The Waning Power of Shared Sovereignty in International Law: The Evolving Effect of U.S. Hegemony

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I. INTRODUCTION

The United Nations Charter (Charter) is one of the cornerstones of modern international law. A product of two devastating world wars, the United Nations was organized primarily to maintain international peace and security.[1] Unfortunately, the principal judicial organ of the United Nations, the International Court of Justice (ICJ), has glossed over this purpose in its recent decisions. As the generation who fought in those world wars dies out, and the exigency of balancing two competing superpowers fades, so do the lessons learned.

Conceivably, it is the very structure of the United Nations that fails to vindicate its primary objective. The Charter was not meant to be a body of international law, but rather a mechanism of collective security, balanced by superpower involvement and guided by the discretion of the United Nations Security Council.[2] Without a more complete expression of legal order, the U.S. ascent to lone superpower status has tipped this balance of power; its hegemonic discourse now threatens any semblance of shared sovereignty, and in so doing, endangers the collective security of all nations.

Although sometimes used in different contexts, with different meanings, the most accepted definitions of "hegemony" are: "(a) the predominant influence, as of a state, region, or group, over another or others; or (b) leadership; preponderant influence or authority—usually applied to the relation of a government or state to its neighbors or confederate; or (c) the domination of one state over its allies."[3] Not only

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1. *See* U.N. Charter, pmbl. ("We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."); *see also id.* art. 1, para. 1 ("The Purposes of the United Nations are: 1. 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 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.").

2. *See* Andreas Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 MICH. J. INT'L L. 691, 714-15 (2004).

3. Scheherazade S. Rehman, *American Hegemony: If Not Us, Then Who?*, 19 CONN. J. INT'L L. 407, 408 (2004) (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 813 (4th ed. 2000) (quotations omitted)); *see also* WEBSTER'S NEW TWENTIETH

have outside observers applied this term to the United States, but its own policies have recognized as much, and have even provided for how to continually secure this hegemonic status.[4] This status has allowed the United States to exert a disproportionate influence on international affairs. Specifically regarding the use of force, the United States has disguised its hegemonic goals under the rubric of "self-defense."[5] If left unchecked, U.S. hegemony will threaten the shared sovereignty and equality of all nations under the law, as recognized by the Charter.[6] Yet, rather than stand up to this lone superpower and hold firm to international principles that have served to protect international peace and security for more than half a century, the United Nations and its composite parts, particularly the Security Council[7] and the ICJ, have repeatedly acquiesced to U.S. pressure. As a result, the international community is endangered by the very real possibility that the use of force will transcend manageable levels of control.

Therefore, it will be useful to examine the role of the ICJ in the use of force cases, followed by an analysis of the established international law on the use of force. By contrasting this law and U.S. policies, actions, and representations as they relate to the use of force, a deeper subtext in American discourse will be exposed. Thereby, it will become clear that both the policies and the actions that the United States present as valid uses of force, in fact, violate international law.

CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 841 (2d ed. 1970); 1 SHORTER OXFORD ENGLISH DICTIONARY: A-M 1220 (5th ed. 2002).

4. *See, e.g.*, Noam Chomsky, *Hegemony or Survival: Noam Chomsky Debates with Washington Post Readers*, WASH. POST, Nov. 26, 2003, *available at* http://www.chomsky.info/debates/20031126.htm ("That the current US administration has declared that it will unilaterally act to secure its hegemonic status, now and for the indefinite future, is not seriously in question. That's the way the National Security Strategy of Sept. 2002 was interpreted at once, e.g., in the major establishment journal Foreign Affairs. It was not only stated clearly, but accompanied by 'exemplary actions' to make it clear that the goal was intended seriously."). This goal is also reflected in the newly released National Security Strategy of March 2006. "[W]e must seize the opportunity . . . of an absence of fundamental conflict between great powers . . . [and to] prevent[] the reemergence of the great power rivalries that divided the world in previous eras." GEORGE W. BUSH, U.S. PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 35 (2006), *available at* http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf [hereinafter 2006 U.S. NATIONAL SECURITY STRATEGY]. The document as a whole is an odd juxtaposition of purporting to be working with other states as a cooperative venture, yet doing so to fulfill an expressly American agenda. *See generally id.*

5. *See, e.g.*, *supra* Parts III.A, III.C; *see also* Part V.C.; 2006 U.S. NATIONAL SECURITY STRATEGY, *supra* note 4, at 18.

6. *See, e.g.*, Lucy Martinez, *September 11th, Iraq and the Doctrine of Anticipatory Self-Defense*, 72 UMKC L. REV. 123, 191 (2003).

7. In fairness to the United Nations, unless the structure of the Security Council is modified, the Council will never be able to check the transgressions of its Permanent Members because any one of them has the ability to veto any resolution contrary to its aims.

Lastly, this Comment strives to make visible an imperial ontology in the U.S. representation of "truth," one which obviates the need to establish an empire by conquest and occupation and, combined with the U.S. violations of international law, indicates a lack of legitimacy in the U.S. promulgation of freedom and democracy, exposing them not as self-evident truths, but as a means to an end. It is this lack of legitimacy that the United Nations, and in part the ICJ, must recognize to preserve the shared sovereignty of all nations.

II. ROLE OF THE INTERNATIONAL COURT OF JUSTICE

A. Jurisdiction

Since the United Nation's inception, the Security Council has been the primary political organ in charge of international peace and security.[8] However, primary responsibility does not equate to exclusive jurisdiction.[9] Although separate, the ICJ has a complementary function, particularly in evaluating the legality of the use of force.[10] This is a role that most legal commentators have overwhelmingly supported.[11] Nonetheless, nearly all the respondents in the ICJ's use of force cases have challenged justiciability or jurisdiction.[12] However, as these cases have ultimately demonstrated, jurisdictional challenges have usually been more of a litigation tactic than a principled objection.[13]

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8. Christine Gray, *The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force After Nicaragua*, 14 EUR. J. INT'L L. 867, 868-71 (2003).

9. *Id.*

10. *Id.* at 871.

11. Jurisprudence on the use of force began as long ago as *Corfu Channel*, but most critical discourse followed the *Nicaragua* case. *See* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9); *cf.* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). For commentary subsequent to *Nicaragua*, see, e.g., Eugene V. Rostow, *Disputes Involving the Inherent Right of Self-Defense*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 264 (Lori F. Damrosch ed., 1987), and Herbert W. Briggs et al., *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 77 (Harold G. Maier ed., 1987).

12. Gray, *supra* note 8, at 868. The only recent case that has not challenged jurisdiction is the yet to be decided *Democratic Republic of Congo v. Uganda*, although Uganda has reserved the right to do so. *Id.*; *see* Counter-Memorial of Uganda, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 1 I.C.J. Pleadings 107-09, 218-21 (Apr. 21, 2001), *available at* http://www.icj-cij.org/icjwww/idocket/ico/ico_written_pleadings/ico_counter_memorial_uganda_20010421.pdf.

13. *See, e.g.*, Gray, *supra* note 8, at 874 (discussing U.S. litigation tactics); *id.* at 877 (discussing Nigerian litigation tactics). See also *id.* at 874 for a discussion of the *Oil Platforms* case, where the United States fought jurisdiction at the preliminary stage, then reversed position and counterclaimed, whereby Iran, who had been fighting to broaden the ICJ's jurisdiction, reversed course and sought to narrow it.

The ICJ is able to rule on the legality of the use of force when granted jurisdiction through bilateral or multilateral treaties.[14] Through these often economic treaties, the ICJ can rule upon whether the use of force violates customary international law or Charter law and may therefore adjudicate disputes on the legality of the use of force in question.[15] A few ICJ judges have also made the argument that when deciding the legality of the use of force, cases should not be rejected because of a lack of prima facie jurisdiction on the merits; rather, cases that can be used to further international peace and security are important enough to be resolved under Charter and customary international law even without a treaty between the parties.[16] Nevertheless, the direction of the ICJ has been controlled by those judges who believe that deciding use of force issues outside of such treaties would go beyond the judicial function of the ICJ.[17]

Despite these disputes over the ICJ's jurisdiction, the majority of cases heard by the ICJ in recent years have involved the legality *vel non* of the use of force.[18] Yet, interestingly, until the 2003 *Case Concerning Oil Platforms* (*Oil Platforms*) decision, only one other such case since 1986 has reached the merits, and that court avoided any decision on the use of force.[19] Thus, while the ICJ is willing to hear these cases, it has been hesitant to rule on the legality of the use of force. Perhaps this is because as some critics have argued, that to maintain credibility, the ICJ should avoid cases where a judgment may be resisted.[20] Although no

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14. *See* Statute of the International Court of Justice, arts. 36-37 (June 26, 1945), *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm. For example, see *Nicaragua*, 1986 I.C.J. at 16-17, which relied upon the 1956 Treaty of Friendship, Commerce, and Navigation between the parties.

15. *See, e.g.*, Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 182-83 (Nov. 6).

16. *See, e.g.*, Legality of Use of Force (Yugo. v. Belg.), 1999 I.C.J. 124, 207 (Request for the Indication of Provisional Measures of June 2) (Shi, J., dissenting); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), 2002 I.C.J. 219, 260-61 (July 10) (declaration of Judge Elaraby); *Oil Platforms*, 2003 I.C.J. at 223-24 (Koroma, J., dissenting). *But see* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda) (Feb. 3, 2006), *available at* http://www.icj-cij.org/icjwww/idocket/icrw/ijudgment/icrw_20060203.pdf (deciding that no jurisdiction existed to entering the Democratic Republic of Congo's case).

17. *See Rwanda*, 2002 I.C.J. at 257-59 (declaration of Judge Buergenthal); Armed Attacks on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2000 I.C.J. 111, 131-33 (Request for the Indication of Provisional Measures of July 1) (declaration of Judge Oda).

18. *See* Gray, *supra* note 8, at 867.

19. *Oil Platforms*, 2003 I.C.J. 161. The one other case was *Land and Maritime Boundary* (Cameroon v. Nig.), 1996 I.C.J. 13 (Mar. 15).

20. *See generally* Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS, *supra* note 11, at 288.

court would likely admit such a charge, the effect of politics on the ICJ merits attention and therefore will be examined in the next Subpart.

B. The Effect of Politics on the ICJ

As mentioned previously, the ICJ and Security Council have complementary roles in evaluating international uses of force. Yet, little legal scholarship has focused on the repercussions if those roles conflict.[21] Thus far, the ICJ has refused to review Security Council decisions[22] and has been hesitant to act even in situations where the Security Council has not acted but has failed to condemn the actions in question.[23] The ICJ continually defers to the Security Council as the primary guarantor of international peace and security and is quick to stress the primary role of the Council in such matters.[24] However, which parties are applying for relief in a given case may make a difference in how the ICJ rules. When a country's request for relief from the Security Council is denied, the ICJ has generally been unwilling to act in a contrary manner.[25] However, should the pleading nation ask for relief from a nation that is a permanent Security Council member, with the power to block a resolution for relief, the ICJ may be more willing to hear the case.[26]

On the other hand, there is also the fear that the rise in use of force cases before the ICJ is not just a willingness of states to affirm the legal standing of their actions or to decry the actions of another state, but a political maneuver in a propaganda war, where the issue is already being settled elsewhere, and the claim is essentially a frivolous means of distracting, delaying, or otherwise inconveniencing that state.[27]

Political considerations can also have an effect on compliance with ICJ decisions. The events following the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua*), discussed further in the next Part, provide an apt example.[28] After losing this case, the United States blocked enforcement of the ICJ's decision through its

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21. *See* Gray, *supra* note 8, at 897 n.130.

22. *See, e.g.*, *id.* at 897 (discussing the Lockerbie and Bosnia-Herzegovina genocide cases).

23. *See, e.g.*, *id.* at 903 (discussing NATO's intervention in Yugoslavia).

24. *See id.*

25. *See id.* at 903, 905.

26. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). For more on this subject, see Gray, *supra* note 8, at 881.

27. *See* Gray, *supra* note 8, at 904.

28. *See infra* Part III.A (discussing the *Nicaragua* case further).

veto on the Security Council.[29] Other political factors can also affect compliance. Studies have shown that cases involving political or strategic considerations are five times less likely to be heeded than ones that are purely economic in nature.[30] Also, states with more military might than the other party have been less compliant when losing a decision than states that lose to a party that is more similarly situated.[31]

It is likely that such political factors enter ICJ judges' minds when they hear cases. No judge likes being overturned or, when it comes to the ICJ, ignored. Thus, without a fully developed body of law and possessed of an uncertain enforcement process, the ICJ would be hard pressed to ignore such factors. Yet, the problem with taking these "realities" into account is that doing so endangers the ICJ's credibility. With a divergence between the actual practice of states and the normative legal values, there becomes a "credibility gap" that no amount of acquiescence can overcome.[32]

Moreover, an analysis of ICJ cases since the court's inception suggests that the nationality of individual judges has a strong influence on judicial decision-making.[33] While this study does not prove a conscious bias, it does indicate that ICJ judges vote for their home states approximately ninety percent of the time, and that they are more likely to vote for states that are economically, culturally, and politically similar to their own.[34] While some states might be more willing to comply with an unfavorable decision when handed down by judges whom they know are similar to them, and thus less likely to be biased against them, the converse is also true: states receiving adverse verdicts by "unfriendly" judges may feel they did not receive a fair trial.[35]

As the rising number of use of force cases before the ICJ accompanies escalating violence worldwide, this is not a time for the court to equivocate or be partial. The prohibitions against the use of force in international relations is a cornerstone of international law and

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29. *See* Gray, *supra* note 8, at 881.

30. Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM J. INT'L L. 434, 459 (2004) ("[F]ive of six cases that were primarily economic in nature resulted in compliance, as opposed to only one of six involving mainly political or strategic considerations.").

31. *Id.*

32. Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 1-2 (1972).

33. Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 624 (2005).

34. *Id.* at 624-25.

35. *See id.* at 625-26.

must be *jus cogens*, from which no derogation is permitted.[36] If the ICJ cannot recognize that these principles are worth upholding, even though risking the ire of the U.S. hegemony—or of the nations that nominated them to the court[37]—the ICJ is in jeopardy of becoming irrelevant in the development of international law on the use of force.[38]

III. RECOGNIZED LAW ON THE USE OF FORCE

A. Operations in and Against Nicaragua

In 1986, *Nicaragua* was the first modern ICJ case to deal with the legality of the use of force.[39] The *Nicaragua* court synthesized customary international law and Charter law to recognize objective standards for evaluating the legality of both armed attacks and self-defense.[40] According to article 51 of the Charter, the only time a state may validly use force against another nation unilaterally is in self-defense.[41] An important feature of the *Nicaragua* decision was to recognize the twin criteria of necessity and proportionality as established under customary international law.[42] To determine if a nation has validly invoked this concomitantly recognized right, the ICJ will inquire whether the measures taken by the nation invoking self-defense were necessary and proportional to the threat defended against, in order to protect that nation's essential security interests.[43]

Nicaragua involved allegations that U.S. forces were involved with supporting insurgency forces in Nicaragua, including armed attacks by air, land, and sea, as well as through the continual threat of force.[44] The

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36. *See* Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 291 (Nov. 6) (Elaraby, J., dissenting) ("This fundamental principle draws a distinction between a post-Charter era of law-abiding, civilized community of nations and the pre-Charter era when the strong and powerful States were not restrained from attacking the weak at will and with impunity.").

37. *See* Posner & de Figueiredo, *supra* note 33, at 608 (discussing the possibility of ICJ judges' political allegiance to the nations that nominated them for the Court).

38. *See Oil Platforms*, 2003 I.C.J. at 327 (separate opinion of Judge Simma) ("I find it regrettable that the Court has not mustered the courage of restating, and thus reconfirming, more fully fundamental principles of the law of the United Nations as well as customary international law (principles that in my view are of the nature of *jus cogens*) on the use of force, or rather the prohibition on armed force, in a context and at a time when such a reconfirmation is called for with the greatest urgency.").

39. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

40. *See id.* at 96-97; *see also* Elisabeth Zoller, *The Law Applicable to the Preemption Doctrine*, 98 AM. SOC'Y INT'L L. PROC. 333, 334-35 (2004).

41. *See* U.N. Charter art. 51.

42. *Nicaragua*, 1986 I.C.J. at 103, 117.

43. *Id.*

44. *Id.* at 18-19.

Nicaraguan government asserted, *inter alia*, that the United States had violated article 2(4) of the Charter and a 1956 treaty between the nations.[45] In response, the United States invoked Nicaragua's provision of military support to rebels in neighboring countries, and relying upon the principle of collective self-defense, claimed to have acted under article 51.[46] The ICJ determined that if the United States had indeed complied with the established requirements for the right of collective self-defense, then it would not have violated the Charter or the 1956 Treaty.[47]

However, the Court found insufficient evidence that Nicaragua had initiated armed attacks against its neighbors El Salvador, Costa Rica, and Honduras.[48] It also rejected U.S. arguments that Nicaragua had threatened its neighbors by establishing a totalitarian communist dictatorship, noting that every state possesses a fundamental right to choose and implement its own form of government.[49] Nor was the Court persuaded that Nicaragua's "excessive" militarization justified a threat to America's essential security interests.[50] In sum, the ICJ found no compelling threat to America's national security interests, vis-à-vis danger to their sovereign state or through collective concerns.[51]

Nonetheless, the ICJ also proceeded to discuss the criteria of necessity and proportionality. Because the ICJ found that the majority of Nicaragua's intervention in El Salvador had taken place well before U.S. efforts to undermine the Nicaraguan government, the U.S. actions could not have been taken as a necessary step of collective self-defense.[52] The court also found that U.S. mining of Nicaraguan ports and attacks on its oil installations were not proportional to combating Nicaraguan aid given to El Salvadorian rebels.[53] Moreover, the ICJ noted that American activities in Nicaragua had continued long after such actions could

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45. *Id.* at 16-18, 22. The treaty relied upon was the 1956 Treaty of Friendship, Commerce, and Navigation between the parties. *Id.* Article 2, paragraph 4 of the Charter provides: "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.

46. *See Nicaragua*, 1986 I.C.J. at 22.

47. *Id.* at 35-36.

48. *See id.* at 120-22.

49. *See id.* at 131-33.

50. *See id.* at 135 ("It is irrelevant and inappropriate, in the Court's opinion, to pass upon this allegation of the United States, since in international law there are no rules . . . whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.").

51. *See id.* at 123.

52. *Id.*

53. *Id.* at 122.

reasonably have been construed as self-defense.[54] Therefore, the court ruled that the U.S. actions were neither necessary nor proportional to the alleged threats to collective security and thus did not constitute a valid exercise of self-defense.[55]

Observers should note that the events adjudicated in *Nicaragua* took place in a very different context than contemporary affairs. This was the environment for which the Charter was designed.[56] The *Nicaragua* court had to balance two competing world views, communism and democracy, and had to encourage stability by not choosing sides in that ideological struggle. Working under that balance of great power rivalry, the *Nicaragua* court not only discerned the thinly veiled U.S. efforts to fight communism, but censured such actions as undermining the sovereignty of another nation.[57]

B. The Legality of Nuclear Weapons

The 1996 *Legality of the Threat or Use of Nuclear Weapons* (*Nuclear Weapons*) is an advisory opinion and therefore not binding; nonetheless, it has played an important role in the development of international law regarding the use of force.[58] Although *Nuclear Weapons* was decided after the end of the Cold War, the ICJ was clearly influenced by the principals of *détente* and the continuing existence of unfriendly neighbors who maintained nuclear stockpiles.[59] In particular, the court pointed to the concept of deterrence employed during the Cold War, where the mere presence of such weapons deterred their use.[60] In finding that this ancillary attribute of nuclear weapons was politically beneficial, the ICJ was actually lauding the restraint from engaging in armed attacks. When the only reason the court could supply for using nuclear weapons was the very survival of the state, *a contrario*, it was arguing that no other reason was necessary to a member state's essential security interests or proportionate to the threat faced.[61]

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54. *See id.* at 122-23 (explaining that the aid given to El Salvador at that time, if any, was so minimal that it could not even decisively be attributed to the Nicaraguan government).

55. *Id.*

56. *See generally* Paulus, *supra* note 2, at 714-15.

57. *See Nicaragua*, 1986 I.C.J. at 133.

58. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

59. Pakistan and India are one example of nuclear-capable neighbors. Russia and China are another. *See* Nat'l Res. Def. Council, *Nuclear Weapons & Waste* (2002), http://www.nrdc.org/nuclear/nudb/datainx.asp. Israel and Iran may soon be another. *See, e.g.*, David E. Sanger, *Suppose We Just Let Iran Have the Bomb*, N.Y. TIMES, Mar. 19, 1006, § 4, at 1.

60. *Nuclear Weapons*, 1996 I.C.J. at 253.

61. *Id.* at 263.

In *Nuclear Weapons*, the ICJ reinforced the requirements of necessity and proportionality as integral components to a valid claim of self defense.[62] The court also continued to discourage the use of force as a method of solving problems, unless that use of force was essential to the nation's very existence.[63]

C. Armed Attacks on Iranian Oil Platforms

In the decision handed down in the 2003 *Oil Platforms* case (which originated in 1992), the ICJ failed to establish firmly the law on the use of force—or to further develop it, as one dissenting judge would have preferred.[64] After the U.S. military attacked four of Iran's oil platforms in two incidents, each a year apart, Iran brought suit before the ICJ.[65] The United States claimed to be protecting its essential security interests after its ships were damaged by what it alleged were Iranian missiles and mines.[66] Iran, which was in the midst of a war with Iraq at the time of the incidents, denied responsibility for the armed attacks and maintained that any military actions, including those performed by any military actors stationed on their oil platforms, were all of a defensive nature.[67]

As in *Nicaragua* and *Nuclear Weapons*, the ICJ examined these facts under the criteria of necessity and proportionality.[68] The court made it clear that these were not determinations left to the party's subjective interpretation, but rather had to be supported by proof capable of withstanding objective scrutiny.[69] The United States claimed that a nation should be afforded a measure of discretion in a good-faith use of force in self-defense, but the ICJ squarely rejected this argument.[70] Alternatively, the United States claimed that the protection of its vessels and crew and the uninterrupted flow of commerce in the Persian Gulf were essential

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62. *Id.* at 245.
63. *Id.* at 263-64.
64. *See* Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 295 (Nov. 6) (Elaraby, J., dissenting) ("The *Oil Platforms* case presented the Court with an occasion to reaffirm, clarify, and, if possible, develop the law on the use of force in all its manifestations . . . . The Court regrettably missed this opportunity."); *see also* Djamchid Momtaz, *Did the Court Miss an Opportunity To Denounce the Erosion of the Principle Prohibiting the Use of Force?*, 29 YALE J. INT'L L. 307, 310 (2004).
65. *Oil Platforms*, 2003 I.C.J. at 166. These incidents occurred in 1987 and 1988. *Id.*
66. *Id.* at 172.
67. *Id.* at 176.
68. *See id.* at 183.
69. *Id.*
70. *Id.*

security interests.[71] While Iran did not argue this point, it countered that the U.S. use of force in this case was not necessary for that purpose.[72]

In its analysis, the ICJ noted that the United States had never complained to Iran of military activities taking place on the oil platforms in question, as compared to its repeated complaints to Iran of its mine laying and attacks on maritime commerce in the Gulf.[73] Although not dispositive, the ICJ found suggestive that the targeting of the platforms was not a necessary act.[74] Further, it observed that U.S. documents identified the platforms attacked in 1988 as representing a "target of opportunity" which was proven to be part of a larger operation against Iranian interests.[75]

Ultimately, the ICJ held that the attacks on the Iranian oil platforms were not justified as measures necessary to protect the essential security interests of the United States and thus did not qualify as acts of self-defense under international law.[76] Yet, while the court addressed these issues, it only did so after determining that both the attacks against U.S. interests and the U.S. attacks on the Iranian oil platforms were not "armed attacks" in contravention of international law.[77] The ICJ seemed to say simply that the United States had incorrectly invoked its article 51 rights, but it did not evaluate the resultant nature of that use of force.[78]

This failure was best summarized in Judge Simma's separate decision, in which he noted that if the attacks on the oil platforms were not valid armed attacks (nor were they authorized by the Security Council under chapter VII of the Charter), then they must have been the use of force that is proscribed: "*Tertium non datur*."[79] The ICJ claimed to be limiting itself to the jurisdiction granted by the treaty at issue, but as Judge Simma pointed out, this was "an exercise in inappropriate self-restraint."[80] Had it chosen to, the court certainly could have adjudicated

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71. *Id.* at 183-84.
72. *Id.*
73. *Id.* at 198.
74. *Id.*
75. *Id.* (noting, however, that these other operations, "which involved, *inter alia*, the destruction of two Iranian frigates and a number of other naval vessels and aircraft," were outside the scope of this case).
76. *Id.* at 198-99.
77. *See id.* at 191-92, 207-08.
78. *See id.* at 199.
79. *Id.* at 328 (separate opinion of Judge Simma).
80. *Id.* (separate opinion of Judge Simma). Judge Simma also added, "It is a great pity however that the reasoning of the Court does not draw this necessary conclusion, and thus strengthen the Charter prohibition on the threat or use of armed force, in straightforward, terms. To repeat, I cannot see how in doing so the Court would have gone beyond the bounds of its jurisdiction." *Id.* at 328-29 (separate opinion of Judge Simma).

beyond the treaty and decided the case under customary international law, as it had in *Nicaragua*.[81]

The refusal to address the U.S violation of article 2(4) of the Charter and to recognize the concomitant law of self-defense is a distancing of the connection between the grounds and the holding of the case.[82] As the principal judicial organ of the United Nations, it should have been incumbent upon the ICJ to seize the opportunity offered by *Oil Platforms* to reaffirm the restrictive force of article 2(4) of the U.N. Charter.[83] Therefore, one must ask what would have led the court to retreat from such an obvious opportunity.

Oil Platforms was decided one year after the United States published its 2002 National Security Strategy, which put forth the Doctrine of Preemption.[84] As the next Part will detail, this doctrine conflicts with both customary international law and Charter law. Thus, faced with the rising hegemony of a lone superpower which was increasingly employing the use of force to solve its problems and claiming broader rights to do so,[85] the ICJ did little or nothing to check this abuse of power by the United States and instead caved under its hegemonic weight. However, since the court failed to condemn the U.S. use of force, it could not have condemned the Iranian actions either. Thus, the end result of the case is as disconcerting as it is discontinuous and ultimately fails the very purposes it was supposed to uphold, namely, the prevention of the unilateral use of force.

IV. THE DOCTRINE OF PREEMPTION

A. Anticipatory Self-Defense vs. Preemptive Self-Defense

The Doctrine of Preemption was first promulgated in the 2002 National Security Strategy of the United States of America.[86] In this document, the Bush Administration argued that "[f]or centuries,

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81. *Id.* at 303-05 (Elaraby, J., dissenting).

82. *See* Momtaz, *supra* note 64, at 310.

83. *See Oil Platforms* (Iran v. U.S.), 2003 I.C.J. at 390 (separate opinion of Judge Rigeaux); *see also* Momtaz, *supra* note 64, at 311 ("A firm and unambiguous condemnation of the actions carried out by the United States in violation of Article 2(4) of the U.N. Charter from the principal judicial organ of the United Nations would indisputably have had the effect of restoring the image of the rule prohibiting recourse to force, sadly misused over the course of recent years.").

84. *See* GEORGE W. BUSH, U.S. PRESIDENT, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf [hereinafter 2002 U.S. NATIONAL SECURITY STRATEGY].

85. *See id.*

86. *Id.*

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."[87] Yet in making this claim, the United States misrepresented a newer, broader doctrine with Anticipatory Self-Defense, which is actually what international law has recognized for centuries.[88] The United States has continued this approach in its 2006 National Security Strategy.[89]

The Preemptive Self-Defense presented by the Bush Administration allows one state to use force to prevent any possibility of attack by another state, even though there is no evidence to believe that an attack has been planned against that state, and no such prior attack has occurred.[90] Anticipatory Self-Defense is a much narrower doctrine and may only be employed when there is an imminent threat of attack from another state.[91]

Anticipatory Self-Defense was first legally recognized in the *Caroline* case, or rather by the correspondence between U.S. Secretary of State Daniel Webster and British Ambassador Henry S. Fox, after British troops attacked a U.S. vessel.[92] Knowing that a ship in the waters bordering Canada was indeed loaded with insurgents, Webster did not challenge Britain's right to rely on the doctrine of Anticipatory Self-Defense.[93] From this incident emerged what became known as the Caroline Doctrine, which held that there were four criteria that had to be met to validly invoke Anticipatory Self-Defense: (1) the presence of "an imminent threat"; (2) that "the response must be necessary to protect against the threat"; (3) that "the response must be proportionate to the threat"; and (4) that "the self-defensive action must be taken as a last resort, after peaceful means have been attempted or it is shown that such an attempt at peaceful means, including 'admonition or remonstrance . . .

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87. *Id.*

88. *See* Martinez, *supra* note 6, at 126. William H. Taft IV—who argued the *Oil Platforms* case—in reaction to *Oil Platforms*, continued to associate the two disparate theories when he claimed: "the Court . . . does not consider other issues relating to the international law of self-defense, such as the legality of anticipatory or preemptive uses of force." William H. Taft IV, *Self-Defense and the* Oil Platforms *Decision* 29 YALE J. INT'L L. 295, 295-96 (2004).

89. 2006 U.S. NATIONAL SECURITY STRATEGY, *supra* note 4, at 18, 23. In the section dealing with "proactive" defense, Bush begins by claiming the right to "anticipatory action," while in the next paragraph referring to the right to "act preemptively." Thereafter, the language used involves variations of the word "preemption." *Id.* at 18-24.

90. *See* Martinez, *supra* note 6, at 126 (citing MARY ELLEN O'CONNELL, AM. SOC'Y OF INT'L LAW TASK FORCE ON TERRORISM, THE MYTH OF PREEMPTIVE SELF-DEFENSE 2 n.10 (2002), *available at* http://www.asil.org/taskforce/oconnell.pdf).

91. *Id.* at 126.

92. *Id.* at 128-29.

93. *Id.*

was impracticable' or 'would have been unavailing.'"[94] In particular, the new U.S. strategy diverges from the first and fourth requirements of Anticipatory Self-Defense. Therefore, the U.S. doctrine of Preemptive Self-Defense is distinct from centuries-old law.

B. The Bush Doctrine and Preemption

U.S. discourse is often about representation: a collection of "truths," which are purported to be "self-evident."[95] Yet when one makes visible this rhetoric of "self-evident truths" and "obvious" facts, one will see that this representation of liberal capitalist democracy is not a "self-evident" or "obvious" truth, but rather a created truth.[96] For example, is the current War on Terror[97] really comparable to the Cold War, as U.S. President Bush claims?[98] Is this a "truth" set before the people of the world to be freely absorbed as part of a conscious decision, or is it rather part of a complex, interwoven scheme: a hegemonic discourse of fictionalized truths?[99] In contrast to the Cold War, the War on Terror does not involve opposing powers that each have the ability to destroy the world several times over, nor does it arise from a war which left millions dead.[100] The voice of a hegemon, however, carries heavy weight, and even when acting contrary to the wishes or laws of others, it can be hard to refuse that state, especially when the hegemon is clever about such policy.

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94. *Id.* at 129-30. The ICJ has adopted the requirements of "necessity" and "proportionality" into modern self-defense jurisprudence, discussed *supra* Part III.A. Some commentators have argued also that "imminence" and "exhaustion of peaceful means" have been folded into "necessity." *See, e.g.*, *id.* at 129 n.39.

95. *See* WILLIAM V. SPANOS, AMERICA'S SHADOW: AN ANATOMY OF EMPIRE 149, 166 (2000).

96. *See id.* at 129, 133.

97. Although I adopt the phrase "War on Terror" promulgated by the U.S. government, see, e.g., 2002 U.S. NATIONAL SECURITY STRATEGY, *supra* note 84, at 4 and 2006 U.S. NATIONAL SECURITY STRATEGY, *supra* note 4, at 12, many critics dispute its accuracy, *see, e.g.*, *supra* notes 134-139 and accompanying text.

98. *See* CBS & Associated Press, *Bush Likens War on Terror to WWII*, CBS NEWS (June 2, 2004), http://www.cbsnews.com/stories/2004/06/02/politics/main620777.shtml. Speaking at the U.S. Air Force Academy, President Bush stated: "Just as events in Europe determined the outcome of the Cold War, events in the Middle East will set the course of our current struggle." *Id.* (quoting George W. Bush, U.S. President); *see also* 2006 U.S. NATIONAL SECURITY STRATEGY, *supra* note 4, at 1 ("The United States is in the early years of a long struggle, similar to what our country faced in the early years of the Cold War.").

99. *See* Michael T. Wawrzycki, *The Vietnam War: American Democracy and Hegemony* (2000), http://www.verve.name/mtw/writing/essays/2000f_vietnam-america.html.

100. Luke Mitchell, *A Run on Terror: The Rising Cost of Fear Itself*, HARPER'S, Mar. 2004, at 80.

The sleight of hand by which the United States has swapped Anticipatory Self-Defense for Preemptive Self-Defense has also been associated with a larger plan known as the "Bush Doctrine."[101] Nevertheless, U.S. policy-makers are too astute to simply disregard Anticipatory Self-Defense; the United States cannot yet unilaterally discard established law. Instead, the United States has folded Anticipatory Self-Defense into its own ideology, shaping the presentation of the Bush Doctrine's criteria until that older doctrine can achieve the desired ends. Despite suggestions by the 2002 U.S. National Security Strategy, an imminent threat under customary international law is not merely a "visible mobilization of armies, navies, and air forces preparing for attack."[102] Such mobilization might suffice if there was an accompanying, undeniably hostile intent, although aggressive statements on their own (as evidenced by the Cold War) do not signify an actual intent to attack.[103] To the contrary, the Caroline Doctrine as accepted by the international community requires a threat that is "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[104]

Thus, through its hegemonic discourse, the United States has represented a set of facts as an obvious "truth"—here, that Anticipatory and Preemptive Self-Defenses are the same thing—which its citizens can purportedly accept or reject freely. Yet, those not learned in international law and the use of force would not understand that these doctrines were different, nor have any reason to doubt an assertion that they were the same. So the choice is never really there. It is through this *illusion* of choice, of "freedom," that the U.S. discourse operates. This representation of doctrine is then nothing so simple or obvious; rather it is a subtle and manipulative change of language, that if allowed to go unnoticed or unchallenged, could lead to dangerous consequences. The Bush Doctrine, if applied to the active use of force, would stand as a drastic change in how the U.S. hegemon interacts with its neighbors—friend or foe—despite its claim to be continuous with historical modes of self-protection.

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101. *See, e.g.*, Martinez, *supra* note 6, at 181.

102. 2002 U.S. NATIONAL SECURITY STRATEGY, supra note 84, at 15; *see also* Martinez, *supra* note 6, at 170.

103. Martinez, *supra* note 6, at 170.

104. R.Y. Jennings, *The* Caroline *and* McLeod *Cases*, 32 AM. J. INT'L L. 82, 91-92 (1938).

C. Applying Preemption

The Legal Advisor to the United States Department of State who argued the *Oil Platforms* case immediately afterward wrote a reaction paper, in which he expressed concern that the ICJ was discouraging a state from protecting itself in ways unsupported by international law and which would "undermine, rather than strengthen, international peace and security."[105] Yet the validity of these arguments presupposed that Anticipatory Self-Defense and Preemptive Self-Defense were the same thing. They are not. Complicating matters are the ever-shifting legal arguments and political rationales provided by the United States for employing this doctrine.[106]

While the 2002 U.S. National Security Strategy attempted to redefine "imminence," President Bush gradually insisted on a more preemptive approach—as opposed to anticipatory—the apotheosis of which was refuting that the United States "must not act until the threat is imminent."[107] Although this may sound like a reasonable argument to a frightened, post-September 11th American public, constantly presented with the dangers of resurgent domestic terrorism, they likely do not fully understand the legal import of the word "imminent." Indeed, many might confuse the President's very pointed use of a legal term of art for the casual speak by which he is so well known and simply hear that he will keep them safe. Perhaps the U.S. public would think twice if they knew that this was not merely a promise of protection, but the presumptive actions of one state unilaterally attempting to disregard the very centuries of international law on behalf of which it claimed to be acting.[108]

Moreover, the United States not only advocates dispensing with the imminence requirement, but also the requirement that preemptive actions need not be the last resort or where other options are unavailing. On several occasions, the United States has stated that it refuses to accept the

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105. *See* Taft, *supra* note 88, at 295.

106. *See* Dino Kritsiotis, *Arguments of Mass Confusion*, 15 EUR. J. INT'L L. 233, 234-35 (2004).

107. George W. Bush, U.S. President, President Delivers State of the Union (Jan. 28, 2003), http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html ("Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words, and all recriminations would come too late.") [hereinafter 2003 State of the Union].

108. *See* Martinez, *supra* note 6, at 191; *Zoller*, *supra* note 40, at 334 (citing 2002 U.S. NATIONAL SECURITY STRATEGY, supra note 84, at 15); *see also* Amy E. Eckert & Manooher Mofidi, *Doctrine or Doctrinaire—The First Strike Doctrine and Preemptive Self-Defense Under International Law*, 12 TUL. J. INT'L & COMP. L. 117, 120 (2004).

mere *possibility* that "rogue states" might acquire weapons of mass destruction (WMD).[109] President Bush has argued that the mere potentiality of rogue states or persons gaining access to WMD justified immediate action because such a state "could decide on any given day to provide a biological or chemical weapon to a terrorist group or individual terrorists. . . . [W]e cannot wait for the final proof—the smoking gun—that could come in the form of a mushroom cloud."[110] Yet this policy runs squarely counter to the ICJ's *Nuclear Weapons* ruling–an opinion aligned with customary international law—that the mere possession of nuclear weapons does not in itself constitute a security threat to other nations.[111]

D. Hegemonic Discourse and Public Representation

The criteria established by customary international law for Anticipatory Self-Defense recognized objective standards by which to evaluate the legality of the use of force. When those criteria are disregarded, observers must ask: (1) how would one ascertain facts surrounding the use of force, and (2) who would decide what actions were necessary?[112] Were any one nation granted the power to make such decisions unilaterally, justice would be replaced with self-serving explanations.[113] Unsurprisingly, this is the most logical conclusion behind U.S. public representation of the Preemption Doctrine. The U.S. hegemon does not want to share its sovereignty with the international community; the more criteria it can dispense with, the closer it comes to achieving that goal. As the requirements of certainty evaporate, the preempting nation gains more and more discretion. Consider the pellucid oratory of President Bush: "America will never seek a permission slip to defend the security of our country."[114] The political brilliance of this speech lies in its simplicity. To the average listener, this is common sense; to the legal scholar, article 51 of the Charter and the principles of self-defense come to mind. However, the real question is

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109. *See* 2002 U.S. NATIONAL SECURITY STRATEGY, *supra* note 84, at 15.

110. George W. Bush, U.S. President, President Bush Outlines Iraqi Threat (Oct. 7, 2002), http://www.whitehouse.gov/news/releases/2002/10/20021007-8.html.

111. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 263-64 (July 8). In addition, those who have lived through the Cold War understand that this was once a daily reality, and thus not a "new" danger to the United States or the world. The only difference now is that the United States no longer fears any other state's reprisal.

112. *See* Paulus, *supra* note 2, at 720-21.

113. *Id.*

114. George W. Bush, U.S. President, State of the Union Address (Jan. 20, 2004), http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html.

how the United States would *define* "to defend the security of our country," and what implications such definitions hold.

The discretion gained through Preemptive Self-Defense has been represented as a necessary component to an efficacious U.S. response to the events of September 11th.[115] With such discretion on the use of force, the United States has purported to act in the best interests of international peace and security, such that it wills to stop terrorists who would threaten the security of all before they can strike. Some policy-makers have even suggested that the legality of the use of force must adapt to a "new reality," spurred on by new technology, the upswing of terrorism, and "logic and common sense."[116] Others have gone further:

> [A]fter defeating fascism and communism, the free world is once more at war: the Bush Doctrine, disdaining judicial responses for military measures, pronounces unmistakably the American view that the nexus of Islamic terrorism and WMD—a threat to civilization far greater than anything that has yet presented in the framework of traditional understandings of criminality—must be vanquished to prevent the triumph of an intolerable tyranny.[117]

Do the events of September 11th and those subsequent truly create a "new reality," or is it an exercise in the politics of fear?

While it is true that the terrorists who struck on September 11th, who likely financed their attacks for less than the cost of a single tank, proved that one did not need an army or an industrial base, does that constitute a "new reality" or simply a new kind of threat?[118] The difference is subtle, but poignant; with the simple alteration of words, one can create a whole new exigency. In this case, the unknown. Fear has always been a staple of political maneuvers, riding the coattails of history, and has long allowed leaders to paint parallel histories alongside reality.[119] It is this anxiety over the unknown that has historically pushed "civilizing" forces to annul public dread and to render it docile and useful: through force if necessary, but vis-à-vis culture or representations

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115. *See, e.g.*, Deputy Secretary Wolfowitz Interview with Sam Tannenhaus, VANITY FAIR (May 9, 2003), *available at* http://www.defenselink.mil/transcripts/2003/tr20030509-depsecdef0223.html.

116. Martinez, *supra* note 6, at 158-59.

117. William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal To Rationalize the Laws of War*, 73 MISS. L.J. 639, 686-87 (2004) (citations and quotations omitted).

118. *See* Eckert & Mofidi, *supra* note 108, at 120 (citing George W. Bush, U.S. President, President Delivers Graduation Speech at West Point (June 1, 2002), http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html).

119. Brian Massumi, *Preface* to THE POLITICS OF EVERYDAY FEAR, at vii (Brian Massumi ed., 1993) ("[A] history of modern nation-states could be written following the regular ebb and flow of fear rippling their surface, punctuated by outbreaks of outright hysteria.").

of policy when a state is able to describe the very language in which the discourse operates.[120] Consequently, one must recall the warning of Judge Simma, who in his separate opinion in *Oil Platforms*, was insistent that in such troubled times the Court should not fold to the apparent exigency of a singular event, but to the contrary, that "reconfirmation [of customary international law] is called for with the greatest urgency."[121]

The argument that politics of fear are a part of U.S. preemptive discourse is particularly borne out by the facts. Admittedly, the events of September 11th unfolded great tragedy, which the world mourned. On that day, 2,978 Americans were killed.[122] However, no Americans have been killed on American soil by terrorists since that day.[123] According to the FBI, no Americans were killed by terrorists in the United States in 2000, one was killed in such a manner in 1999, three in 1998, and none in 1997.[124] Yet even assuming that the 2001 loss of life was a typical yearly loss, it would still rank well below the dangers to the United States posed by heart disease (700,142 deaths in 2001), cancer (553,768), accidents (101,537), suicide (30,622), and nonterroristic homicides (17,330).[125] Comparatively, terrorism ranks closer to fatal workplace injuries (5,431 deaths in 2001) or drowning deaths (3,247).[126] Nonetheless, nearly every presidential speech since September 11th has touched on terrorism, and two wars have been launched in its name.[127]

Even taking into account the sudden devastating effect that WMD can have, as opposed to these other national concerns, the United States has downplayed the difficulty to obtain these weapons, the reluctance to use them, and exaggerated their efficacy. It has taken North Korea thirty years to develop at most one or two nuclear weapons, Libya recently gave up its efforts, and for all the dread caused over nuclear weapons being smuggled out of Russia, the Japanese organization Aum Shinrikyo—which successfully launched a chemical attack in a Japanese subway station in the late 1990s—attempted to procure nuclear weapons from the

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120. SPANOS, *supra* note 95, at 87, 200.

121. Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 327 (Nov. 6) (separate opinion of Judge Simma).

122. Mitchell, *supra* note 100, at 79.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* Indeed, even years after the wars in Afghanistan and Iraq have supposedly been won, the *2006 National Security Strategy* opens with the words "America is at war," despite on the very same page praising these victories as strides against terrorists. 2006 U.S. NATIONAL SECURITY STRATEGY, *supra* note 4, at i.

Russians and failed.[128] Even "rogue states" like North Korea realize that gaining even a handful of bombs could not protect it from U.S. reprisal.[129] There is little evidence other would-be nuclear powers, such as Iraq or Iran, would pose much more of a threat.[130] As to efficacy, the aforementioned Aum Shinrikyo was the perfect example of the dangers the Bush Administration would invoke: a widespread, well-financed, and well-planned terrorist organization.[131] Yet even with all its assets, its sarin gas attack in a crowded subway station killed only sixteen people.[132] This is the "weapon of mass destruction" for which the U.S. Administration would have its people alter their society? A man firing semiautomatic weapons into the crowd could have done as much or more damage, as could a man with his vehicle packed full of simple explosives.[133] Based on these facts, one must therefore doubt that the United States faces a "new reality" which needs a novel legal approach to ensure international peace and security.

One should also closely examine the words that the Bush Administration has chosen: "War on Terror." While this may seem an apt title, when analyzed word for word it is less than obvious and more likely a calculated decision.[134] "War" evokes extraordinary power, and even at times the suspension of civil liberties.[135] Any constitutional law scholar would recognize the benefits to a strong executive who operates in wartime. The use of the term "Terror," is more nebulous, however. It

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128. Mitchell, *supra* note 100, at 79-80; *see also* Kyle B. Olson, Ctr. for Disease Control, *Aum Shinrikyo: Once and Future Threat?*, *available at* http://www.cdc.gov/ncidod/EID/vol5no4/olson.htm (last visited Mar. 19, 2006).

129. *See* Peter Maass, *The Last Emperor*, N.Y. TIMES, Oct. 19, 2003 (Magazine), at 38 (quoting North Korean Dictator Kim Jong Il). For a more thorough discussion of this topic, see Paul E. Boehm, *Decennial Déjà Vu: Reassessing a Nuclear North Korea on the 1995 Supply Agreement's Ten-Year Anniversary*, 14 TUL. J. INT'L & COMP. L. 81, 82-98 (2005).

130. *See* Sanger, *supra* note 59.

131. Mitchell, *supra* note 100, at 80 ("Aum Shinrikyo—which had 65,000 members worldwide, $1.4 billion in assets, and a secret weapons lab run by scientists recruited from Japan's best universities, and spent years underground during which no investigative body knew of them, much less was seeking them.").

132. *Id.*; *see also* Olson, *supra* note 128.

133. *See* Mitchell, *supra* note 100, at 80; *see also* Chris Hughes, *Cement Mixer Suicide Bomber Kills 20*, MIRROR (U.K.), Oct. 25, 2005, at 4; Wire Services, *Suicide Bomber Kills 115 in Iraq*, SEOUL TIMES, *available at* http://theseoultimes.com/ST/?url=/ST/db/read.php?idx=1545 (last visited Mar. 19, 2006).

134. *See* George Lakoff, *"War on Terror" Rest in Peace*, ROCKRIDGE INSTITUTE, http://www.rockridgeinstitute.org/research/lakoff/gwot_rip (last visited Apr. 18, 2006). Although Lakoff claims the United States has been slowly backing away from this term, its reiterant use in the 2006 National Security Strategy belies this argument. *See generally* 2006 U.S. NATIONAL SECURITY STRATEGY, *supra* note 4.

135. *See* Lakoff, *supra* note 134.

> names not a nation or even people, but an emotion and the acts that create it. A "war on terror" can only be metaphorical. Terror cannot be destroyed by weapons or signing a peace treaty. A war on terror has no end. The president's war powers have no end. The need for a Patriot Act has no end.[136]

A more accurate phrasing would therefore not refer to "terror" but to "terrorists."[137] Terrorists were the ones who attacked the United States on September 11th; terrorists were the ones who placed anthrax in U.S. mail packages months later. Making this distinction forces one to reexamine the term "War." Beyond its obvious value as political capital, one must question the *accuracy* of the term. Certainly, there is a violence involved, but so is there in police action, among other state actions. And while there are very likely hundreds, if not thousands, of terrorists poised to strike U.S. interests, there are probably not tens of thousands of such persons.[138] "The point is, terrorists are actual people, and relatively small numbers of individuals, considering the size of our country and other countries. It's not a nation-state problem. War is a nation-state problem."[139] This quandary is exemplified in the 2006 U.S. National Security Strategy. Wars against nation-states are fought, won, and over.[140] Evoking "terrorists" is more advantageous, because individuals present a difficult target; even after claiming multiple victories, the United States still argues that it must take the fight to the terrorists, "to keep them on the run."[141] However, "terror," is the ultimate rubric, for the war on terror can never be won, because fear itself can never be defeated.[142]

Moreover, there is ample evidence that U.S. claims of acting on behalf of international peace and security are less than sincere. Although the United States claims to be adapting to new threats, it has more often than not stood in the way of the international community's efforts to rid the world of these threats. It was the United States that prevented the adoption of a protocol on biological weapons, while at the same time minimizing its cooperation on the Chemical Weapons Convention.[143] Also, the United States Senate blocked the Comprehensive Nuclear Test-

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136. *Id.*

137. Bonnie Azab Powell, *Linguistics Professor George Lakoff Dissects the "War on Terror" and Other Conservative Catchphrases*, UC BERKELEY NEWS, Aug. 26, 2004, http://www.berkeley.edu/news/media/releases/2004/08/25_lakoff.shtml (quoting George Lakoff).

138. *Id.*

139. *Id.*

140. *See supra* note 127 and accompanying text.

141. 2006 U.S. NATIONAL SECURITY STRATEGY, *supra* note 4, at 8.

142. *Cf. id.* ("The war against terror is not over. America is safer, but not yet safe.)

143. Paulus, *supra* note 2, at 722-23 & nn.131-32.

Ban Treaty and refused to ratify the Landmines Convention.[144] Thus, the lack of an international apparatus to prevent the spread of WMD and other dangerous weapons is the fault of not only "rogue states," but also U.S. reluctance to subject itself to international law.[145] In addition, the United States has actively deterred the establishment of an effective system to criminally prosecute the proliferation of WMD at the Rome conference on the International Criminal Court.[146] As one critic noted: "As long as the United States . . . obstruct[s] an effective multilateralism, arguments as to the ineffectiveness of international institutions sound hollow."[147]

The least generous reconciliation of fact and representation is that the United States is outgrowing its hegemonic status and evolving into an empire; the most generous explanation is that the United States simply does not trust anyone else to care for its defense.[148] Yet, when the quest for security comes at the expense of international law and engenders a willingness to infringe upon other nations' sovereignty, it cannot be just. Although ICJ rulings against a hegemonic power regarding its political or strategic initiatives may be ignored or their enforcement blocked by the Security Council, such a ruling would seriously impair the legitimacy of U.S. actions and might mobilize other states against such self-aggrandizement, for "[the U.S. Administration] will learn sooner or later that hegemony, unlike empire, rests on consent."[149] In addition, such rulings might influence countervailing forces within the United States and spur them to push their country back toward a more legitimate, multicultural social democracy.

E. The Legal Standing of Preemptive Self-Defense

Political rhetoric notwithstanding, the United States is well aware that the ICJ in *Nicaragua* culled the political justifications from its argument and looked only at the legal bases for the use of force.[150]

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144. *Id.* at 723. In addition, certain U.S. domestic policies have had the same negative impact on security. For example, at a time when the Pentagon and the federal government are scouring for foreign linguists, at least twenty-five Middle Eastern language speakers and up to eighty-six in total have been discharged for being homosexual, in violation of the U.S. Military's "Don't Ask, Don't Tell" policy. *See* Pamela Hess, *Military Discharged 26 Mideast Linguists*, UNITED PRESS INT'L, Jan. 13, 2005.

145. Paulus, *supra* note 2, at 722-23 & n.131.

146. *Id.* at 722-23.

147. *Id.*

148. *See infra* Part VI.

149. Michael Walzer, *Is There an American Empire?*, DISSENT, Fall 2003, at 29.

150. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 70-71, 106, 109-10, 133-34 (June 27).

Nicaragua complained that U.S. references to self-defense were pretexts for other political goals, but had the United States been able to proffer legitimate reasons for the use of force, then those political goals would not have invalidated such a use of force.[151] Thus, no matter the goals of the U.S. hegemon, if its lawyers can successfully convince the ICJ that Preemptive Self-Defense comports with international law, it will ultimately be ruled valid. To do so, the United States must be able to reconcile this doctrine with either customary international law or Charter law.

However, the ICJ holding in *Nicaragua* precludes the acceptance of Preemptive Self-Defense under customary law.[152] In applying customary law on the use of force, the court held that "[i]n the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack."[153] In addition, the French version of the decision is even clearer: "using the exclusive locution '*que si'* (only if)—'only if' the state concerned has been the victim of an armed attack."[154] The ICJ reiterated this requirement in *Oil Platforms*.[155] It is thus indisputable that the requirement of an "armed attack" is a requirement to self-defense under contemporary customary international law.[156] Therefore, Preemptive Self-Defense cannot be supported by customary law.

Nonetheless, there is an argument that Preemptive Self-Defense is in line with Charter law, even without having to resort to comparisons of Anticipatory Self-Defense or use of the Caroline Doctrine.[157] To do this, one must consider Charter law under civil law—as most of the world does—not common law; while common law jurists base law on precedents, civil law scholars look for reasons.[158] Under standard treaty interpretation, the armed attack requirement of article 51 of the Charter "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms."[159] The results from such an

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151. *Id.* at 70-71.

152. This analysis is in addition to and separate from the distinction from "Anticipatory Self-Defense," discussed *supra* Part IV.A.

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

154. Zoller, *supra* note 40, at 335 (citing the French publication of *Nicaragua*, 1986 I.C.J. at 103). "Dans le cas de la légitime défense individuelle, ce droit ne peut être exercé que si l'Etat intéressé a été victime d'une agression armée." *Nicaragua*, 1986 I.C.J. at 103 (French version).

155. Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 186-87 (Nov. 6).

156. Zoller, *supra* note 40, at 335.

157. *See id.*

158. *Id.*

159. Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 340 [hereinafter Vienna Convention].

interpretation must be discarded if they are "manifestly absurd or unreasonable."[160] To a civil law jurist, it may well be absurd and unreasonable to ask states "to wait like sitting ducks for the 'wanton destruction and the targeting of innocents [by] rogue states and terrorists.'"[161] But like so many U.S. arguments discussed herein, which sound reasonable, such logic ultimately fails when examined closely.

The Bush Administration's version of Preemptive Self-Defense allows the United States to strike at any foe it believes is a threat. In particular, President Bush has singled out those states against whom, were they to possess WMD, the United States would use force, unilaterally if need be. For example, President Bush has stated that, "[t]rusting in the sanity and restraint of Saddam Hussein is not a strategy, and it is not an option."[162] Yet, after examining the Charter, the ICJ refused to hold that the mere possession of nuclear weapons (and, by implication, all other less destructive weapons) constituted the use of force or the threat of the use of force.[163]

Even regarding more conventional threats to a state's security, the U.S. stance is a misrepresentation of international law. One need not remain still like a "sitting duck" if one state knows another is going to attack it; in such a case, that state would have full recourse to Anticipatory Self-Defense, as established under the Caroline Doctrine and customary law, which remains valid alongside Charter law.[164] Thus, the appeal that the United States makes to its populace is nothing more than a politic of fear to those who understand the need to feel safe but not the nuances of international law. Preemptive Self-Defense is not necessary against an evident threat; in such a scenario, Anticipatory Self-Defense will ably protect that state and its inhabitants and thus prevent any "absurd or unreasonable" results.

Further, if the standards for evaluating the legality of Anticipatory Self-Defense are broadened as far as the United States would have, what is to preclude a nation facing imminent attack by a preempting nation from being justified in launching its own preemptive attack?[165] This scenario creates a logical paradox, whereby each country in a preemptive

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160. *Id.* art. 32.

161. Zoller, *supra* note 40, at 336 (quoting 2002 U.S. NATIONAL SECURITY STRATEGY, *supra* note 84, at 15).

162. 2003 State of the Union, *supra* note 107.

163. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 263-64 (July 8).

164. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 110-11 (June 27).

165. *See* Martinez, *supra* note 6, at 165.

scenario would be arguably justified under international law by lesser and lesser standards, sliding down a slippery slope, as each one suspects the impending attack of the other. Such a *reductio ad absurdum* could not possibly lead to international peace and security, but would create an absurdity that would nullify the very law that this doctrine purported to support.

Another useful analytical tool for analyzing the Preemption Doctrine is that of the philosophical *dispositif* of the Categorical Imperative; that is, that one should "[a]ct in conformity with that maxim, and that maxim only, which you can at the same time will to be a universal law."[166] The question under this mode of analysis would therefore be: would the United States will that each state have the right to utilize Preemptive Self-Defense? To critics of U.S. policy, the answer has been a resounding "no."[167]

Outside observers are not the only ones to have answered this question. The U.S. administration has explicitly stated that the Bush Doctrine denies the right of preemption to "rogue" states.[168] In this regard, "the Bush Doctrine purports among other things to concede to some states (e.g., Israel, France, and India) but not others (e.g., Iran [or Iraq]) the right to provide for their defense in whatever manner they deem fit."[169] Therefore, such a doctrine cannot be said to be acting in accordance with Charter law, because it challenges one of the cornerstones of the United Nations itself, namely, the legal equality of states.[170]

In sum, the Preemption Doctrine, as defined under the larger Bush Doctrine, does not comport with either customary international law or Charter law and thus has no legal basis. Further, with Anticipatory Self-Defense accessible to all nations, there is no rational reason to alter the international law on the use of force.

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166. *See* Immanuel Kant, *Fundamental Principles of the Metaphysics of Morality*, *reprinted in* READINGS IN ETHICS 271 (Gordon H. Clark & T.V. Smith eds., 2d ed. 1946) (1785) (emphasis omitted).

167. *See, e.g.*, THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 98 (2002) ("The law cannot have intended to leave every state free to resort to military force whenever it perceived itself grievously endangered by actions of another, for that would negate any role for law."); Paulus, *supra* note 2, at 714-15.

168. *See* Martinez, *supra* note 6, at 181.

169. Tom J. Farer, Editorial Comment, *Beyond the Charter Frame: Unilateralism or Condominium?*, 96 AM. J. INT'L L. 359, 360 (2002).

170. *Id.*

V. THE IRAQ WAR AND INTERNATIONAL LAW ON THE USE OF FORCE

A. The U.S. Approach to the Legal Justification for the War on Iraq

In the wake of September 11th and U.S. President Bush's "[e]ither you are with us, or you are with the terrorists," speech,[171] the United States has increasingly asserted a right to Preemptive Self-Defense and has denied the existence of any multilateral checks on its power.[172] Curiously, then, despite the fact that a possible conflict in Iraq seemed to be a perfect opportunity to exercise Preemptive Self-Defense, the United States steadily backed away from this doctrine as the time for the use of force neared.[173] Considering that Iraq had launched no armed attacks against the United States, nor had threatened any of its essential security interests, the Iraq scenario "possessed the right factual matrices associated with claims of pre-emptive self-defence."[174] The United States saw a *possible* threat in Iraq and was determined to end that potentiality.[175] However, instead of forging ahead full steam under this doctrine, the U.S. policy-makers lost listeners in a morass of explanations: part of an ever-shifting political, legal, and factual *dispositif*.[176] Given the massive resources at the United States' disposal, this was likely not done without forethought. Rather, this "extraordinary cocktail of historical and modern and changing and speculative circumstance"[177] was enough to keep jurists boggled until well after the U.S. military presence in Iraq was inextricable. With Security Council condemnation impossible due to U.S. veto power, and the ICJ process notoriously slow,[178] the United States was free to act according to its will.

This "cognitive stew" of justifications for the use of force in Iraq has led to the confusion surrounding assessments of the legality of the war in Iraq.[179] Yet much of this confusion is derived from the obfuscation

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171. George W. Bush, U.S. President, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

172. Paulus, *supra* note 2, at 725; *see also* 2006 U.S. NATIONAL SECURITY STRATEGY, *supra* note 4, at ii, 18-24, 44-46.

173. Kritsiotis, *supra* note 106, at 247.

174. *Id.*

175. 2003 State of the Union, *supra* note 107.

176. Kritsiotis, *supra* note 106, at 234-35.

177. *Id.* at 235.

178. *See* Sarah E. Tilstra, Comment, *Prosecuting International Terrorists: The Abu Sayyaf Attacks and the Bali Bombing*, 12 PAC. RIM L. & POL'Y J. 835, 860-61 (2003). Consider the *Oil Platforms* case, which although filed in 1992, was not decided until 2003. Icj-cij.org, List of Cases Brought Before the Court since 1946, http://www.icj-cij.org/icjwww/idecisions.htm.

179. Kritsiotis, *supra* note 106, at 274.

of legal justifications by political rhetoric on the use of force.[180] This muddled *dispositif* has hindered any conclusions about the legality of such actions, even "provisional conclusions," on the *jus ad bellum* of U.S. actions.[181] However, an accurate assessment of such actions will cull the political justifications as legally irrelevant.[182] Therefore, to analyze properly how the United States is held accountable *vel non* according to international law, the rhetoric that the American leaders deliver to their public must be ignored, and the official U.S. supplications to the United Nations should be considered.

On the day that armed attacks commenced in Iraq, the United States and United Kingdom filed communications with the Security Council.[183] Thus, U.S. endeavors to control the global apparatus of international law notwithstanding, the United States still has found it necessary to work within that apparatus, because even hegemony rests on the consent of other nations in the field of public opinion, if nowhere else.[184]

B. Chapter VII Reliance for the Use of Force in Iraq

No state has the right to use force against the territorial integrity or political independence of another.[185] According to Charter law, the only exceptions to this cornerstone of international harmony are: (1) a state always has the right to defend itself when faced with an armed attack,[186] and (2) it is acceptable when such action is explicitly authorized by the Security Council.[187] Because the right to self-defense is the only form of armed attack allowed unilaterally, it is subject to the strict scrutiny already herein discussed and subject to review by both the Security Council and the ICJ. However, the use of force authorized by the Security Council will not be reviewed by the ICJ, and if the court senses even the least conflict with that body, it will defer.[188] Therefore, despite arguing that Preemptive Self-Defense was a valid doctrine, the U.S. and U.K. envoys to the United Nations tried very hard to convince the Security Council to authorize military action against Iraq under its

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180. *Id.*
181. *Id.* at 275.
182. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 70-71, 106, 109-10, 133-34 (June 27).
183. Kritsiotis, *supra* note 106, at 241.
184. *See id.*
185. U.N. Charter art. 2, para. 4.
186. *Id.* art. 51.
187. *See generally id.* ch. VII.
188. Gray, *supra* note 8, at 897, 903-05.

Chapter VII powers.[189] When the Security Council refused, the United States and the United Kingdom linked together Security Council resolutions over the last ten-plus years and claimed that Iraq was in material breach of these resolutions and, consequently, that the use of force had been implicitly authorized by the Security Council.[190] It is important to understand, however, that there was never an explicit mandate for the use of force against Iraq.[191]

Logically, the United States would not have sought a new Security Council resolution had it been confident that the use of force was justified under past resolutions.[192] It is unsurprising, then, that a thorough examination of the facts shows that the case for war was not what the United States represented it to be, and thus the use of force against Iraq should not be considered as validly employed pursuant to Security Council resolutions.

First of all, the Vienna Convention on the Law of Treaties provides that a "material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty."[193] But because it was the Security Council—not the United States or the United Kingdom—that declared there were recurring material breaches and warned of serious consequences if Iraq did not comply, the Security Council was the party that should have decided if there was further breach.[194] In addition, although these earlier resolutions had declared the ceasefire after the Gulf War in the early 1990s, such a ceasefire could not have been cancelled by individual Council members.[195] Rather, the ability to end the ceasefire would have fallen to the Security Council *in toto*.[196]

Another shortcoming in the U.S. argument is that even if the ceasefire had been lifted, that would have left in place the original Chapter VII resolutions regarding the use of force against Iraq. The aims of these resolutions were remarkably modest compared to the current foreign policy goals in Iraq: "Member States co-operating with the Government of Kuwait . . . [are] to use all necessary means to uphold and implement resolution 660 (1990) [demanding that Iraq evacuate Kuwaiti territory] . . . and to restore international peace and security in the

189. Kritsiotis, *supra* note 106, at 241-42.
190. *See generally id.* (examining U.S. and U.K. constructed reliances on U.N. resolutions).
191. *Id.* at 264.
192. *See* Paulus, *supra* note 2, at 698.
193. Vienna Convention, *supra* note 159, art. 60.
194. *See* Paulus, *supra* note 2, at 700.
195. *Id.*
196. *Id.*

area."[197] The first U.S. President Bush complied with the limits of this resolution, but his eventual successor, George W. Bush, seems to have no such compunctions. For all of these reasons, the current occupation of Iraq and the subsequent nation-building cannot possibly be a logical derivation from these earlier resolutions.

Even the 2002 Security Council resolution, giving Iraq "a final opportunity to comply with its disarmament obligations,"[198] was passed with the specific intent that there was no "hidden trigger" for the use of force if there was failure to comply with this resolution.[199] Indeed, no less than three permanent members of the Security Council threatened to veto the resolution without this provision.[200] In sum, no prior Security Council resolution authorized the use of force against Iraq, regardless of U.S. claims to the contrary.[201]

C. Preemptive Self-Defense Waylaid

Despite heavy U.S. rhetoric regarding the Preemption Doctrine after the September 11th attacks, the United States slowly backed away from this position as it made its case for war.[202] Instead, the United States relied upon the previously discussed intricate representation of Security Council "authorization," and only a passing mention was made of the "necessary steps" that would be taken "to defend the United States and the international community from the threat posed by Iraq *and* to restore international peace and security in the area."[203] This vague and terse reference to Preemptive Self-Defense was as close as the United States came to citing the doctrine in the entire forty-four lines of reasoning and legal justification provided to the Security Council for the use of force in Iraq.[204]

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197. S.C. Res. 678, U.N. SCOR, 45th Sess., 2951st mtg., at 1, U.N. Doc. S/RES/0678 (Nov. 29, 1990).

198. S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., at 3, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

199. Irak: Joint Statement from the Popular Republic of China, the Federation of Russia, and France (Nov. 8, 2002), *available at* http://www.un.int/france/documents_anglais/021108_cs_france_irak_2.htm.

200. *See* Paulus, *supra* note 2, at 697.

201. Letter Dated 20 March from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/351, 1 (Mar. 21, 2003) [hereinafter U.S. Letter to U.N.].

202. *See* Martinez, *supra* note 6, at 152.

203. U.S. Letter to U.N., *supra* note 201, at 2 (emphasis added).

204. *Id.* at 1-2. It is also worth noting that the United Kingdom made absolutely no mention of Preemptive Self-Defense in its communication to the Security Council. Letter Dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and

Apparently, even the U.S. administration felt that the Preemption Doctrine was more valuable as political capital than as valid international law. The reduced role of Preemptive Self-Defense in its official communications to the Security Council was a far cry from the great expectations held out for this doctrine as set out in the National Security Strategy of September 2002.[205]

D. The Use of Force Against Terrorism as Justification

The United States also added allegations of links to terrorism in an attempt to justify its use of force on Iraq.[206] Was this a serious security concern, politically motivated, or a legal justification? As the United States was aware of no evidence of a link between Iraq and al-Qaeda, the first choice seems unlikely.[207] Certainly there was political advantage from such an accusation, because American citizens were still understandably angered by al-Qaeda's attacks on the United States, and even other nations sympathized with victims of those attacks. But as a matter of legal justification, the tenuous nature of the proof rendered on the connection between Iraq and al-Qaeda could not have validated the use of force in Iraq.[208] Rather, the U.S. presentation before the Security Council in February 2003 just before the outbreak of war, which linked Iraq and terrorism, could only have been to build the representation of the situation as one calling for urgent action.[209]

Another possibility was that the link between Iraq and terrorism was to send a message to terrorists through the use of force:

Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/350, 1 (Mar. 21, 2003).

205. *See* Kritsiotis, *supra* note 106, at 248. Incredibly, nearly three years later, the United States now trumpets the War on Iraq as a successful exercise in "proactive counterproliferation efforts" by occluding the very possibility that Iraq would gain WMD, and thus posing this war as justification for future preemptive strikes. *See* 2006 U.S. NATIONAL SECURITY STRATEGY, *supra* note 4, at 18, 23-24.

206. *See* James Risen, *Terror Acts by Baghdad Have Waned, U.S. Aides Say*, N.Y. TIMES, Feb. 6, 2002, at A10.

207. *Id.* ("The Central Intelligence Agency has no evidence that Iraq has engaged in terrorist operations against the United States in nearly a decade, and the agency is also convinced that President Saddam Hussein has not provided chemical or biological weapons to Al Qaeda or related terrorist groups."); *see also* Christopher Marquis, *Powell Admits No Hard Proof in Linking Iraq to A1 Qaeda*, N.Y. TIMES, Jan. 9, 2004, at A10, ("[Then U.S.] Secretary of State Colin L. Powell conceded . . . 'I have not seen smoking-gun, concrete evidence about the connection . . . [but] the possibility of such connections did exist.'").

208. Kritsiotis, *supra* note 106, at 259.

209. Colin Powell, U.S. Secretary of State, Colin Powell Addresses the U.N. Security Council (Feb. 5, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/02/20030205-1.html; *see* Kritsiotis, *supra* note 106, at 259.

> [A]fter 9/11 America needed to hit someone in the Arab-Muslim world. . . .
>
> The only way . . . was for American soldiers, men and women, to go into the heart of the Arab-Muslim world, house to house, and make clear that we are ready to kill, and to die, to prevent our open society from being undermined by this terrorism bubble.[210]

Although this is not a valid legal rationale according to *Nicaragua*, politically motivated goals, no matter their import in the decision making process, become irrelevant if there are valid legal justifications for the use of force.[211] However, without any proof that terrorist acts perpetrated by Iraq affected or threatened U.S. essential security interests, this rationale also fails.

E. The Fight for Freedom and Democracy

Another oft-cited justification for the use of force in Iraq is that doing so promotes freedom and democracy, that President Bush has in fact been acting on behalf of the best interests of the Iraqi people.[212] However, this rationale cannot withstand the scrutiny of international law. Fighting a war to establish freedom and democracy flies squarely in the face of the *Nicaragua* holding, which objected to promoting any political ideal over another. In that case, the *Nicaragua* court strongly rebuked the United States for undermining and disregarding the "fundamental principle of State sovereignty, on which the whole of international law rests, and [making nonsense of] the freedom of choice of the political, social, economic and cultural system of a State."[213]

The ideological waters are muddied even further when it becomes clear that the United States is either insincere or blinded by its own hegemonic discourse. In pursuing "democratic peace" as part of the Bush Doctrine,[214] U.S. President George W. Bush has claimed that "[f]reedom is worth fighting for, dying for, and standing for—and the

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210. Thomas L. Friedman, *Because We Could*, N.Y. TIMES, June 4, 2003, at A31. For further discussion of this argument, see Paulus, *supra* note 2, at 695-96 & n.15.

211. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 70-71, 106, 109-10, 133-34 (June 27).

212. George W. Bush, U.S. President, President's Remarks at the United Nations General Assembly (Sept. 12, 2002), http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html ("Liberty for the Iraqi people is a great moral cause, and a great strategic goal. The people of Iraq deserve it; the security of all nations requires it. Free societies do not intimidate through cruelty and conquest, and open societies do not threaten the world with mass murder. The United States supports political and economic liberty in a unified Iraq.").

213. *Nicaragua*, 1986 I.C.J. at 133.

214. *See* Paulus, *supra* note 2, at 727.

advance of freedom leads to peace."[215] Yet it is hard to see how freedom can lead to peace when one must fight and die for it and bring it forcibly to another. This is doubly so when the United States refuses to take into account intercultural values and their impact on government.[216]

Regardless of how noble such causes may or may not be, bringing freedom and democracy to another state cannot be used as justification for the use of force. This should have been clear from examining the *Nicaragua* holding, which may be the reason that the U.S. government did not plead this issue to the Security Council.[217]

F. Humanitarian Intervention

Although U.S. rhetoric speaks often of humanitarian relief for the Iraqi people, this is another rationale that was never formally argued before the Security Council.[218] This is because the legality of such use of force is clear. The *Nicaragua court* explained in no uncertain terms that "the use of force could not be the appropriate method to monitor or ensure such respect [for human rights]."[219] To be sure, such an intervention would be difficult to measure; how would either an intervenor or a court decide what level of response was appropriate?[220] Similar to the Preemption Doctrine, this justification would grant too much discretion to the acting nation. Further, other critics have noted that this justification is suspect to manipulation. What one state calls "humanitarian aid," another might call "imperialism."[221] Thus, humanitarian intervention could not have provided a legal justification for the use of force in Iraq.

G. Evaluation of the Use of Force in Iraq

For all the reasons given in this Part, it is clear that there were not any valid legal justifications for the use of force in Iraq. Therefore, these

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215. George W. Bush, U.S. President, President Bush Discusses Freedom in Iraq and Middle East (Nov. 6, 2003), http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html.

216. Paulus, *supra* note 2, at 729 ("The insistence on the primacy of one's own values, however, followed, *in extremis*, by the use of force, does not entail persuasion of others, but resistance. The connection of use of force with the spread of democracy is not a recipe for democratic peace, but risks inter-cultural war.").

217. *See* U.S. Letter to U.N., *supra* note 201; *see also* Kritsiotis, *supra* note 106, at 273.

218. Kritsiotis, *supra* note 106, at 271.

219. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 134-35 (June 27).

220. *See* ROBERT COOPER, THE BREAKING OF NATIONS: ORDER AND CHAOS IN THE TWENTY-FIRST CENTURY 73 (2003) ("Humanitarian interventions are particularly dangerous for those who intervene. It is difficult to set clear objectives: it is difficult to know where to stop.").

221. *See, e.g.*, SPANOS, *supra* note 95, at 60-61.

actions were in violation of international law. However, because the use of force nonetheless took place, there will be inevitable repercussions on the future of international law. Already, there is speculation that the U.S. actions in Iraq will create a dangerous example for other nations to follow. Nevertheless, the U.S. hegemon has not yet set international law on an inexorable path away from shared sovereignty; the wane of collective international law may be but a temporary phase in international jurisprudence. That is, unless U.S. power waxes such that its rise is unchecked by either external or internal forces, and its political discourse reaches beyond its overt limitations.

VI. BEYOND HEGEMONY

A. Regimes of Power and the Use of Force

International relations consist of one of three regimes of power: equilibrium (balance of power), hegemony, or empire.[222] Equilibrium is a peace created by a counterbalancing of world powers that rival and check each other, such as during the Cold War.[223] Hegemonic power is marked by an order established and maintained by a lone dominant state, although through cooperation with other states.[224] The imperial power, however, "reserves to itself the monopoly of legitimate violence."[225] Each one of these regimes affects the international legal *dispositif* in different ways.[226]

The international legal apparatus established after World War II, including the Security Council and the ICJ, built to oversee common laws, norms, and *jus cogens*, reflects the world of equilibrium.[227] Accordingly, such a system utilizes subjective standards, applied equally to each state, to determine the legality of the use of force.[228] The hegemon, however, establishes its own definitions of international law and is able to manipulate the workings of the international apparatus as a whole.[229] By contrast, the empire answers to no one; the legitimation of

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222. RAYMOND ARON, PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS 151 (1966).

223. *Id.*

224. *Id.*

225. *Id.*

226. *See* Harvey Rishikof, *When Naked Came the Doctrine of "Self-Defense": What Is the Proper Role of the International Court of Justice in Use of Force Cases?*, 29 YALE J. INT'L L. 331, 335 (2004).

227. *Id.*

228. *Id.*

229. *Id.*

force and indeed all international law flows through its own internal political organs.[230]

Clearly, today's international apparatus has lost its balance of power. The United States stands as the lone superpower.[231] Because the United States still works through the United Nations and appears concerned with its allies' opinions, it falls within the hegemonic classification. While the United States has already herein been referred to as such, this categorization serves to illuminate the issue on a comparative level. The distinction from empire is also important, as is analyzing the continuing evolution of U.S. actions on the international stage in this context.

B. Deconstructing U.S. Hegemonic Discourse

When the U.S. hegemonic discourse is deconstructed, it is difficult to discern how the United States has acted with the interests of the international community in mind. As the lone superpower, the United States has taken advantage of the sovereign rights granted to it by the international legal apparatus.[232] That is, the United States has calculatingly imposed international obligations on other states, while remaining unburdened itself.[233] In addition, the United States has been able to exert enough influence through this system to prevent the emergence of certain laws and to violate existing international law, although it has so far been unable to craft international law by itself.[234] Thus, the legitimacy of U.S. actions still rests within the purview of the international community.

In the continuing quest to unburden itself of these limits on its sovereignty, the United States may ultimately seek to transcend the inherent limits of hegemony. Nonetheless, the need for global consent for its actions, or at least the semblance of consent, implies that the United States has not yet evolved past hegemony. The impetus to build alliances, endemic to U.S. uses of force, could be construed as a sign that it is not yet an imperial power. But both hegemons and empires build alliances: it is only the "center of gravity" of such alliances that shift.[235] Potentially, the two uses of force against Iraq demonstrate such a shift. The Gulf War fought in the 1990s was truly a coalition of nations, fought

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230. *Id.*

231. *Id.* at 339. Although certain states—in particular China—have the potential to create a new equilibrium, none have thus far exerted an equivalent counterbalancing force against U.S. policies.

232. *Id.*

233. Paulus, *supra* note 2, at 725.

234. *Id.*

235. *See* Rishikof, *supra* note 226, at 335-36.

with limited goals at the behest of the Security Council and thus within the bounds of international law.[236] By contrast, the most recent actions in Iraq were fought against the majority of the world's consent and were less an endorsement of national sovereignty as they were an example of U.S. dominance.[237] This is especially true when one considers that most of the other coalition members were states that depended on the United States for their own security.[238]

The U.S. refusal to participate in the International Criminal Court (ICC) provides an apt example of the governing power dynamics that drive the United States in contradistinction to its own self-representations. Arguably, the ICC could serve as an excellent tool against terrorism by providing a neutral forum with uniform laws, where countries would accept that their citizens would receive fair trials.[239] All the United States would need to do to allay its fears is ensure that its citizens do not commit "war crimes" or "crimes against humanity."[240] Instead, the United States has refused to work with the ICC and has opined that it would "subvert United States jurisdiction, [and] trump United States sovereignty."[241] This statement, of course, presupposes both that the United States has jurisdiction across the globe and that any other institution that has the ability to judge an American who has done something wrong overseas infringes upon U.S. national sovereignty.

Moreover, the United States has passed the American Servicemembers' Protection Act, which "terminates military aid to states parties, precludes United States personnel assignments to missions in their territory and, with the 'Hague Invasion Clause,' commands the President to employ 'all means necessary,' including military force, to rescue any United States national in ICC custody."[242] In addition, the United States has obtained separate bilateral immunity agreements from sixty countries, many of which are either smaller states or those with weak economies.[243] With many of these states, the United States will withdraw military assistance if an agreement is not reached.[244] This hardly seems the approach of a state concerned with how others states

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236. *See* Paulus, *supra* note 2, at 699.
237. *Id.* at 720.
238. *See* COOPER, *supra* note 220, at 163.
239. *See* Tilstra, *supra* note 178, at 862.
240. *See id.*; *cf.* Bradford, *supra* note 117, at 666-67 (discussing this argument).
241. Bradford, *supra* note 117, at 658-59.
242. *Id.* at 664 (footnotes omitted) (referring to the American Servicemembers' Protection Act of 2002, 22 U.S.C. §§ 7421-7433 (2002)).
243. Marjorie Cohn, *How U.S. Opposition to International Court Jeopardizes U.S. Troops*, CNN, Sept. 10, 2003, http://www.cnn.com/2003/LAW/09/10/findlaw.analysis.cohn.peacekeepers/.
244. *Id.*

view its actions. Instead it seems more the patchwork beginnings of a new dominant international legal apparatus, one held together by individual contracts and treaties.

Increasingly, the United States claims to know what is in the best interests of the international community. In the past, the United States has only found it necessary to act when the international community did not, as exemplified by the incidents that took place in the *Oil Platforms* case.[245] Yet with the 2003 invasion and occupation of Iraq, the United States has only marginally tried to involve the international community. Unlike the use of force against Iran's oil platforms, the United States and its allies did not wait until their forces were under attack. Nor does the United States even claim to need to know when or where such an attack might occur—if ever in order to justify the use of force.[246] Perhaps the next time it employs the use of force, the United States will not even consult the international community.

The U.S. representation of the Iraq invasion is that it did so only to "improve" international peace and security.[247] However, it simply cannot be said that international peace and security, no matter the aims of the intervenor, are better served by one nation unilaterally defining right and wrong and applying its moral code universally to inherently different states. This is especially true when respect for national sovereignty is supposed to be the cornerstone of international collective security.

C. U.S. Influence in Defining International Law

As a hegemonic power, the United States often attempts to define international law and is able to ignore adverse rulings of international bodies. For example, in a response paper to *Oil Platforms*, the legal advisor to the United States Department of State continually disputed the ICJ's interpretations of key terms and actually chastised the court on the proper assessment of certain criteria.[248] This article concluded that "[t]he United States, for its part, will continue to follow what it understands to be a correct interpretation of international law on these points."[249] Apparently, the United States considers the Charter and ICJ decisions unenforceable.

The vantage point of the hegemon also gives the United States the belief that it has the right to sit above the international apparatus and

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245. *See* Rishikof, *supra* note 226, at 341.
246. 2006 U.S. NATIONAL SECURITY STRATEGY, *supra* note 4, at 23.
247. *Id.* at 23-24.
248. Taft, *supra* note 88, at 303-06.
249. *Id.* at 306.

judge it. U.S. officials have often viewed the United Nations and its political organs as obsolete and unable to cope with the "new realities" of a post-9/11 world.[250] Consider the words of Pentagon advisor Richard Perle: "As we sift the debris of the war to liberate Iraq, it will be important to preserve, the better to understand, the intellectual wreckage of the liberal conceit of safety through international law administered by international institutions."[251] To the United States, the idea of collective security through the civilization of common understanding and respect seems lost to the concept that brute power will right all wrongs.[252]

Confronted by a United Nations that refuses to endorse its international objectives, the United States has attempted to use its influence to call for reforms of the United Nations, indicating that this institution must change to earn respect.[253] With its focus shifting to alleged improprieties at the United Nations, the United States innocuously added to its argument that "'[t]he United Nations was created to spread the hope of liberty, and to fight poverty and disease, and to help secure human rights and human dignity for all the world's people.'"[254] This amalgamated statement takes the focus off of U.S. hegemony and, through misdirection, creates a gloss over its own "benevolent" democratic discourse. It is through this seductive "improvement," this cultivating, developing, and nurturing role that the United States claims to be the fulfillment of a free democratic society and thus distinct from the old imperial Europe.[255] Indeed, most Americans would not find fault with this discourse. Yet it is clear that this was *not* the reason the United Nations was founded. This Comment has emphasized repeatedly that the ICJ has explicitly declared that each nation has the right to sovereignty and to choose its own method of governance.[256] The purposes of the United Nations are unambiguously stated in chapter I, article 1 of the Charter:

> 1. 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 for the suppression of acts of aggression or

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250. *See* Paulus, *supra* note 2, at 691-92; *see also* 2006 U.S. NATIONAL SECURITY STRATEGY, *supra* note 4, at 45-46.

251. Richard Perle, *United They Fall*, THE SPECTATOR, Mar. 22, 2003, at 22.

252. *See* Paulus, *supra* note 2, at 692.

253. Sam Knight, *Bush Tells UN It Must Change To Earn Respect*, TIMES (London), Sept. 14, 2005, http://www.timesonline.co.uk/article/0,,3-1780389,00.html.

254. *Id.* (quoting George W. Bush, U.S. President).

255. *See* SPANOS, *supra* note 95, at 58.

256. *See supra* notes 49, 57, 213 and accompanying text; *see also infra* note 268 and accompanying text.

> 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.
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
> 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.[257]

Nonetheless, the U.S. representations of the United Nations continually diverge from this reality. For example, portraying liberal capitalist democracy as a self-evident liberty that the world not only wants, but deserves, the United States has additionally influenced international law through the development of programs such as the United Nations Democracy Fund.[258] In so doing, the United States purports to be acting out of benevolence and thus must work to "win the hearts and minds" of all who do not yet recognize the benefits of democracy, or are struggling to achieve it—as in Iraq.[259] However, this effort obscures an increasingly greater U.S. influence on the international legal apparatus, which is becoming more and more American in how it thinks, speaks, and acts; even when grounded in opposition to the United States, nations increasingly do so in fundamentally American ways.[260]

D. The Representation of Freedom and Democracy on the International Stage

Corollary to the increasingly influential U.S. discourse is the primacy of its worldview. This subtle shift does not just appear in the self-representation of the hegemon but upon the international legal apparatus as a whole. Just as the United States has changed its rationales for launching the war against Iraq, U.S. representation of the role of the United Nations is equally malleable.

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257. U.N. Charter art. 1, para. 1.

258. *See* Bureau of Int'l Organizational Affairs, U.S. Dep't of State, *Key U.S. Initiatives at the United Nations*, Sept. 9, 2005, http://www.usembassy.it/file2005_09/alia/a5091201.htm.

259. *See* SPANOS, *supra* note 95, at 181.

260. *See id.* at 180-81.

When U.S. President Bush addressed the United Nations General Assembly in late 2004, he spoke with great respect for the United Nations and appealed to its seminal attributes, peace and security, while lauding freedom and democracy as ways to achieve those goals.[261] Yet when speaking to the American public, President Bush has stated that the United States and the United Nations "are working to spread democracy" to achieve international peace and security.[262] This reversal of means and ends highlights the U.S. propensity to define the very terms by which it would otherwise be obligated to achieve its desired ends.

Such semantics are no mistake. This approach has been further developed in the forum of public opinion of the United States by carefully building up a case for "reforming" the United Nations. These efforts culminated in December 2004 when the United States Congress initiated a task force to investigate reform and offered suggestions on how to allow the United Nations be "more effective in realizing the goals of its Charter."[263] Interestingly, this report was issued between the two statements above, which reverse means and ends. Calling for the United Nations to conform better to its own Charter had more legitimacy when the United States recognized the actual purposes of that institution, but less so when it asserted that the purposes of the international apparatus were its own.[264] The issue, then, is not whether these goals are laudable but whether one country has the right to force another to comply with its conceptions of morality and governance. While it may be natural for Americans to believe that all persons want to be free and partake in electing their leaders, it is quite another thing to presume that this desire "arises from the very design of human nature."[265] Moreover, can promulgating even the highest ideals ever be a justification for the use of force? If these ideals were such obvious, self-evident truths, would wars

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261. *See* George W. Bush, U.S. President, President Speaks to the United Nations General Assembly (Sept. 21, 2004), http://www.whitehouse.gov/news/releases/2004/09/20040921-3.html.

262. *See* Press Release, George W. Bush, U.S. President, President Appoints John Bolton as Ambassador to the United Nations (Aug. 1, 2005), http://www.whitehouse.gov/news/releases/2005/08/20050801.html.

263. NEWT GINGRICH & GEORGE MITCHELL, *Foreword* to UNITED STATES INSTITUTE OF PEACE, TASK FORCE ON THE UNITED NATIONS, AMERICAN INTERESTS AND UN REFORM 1 (2005), *available at* http://www.usip.org/un/report/usip_un_report.pdf.

264. *See, e.g.*, Kim R. Holmes, Assistant Secretary of the Bureau of Int'l Organizational Affairs, U.S. Dep't of State, Making the U.N. a Stronger Force for Freedom, Address Before the U.N. Foundation (Apr. 19, 2005), http://www.us-mission.ch/Press2005/0419UNstronger.htm ("We believe in the ideals on which the United Nations was founded, and we want the UN to be better able to achieve its important purposes. . . . And, we want freedom and democracy to spread. Wholesale.").

265. *Id.*

need to be fought to bring them to other nations? The answer must be no.

Nonetheless, the U.S. representation of its "truth" as the only truth is so central to its discourse that one of the polyvalent manifestations of this U.S. discourse is an insistence that the United Nations must reform itself to conform to these truths. Indeed, the United States Congress has passed measures threatening to cut funding to the United Nations if its demands for reform are not met.[266] Moreover, as one United States Senator declared: the new U.N. ambassador, John Bolton, would "fully dedicate himself to reforming a flawed U.N., to one that better advances the principles of democracy, freedom and respect for human rights."[267] As noble as this may sound, this position flies squarely in the face of the Charter, which recognizes each nation's right to sovereignty, regardless of its form of government, and completely disregards the ICJ ruling in *Nicaragua*, which explicitly held the same.[268]

It can be argued that the United States is taking a leadership in international affairs.[269] Yet when such leadership comes at the expense of the very laws it is purporting to uphold, it is hard to find the actions of that state legitimate.

E. The Goals of Empire Inherent in U.S. Discourse

Both the United States and certain critics would argue that in contrast to a state with imperial status and goals, America is an anti-empire, an alternative to Old World European imperialism.[270] Others suggest that democracy is a destroyer of empires, that the sense of

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266. *See* Phil Hirschkorn, *House Threatens To Withhold U.N. Dues*, CNN, June 20, 2005, http://edition.cnn.com/2005/US/06/18/un.reform/. The measure passed in the House; the Senate has introduced a similar measure, which is still under debate. *See* To Reform the United Nations, and for Other Purposes, H.R. 2745, 109th Cong. (2005), *available at* http://www.congress.gov/cgi-bin/bdquery/z?d109:H.R.2745:; A Bill to Seek Urgent and Essential Institutional Reform at the United Nations, S. Res. 1383, 109th Cong. (2005), *available at* http://www.congress.gov/cgi-bin/bdquery/z?d109:S.1383:.

267. Sharon Kehnemui Liss, *Bush Appoints Bolton to U.N. Job*, FOX NEWS, Aug. 1, 2005, http://www.foxnews.com/story/0,2933,164357,00.html (quoting U.S. Senator John Cornyn); *see also* 2006 U.S. NATIONAL SECURITY STRATEGY, *supra* note 4, at 46. The 2006 National Security Strategy calls for: "Reinvigorating the U.N.'s commitment reflected in the U.N. Charter, to the promotion of democracy and human rights." 2006 U.S. NATIONAL SECURITY STRATEGY, *supra* note 4, at 46. The term "human rights" appears in the Charter seven times. U.N. Charter, pmbl, arts. 1(3), 13(1)(b), 55(c), 62(2), 68, 76(c). The term "democracy" appears zero times. *See generally id.*

268. *See* U.N. Charter art. 1, para. 2; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 14, 133 (June 27).

269. *See, e.g.*, 2006 U.S. NATIONAL SECURITY STRATEGY, *supra* note 4, at 49.

270. *See, e.g.*, NIALL FERGUSON, EMPIRE: THE RISE AND FALL OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER 343-45 (2002).

identity and political community engendered by this mode of expression precludes empire.[271] However, these theories are predicated on the assumption that empire only comes through conquest or involves physical occupation.[272] There is no need to conquer a people and subjugate them if they have already have been inscribed with the same mode of thought and being as the would-be conquering nation. Although identity and political community may preclude one form of empire, it does not preclude all others. The transnational globalism inherent to the international discourse may seem to dilute a hegemonic or imperial control of being. However, this does not mean that the United States cannot be an imperial center, rather only that the global discourse is subject to being "Americanized" under the rubric of discovering "truths" and spreading "freedoms" and "liberties" which make invisible an imperial project.[273]

Nonetheless, even if the United States is capable of establishing a modern empire, many believe that the American public has no taste for this and that its resistance would make an American empire untenable. This may be true of empire by conquest, but not necessarily of empire by less overt means. Certainly, the American people want the benefits of empire: order, control, liberties, and luxuries. As the war in Iraq has shown, as long as the daily lives of American citizens are unchanged, they are willing to overlook the effect of U.S. power elsewhere. Underlying this acquiescence, however, is the invisibility of the U.S. discourse. Precisely because it represents itself as something it is not, the U.S. imperial project is weakest when its underlying motives are visible.

An example of such visibility was the Vietnam War.[274] It was a rare moment in U.S. history when the monumentalized versions of "truth" became inescapably visible, and Americans were forced to question the knowledge that they had about themselves and the nation that they believed in—a situation which was only exacerbated by the Watergate Scandal and the release of the Pentagon Papers.[275] This moment of visibility of the U.S. imperial project makes it all the more important that this era in history not be seen as discontinuous with U.S. hegemony, but rather as a fulfillment of it.[276] Only then can the current actions of the United States be understood correctly.

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271. *See* COOPER, *supra* note 220, at 14.
272. *See id.* at 61.
273. *See* SPANOS, *supra* note 95, at 180-81.
274. *Id.* at 155.
275. *Id.*
276. *Id.* at 160.

If the evolution of the U.S. hegemony is progressing toward empire, the next logical step is to usurp the legal apparatus overtly. Yet this step would need to rely upon *legitimacy*. Exposing the illegality of the war on Iraq and distancing the Preemption Doctrine from accepted law are thus important steps for both the international community and the American citizenry. It is incumbent upon those who would not see this imperial project continue to evolve to oppose it by thinking outside of "Americanization" and fostering a true multicultural social dialogue. The differences between peoples must be accepted, not as something to understand or to bring order to, but just to be.

VII. CONCLUSION

International peace and security are the explicit goals of the United Nations. However, these principles of modern international law cannot be protected by the Security Council. As long as that political body allows any nation to retain a permanent seat on the Council with veto powers, it cannot possibly prevent the depredations of one of those nations. Thus, if the ideals of shared sovereignty and international peace and security are to be protected, it must be through the ICJ. To do this, the ICJ must stand firm on established international law when the United States—or any nation—violates such law. The ICJ cannot wonder if its decisions will be ignored, rather it must stand on principle and trust that the rest of the world will support it. This also may alert the American people to a motive different and distinct from the public U.S. discourse.

The recent U.S. actions in Iraq are clear violations of international customary law, as well as Charter law. The Preemption Doctrine, especially as folded into the Bush Doctrine—which only allows nations of U.S. choosing to use it—unbalances the international order and serves only U.S. ends. Some have called the War on Terrorism (which allegedly includes the war on Iraq) as the next threat to civilization, the new barbarians at the gates of Rome.[277] However, if current affairs are any indication of reality, history does not yet seem to be repeating itself; the walls to the American city do not seem in danger of falling. What then does the rest of the world do when a single state believes it can achieve empire without conquest and "civilizes" with violence only when others refuse its representations of truth?[278]

In contradistinction to the era of the Roman Empire, the rest of the world now has an international forum for communication and discourse.

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277. *See generally* Bradford, *supra* note 117.

278. *See* SPANOS, *supra* note 95, at 95.

Yet despite possessing such opportunity, the rest of the world has watched in rapt silence as the United States continues to ignore global consensus. As long as U.S. leaders can promise its people peace within its borders without disruption of its citizens' daily lives, all the while offering them prosperity and American democracy, the people will keep those leaders in power. Using a politic of fear, the United States has convinced its people that it acts as it does only because of the exigency of survival, that otherwise the barbarians will tear down the walls of their new Rome, thus cloaking its hegemonic goals under a safer *logos*.

However, with the international apparatus already in place, such exigency does not exist; there are already mechanisms extant to protect the international community from the scourge of terrorism. Nonetheless, the United States has withdrawn from many of these mechanisms, trusting only in its own might. If the United States continues to disregard these international apparati, other nations will follow suit. When enough states do so, anarchy will eclipse collective security, setting civilized society back a century as the globe becomes beset by paranoid neighbors and preemptive wars. That is, unless the rest of the world acts now to stop such madness and restores the principles of shared sovereignty and collective security to their rightful place in the *dispositif* of international law. If not, in due time, all international law will be routed through the internal legislative bodies of the rising U.S. Empire.