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Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent

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REGULATION OF PREVENTIVE AND PREEMPTIVE FORCE IN THE UNITED NATIONS CHARTER: A SEARCH FOR ORIGINAL INTENT

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INTRODUCTION

In September 2002, the United States formally declared its intention to use force against terrorist organizations before they strike. This doctrine is stated emphatically in *The National Security Strategy of the United States of America*[2]: "[W]e will not hesitate to act alone, if necessary, to exercise

2. *The National Security Strategy of the United States of America at* http://www.whitehouse.gov/nsc/nss.html (last visited Feb. 26, 2003) [hereinafter *National Security Strategy*]. Other nations have made similar announcements recently. After terrorists killed over 150 Australians in the Bali nightclub firebombing, Australian Prime Minister John Howard also indicated a willingness to take preemptive military action against terrorists. *See* Roger Maynard, *Australian 'First Strike' Talk Upsets Region*, LONDON TIMES, Dec. 2, 2002, at 14. Some two months after the Australian announcement, the Japanese government put North Korea on notice that Japan "would launch a preemptive strike if Tokyo found evidence than Pyongyang was about to attack with a ballistic missile." *See* Richard Beeston, *Nervous Japan Tells North Korea It Will Strike First*, LONDON TIMES, Feb. 14, 2003, at 23.

our right of self-defense by acting preemptively against such terrorists . . . ."[3] The document reiterates the point later stating: "To forestall or prevent such hostile acts [terrorists acts and use of weapons of mass destruction] by our adversaries, the United States will, if necessary, act preemptively."[4] The context of these statements makes clear they refer to military force rather than law enforcement efforts.

Shortly before, Vice-President Cheney had asserted the right of the United States to use force preemptively against a state (Iraq), in order to eliminate its weapons of mass destruction.[5] He approvingly quoted a former Secretary of State who had said: "The eminence of proliferation of weapons of mass destruction, the huge dangers it involves, the rejection of a viable inspection system and the demonstrated hostility of Saddam Hussein combine to produce an imperative for preemptive action."[6] *The National Security Strategy of the United States of America* uses the language of *preemptive* force, noting: "For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack."[7] However, the document suggests that, in light of the goals and destructive capacity of modern terrorists, the government is expanding its definition of *preemptive* force to include force that is better described as *preventive*.[8]

The U.S. Defense Department defines a *preemptive* attack as one "initiated on the basis of incontrovertible evidence that an enemy attack is *imminent*."[9] A *preventive* war on the other hand, is defined as one "initiated

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3. *National Security Strategy*, *supra* note 2, at 6.

4. *Id.* at 15. This is not the first time the U.S. has asserted the right to use force preemptively against terrorists. *See, i.e.*, Richard Falk, *The Decline of Normative Restraint in International Relations*, 10 YALE J. INT'L. L. 263, 265-66 (1985), describing a speech by Secretary of State George Shultz as stating a policy of preemptive strikes. The recent assertion, however, is the clearest statement of such a policy by the United States.

5. *See, i.e.*, *Cheney Says Peril of a Nuclear Iraq Justifies Attack*, N.Y. TIMES, Aug. 27, 2002, at A1, and *In Cheney's Words: The Administration Case for Removing Saddam Hussein*, N.Y. TIMES, Aug. 27, 2002, at A8.

6. *Id.* (quoting former Secretary of State Henry Kissinger).

7. *National Security Strategy*, *supra* note 2, at 15.

8. The *National Security Strategy* states:

> 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.

Id. (emphasis added). The recent Australian and Japanese statements concerning the pre-attack circumstances under which they might use force are shaded toward preemption. The Japanese Minister of Defense, for example said he "would regard the loading of fuel on a ballistic missile aimed at Japan as a justification for attack." Beeston, *supra* note 2.

9. DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 413 (2001, as amended 2002) *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf

in the belief that military conflict, while *not imminent*, is inevitable, and that to delay would involve greater risk"[10] One commentator has pointed out that "[p]reventive uses of force . . . seek to stop another state . . . from developing a military capability before it becomes threatening or to hobble or destroy it thereafter, whereas [p]reemptive uses of force come against a backdrop of tactical intelligence or warning indicating imminent military action by an adversary."[11] With regard to Iraq, the U.S. did not specify whether it believed its action would be preemptive or preventive, but the contemplated attack clearly would be preventive under the Defense Department definitions just discussed.

This claim by the United States of a right to use force preventively against Iraq has met with opposition from other states and has precipitated a crisis in the United Nations Security Council. The claim again raises to prominence the question: What uses of force not approved by the Security Council does the United Nations Charter permit? [12] More specifically, does Article 51,[13] the Charter provision recognizing the right of states to use force in self-defense, prohibit either preemptive or preventive self-defense? The extent to which member states agreed in the Charter to restrict their use of force has been debated since the document's inception. In this article I will not review extensively the large body of secondary literature on that debate. Instead, I will trace and examine in detail the drafting history of the Charter's main use of force provisions, Article 2(4)[14] and Article 51, in order to

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(last visited Feb. 26, 2003) (emphasis added). Preemptive self-defense is often used synonymously with the term "anticipatory self-defense."

10. *Id.* at 461(emphasis added).

11. William Safire, *Rope-a-Dope: A Lexicon of Intervention*, N.Y. TIMES, Oct. 13, 2002, at 30, 31 (quoting RICHARD HAASS, INTERVENTION: THE USE OF AMERICAN MILITARY IN THE POST-COLD WAR WORLD (Rev. ed. 1999)).

12. For one commentator's list of such uses of force, *see* Oscar Schachter, *The Lawful Resort to Unilateral Use of Force*, 10 YALE J. INT'L L. 291 (1985).

13. Article 51 states:

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

U.N. CHARTER art. 51.

14. "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." U.N. CHARTER art. 2, para. 4.

clarify the basic concerns they were intended to address and the basic principles they establish.[15]

I will focus on the narrow question of particular relevance to the present controversy: Did the Charter's drafters intend to permit a state to use force in self-defense, either preventively or preemptively, before that state has been the victim of an armed attack? Or, in other words, will the U.S. violate obligations it can reasonably be said to have undertaken when it ratified the Charter if it uses preventive or preemptive armed force without Security Council approval, as it has asserted the right to do? Although a review of the secondary literature of this field might lead one to conclude it has been ploughed to the point of soil exhaustion,[16] it is an extremely valuable inquiry at the present time for three reasons.

First of all, few writings on this topic examine a source critical to a proper understanding of it – the 1,611 page volume in the *Foreign Relations of the United States* series that includes the minutes of internal U.S. delegation meetings and of meetings the U.S. delegation had with the other Great Powers (who would become the Security Council's permanent members) at the United Nations Conference on International Organization during which Article 51 was discussed and created.[17] An online search of law review articles discovered only three that referred to this source for guidance in interpreting the meaning of the Charter use of force rules.[18] One monograph does

15. According to article 32 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969), "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." Given the long-standing disagreement among commentators and states about the meanings of art. 2, para. 4, and art. 51, it is fair to say the meanings of those provisions are ambiguous. *See infra* text accompanying notes 312-28 for a discussion of treaty interpretation, especially as it relates to the Charter.

16. *See* the lengthy list of pieces on both sides of the debate cited in George K. Walker, *Anticipatory Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT'L. L.J. 321, 322 n.1 (1998). *See also* the excerpts representing an array of opinions in Self-Defense, 5 Whiteman DIGEST § 25, at 971.

17. Department of State, United States of America, *Foreign Relations of the United States: Diplomatic Papers*, 1945 (1967). [hereinafter FRUS]. The editor's introductory note states: "The underlying purpose [of the volume] is to present the American Delegation's position in relation to the various issues, discussions, and decisions at different levels, such as informal diplomatic meetings, in Conference committees and subcommittees, and informal meetings of individuals, with emphasis on the why and how, and the atmosphere in which agreements were reached, rather than on what transpired in the formal meetings of the Conference." *Id.* at 3.

18. Lexis-Nexis and Westlaw searches yielded: Thomas M. Franck, *When, if Ever, May States Deploy Military Force without Prior Security Council Authorization*, 4 SING. J. INT'L & COMP. L. 362 (2000) *reprinted in* 5 WASH. U. J.L. & POL'Y 51 (2001); Malvina Halberstam, *The Right to Self-Defense Once the Security Council Takes Action*, 17 MICH. J. INT'L L. 229 (1996); and Carin Kahgan, *Jus Cogens and the Inherent Right to Self-Defense*, 3 ILSA J. INT'L & COMP. L. 767 (1997). The latter is the only one of these to refer frequently to FRUS.

refer frequently to these delegation minutes, but it does not look at them in connection with Article 51 as extensively as I will here.[19] It is likely the minutes do not figure more prominently in the literature for these reasons: 1) they were not published until 1967, long after doctrine in the field was firmly established; 2) they are minutes – a third party's account of the meetings – rather than verbatim transcripts, thus their evidentiary value is somewhat reduced; and 3) on the whole, they do not constitute a "smoking gun" – they do not obviously and consistently verify or contradict the standard approaches to the Charter's use of force rules. Nevertheless, a patient, detailed examination of the meeting minutes does shed much light on these rules and suggests a different way of viewing them. The minutes are particularly useful in understanding the intent of Article 51, because the U.S. delegation to the San Francisco Conference proposed its precursor and was heavily involved in drafting the article as it was approved.

Secondly, this inquiry is warranted because the secondary literature on this topic focuses on whether Article 51's drafters intended to eliminate the right of *preemptive*, or *anticipatory*, self-defense, which had been part of *an individual state's* broad customary international law right of self-defense.[20] A close examination of the self-defense related minutes in *Foreign Relations of the United States*, however, shows that the drafters' primary concern was to establish a right of *collective self-defense* and to make clear it did not extend to *preventive* action. The minutes show the drafters' only interest in *individual self-defense* was to verify that it continued to exist, not to limit it or define its scope.

Finally, after more than a half-century removed from the Charter's creation, during a U.N. crisis, it is particularly useful to re-examine these original sources. From this vantage point in time it is easy to lose sight of the document's basic character and its object and purpose.[21] The substantially divergent approaches to the present Iraq controversy taken by the Security Council's permanent members reveal significantly different present understandings of the Charter's approaches to threats to the peace. My purpose here is to use the historical record to re-create the concerns of the drafters and their approach to use of force rules in the United Nations Charter, in order to arrive at the most plausible understanding of the drafter's original

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Kahgan's thesis differs significantly from mine, though our observations agree on many points.

19. STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 77-105 (1996). We come to different conclusions as to the intent of the drafters. *See infra* text accompanying notes 329-46.

20. For a description of that customary international law right, *see infra* text accompanying notes 22-25.

21. Article 31 of the Vienna Convention on the Law of Treaties requires: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, *supra* note 15.

intent. Of course, the parties to a treaty can reinterpret its provisions to suit changed conditions. Nevertheless, this should not be done without a full appreciation of the considerations that drove the document's drafters. One purpose of this article is to help achieve such an appreciation in the hope that it may provide common ground for an honest debate on the issues underlying the present crisis.

After analyzing the relevant documents, I conclude that: 1) at the United Nations Conference on International Organization (UNCIO or Conference) there were substantial, unresolved disagreements both among the U.S. delegates and among the future permanent members of the Security Council about the circumstances under which states should be able to use force without Security Council approval; 2) these disagreements, combined with time pressures at the Conference, resulted in Charter use of force provisions that are imprecise, somewhat inconsistent, and open to interpretation; 3) many of the drafters of these provisions were not concerned with their lack of precision because they assumed the permanent members of the Security Council would negotiate judgments concerning uses of force case by case, in good faith, once the Organization was operating; 4) the dominant view of Article 2(4) is correct – i.e. the article was intended to require a broad renunciation of the unilateral uses of force in international relations; 5) the United States sought to restrict unapproved uses of *collective* self-defense more severely than did other future permanent members of the Council; and 6) the drafters did not intend to address the right of individual *preemptive* self-defense, but they did intend to eliminate *preventive* self-defense – such as proposed by the U.S. government with respect to Iraq – except by the war time allies in regard to former enemy states. I then make additional conclusions concerning the utility of this study for solving the present Security Council crisis. Before examining the drafting history of the Charter's use of force rules, however, it is necessary briefly to address three other matters for background: 1) the two basic approaches to uses of armed force under the Charter; 2) the status of preemptive, or anticipatory, self-defense in customary international law; and 3) whether the Charter's use of force rules remain relevant in the face of repeated violations.

I. Approaches to Uses of Armed Force Under the Charter[22]

There are two basic perspectives on the Charter's use of force principles, with one significant variation. The view that seems to predominate among commentators, especially in Europe, is that Article 2(4) thoroughly prohibits all uses of armed force that are not specifically approved by the Charter.[23] These uses are limited to: 1) Security Council enforcement actions; 2) a narrow right of individual and collective self-defense *in response to an armed attack*, under Article 51; and 3) measures against former enemy states (now a defunct category).[24] Those who take this approach point out that the broad renunciation of force by states in Article 2(4) is compensated for by the broad authority given to the Security Council in Chapter VII of the Charter to use force "to maintain or restore international peace and security."[25] In this view, as implied above, Article 51 does not permit preventive or preemptive self-defense; it permits defensive force only after an armed attack has been launched.[26] Preventive force is now the excusive province of the Security Council under Article 42, and preemptive force is prohibited by Article 51. This position has been referred to as the restrictionist school.[27]

Other commentators see Article 2(4)'s limits on the uses of force as being less restrictive. They read the words "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" as permitting a variety of uses of force (e.g., humanitarian intervention) that are not motivated by such aggres-

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22. Among the surveys of this broad topic are: ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE (1993); BELATCHEW ASRAT, PROHIBITION OF FORCE UNDER THE UN CHARTER (1991); D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW (1958); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963); THE CURRENT LEGAL REGULATION OF THE USE OF FORCE (A. Cassese ed. 1986); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE (2nd ed. 1994); Rosalyn Higgins, *The Legal Limits to the Use of Force in International Law*, 1962 BRIT. Y.B. INT'L L. 269; Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984); S.M. Schwebel, *Aggression, Intervention and Self-Defense in Modern International Law*, 136 RECUEIL DES COURS 411 (1972).

23. *See*, Albrecht Randelzhofer, *Article 2(4)*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 106, 108-18 (Bruno Simma ed. 1994). For an explanation as to why this view is common on the continent, *see* David K. Linnen, *Self-Defense, Necessity and U.N. Collective Security: United States and Other Views*, 1 DUKE J. COMP. & INT'L L. 57, 68-70 (1991). Linnen sees this as being the position of Continental, socialist and developing nations' publicists, and he believes the less restrictive position is characteristic among Anglo-American publicists. *See id.* at 68-70. Current literature, however, seems to indicate that the restrictive view is now the majority position among Anglo-American writers as well.

24. Randelzhofer, *supra* note 23, at 119-21.

25. "Should the Security Council consider that measures provided for in Article 41 [non-forceful sanctions] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." U.N. CHARTER art. 42.

26. *See* Randelzhofer, *supra* note 23 at 667.

27. *See* AREND & BECK, *supra* note 22, at 73.

sive intentions as the acquisition of territory or the coercion of a government. Some who take this position do so based upon the language of the article itself.[28] This group also interprets Article 51 less restrictively. Because they believe Article 2(4) permits a range of non-aggressive uses of force, they see Article 51 as simply acknowledging that the inherent right of self-defense, as recognized in customary international law, continues to exist. Thus, in this view, it would be unreasonable to see Article 51 as requiring states to suffer injury from an armed attack that they knew to be imminent.[29] A sub-group in this category of commentators accepts the dominant view as to the drafter's intent to create a broad prohibition of the use of force in Article 2(4), but argues that it was "embedded in and made initially plausible by a complex security scheme established in the . . . Charter" and that the failure of the security scheme means that provision should not be interpreted as originally intended.[30] The logic of this sub-group would seem to allow preventive force under limited circumstances.[31]

A third group, which traditionally has included the U.S. and many other Western states, shares the majority view of Article 2(4)'s broad prohibition on the unilateral use of force by states, but interprets Article 51 as permitting anticipatory self-defense as it was defined in customary international law as a result of the *Caroline* incident.[32] Interestingly, even German Chancellor Gerhard Schroeder recently indicated agreement with this interpretation in the course of defending his refusal to agree to the use of preventive force against Iraq.[33] The second and third groups are sometimes known as counter-restrictionist.[34]

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28. *See* D.W. BOWETT, *supra* note 22, at 152; JULIUS STONE, AGGRESSION AND WORLD ORDER 43 (1958).

29. *See* BOWETT, *supra* note 22, at 187-93.

30. W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 279-80 (1985). *See also* ASRAT, *supra* note 22, at 43-47, 62-63.

31. Among Riesman's nine categories "in which one finds varying support for unilateral uses of force" are "self-defense, which has been construed quite broadly; humanitarian intervention; intervention by the military instrument to replace an elite in another state." Riesman, *supra* note 30, at 281. Each of these three categories has been mentioned by the U.S. as a basis for the proposed use of preventive force against Iraq.

32. *See* Schachter, *supra* note 12, at 293; Rosalyn Higgins, *The Attitude of Western States Towards Legal Aspects of the Use of Force, in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE, *supra* note 22, at 442. *See also* the recent Australian and Japanese statements supporting this view, *supra* notes 2, 8.

33. In a speech to the Bundestag he said: "[A]s the final means of conflict resolution, the use of military force is subject to strict restrictions. In particular, self-defense against an imminent armed attack or averting a direct serious danger to world peace mandated by the Security Council are exceptions." *See Policy Statement by Federal Chancellor Gerhard Schroeder in the German Bundestag on the Current International Situation*, THE WEEK IN GERMANY, Feb, 14, 2003, *available at* http://www.germany-info.org/relaunch/politics/speeches/021303. htm (last visited Feb. 26, 2003).

34. *See* AREND & BECK, *supra* note 22, at 73.

II. Preemptive, or Anticipatory, Self-Defense in Customary International Law

As previously noted in differentiating preemptive from preventive self-defense, preemptive (anticipatory) self-defense requires knowledge that the aggression is *imminent*.[35] The concept was articulated in a letter to the British government by United States Secretary of State Daniel Webster and was widely accepted as part of customary international law, at least until the Charter era. In the incident Webster was discussing, the British had claimed that force they used in U.S. territory during the Canadian rebellion of 1837 to prevent a steamer from moving rebels and weapons into Canada qualified as legitimate self-defense. Webster responded that for this to be the case, the British government would have to "show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[36] Webster thought the British action did not qualify as legitimate self-defense because they had not previously used diplomatic means to stop the activities in question.[37] He qualified the right further by stating the British government also would have to show "that the local authorities of Canada . . . 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."[38] This limitation is commonly seen as requiring proportionality in the defensive use of force and as having been accepted into customary international law.

ARTICLE I.

III. Are the Charter Use of Force Rules Irrelevant?

As a final preliminary matter, it should be noted there is a strong case to be made for the proposition that the Charter use of force rules are no longer law. Recently Michael Glennon has argued that "international 'rules' concerning use of force are no longer regarded as obligatory by states."[39] He notes there have been nearly 300-armed conflicts engaged in by two-thirds

35. *Supra* text accompanying note 11.

36. THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 104 (N.Y., Harper & Bros. 1848). For detailed descriptions and analyses of the case, *see* Plea of Necessity – Destruction of the Caroline 2 Moore DIGEST § 217, at 409; R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J.INT'L L. 82 (1938); Timothy Kearley, *Raising the Caroline*, 17 WIS. INT'L L.J. 325 (1999).

37. *See* Alberto R. Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 297 AM. SOC. INT'L L. PROC. 301 (1987).

38. THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE, *supra* note 36, at 110.

39. Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. LAW & POLICY 539, 540 (2002). *See also* Michael J. Glennon, *How War Left the Law Behind*, N. Y. TIMES, Nov. 21, 2002, at A3; MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTION AFTER KOSOVO (2001).

of the members of the United Nations and resulting in over 22 million deaths from the time of the organization's founding up to 1999.[40] He goes on to claim: "The upshot is that the Charter's use-of-force regime has all but collapsed. This includes, most prominently, the restraints of the general rule banning use of force among states, set out in Article 2(4). The same must be said . . . with respect to the supposed restraints of Article 51 limiting the use of force in self-defense."[41] Others have made similar arguments in the past.[42]

It might seem a useless exercise, then, to investigate the drafting history of these provisions. I believe, however, that it will still serve a valuable purpose. Agreement on the meaning the drafters originally intended for the Charter rules can provide common ground for debate on how they should be interpreted now and can be made effective.

IV. The Origins of the United Nations and Its Use of Force Rules[43]

The United Nations Organization, as a successor to the League of Nations, can be traced back to the Atlantic Charter. This joint declaration, made by Prime Minister Churchill and President Roosevelt on August 14, 1941,[44] states the belief "that all nations of the world must come to the abandonment of the use of force,"[45] and it looks forward to "the establishment of a wider and permanent system of general security . . . ."[46] The Declaration by United Nations,[47] which followed some six months later, affirms the Atlantic Charter, but is most notable in the present context for using the term "United Nations" for the twenty-six states who had joined together against the Axis powers.

During the second half of 1943, several activities advanced the creation of a new general international organization. In August of 1943 the Republican Party, in its Mackinac Island Resolution, supported "responsible participation by the United States in postwar cooperative organization among sovereign nations to prevent military aggression and to attain perma-

40. Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article of the United Nations Charter*, 25 HARV. J. LAW & POLICY 539, 540 (2002).
41. *Id.*
42. *See*, AREND, *supra* note 22, at 4-5, 9-10, 177-87; Jean Combacau, *The Exception of Self-Defence in U.N. Practice, in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 30-32 (A. Cassese ed. 1986); Thomas M. Franck, *Who Killed Art. 2(4)? Or: The Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970); Eugene V. Rostow, *The Legality of the International Use of Force by and from States*, 10 YALE J. INT'L L. 286, 286-89 (1985).
43. *See generally* RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945 (1945).
44. *Id.* at 975.
45. *Id.*
46. *Id.*
47. *Id.* at 976.

nent peace with organized justice in a free world."[48] (This was particularly noteworthy given the party's strong isolationist tendencies.) That same month the Department of State finished a draft proposal for the new international organization, which it titled "Charter of the United Nations."[49] In September and November, the U.S. House of Representatives and the U.S. Senate overwhelmingly passed resolutions supporting the creation of a new general international organization.[50] In between the passage of the House and Senate resolutions, representative of the U.S., U.K., U.S.S.R., and China met in Moscow and, among other things, decided to begin planning seriously for the League's successor. The Moscow Declaration (formally titled "Declaration of Four Nations on General Security")[51] stated in point 4 that the four nations "recognize the necessity of establishing at the earliest practicable date a general international organization . . . for the maintenance of international peace and security."[52]

This seems to have been seen by key U.S. officials as signaling that they would now need to give serious attention to the specifics of such an organization. At the Tehran Conference of November-December, 1943 Churchill, Roosevelt and Stalin continued their discussion of a general international organization, and after the conference Roosevelt for the first time asked the Department of State for its recommendations on a postwar security organization. Its response was the "Plan for the Establishment of an International Organization for the Maintenance of International Peace and Security" (known in the Department as the "Outline Plan"),[53] which was transmitted to the President December 29, 1943.

A. Use of Force in the Outline Plan[54]

Article I of the Outline Plan – "Functions and Purpose" – articulates the fundamental principles concerning the use of force that the drafters intended to embody in the Charter more clearly than they may appear there now. It states that the first of the two primary functions of the international organization should be "to establish and maintain peace and security, by

48. *Id* at 125-26.

49. It usually was referred to as the "Staff Charter." *See id.* at 219-20.

50. The House passed the Fulbright Resolution, H.R. Con. Res. 25, 78th Cong. (1943) (enacted), and the Senate passed the Connally Resolution, S. Res. 192, 78th Cong. (1943) (enacted).

51. RUSSELL, *supra* note 43, app. D at 977.

52. *Id.*

53. *Id.* at 221. This was the Department's first official position on a new general international organization, although two other drafts had been completed earlier: the Staff Charter and, prior to that, the *Draft Constitution of an International Organization*. *See id.* at 219-20.

54. The Appendix provides a chart showing selected provisions concerning principles and purposes, collective security obligations, and self-defense in the Outline Plan, the U.S. Tentative Proposals, the Dumbarton Oaks Proposals, and the United Nations Charter.

force if necessary . . . ."[55] Article I goes on to declare: "The organization should provide means of cooperative action . . . to prevent the use of force or of threats to use force in international relations *except by authority of the international organization itself* . . . ."[56] This is the precursor of Charter Article 2(4), and it clearly articulates the restrictive intent of that provision. States are to refrain from unapproved uses of force in their international relations generally, not only when those uses of force arguably do not infringe on another state's territorial integrity or political independence. The Outline Plan's "Principle Obligations of a Member State" reinforces this meaning by listing as point 1 the obligation "[t]o refrain from use of force or threat to use force in its relations with other states and from any intervention in the internal affairs of other states, *except in performance of its obligation to contribute to the enforcement procedures instituted by the Executive Council.*"[57]

This general injunction against the unapproved use of force assumed that the international organization would authorize uses of force when necessary. The Outline Plan emphasized this in declaring that one of the organizations powers should be "to determine the existence of threats or acts of aggression and to take measures necessary to repress such threats or acts."[58]

B. Use of Force in the United States Tentative Proposals for a General International Organization[59]

After President Roosevelt approved the Outline Plan in February 1944, the U.S. worked with China, the United Kingdom, and the Soviet Union to set up consultations on establishing an international body for peace and security.[60] The revised version of the Outline Plan which the U.S. used as the basis for its position in the consultations was titled: United States Tentative Proposals for a General International Organization. The wording

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55. RUSSELL, *supra* note 43, app. F, at 991.
56. *Id.* (emphasis added). The Outline Plan begins:

> I. Functions and Purposes. The primary functions of the international organization to be established in accordance with the provisions of the Atlantic Charter, of Point 4 of the Moscow Declaration, and of the Congressional Resolutions, should be, *first*, to establish and maintain peace and security, by force if necessary; and, *second*, to foster cooperative effort among the nations for the progressive improvement of the general welfare. The organization should provide means of cooperative action for the creation, operation, and coordination of agencies and procedures for the following purposes: 1. to prevent the use of force or of threats to use force in international relations except by authority of the international organization itself . . . .

Id.
57. *Id.* at 994.
58. *Id.* at 992.
59. *See id.*, app. G, at 995-1006.
60. *See id.* at 316-17.

of the Tentative Proposals' use of force provisions varies somewhat from those of the Outline Plan, but the drafting history indicates the variation does not reflect any attempt by the U.S. to change the organization's basic use of force rules.

The Tentative Proposals still indicate that the first of the two primary purposes of the organization is "to maintain international security and peace,"[61] and among its methods for doing so is to "provide for the use of armed force, when necessary in support of security and peace, if other methods and arrangements are inadequate."[62] The most significant change in language appears in the precursor of Charter Article 2(4). Instead of clearly articulating, as the Outline Plan did, that one purpose of the organization is to prevent any uses of force that the organization does not authorize, the Tentative Proposals state more vaguely:

> The organization should be empowered to make effective the principle that no nation shall be permitted to maintain or use armed force in international relations *in any manner inconsistent with the purposes envisaged in the basic instrument of the international organization* or to give assistance to any state contrary to preventive or enforcement action undertaken by the international organization.[63]

This change could be interpreted as an attempt to allow a variety of uses of force that are not authorized by the organization. However, according to Ruth Russell, a commentator familiar with the drafting history of these plans, this change was made only to meet the concerns of those who thought the Outline Plan provision could be read as empowering the organization to prevent states from using force even in self-defense unless that body authorized it; the Tentative Plan drafters decided to loosen the language of the relevant provision in order to indicate the right of self-defense was not affected.[64]

It might be asked why they did not instead simply add another provision stating that the right of self-defense remained in the states, as was eventually done in the Charter drafting process. A verifiable answer cannot be given in regard to the Tentative Proposals. However, the Charter's drafting history shows that the U.S. delegation was extremely reluctant to articulate the right of self-defense for two reasons. First, most delegates thought it would be very difficult to devise a definition of self-defense that would be

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61. *Id.*, app. G, at 996.
62. *Id.*
63. *Id.* (emphasis added). *See also* RUSSELL, *supra* note 43, app. G, at 1000.
64. Russell, *supra* note 43, at 296 n.23. In this note, Ms. Russell is discussing the phrase as it is used in art. V, para. 1(b), but her explanation applies equally to the same phrase as it is used in art. I, sec. A, para. 3.

broadly acceptable. Second, many were afraid that any attempt to do so would result in the diminution of that right. As we shall see, this background is extremely important in discerning the meaning of Charter Article 51.

A corollary of this reluctance to define self-defense also is apparent in another change in the language governing the use of force in the Tentative Proposals. While the Outline Plan uses the phrase "acts of aggression," the drafters of the Tentative Proposals dropped it. Russell indicates its use in the Outline Plan was an anomaly that was avoided in all other State Department drafts.[65] Problems in the League of Nations regarding the definition of aggression figured heavily in the decision to avoid the term.[66] Thus, it was a consistent U.S. policy to refrain from defining key use of force terms in order to give the organization's enforcement agency flexibility in deciding when to act and in order to avoid narrowing the right of self-defense.

ARTICLE II.

C. Use of Force in the Dumbarton Oaks Proposals

Phased negotiations among technical experts of China, the U.K., the U.S. and U.S.S.R. to a draft plan for the proposed postwar international organization were held at Dumbarton Oaks in the District of Columbia from August 21 through October 7, 1944. These were referred to as "conversations" and were kept at the technical level rather than being conducted at a higher diplomatic level for several reasons, including their exploratory nature and the high probability there were points on which agreement would not be reached immediately.[67] The latter fear proved accurate, and the resulting document omitted several features (such as Security Council voting) that had to be left open for discussion at the San Francisco Conference. The

65. *Id.* at 249 n.31. "The use of 'aggression' in the Outline Plan appears to be another sign of drafting haste, for the term was again avoided in later drafts . . . as it had been in the earlier draft plans." *Id.*

66. *Id.* at 234. "When it came to defining the criteria to be used in determining aggression, it was decided to avoid the words 'war' and 'aggression.' The use of these words in the Covenant of the League had led to prolonged legalistic debate, as over the Manchurian affair in 1931, for example." *Id.* For extensive discussions of the meaning of aggression in international law, *see* G.G. Fitzmaurice, *The Definition of Aggression*, 1 INT'L & COMP. L.Q. 137 (1952); Schwebel, *supra* note 22; ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW (SMU Press 1972). In 1974, the U.N. General Assembly recommended a definition of aggression to the Security Council to assist it in fulfilling it obligation under Article 39 "to determine the existence of any threat to the peace, breach of the peace, or act of aggression . . . ." *See* G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/RES/3314 (1974).

67. The meetings are most commonly referred to as the Dumbarton Oaks Conversations, although at the time they were also called the Washington Conversations on International Organizations. *See generally*, *Washington Conversations on International Organization* 1944 DEP'T ST. BULL. 365.

points that were agreed to were published on October 9 as "The United Nations Dumbarton Oaks Proposals for a General International Organization."[68]

The provisions in the Dumbarton Oaks Proposals (DOP) relating to the use of force were very similar to those in the previous U.S. plans. The first listed purpose of the organization was stated as being: "To maintain international peace and security; and to that end to take effective collective measures for the prevention and removal of threats to the peace, and the suppression of acts of aggression or other breaches of the peace . . . ."[69] The term aggression re-entered the picture here at the behest of the Soviets.[70] However, it remained undefined due to U.S. fears that doing so would too greatly limit Security Council authority.

The future Charter Article 2(4) reads: "All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization."[71] The drafters believed this was more significant than the usual vow not to use force in settling disputes.[72] The British government understood chapter II, article 4 as having the broad restrictive sense that had been expressed more clearly in the Outline Plan. The official British commentary on the DOP states:

> The right of all States to protection is also reinforced by the third and fourth Principles, by which the members would engage to settle all dangerous disputes by peaceful means and to refrain from the use or even the threat of force except as the Purposes of the Organization allow, i.e. *for the collective enforcement of decisions made by the Security Council for the purpose of maintaining international peace and security.*[73]

Other than banning the threat as well as the use of force in international relations, the Dumbarton Oaks Proposals do not significantly change the general

68. RUSSELL, *supra* note 43, app. I, at 1019. *See also* Doc. 1, G/1, 3 U.N.C.I.O. Docs. 1 (1945); DEP'T ST. PUBLICATION 2297, Conference Series 66 (1944).

69. RUSSELL, *supra* note 43, app. I, at 1019. In a speech explaining the nature of the Dumbarton Oaks Proposals, President Roosevelt emphasized that they relied on a credible threat of collective force to maintain peace, saying, "Peace, like war, can succeed only where there is a will to enforce it, and where there is available power to enforce it." *See American Foreign Policy: Address by the President*, 1944 DEP'T ST. BULL. 447, 448. He went on to analogize the Security Council to a policeman and noted that the "United Nations must have the power to act quickly and decisively to keep the peace, by force if necessary." *Id.*

70. RUSSELL, *supra* note 43, at 452.

71. *Id.* app. I, at 1019.

72. *Id.* at 456-57.

73. *A Commentary on the Dumbarton Oaks Proposals for the Establishment of a General International Organization 1944*, Cmd. 6571, para. 17, at 5 (1944) (hereinafter British Commentary).

prohibition against unapproved uses of force set out in the Outline Plan and in the U.S. Tentative Proposals.

It is also important to note that, consistent with prior U.S. plans, the DOP still lack any provision concerning a retained right of self-defense. The Chinese technical experts saw DOP chapter II, paragraph 4 as permitting force used in self-defense but asked who would judge if force so used was indeed consistent with the purposes of the organization. The U.S. responded that the Charter could not deny a state the right to defend itself, and that the Security Council probably would be the appropriate body to decide if force alleged to have been used in self-defense actually came within the bounds of chapter II, paragraph 4.[74]

D. The Inter-American Conference of Problems of War and Peace[75]

This Inter-American conference, which took place between the Dumbarton Oaks Conversations and the United Nations Conference on International Organization, February 21 – March 8, 1945 played an important role in shaping the use of force rules that emerged from the latter. The Inter-American Conference's final act, commonly known as the Act of Chapultepec,[76] refers to an Inter-American collective security arrangement, which Latin American delegations to the United Nations Conference fought strongly to maintain within the general international organization. The Act declares: "[E]very attack of a State against . . . an American State, shall . . . be considered as an act of aggression against the other States which sign this Act."[77] Were it not for the powerful desire of the Latin American states to guarantee that this Inter-American collective security capacity survived the creation of the global organization for peace and security, it is doubtful Article 51 would have been created for the U.N. Charter.

ARTICLE III.

V. The United Nations Conference on International Organization

On April 25, 1945, shortly after the Inter-American Conference, and some six months following the Dumbarton Oaks Conversations, the United Nations Conference on International Organization opened in San Francisco. Former Secretary of State Cordell Hull, Secretary of State Edward Stettinius,

74. Russell, *supra* note 43, at 466. The British also understood the right of self-defense as being implicit in the DOP. *See* British Commentary, *supra* note 73, para. 17, at 5.

75. For a documentary history of this conference, *see* 1 FOREIGN RELATIONS OF THE UNITED STATES 1-153 (1967). *See also* Manuel S. Canyes, *The Inter-American System and the Conference of Chapultapec*, 39 AM. J. INT'L L. 504 (1945).

76. *Final Act of the Inter-American Conference on Problems of War and Peace*, 60 STAT. 1837 (1945).

77. *Id.* at 1839.

Senators Tom Connally and Arthur Vandenberg, Representatives Sol Bloom and Charles Eaton, Dean Virginia Gildersleeve, and Commander Harold Stassen (former governor of Minnesota) were named U.S. delegates to the Conference.[78] They were assisted by dozens of advisers and technical experts.[79] Among the advisers who took a particularly active role in the U.S. Delegation's debates over the Charter's use of force rules were future Secretary of State John Foster Dulles, Special Assistant to the Secretary of State Leo Pasvolsky,[80] and Department of State Legal Adviser (and future International Court of Justice judge) Green Hackworth.

The U.S. delegation met prior to the Conference and formulated its position on all but four issues. [81] The most serious problem left unresolved by the delegation before leaving for San Francisco was whether or not it should seek an amendment to DOP chapter VIII that would explicitly recognize the right to self-defense.[82] The U.S. delegates agreed that the right was inherent in sovereignty, but the question was "whether attempted definition would not defeat the very end desired by making possible a restrictive interpretation of the principle."[83] Given this dilemma, the delegation decided to leave the issue open but fully expected it to be raised at the Conference.

ARTICLE IV.

VI. The Development of United Nations Charter Article 51

It is widely understood by commentators that the right to self-defense enshrined in Article 51 came into existence primarily due to the desire of Latin American states to have the collective security arrangements

78. RUSSELL, *supra* note 43, at 543. Due to ill health, former Secretary Hull was not able to attend. *Id.* at 590 n.1. For a candid assessment of the strengths and weaknesses of her fellow delegates, *see* VIRGINIA GILDERSLEEVE, MANY A GOOD CRUSADE 320-323 (MacMillan Co. 1954). For Connally's opinion on the contributions of his colleague Senator Vandenbeg, *see* TOM CONNALLY, MY NAME IS TOM CONNALLY 280 (Thomas Y. Crowell Co. 1954).

79. For a complete list of U.S. personnel and their titles, *see Report to the President on the Results of the San Francisco Conference*, app. D, at 197-205, *in The Charter of the United Nations: Hearings and Report of the U. S. Senate* (S. Doc. No. Y4.F76/2: C38/rev.) (1945).

80. Gildersleeve refers to Pasvolsky as "a kind of focus of responsibility for the actual drafting [of the Charter]. He sat in the middle [of the U.S. delegation] directly opposite Mr. Stettinius and recorded and formulated our ideas. As he could speak Russian, he was very valuable in helping us come to an agreement with the Soviet delegation regarding some of the wording of the Charter." GILDERSLEEVE, *supra* note 78, at 323. Connally agrees with Gildersleeve's assessment of Pasvolsky's role in the U.S. delegation. *See* CONNALLY, *supra* note 78, at 279. Pasvolsky had been involved in drafting the Charter's precursors since July 1943 when he chaired the group that drafted the Staff Charter. *See* CORDELL HULL, THE MEMOIRS OF CORDELL HULL 1647 (MacMillan Co. 1948).

81. Memorandum from the Secretary of State to President Truman (April 19, 1945), *reprinted in* FRUS, *supra* note 17, at 353-55.

82. RUSSELL, *supra* note 43, at 599.

83. *Id.*

contemplated by the Act of Chapultepec continue under the Charter.[84] These states proposed amendments that would have recognized the inter-American system specifically and would have given it significant independence.[85] Australia, New Zealand, and the Arab states also were interested in having the general organization recognize substantial regional autonomy.[86] In pursuit of this goal, Australia proposed adding a new section D to DOP chapter VIII that stated:

> If the Security Council does not itself take measures, and does not authorize action to be taken under a regional arrangement or agency, for maintaining or restoring international peace, nothing in this Charter shall be deemed to abrogate the right of the parties to any arrangement which is consistent with the Charter to adopt such measures as they deem just and necessary for maintaining or restoring international peace and security in accordance with that arrangement.[87]

This Australian proposal significantly influenced the eventual creation of Article 51.[88]

Also influential in the origin of Article 51 were the strongly felt opinions of France and the U.S.S.R. that the Charter should exempt from Security Council control uses of force by the war-time allies against possible renewed aggression by former enemy states. Chapter XII, paragraph 2 of the Dumbarton Oaks Proposals already provided such an exemption, but the fear of renewed German aggression was so great that both the Russians and French were adamant about inserting into the Charter a more explicit provision that would verify their ability to act under mutual assistance treaties they had entered into during the war.[89] This potential ability of European powers to act independently of the world organization, in turn, caused the

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84. Caynes, *supra* note 74, at 506-07; RUSSELL, *supra* note 43, at 688-706.

85. RUSSELL, *supra* note 43, at 689. *See generally* the Chilean proposal, Doc. 2, G/7 (i), 3 U.N.C.I.O. Docs. 282, 290 (1945), the Ecuadorian proposal, Doc. 2, G/7 (p), 3 U.N.C.I.O. Docs. 393, 440 (1945), and the joint proposal of Chile, Colombia, Costa Rica, Ecuador, and Peru, Doc.2, G/28, 3 U.N.C.I.O. Docs. 620 (1945).

86. Russell, *supra* note 43, at 688-89.

87. Doc. 2, G/14 (1), 3 U.N.C.I.O. Docs. 543, 552 (1945).

88. *See* Edward R. Stettinius, *Report on the San Francisco Conference. Address by the Secretary of State*, 1945 DEP'T ST. BULL., 1007, 1009.

89. For the proposed French amendment, *see* Doc. 2, G/7 (o) (2), 3 U.N.C.I.O. Docs. 392 (1945). The similarly worded Soviet proposal is Doc. 2, G/14 (w) (1), 3 U.N.C.I.O. Docs. 601 (1945). France also proposed a much broader exception to the need for Security Council approval for the use of force in its suggested amendment to DOP chapter VI, section C: "Should the Council not succeed in reaching a decision, the members of the Organization reserve to themselves the right to act as they may consider necessary in the interest of peace, right and justice." Doc.2, G/7 (o), 3 U.N.C.I.O. Docs. 376, 385 (1945).

Latin American states and many U.S. delegates to be increasingly insistent about guaranteeing a similar right for American states in their region.[90]

At the same time, the U.S. delegation remained uneasy at the prospect of approving a document that did not explicitly verify that states retained the right of self-defense. Senators Connally and Vandenberg were certain the Senate would insist on a reservation to the treaty if it came to that body without recognizing the right to self-defense, and they were eager to forestall the need for any reservations so as to avoid repeating the Senate's Kellog-Briand pact debacle.[91]

ARTICLE V.

April 26, 1945

The U.S. delegation renewed its discussion of the right to self-defense as soon as the Conference began. On April 26, the delegates and advisers engaged in a debate about the DOP use of force regime that revealed significantly different approaches among them to the question of how much independent use of force states should renounce in the Charter.[92] The discussion arose over the issue of whether to expand the DOP chapter II paragraph 4 requirement that states must "refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization" by adding after "purposes" the phrases "and principles" "and the provisions of the Charter."

Commander Stassen made clear fears he would raise throughout the conference when he said he objected to the additions because if Russia vetoed action by the Organization, he wanted it to be possible for the United States to take whatever action was necessary, consistent with the purposes of the Organization. He believed the original language, confining the obligation to refraining from the use of force in a manner inconsistent with the purposes, was preferable.[93]

Dulles agreed with Stassen, and the two consistently sought to maintain U.S. freedom of action under the Charter. Their reasoning was that DOP chapter II, paragraph 4 could be read as restricting only uses of force inconsistent with the rather broadly defined purposes of the Charter, and that any effort to provide explicitly for the right to self-defense in the Charter would

90. See *infra* text accompanying note 147.
91. *See generally*, FRUS, *supra* note 17, at 229-30, 427.
92. Minutes of the 18th Meeting of the United States Delegation, held at San Francisco, April 26, 1945, 9:30 a.m., *in* FRUS, *supra* note 17, at 414, 426-29.
93. *Id.* at 426.

likely narrow it.[94] Advisers Dunn,[95] Notter,[96] and Sandifer[97] generally took this approach as well.

At the same meeting, Senators Vandenberg and Connally noted the importance of having a statement concerning self-defense available for the Senate. Vandenberg pointed out the problem created by the gap in the Charter between the time of a failed attempt at peaceful settlement and the decision by the Security Council to solve the problem by force. In response, Sandifer reiterated Stassen's interpretation of proposed DOP chapter II, paragraph 4 to the effect that "the test was whether the use of armed force was in accordance with the purposes of the Organization and that the individual use of armed force by a state might on occasion be construed as serving the purposes of the Organization and at the same time constitute self-defense."[98] Vandenberg then articulated what the Senate's concerns about self-defense were likely to be by quoting from the Foreign Relations Committee report on the Kellogg-Briand Pact. When Representative Bloom suggested it might be a good idea to add a similar qualification concerning self-defense in the Charter, adviser Bowman[99] raised the problem created by this and the Stassen-Dulles approach. He doubted that "the Charter should go so far as to acknowledge the right of each state to 'judge its own measures.'"[100] Bloom showed he leaned toward this position by asking what the Organization would be for "if each state would still have the right to use military force whenever it thought necessary in its own defense."[101] (Pasvolsky had previously shown his inclination toward this approach in arguing against Stassen-Dulles position and in favor of the need to have states obligate

94. Stassen and Dulles had expressed these views in Delegation meetings even before the Conference began. As early as April 10, Dulles indicated a reluctance to enhance the restrictions of chapter II, paragraph 4. *See* Minutes of the Sixth Meeting of the United States Delegation, held at Washington, Tuesday, April 10, 1945, 10:15 a.m., *in* FRUS, *supra* note 17, at 227, 229-30. Similarly, on April 18, Stassen and Dulles both argued against increasing the scope of that provision's restrictions, with Stassen not wanting the principle to be "so restrictive that when the Organization failed to act, states would still be bound by the provisions of the Charter." Minutes of the Twelfth Meeting of the United States Delegation, held at Washington, Wednesday, April 18, 1945, 9:10 a.m., *in* FRUS, *supra* note17, at 330, 344.

95. James Dunn, Assistant Secretary of State. Persons "who appear prominently and frequently" in the FRUS report of the Conference are described in its "List of Persons." *See* FRUS, *supra* note 17, at 5-9. Dunn and Notter, along with Dulles and Pasvolsky, Isaiah Bowman and Hamilton Fish Armstrong, are referred to by Gildersleeve as the delegation's six principle advisers. Bowman was president of Johns Hopkins University, and Armstrong was editor of the journal *Foreign Affairs*. GILDERSLEEVE, *supra* note 78, at 322-23.

96. Harley Notter, Adviser, Office of Special Political Affairs, Department of State.

97. Durwood Sandifer, Secretary General of the U.S. Delegation and Chief, International Organization Affairs, Department of State.

98. FRUS, *supra* note 17, at 427-28.

99. Isaiah Bowman, Special Adviser to the Secretary of State.

100. FRUS, *supra* note 17, at 428.

101. *Id.*

themselves not to use force to settle disputes.)[102] The Delegation moved on to another topic without resolving the issue, but with Notter agreeing the advisers would draft a statement on self-defense under the Charter that Connally and Vandenberg could use in the Senate.

ARTICLE VI.

May 4, 1945

The regional arrangements issue was broached seriously for the first time at the U.S. delegation's 29th meeting, held on May 4, 1945. Assistant Secretary of War John McCloy (who was also an adviser to the Delegation) reported the Joint Chiefs of Staff were concerned about defense in the Western Hemisphere. He noted that the Dumbarton Oaks Proposals requiring prior Security Council approval for enforcement actions by regional organizations had been approved prior to the Yalta Conference at which the great powers' veto power was established. McCloy pointed out the veto now meant one permanent member of the Security Council could prevent action by a regional arrangement. Senator Vandenberg worried that this spelled the end of the Monroe Doctrine.[103] McCloy agreed that the doctrine certainly would be watered down and noted how the new Soviet-French proposal[104] gave them considerable freedom of action in Europe.[105]

The Delegation then engaged in an extensive and revealing debate about the Charter's use of force principles.[106] Three points are worth empha-

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102. *See* Minutes of the Sixth Meeting of the United States Delegation, held at Washington, Tuesday, April 10, 1945, 10:15 a.m., *in* FRUS, *supra* note 17, at 227-29; Minutes of the Twelfth Meeting of the United States Delegation, held at Washington, Wednesday, April 18, 1945, 9:10 a.m., *in* FRUS, *supra* note 17, at 330-44.

103. Minutes of the Twenty-Ninth Meeting of the United States Delegation, Held at San Francisco, Friday, May 4, 1945, 9:00 a.m., *in* FRUS, *supra* note 17, at 588, 591. For a statement of the Monroe Doctrine *see* Frank B. Kellogg, *Official Statement of and Commentary Upon the Monroe Doctrine*, 1 FOREIGN RELATIONS OF THE UNITED STATES 698 (1967). Kellogg indicates the doctrine means "that the United States would as a measure of self-defense, protect the weak and struggling revolted Spanish colonies trying to make good their independence, from 'any interposition' by European powers 'for the purpose of oppressing them or controlling in any other manner their destiny.'" *Id.* at 710. *See also*, Chandler P. Anderson, *The Monroe Doctrine Distinguished from Mutual Protective Pacts*, 30 AM. J. INT'L L. 477 (1936).

104. Chapter VIII, sec. C, para. 2 stated in relevant part, "But no enforcement action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . . ." Minutes of the Second Four-Power Consultative Meeting on Charter Proposals, held at San Francisco, May 3, 1945, 10 a.m., *in* FRUS, *supra* note 17, at 562, 568. The Russian proposal, supported by the French was to add the clause "with the exception of measures provided for in treaties already concluded directed against the renewal of a policy of aggression on the part of the aggressor states in the present war." *Id.*

105. Minutes of the Twenty-Ninth Meeting of the United States Delegation, held at San Francisco, Friday, May 4, 1945, 9:00 a.m., *in* FRUS, *supra* note 17, at 591.

106. *Id.* at 592-97.

sizing: 1) it was agreed there existed an inherent right of self-defense that the Charter did not infringe upon, but that defining it would be problematic and, according to some, undesirable; 2) the primary consideration was how regional defense, such as contemplated in the Act of Chapultepec and forceful U.S. actions under the Monroe Doctrine, could co-exist with the veto and the desire to require for prior Security Council approval of regional enforcement actions; and 3) good faith and the U.S. veto were raised as the ground on which U.S. freedom of action could be maintained in the absence of Security Council approval.

Senator Vandenberg expressed his continuing concern about the lack of an explicit recognition of the right to self-defense in the Charter, and Mr. Pasvolsky and others renewed their assurance that the right was implicit. Pasvolsky said there was no question as to the right of individual self-defense, but that "[t]he question was whether the right of self-defense included action on a regional basis."[107] Senator Vandenberg asked if it was possible to define the right without "throwing open the door to individual action," to which Commander Stassen replied that no attempt should be made in that direction because "to define it simply raised the question as to what constitutes self-defense."[108] Later in the same meeting, however, after further debate, Stassen wondered if, after all, there were any disadvantages to inserting in the Charter a simple statement to the effect that "nothing in the Charter takes away the right to self-defense."[109] In response, Senator Connally observed that "such a provision would probably be opposed by the little countries who would be afraid of raising the question openly", Senator Vandenberg opined that the "main objection would be that the Russians might then claim that they were acting under the provisions of the Charter permitting actions in self-defense," and Mr. Sandifer reminded everyone the drafters had thought it "wisest to leave the matter implicit."[110] This exchange summarizes in a nutshell the approach-avoidance dilemma concerning self-defense.

The Monroe Doctrine, good faith, and the veto were implicated by questions two members posed about the U.S. ability to act under the Charter if a European power intervened in a Latin American country. Mr. McCloy posed the hypothetical of a German fleet entering Argentine waters and asked if it would be illegal if the U.S. "shot across the German bows" when they attempted to land. On its face, this question might seem to be about the continued validity of anticipatory self-defense under the proposed changes. This probably is not the case. It is much more likely this hypothetical anticipated an intervention invited by elements of the Argentine military rather than German invasion of Argentina. Argentina had declared war on Ger-

107. *Id.* at 593.
108. *Id.*
109. *Id.* at 594 (quotations omitted).
110. *Id.*

many some six weeks before,[111] but the U.S. still had not recognized its government and considered it to be sympathetic to the Nazis.[112] Therefore, the question more likely concerns the continued validity of the Monroe Doctrine; i.e., could the U.S. act to forestall a foreign involvement in the Americas that the U.S. perceived as threatening. (Note also that McCloy spoke of firing a warning shot, not of attacking). Mr. Pasvolsky said he believed the U.S. could act and then the Security Council would review the action, his assumption being that "the procedure implied good faith on our part not to take action except in self-defense."[113] Following up on this exchange, General Embick[114] indicated his belief that if the Council interpreted DOP chapter VIII, section C in good faith, "we would be allowed to intervene to *prevent* aggression in this hemisphere."[115]

When Representative Easton asked whether the U.S. could act if a South American state were attacked, Mr. Bowman's opinion was that the regional arrangement providing for such action would have to have Security Council approval.[116] (However, later in the discussion he opined that the U.S. could make an agreement providing for such action and the Security Council would have to disapprove it, but wouldn't be able to do so over a U.S. veto).[117] Mr. Pasvolsky thought that the Council would have to find the regional arrangement inconsistent with the U.N. and that the U.S. would have the veto power over such a finding.[118] Commander Stassen showed a similarly loose approach to the proposed Charter use of force rules in stating his belief that if the veto was used arbitrarily to prevent necessary regional defensive measures the U.S. would have to take action anyway.[119] In the end, the Delegation agreed to oppose the proposed changes to chapter VIII, section C on the grounds that they undermined Security Council authority vís a vís independent regional action. On the other hand, the bulk of the delegation's remarks demonstrated its interest in having U.S. freedom of action be retained to the fullest extent possible.

111. RUSSELL, *supra* note 43, at 571.
112. *See Non-Recognition of the Argentine Regime*, 1945 DEP'T ST. BULL. 107.
113. Minutes of the Twenty-Ninth Meeting of the United States Delegation, held at San Francisco, Friday, May 4, 1945, 9:00 a.m., *in* FRUS, *supra* note 17, at 592.
114. Lieutenant General Stanley Embick, adviser to the U.S. delegation.
115. Minutes of the Twenty-Ninth Meeting of the United States Delegation, held at San Francisco, Friday, May 4, 1945, 9:00 a.m., *in* FRUS, *supra* note 17, at 592 (emphasis added).
116. *Id.* at 593.
117. *Id.* at 595.
118. *Id.* at 593.
119. *Id.* at 596.

Four-Power Consultative Meetings

The four sponsoring powers met three times that day after the U.S. Delegation's morning meeting.[120] It became clear that the Soviets and the British wanted the Charter to state more clearly that the European alliances they had formed to meet the threat of renewed German aggression after the war could operate immediately and independent of the Security Council. Therefore, the U.S. representatives to the four-power meeting sought to craft an acceptable compromise amendment to chapter VIII, section C, paragraph 2 despite the U.S. delegation's vote that morning to oppose such an amendment. After agreeing to make the compromise,[121] they reconvened the U.S. delegation that evening to explain the situation and gain the delegation's approval for the amendment. All of the U.S. delegates except Commander Stassen agreed to the amendment.[122] When the four powers could not agree upon particular language at their last meeting, they decided that each power would make its own proposed amendment providing for a limited exception to the requirement for Security Council approval of enforcement actions.

ARTICLE VII.

May 7, 1945

The following Monday morning, at the thirty-first meeting of the U.S. delegation, "hell broke loose" over the regional issue.[123] Senator Vandenberg had almost immediately regretted his approval of the proposed chapter VIII, section C, paragraph 2 amendment. In a journal entry dated Saturday, May 5, he reflected as follows on Friday's decision:

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120. *See* Minutes of the Fourth Four-Power Consultative Meeting on Charter Proposals, held at San Francisco, May 4, 1945, 12:15 p.m., *in* FRUS, *supra* note 17, at 598-607, 610-12. The four sponsoring powers were China, the U.K., the U.S., and the U.S.S.R. Later in the Conference, France was admitted to meetings of the sponsoring powers.

121. The proposal was to add after the existing DOP language

> with the exception of measures against enemy states in this war provided for in regional arrangements directed against renewal of aggressive policy on the part of such states until such time as the world organization may, by a decision of the Security Council, be charged with the responsibility for preventing further aggression by a state now at war with the United Nations.

Minutes of the Thirtieth Meeting (Executive Session) of the United States Delegation, held at San Francisco, Friday, May 4, 1945, 7:10 p.m., *in* FRUS, *supra* note 17, at 607.

122. Stassen objected to the freedom action in Europe the amendment would give to the U.S.S.R. and France. *Id.* at 608-09.

123. ARTHUR H. VANDENBERG, THE PRIVATE PAPERS OF SENATOR VANDENBERG 188 (1952). For another narrative of the U.S. delegation's discussion over the regional issue on May 7 & 8, *see* RUSSELL, *supra* note 43, at 694-98.

> I could not object to this because it is in line with my January 10th speech demanding a permanent military alliance, outside the Peace League, to keep the Axis disarmed. But . . . this Amendment opened up serious collateral considerations as we thought it over today. Europe would have freedom of action for her defensive regional arrangements (pending the time when the Peace League shall prove its dependability as a substitute policeman) but the Western Hemisphere would *not* have similar freedom of action under its Pan-American agreements which have a background of a century behind them . . . . Therefore, in the event of trouble in the Americas, we could not act ourselves; we would have to depend exclusively on the Security Council; and any one permanent member of the Council could veto the latter action (putting us at the mercy of Britain, Russia or China). Thus, little is left of the Monroe Doctrine.[124]

Vandenberg discussed his concerns at dinner with Assistant Secretary of State for Latin American Affairs, Nelson Rockefeller, who voiced a similar opinion.[125] As a consequence, when the U.S. delegation met on the morning of Monday, May 7, Vandenberg suggested an expansion of the proposed amendment to DOP chapter VIII, section C, paragraph 2 that would give the Pan-American regional arrangement the same exemption given to our European allies with respect to our European enemies.[126]

A vigorous debate followed in which a majority of speakers expressed their concern that additional exceptions to Security Council control over uses of force by states via treaty commitments would destroy the general organization.[127] Ironically, however, some of those who had argued the most vigorously for a strong general organization believed the U.S. would be free to act when it wanted to, despite the veto held by other great powers, because of the U.S. veto. That is, if the U.S. and other American states thought action was necessary, but a great power vetoed proposed Security Council action, the U.S. could act anyway and veto any Council condemnations.

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124. VANDENBURG, *supra* note 124, at 187.

125. *Id.*

126. *Id.* at 187-88. His proposal was to add to the proposed amendment the phrase

> and with the exception of measures which may be taken under . . . the Act of Chapultepec of the Inter-American Conference on Problems of Peace and War, signed at Mexico City on March 8, 1945, until such time as the Organization may, by consent of the Governing Board of the Pan American Union, be charged with this function.

Id. at 188.

127. *See* Minutes of the Thirty-First Meeting of the United States Delegation, held at San Francisco, Monday, May 7, 1945, 9 a.m., *in* FRUS, *supra* note 17, at 615, 617-26.

Stassen and Armstrong thought it would be better to assure freedom of action for the Pan-American organization by limiting ability of other great powers to veto Pan-American regional action,[128] while others favored a special agreement with the Security Council by which the Pan-American organization would receive blanket prior approval for regional enforcement actions in the Western Hemisphere.[129] In the course of debate, Commander Stassen again demonstrated his sense that the international organization was a kind of tentative effort that would rely heavily on the good faith of the great powers. In arguing against an explicit exception for independent action by the Pan-American organization, he said, "[I]f the veto power impairs effective action for international security then we would have to act anyway."[130] When Rockefeller noted that this approach would make the veto power meaningless, Stassen replied that "any one of the major powers could destroy the organization,"[131] implying also that unreasonable use of the veto in the first place would be the original destructive act.

That evening at the thirty-second meeting of the delegation, even Leo Pasvolsky, a major architect of the general organization, suggested that the U.S. veto was a kind of trump card that would allow the U.S. to act as it saw fit without having to include in the Charter any provisions that would allow states that were not permanent members of the Security Council to act similarly. In the course of a dialogue with Vandenberg in which he opposed the latter's suggested amendment to chapter VIII, section C, section 2, Pasvolsky said no state could interfere in this hemisphere due to our veto, and that "there was no question . . . but that if our security was immediately imperiled by the failure of the [general] Organization to act, we would ourselves act."[132] When Representative Bloom and Senator Connally questioned Pasvolsky as to whether and how the Monroe Doctrine continued to exist under the Charter, he assured them that it did continue by virtue of the U.S. veto and the non-intervention obligation states assume. (He also opined: "The old [whole] system . . . rests upon the good faith of the big powers and their willingness to behave. If they fall out there is no opportunity to keep the peace.")[133]

Dulles and Stassen supported Pasvolsky in his discussion with Vandenberg, though on a somewhat different basis. Dulles again advanced his loose interpretation of chapter II, paragraph 4 saying:

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128. *Id.* at 618-20.
129. *Id.* at 622-23.
130. *Id.* at 621.
131. *Id.*
132. Minutes of the Thirty-Second Meeting of the United States Delegation, held at San Francisco, Monday, May 7, 1945, 6:08 p.m., *in* FRUS, *supra* note 17, at 631, 636.
133. *Id.* at 637. It seems clear from the context that "whole" is indeed the appropriate word. Pasvolsky was stating his opinion that the proposed international organization was dependent on the continued cooperation of the great powers.

> Under principle four they [states] pledged to refrain from the use of force in a manner inconsistent with the purposes of the organization. Since the prevention of aggression was a purpose of the organization, action to prevent aggression in the absence of action by the Security Council would be consistent with the purposes of the organization.[134]

In his opinion, therefore, the U.S. would be free to use force to prevent aggression in the Western Hemisphere even in the face of a Security Council veto.[135] Commander Stassen pointed out that the desirability of being able to act in this way was the reason he had opposed tightening the language of chapter II, paragraph 4.[136] In response, Senator Vandenberg stated his belief that the DOP embodied a general renunciation of the right to use force and that "he was now convinced that the people would be disillusioned beyond words when they realized the plan."[137]

While the entire conversation up to that point had been couched in terms of independent *regional* self-defense, toward the end of the meeting Vandenberg raised it in more *general* terms. He asked whether Mr. Pasvolsky would support a reservation declaring the right of a state to self-defense, because he was sure the Senate would insist on one.[138] Pasvolsky's response was that "if the system failed, that is, if the Security Council did not act when it ought to, obviously a state was free to act to defend itself."[139] However, the delegation was not able to resolve the regional issue at this meeting, and their comments clearly revealed disparate approaches in their sense of what use of force norms ought to prevail in the new organization.

ARTICLE VIII.

May 8, 1945

This debate over what everyone involved understood as "the regional problem" continued at the U.S. delegation's next meeting. Mr. McCloy reported that Secretary of War Stimpson had indicated to him earlier in the afternoon his desire to have the U.S. retain freedom of action in the Western Hemisphere.[140] Secretary of State Stettinius read a memo noting that the Latin American states had urged him not to let the arrangements

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134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* His journal entry for this date refers to the debate as "acrimonious" and says "some astonishing statements" were made in the course of it. VANDENBERG, *supra* note 124, at 189.
138. FRUS, *supra* note 17, at 639.
139. *Id.*
140. Minutes of the Thirty-Third Meeting of the United States Delegation, held at San Francisco, Tuesday, May 8, 1945, 5 p.m., *in* FRUS, *supra* note 17, at 641.

planned in the Act of Chapultepec be foiled by a veto in the Security Council.[141] Others reiterated reasons for not expanding the exceptions to the need for Security Council approval of enforcement actions.[142]

Vandenberg, Dulles and Stassen also had another exchange that reflected their radically different conceptions of the intent behind the general organization's use of force norms. When Mr. Rockefeller reiterated his concern that the Monroe Doctrine would be impaired by the great power veto, Dulles disagreed, referring to a memorandum he had written on the meaning of the Monroe Doctrine in relation to the Dumbarton Oaks Proposals.[143] Mr. Stassen said he agreed with the memo and restated his and Mr. Dulles's position that in so far as the Monroe Doctrine meant that an attack on one American state was an attack on all, it was not inconsistent with the General Organization.[144] Vandenberg responded that the Dulles approach amounted to "the principle that we have the right to do anything we please in self-defense."[145] The meeting ended without a resolution to the regional problem, and the next day an article in the NEW YORK TIMES made the problem a very public one.[146]

May 10, 1945

The thirty-fifth meeting of the U.S. delegation can be seen as the day on which the Charter right of self-defense was conceived. In the course of the continuing debate on the regional problem, Commander Stassen noted that he had just returned from a regional subcommittee meeting at which Alberto Lleros Camargo, the Columbian delegate, had made a stirring plea for a Pan-American exemption such as proposed by Senator Vandenberg.[147]

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141. *Id.* at 644. Secretary Stettinius telegraphed the President and former Secretary of State Hull the next day with a report that the heads of eight Latin American delegations had visited him on the morning of May 8 to urge this position. *Id.* at 644 n.42.

142. *See id.* at 645 (for statements by Dunn). *See also id.* at 650 (for statements by Pasvolsky).

143. *Id.* at 648. The memo is not reprinted, but Stassen's and Vandenberg's responses indicate it argued that the Monroe Doctrine was intact under the DOP given the Dulles-Stassen loose interpretation of Chapter II, Paragraph 4.

144. *Id.*

145. *Id.*

146. James B. Reston, *Propose Relating Pan American Plan to World Security,* N.Y. TIMES, May 9, 1945, at 1. The article noted: "The delegation of the United States inclines to the belief that this is not a question but a dilemma . . . ." *Id.* In an article the next day, Reston wrote: "It was something of a surprise to go into it's [the delegation's] headquarters this afternoon without running into a delegate from Washington who did not have a formula of his own for solving the dilemma between the world security organization and the Pan-American security system." James B. Reston, *Attack is Opened on Big 5 Veto Right*, N.Y. TIMES, May 10, 1945, at 1, 13.

147. Minutes of the Thirty-Fifth Meeting of the United States Delegation, held at San Francisco, Thursday, May 10, 1945, 6:30 p.m., *in* FRUS, *supra* note 17, at 657, 659. A contemporary newspaper account notes other states were similarly upset about the ability of one

Stassen still opposed such an exemption because he believed it was motivated by a desire for "hemispheric isolation." However, he said he had "come to the conclusion that it might be best to spell out in the Charter the right of self-defense" in order to meet the criticism that regional organizations could not act in the event of a great power veto.[148] Stassen then read a memorandum he had written on the issue, which proposed an amendment to DOP Chapter VI as follows:

> VI-E. Self-Defense
>
> 1. Nothing in this Charter shall be construed as abrogating the inherent right of self-defense against a violator of this Charter.
>
> 2. In the application of this provision the principles of the Act of Chapultepec and of the Monroe Doctrine are specifically recognized.
>
> It is of course also clear that all regions are fully entitled to use all peaceful means of settling disputes without the permission of the Security Council.[149]

Stassen indicated the intent of his proposal was to give the general organization the responsibility for using force unless it delegated that responsibility. However, the principle of self-defense would go into effect if the principles in the Act of Chapultepec or the Monroe Doctrine were violated.[150] He had consistently argued for interpreting the DOP use of force rules loosely to permit maximum freedom of action for the U.S. and had similarly argued against stating the right of self-defense to avoid restricting that right. Therefore, it is likely Stassen saw his proposed amendment as establishing a collective, regional right of self-defense in case of armed attack that would not be subject to great power veto, and as verifying the U.S. right to intervene in the Americas under the Monroe Doctrine, but that he had no intention of limiting the existing customary international law right of self-defense.

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permanent member of the Security Council to veto enforcement actions by regional organizations. *See* James B. Reston, *Attack is Opened on Big 5 Veto Right*, *supra* note 146, at 13.

148. FRUS, *supra* note 17, at 659.

149. *Id.* at 659-60.

150. *Id.* at 660.

ARTICLE IX.

May 11, 1945

The next day, at its thirty-sixth meeting, the U.S. delegation engaged in the most extensive discussion on self-defense it had yet engaged in.[151] The entire context of the discussion was regional defense and trying to balance the original plan for a strong central organization with the desire expressed by Latin American states to maintain the independent regional action contemplated by the Act of Chapultepec.

Senator Connally (presiding in the absence of Secretary of State Stettinius) asked Mr. Dunn to report on "the new draft on regional arrangements," which would be added as new Paragraph 12 to Chapter VIII, Section B of the Dumbarton Oaks Proposals. As initially proposed to the delegation the paragraph read:

> In the event of an attack by any state against any member state, such member state shall possess the right to take measures of self-defense. The right to take measures of self-defense against armed attack shall apply to arrangements, like those embodied in the Act of Chapultepec, under which all members of a group of states agree to consider an attack against any one of them as an attack against all of them. The taking of such measures shall not affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.[152]

Just after Connally had requested this report, Secretary of State Stettinius came into the meeting and told the delegation about his discussion earlier that morning with British Foreign Secretary Anthony Eden. Stettinius noted that Eden remained concerned about the regional problem and said Eden favored the French approach, which was embodied in their proposed amendment to Chapter VI, Section C.[153] The proposed French amendment states: "Should the Council not succeed in reaching a decision, the members

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151. *Id.* at 663-74,

152. *Id.* at 674. This text is printed as an annex to the meeting minutes. Appended to it is note 71a, which quotes a marginal notation on the original as saying: "Deletions made at the Delegation meeting of May 11, are indicated by lines through the word and additions by underscoring." *Id.* at 674, n.71a. For purposes of exposition, the text printed above contains the words later deleted by the delegation and omits those added by the delegation, thus showing it in its original form. *See* text accompanying *infra* note 170 for the language as amended.

153. Ch. VI, sec. C concerns voting in the Security Council.

of the Organization reserve to themselves the right to act as they may consider necessary in the interest of peace, right, and justice."[154]

The delegation then began discussing the U.S. proposed amendment to chapter VIII, Section B with Stettinius asking for the military's opinion. General Embrick reported that Assistant Secretary of War McCloy found the formula satisfactory, and Major General Fairchild (advisor to the U.S. delegation) and Vice Admiral Willson (advisor to the U.S. delegation) expressed unenthusiastic approval.[155] Admiral Hepburn (advisor to the U.S. delegation) described the opinion of McCloy and others in Washington as being that the proposal protected the inter-American system adequately but that it might undermine the general organization.[156]

At this point delegates entered into a more detailed discussion over the implications of specific phrases. Assistant Secretary of State MacCleish worried that "attack" in line one was too vague, reminding the delegation that Germany had justified its attack on Poland at the start of the war by asserting Poland had attacked first. Dulles defended "attack" by implying it had been chosen due to its similar use in the Act of Chapultepec (to establish the principle that an attack on one American state would be an attack on them all).[157] He opined that the proposed French amendment was "substantially similar in concept" to this one because it verifies that if the Security Council fails to act, states retain the right to defend themselves – that "the inherent right of self-defense cannot be immobilized."[158] Interestingly, Dulles saw the French proposal's rather loose language as "unduly restrictive" due to the uncertainty involved in deciding when the Security Council had failed to act.[159]

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154. Doc. 2, G/7 (o), 3 U.N.C.I.O. Docs. 376, 385 (1945).
155. FRUS, *supra* note 17, at 665.
156. *Id.*
157. *Id.* Article I (3) states:

> [E]very attack of a State against the integrity or the inviolability of the territory, or against the sovereignty or political independence of an American State, shall . . . be considered as an act of aggression against the other States which sign this act. In any case invasion by armed forces of one State into the territory of another trespassing boundaries established by treaty and demarcated in accordance therewith shall constitute an act of aggression.

Final Act of the Inter-American Conference on Problems of War and Peace, 60 Stat. 1837 (1945).
158. FRUS, *supra* note 17, at 665.
159. *Id.* The French proposal is reminiscent of League of Nations Covenant art.15, para. 7:

> If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves

Senator Vandenberg asked why "attack" was employed in the first line and "armed attack" in the second. Dulles responded that this was an intentional effort to encompass both aspects of the Monroe Doctrine – one of which dealt with overt attacks and the other of which concerned political attacks from outside the Americas aimed at subverting political institutions in the Americas.[160] He said "attack" could cover both aspects, but that "armed attack" had "specific reference to collective action under the Act of Chapultepec."[161] Given this explanation, Vandenberg said he thought that "attack" could cover even a propaganda attack.[162]

Others also were concerned about these terms. MacCleish reiterated his objection to "attack" as being too vague and thought the delegation "would regret the formula as long as the memory of the Conference lasted."[163] After consulting with Assistant Secretary of War McCloy by phone, Mr. Gates (Artemus Gates, Assistant Secretary of the Navy and adviser to the U.S. delegation) said the distinction between the two "gave rise to certain doubts."[164] Mr. Hackworth thought only "armed attack" should be used, while Secretary of State Stettinius suggested "attack" might be replaced by "aggression."[165] No explanations of these opinions are recorded. In light of this flurry of suggested changes, Mr. Dulles warned against having the whole delegation try to re-draft the proposal and recommended referring suggestions back to the smaller drafting group.[166] At the end of the meeting, the delegation agreed to, among other things: 1) wait to hear the opinions of the Secretaries of War and the Navy; 2) if their opinions were positive, to pass the proposal on to President Truman for his approval; and 3) in the Five-Power negotiations to cast the proposal as a modification of the French proposal (because it was known that Eden favored the French approach).[167]

The amended proposal that emerged from this meeting is as follows:

> In the event of an attack by any state against any member state, such member state possesses the inherent right to take the right to take such action as they shall consider necessary for the maintenance of right and justice.

Id.

160. FRUS, *supra* note 17, at 667.

161. *Id.* It should be noted that "armed attack" is not actually used in the Act of Chapultepec. Dulles seems to have meant that "armed attack" in the proposal is equivalent to the phrase "invasion by armed forces" in line two of article I (3) of the Act of Chapultepec.

162. *Id.*

163. *Id.* at 670.

164. *Id.* at 672.

165. *Id.*

166. FRUS, *supra* note 17, at 672. Earlier in the discussion, Mr. Pasvolsky had suggested several changes that appear in the proposal as printed as an annex to the meeting minutes.

167. *Id.* at 673.

> measures of self-defense. The inherent right to take measures of self-defense against armed attack shall apply to arrangements, like those embodied in the Act of Chapultepec, under which all members of a group of states agree to consider an attack against any one of them as an attack against all of them. The taking of such measures shall be reported immediately to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.[168]

Four aspects of the amended proposal should be noted. First, the adjective "inherent" precedes every mention of the right of self-defense. This emphasizes the delegation's view of the importance and the nature of the right. Second, by requiring any actions taken under the right to self-defense to be reported immediately to the Security Council, the delegation expressed its somewhat contradictory desire to have strong central control of force in the Charter. Third, the amended draft, as the original, appears to distinguish between the individual and collective self-defense with regard to when they may be exercised. A state is said to possess the right to self-defense "in the event of an attack" (without defining "attack"), while states in collective arrangements are said to have the right "against armed attack" (which is also undefined, but which carries a narrower possible range of meanings). Fourth, the amended proposal does not address the concerns of those who criticized the use of "attack" or mixing its use with "armed attack." At the very least, both the original and amended proposals are ambiguous as to the circumstances under which a state is permitted to use force without prior Security Council approval.

May 12, 1945

If May 10 was the date of conception for the right of self-defense, May 12 was its birthday. On this day, the U.S. delegation debated the topic at length (again in the context of solving the regional issue), and by the end of the day, after two five-power negotiating sessions, the future members of the Security Council agreed to a provision clearly identifiable as Charter Article 51.[169]

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168. *Id.* at 674. The above text omits deletions noted as having been made at the delegation meeting and includes the additions shown as having been made there. *See also* note 154 and accompanying text (Amendments Proposed by the French Government to the Proposals Relative to the Establishment of a General International Organization).

169. *See* FRUS, *supra* note 17, at 674, 691, 206.

The U.S. Delegation Meeting

The basic themes continued to be: 1) how to satisfy Latin American demands for the collective self-defense promised in the Act of Chapultepec without turning the general organization into a body of regional blocs; 2) how to satisfy the need for states to act forcefully to protect themselves before the Security Council is able to act, or if it does not act, without destroying the organization's purpose of reducing unapproved uses of force to a minimum; 3) as a sub-division of the latter, how to modify the proposed French amendment to chapter VI, section C to achieve the U.S. delegation's objectives.[170]

At the outset, Senator Vandenberg indicated that the Latin Americans were now satisfied with the way the U.S. delegation was dealing with the regional problem. However, he said there was still some urgency in resolving the matter, because the previous day in his Committee on Regional Arrangements Australia and the U.S.S.R. had insisted on addressing it, causing him great difficulty.[171]

Mr. Dulles then read a new version of Chapter VIII, Section B, Paragraph 12 proposed by the drafting subcommittee.[172]

> If the Security Council fails to prevent aggression by any state against any member state, such member state possesses the inherent right to take measures of self-defense. The right to take measures of self-defense against armed attack shall apply to arrangements, like those embodied in the Act of Chapultepec, under which all members of a group of states agree to consider an attack against one of them as an attack against all of them. The taking of such measures shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.[173]

Dulles explained that they had replaced "in the event of an attack" with "[i]f the Security Council fails to prevent aggression" in order to make it more like the French approach, which Eden favored.[174] He did not explain why "aggression" was substituted for "attack," but it is probably because "aggression" is used in Section B of the document in describing Security

170. *See supra* note 154 and accompanying text (the text of the French proposal).
171. FRUS, *supra* note 17, at 675.
172. *Id.*
173. *Id.* at 675-76.
174. *Id.* at 676.

Council responsibilities to maintain international peace and security.[175] The Act of Chapultepec was referred to by name in order to please the Latin American states and to limit the number of regional groups that could make use of this exception to the general rule requiring Security Council approval for uses of force.[176]

State Department Legal Adviser Hackworth criticized the new language, pointing out that it anticipates a Security Council breakdown. He also noted the potential problem of deciding when the Council had failed (which, ironically, Dulles himself had noted on the previous day).[177] Mr. Dunn responded that the new language was designed to "bring the Security Council into the picture – that is to make it clear that the regional arrangement only operated in self-defense."[178] Mr. Pasvolsky reminded the delegates of the similarity of the French proposal to article 15 (7) of the League of Nations Covenant and commented that such an approach permits much more independent action by states than the U.S. approach.[179]

In addition, Pasvolsky remarked upon an aspect of the British view of self-defense that became important in shaping how it was articulated in the Charter. He observed they "were shocked by the American concept of self-defense. It was to them a new thought that self-defense can operate outside of a nation's territorial limits."[180] The notion of a "collective" "self-defense," whereby one state could use force to protect another state distant from it, was problematic to some even after the Charter.[181] This is one reason Eden preferred the French approach. Hence, it appears as if one of the reasons the individual right of self-defense eventually came to be paired closely with the collective right of self-defense in the Charter was the U.S. delegation's perception it would be easier to gain British recognition of this "new" right by doing so.

Throughout the meeting, the U.S. delegation tried to make its proposal seem like the French proposal, despite being opposed to the scope that the latter allowed for individual action. In discussing the French proposal, Stassen, for example, suggested a restrictive modification that began: if the Council does not prevent aggression and aggression occurs by any state

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175. "In general the Security Council should determine the existence of any threat to the peace, breach of the peace or act of aggression and should make recommendations or decide upon the measures to be taken to maintain or restore peace and security." DOP art. VIII, sec. B, para. 2.

176. *See* FRUS, *supra* note 17, at 676, 678.

177. *Id.* at 676.

178. *Id.* at 676-77.

179. *Id.* at 677.

180. *Id.*

181. *See, e.g.*, BOWETT, *supra* note 22, at 200-48; LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 348-49 (3rd ed. 1969).

against any member state . . . ."[182] Pasvolsky recommended a variation on Stassen's that was the first to join in one phrase the individual and collective rights of self-defense and which did not suggest any difference in the circumstances. Throughout the meeting, the U.S. delegation tried to make its proposal seem like that of the French, despite being opposed to the scope that the latter allowed for individual action. In discussing the French proposal, Stassen, for example, suggested a restrictive modification that started:

> Should the Council not succeed in preventing aggression and should aggression occur by any state against any member state such member state possesses the inherent right to act individually or collectively as they may consider necessary in the interest of self-defense against aggression.[183]

In explaining his proposed changes, Pasvolsky noted that both the U.S. delegation and Eden were bothered by the fact that the Dumbarton Oaks Proposals did not articulate a way that individual states can lawfully use force within the system. He also said, "Mr. Eden would prefer a wording relating to 'collectively.'"[184] U.S. delegation members criticized many features of the French proposal, especially the latitude it allowed for action independent of the Security Council.[185] However, they continued to work with it for strategic reasons. Not only did Eden support it, but Senator Vandenberg noted that using it would help him in his committee.[186]

In the course of the discussion, there was no debate over whether different standards should apply to the right of self-defense for an individual state versus a group of states, or of precisely what the standard should be. Most versions of the U.S. proposal suggested in the course of the meeting used "aggression" as the trigger that would launch the right of individual self-defense.[187] These also specified "armed attack" as the trigger for collective self-defense. Only one used the same trigger point for both forms of the right, and that trigger was "aggression."[188] Admiral Willson said they would have to choose between armed or unarmed attack as initiating the use of the right, but no one is recorded as having responded to his assertion.[189] In musing on how to characterize this dispute to the public, Mr. MacLeish noted the right of self-defense is spelled out in bi-lateral and regional treaties and sug-

182. FRUS, *supra* note 17, at 677.
183. *Id.* at 679.
184. *Id.*
185. *Id.* at 679-680.
186. *Id.* at 681.
187. *Id* at 676-77, 682, 684-96 (see the six separate suggestions).
188. FRUS, *supra* note 17, at 679 (Pasvolsky's suggestion).
189. *Id.* at 682.

gested it "should be presented . . . as a spelling-out of the self-defense arrangements [in these treaties] . . . ."[190]

Some two hours and twenty minutes into the meeting, the delegation unanimously approved the following language to present to the President for his approval and subsequent use as the official U.S. proposal in the Five-Power negotiations later that day:

> Should the Security Council not succeed in preventing aggression, and should aggression occur by any state against any member state, such member state possesses the inherent right to take necessary measures for self-defense. The right to take such measures for self-defense against armed attack shall also apply to understandings or arrangements like those embodied in the Act of Chapultepec, under which all members of a group of states agree to consider an attack against any one of them as an attack against all of them. The taking of such measures shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.[191]

It is worth noting that this proposal retains the different trigger points for individual and collective self-defense – "aggression" for the former and "armed attack" for the latter – despite the concerns raised about this by a few in the delegation.

The Five-Power Consultations

The minutes of the negotiations held later on May 12 among the Security Council's future permanent members make fascinating reading, especially in light of the Security Council's recent debates over the desire of the U.S. to use force in Iraq.[192] During this five-power meeting, the U.S. representatives argued strenuously for modifying the proposed French amendment to chapter VI, section C because it gave states excessive freedom of action.[193] British Foreign Minister Eden strongly supported the French approach, and he severely criticized the U.S. proposal noted above on the

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190. *Id.* at 681.

191. *Id.* at 685-86 (original alterations omitted). This was referred to as the "11:20 draft" to distinguish it from the similar "11:05 draft." *See id.* at 685 (for the text of the latter draft). *See also id.* at 691 (for the reprinted "11:20 proposal").

192. *Id.* at 691-706.

193. *See supra* note 22 and accompanying text.

grounds that it encouraged regionalism.[194] Even in the minutes, the acrimony is palpable.

Several points are worth detailed examination here. First of all, the U.S. representatives frequently explain their proposal in terms of its regional, or collective, self-defense aspects, and do not refer to how it might affect self-defense by an individual state. They cast it as a more limited version of the extensive right of action retained by their European allies against former enemy states, which permits even preventive action without Security Council approval.[195] Senators Vandenberg and Connally pointed out to Eden that the British and Russians had proposed an amendment recognizing their special treaties, that the U.S. had agreed to it, and that the U.S. request was "on all fours" with their situation.[196] Commander Stassen picked up on the same theme asserting that "[r]ecognition must be given to the right of *joint* action in self-defense."[197] In response to a question from Chinese Ambassador Koo, Stassen reiterated that the "the right of *collective or group action* only comes into operation in the event of an armed attack."[198] Senator Connally then confirmed and tied together both U.S. themes by stating:

> He thought that the United States proposal was not greatly at variance with the Anglo-Soviet and the Franco-Soviet treaties. Under these treaties, as in the case of the Act of Chapultepec an attack against one is treated as an attack against all parties to the agreement. In both cases, the treaties were aimed at resistance to armed aggression.[199]

Thus, the U.S. representatives left no doubt they were proposing to make "armed attack" the trigger mechanism for collective self-defense and were not discussing individual self-defense.

Against Eden's assertion the U.S. proposal fostered regionalism, they argued that the freedom of action it gave regional arrangements was not as wide at that the Europeans would enjoy toward former enemy states. Commander Stassen noted, "Under that formula [the proposed amendment to Chapter VIII, Section C, Paragraph 2] the parties to the treaties could take enforcement [preventive] action against the enemy states. Under the United States draft there is no right of enforcement [preventive action]. There is only the right of action in self-defense against armed attack."[200] Eden's re-

194. *FRUS*, *supra* note 17, at 692-93, 695-96.
195. *See supra* note 90 and accompanying text.
196. FRUS, *supra* note 17, at 692-93.
197. *Id.* at 693-94 (emphasis added).
198. *Id.* at 694 (emphasis added).
199. *Id.*
200. *Id.* at 695. In this context, Stassen was using "enforcement action" as the equivalent of "preventive action." In the Charter, actions ordered by the Security Council under Chapter

sponse to the U.S. desire to recognize the legitimacy of collective self-defense was that the French proposal did so.[201] Clearly, at the end of this consultation no movement had been made toward reconciling the U.S. and British positions. Since Mr. Eden was leaving the Conference that night, more work was necessary immediately; therefore, U.S. and British representatives remained after the other delegations left in order to reach a mutually acceptable solution.

The U.S.-British Negotiations

Shortly after the U.S.-British session began, Sir Alexander Cadogan (Eden's Permanent Under-Secretary of State for Foreign Affairs and advisor to the British delegation)offered the following in place of the U.S. proposed amendment to Chapter VIII, Section B:

> Should a breach of the peace arise out of a dispute or situation still under consideration by the Security Council or shall a sudden and unforeseen breach of the peace occur, any member state has the right to take measures of self-defense. If the Security Council should be unable to make a decision on the measures to be undertaken to restore the situation, the members of the organization reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.[202]

Cardigan's language obviously attempts to combine aspects of the U.S. and French proposals, with more of an emphasis on the French approach. Secretary of State Stettinius commented that it failed to stipulate that defensive measures could be taken collectively, while Commander Stassen noted it was similar to the French proposal in that it "opened very widely the field for the exercise of the right of self-defense."[203]

In response, Mr. Eden explained his aversion to the U.S. approach and inclination toward the French one by posing a hypothetical Soviet-instigated attack by Bulgaria on Turkey. He said that Great Britain would want to act immediately as a matter of self-defense of the empire.[204] His unstated rationale was that the U.S. proposal guaranteed non-Security Council approved collective self-defense only in the context of "regional arrange-

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VII to maintain or restore international peace and security are broadly referred to as enforcement actions, because they are taken to enforce Council decisions. The phrase includes preventive action, and it is clearly that aspect Stassen was discussing here; under the proposed amendment he referred to, the Allies in Europe could act against former enemy states without Security Council approval at the first sign of a renewed threat from the former enemy states.

201. *Id.* at 696.

202. FRUS, *supra* note 17, at 699.

203. *Id.*

204. *Id.* at 700.

ments," whereas the much broader French proposal would accommodate a British defense of Turkey. Cadogan added that his use of "breach of the peace" permitted action more readily, while the U.S. use of "aggression" raised the problem of defining that term. Dulles then noted that the U.S. had hoped to avoid that by defining it in terms of an armed attack.[205]

Senators Connally and Vandenberg each suggested one last diversion from the line that eventually led to Article 51 by again proposing the matter be dealt with by giving the U.S. an exception to the need for Security Council approval for enforcement action similar to the one provided European powers in the amendment to DOP chapter VIII, section C, paragraph 2.[206] Connally's suggestion was to make an exception for the Monroe Doctrine, while Vandenberg's was to make one for measures taken according to the Act of Chapultepec.[207] However, Commander Stassen opposed this approach on the ground "that what he wished to see was any such exception limited only to defensive action."[208]

The British likewise remained opposed to mentioning the Act of Chapultepec, and they continued to favor the French approach on the ground it permitted greater freedom of action. In the course of the discussion, Eden alluded to this more than once, stating, for example, that "self-defense in modern Europe was a difficult term to define, and that attempts to specify in the Charter those conditions under which such self-defense measures could be taken would raise many difficult issues."[209] The U.S. representatives steadfastly opposed the French approach precisely because of the extent to which it would allow states to act without Security Council approval, thereby undercutting that body's authority.[210] The U.S. remained focused on guaranteeing a limited right of collective action in self-defense – a right to

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205. *Id.*

206. *Id.* at 701-02. The four-power amendment as agreed to at that point read:

> The Security Council should, where appropriate, utilize such arrangements or agencies for enforcement action under its authority. But no enforcement action should be taken without the authorization of the Security Council *with the exception of measures against enemy states in this war provided for pursuant to Chapter XII, paragraph 2, or in regional arrangements directed against renewal of aggressive policy on the part of such states, until such time as the Organization may by consent of the Governments concerned, be charged with the responsibility for preventing further aggression by a state now at war with the United Nations.*

Id. at 702. The italicized portion was agreed to by the sponsoring powers at the Conference to verify the right of the allies to act against former enemy states without Security Council approval. Of course, it covered all the allies, but it was requested by the European allies and was seen as operating almost solely to their benefit.

207. *Id.* at 701.

208. FRUS, *supra* note 17, at 701.

209. *Id.* at 703.

210. *Id.* at 702-04.

responded collectively to armed attack – rather than on dealing with the right of self-defense in general, which it preferred to leave undefined.

To break the deadlock, Mr. Dulles suggested trying to combine the most recent British proposal with Senator Vandenberg's proposal to amend chapter VIII, section C, paragraph 2. However, before an attempt was made in that direction, Mr. Jebb (Gladwyn Jebb, advisor to the British delegation) returned with another proposed draft for a new paragraph 12 to add to Chapter VIII, Section B:

> Nothing in this Charter should invalidate the right of self-defense against armed attack, either individual or collective, in the event of the Security Council failing to take the necessary measures to maintain or restore international peace and security. Measures taken in the exercise of this right shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.[211]

Anyone who is familiar with Charter Article 51 will recognize this immediately as its progenitor. It is interesting, however, to compare Jebb's draft with Stassen's proposal of May 10, in which Stassen suggested stating, "Nothing in this Charter shall be construed as abrogating the inherent right of self-defense against a violator of the Charter."[212] Vandenberg and Rockefeller again indicated the desirability of mentioning the Act of Chapultepec, but Stettinius and Eden agreed to have their technical experts use Jebb's draft as the basis for a proposal to be presented to the Five-Power foreign ministers when they met again that evening.

An hour later, when Stettinius and Eden returned, the drafters had altered Jebb's proposal somewhat without changing its substance. It read:

> Nothing in this Charter should invalidate the right of self-defense against armed attack, either individual or collective, in the event of the Security Council failing to take the necessary measures to maintain or restore international peace and security. Measures taken in the exercise of this right shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Charter to take at any

211. *Id.* at 704.
212. *See* note 149 and accompanying text.

> time such action as it may deem necessary in order to maintain international peace and security.[213]

The U.S. also suggested adding a specific reference to the Act of Chapultepec in Chapter VIII, section C, paragraph 1.[214] When Eden objected, Vandenberg said if this were not included there would have to be a reservation to that effect in the Senate. Eden indicated such a reservation would be all right as far as he was concerned. He and Stettinius agreed that Eden would introduce the proposal to the Five-Power foreign ministers as the basis for discussion, but Stettinius said some way had to be found to mention the Act of Chapultepec.[215] At the Five-Power meeting, the other ministers made tentatively favorable comments on the modified Jebb proposal, which was presented to them as a British amendment.[216] The Vandenberg proposal also was read and was supported by U.S. representatives, but the minutes report no response to it from the other ministers.

May 14, 1945

The proposals agreed to at Saturday night's Five-Power consultation were presented to the U.S. delegation the following Monday morning. By this time, Senator Vandenberg had decided that it would be preferable not to mention the Act of Chapultepec specifically in the Charter, if the Latin American states and Assistant Secretary of State Rockefeller could accept it, because doing so might encourage the Arab League and other groups also to claim special status as regional arrangements.[217] Noting Eden's acceptance of a Senate reservation to protect the Monroe Doctrine, Vandenberg indicated he now thought that was the best way to proceed. (In the end, the Senate did not attach any reservations to the Charter in giving its advice and consent.)

Preventive or Preemptive Self-Defense Discussed

At this point, Assistant Secretary of the Navy Gates initiated one of the few direct discussions of preventive or preemptive self-defense recorded among U.S. representatives. The report of these discussions, like those of the other two similar discussions, is frustratingly brief and indicates few of the representatives participated. In addition, the report demonstrates that the discussants did not articulate whether they were considering preventive or

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213. FRUS, *supra* note 17, at 705.

214. *Id.* That provision began, "Nothing in the Charter should preclude the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action . . . ." The U.S. proposal would have inserted after "regional arrangements or agencies" the phrase "or collective arrangements like that contemplated by the Act of Chapultepec." *Id.*

215. *Id.* at 705-06.

216. *Id.* at 706.

217. *Id.* at 708.

preemptive self-defense, or that they always distinguished between collective and individual self-defense.

Mr. Gates asked about "our freedom under this provision in case a fleet had started from abroad against an American republic, but had not yet attacked."[218] Commander Stassen made the only immediate response, opining, "[W]e could not under this provision attack the fleet but we could send a fleet of our own and be ready in case an attack came."[219] Mr. Gates could have been inquiring about either preventive or preemptive self-defense in his hypothetical. The language he used – "had started from abroad" – implicates preventive rather than preemptive self-defense. It is a case in which an armed attack seems likely but not imminent, not one to which the *Caroline* doctrine would apply. In any event, the hypothetical certainly concerns collective self-defense (or, more precisely, defense of a third party) rather than individual self-defense.

Stassen's response indicates his belief that there would be no right under the proposed amendment to *collective preventive* self-defense, or, perhaps, to collective preemptive self-defense. However, it does not indicate whether he believed the amendment addressed the *individual* right to self-defense at all. In addition, Stassen's phrase "in case an attack came" does not clearly denote when he thought an attack would have come.; e.g., whether it would have come when there was activity on the flight deck of an aircraft carrier preparatory to launching bombers, whether it would have come when the ships violated the victim state's territorial waters, when the planes violated its airspace, or whether it would not come until the first bombs exploded on its territory. The same questions reasonably can be asked in interpreting Article 51's phrase "if an armed attack occurs."[220] The delegation did not address this issue further that day.[221]

May 15, 1945

The way in which the U.S. delegation continued to discuss the proposed amendment the next day is indicative of its approach to it. The entire discussion was in terms of its being a solution to the "regional problem" rather than its being a crucial definition of the limits of an individual state's

218. *Id.* at 709.
219. FRUS, *supra* note 17, at 709.
220. *See* DINSTEIN, *supra* note 22, at 187-91 (arguing that an armed attack may begin before a shot is actually fired).
221. *Id.* It is interesting to note, however, that in the course of considering whether to propose a separate Five-Power protocol covering the Act of Chapultepec, Representative Eaton made a statement reflecting the U.S. delegation's ambivalent attitude toward the Charter and essential U.S. self-defense. In rejecting the need for the protocol, Eaton "asked why we should fool ourselves; if an armed attack should come from abroad we would take action in any case." *Id.* That is, the U.S. would act to protect its security interests regardless of whether or not the action seemed to be permitted by the Charter.

right to use force in its own defense.[222] In his journal for that day, Senator Vandenberg referred to the issue in similar terms, writing, "[W]e finished the troublesome regional problem today as far as we are concerned" by telling the Latin American states we would "propose an Amendment reserving the right of self-defense if and when the Security Council fails to act . . . ." and "agree to call a new Pan-American Conference (after the Frisco Conference) to implement the Act of Chapultepec (as required by that Act) within the framework of the Peace League."[223] Likewise, the issue was presented to the public as primarily dealing with the future relationship of the general international organization to regional groups and guaranteeing the right of collective self-defense.[224]

On the evening of the May 15th, the Five Powers expressed approval of the approach represented in the proposed amendments to chapter VIII, section B and chapter VIII, section C. The former had been altered slightly to read: "Nothing in this Charter impairs the inherent right of self-defense, either individual or collective, in the event that the Security Council does not maintain international peace and security and an armed attack against a member state occurs."[225] Reference to the Act of Chapultepec had been omitted from the latter, but a statement emphasizing the role of regional arrangements in peaceful dispute resolution had been added.[226] In explaining the proposals, Stettinius said the U.S. delegation thought it essential that the international organization retain authority over enforcement actions (which encompassed preventive force), but that "[u]nder these proposals if the international organization does not maintain international peace and security and an armed attack occurs the right of self-defense would remain unimpaired."[227] Here again, future Article 51 was characterized as a way of assuring Security Council authority over enforcement actions, while allowing regional organizations to function without Security Council approval in the event of that body's failure.

May 19, 1945

The agreement in principle reached by the Five Powers on the "regional issue" meant the U.S. delegation did not discuss self-defense for a few days. On May 19th, however, the delegation again addressed the ques-

222. *See* FRUS, *supra* note 17, at 719-725.

223. VANDENBERG, *supra* note 124, at 193. The conversation with Latin American states referred to by Vandenberg took place later that day. *See also* FRUS, *supra* note 17, at 730. The new Pan-American Conference agreed to at the meeting was held in 1947, and that conference implemented the Act of Chapultepec by creating the Rio Treaty. *Id. See also Inter-American Treaty of Reciprocal Assistance*, 62 Stat. 1681 (Sept. 2, 1947).

224. *See* James B. Reston, *Conference Deadlock Ended by Proposal from Truman,* N.Y. TIMES, May 16, 1945, at A1.

225. *Id.*; FRUS, *supra* note 17, at 737.

226. FRUS, *supra* note 17, at 737-38.

227. *Id.* at 737-38.

tion of whether or not to define aggression.[228] Mr. Pasvolsky noted that each of the Five Powers, save China, opposed defining the term. Mr. Hickerson[229] indicated some states wanted to define aggression so as to require the Security Council to take action automatically in certain cases – without a vote.[230] He interpreted this as an attempt to reduce the scope of the veto. Senators Connally and Vandenberg expressed their opposition to defining aggression, and Mr. Hickerson said he thought it possible to stave off such a definition. This matter is noteworthy in that it is yet another instance in which the U.S. showed its desire to retain flexibility for itself and the Security Council in use of force questions (as did most of the other Five Powers). They consistently demonstrated a strong interest in retaining the right to use force when they deemed it necessary and to refuse to use it when they did not want to.

Later that day in a Five-Power meeting, the Soviets proposed the following changes to the future Article 51:

> Nothing in this Charter impairs the inherent right of self-defense, either individual or collective, ~~in the event that the Security Council does not maintain international peace and security and~~ if prior to undertaking the measures for the maintenance of international peace and security by the Security Council an armed attack against a member state occurs.[231]

Mr. Stettinius indicated the other Five-Power delegations would have to consider the implications of this proposal, and said this should be done initially by the group's Subcommittee of Five, which would report back to the larger group at its meeting the next day.

May 20, 1945

The following morning, the U.S. delegation discussed this Russian proposal to alter chapter VIII, section B, new paragraph 12.[232] Mr. Kane[233]

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228. FRUS, *supra* note 17, at 808.

229. John D. Hickerson, Deputy Director, Office of European Affairs, and adviser to the U.S. delegation.

230. FRUS, *supra* note 17, at 808. *See also* Restricted Doc. 390, III/3/18, 12 U.N.C.I.O. Docs. 341 (1945) (defining aggressor).

231. FRUS, *supra* note 17, at 812. This version using strike-throughs and underlining to show the proposed Russian deletions and insertions is found *id.* at 813. The second sentence of the paragraph is omitted because no changes to it were suggested. *Id.* The Russians also proposed adding language to Ch. VIII, section C, emphasizing the role of regional arrangements in peaceful dispute resolution. *Id.* at 813-14.

232. *Id.* at 813-20.

233. Keith Kane, Special Assistant to the Secretary of the Navy and adviser to the U.S. delegation.

explained at length Assistant Secretary of the Navy Gates' disquiet with the Russian suggestions. Most of Gates' concern revolved around his belief that the Russian amendments would tend to "disassociate regional arrangements from enforcement functions," whereas U.S. policy "was to use regional arrangements as the normal means of enforcement" and "to associate regional arrangements with defense measures which might be necessary in the event of armed attack."[234] Gates had indicated to Kane that the Secretary of the Navy could accept the Russian proposals if "adequate" were to precede "measures" in their proposed language. More importantly, Mr. Kane suggested (without indicating whether it was his, or Gates', or the Secretary of the Navy's opinion) that it might be advisable not to use the Russian or the American version but rather to revert to a simpler statement like "Nothing in this Charter impairs the inherent right of self defense, either individual or collective."[235]

A few of those present were sympathetic to Gates' concerns, while others were not.[236] Secretary of State Stettinius then asked Mr. Pasvolsky to report on the Subcommittee of Five's deliberations. Pasvolsky summarized the subcommittee's thinking on several aspects concerning regional arrangements. One interesting conclusion he reported was that "[t]he possibility existed that the Security Council might want to give prior authority to a particular regional agency to take enforcement action . . . ."[237]

Pasvolsky went on to read a statement that summarized the subcommittee's understanding of what future Article 51, with the amendments proposed by the Soviets, would mean: "In the event that an armed attack occurs against a member state, nothing impairs the exercise of the inherent right of self-defense, either individual or collective, during the period elapsing between the attack and the time the Security Council takes adequate measures to restore international peace and security."[238] Admiral Arthur Hepburn (adviser to the U.S. delegation) said this was the correct interpretation, but then went on to say, "If we want to handle enforcement action in this hemisphere by ourselves, we have power to stop other action by the Security Council."[239]

Pasvolsky went on to circulate a draft of chapter VIII, section B, new paragraph 12 prepared by the Subcommittee of Five in light of the statement of understanding he had just read.

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234. FRUS, *supra* note 17, at 814.
235. *Id.* at 815.
236. *Id.*
237. *Id.* at 816.
238. *Id.* at 817.
239. *Id.*

> Nothing in this Charter impairs the inherent right of self-defense, either individual or collective, if an armed attack occurs against a member state before the Security Council has taken adequate measures to maintain international peace and security. Measures taken in the exercise of this right shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.[240]

Senator Connally indicated he approved the statement but suggested using the phrase "until such time as the Security Council has taken adequate measures."[241] He said he thought "the exercise of the right of self-defense should not be limited until the Security Council took effective action" and Senator Vandenberg noted his enthusiastic agreement with this position.[242] Vandenberg also suggested substituting "until" for "before" in order to affirm this understanding.[243] The delegation assented to this and a punctuation change.[244]

An apparently straightforward exchange concerning the trigger point for the unapproved use of force in self-defense under this provision then took place. Department of State Legal Adviser Hackworth "expressed the view that the present draft greatly qualified the right of self-defense by limiting it to the occasion of an armed attack."[245] Commander Stassen replied that "this was intentional and sound. We did not want exercised the right of self-defense before an armed attack had occurred."[246] The minutes do not indicate any other contributions to this dialogue, but the delegation agreed to recommend two minor additions to the proposal.[247]

On its face, this would seem to be strong evidence that at least two members of the U.S. delegation understood a proposal very close to the final form of Charter Article 51 as precluding preemptory self-defense.[248] However, the larger context injects doubt about that conclusion and suggests instead that Stassen was referring only to the right of collective self-defense,

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240. FRUS, *supra* note 17, at 817.
241. *Id.* For a discussion of what this phrase means, *see* Halberstam, *supra* note 18.
242. FRUS, *supra* note 17, at 817.
243. *Id.* at 818.
244. *Id.* Pasvolsky suggested inserting a coma after "member state." *Id.*
245. *Id.*
246. *Id.*
247. *Id.* at 819. The first addition was to add "or restore" in the first sentence after "until the Security Council has taken adequate measures to maintain" [international peace and security]. *Id.* The other addition was to add "of self-defense" following "Measures taken in the exercise of this right" in the second sentence. *Id.* at 819.
248. *See* Franck, *supra* note 18, at 368 (supporting this assertion).

not the right of individual self-defense. Just prior to the exchange in question, Mr. Pasvolsky had suggested adding a modifier to the phrase "inherent right of self-defense" in the first sentence.[249] Mr. Dulles immediately opposed his suggestion on the grounds that "we should say clearly that nothing impaired the right itself."[250] Stassen supported Dulles, saying, "[A]ny reference to the exercise of the right in that first sentence would by inference suggest that we were impairing the right itself."[251]

It is difficult to reconcile Stassen's two statements – one consistent with his frequently expressed wish not to limit the right to self-defense, and the other agreeing that the draft qualified that right unless one posits that he was referring to two different rights of self-defense – a collective right and an individual right. This interpretation is in keeping with Stassen's (and others') desire to keep regional groups under Security Council control while maintaining the inherent right of self-defense and reserving maximum freedom of action for the United States. No one in the delegation commented further on the right of self-defense that day, but the delegation agreed to recommend the proposal.[252]

Later that day, the Five-Powers approved a version of proposed amendment VIII-B-12 that had been altered slightly by a drafting subcommittee to read:

> Nothing in this Charter impairs the inherent right of individual or collective self-defense if an armed attack occurs against a member state, until the Security Council has taken measures necessary to maintain (or restore) international peace and security. Measures taken in the exercise of this right to self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this charter to take at any time such action as it may deem necessary in order to maintain (or restore) international peace and security.[253]

This draft institutes the phrase "individual or collective self-defense" and, more substantively, stipulates that the right applies "*until* the Security

249. FRUS, *supra* note 17, at 817.
250. *Id.*
251. *Id.*
252. *Id.* at 819. There were two additions to the proposal. *Id.* One was to add "or restore" in the first sentence after "until the Security Council has taken adequate measures to maintain" [international peace and security], and the other was to add "of self-defense" following "Measures taken in the exercise of this right" in the second sentence. *Id.* at 819.
253. *Id. at 823-24.* "Restore" in the last sentence was not acceptable to the Soviets and was dropped. *Id.* This is the language in the Conference document dated May 23. Restricted Doc. 576, III/4/9, 12 U.N.C.I.O. Docs. 679, 680 (1945); RUSSELL, *supra* note 43, at 702-03.

Council has taken the measures necessary" rather than *before* the Council has taken those measures. The prior language could have been interpreted "to mean that self-defense measures could not properly be resorted to until the Council had considered acting to repel the armed attack in question and had failed."[254]

On May 25, the Conference's Committee on Regional Arrangements unanimously approved chapter VIII, section B, paragraph 12 as printed above.[255] Later, a Great Power subcommittee made minor changes in its language.[256]

May 29, 1945

Statements made by Mr. Paul-Boncour, Acting Chairman of the French Delegation, at a Five-Powers meeting nine days later tend to verify the notion that the drafters intended to apply the armed attack trigger only to collective self-defense.[257] Paul-Boncour noted that the French had approved the Four-Power amendment to Dumbarton Oaks Proposals chapter VIII, section C, paragraph 2 (to the effect that the Allies did not need Security Council approval to act against former enemy states) before the Five-Powers had approved what he referred to as "the United States formula on *collective* self-defense."[258] He proposed changes in the Four-Power approved amendment in order to make more clear that under mutual assistance treaties entered into by the allies against former enemy states, "the parties to such treaties could take *preventive* action as well as the *repressive* action covered by the United States formula."[259]

In response to a modification of the French proposal suggested by Senator Vandenberg, Paul-Boncour "insisted that the French Delegation desired to have it clearly brought out that *preventive* action without order authorization of the Security Council is permissible under treaties of mutual assistance, particularly since the United States formula on collective self-defense covers only *repression* of aggression."[260] Chinese Ambassador Koo supported Paul-Boncour, observing that "the concept of *collective* self-defense applies only to armed attack."[261]

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254. RUSSELL, *supra* note 43, at 703 n.18.
255. 12 U.N.C.I.O. DOCS. 680 (1945).
256. *See* RUSSELL, *supra* note 43, at 702. Additional stylistic changes were made by the Conference Coordinating Committee. For an explanation of the Functions of the Conference's commissions and committees, *see id.* at 639-42.
257. FRUS, *supra* note 17, at 968, 972-73.
258. *Id.* at 972 (emphasis added).
259. *Id.* (emphasis added).
260. *Id.* at 973 (emphasis added).
261. *Id.* (emphasis added).

June 3, 1945

In a speech made on June 3, Secretary of State Stettinius reinforced Paul-Boncour's characterization of the provision that would become Article 51. At the same time, Stettinius alluded to its function of meeting British concerns about whether there was a right to collective self-defense. In explaining the provision, he said, "It reemphasizes the inherent right of self-defense and *extends that right to a group of nations whenever an armed attack against one of them can rightfully be regarded as an attack against all of them.*"[262]

VII. Final Form of Article 51

The Five Powers and the U.S. delegation did not again discuss the provision that became Charter Article 51. The U.S. delegation did engage in one last significant discussion of the basic Charter use of force rules very late in the Conference.[263] Some states were still pursuing an amendment to future article 2, paragraph 4 that would have made it read: "All members of the Organization will refrain in their relations from the threat or use of force in any manner inconsistent with the provisions of this Charter."[264] Commander Stassen objected to using "provisions of this Charter" in lieu of "purposes of the Organization" on the grounds "the revision would constitute an unnecessary restriction upon the right of the member states to use force consistent with the purposes of the Organization."[265] Dulles also opposed the change, noting that "the right of self-defense, recognized in the revised Chapter VIII, Section C, was dependent upon the original wording of Principle 4 which made possible the use of force by the member states."[266]

Stassen's further elaboration of his theory of the Charter's basic use of force principle is worthy of extensive quotation. He explained that in his view:

> Under the original wording the members could use force if the Security Council were to fail in dealing with the dispute or if it were to become deadlocked. The only restriction on the right of a member state to use force, [in the original wording] would be that the use of force had to be consistent with the purposes of the Organization . . . the use of the

262. Edward R. Stettinius, *Report on the Conference: Address by the Secretary of State*, June 3, 1945 DEPT ST. BULL. 1007, at 1009 (emphasis added).
263. *See* FRUS, *supra* note 17, at 1160, 1162-63.
264. *Id.* at 1162.
265. *Id.*
266. *Id.*

> word 'provisions' would necessitate supervision by the Security Council over the use of force by member states.[267]

No one contradicted Commander Stassen. Secretary Stettinius proposed that the delegation continue to support the original language, and no one in the delegation objected.[268]

VIII. Post-Conference, Pre-Ratification Explanations of Charter Use of Force Rules

The Conference approved the Charter on June 25, 1945.[269] President Truman signaled the treaty's importance to the United States by personally handing it to the presiding officer of the Senate on July 2.[270] The Senate Committee on Foreign Relations held expedited hearings July 9 – 13,[271] recommended ratification by a 20 – 1 vote,[272] and issued its report on July 16.[273] The full Senate began its debate on the Charter Monday, July 23, and voted 89-2 in favor of ratification on Saturday, July 28.[274] It has been suggested that the Senate asked too few questions about the Charter and that it was vastly oversold.[275]

Nothing said in Secretary of State Stettinius' lengthy report to the President on the Conference or during the ratification process examines the meaning of the Charter's use of force rules in detail.[276] However, key U.S. delegation figures did verify their basic understanding of these rules in the course of the Charter's ratification.

First of all, Secretary Stettinius made clear in his discussion of the Charter's principles and purposes that Article 2(4) was intended to require a

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267. *Id.* at 1162-63.
268. *Id.* at 1163.
269. RUSSELL, *supra* note 43, at 932.
270. *Id.* at 935.
271. *Id.* at 936. *See also The Charter of the United Nations: Hearings Before the Senate Committee on Foreign Relations*, 79th Cong. (1945) [hereinafter Hearings].
272. RUSSELL, *supra* note 43, at 941.
273. *Id. See also* S. EXEC. REP. NO. 8, *To Accompany Executive F*, 79th Cong. (1945) [hereinafter Senate Report].
274. Russell, *supra* note 43, at 941-42.
275. *See* the comments Senator Fulbright made during the Senate floor debate at 91 CONG. REC. 7962 (1945). A contemporary newspaper report noted Senator Fulbright's statement and also remarked: "The United Nations Security Charter met with so little opposition in its first day before the Senate today that the Administration leaders had to interrupt the discussion for lack of speakers and go on to other business." James B. Reston, *Connally Opens Debate on Charter, Warns that Allies 'Remember 19'*, N.Y. TIMES, July 24, 1945, at 1. *See also* THOMAS M. FRANCK, NATION AGAINST NATION 6-24 (Oxford Univ. Press 1985).
276. Hearings, *supra* note 271, at 34-205. The report is dated June 26, 1945, the date Stettinius resigned as Secretary of State [hereinafter Stettinius Report]. Also published separately under the same title as DEPARTMENT OF STATE PUB. No. 2349, Conference Series 71.

broad renunciation of force by states. In explaining the meaning of this provision, Stettinius wrote:

> This means that force may be used in an organized manner *under the authority of the United Nations* to prevent and to remove threats to the peace and to suppress acts of aggression. The whole scheme of the Charter is based on this conception of collective force made available to the Organization for the maintenance of international peace and security.[277]

This verifies that one of the Charter's basic features was the substitution of collective force *approved* by the international organization should be substituted when possible for unapproved uses of force, whether undertaken by one state or a group of states. The phrase "under the authority of the United Nations" strongly suggests the need for *active* approval of force by the Organization was contemplated, as opposed to approval *assumed* on the grounds that the force used arguably fosters one of the Organization's stated purposes.[278]

In this same discussion, Stettinius explained that Organization approval was not necessary in cases covered by Article 51. He noted, "Under Article 51 force may be used in self-defense *before the machinery of the Organization can be brought into action*, since self-defense against aggression would be consistent with the purposes of the organization.[279] Thus, Stettinius did not appear to believe article 51's "armed attack" language meant that a state would have to suffer serious injury before it could use force without Security Council approval. Instead, he seems to have understood the Charter scheme as requiring states to forswear unilateral action *when the Organization could act*; i.e., Article 51 means a state can act in its own defense until the Organization can bring the weight of the collectivity to bear in the state's defense. In this view, preemptive self-defense would be permissible because, by definition, "the machinery of the Organization" could not "be brought into action" in time to defend the state that was subject to imminent attack.

Most of Stettinius's explanation of Article 51 is in his discussion of chapter VIII, on regional arrangements, rather than in his discussion of chap-

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277. *See* Hearings, *supra* note 271, at 55 (emphasis added).

278. The rapporteur for Committee I/1 made this point as well in stating with regard to Article 2(4): "The unilateral use of force or similar coercive measures is not admitted. The use of arms in legitimate self-defense remains admitted and unimpaired. The use of force therefore remains legitimate only to back up the decisions of the Organization at the start of a controversy or during its solution in the way that the Organization itself ordains." Restricted Doc. 944, I/I/34 (1), 6 U.N.C.I.O. Docs. 447, 459 (1945).

279. Stettinius Report, *supra* note 276, at 55 (emphasis added).

ter VII. In this section, Stettinius noted that three categories of amendments to the DOP had been proposed by states attending the Conference. The third category addressed the problem of integrating mutual assistance treaties into the U.N.'s framework. Stettinius described the issues as: "(1) the *permanent inherent right of self-defense*, individual and collective, against a *possible aggressor*; and (2) the *provisional right or temporary right* of the parties to such pacts to take *preventive action against a possible aggression* on the part of states which had fought against the United Nations during the present war."[280] He said the exemption from Security Council control of the "application of enforcement measures taken under the special mutual assistance treaties" would not "meet the issue" of how to give other regional groups greater autonomy in enforcement actions, and he indicated Article 51 was designed to address that issue.[281] Stettinius then characterized Article 51 as the solution: "This article, with the other relevant provisions of the Charter, makes possible a useful and effective integration of regional systems of cooperation with the world system of international security."[282] He makes no comment on how the article might define the individual right of self-defense.

Relatively little attention was paid to individual self-defense under Article 51 during the ratification process, which, perhaps, is revealing in itself.[283] Most of the discussion about the provision related to its regional collective self-defense aspect; that is, whether it permitted the continued functioning of the Monroe Doctrine and would allow the self-defense feature of the Act of Chapultepec to function. With respect to its individual self-defense aspect, it seems to be a case of "the dog that didn't bark." That is, if any Senator was concerned that Article 51 might reduce the customary international law right of self-defense, one would expect that point to have been raised in the course of the hearings or floor debates, yet it was not. The statements that were made about the individual right of self-defense as a general concept were to the effect that "there is nothing whatever in the Charter which impairs a nation's right of self-defense."[284]

Some Senators were concerned that the Monroe Doctrine not be abridged and therefore queried witnesses about how the Charter affected it. Mr. Pasvolsky assured Senator Millikin that "[t]he Monroe Doctrine is completely safeguarded under these provisions."[285] Later in the hearings, Mr. Dulles made a similar assurance.[286] The Foreign Relations Committee report

280. *Id.* at 97 (emphasis added).
281. *Id.* at 100.
282. *Id.*
283. The two topics garnering most of the attention were the contribution of military forces for Security Council use under Article 43 and the acceptance of the International Court of Justice's compulsory jurisdiction. RUSSELL, *supra* note 43, at 938-39, 942-47.
284. Hearings, *supra* note 271, at 650.
285. *Id.* at 304.
286. *Id.* at 650.

likewise verified the Monroe Doctrine's continued validity under the Charter.[287] Senator Connally indicated on the floor of the Senate that the doctrine "is not abrogated, modified, or impinged upon by any provision of the Charter."[288] However, many remarks made in the ratification process show how the U.S. delegates thought the Charter approached use of force definitions, how it differentiated aggressive and preventive uses of force from force used in self-defense, and how it regulates those uses of force.

Comments concerning the definition of aggression are particularly important in this regard. In his report to the president, Secretary of State Stettinius explained why the U.S. had opposed defining aggression in the Charter:

> The Conference finally agreed that even the most simple and obvious cases of aggression might fall outside any of the formulae suggested, and, conversely, that *a nation which according to a formula strictly interpreted could be deemed the offender in any particular instance might actually – when all circumstances were considered – be found to be the victim of intolerable provocation.* The problem was especially complicated by the progress of modern warfare and the development of novel methods of propaganda and provocation.[289]

Mr. Paul-Boncour, as rapporteur for Commission III's Committee on Enforcement Arrangements (Committee III/3) had made similar points in explaining to the full commission (on June 13) why his committee had not defined aggression. He said, "The Committee . . . decided to adhere to the text drawn up at Dumbarton Oaks and to leave to the Council the entire decision, and also the entire responsibility for that decision, as to what constitutes a threat to the peace, breach of the peace, or an act of aggression."[290]

Mr. Pasvolsky and Senator Vandenberg verified this intent in the Foreign Relations Committee's hearings. In a colloquy with Senator Brooks about the meaning of aggression, Pasvolsky said it had been impossible to create a "comprehensive, all-inclusive definition, and it was felt that unless the definition of the word 'aggression' were left to the Security Council itself, we would simply be setting up standards which would provide an easy escape for a would be aggressor."[291] Senator Vandenberg then interjected that the drafters thought it best to decide according to the particulars of each

287. Senate Report, *supra* note 273, at 10.
288. 91 CONG. REC. 8062 (1945).
289. Stettinius Report, *supra* note 276, at 89 (emphasis added).
290. Doc. 943, III/5, 11 U.N.C.I.O. Docs. 12, 17 (1945).
291. Hearings, *supra* note 271, at 287.

case whether some act constituted aggression.[292] He went on to make a statement that, while directed to the issue of defining aggression, is also relevant to the question of whether the drafters intended to define comprehensively the limits of self-defense:

> If we had inserted all the definitions which various nations sought from time to time, we would have had a document a thousand pages long. The analogy that was constantly argued at San Francisco was that we were writing a constitution, in effect, rather than a statute, in effect, and we had to confine ourselves to general terms.[293]

The Foreign Relations Committee report also verifies this view of the Charter's approach to determinations of threats to the peace, breaches of the peace, or acts of aggression in noting "If and when such a determination is made, the Security Council will take into account all pertinent facts and factors."[294]

The ratification history verifies that Article 51 was seen by its drafters primarily as recognizing the right to *regional collective* self-defense in response to armed attack, and as differentiating that reactive right from the right to initiate preventive force prior to aggression that was granted to the Security Council and also retained by the victorious allies with respect to their enemies in the war.

The other nations intimately involved with drafting Article 51 characterized it similarly in their reports on the Conference. The official Australian report, in referring to Article 51, notes that "a possible crisis was avoided" by accepting it, and then goes on to say, "This formula [Article 51] empowers regional agencies like the inter-American system to operated immediately to resist aggression, but maintains the right of the Security Council to interfere at any time if it so desires."[295] The article is not described as defining the individual right of self-defense. The report of New Zealand likewise casts Article 51 (together with Article 52) as the solution to the regional problem and does not refer to it as defining the limits of self-defense generally.[296]

The British Conference commentary does point out that Article 51 declares the rights of both individual and collective self-defense, but the

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292. *Id.* at 288.
293. *Id.*
294. Senate Report, *supra* note 273, at 8.
295. F.M. Forde & H.V. Evatt, *United Nations Conference on International Organization held at San Francisco, from April 25 to June 26, 1945*, at 27 ¶ 134 (1945).
296. Peter Fraser, *United Nations Conference on International Organization: Report on the Conference held at San Francisco, from April 25 – June 26, 1945*, at 93-96 (1945).

commentary emphasizes that the article exists because of a need to recognize the individual right. The commentary notes that "self-defense may be undertaken by more than one state at a time, and the existence of regional organizations made this right of special importance to some states, while special treaties of defense made its explicit recognition of importance to others."[297] It goes on to articulate an expansive view of the rights retained by states in Article 51: "In the event of the Security Council *failing to take any action* [to maintain or restore international peace and security], or if such action as it does take is clearly inadequate, the right of self-defense could be invoked by any Member or group of Members as justifying any action they thought fit to take."[298] The Pan-American Union report refers to Article 51 as a "compromise plan . . . which amalgamated and reconciled about sixteen proposals" – some concerned with regional arrangements and others seeking to protect their mutual assistance treaties."[299] Finally, it also is noteworthy that when the Conference's Committee III/4 approved the provision that became Article 51, all of the delegates (but one) who spoke about it referred to its regional security aspect.[300] The Soviet delegate did note its individual self-defense feature, but only to argue that the provision related to the powers and duties of the Security Council and therefore should not be made into a separate section as the committee had recommended.[301]

IX. Treaty Interpretation

Before answering the question posed at the beginning of this article, it is necessary to discuss a few key aspects of treaty interpretation. It is commonly accepted that the relevant provisions of the Vienna Convention on the Law of Treaties (Vienna Convention) can be applied to an analysis of the United Nations Charter even though that convention came into force after the Charter, does not apply retroactively, and has not been ratified by the U.S.[302] This is so because the Vienna Convention is deemed to have restated the pre-Convention customary law of treaties for the most part.[303] Article 31 of the Convention states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the

297. *A Commentary on the Charter of the United Nations Signed at San Francisco the 26th June, 1945*, at 9 ¶ 38 (1945).
298. *Id.* (emphasis added).
299. *The United Nations Conference on International Organization, San Francisco, April 25 – June 26, 1945: Report on the Action of the Conference on Regional Arrangements*, at 8 (1945).
300. Restricted Doc. 576, III/4/9, 12 U.N.C.I.O. Docs. 679, 680 (1945).
301. *Id.* at 682-83. The committee had voted 29-8 to make the provision new section D in chapter VIII (section C dealt with regional arrangements), whereas the Soviet delegate pointed out that it had been presented originally as new paragraph 12 in DOP chapter VIII's section B which dealt with Security Council determinations of threats to the peace or acts of aggression. *Id.*
302. *See* Linnan, *supra* note 23, at 77-80.
303. *Id.* at 80.

treaty in their context and in the light of its object and purpose."[304] Article 32 goes on to note that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion . . . to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure . . . ."[305] It is difficult to look at the ordinary meanings of "inherent right" ("droit naturel" in the equally authentic French version) in customary international law and "if an armed attack occurs" in plain English ("aggression armée" in French) and not find the meaning of Article 51 at least "ambiguous or obscure." The language seems both to verify the continued existence of a customary international law (or even a natural law) right which included the right to use force preemptively.[306] It also narrows that right to situations in which an armed attack already has occurred. Hence, recourse to the minutes of U.S. delegation meetings and other circumstances of the Charter's conclusion to interpret Article 51 is justified.

The main circumstances of the Charter's conclusion that must be considered in interpreting Article 51 are: 1) the specific circumstances surrounding Article 51's drafting, the explication of which has constituted the bulk of this article; 2) the Charter's character as primarily a constitution, or political document, rather than a statutory instrument; and 3) its relatively hurried preparation. With respect to the Charter's character, Hans Kelsen pointed out in analyzing its initial draft – the Dumbarton Oaks Proposals – that: "The organization is to have a political rather than a legal character . . . . Its activity is not to be limited too much by strict rules of law but . . . the Charter shall confer upon the agencies of the new League a great deal of discretion in the exercise of their functions."[307] Verifying this characterization is: The U.S. delegation minutes; Senator Vandenberg's testimony at the Senate hearings on the Charter that the drafters believed they were creating a

304. Vienna Convention on the Law of Treaties, *supra* note 15.

305. *Id.*

306. *Id.* Most commentators agree the Charter's use of force rules, including Article 1, are *jus cogens*. According to the Vienna Convention, a peremptory norm "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.* at art. 53. The same article indicates: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." *Id. See, i.e.*, HANS KELSEN, THE LAW OF THE UNITED NATIONS 791, 803 (1950, with supp. RECENT TRENDS IN THE LAW OF THE UNITED NATIONS 1951); Kahgan, *supra* note 18, at 778-81. Kahgan argues that Article 51 restates the previously existing customary international law of self-defense, which included anticipatory self-defense. *Id.* She goes on to point out that under *jus cogens* theory, any Security Council action interfering with a state's exercise of its right to self-defense would be void. *Id.* at 825. For a critical view of *jus cogens* theory, *see* Anthony D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!*, 6 CONN. J. INT'L L. 1 (1990).

307. Hans Kelsen, *The Old and the New League: The Covenant and the Dumbarton Oaks Proposals*, 39 AM.J.INT'L. L. 45, 46 (1945).

constitution, rather than a statute,[308] and Secretary of State Stettinius's reference to it in his report as a declaration and constitution.[309] As to its hurried preparation, it is important to keep in mind that while the U.S. worked on a draft charter for the general international organization for two to three years, multinational work on it took place only for the seven weeks of Dumbarton Oaks and the two months of the United Nations Conference. Moreover, the essence of Article 51 was drafted in one day. On the other hand, when states have drafted subsequent multilateral treaties they saw as having a statutory nature they have taken as much as a decade to articulate detailed rules to which they knew they would be bound.[310]

The differences between the U.S. and European approaches to treaty interpretation also should be noted here. The dominance of the restrictionist position regarding Charter use of force rules among Continental commentators was referred to earlier.[311] It has been suggested that one reason for this tendency is the latter's aversion to using legislative history and their preference for an analysis of a text's "self-evident meaning linked with the idea of doctrinal development through rational objectivity."[312] I would add that a reading of Continental commentaries on the Charter leaves one with the impression that the authors approach the Charter as they would their civil codes; they seem to assume that the Charter, like a Continental civil code, was carefully drafted over many years and was intended to be a self-contained document in which every term is well defined and in which the interaction of each provision with every other provision was carefully considered. As we have seen in examining Article 51's drafting process, however, this was not always the case where the Charter is concerned.

A good example of this Continental approach to the Charter can be seen in the description of the relationship of Article 2(4) and Article 51 in a leading Continental commentary. The commentary states that because the former provision broadly prohibits the use of force ("the threat or use of force") while the latter article authorizes self-defense only in the case of armed attack, "the stunning conclusion is to be reached that any state affected by another state's unlawful use of force not reaching the threshold of

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308. *See supra* text accompanying note 303.

309. Stettinius Report, *supra* note 276, at 36.

310. For the Vienna Convention on the Law of Treaties, for example, exploratory work occurred from 1950-1961, concentrated work was done from 1962-1966, the U.N. General Assembly considered it in 1966-1967, and an international conference completed the drafting during two months in 1968 and six weeks in 1969. Shabtai Rosenne, *Vienna Convention on the Law of Treaties, in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 1308 (2000). The United Nations Convention on Contracts for the International Sales of Goods was drafted in nine annual sessions, from 1969-1978. JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES 9 (1982). The United Nations Convention on the Law of the Sea took over a decade to draft. R.R. CHURCHILL & A.V. LAVE, THE LAW OF THE SEA 14 (2d ed. 1988).

311. *See* discussion *supra* notes 23-27 and accompanying text.

312. Linnan, *supra* note 23, at 78 and accompanying text.

an 'armed attack,' is bound, if not exactly to endure the violation, then at least to respond only by means falling short of the use or threat of force . . . ."[313] The author goes on to claim that "[t]his at first sight unacceptable result is undoubtedly intended by the Charter, since the unilateral use of force is meant to be excluded as far as possible."[314] I suggest that the detailed review of the meeting minutes just engaged in does indeed cast doubt on the quoted interpretation. The interpretation is reasonable if one looks only at the language of the provisions and assumes an overriding purpose (the greatest possible reduction in relatively high intensity uses of force). However, the interpretation does not ring true if one looks at what Article 51's drafters actually focused on and spoke about, and if one perceives that retaining for states their inherent right to self-defense was at least as important to the drafters as limiting uses of force.

Finally, any interpretation of the Charter should consider very seriously Hans Kelsen's reflections on interpretation in his seminal work THE LAW OF THE UNITED NATIONS.[315] Kelsen asserts (correctly, I believe) that traditional jurisprudence is incorrect in assuming there is only one "true" meaning for what he calls "the verbal expression of a legal norm."[316] He goes on to point out a fact especially relevant to any interpretation of the Charter:

> The true meaning of a legal norm is usually supposed to be the one which corresponds to the will of the legislator. But it is more than doubtful whether there exists at all such a thing as the 'will of the legislator,' especially where the law is the result of a complex procedure in which many individuals participate, such as . . . the procedure through which a multilateral treaty is negotiated . . . . The intention of the one or more who draft the text of a legal instrument is not at all identical with the will of the legislator . . . who often fulfill[s] this function without adequate knowledge of the text.[317]

Our examination of the U.S. delegation meeting minutes has shown that members of the delegation (official "delegates" and advisers) held significantly different views on the meaning of the use of force rules they created in the Charter. The use of force rules in the "Dulles-Stassen Charter" are quite different from those in the "Vandenberg-Hackworth" version.

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313. Randelzhofer, *supra* note 23, at 663.
314. *Id.* at 664. Randelzhofer does not consider the possibility that his interpretation may encourage unilateral uses of force that arguably remain under the threshold of an armed attack. *Id.*
315. KELSEN, *supra* note 306.
316. *Id.* at xiv.
317. *Id.*

Moreover, the dominant U.S. approach, which emphasized Security Council control, differed from that of the British and French, which involved more freedom of action for states.

Kelsen makes another point that is particularly relevant to our inquiry when he notes:

> The fact that the wording of a legal norm allows several interpretations proves that its actual framer or the competent legislator has not been able or willing to express his intention in a way excluding any interpretation not in conformity with his intention . . . . The ambiguity of a legal text moreover is sometimes not the unvoluntary [sic] effect of its unsatisfactory wording but a technique intentionally employed by the legislator, who, for some reason or another, could not decide between two or more solutions of a legal problem, and hence left the decision to the law-applying organs.[318]

The record shows that in the case of the Charter's use of force rules, the drafters expressly refrained from defining aggression and implicitly avoided defining the limits of individual self-defense because they knew they could not agree upon such definitions. It also shows that they deliberately left the solution of the definitional problems to a "law applying organ" – the Security Council. That is, the drafters decided to describe rather loosely what uses of force were permitted and prohibited to states and to have the Security Council essentially develop definitions through its case by case decisions concerning state behavior in real situations.

X. Analysis

Let us return to the question posed at the beginning of this article: Will the U.S. violate obligations it undertook when it ratified the Charter if it uses either preventive or preemptive force without Security Council approval as it has asserted the right to do? The Charter provisions the U.S. arguably would violate are Article 2(4) and Article 51.[319] What do the drafting and pre-ratification histories just reviewed reveal about the application of these articles to the question posed?

A. The Nature of the Charter and Its Use of Force Rules

The points noted above about treaty interpretation are fundamental to understanding the Charter's use of force rules. With respect to these rules, the Charter mainly establishes general principles and does not pre-

318. *Id.*
319. *See supra* note 14 for the text of article 2(4). *See supra* note 13 for the text of article 51.

cisely define which uses of force are prohibited and which are permitted. What are the relevant general principles?

> The Charter's first mentioned purpose is:
>
> To maintain international peace and security, and to that end: to removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[320]

The essence of this purpose certainly is for states to refrain from aggressive uses of force and to substitute UN authorized collective force for the unilateral kind. In Article 2(4) the parties reinforce Article 1(1)'s goal of eliminating aggressive, unilateral uses of force by agreeing to "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." The collective security provisions of chapter VII, give to the Security Council the responsibility for determining "threats to the peace, breaches of the peace and acts of aggression," and for dealing with them by force if necessary. It was assumed that the Council might well have to use preventive force to forestall aggression.[321] Thus, these latter provisions, like those in Articles 1 and 2 indicate that states are to refrain from using aggressive force and that the Security Council is to organize collective responses to such force.

However, the drafters refused to clarify those key phrases ("threat to the peace," "breach of the peace," and "act of aggression"), preferring to develop their content in practice. Some states wanted very much to define aggression, or at least list instances of it – such as any first use of force, but their approach did not prevail. Hence, prior to the creation of Article 51 the draft Charter clearly prohibited aggressive uses of force, but it did not help identify what those were or prohibit any particular uses of force. Did Article 51 help clarify what uses of force the Charter permits or prohibits?

B. Preventive Uses of Force

With respect to preventive force, it was fairly certain even before Article 51 was drafted that the Charter's framers intended to prohibit such

320. U.N. CHARTER art. 1, para. 1.

321. The Senate Foreign Relations Committee pointed to this as one of the Charter's basic features: "One of the fundamental purposes of the Charter is to provide forces which will be immediately available to the Security Council to take action to prevent a breach of the peace." Senate Report, *supra* note 273, at 9.

assertive action except as specifically authorized in the form of Security Council approved Chapter VII enforcement actions or Article 107 actions against former enemy states. (The Dulles-Stassen view of the Charter's use of force rules may have permitted some types of preventive force, but theirs was a minority position within the U.S. delegation.) Article 51 verifies that intent. Its drafting history reflects a conscious decision on the part of the drafters not to expand the circumstances under which preventive force could be used without Security Council approval.

The U.S. delegation, as a whole, was the most adamant about limiting preventive uses of force. While the minutes and statements made by delegates during the ratification process may be ambiguous and contradictory on many points, they are rather clear on this one. They indicate a majority of the delegation wanted the Security Council to have a monopoly on preventive force, except with regard to former enemy states. They were eager to centralize control of the use of force in the Council. Even those in the U.S. delegation who favored a loose interpretation of Article 2(4) (e.g., Dulles and Stassen) insisted upon Security Council control over enforcement actions by regional agencies (which they understood as including preventive actions). They accepted the ability of the Allies to take preventive action against former enemy states, but they wanted no additional exceptions.

The other Great Power delegations, all of whom participated in drafting Article 51, took a similar view of preventive force as a general Charter principle. France, the Soviet Union, and the United Kingdom obtained explicit authorization under the Charter to use force preventively against their most likely future foes, but did not want other groups of states to have that authorization. The United Kingdom was especially insistent that regional groups not be authorized to use preventive force, because it feared such authorization would cause the U.N. to become a body of independent regional blocs instead of a world organization.

The drafters' primary purpose in creating Article 51 was structural or organizational in nature: the article verifies the supremacy of the Security Council over regional groups with respect to enforcement actions and the preventive use of force.[322] In establishing this structural principle, it also defines the scope of the collective use of self-defense force by permitting groups to use force only "if an armed attack occurs." This was the drafters' way of stating in positive terms the negative restriction: "Regional groups or agencies may not use preventive force without Security Council approval." The U.N.'s monopoly over the use of preventive force is essential to the Charter's object and purpose for three reasons: 1) the decision as to the ne-

322. Article 53, which had been drafted before Article 51, already suggested this in stating, "[N]o enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state . . . ." U.N. CHARTER art. 53, para. 1.

cessity of preventive force is highly subjective, and if it were left to individual states or small groups of them, there very probably would be a substantial increase in uses of force; 2) unilateral preventive force can easily blend into, or provide cover for, the aggressive force the Charter was intended to eliminate; and 3) use of unilateral preventive force undermines the Security Council's authority—the Council's nearly exclusive right to authorize enforcement actions (which include preventive force) was a central feature of the Charter.

C. Preemptive Uses of Force

Preemptive force under the Charter should be viewed quite differently than preventive force. Preemptive force, by definition, lacks the level of aggression, or the degree of initiative, inherent in preventive force. The drafters seldom, if ever, considered preemptive force. Prohibiting preemptive force is not necessary to fulfill the object and purpose of the Charter because: 1) recognizing the continued permissibility of anticipatory self-defense within the limits of the *Caroline* doctrine is unlikely to increase uses of force significantly;[323] 2) preemptive self-defense is no more likely to blend into, or provide a cover for, aggressive force than is self-defense allegedly used in response to armed attack;[324] 3) preemptive force does not undermine Security Council authority because, by definition, it can be used only when the imminence of the threat makes impossible advance Security Council authorization to use force against that threat – or, to use Secretary of State Stettinius's phrase, preemptive self-defense force, like defense against an armed attack, is used "before the machinery of the Organization can be brought into action."[325]

While the Charter showed a clear intent to prohibit unilateral preventive force even before Article 51 was drafted, the pre-Article 51 Charter simply did not address traditional self-defense at all. Neither the principles set out in Article 1 nor the broad renunciation of the assertive use of force in

323. Since the Charter went into effect, states have seldom pled anticipatory self-defense. *See* AREND & BECK, *supra* note 22, at 74-79 for an account of the most notable incidents.

324. As U.S. adviser, MacLeish noted (somewhat undercutting his own point at the time), German officials argued their nation's invasion of Poland was in response to an armed attack. *See supra* text accompanying note 160. MacLeish did not point out that Germany went so far as to stage an attack on itself, using persons in Polish uniforms, and attributed it to Poland in order to justify its own aggression. *See Sworn Statement by Alfred Helmut Najocks, Former Member of the SD: On 31 August 1939 He (Najocks) Acting under Heyrich's Orders, Simulated A Polish Attack on the Radio Station of Gleivitz* (Exhibit USA-482), Document 2751-PS, *in* 31 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 91 (1948). For related supporting evidence, *see* 1 NAZI CONSPIRACY AND AGGRESSION 702-03 (1946). It seems more likely that a state desiring to use the right of self-defense as a cover for aggression would similarly use covert means to stage an attack on itself than it would be to strike before an attack and attempt to justify itself later by trying to demonstrate it was about to be attacked.

325. *See supra* text accompanying note 28.

international relations embodied in Article 2(4) were ever seen as encompassing force used in legitimate self-defense, which customarily included anticipatory self-defense. In every scheme for a new international organization, from the Outline Plan, to the Tentative Proposals, and to the Dumbarton Oaks Proposals, the drafters assumed that the traditional right of self-defense would remain unimpaired. It was seen as an inherent right – a basic aspect of state sovereignty. The right was to remain even if it were not mentioned, just as it did under the Covenant of the League of Nations and the Kellog-Briand Pact, where it was not mentioned.[326] Furthermore, as we have seen, the U.S. did not insert the right of self-defense in any of its drafts specifically because it did not want to limit the right.[327]

Article 51's language can be interpreted as prohibiting preemptive self-defense, but it is ambiguous. Given the fundamental nature of the right of self-defense and the approach of the drafters up to the time Article 51 was created, it is reasonable to require that the drafting history of Article 51 should clearly show an intent to restrict the right by eliminating its preemptive aspect.[328] As we have seen, the drafting and ratification records reveal rather little direct discussion about it. The minutes show no uses of the term anticipatory self-defense nor do they show any clear debate about the concept.

The minutes do show the delegates' intent to achieve two somewhat contradictory goals with Article 51. As was just noted, their primary aim was to establish a *limited* right of *collective* self-defense in the Charter. Kelsen has pointed out that Article 51 *extends* the right to self-defense to the extent that it creates a right of *collective* self-defense.[329] The drafters agreed that this right should not include the preventive use of force permitted to the former Allies and to the Security Council. They expressed this restriction in positive terms by describing it as an inherent right that exists "if an armed attack occurs." Their second goal was to verify the continued existence of a state's customary international law right to defend itself. They pursued it inartfully by attaching this long-established, extensive right to a controver-

326. *See, e.g.*, British Commentary, *supra* note 73, at 5 ¶ 17.

327. *See supra* text accompanying note 73.

328. It traditionally has been accepted that a treaty provision should not be interpreted as changing an existing rule of law unless it does so in express terms. See ARNOLD MCNAIR, THE LAW OF TREATIES 463 (1961). In addition, as has already been noted, some commentators claim that the pre-Charter right to self-defense, which included anticipatory self-defense, is a *jus cogens* norm – a fundamental norm from which there can be no derogation. If this is so, the U.N. Charter could not abrogate it. Even if one does not accept the theory of *jus cogens* in this context, however, it is reasonable as a matter of interpretation to require a clear intent to abrogate any right referred to in the document as inherent or as a *droit naturel*.

329. More specifically, Kelsen claims that, for those who see Article 51 as embodying a natural law right to self-defense, the article is problematic because it also creates this new right of collective self-defense not recognized in natural law theory. *See* KELSEN, *supra* note 306, at 914.

sial, limited right without differentiating between the two.[330] It is only this connection and a few discussions concerning it that suggest an intention to limit the right to individual self-defense, not any logic inherent in the Charter.

In one of these discussions, Mr. Dulles, an experienced international lawyer, noticed the connection in the language of the British draft, and he articulated his concern that it seemed to curtail the individual right.[331] However, his comment was general; it did not indicate what aspect of the individual right he thought it might curtail. The minutes show Mr. Dulles had an extremely expansive view of the right to individual self-defense. Hence, he may have believed the British approach called into question more assertive kinds of self-help he thought would be permitted otherwise by his loose interpretation of Article 2(4) rather than believing it eliminated preemptive self-defense. Moreover, in Mr. Dulles's pre-ratification testimony he clearly asserts that the right to self-defense remains unimpaired under the Charter.[332] Therefore, his earlier comment need not be read as indicating a belief that Article 51 eliminates an individual right to preemptive self-defense. It is possible he simply recognized the language used could cause difficulties.

Similarly, the May 20 conversation between Department of State Legal Adviser Hackworth and Mr. Stassen, can be pointed to as proof Article 51 eliminates the right to preemptive self-defense.[333] However, the conversation is better understood as referring to preventive self-defense and in particular to Mr. Stassen's belief that regional agencies should not be able to use force without Security Council approval unless one of their members is the victim of an armed attack. The larger context suggests that Stassen was agreeing only that the proposed draft of Article 51 limited the right of collective self-defense, not the right of individual self-defense.

Finally, in the May 14 discussion between Mr. Gates and Mr. Stassen concerning "our freedom under this provision [the Article 51 draft] in case a fleet had started from abroad against an American republic, but had not yet attacked," Mr. Stassen could be interpreted as believing the provision prohibits preemptive self-defense.[334] However, the conversation more likely relates to preventive self-defense, and, in any event, the concern underlying it clearly is whether the Monroe Doctrine would continue to be valid if Arti-

330. Kelsen has criticized aspects of Article 51's drafting. *See, e.g., id.* at 914. Clyde Eagleton criticized Charter drafting more generally. He noted that many nations wanted to have their ideas included in it and suggests "the necessity of compromise language for some of these ideas made it more vague." *See* Clyde Eagleton, *The Charter Adopted at San Francisco*, 39 AM. POL. SCI. REV. 934, 936 (1945).

331. *See supra* text accompanying notes 227-28.

332. *See* Hearings, *supra* note 271, at 650.

333. *See supra* text accompanying notes 255-57.

334. *See supra* text accompanying notes 224-25.

cle 51 were adopted; i.e., the dialogue is about the ability of the U.S. to intervene to protect a third party, not about its ability to defend itself.[335]

In short, nothing in the language of Article 51, its drafting history, or its relation to the Charter's object and purpose indicates its drafters intended it to prohibit the preemptive use of force in self-defense. It also should be noted that some commentators, pointing out Article 51 was drafted without modern weapons of mass destruction (wmd) in mind, have argued that the present threat of such weapons provides another reason for interpreting the article as permitting preemptive (or even preventive) self-defense.[336]

XI. Conclusion

It would be insufficient merely to conclude that if the U.S. uses force *preventively*, without Security Council approval, as it has claimed the right to do, it would violate its obligations under the U.N. Charter as its drafters understood them, but that by using force *preemptively* it would not violate it obligations. In the course of describing the development of the Charter's use of force rules, I have pointed out three related facts that need to be revisited here. First, states agreed to restrain their unilateral uses of force in exchange for the creation of a credible, overwhelming collective force.[337] Second, in drafting the Charter, the future members of the Security Council, who were still engaged in the world's most destructive war, saw the Council foremost as a collective policeman that would wield the overwhelm-

335. The May 4 delegation conversation about what U.S. actions would be permissible if a German fleet were to enter Argentine waters also is similar in that it also may refer to preventive force and in that it definitely refers to collective self-defense. In any event, the discussion precedes the proposal of what became Article 51 and so is not directly relevant to its interpretation.

336. *See, e.g.*, Anthony Clark Arend, *International Law and Rogue States: The Failure of the Charter Framework*, 36 NEW ENG. L. REV. 735, 750-53 (2002) (arguing new use of force rules must be created to deal with rogue states possessing wmd); Louis J. Capezzuto, *Preemptive Strikes Against Nuclear Terrorists and Their Sponsors: A Reasonable Solution*, N.Y.L. SCH. J.INT'L & COMP. L. 375, 393-96 (1993) (advocating substitution of the imminence requirement by a reasonableness standard for anticipatory self-defense against nuclear weapons); Sean M. Condon, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MIL. L. REV. 115, 179-80 (1999) (concluding the special threat of wmd justify a preventive attack on Iraq under a reprisal theory to eliminate them); Frederic L. Kirgis, *Pre-emptive Action to Forestall Terrorism*, ASIL INSIGHTS (June 2002), *at* http://www.asil.org/insights/insigh88.htm (suggesting the development of wmd may constitute a fundamental change in circumstances for Charter interpretation, overcoming the restrictionist reading of Article 51 and that the nature of wmd are special facts that make inapplicable the restrictions of the *Caroline* doctrine); Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT'L L. & POL'Y. 483, 519-28 (1999) (proposing six criteria to be used for determining when preventive force legitimately could be used to eliminate threats created by wmd).

337. Articles 43 & 45 obligate member states to make military forces available to the Security Council, while articles 46 & 47 describe how the Council is to organize the use of those forces.

ing force. They created mechanisms for the peaceful resolution of disputes, but they recently had been the victims of aggressive regimes that did not respond positively to efforts at peaceful resolution. Therefore, the Great Powers assumed it would be necessary to maintain credible military forces and that it might be necessary to use that force preventively in order to stop potentially catastrophic aggression in the future. Third, the future Security Council members understood that the success of the organization they were building relied on their common vision and continued mutual good faith in pursuing its goals.

The present Security Council crisis over how to meet Iraq's threat to the peace suggests that while the United States still shares the war-time drafter's perspective on the likely need for the use of force in international relations, some members, such as France and Germany, do not. Robert Kagan has written of this divergence very persuasively, noting, "On the all-important question of power – the efficacy of power, the morality of power, the desirability of power – American and European perspectives are diverging."[338] Kagan attributes this divergence in perspective to a broad ideological gap and to the vast difference in the two sides' military power; the relatively strong are more willing to use power while the relatively weak rely on other means. According to Kagan, "These very different points of view, weak versus strong, have naturally produced differing strategic judgments, differing assessments of threats and of the proper means of addressing threats, and even differing calculations of interest."[339] Kagan's theory helps explain why the U.S., "still mired in history" and the Hobbesian world, like the war time Allies, interprets Iraqi behavior as a threat to the peace that can be met successfully only by forceful means, and why France and Germany, in their "post-historical paradise of peace" have faith in the prospect of a peaceful solution.

The disappearance of mutual good faith between some Security Council members is related to this divergence of perspective on the use of power. When a fundamental aspect of states' worldviews differs significantly, those states assume the worst about each others' motives, as happened during the Cold War. If, as Kagan believes, "The reasons for the transatlantic divide are deep, long in development, and likely to endure,"[340] then the outlook for agreement on Charter use of force rules and Council enforcement actions would seem to be grim. However, a first step toward resolving this conflict might lie in revisiting the views on the use of force expressed by the Charter's Great Power drafters, as has been done here, followed by an honest debate about those rules that acknowledges the divergence in perspectives and seeks to accommodate them.

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338. Robert Kagan, *Power and Weakness*, POLICY REV. 3 (June/July 2002).
339. *Id.* at 3-4.
340. *Id.* at 6.

AUTHOR'S POSTSCRIPT

On March 19, 2003, after the foregoing article was completed, and while it was in the final stages of editing, President Bush ordered U.S. military forces "to commence combat operations . . . against Iraq."[341] Under these circumstances, it is important to point out that the article does not address the validity of this specific U.S. action under international law. Instead, it focuses on the validity of unilateral preventive and preemptive force as general concepts under the Charter.[342] Although the President in his March 17, 2003, address to the nation seemed to justify his order to use force against Iraq primarily as an act of preemptive self-defense,[343] he also relied upon Security Council resolutions.[344] It is debatable whether existing Security Council resolutions authorize the use of force against Iraq without additional Security Council approval, but credible arguments can be made for that proposition.[345]

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341. Text of a Letter from the President to the Speaker of the House of Representatives and President Pro Tempore of the Senate, March 21, 2003, *at* http://www.whitehouse.gov/news/releases/2003/03/20030321-5.html.

342. *See supra* text accompanying notes 12-15 for the questions I address.

343. *See* David E. Sanger, *Bush's Doctrine for War*, N.Y. TIMES, March 18, 2003, at A1, wherein the author characterizes the President's position as follows:

> His argument boiled down to one precept: In an age of unseen enemies who make no formal declarations of war, waiting to act after America's foes 'have struck first is not self-defense, it is suicide.' President Bush thus turned America's first new national security strategy in 50 years – the doctrine of pre-emptive military action against foes – into the rationale for America's latest war.

Id. I would argue both that the President's argument should not be boiled down to one precept and that the doctrine in question is better characterized as *preventive* military action.

344. The President stated: "Under Resolutions 678 and 687 – both still in effect – the United States and our allies are authorized to use force in ridding Iraq of weapons of mass destruction." *See Bush's Speech on Iraq: 'Saddam Hussein and His Sons Must Leave,'* N.Y. TIMES, March 18, 2003, at A10; *also available at President Says Saddam Hussein Must Leave Iraq within 48 Hours: Remarks by the President in Address to the Nation*, March 17, 2003, *at* http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html. The joint resolution authorizing force against Iraq also refers to Security Council Resolutions. *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, pmbl. & § 3(a)(2), 116 Stat. 1498, 1499, 1501 (2002).

345. *See, e.g.*, Frances Gibb, *Attorney-General Gives MPs Legal Basis for War*, LONDON TIMES, March 18, 2003, at 1, wherein the Attorney-General of the United Kingdom stated: "The government would be legally justified in declaring war on Iraq because of the 'combined effect' of three UN resolutions . . . ." *But see* Anne-Marie Slaughter, *Good Reasons for Going Around the U.N.*, N.Y. TIMES, March 18, 2003, at A31, in which the author, while approving of the U.S. action, says of the claim to authorization under Resolution 1441: "Most international lawyers will probably reject this claim and find the use of force illegal under the terms of the Charter." Slaughter characterizes the action as "illegal but legitimate." *Id.*

APPENDIX

Drafting History of the U. N. Charter Use of Force Principles

Provisions	Outline Plan	Tentative Proposals
Principles & Purposes	The primary functions of the international organization . . . should be, first to establish & maintain international peace & security, by force if necessary . . . . The organization should provide means of cooperative action for the following purposes: 1. to prevent the use of force or threats to use force in international relations except by authority of the international organization itself. Art. I [A member is obliged] to refrain from the use of force . . . except in performance of its obligations to contribute to the enforcement procedures instituted by the Executive Council. Attch., Art. I.	The organization shall be empowered to make effective the principle that no nation shall be permitted to . . . use armed force in international relations in any manner inconsistent with the purposes of the international organization . . . . Art. I (A)(3). The primary purposes of the organization should be, first, to maintain international peace and security . . . . Art. I (B)(1). The international organization should . . . provide for the use of armed force, when necessary in support of security and peace, if other methods and arrangements are inadequate. Art. I (C)(K).
Provisions	**Dumbarton Oaks Proposals**	**United Nations Charter**
Principles & Provisions	The purposes of the Organization should be: 1. To maintain international peace & security, &, to that end, to take effective collective measures for the prevention & removal of threats to the peace, breaches of the peace, & acts of aggression...& to bring about by peaceful means adjustment or settlement of international disputes . . . . Ch. I(1). All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization. Ch. II(4).	The purposes of the U.N. are: 1. To maintain international peace and security, & to that end: to take effective measures for the prevention & removal of threats to the peace, breaches of the peace, & acts of aggression, & to bring about by peaceful means, & in conformity with international law . . . settlements of international disputes . . . . Art. 1(1). 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. Art. 2(4).

Provisions	Outline Plan	Tentative Proposals
Contribution to U.N. Authorized Force	[A member is obliged] to make such contribution to the facilities and means which the Council may require for . . . the prevention or repression of aggression . . . . Attachment, Art. 6.	The member states should undertake to furnish forces and facilities when needed for this purpose [the use of armed force to assure the maintenance of security & peace]. Art. I(D)(2).
Provisions	**Dumbarton Oaks Proposals**	**United Nations Charter**
Contribution to U.N. Authorized Force	[A]ll members . . . should undertake to make available to the Security Council . . . armed forces . . . necessary for the purpose of maintaining international peace & security. Ch. VIII(B)(5).	All Members . . . undertake to make available to the Security Council . . . armed forces . . . necessary for the purpose of maintaining international peace & security. Art. 43(1)
Unilateral Self-Defense		Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . . Art. 51.