The Right of Self-Defense in the Global Fight against Terrorism

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The fight against the scourge of terrorism has become a key objective in international politics. It has become much more than a pure law enforcement task but a political fight in the widest sense that has to draw on all the resources of political action, including, if necessary, military options. When the fight against terrorism turns into military action abroad, international politics meets international law. The use of military force by a State beyond its borders is governed by international law. Still, given the political depth of the fight against terrorism that sometimes seems to acquire existential meaning—is it at all possible to discuss the right of self-defense in the global fight against terrorism in purely legal terms? When each and every legal argument may assume major political significance, are we still talking about international law or do we discuss politics? Apparently both. This article seeks to shed some light not only on the law but also on the dynamic interrelationship between State policies on the use of force and the evolution of the law: the historical background of the UN Charter law, the law as it stands, and the rift between world order as designed by the UN Charter and the real state of affairs. In conclusion, it will be argued that the political and legal benefits flowing from a

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The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
strengthening of the UN Charter’s framework on the use of force clearly outweigh the risks incurred by letting that framework fall into desuetude.

**Historical Background**

Ninety years ago, in June 1914, a terrorist organization code-named “Black Hand” unsuccessfully tried to stop an assassination plot that it had earlier supported by supplying arms, training and money. On the 28th of June, one of the terrorists nurtured by “Black Hand” carried out the plot. He assassinated the crown prince of the Austro-Hungarian Empire and his wife.¹

The empire then struck back. By turning against the State of Serbia, the presumed home base of “Black Hand,” Austria-Hungary set into motion a world war and its own demise. It would seem to be an interesting, even though academic question how to qualify the Austro-Hungarian action in the context of the contemporary debate. Of course, given the mood of the day and the European system of trip-wire alliances, World War I was probably inevitable anyway. Still, the story of June 1914 seems a useful reminder of the deeper layers of terrorism’s destructive power, a destructive potential that works indirectly, through the poisoning of international relations, and may even trigger wars that were not intended to happen the way they did.

The major lesson of the First World War was related to the broader question of legality and legitimacy of the use of force in international relations. After the horror experienced by the killing of some 10 million people, a new question was being asked: could it be that something was fundamentally wrong with a world in which any nation with the power to use force felt free to do so? President Woodrow Wilson of the United States tried to initiate a revolutionary alternative: an international organization of global reach, tying all States together in a system of collective security. He was ahead of his time; the US Senate did not follow his lead. The truncated League of Nations, as it did emerge, was too weak to deal effectively with the blows from Japan, Germany, and Italy.² World War II followed, more than 50 million people were killed, this time the majority of victims being civilians. During the war, it was again an American president who took the lead in starting a new search for an organizational framework to create world order.³ These efforts resulted in the Charter of the United Nations, which sets forth the basic principles and rules intended to govern international relations.

For nearly sixty years, the UN Charter has been the basic legal document for public international law. Accordingly, this article will turn to the Charter to try and find some answers to the question of how to define the scope of self-defense in the fight against terrorism. There is no alternative starting point for finding the
applicable rules of international law. Furthermore, there is already evidence that legal practice under the Charter is adapting to the new threat. At the same time, a lawyer working in the context of international politics has to note, of course, that time and again it seems fashionable to put into doubt the whole UN system. It is true that the objectives of the United Nations are still far from being met. For decades, the Cold War paralyzed the Security Council. Even under the new, more favorable conditions existing since the 1990s, the Security Council’s record in taking effective action has been mixed. To appreciate the United Nations, we have to imagine a world without it. After the catastrophic breakdown of the old order of nation States in the first half of the 20th century there has never been any doubt for post-war Germany that the lead of the American architects of the new multilateral order should be followed, and that in addition to a robust defensive alliance of the West, an effective global system of collective security and cooperation must be sought.

**The Law as it Stands**

No other article of the UN Charter plays such a prominent role in the current debate on the significance of international law for a stable and peaceful world order as does Article 51. How is it to be read after the events of September 11, 2001, the subsequent war in Afghanistan, the United States’ presentation of its new security strategy in September 2002, and the Iraq war? How is it to be read in the light of the threats posed by failing States, the proliferation of weapons of mass destruction and international terrorism? Article 51 is the final provision of the UN Charter’s Chapter VII which sets out the conditions that justify the use of force within the system of collective security created by the Charter should there by any threat to the peace, breach of the peace or act of aggression. The system of collective security is based on the prohibition of the use of force against other States. Only two exceptions to that prohibition are provided for in the Charter: coercive measures that must be authorized by the Security Council, and the “inherent” right of individual or collective self-defense. The first sentence of Article 51 reads as follows: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

The exercise of the “inherent right of individual or collective self-defence” is thus permissible only in the event of “an armed attack . . . against a Member of the United Nations.” It cannot be invoked when faced with actions that do not reach the threshold of an armed attack and it may only be exercised until such time as the
Security Council has taken measures necessary to maintain international peace and security. September 11 raised the question of whether the right of self-defense also applies in the face of terrorist action. The Security Council gave a clear answer immediately, on the day following the attack in Resolution 1368 (2001) and again, at the end of the same month, in Resolution 1373 (2001). It determined in general terms, first, all acts of international terrorism constitute a threat to international peace and security, and second, the right of individual or collective self-defense in accordance with the Charter could be applicable in connection with acts of international terrorism. No authorization is required from the Security Council in such self-defense actions, however, the measures taken by a State in the exercise of its right of self-defense must be immediately reported to the Security Council.

The Security Council’s decision to recognize especially grievous terrorist attacks as an “armed attack... against a Member of the United Nations” was a very significant, evolutionary step in the reading of Article 51. Previously, legal doctrine generally assumed that an “armed attack” could not be carried out by non-State actors, but required action by a State. The new reading of Article 51 met with the virtually unanimous approval of international jurists and governments. The recent advisory opinion, Legal Consequences of the Construction of a Wall, of the International Court of Justice did not explicitly endorse the new reading of Article 51, but the Court’s seemingly restrictive language—"Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State"—should not be understood as a contradiction, either. The Court apparently aimed at emphasizing the point that an armed attack has to originate from a territory outside the control of the attacked party.

Recognizing the possibility of non-State actors mounting an “armed attack” as meant by Article 51 leads to a tricky follow-on question: who or which entity constitutes a legitimate target when defending against such terrorist attack? Following September 11 the answer to this question was relatively simple: given the obvious links between Al Qaeda and the Taliban, the use of force by the United States and coalition forces in Afghanistan to topple the Taliban regime was legitimate self-defense under Article 51 of the UN Charter. The German Government and all other NATO States shared this view. On October 2, 2001, the North Atlantic Council decided, for the first time in its history, to invoke the principle of collective defense contained in Article 5 of the North Atlantic Treaty. On the basis of Article 51 of the UN Charter, in conjunction with Security Council Resolutions 1368 and 1373, the German Bundestag on November 16, 2001 issued a mandate authorizing the Bundeswehr to support the United States in Operation Enduring Freedom. This mandate was renewed for the second time in November 2003. As authorized
by that mandate, the German Government provided soldiers for the war in Afghanistan, as well as for naval duties in the fight against terrorism.

Defensive action after September 11 followed an armed attack. What about anticipatory self-defense? Whether there is room for a right of preemptive or even preventive self-defense for individual States within the UN Charter’s system of collective security is a highly controversial question. The restrictive wording of Article 51 ("if an armed attack occurs") would seem to rule out a right of anticipatory self-defense. What little State practice there has been to date also seems to indicate caution. Prior to 2001, the question was explicitly discussed in the UN framework only on two occasions, during Israel’s preventive strike against Egypt during the Six-Day War in 1967 and when Israel bombed the partially constructed Iraqi nuclear reactor Tamuz I in 1981. While a number of States felt that preventive self-defense was permissible in the former case, in the latter case it was held to be impermissible and unanimously rejected by the UN Security Council in Resolution 487 (1981). At that time the United States was among the States that opposed Israel’s preventive action in the Security Council debate with particularly persuasive arguments based on international law. Those States which did not want to rule out the option of anticipatory self-defense absolutely and a priori have based their arguments on a case from the year 1837. The test introduced in the Caroline case permitted pre-emptive self-defense in very exceptional cases. US Secretary of State Daniel Webster formulated it as follows: “It will be for the government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation.”

The criteria of urgent necessity contained in this test led to the subsequent development in international law of the requirement that an attack must be imminent. Very restrictive conditions have been placed on the concept of “imminence.” Such imminence must moreover be apparent to an objective observer. The United States’ national security strategy of September 2002, however, took a wider approach:

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries . . . . 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.

Just how the United States will implement this concept remains an open question. No precise criteria have been specified yet. Nor does the security strategy place the right of self-defense within the context of the UN Charter and its system of collective security. The Iraq war may, in political terms, be viewed as an
application of the new national security strategy. In justifying its position under international law to the UN Security Council, however, the United States did not argue the asserted right of anticipatory self-defense. It rather stated that its military operations were in accordance with Resolutions 678 (1990) and 687 (1991), and in particular with the threat of serious consequences made in Resolution 1441 (2002).

The European Union adopted a new security strategy in December 2003, which lays out a threat assessment similar to that contained in the US security strategy, also referring to the threats posed by terrorism, the proliferation of weapons of mass destruction, failing States and organized crime. It also recognizes the need for anticipatory action:

Our traditional concept of self-defence – up to and including the Cold War – was based on the threat of invasion. With the new threats, the first line of defence will often be abroad. The new threats are dynamic. The risks of proliferation grow over time; left alone, terrorist networks will become even more dangerous. State failure and organized crime spread if they are neglected – as we have seen in West Africa. This implies that we should be ready to act before a crisis occurs. Conflict prevention and threat prevention cannot start too early . . . We need to develop a strategic culture that fosters early, rapid, and when necessary, robust intervention . . . . We need to be able to act before countries around us deteriorate, when signs of proliferation are detected, and before humanitarian emergencies arise. Preventive engagement can avoid more serious problems in the future.

However, the objectives of the European Security Strategy are explicitly put into the context of “effective multilateralism” and a “rule-based international order”:

We are committed to upholding and developing International Law. The fundamental framework for international relations is the United Nations Charter. The United Nations Security Council has the primary responsibility for the maintenance of international peace and security. Strengthening the United Nations, equipping it to fulfill its responsibilities and to act effectively, is a European priority. . . . It is a condition of a rule-based international order that laws evolve in response to developments such as proliferation, terrorism and global warming.

The common European view of international law governing the use of force is thus very much geared towards the United Nations. At the same time, it is not static, but open to new developments contributing to truly effective multilateralism. In this context, Secretary-General Kofi Annan’s statement in September 2003 seems highly relevant. After reiterating the traditional, narrow reading of Article 51, he stated:
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.

My concern is that, if it were to be adopted, it could set precedents that resulted in a proliferation of the unilateral and lawless use of force, with or without justification. But it is not enough to denounce unilateralism, unless we also face up squarely to the concerns that make some States feel uniquely vulnerable, since it is those concerns that drive them to take unilateral action. We must show that those concerns can, and will, be addressed effectively through collective action.

The Council needs to consider how it will deal with the possibility that individual States may use force ‘pre-emptively’ against perceived threats. Its members may need to begin a discussion on the criteria for an early authorization of coercive measures to address certain types of threats – for instance, terrorist groups armed with weapons of mass destruction.29

The German Government shares the assessment of the Secretary-General. While the UN Charter narrowly limits the use of military force by individual States for good reason, i.e., to prevent the escalation of violence, the Security Council does have a wide range of options at its disposal. Under Article 24 it is given the primary responsibility for the maintenance of international peace and security; under Article 39 it is granted the necessary powers to act in the event of a threat to or breach of the peace. This preventive competence bestowed on the UN Security Council, together with the conflict prevention instruments available to the UN Secretary-General, must be made easier to use in the future—precisely in order to prevent the escalation of violence and the spread of armed conflict.

Meanwhile, following his speech of the 23rd of September, Secretary-General Annan in November 2003 appointed a high level panel to develop recommendations for UN reform and for a collective response to the new threats.30 The report of the panel was issued in December 2004.31 All States were invited to contribute to its work. The European Union submitted a joint contribution whose thrust is clear—the Security Council should do more to assume its responsibilities under the Charter. The relevant paragraphs of the EU contribution read as follows:

The EU reaffirms that the provisions of the UN Charter regarding the use of force remain valid. The EU also recognizes the potentially devastating threat posed to UN member states by modern terrorism, and by weapons of mass destruction in the hands of non-state actors. The threat is devastating both to states targeted and to those where
they are allowed to operate. Military action may in certain circumstances – such as when a state is unwilling or unable to deal with the threat posed by a non-state actor on its territory – be required to meet the threat effectively. In this context, the EU is of the view that military action going beyond the lawful exercise of the right to self-defence should be taken on the basis of Security Council decisions. The Security Council, however, must be prepared to make a rapid assessment of any threat brought to its attention and, if necessary, to act quickly and decisively in order to neutralize it. Strong engagement by the Council on terrorism and weapons of mass destruction, as recommended above, and the expertise thereby commanded, would confer on it an additional strong measure of authority in demanding compliance with obligations, and of respect for its collective decisions.\textsuperscript{32}

To sum up: Germany, like its European partners, clearly sees the necessity for more effective anticipatory action in the light of the new threats, including a wide spectrum of measures that may be grouped under preventive engagement by political means. Preventive military action, however, should be authorized by the UN Security Council. Only in cases where a previously indistinct threat turns into the threat of an imminent attack\textsuperscript{33} is pre-emptive self-defense authorized under international law.

\textit{The Rule of Law—Squeezed by Machtpolitik, Saved by Realpolitik?}

Law transcends politics but time and again it has to meet the test of political acceptance. When legal norms are perceived as faltering or when they appear unsuited to meet their intended purpose, political pressures will mount to change the law. The UN Charter law on the use of force provides the legal framework designed to maintain international peace and security. However, even a cursory look around the globe reveals that peaceful order has remained as elusive a goal as ever. What went wrong with the UN Charter system of maintaining international peace and security? Are there better ways and means to create order in the world?\textsuperscript{34}

Order cannot be created without harnessing power and establishing rules for the use of force. In a functioning nation State, government has a monopoly on the use of force. Internationally, the UN Charter system has envisaged a distribution of the authority to use force between the nation States and the UN Security Council. The system has shown three major deficiencies. First, a growing number of nation States have proved to be unable to establish internal peace and a monopoly on the use of force on their own territory, hence the increase in civil strife and cross-border violence by non-State actors, including terrorists. Second, governments have repeatedly used force beyond the limits set by the UN Charter. Third, the Security Council has only sometimes been able to take remedial action against the
disorder spreading from disintegrating States or the unauthorized use of force by
governments. Of these three deficiencies, only the first eludes direct and swift rem-
edies. The other two would seem to be remediable: given the political will, govern-
ments could cease to flout the UN Charter rules on the use of force, and those
represented in the Security Council, especially the five permanent members, could
make it work. Why don’t they just do it?

Some governments apparently do not believe that playing by the rules of the UN
Charter could ever satisfy their vital security concerns. During the Cold War, such
skepticism was well-founded. Given the ideological rift and the imperial designs of
the Soviet Union, the idea of collective security never really had a chance so that
traditional patterns of great power rivalry and balance of power continued to shape
international politics, establishing de facto rules on the use of force in international
relations. Following the demise of the Soviet empire, the 1990s seemed to witness
a renaissance of the UN Charter’s normative framework on the use of force. Under
the shock of September 11 and the twin threat of terrorism and the prolifera-
tion of weapons of mass destruction, the picture has become mixed; the United
States in particular seems to have only limited confidence in the preventive and
protective potential of the UN Charter system.

It is true that the reality of today’s world does not really fit the legal abstractions
of the UN Charter. The Charter envisaged a world composed of nation States
which implicitly were assumed to have a number of seemingly self-evident charac-
teristics that allowed them to interact on the basis of sovereign equality, that made
them share a common sense of purpose, and that gave them the ability to shape the
course of events. Nation States were, by and large, implicitly assumed to be reason-
ably well organized, to be run by responsible governments, to be masters in their
own house, to have a bona fide orientation towards the lofty goals of the Charter, to
pursue power not as an end in itself, to overcome the traditional zero-sum-game
mentality of international politics and to seek a better life through cooperation
with others. The real world, of course, looks different. While States in some
regions, in particular in Europe, have indeed buried their centuries-old rivalries
and the very idea of war amongst themselves, others continue traditional power
politics, whilst a third category of a growing number of States seems to be headed
towards primeval chaos, not to mention the dubious domestic legitimacy of too
many dictatorships and authoritarian regimes. The dangers inherent in spreading
zones of chaos are multiplied by new categories of powerful non-State actors in
fields like organized crime, weapons proliferation, and terrorism, who are not only
operating international networks, but sometimes have even acquired the capability
to initiate and sustain a new type of armed conflict that may most aptly be called
asymmetrical warfare.
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It is against the background of such a pointedly realistic world view—which, incidentally, is widely shared by both the United States as well as the EU security strategies—that the normative thinking of some authors has returned to traditional patterns of power politics where little room is left for the UN Charter’s multilateralist concept of world order. These authors consider this concept as idealistic at best, as naive and irresponsible at worst. Their views are reflected in the following statements: “Although the effort to subject the use of force to the rule of law was the monumental internationalist experience of the twentieth century, the fact is that that experiment has failed” and “The first and last geopolitical truth is that states pursue security by pursuing power. Legalist institutions that manage that pursuit maladroitly are ultimately swept away.” But which order would emerge if the United Nations were thus swept away? Given the unipolar reality of the day, could it not, should it not be a Pax Americana? Robert Cooper provides a thoughtful comment on such an eventuality:

In general, monopolies are undesirable. One exception to this rule is the monopoly of force. This is not just desirable; it is the essential basis of order in the state and in the state system. What is wrong, then, with a virtual monopoly of force in the world? The answer is that the state is based on the legitimate monopoly of force and the difficulty with the American monopoly of force in the world community is that it is American and will be exercised, necessarily, in the interest of the United States. This will not be seen as legitimate. Legitimacy is as much a source of power as force. Force without legitimacy is tyranny – for those who are subject to it. In an age in which security will depend on taking early action against emerging threats abroad, legitimacy is more important than ever. And, like it or not, the United Nations remains the most powerful source of legitimacy for such action.

In response, Robert Kagan suggests “the legitimacy of liberalism”—apparently meant to operate outside and independently of the UN framework—which the United States and the liberal democracies of Europe would exercise in harmony, could add to American power. However, he puts this vision himself into doubt by assuming that “many Europeans are betting that the risks from the ‘axis of evil,’ from terrorism and tyrants, will never be as great as the risk of the American Leviathan unbound.” It seems indeed doubtful whether a joint transatlantic push for legitimacy outside the United Nations could contribute to making US power politics a success—but not for the reason Kagan assumes. His assertion that many Europeans are more concerned about American power than the risks of nuclear proliferation and mega-terrorism seems totally beside the point. Robert Cooper’s remarks on legitimacy probably come closer to mainstream European thinking, but the core of European skepticism vis-à-vis the unrestrained use of American
power may be found in a more elementary thought that is the opposite of starry-eyed idealism: many Europeans simply believe that unipolar power politics, whether executed purely unilaterally or through a coalition of the willing, are not practical and do not work. Suicidal terrorists will not be moved by the “shock and awe” of a bombing campaign, the application of sheer power alone does not render the desired results under conditions of asymmetrical warfare, the transformation of deficient nation States into responsible liberal democracies requires different means than the application of military force.

The rebirth of democratic West Germany out of the ruins of the Third Reich is sometimes referred to as an example for successful State-engineering initiated by overwhelming force. Maybe it is—but only ceteris paribus: in Germany 1945, the Allies entered with huge armies and fully controlled a country that was utterly exhausted and destroyed by nearly six years of “total war” of the Germans’ own choosing. The Wehrmacht did not melt away to resurface later in a guerilla but fought until it was finished. Furthermore, people were demoralized not only by defeat, destruction and million fold deaths, but also, when faced with the truth of unspeakable crimes, by a rapidly growing sense of guilt. In that situation, it simply did not occur to the remaining young men to question defeat and to form suicidal bands of fanatics trying to fight asymmetrical war. Instead, the Germans, who also happened to consist of a homogeneous and highly educated population, took up the generous offer by the victors to re-enter the civilized world, chose to rebuild their country, and had another try at democracy.

Today’s threats are different and require different treatment. In the end, only non-military means will drain the breeding grounds of a suicidal terrorism that is fueled by pseudo-religious fervor. The battle for hearts and minds will involve a war of ideas where there is no substitute for the victory of reason. For reason to prevail, it will be essential that the use of force, when necessary, is properly understood as action in the common interest.\textsuperscript{46} It appears hardly conceivable to achieve this objective without following a course of “effective multilateralism” as envisaged by the European Security Strategy,\textsuperscript{47} with a reformed and revitalized UN Security Council assuming a central role. In that regard, it seems as if some American authors have replaced the old maxim “if it ain’t broke, don’t fix it” by a new leitmotif, “if it ain’t fixed yet, break it,” whereas a pragmatist would probably suggest “if it ain’t fixed yet, try and do it.” Therefore, if the implementation of the UN Charter system has indeed remained deficient, why sweep it away, why not try and fix it? A number of important steps into that direction have already been taken by the Security Council, not only before, but also after the unfortunate controversy preceding the Iraq war, including, \textit{inter alia}, Security Council Resolution 1373 (2001) to fight international terrorism,\textsuperscript{48} Resolution 1540 (2004) to fight the
proliferation of weapons of mass destruction,\textsuperscript{49} and Resolution 1546 (2004) on Iraq’s political transition and reconstruction.\textsuperscript{50} The road towards international peace and security through effective multilateral action has been clearly laid out by Secretary-General Annan: it should follow the rule of law,\textsuperscript{51} lead to a reform of the Security Council, and arrive at a new commitment for joint action that should include criteria on when and how anticipatory action by the Council is necessary to counter the terrorist threat.

In conclusion, it seems fair to say that the reading of the international law on the use of force as set forth above is strongly supported by contemporary political beliefs in Germany. The cataclysmic events in the first half of the 20th century, the German role in those events, and our national experience after 1945; all those factors have converged into a very strong conviction of mainstream foreign policy thinking in Germany: the conviction that we should follow the new course of international relations charted in San Francisco in June 1945, which had been inspired by the United States. Germans presumably will stay this course not only because they firmly believe that it is right, but also because they see no practical alternative in terms of \textit{Realpolitik}.

\textbf{Notes}

3. See id. at 30. Schlesinger describes how Roosevelt followed Wilson’s idea. He argues that Roosevelt’s prior experience as Wilson’s Secretary of the Navy helped him “forge a strategic vision” of the world.
4. For a discussion of Article 51 of the UN Charter, see infra pp. 353–58.
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7. For an opposing view, see Ramsey, supra note 6, at 1557.
12. Id. ¶ 139.
13. See id. The relevant parts of paragraph 139 of the advisory opinion read as follows:

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

14. Generally speaking, defensive military action targeting territory of another State should be considered lawful if that State is either unwilling or unable to prevent its territory from being used for preparing or launching an armed attack. See Albrecht Randelzhofer, Commentary on Article 51, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 799–802 (Bruno Simma ed., 2d ed. 2002).
15. Supra note 8.
16. Supra note 9.
17. For a discussion on pre-emptive self-defense after September 11, see generally Harold Hongju Koh, On American Exceptionalism, 55 STANFORD LAW REVIEW 1479, 1516 (2003). See also Yoo, supra note 6, at 571.
18. Stromseth, supra note 10, at 638–640, argues that the United States should draft together with its allies parameters for preemptive self-defense against threats posed by terrorism. See also Falk, supra note 6, at 593; and Ramsey, supra note 6, at 1558.
19. For a general analysis of the Six-Day War and its consequences for the Middle East, see Michael B. Oren, Six days of War: June 1967 and the Making of the Modern Middle East 6 (2002).

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28. Id. at 9,10.


33. The German government, in answering a question from parliament, recently confirmed that it regards not only an actual but also an imminent attack as a sufficient basis for the exercise of the right of self-defense: “The right of individual or collective self-defense according to Article 51 of the UN Charter includes, in the Federal Government’s opinion, measures of defense against an imminent attack.” See Antwort der Bundesregierung: Umsetzung der Europäischen Sicherheitstrategie, BUNDESTAGS-DRUCKSACHE 15/3181 (2004), at 25.

34. “Order in the world” is here understood in the narrow sense of security backed by the eventual use of force. Broader concepts of world order and global governance generally seem less applicable to the core security issues, cf e.g., ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004), even though new analytical insights like those on the workings of the “disaggregated state” through government networks might be very useful in tackling the broader questions of promoting world stability short of the use of force, including law enforcement networks to fight international terrorism. On the other hand, it [a networked world order] would still feature States acting as unitary States on important issues, particularly in security matters. Id. at 6.
35. Thomas Franck described those rules as follows:

Under that new normative order, each superpower would refrain from attacking the essential interests of the other, but would be freed to use force at will in its own sphere of influence. States that were clients of a superpower would be freed to use force against those that were not, but would be restrained from using force against the clients of the other superpower . . . . In this context, ‘equality’ and ‘supremacy’ did not merely define the equation of military power among states, but also states’ respective de facto normative prerogatives and precautions in the use of force.


36. Id. at 609, 610.

37. For an extremely critical view of the current and future role of the Security Council, see Michael J. Glennon, supra note 5, at 31: “The charter’s use of force regime . . . petered out over a period of years. The Security Council itself hobbled along during the Cold War, underwent a brief resurgence in the 1990s, and then flamed out with Kosovo and Iraq.”

38. See Robert Cooper, The Breaking of Nations: Order and Chaos in the Twenty-First Century (2003). Cooper distinguishes the pre-State, “post-imperial chaos” as typical example of the “pre-modern world,” the classical State system of the “modern world” shaped by balance-of-power or hegemonic policies, and the “postmodern world” as exemplified by the European Union where the pattern of inter-State relations has been completely switched from the balance-of-power mode towards ever-growing cooperation and openness.


40. See supra notes 23 and 27.

41. See Michael J. Glennon, supra note 5, at 24.

42. Id. at 25.

43. See supra note 38, at 167.


45. Id. at 158.

46. For reasons of legitimacy, but also in order to improve and not to erode the prospects of change induced by “soft power.” Regarding the sources and the potential of the United States’ soft power, as well as its inverse relationship to the unrestrained use of hard power, see Joseph S. Nye Jr., The Paradox of American Power: Why the World’s Only Superpower Can’t Go It Alone (2002). Regarding this interrelationship, cf. also The 9/11 Commission Report – Final Report of the National Commission on Terrorist Attacks Upon the United States 375 (2004):

Support for the United States has plummeted. Polls taken in Islamic countries after 9/11 suggested that many or most people thought the United States was doing the right thing in its fight against terrorism; few people saw popular support for al Qaeda; half of those surveyed said that ordinary people had a favorable view of the United States. By 2003, polls showed that ‘the bottom has fallen out of support for America in most of the Muslim world. Negative views of the U.S. among Muslims, which had been largely limited to countries in the Middle East, have spread . . . . Since last summer, favorable ratings for the U.S. have fallen from 61% to 15% in Indonesia and from 71% to 38% among Muslims in Nigeria.

47. See supra note 27.

48. See supra note 9.