

**PRESERVING THE PEACE:
THE CONTINUING BAN ON WAR
BETWEEN STATES**

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The history of international law is, in large part, about the development of restraints on states' right to resort to force in dealing with external conflicts.¹ Today, states may use force only in self-defense to an armed attack or with Security Council authorization. Even in these cases, states may use force only as a last resort, and then only if doing so will not disproportionately harm civilians, their property, or the natural environment. These rules restricting force are found in treaties (especially the United Nations Charter), customary international law, and the general principles of international law. In other words, the three primary sources of international law yield important rules restricting the use of force. The rules on use of force, like all international law rules, are binding on states for the same

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1. For more on this history, see generally MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE (2005) [hereinafter INTERNATIONAL LAW] (discussing how international law is used to implement restraints on the use of force among nations).

reason the law of any jurisdiction binds—because it is accepted as law by the community.

The following remarks on the rules regulating the use of force are divided into three parts. Part I provides a brief history and overview of the current rules on the use of force. Part II applies these rules to assertions that the United States could lawfully attack Iran today. Part III then discusses why these rules are binding as law and answers arguments to the contrary. These remarks will, therefore, touch on the past, present, and future of the law on the use of force to preserve the peace between states.

I. THE BAN ON WAR BETWEEN STATES

A primary, if not the only, purpose of international law is to aid in the peaceful settlement of disputes among states. In human communities, we know that governing by force eventually evolved to governing by law. The right to use force within a community was restricted to law enforcement activities; the right to use force among communities became increasingly restricted as well, especially through international law. Modern international law is dated to the 1648 Peace of Westphalia, a set of important treaties ending Europe's Thirty Years' War.² The Peace of Westphalia established principles meant to prevent new conflicts and instituted means designed to enforce these new principles. These means included collective action against wrongdoers and a requirement to employ negotiation or arbitration before resort to force.³

The Peace of Westphalia remained in effect until the revolutionary leaders of France, who believed their ideas were superior ideas and should therefore be imposed throughout Europe, decided to go to war. The decision to go to war coincided with the developing concept of sovereignty which included the idea that a state had the right to use force whenever its leaders wished. Such an unlimited right to resort to force plainly made no sense if there was to be an international legal order of any kind. Yet legal scholars who no longer believed in a higher law, law above nation states, had no

2. *Id.* at 114-17.

3. *Id.*

arguments based in law against the leaders of sovereign states resorting to force at will.

By the start of the twentieth century and with the development of more technologically advanced and, therefore, more lethal weapons, states finally gave their consent to binding instruments limiting the right to resort to armed force. It was technology, not a new way of dealing with the problem of sovereign states and binding law, that led to the breakthrough. States came together in 1899 and 1907 at the two Hague Peace Conferences in the Netherlands to re-establish legal principles to support peace and provide alternatives to war.⁴ A primary accomplishment of these conferences was the first multilateral treaty that outlawed armed conflict to collect contract debts.⁵

The new rules promoting peace had little impact, however, in restraining states' resort to war in 1914. The assassination of the Austro-Hungarian Empire's heir to the throne by a secret pro-Serbian nationalist group triggered World War I. The assassination seemed to be the very sort of conflict that should have been containable under methods for peaceful resolution of disputes provided for in the 1899 and 1907 Hague Conventions. Instead, a war involving most of Europe, the United States, and colonies around the world erupted. In shock over the senseless loss of life and devastation, statesmen agreed in 1920 to prohibitions on resort to force in the Covenant of the League of Nations.⁶ Additionally, they agreed on collective action to enforce the prohibitions and creation of a new international court to resolve disputes.⁷ Although the League had been the brainchild of U.S. President Woodrow Wilson, it was the automatic obligation to

4. See WILLIAM I. HULL, *THE TWO HAGUE CONFERENCES AND THEIR CONTRIBUTIONS TO INTERNATIONAL LAW* 2-4 (1908) (discussing the historical background and political context in which the 1898 and 1907 Hague Conferences were held). See also *Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts* art. 1, Oct. 18, 1907, 36 Stat. 2241, 1 Bevans 607 [hereinafter *Convention on Contract Debts*].

5. *Convention on Contract Debts*, *supra* note 4, arts. 1-7.

6. See generally *Covenant of the League of Nations* (1920) (establishing, among other things, plans for a Permanent Court of International Justice to hear cases involving international disputes).

7. *INTERNATIONAL LAW*, *supra* note 1, at 127-29; see also *Covenant of the League of Nations* arts. 11 & 14 (1920).

join in collective action against unlawful uses of force that kept American senators from voting to ratify the League's Covenant.⁸ The United States *did* want to take some action to support restraint on war, however, and joined with France to promote the 1928 Kellogg-Briand Pact, which outlawed war as an instrument of national policy.⁹

Despite the Pact, Hitler, convinced of Germany's superiority and of its natural right to be the dominant power in Europe, gained control of neighboring states and then invaded Poland in 1939. Japan's leaders had a similar conviction of superiority and a similar determination to rule over, or even eliminate, peoples they considered inferior. World War II shocked humanity—and the United States—into taking the next step towards outlawing the use of force. In addition to a general prohibition on the use of force, as found in the Kellogg-Briand Pact, the victorious states also agreed to establish the United Nations Security Council—a powerful body designed to enforce the prohibition on force. The prohibition is found in Article 2(4) of the U.N. Charter. The Charter contains two exceptions to the prohibition.¹⁰ The first is found in Article 51, which permits individual and collective self-defense if an armed attack occurs.¹¹ The second exception is found in Articles 39 and 42, providing for the Security Council's right to authorize force if necessary to restore

8. INTERNATIONAL LAW, *supra* note 1, at 126-27.

9. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 80-83 (1963); Kellogg-Briand Pact for the Renunciation of War, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

10. U.N. Charter art. 2, para. 4.: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

11. *Id.* art. 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

international peace in the face of a “threat to the peace, breach of the peace, or act of aggression”¹²

A U.S. delegate to the 1945 San Francisco conference called to draft the Charter made clear that “the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; . . . there should be no loopholes.”¹³ The overall structure of the Charter that emerged in San Francisco is consistent with the broad scope of Article 2(4). Articles 39 and 42 gave the Security Council expansive authority to use force against threats. By contrast, Article 51 established that states acting without Security Council authority have only a narrow right to use force. Article 51 permits force in individual and collective self-defense if an armed attack occurs, and then only until the Security Council takes action.

Latin American delegates had requested the inclusion of Article 51 near the end of the conference.¹⁴ These delegates were concerned that the Rio Treaty arrangements for collective self-defense would be invalidated by Article 2(4). Thus, in order to clarify that Article 2(4) did not prohibit either the right of individual *or* collective self-defense, Article 51 was added to the Charter. Article 51 is a limited exception to Article 2(4), allowing self-defense in situations where it can be shown by the tangible evidence of an armed attack that a state must respond. Further, the attacked state’s response is limited to defense and lasts only until the Security Council acts or the defense is achieved.¹⁵ Central in the minds of the U.N. Charter’s drafters was the excuse the Axis states used for violating the League Covenant and Kellogg-Briand Pact during World War II. The Axis powers made self-defense claims when justifying their actions: Germany claimed the need for *Lebensraum* (living space), and Japan claimed the need for access to natural resources. Thus, the new United Nations would permit unilateral self-defense only in cases where objective evidence of an emergency existed for the entire world to see, namely an actual armed attack. Other, less tangible or immediate threats were to be submitted to the collective scrutiny of the Security Council before the

12. *Id.* art. 39.

13. Conference on Int’l Org., S.F., Cal., Apr. 25, 1945, *Commission I: General Provisions*, art. 7, para. 4.

14. INTERNATIONAL LAW, *supra* note 1, at 226.

15. *Id.* at 226-27; *see also* U.N. Charter art. 51.

use of force would be permitted. The Charter's drafters believed that collective deliberation of the Council would be a better process for determining threats to the peace than would the unilateral decision of the potential victim.

Since the Charter was drafted, numerous decisions of the International Court of Justice (I.C.J.), resolutions of the Security Council and U.N. General Assembly, and official government statements have confirmed the binding nature of the Charter's rules and their meaning. Indeed, the international community has repeatedly affirmed its support for the regime of peace and the prohibition on war between states. The most recent and significant reaffirmation came with the overwhelming vote of confidence in the Charter during the 2005 World Summit.¹⁶ Some claim these rules became obsolete after the September 11 attacks, but it was in 2005—four years after the attacks—that the world reaffirmed the rules.

Today, the rules on self-defense include the reaffirmed U.N. Charter provisions and several important general principles of international law.¹⁷ In brief, a state may use significant force on the territory of another state when the following four conditions are met:

1. A significant actual armed attack has occurred or is occurring;
2. The armed response is aimed at the armed attacker or those legally responsible for the attacker;
3. The response has the purpose of stopping the on-going attack and/or the next imminent attacks;
4. The response is necessary to remove the threat and is proportional in the circumstances.¹⁸

The I.C.J., in its 1986 decision *Military and Paramilitary Activities in and against Nicaragua (Nicaragua)*, made clear that acts triggering the right to use armed force in self-defense must themselves amount to armed attacks.¹⁹ In *Nicaragua*, the I.C.J. held that low-

16. 2005 World Summit Outcome Document, ¶¶ 77-80, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

17. General principles of law are the third primary source of international law after treaties and customary international law, see Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c), 59 Stat. 1031, 33 U.N.T.S. 993.

18. Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 889-90 (2002) [hereinafter *Self-Defense*].

19. *Military and Paramilitary Activities (Nicar. v. U.S.) (Nicaragua)*, 1986

level shipments of weapons did not amount to an armed attack and could not be invoked as a basis for self-defense.²⁰

It is important to realize that “self-defense” is a term of art in international law. The reference in Article 51 to self-defense is a reference to the right of the victim state to use significant offensive military force on the territory of a state legally responsible for the attack.²¹ The I.C.J. has made clear that the armed attack that gives rise to this right of self-defense must involve a significant amount of force, more than would be involved in a mere frontier incident,²² such as sporadic rocket fire across a border.

In addition to demonstrating that they have a lawful basis for using force under the Charter, states using force must also show that using force is necessary to achieve a defensive purpose. If a state can make that showing, it must then show that the method of force used will not result in a disproportionate loss of life and destruction compared to the value of the objective. These principles of necessity and proportionality are not expressly mentioned in the Charter, but the I.C.J., in *Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons)*, held “there is a ‘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.’ This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.”²³

An armed response to a terrorist attack or a nuclear weapons program will almost never meet the I.C.J.’s parameters for the lawful exercise of self-defense. Terrorist attacks are generally treated as crimes: they are clandestine, one-off attacks and not like armed

I.C.J. 14, 103, 119-20 (June 27).

20. *Id.*

21. Legal Consequences of Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 215 (July 9) (separate opinion of Judge Higgins).

22. Nicaragua, 1986 I.C.J. at 103. *Accord Jus Ad Bellum (Eth. v. Eri.)*, Ethiopia's Claims Nos. 1-8, Partial Award (Eritrea-Ethiopia Claims Comm'n Dec. 19, 2005), 45 ILM 430 (2006).

23. *Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons)*, Advisory Opinion, 1996 I.C.J. 226, 245 (July 8) (quoting I.C.J. Reports 1986 at 94). See also Nicaragua, 1986 I.C.J. at 94; *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, 198 (Nov. 6).

attacks that can give rise to the right of self-defense.²⁴ A textbook case of self-defense under Article 51 is the response to Iraq's invasion of Kuwait. After Iraq invaded Kuwait, Kuwait had the right to use force in self-defense, and other states had the right to join Kuwait in collective self-defense in order to help liberate it.²⁵ Iraq's invasion contained at least two aspects not typically found in connection with most terrorist attacks. First, no one doubted who carried out the aggression; it was Iraq. Second, the occupation of Kuwait created a continuing wrong that could be righted, especially since the Security Council had authorized a coalition of states to liberate Kuwait.²⁶

In the case of September 11, and other terrorist attacks (Bali 2002, Madrid 2005, London 2006), the first task of the victim state was gathering evidence to discover who was responsible. Solid evidence on such questions as to who carried out an attack has been the central focus of the debate among states over the right to use force in response to terrorism. Because the state must respond quickly to an armed attack and may even anticipate the attack in some circumstances, states have a problem responding lawfully using military force in the case of terrorist attacks. Terrorist attacks are usually brief and do not result in an ongoing wrong such as the unlawful occupation of a territory. It usually takes some time to find out who the perpetrators are and where they are currently located. But force may not be used long after the attack occurred. Responding weeks or months later constitutes unlawful reprisal, not an act of self-defense.

Some may believe that reprisals have a deterrent effect, but they are not considered lawful measures of self-defense because they do not repel ongoing armed attacks nor do they dislodge an unlawful occupation. Some scholars, including Louis Henkin, have argued that if terrorists undertake an ongoing series of attacks in relatively short order, the victim state may attack the state responsible for the terrorists.²⁷ While Henkin's argument may be persuasive in theory,

24. See LOUISE RICHARDSON, *WHAT TERRORISTS WANT: UNDERSTANDING THE ENEMY, CONTAINING THE THREAT* 4 (2006).

25. Mary Ellen O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait*, 15 S. ILL. U. L.J. 453, 479-80 (1991).

26. *Id.* at 479.

27. LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 125-28

the problem in real cases is obtaining the required evidence. The victim of terrorists may have some evidence of a plan of future attacks, but that evidence is not the same as the reality of experiencing an on-going attack. Evidence of plans from secret intelligence sources is not always reliable. In several cases where states have used force in response to terrorist acts and claimed self-defense, they have been criticized.²⁸

The United States and United Kingdom made a case to justify the use of force against Afghanistan in 2001, and it seems to have been generally accepted in the international community.²⁹ The United Kingdom released some evidence on October 4, 2001, tending to trace the September 11 attacks to al Qaeda and showing links between al Qaeda and the Taliban, Afghanistan's *de facto* government. The United States also presented evidence linking al Qaeda to the attacks, evidence that NATO found "compelling."³⁰ On the other hand, the I.C.J. ruled in *Nicaragua* in 1986, *Democratic Republic of Congo v. Uganda (Congo)* in 2005, and *Bosnia and Herzegovina v. Serbia and Montenegro (Bosnia)* in 2007 that the test of attribution is control.³¹ This test may ultimately mean that the links between al Qaeda and the Taliban were too weak to justify using force in self-defense on the territory of Afghanistan.

There was also the problem in Afghanistan of the disproportionate use of force. During his October 2001 visit to Pakistan, U.S. Secretary of State Colin Powell expressed hope that moderates within the Taliban might be persuaded to join a new democratic

(1995).

28. See, e.g., Mary Ellen O'Connell, *Evidence of Terror*, 7 J. OF CONFLICT & SECURITY L. 19, 34 (2002) (indicating that "Israel's response to terror attacks perpetrated by Palestinians and other anti-Israeli groups operating out of Lebanon have been particularly criticized for their lack of proportionality.").

29. Thomas M. Franck, *Terrorism and the Right of Self Defense*, 95 AM. J. INT'L L. 839, 842 (2001) [hereinafter *Right of Self Defense*]; see also *Self-Defense*, *supra* note 18, at 892-93, 899-901.

30. *Right of Self Defense*, *supra* note 29, at 842.

31. *Nicaragua*, 1986 I.C.J. at 64-65; *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116, ¶¶ 160, 214 (Dec. 19), available at <http://www.icj-cij.org/docket/files/116/10455.pdf>; *Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, 2007 I.C.J. 91, ¶ 391 (Feb. 26), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

government.³² The United States was presumably aiming at eliminating the offensive capability of al Qaeda, not the elimination of the Taliban, but this is not what occurred. Whether the United States gave the green light or not, the Northern Alliance ousted the Taliban from Kabul.³³ The continued use of force by U.S. personnel after al Qaeda camps were destroyed and its fighters were on the run may have violated the proportionality principle.

More troubling was the decision of the United States, United Kingdom, and Australia to invade Iraq in 2003 despite the total absence of any indication of an armed attack occurring. The coalition partners instead attempted to assert a lingering right to use force under Security Council resolutions authorizing collective force to liberate Kuwait in 1990 and 1991. The authorization to use force in those resolutions, however, was for liberating Kuwait, not invading Iraq.³⁴ Even the British Attorney-General advised Prime Minister Tony Blair to get new Security Council authorization. Some may believe that it

32. Pamela Constable, *U.S. Hopes to Attract Moderates in Taliban; Powell Sees Them in 'New Afghanistan,'* WASH. POST, Oct. 17, 2001, at A24.

33. Some accounts indicate that Vice President Dick Cheney and Secretary of Defense Donald Rumsfeld gave a positive indication to the Northern Alliance to take Kabul. Andrew Sullivan, *Remind Me, Who Put This Triumph Together?,* SUNDAY TIMES (U.K.), Nov. 18, 2001.

34. The Attorney-General Lord Goldsmith advised that a new resolution would be needed. *Full Text: Iraq Legal Advice—The Full Text of the Advice About the Legality of War with Iraq Given by the Attorney General, Lord Goldsmith, to the Prime Minister, Tony Blair, on March 7, 2003,* GUARDIAN, Apr. 28, 2005, available at <http://www.guardian.co.uk/print/0,,5182009-103550,00.html>. Richard Norton-Taylor, *Revealed: The Government's Secret Legal Advice on the Iraq War,* GUARDIAN (London), Apr. 28, 2005, at 1. ("The attorney general [Lord Goldsmith] warned Mr. Blair that Britain might be able to argue it could go to war on the basis of past UN resolutions, but only if there were 'strong factual grounds' that Iraq was still in breach of its disarmament obligations."). See also Global Policy Forum, *British Attorney General's Advice to Blair on Legality of Iraq War,* Mar. 7, 2003, <http://www.globalpolicy.org/security/issues/iraq/document/2003/0307advice.htm>. "In other words, we would need to be able to demonstrate hard evidence of non-compliance and non-cooperation [to justify use of force against Iraq]." *Id.* para. 29. For analysis of resort to war in Iraq and conclusion that it was unlawful, see Richard Falk, *What Future for the UN Charter System of War Prevention?,* 97 AM. J. INT'L L. 590, 592-93 (2003); Sean Murphy, *Assessing the Legality of Invading Iraq,* 92 GEO. L. REV. 173, 177 (2005); Mary Ellen O'Connell, *Addendum to Armed Force in Iraq: Issues of Legality,* ASIL INSIGHTS, Apr. 2003, <http://www.asil.org/insights/insigh99a1.htm>.

was better for the United States and its partners to, nevertheless, at least attempt to justify the invasion under the Charter than to assert they were free to do as they pleased. This is no doubt true, but it should not obscure how weak the attempt at justification was, nor how clearly illegal was the invasion. By 2007, the U.S. policies in both Afghanistan and Iraq, especially policies in defiance of international law, were synonymous with debacle.

II. THE BAN ON WAR BETWEEN THE UNITED STATES AND IRAN³⁵

Despite ongoing wars in Afghanistan and Iraq, planning was apparently well underway in the Bush Administration in 2006 for an attack on Iran.³⁶ Knowledgeable scholars indicated that the planning included legal arguments meant to justify an attack tied to Iran's engagement in unlawful actions such as supplying munitions to Iraqi insurgents or assisting Hezbollah in Lebanon to attack Israel.³⁷ The argument would invoke a U.S. right of collective self-defense with Israel or Iraq.³⁸ Apparently, the United States would not argue that it had the right to use force against Iran for having a nuclear program. Presumably, it accepted that even if Iran was developing a nuclear

35. This section is adapted from Mary Ellen O'Connell & Maria Alveras-Chen, *The Ban on the Bomb—And Bombing: Iran, the U.S., and the International Law of Self-Defense*, 57 SYRACUSE L. REV. 497 (2007).

36. According to journalist Seymour M. Hersh, the use of armed force, including the use of a tactical nuclear bomb, was very much on the table. Seymour M. Hersh, *Last Stand: The Military's Problem With the President's Iran Policy*, NEW YORKER, July 10, 2006, at 42. See also Seymour M. Hersh, *The Redirection, Is the Administration's New Policy Benefitting Our Enemies in the War on Terrorism?*, NEW YORKER, Mar. 5, 2007, at 52; Seymour M. Hersh, *The Next Act: Is a Damaged Administration Less Likely to Attack Iran, or More?*, NEW YORKER, Nov. 27, 2006, at 94; Seymour M. Hersh, *The Iran Plans: Would President Bush Go to War to Stop Tehran from Getting the Bomb?*, NEW YORKER, Apr. 17, 2006, at 30.

37. See Gregory E. Maggs, *How the United States Might Justify a Preemptive Strike on a Rogue Nation's Nuclear Weapon Development Facilities Under the U.N. Charter*, 57 SYRACUSE L. REV. 465, 482 (2007). The Bush Administration began complaining about Iran supplying munitions to Afghani insurgents during the week of June 3, 2007. Afghan officials, however, rejected assertions that the insurgents were being supplied by Iran.

38. *Id.*

weapon, possession of a nuclear weapon does not give rise to the right to use force in self-defense without Security Council authorization.³⁹

Yet, the collective self-defense argument in this case is hardly better. Under the test used in *Nicaragua* and its progeny, states are restricted from using force in collective self-defense unless there is a significant armed attack (not a mere border incident or weapons shipment as alleged respecting Iran).⁴⁰ In addition, the state attacked must be legally responsible for the armed attack (not just a financier and/or trainer), and the victim of the attack must formally request the assistance of other states in collective self-defense.⁴¹ None of these conditions was met by the United States with respect to Iran in 2006. Even if they had been, the United States would have had to join in a collective response aimed at ending the activity giving rise to the right of collective self-defense. It could not have taken aim at some entirely different target. If what the United States really wanted to do, as many suspect, is bomb nuclear research sites, bombing such sites would not respond to border incursions into Iraq or to the financing, supplying, and training of armed militant groups in Lebanon or elsewhere.

In addition to the lack of a significant armed attack by Iran, the principles of necessity and proportionality would also restrict the use of military force in this case. As explained above, offensive military operations must aim at the activity triggering the right to use force in the first instance. The principle of necessity requires that the use of force also have a reasonable likelihood of successfully accomplishing the military objective. Bombing nuclear research sites would do nothing to halt the funding of Hezbollah, nor would it cut off supplies to insurgents. Bombing would not even stop Iran's nuclear program. As a recent Human Rights Watch report correctly observed,

military necessity does grant military planners a certain degree of freedom of judgment about the appropriate tactics for carrying out a military operation, [but] 'it can never justify a degree of violence which exceeds the level which is strictly necessary to ensure the

39. Nuclear Weapons, 1996 I.C.J. at 244.

40. *Nicaragua*, 1986 I.C.J. at 103.

41. *Id.* at 120.

success of a particular operation in a particular case.⁴²

Given all that is not known, ensuring success in such an operation is impossible. Allegations of the existence of an Iranian program to develop nuclear weapons remain largely unsubstantiated.⁴³ The *Guardian* reported in February 2007 that the International Atomic Energy Agency (IAEA) disputed U.S. evidence of a bomb program.⁴⁴ Even if Iran's activities have aimed at building a nuclear weapon, former U.S. officials indicated in early 2007 that Iran could not have a weapon for at least two years. Further, "Iran's uranium enrichment program is spread out; it is believed some facilities are underground at unknown locations. There would be no guarantee of ending the program [through bombing]."⁴⁵ Indeed, even former Pentagon analysts agree that "there are no effective military ways to wipe out a nuclear program that has been well hidden and broadly dispersed across the country, including in crowded cities."⁴⁶

Not only would an attack likely fail to meet the presumed objective, the Oxford Research Group reports an attack would, in fact, be counterproductive.⁴⁷ A military strike using conventional or

42. HUMAN RIGHTS WATCH, JENIN: IDF MILITARY OPERATIONS 11-12 (2002) (quoting ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 396 (Int'l Comm. of the Red Cross, ed., 1987)).

43. See Int'l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran* 11, IAEA Doc. GOV/2006/15 (Feb. 27, 2006). The report did, however, reveal certain causes for concern, including the discovery of an Iranian manual outlining "the fabrication of nuclear weapon components." *Id.* at 4-5. It also noted an overall lack of transparency regarding "the scope and nature of Iran's nuclear programme" during the three years of intensive IAEA verification activities that preceded the report. *Id.* at 11.

44. Julian Borger, *U.S. Intelligence on Iran Does Not Stand Up*, *GUARDIAN* (London), Feb. 22, 2007, at 21.

45. Trudy Rubin, *Iran Sounds Like a Bad Rerun, Administration's Hints Show It's Learned Nothing from Iraq War*, *NEWSDAY*, Apr. 12, 2006, at A39.

46. Thom Shanker et al., *U.S. Wants to Block Iran's Nuclear Ambition, but Diplomacy Seems to Be the Only Path*, *N.Y. TIMES*, Dec. 12, 2004, at 1.

47. Kate Kelland, *Air Strikes on Iran Could Backfire: Report*, *REUTERS NEWS*, Mar. 4, 2007, <http://www.reuters.com/article/idUSL036676520070305>; see also Frank Barnaby, *Would Air Strikes Work? Understanding Iran's Nuclear Programme and the Possible Consequences of a Military Strike* (Oxford Research Group Briefing Paper, at 12-13, Mar. 2007).

nuclear weapons in the absence of compelling evidence of a weapons program—indeed, and worse still, with the knowledge that, even if there were such a program, it could not be effectively contained by bombing—would violate the principles of necessity and proportionality. Use of nuclear weapons in such a scenario would be not only completely unlawful, it would immediately classify the United States as a pariah in the opinion of much of the world.

Finally, in addition to the rules on armed attack, necessity, and proportionality, a U.S.-led strike against Iran would need to be preceded by an invitation by Israel or Iraq for the United States to join in collective self-defense.⁴⁸ Perhaps Israel would request such assistance, but the current Prime Minister of Iraq, Nouri al-Maliki, is a Shi'a Muslim, like many Iranians, and is wholly unlikely to request U.S. help in attacking Iran on behalf of Iraq.

With so much focus on the use of force in the United States in recent years, U.S. leaders seem to overlook the fact that the international community has other, *non-lethal*, means to encourage compliance with the nuclear non-proliferation regime and to terminate assistance to terrorists and insurgents. Ukraine and South Africa gave up nuclear weapons and joined the Nuclear Non-Proliferation Treaty (NPT).⁴⁹ Libya gave up a weapons program; Brazil gave up its program as well. No military force was needed in any of these cases. The United States could itself comply with the NPT and reduce its nuclear arsenal, leading by example.⁵⁰ These are alternatives open to the United States and consistent with international law's narrow right of self-defense. What would be most unwise would be to allow an expansion of self-defense. It would be unwise if we care about peace and human rights. Although twenty years have since passed, what Henkin wrote in the late 1980s remains equally salient today:

It is not in the interest of the United States to reconstrue the law of the Charter so as to dilute and confuse its normative prohibitions.

48. Nicaragua, 1986 I.C.J. at 120.

49. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

50. See *id.* art. VI. See also Steven E. Miller, *Proliferation, Disarmament and the Future of the Non-Proliferation Treaty*, in NUCLEAR PROLIFERATION AND INTERNATIONAL SECURITY 50-69 (Morten Bremer Maerli & Sverre Lodgaard eds., 2007).

In our decentralized international political system with primitive institutions and underdeveloped law enforcement machinery, it is important that Charter norms—which go to the heart of international order and implicate war and peace in the nuclear age—be clear, sharp, and comprehensive; as independent as possible of judgments of degree and of issues of fact; as invulnerable as can be to self-serving interpretations and to temptations to conceal, distort, or mischaracterize events. Extending the meaning of “armed attack” and of “self-defense,” multiplying exceptions to the prohibition on the use of force and the occasions that would permit military intervention, would undermine the law of the Charter and the international order established in the wake of world war.⁵¹

III. WHY THE BAN IS BINDING

Despite the eminent sense these rules make—both the moral sense and the common sense—as Americans, we have been told by some of our most prominent political scientists since Hans Morgenthau in the 1960s that international law does not ultimately bind the United States in its drive for power.⁵² These political scientists were joined by Bush Administration lawyers after September 11 who also cast doubt on international law. Henkin sought to answer Morgenthau and, to a greater extent, the realist diplomat George Kennan, in his now-classic book *How Nations Behave*.⁵³ Henkin pointed out that Morgenthau’s chief critique of international law—that it lacks effective enforcement—is not the ultimate test of a legal system and is not determinative of whether international law rules or any legal rules bind.⁵⁴ Rather, it is the belief in the binding nature of law demonstrated by compliance that makes law binding. The belief in the binding nature of international law is amply demonstrated as Henkin famously observed in that “*almost all nations observe almost*

51. Louis Henkin, *The Use of Force: Law and U.S. Policy*, in *RIGHT v. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 60 (Louis Henkin et al. eds., 1989).

52. *Id.*

53. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (2d ed. 1979) [hereinafter *HOW NATIONS BEHAVE*].

54. *Id.* at 26.

all principles of international law and almost all of their obligations almost all of the time."⁵⁵

Henkin was influenced by the British legal philosopher H.L.A. Hart, who responded to the narrow view of what constituted "law" prevailing in the United Kingdom and United States since John Austin promoted it in the early nineteenth century. Hart reduced Austin's dismissal of international law from the realm of law to two main points: Austin's simplistic command/sanction definition of law, and the idea that sovereign states could not be ultimately subject to legal rules. Hart's concept of law did not rely on an essential role for sanctions. He considered sanctions to be secondary—playing a role in assuring majority compliance, but not as an essential element of a legal rule. It is the fact of recognition or acceptance of rules that make them rules, not whether a policeman hauls away each violator.⁵⁶

As for the possibility of sovereign states being subject to law in the first place, Hart, like Hans Kelsen, reminds us that states consist of a population living in a territory under a legal system.⁵⁷ States come in great variety, so it is not to the states themselves but to international law that one must look to determine which entities are actually sovereign.⁵⁸ It is within the rules of international law that sovereignty is defined. Within those rules we find that the law can bind even sovereign states. The facts of international life bear this out. Thus, Hart concluded that international law is law, though in a more primitive form than the law of most national systems. International law is characterized largely by self-help in cases of breach. "Yet if rules are in fact accepted as standards of conduct, and supported with appropriate forms of social pressure distinctive of obligatory rules,

55. *Id.* at 47.

56. See generally H.L.A. HART, *THE CONCEPT OF LAW* 79-99 (2d ed. 1994) (describing law as a system of primary and secondary rules, criminal sanctions falling into the latter, less significant category); M.D.A. FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* 215 (7th ed. 2001) ("The essence of a legal system is the inherent fact, based on various psychological factors, that law is accepted by the community as a whole as binding, and the element of sanction is not an essential, or perhaps even an important, element in the functioning of the system.").

57. HART, *supra* note 56, at 220-26.

58. *Id.*

nothing more is required to show that they are binding rules”⁵⁹ International law rules are “thought and spoken of as obligatory; there is general pressure for conformity to the rules; claims and admissions are based on them and their breach is held to justify not only insistent demands for compensation, but reprisals and counter-measures.”⁶⁰ It is logical that states have a system of binding rules superior to the will of any one state.

Henkin, like Hart, stressed that one need only look at the facts of international life to see that states accept international law. And, like Hart, Henkin understood acceptance as the key to understanding whether a community has a legal system. Henkin wrote out of concern that the combination of Morgenthau’s powerful critique of international law and the dramatic events of the 1960s were obscuring the importance of international law in U.S. foreign policy. To bolster respect for international law among the realists making U.S. policy, Henkin’s book recalls the iconic story of America’s founding. Henkin emphasized that the Founding Fathers were the type of pragmatic statesmen who understood the value of international law.⁶¹ The U.S. Constitution reflects the importance of gaining the respect of other nations. Its drafters recognized the protections that a new state like the United States could find in international law. International law continued to play a useful role in U.S. foreign policy, even as the United States achieved a position of predominance in the world, a predominance often compared with imperial Rome. Henkin argued that America’s national interest continued to lie in respecting the law and even building it, whether the risk of facing a penalty for law violation was small or not.

Thomas Franck of New York University took the next logical step following Henkin’s contribution by considering international law a system that simply has no sanctions. In observing state behavior, Franck sees much compliance even in the absence of any real concern about sanctions. He concludes that international law is a non-coercive system and sets out to show that other phenomena besides mere self-interest or coercion must account for compliance with international law rules. Franck developed a concept he called “legitimacy” to

59. *Id.* at 234.

60. *Id.* at 220.

61. HOW NATIONS BEHAVE, *supra* note 53, at 62.

explain obedience to international rules.⁶² Compliance results when rules exhibit certain characteristics, namely, when they are determinant, coherent, validated, and result in adherence. In Franck's terms, such rules are perceived to be legitimate and understood to be deserving of compliance. Even for those of us who understand international law does have sanctions, Franck's thesis can explain compliance in those cases where it is clear that no sanction will result. U.S. leaders know, for example, that only in rare cases, such as in the area of trade, will the United States possibly be subject to sanctions.⁶³ Yet, the United States complies with the vast majority of its obligations.

Franck concentrates more on rule legitimacy than on the legitimacy of the international legal system in general. But, like Hart, Franck sees a chain of validity within rule systems. A primary rule is legitimate if it was created through a valid process. The process is valid if it was created with state consent. Why state consent gives validity

cannot be demonstrated by reference to any other validating rules or procedures, but only by the conduct of nations manifesting their belief in the ultimate rules' validity *as the irreducible prerequisites for an international concept of right process*. It can only be inferred, that is from the nature of the international system as a community of states.⁶⁴

The community of states and its law began taking on more sophisticated forms at the end of the twentieth century, concurrent with the end of the Cold War. Courts began playing a larger role in the proper application of rules and sanctions. Litigation in the United States to enforce international norms began to increase substantially in the 1990s, but so did the use of courts generally—the I.C.J., human

62. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 3-26 (1990).

63. Significant sanctions were authorized against the United States. For example, the WTO's Dispute Settlement Body for Unlawful Cotton Subsidies issued sanctions during this time. *Trade Body Rules Against U.S. on Cotton Subsidies: The WTO Finding, a Victory for Brazil and African Countries, Could Lead to Huge Sanctions*, L.A. TIMES, Oct. 16, 2007, www.latimes.com/news/nationworld/world/africa/la-fi-wto16oct16,1,7636981.story?coll=la-africa.

64. FRANCK, *supra* note 62, at 193-94.

rights courts, trade courts and tribunals, and international criminal courts.

Just as the Cold War was ending and these new possibilities for international law-making, application, and enforcement were emerging, a small group of political theorists dubbed “neo-conservatives” gained top political positions in the Bush Administration taking office in 2000. Their views had much in common with Morgenthau, although they are thought to be inspired by another University of Chicago academic, a contemporary of Morgenthau, named Leo Strauss. Strauss shared with Morgenthau the view that American foreign policy should aim at pursuing power for the United States with no limit on the right to use military force. A number of Strauss’s students argued for using American military power to advance U.S. hegemony. The neo-conservatives brought with them lawyers antagonistic to international law. These lawyers held views in sync with the neo-conservatives regarding the President’s authority to use military power. They asserted the President has largely unfettered power as commander-in-chief and in the conduct of foreign policy.⁶⁵ In their view, neither Congress nor the courts should interfere with this power. They advised the President that he need not respect the constraints of international law in important areas, such as in the use of harsh methods of interrogation, including torture and rendition to secret prisons. Some of this advice is documented in the *Torture Papers*.⁶⁶

The primary author of several memos, including the most infamous of the memos on torture, was John Yoo, who left the Administration to return to the University of California Berkley in 2003. Another memo writer, Jack Goldsmith, now of Harvard Law School, was the sole author of a memo on transferring protected persons out of Iraq to secret prisons for purposes of interrogation.⁶⁷ These memos quickly brought condemnation because they were seen as a threat to the American constitutional order and an affront to basic

65. See JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 24-29 (2005).

66. E.g., Jack Goldsmith, *Permissibility of Relocating Certain “Protected Persons” from Occupied Iraq*, in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

67. *Id.* at 366.

morality. Less was said by courts and commentators in the United States about international law and its power to bind the President, despite the fact that the use of torture violates a peremptory norm of international law, and transfer to secret detention is a grave breach of the Geneva Conventions.⁶⁸ The discussion in the years following the public release of the *Torture Papers* revealed doubts by some American scholars about the power of international law to bind the United States

Despite these doubts, there is something about international law that commands respect in this country. The United States was founded on the idea that law should be superior to any leader. As Henkin pointed out, since its founding, American leaders have spoken eloquently on the importance of international law. Despite the theories of Morgenthau, Strauss, and their followers, U.S. presidents have never walked away from international law. Indeed, they never publicly denigrate it. Many Americans want to remain supportive of the global consensus on moral conduct reflected in international law's most important principles. Apparently, memos collected in the *Torture Papers* were written for the very reason that so many in the U.S. government felt bound by international law. The memos contained in the *Torture Papers* are a reflection of the power of international law in that U.S. leaders did not simply order torture, abuse, and transfer to secret prisons. Instead, they requested legal advice first and received long, detailed memos with astounding errors, omissions, and misrepresentations of the law but still adequate enough to convince officials to authorize holding persons in secret prisons and subjecting them to harsh methods of interrogation. When the legal analysis in the memos was revealed, human rights lawyers argued that the memo writers were complicit in the crimes that followed from the advice.⁶⁹ The outcry over the mistreatment of detainees and the

68. For a full discussion of international law's ban on harsh interrogation, see Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO. ST. L.J. 1231, 1241-47 (2005). For a discussion of the international law's absolute ban on transfer of protected persons, see Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT'L L. 309, 324-39 (2006).

69. See CENTER FOR CONSTITUTIONAL RIGHTS, BACKGROUND BRIEF ON THE CASE AGAINST RUMSFELD, GONZALES AND OTHERS, <http://www.ccr-ny.org/v2/GermanCase2006/extendedsummary.asp> (last visited Sept. 7, 2007).

arguments for holding even the lawyers criminally responsible for giving false advice on international law may well serve to strengthen international law.

With international law working as an obstacle to certain Bush Administration policies, proponents of American dominance renewed the attack on international law generally. In this context, Jack Goldsmith and Eric Posner produced a book titled *The Limits of International Law*. It concluded that international law is not really law, but rather “a special kind of politics.”⁷⁰ John Yoo and Robert Delahunty have written along similar lines in *Executive Power v. International Law*.⁷¹ Yet, as Henkin wrote decades ago with respect to the rules on the use of force, it is not in the U.S. national interest to dilute or eliminate the rules of international law, for even greater disorder and chaos may result. What Goldsmith and other authors may have in mind is a system of U.S. exceptionalism—the United States gets privileges to do what it wants, but the rest of the world must comply with the rules. The only way to maintain rules, however, is through a general system of international law—with a general theory of obligation, sources, adjudication, and enforcement.

The United States cannot effectively dominate the world; furthermore, the rest of the world has no interest in allowing the United States to hold a position of general exceptionalism. By weakening international law through their quasi-scientific conclusions that international law is not law, Goldsmith and Posner undermine the prospects for achieving an orderly world under the rule of law and progress toward fulfillment of humanity’s most fundamental aspirations.

IV. CONCLUSION

This point brings us back to why international law is binding, including its rules on force. The international community uses international law to accomplish its most important purposes because it accepts that international law binds. It is this acceptance, this belief—

70. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 202 (2005).

71. John Yoo & Robert Delahunty, *Executive Power v. International Law*, 30 HARV. J.L. & PUB. POL’Y 73, 112-13 (2006).

once based on religious belief—which forms the basis of all law.⁷² Belief in the authority of law is an inheritance from an age when nearly all of those who thought about law believed in God and in the ability to apply reason to understanding what God ordained in the form of law. This is our inheritance. We are now committed to respect for the authority of law as law. The international community shows daily and in myriad ways acceptance of international law's authority. It is through international law that humanity has sought to realize its most profound moral principles: its desire to end war, to respect human rights, to end poverty, and to preserve the natural environment. Binding rules, such as those restraining the use of force and requiring peaceful settlement of disputes, are the foremost tools for moving forward. Legal rules bind if they come through a system we believe in with recognized sources backed by sanctions.

We have such rules regulating the use of force. Americans are learning the high price of violating them in the case of Iraq and Afghanistan. This high price should deter an attack on Iran. For the sake of innocent Iranian civilians and brave American troops, all Americans should realize the value of international law to, in the words of the Charter, “save succeeding generations from the scourge of war”⁷³

72. For a brief history of the relationship between belief in law's authority and belief in God, see STEVEN D. SMITH, *LAW'S QUANDARY* (2004).

73. U.N. Charter pmb1.