert Keohane et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401 (2000) (alteration in original).

92. See Lipson, *supra* note 58, at 508.

mitments), and arguing that international actors deliberately choose the character of the form of normative regulation they wish to address an area of international interaction on the basis of the particularities of that issue area and the appropriateness of the form of regulation, either hard or soft, to regulate those particular circumstances.

Thus they argue that hard law will be chosen in issues areas where priority has been placed upon maximizing the credibility of commitments and minimizing future transactions costs associated with renegotiation of commitments, and where problems of incomplete contracting can be addressed through hard law because of the existence of substantial consensus on general principles, notwithstanding the difficulty of predicting specific applications. They argue that soft law, by contrast, will be chosen to address areas of international interaction in which costs of initial contracting are high, where sovereignty costs are potentially severe (as in issue areas involving national security), where uncertainty of the issue area is high (as through dynamic technological change), and where necessity of compromise is great due to fundamental disagreements over principles.<sup>93</sup>

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93. See Abbott & Snidal, *supra* note 90, at 429-40. With regard to arms control agreements, inclusive of the nonproliferation law treaties, the Abbott & Snidal analysis appears to place such agreements somewhat further down the spectrum towards the appropriateness of hard law regulation, noting that "states should use hard legalization to increase the credibility of commitments when noncompliance is difficult to detect, as in most arms control situations." *Id.* at 429. They note that, while arms control treaties are understandable uses of formality of commitment as a regulatory vehicle, they tend also to be "minimally institutionalized." *Id.* at 440. To phrase the point in terms of their three factors, arms control agreements tend to be high in obligation and low in both precision and delegation. See *id.* at 429-40 (2000) (finding delegation is only "moderate" even in NATO, the "most institutionalized alliance ever"). See generally Richard T. Cupitt and William J. Long, *Multilateral Cooperation and Nuclear Nonproliferation*, in *THE PROLIFERATION PUZZLE: WHY NUCLEAR WEAPONS SPREAD AND WHAT RESULTS* (Zachary S. Davis and Benjamin Frankel, eds., 1993) (discussing the differing approaches taken to combat nuclear proliferation and their similarities to hard law and soft law); Joseph Grieco, *Understanding the Problem of Institutional Cooperation*, in *NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE* 317-21 (David A. Baldwin ed., 1993); Lisa L. Martin, *Coercive Cooperation: Explaining Multilateral Economic Sanctions* 3-8 (1993); Arthur Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, in *NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE* 33, 46-9 (David A. Baldwin ed., 1993); George Bunn and David Holloway, *Arms Control without Treaties?* Stanford University CISAC Working Paper, 1998 (contrasting arms control treaties, which are "formally negotiated [and] legally binding" with reciprocal unilateral measures). For an examination of the multilateral export control regimes by reference to the Abbott & Snidal model, see Daniel H. Joyner, *Restructuring the Multilateral Export Control Regime System*, 9 *J. Conflict & Sec. L.* 181 (2004) (examining the multilateral export control regime by reference to the Abbott & Snidal model).

Applying the “spectrum” model of the legalization thesis, and being guided by the Abbott & Snidal analysis, there would appear to be no more persuasive candidate for international normative regulation through deformed soft law, or non-binding commitments, than the issue area of international uses of force, as particularly manifest in the lesser included issue area of international uses of force against WMD threats. If the gap between law and reality in this area is accepted, as also therefore the need for some normative change, then the daunting prospect of some new multilateral binding agreement on use of force law presents a case of extremely high initial contracting costs for instituting this change in hard law. Sovereignty costs in this issue area are clearly at their zenith, due to modern threats to national security including the potential and very real threat of use of WMD against states by other states and non-state actors. The issue area is highly uncertain, in that the necessities of normative regulation have evolved and continue to evolve as influenced by the dynamic changes to both the means of violence and to the political and economic phenomena (e.g. the facilitation of WMD dual use trade through the forces of globalization) which shape the threats facing states. And the fundamental disagreements among states concerning principles of legitimate self-defense, particularly on the subject of counterproliferation-oriented preemptive strikes as described above, heighten the need for normative compromise in this area. Thus, all of the criteria for prudential application of soft law, instead of hard law, to the issue area are satisfied.<sup>94</sup>

#### D. *Argument*

The foregoing arguments based in both international legal theory and international relations theory support the following conclusions:

- (1) that the *jus ad bellum* constitutes an overstretching of the normative and structural capacities of the formal sources of international law in their current evolutionary status; and
- (2) that as a consequence of (a) this overstretching, (b) the resulting gap between law and reality in the area of counterproliferation-oriented preemption, and (c) the harm caused by

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94. See generally Dinah Shelton, *Introduction to Chapter 8: Multilateral Arms Control*, in COMMITMENT & COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 465-66 (Dinah L. Shelton ed., 2000; Barry Kellman, *Protection of Nuclear Materials*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 486-505 (Dinah Shelton ed., 2002) (discussing the use of soft law to combat the spread of WMDs).

this gap not only to the perceived legitimacy of use of force law but to the perceived legitimacy of the rest of the formal corpus of international law, the body of formal international law now constituting international use of force law should be normatively re-characterized as comprising non-binding commitments, or soft law.

Before proceeding with a further explanation of these conclusions, it is important to distinguish this deformalization thesis from other more extreme arguments relating to the prudential character of international norms in this area, and particularly those of Michael Glennon, which might be termed the “legal nihilist” approach to use of force law.<sup>95</sup>

Glennon’s exhaustive writing on the subject of the character and usefulness of international law, particularly in the area of use of force law can be summarized as follows. Glennon argues that the rules of the U.N. Charter regulating international uses of force are hopelessly unrealistic and impractical, and that because of this impracticality a gap between the law and state practice has been maintained since the Charter was established. He argues that because of this gap, policymakers do not consider international use of force rules as constituting binding law, and therefore tend to ignore them in their policy decisions. As a result of this consistent disregard and breach, he argues, international use of force law has fallen into desuetude, or has become invalid as law. Therefore, he argues, it should continue to be disregarded by policymakers.

Glennon is satisfied (and indeed appears pleased) that there are effectively no international norms which should influence state behavior in their international uses of force. He offers no replacement norms for those he says have fallen into invalidity through non-compliance, simply leaving it to states to decide for themselves which standards if any should guide their behavior in this area of interaction, without any principled framework around which international pressure can be mounted to convince the forceful state that the conduct, while perhaps politically expedient, runs afoul of long standing principles to which the state itself has assented. The only hope he offers for standards to guide states in this area in the future is the potential evolution of customary law through state practice.

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95. For examples of Glennon’s theories, see generally *supra* note 33, at 540 (“I have suggested . . . international ‘rules’ concerning use of force are no longer regarded as obligatory by states.” (footnote and citation omitted)); Michael Glennon, *How International Rules Die*, 93 GEO. L.J. 939 (2005); Michael Glennon, *The Rise and Fall of the U.N. Charter’s Use of Force Rules*, 27 HASTINGS INT’L & COMP. L. REV. 497, 509 (2004).

While sharing some of the same observations regarding the gap between law and reality in international use of force law, the arguments for deformalization in this Article are quite different than Glennon's normative nihilism. The argument herein is that use of force law should largely retain the substance, or definition of its standards, but should simply be re-characterized by states, through positive acts of renunciation and redrafting of documents, primarily including the U.N. Charter, and revised processes of declaration of assent to those agreements as comprising non-binding commitments rather than binding law. These actions, along with further state practice and *opinio juris* pursuant to the revised understanding of the character of use of force principles, would in time further work a modification of relevant customary law. Some would surely call this distinction specious, and would maintain that in the absence of Hart's secondary administrative rules and a vertical orderer, international law has never been anything but a collection of non-binding, hortatory recommendations.<sup>96</sup>

However, it is argued herein that this distinction is meaningful and that the revised non-binding form of these rules would retain to this important area of international interaction a normative core of mutually agreed standards among states, through explicit agreement in documentary form, which would provide a principled locus around which efforts of domestic and international compliance pressure could be focused, and that this retention of explicit standards is both normatively and practically superior to the devilishly indeterminate processes of custom for purposes of influencing state behavior.<sup>97</sup>

While maintaining this normative core of referenceable standards, however, such deformed commitments would have the added advantage of avoiding the unnecessary complications, tortured legal and practical fictions, and increasing harm to the per-

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96. See Guzman, *A Compliance-Based Theory of International Law*, *supra* note 38, at 1870-71 (questioning the efficacy of international law to regulate high stakes issues).

97. See Jeffrey T. Checkel, *Why Comply?: Social Learning and European Identity Change*, 55 INT'L ORG. (Summer) 553, 557-58 (2001). This conclusion has some theoretical kinship to the arguments of the managerial school of regime theory, in which compliance with regime norms is asserted to be more likely achieved through persuasive and "managerial" approaches rather than by the use of coercive sanctions built into the structure of regimes. See CHAYES & CHAYES, *supra* note 81. It is also in keeping with the definition of international regimes put forward by Stephen D. Krasner as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 2 (Stephen Krasner, ed., 1983).

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ceived legitimacy of international law which will necessarily accompany the continued application of formal, binding rules to this international issue area.

With regard to the substance of such deformed rules, as argued above in the first instance the definition of such standards need not depart from their construction in existing legal documents, including most importantly the U.N. Charter. However, as Abbott and Snidal point out, one of the many utilities of soft law regulation is the facility of such norms for amendment with far lower transactions costs than those incurred in efforts to amend formal, binding agreements.<sup>98</sup> The recognition of an agreement as non-binding allows states to renegotiate the language of standards in a much less pressured environment, both due to the fact that they know their actions may never be as strictly decried as illegitimate based upon such non-binding standards, as well as the fact that the domestic procedures and scrutiny which accompany the initial establishment as well as subsequent amendment to soft law agreements are often not nearly as onerous as those which accompany the establishment or amendment of hard law agreements.

Thus, it is likely that such soft law standards could be drafted, or subsequently amended, to incorporate an increased measure of specificity in the definition or explication of standards on issues which in their hard law incarnation have eluded further explication due to significant disagreement among states. Examples of normative regimes in which specificity has been achieved precisely due to the non-binding nature of commitments include the multilateral export control regimes as normative addenda to binding non-proliferation treaties, as well as the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe.<sup>99</sup>

In the use of force context, issues which might receive such added specificity, or explication in a soft law instrument include both anticipatory self-defense and humanitarian intervention. It is worth briefly noting in this context that the controversies which have long subsisted regarding the current restrictive state of international law on the subject of humanitarian interventions, and the gap between law and reality which has appeared in this area (as

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98. Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. (Summer) 421, 434-36 (2000).

99. See Daniel H. Joyner, *Restructuring the Multilateral Export Control Regime System*, 9 J. CONFLICT & SEC. L. 181, 198 (2004).

particularly manifest in the 1999 Kosovo intervention) serve only to support the deformalization thesis for the *jus ad bellum*.<sup>100</sup>

It is likely that such increased specificity would not take the form of more clearly defined or determinate standards, since the disagreements which prevented such clarity in hard law form will persist. Rather, this specificity is more likely to take the form of agreed considerations which should guide state decisionmaking in such areas. These considerations could include both standards which have evolved in custom, such as necessity and proportionality, as well as other factors such as evidentiary standards and legitimating purposes which may be agreed in principle, though left in their specific application to state discretion.<sup>101</sup> This non-binding commitment form would thus provide a normative environment in which the sovereignty sensitive, technologically and politically dynamic issue area of international uses of force could be more dynamically responded to with more specific, explicitly and objectively agreed normative content than is currently possible through hard law forms of regulation.

A further insight from the Abbott and Snidal analysis also bears mention. That is that soft law, in many instances, because of its relative malleability, can function as a very useful precursor to harder forms of regulation, by allowing states to experiment with the definition of standards in a less normatively and politically threatening environment than that of binding multilateral treaties.<sup>102</sup> If the standards embodied in such soft law agreements eventually successfully narrowed the gap between international rules and state practice, the reverse process of formalization of those norms would be relatively straightforward. The deformalization thesis, therefore, while at first blush appearing to work a retrogression in norms addressing uses of force, would be better characterized as a tactical normative retreat, the direction of which could easily be reversed in future.

Thus, while Glennon argues for an absence of normative standards in the area of international uses of force, the argument herein is for a retention of the same or better international stan-

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100. See Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1706 (2000); Daniel H. Joyner, *The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm*, 13 EUR. J. INT'L L. 597 (2002).

101. See DOYLE, *supra* note 54, at 46-64 (proposing standards that look to lethality and likelihood of threat and legitimacy and legality of response); Henry Shue, *What Would a Justified Preventive Military Attack Look Like?* in PREEMPTION: MILITARY ACTION AND MORAL JUSTIFICATION (Henry Shue & David Rodin eds., 2007).

102. Abbott & Snidal, *supra* note 90, at 444-45.



dards, simply with a different normative character. The rejoinder to this deformalization thesis from many international lawyers however will be to argue that the formal, legally binding character of norms governing uses of force is important, and that this argued dilution of the character of norms addressing uses of force would work a significant decrease in the influence of those norms upon state behavior for a number of reasons, and thus to their value in preserving international peace and order. Concern would be no doubt expressed that this path would lead inexorably to a returning of the international normative environment to the *bellum omnium contra omnes* status of pre-*jus ad bellum* international relations, resulting from each state having a largely unregulated *competence du guerre*. It is to these objections to the deformalization thesis that consideration will now turn.

#### IV. IS SOFT LAW MEANINGFUL?

The idea that soft law, or non-binding international norms matter (i.e. influence state action) is in fact much easier to argue than the idea of hard law or formally binding norms having any greater marginal effect on state behavior than soft law norms have. The former argument is supported by extensive and well-developed literature in the field of international relations theory, and in the sub-field of liberal institutionalism particularly.<sup>103</sup> As Robert Keohane, et al. have written:

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103. See, e.g., ROBERT JERVIS, *Security Regimes*, in INTERNATIONAL REGIMES, 173, 173 (Steven Krasner, ed., 1983); ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 63-105 (1984); COOPERATION UNDER ANARCHY (Kenneth Oye ed., 1986); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda* 87 AM. J. INT'L L. 205 (1993); Robert Keohane and Lisa Martin, *The Promise of Institutional Theory*, 20 INT'L SEC. 1, 39, 50; ; Oran Young, *Political Leadership and Regime Formation: On the Development of Institutions in International Society*, 45 INT'L ORG. 281, 284 (1991). Among international lawyers, opinions regarding the recognition of the utility of non-binding norms, as well as the term "soft law" have been mixed. However, it is generally accepted that non-binding norms do have an impact on state behavior, and are thus important to consider from a legal perspective. As Oscar Schachter has noted, "[s]tates entering into a non-legal commitment generally view it as a political (or moral) obligation and intend to carry it out in good faith. Other parties and other states concerned have reason to expect such compliance and to rely on it. . . . [P]olitical texts which express commitments and positions of one kind or another are governed by the general principle of good faith." OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 100 (Martinus Nijhoff Publishers 1991); see also Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296, 299-304 (1977) (discussing the political and moral obligations imposed on parties to non-binding international agreements). When questioned about soft law instruments by the U.S. Senate Foreign Relations Committee, then U.S. Secretary of State Henry Kissinger once remarked that the United States is not "morally or politically free to act as if they did not exist. On

In certain respects the study of international institutions in political science has been directed to demonstrating that informal institutions—not legalized and lacking any centralized enforcement—could still be effective. On the basis of institutionalist theory one should expect frequent informal agreements, some formal rules, and loopholes that provide flexibility in response to political exigencies. . . . Institutional theory has explained how cooperation endures without legalization, but it has not explained legalization.<sup>104</sup>

To argue that a delegalization of international use of force law to produce a system of non-binding commitments would result in a loss of influence of those standards upon state behavior, and thereby devolve the world into Hobbesian anarchy from which the formal rules have saved it for the past sixty years, is simply an unsupported causal statement. To make this argument in light of the model proposed herein, it would have to be shown that there is something specifically about the formality of the norms in this area that has had, or that should be expected to have, a significant marginal effect on bringing about peace and order, i.e. the absence of war, over and above what soft law norms would have been able, or should be expected to be able to achieve. As with many areas of international relations, it is probably impossible empirically to do this because of the absence of a control case, but again, what

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the contrary, they are important statements of diplomatic policy and engage the good faith of the United States as long as the circumstances that gave rise to them continue.” CONG. RESEARCH SERV., *Treaties and other International Agreements: The Role of the United States Senate* 38 (1993) (quoting 73 U.S. Dep’t of State Bulletin 613 (1975)). See generally Alan Boyle & Christine Chinkin, THE MAKING OF INTERNATIONAL LAW 210-229 (2007); Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT & COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21-42 (Dinah Shelton ed., 2000); Mary Ellen O’Connell, *The Role of Soft Law in a Global Order*, in COMMITMENT & COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 100-114 (Dinah Shelton ed., 2000). For a contrary view, see Jerzy Sztucki, *Reflections on International ‘Soft Law’*, in FESTSKRIFT TILL LARS HJERNER – STUDIES IN INTERNATIONAL LAW 550-51 (Jan Ramberg et al. eds., 1990) (“*Primo*, the term is inadequate and misleading. There are no two levels or “species” of law—something is law or is not law. *Secundo*, the concept is counterproductive or even dangerous. On the one hand, it creates illusory expectations of (perhaps even insistence on) compliance with what no one is obliged to comply; and on the other hand, it exposes binding legal norms for risks of neglect, and international law as a whole for risks of erosion, by blurring the threshold between what is legally binding and what is not.”). D.J. Harris has responded that although it may be paradoxical and confusing to call something “law” when it is *not* law, the concept is nonetheless useful to describe instruments that clearly have an impact on international relations and that may later harden into custom or become the basis of a treaty. CASES AND MATERIALS ON INTERNATIONAL LAW 65-66 (5th ed. 1998). In the nonproliferation context in particular, see George Bunn, *The Legal Status of U.S. Negative Security Assurances to Non-Nuclear Weapon States*, 4 NONPROLIFERATION REV. 1 (1997).

104. Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INTERNATIONAL ORGANIZATION 385, 392 (2000).

empirical work there is in international relations literature simply does not bear out this argument. This literature does however bear out the argument that the existence of international norms does have a marginal effect on state behavior over and above the non-existence of norms. This evidence would seem to support the conclusion that it is the weight of a norm as a recognized and supported international community standard, with the corresponding moral, reputational, precedential, and reciprocity factors militating for its observance, that in fact affects compliance and not the precise status of the norm in the relative hierarchy of legality imposed by the international legal system.<sup>105</sup> As Charles Lipson has written:

[H]igh costs of self-enforcement and the dangers of opportunism are important obstacles to extralegal agreements. Indeed, the costs may be prohibitive if they leave unsolved such basic problems as moral hazard and time inconsistency. The same obstacles are inherent features of interstate bargaining and must be resolved if agreements are to be concluded and carried out. Resolving them depends on the parties' preference orderings, the transparency of their preferences and choices (asymmetrical information), and the private institutional mechanisms set up to secure their bargains. It has little to do, however, with whether an international agreement is considered "legally binding" or not.<sup>106</sup>

Similarly, Ian Hurd has recently explained:

"Legitimacy," as I use the term, refers to an actor's normative belief that a rule or institution ought to be obeyed. It is a subjective quality, relational between actor and institution, and is defined by the actor's *perception* of the institution. . . . Such a perception affects behavior, because it is internalized by the actor and comes to help define how the actor sees its interests. . . . In this sense, saying that a rule is accepted as legitimate by some actor says nothing about its justice in the eyes of an outside observer. Further, an actor's belief in the legitimacy of a norm, and thus its following of that norm, need not correlate to the actor being "law-abiding" or submissive to official regulations. Often, precisely the opposite is true: a normative conviction about legitimacy might lead to *noncompliance* with laws when laws are seen as conflicting with the conviction.<sup>107</sup>

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105. This of course presupposes a degree of transparency in the workings of institutions such that there is adequate information disclosure regarding norms around which pressure can be brought to bear upon states in favor of its observance. See generally THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 47-49 (Oxford University Press 1990); Martha Finnemore, *Norms, Culture and World Politics: Insights from Sociology's Institutionalism*, 50 INT'L ORG. 325 (1996); Daniel H. Joyner, *Restructuring the Multilateral Export Control Regime System*, 9 J. Conflict & Sec. L. 181 (2004).

106. Lipson, *supra* note 58, at 507.

107. HURD, *supra* note 65, at 7-8.

Thus, in issue areas where hard law forms carry more costs than benefits, it is quite reasonable to assume, as argued above, that it would be highly preferable to have specific, soft commitments rather than to have more vague, binding commitments, as the specificity of the norm is more likely to form a principled locus around which efforts of domestic and international compliance pressure may be focused.<sup>108</sup>

The latter position placing primacy on the binding character of norms regulating international uses of force is, however, argued consistently by traditional international lawyers.<sup>109</sup> They argue that the formality of the rule expresses its importance and centrality to the system of norms, thus conveying a message to states that breaching will incur more disapproval and more likely sanctions from the international community than would breach of a soft law norm. They argue that because of this flagging of importance, states will be less likely to breach the rule. They further argue that hard law provides a better normative locus for both international and domestic compliance pressuring forces, enabling such movements to use the gravitas-laden rhetoric of illegality to delegitimize breaches of international standards.

It is not denied that such assertions are at least in some cases correct and therefore can add to the marginal influence of hard law norms on state behavior over the influence of soft law norms. However, these positive factors accompanying formality must be taken together with negative factors accompanying it in order to arrive at a true picture of the marginal advantage of formality, particularly in the issue area under consideration herein. In the international use of force area specifically, as in other areas of high politics, the fact of bindingness in normative regulation can itself

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108. See e.g., George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 380, 397 (1996) (discussing costs and benefits of using a managerial approach instead of an enforcement approach to address compliance issues); Judith Goldstein and Lisa L. Martin, *Legalization, Trade Liberalization and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603 (2000) (discussing the costs and benefits associated with the increased legalization of international trade); Joel Trachtman, *Bananas, Direct Effect and Compliance*, 10 EUR. J. OF INT'L L. 655, 655 (1999) ("hard law is not necessarily good law, and . . . strengthened implementation, including possible direct effect, is not necessarily desirable. . . . This seems obvious once we recognize that, putting aside for a moment transaction costs and strategic costs, states generally have the level of compliance that they want. The correct role for scholars and for lawyers involved with these issues is to help political decision-makers to identify circumstances in which, due to such problems, states have not achieved the desired level of compliance.").

109. See e.g., Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369 (2005).

produce negative effects at least partially counteracting any benefits accruing from it.

As Charles Lipson explains, binding law is often established in such issue areas in order to reflect long term interests back upon state behavior and thereby give added incentive for not breaching the rules precisely because it is known that the issue area contains concerns of high politics and is thus highly sensitive for policymakers in the short term.<sup>110</sup> Because of this high political sensitivity in the short term, these are of course the issue areas in which states are most likely to breach when their short term interests appear to them to overshadow their longer term interests.<sup>111</sup> Therefore, paradoxically, the original desire to give added incentive to comply ends up installing a formal legal framework in an area most likely to see those formal laws breached in times of extremity.<sup>112</sup> These original high intentions thus in actuality produce an effect deleterious to the assumptions which underlay them, as the high-profile breaches of formal, binding agreements which they facilitate, harm the perceived credibility of the very norms being used, and by extension the legal system as a whole.<sup>113</sup>

Therefore, in some issue areas it will be conceded that bindingness may indeed give added weight of influence upon state practice, facilitating predictability and surety of commitments, and raising the political costs of non-compliance, and can thus be a very useful legal fiction to maintain. However, as with the horizontal structural forces producing compliance pressuring in the international legal system, it is argued that this marginal advantage in influence achieved from bindingness is likely to occur only meaningfully in low politics areas where—because of low costs of compliance, damage to short term interests being deemed compensated by achievement of long term interests, and reasonable expectations of reciprocity being maintained—the decisionmaking environment is one wherein states *are already close to compliance anyway*.

In high politics areas, any marginal effect on state behavior toward compliance derived from bindingness is likely to be minor in degree, and, most importantly, is highly likely to be outweighed in states' policymaking calculus, per the Lipson paradox, in the very situations in which it would be hoped that norms would matter, i.e. when situations arise in which states perceive compliance as

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110. See Lipson, *supra* note 58, at 512.

111. *Id.*

112. *Id.*

113. *Id.*

being harmful to their vital national survival and prosperity interests.<sup>114</sup>

We must accept that, at the current state of evolution of international law as a legal system, in high politics areas like international uses of force, it is not the bindingness of the norm that makes for high levels of compliance. It is rather the strength of and consensus regarding wider social and political concerns and values which the norm expresses. Only these considerations, and active forces of compliance pressuring brought to bear in support thereof, can hope to truly influence state action, not considerations of the character of the norm itself. Thus in international use of force law, non-binding norms can be expected to have just as much of an influence on state behavior as binding ones have had, particularly if because of their non-binding character, they can be made more specific and thus serve more effectively as normative loci around which international compliance pressure can be focused.

#### V. PRACTICAL EFFECTS/BENEFITS

The essential practical benefits of such a deformalization of international use of force law are that it would provide norms to which states would positivistically and explicitly assent and that would be acknowledged to apply to this area of international relations on the one hand, but which would allow states with legitimate concerns, as particularly expressed in WMD counterproliferation strategies, the flexibility they need to deal with modern threats to their vital national security and prosperity interests on the other. With such standards in place, states seen by the international community to act in disharmony with such agreed standards could be made subject to precisely the same methods of compliance pressure which now serve as sanctions for breaches of binding, hard law rules. Unilateral or multilateral sanctions could be imposed on the basis of these standards, and if necessary, military force could be used, as coordinated by international regimes with duly delegated institutional discretion. The court of world opinion regarding compliance with these standards would still be in constant session. And again, using such soft law sources, it is as explained above reasonable to hope that standards of conduct would be given more specificity and explication than is currently the case in hard law

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114. *See id.*; Guzman, *A Compliance-Based Theory of International Law*, *supra* note 38, at 1883.

forms, making even more effective such efforts of compliance pressuring by the international community.

However, with such regulation through soft law instruments, we would be spared the continuous and inevitably fruitless rhetorical battles regarding formal legality of state actions regarding international uses of force, in an institutional environment in which we are unlikely to ever get authoritative statements or adjudications of who is right and who is wrong. Those arguments could still be usefully maintained in other issue areas in which compliance pressures, combined with formal legality, combined with increased willingness to submit such disputes to international judicial resolution, are more likely to make such breaches fewer in number and of less serious effect when they do occur. The deformalization argument herein is essentially a proposal to preserve to those areas in which it is meaningful and likely to be useful, the added weight of formal bindingness of rules, and to relieve issue areas in which it is likely not to be meaningful and unlikely to be useful from its inefficiencies. To place it in Morgenthauian terms, to save for normative regimes in those issue areas in which meaningful sanctions are likely and are likely to compel compliance, the moniker and trappings of valid law.

#### VI. IMPLICATIONS OF THE DEFORMALIZATION THESIS FOR THE UNITED NATIONS

Should the international community choose to implement the deformalization proposals in this Article, what would be the implications for the U.N. Charter organizational system? As noted previously, a deformalized U.N. Charter system would essentially retain its principled structure and content. Furthermore, the organs of administration created by the Charter and their respective roles could also remain largely unchanged. In fact, very little of the activity of the United Nations as an organization is at all dependent upon the status of the UN Charter as a formal treaty.

The United Nations as an organization could still serve all of its functions as a center for multilateral diplomacy on a wide array of issues of international concern, and could play essentially similar roles to those it has always played in facilitating communication among states, in coordinating negotiations on new treaties, in advancing issues of importance to the international community including human rights, and in issuing normative pronouncements. There could still be a General Assembly with its associated subsidiary committees and bodies.

The only changes to the functioning of the United Nations which would be occasioned by the adoption and implementation of the deformalization thesis by the international community would have to do with the role and authority of the Security Council, and these changes would still in fact arguably change little in practice. As the Charter would no longer be a treaty, the Security Council would have no authority to issue legally binding decisions—in effect Article 25 would be left out of the revised Charter document. There could indeed still be a Security Council under the deformed UN structure, which would continue to be a specialized deliberative body, with primary responsibility for issues of international peace and security. The Council could issue decisions either approving or condemning particular state actions, and making recommendations for the resolution of international disputes as it ever has done. It could even continue to play a meaningful role in the legitimization or delegitimization of forceful measures up to and including international uses of force, in exercise of its Chapter VII role—though to be clear, since there would no longer be a formal legal prohibition on international force, pursuant to the *Lotus* principle there would be no need to have such uses of force formally authorized.<sup>115</sup> Rather, the Council's role in this regard would be that of legitimacy determination for forceful measures up to and including uses of force. As Ian Hurd has recently demonstrated, fulfilling this role of legitimacy determination and promulgation has been the Council's primary contribution as a part of the U.N. Charter system.<sup>116</sup>

As has been argued above, the effectiveness of an international commitment or institution has more to do with the presence of generally supported norms than it does with the character of those norms as legal or non-legal. Thus, if states agreed to continue the Security Council's mandate as a legitimizer of forceful actions, and so long as the Council demonstrated by its record that it could act in a supportable and legitimate manner in this role, the lack of formal legal authority underpinning its decisions should have little bearing on the Council's ability to function in this role—as indeed it would be difficult to demonstrate that the effectiveness of the

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115. See *Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18-19 (Sept. 7 1927) (stating that “restrictions upon the independence of States cannot . . . be presumed” and that international law leaves to States “a wide measure of discretion which is only limited in certain cases by prohibitive rules”).

116. HURD, *supra* note 65, at 194-96.



Council has in the past been enhanced by its possession of formal legal authority *per se*.<sup>117</sup>

It should be briefly noted that a deformalization of the U.N. Charter would have no necessary effect upon the role and functioning of the International Court of Justice. The ICJ statute is essentially separate from the Charter, and the ICJ could continue to function as it ever has.

## VII. CONCLUSION

This Article has described one possible option for the future of the *jus ad bellum*. Because of its revolutionary nature it will no doubt be met with skepticism and quickly dismissed by many. However, it is argued that at the current crisis moment, we must be willing to take bold and creative steps in order to bring the character and organization of this important area of international normative regulation into line with what are reasonable expectations for the capacity and usefulness of international norms in an area of such high politics and state sovereignty sensitivity. As stressed herein, addressing this crisis moment need not simply be a question of the maintenance or not of international norms in this issue area, but rather a question of what kind of international norms would be best suited for the purpose of standardizing international behavior in this issue area to the extent realistically possible given the current evolutionary state of the international legal system. It has been argued that the continuing negative implications of allowing formal international law to be overstretched to include within its regulation issue areas that it simply cannot reasonably be expected to regulate effectively at the current stage of its evolutionary progression, will include decreasing respect for international law generally, and, albeit unfairly, a lessening of the perceived authority of international law in other areas in which it does in fact function relatively well. It is hoped that international lawyers will have the intellectual integrity not to be bound to the *status quo* simply for its own sake, and that we will be willing to think and act in

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117. See *id.* at 128 (“The Security Council is just one example of such a higher authority, revealed not by its Charter or any legal interpretation but by the practice of states themselves.”); Lipson, *supra* note 58, at 507; see also Trachtman, *supra* note 108, at 676-78 (1999) (“[T]he type of binding force desired depends, to some extent, on the substantive obligations concerned, as well on the institutional legitimacy of the legislator that makes the law and the tribunal applies it. . . . [A d]enial of direct effect and weak mechanisms of compliance may be viewed not necessarily as gaps in compliance, but as mechanisms to reinforce democratic legitimacy, to the extent that the state is the locus of democratic legitimacy.”).

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the best interests of the future of international law generally, to enable it to better fulfill its important role in international relations.