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Protection of Nationals Abroad: Is Consent the Basis of Legal Obligation

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Protection of Nationals Abroad: Is Consent the Basis of Legal Obligation?

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I. INTRODUCTION

A. *Significant Questions Involving Self-Defense*

The application of doctrine and principles of the law of nations is most compellingly tested when international tensions result in the use of force. The body of public international law governing use of force is at once challenged and informed by each new instance of violence. During the last fifteen years several incidents which involved or could have involved the use of force have raised significant questions concerning the principles of international law governing the right of states to act in self-defense.

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As the catalog of incidents grows, the work of international lawyers to draw conclusions about the nature and legitimacy of the use of force has struggled to keep pace. Of particular importance is the invocation of self-defense as a legitimizing factor in the use of force. The variety of situations in which self-defense has been raised as a justification calls for a taxonomical reexamination of self-defense claims in order to distinguish the various shades of meaning inherent in that phrase.

For example, one important self-defense question centers on the temporal proximity of the retaliatory use of force to the original attack. Both the Falkland-Malvinas Islands conflict between Argentina and Great Britain in the early spring of 1982¹ and Israel's invasion of Lebanon in June of that same year² raised the question whether force used some time after an unlawful armed attack can be considered legitimate self-defense.³

Yet another question centers on the consequence of a use of force of an entirely different character than that used in the original action. In December 1979, National Security Affairs Advisor Dr. Zbigniew Brzezinski, intimated that the United States refused to rule out the possibility of using military force to counter efforts to block access to essential Persian Gulf resources.⁴ This suggestion, made in the wake of the Arab oil embargo, Khomeini's rise to power in Iran, and Soviet activity in Afghanistan, raised a new question—whether self-

1. On the conflict generally, see Acevedo, *The U.S. Measures Against Argentina Resulting from the Malvinas Conflict*, 78 AM. J. INT'L L. 323 (1984); Franck, *Dulce et Decorum est: The Strategic Role of Legal Principles in the Falklands War*, 77 AM. J. INT'L L. 109 (1983); Moore, *The Inter-American System Snarls in Falklands War*, 76 AM. J. INT'L L. 830 (1982). On the Argentine claim to use force, see Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1636 (1984). On justifying a claim of self-defense, see Hassan, *The Sovereignty Dispute Over the Falkland Islands*, 23 VA. J. INT'L L. 53, 64-65 (1982).

2. S. MALLISON & W. MALLISON, *ARMED CONFLICT IN LEBANON, 1982: HUMANITARIAN LAW IN A REAL WORLD SETTING* (1983); ISRAEL IN LEBANON, REPORT OF THE INT'L COMM'N TO INQUIRE INTO REPORTED VIOLATIONS OF INTERNATIONAL LAW BY ISRAEL DURING ITS INVASION OF LEBANON (1983). See generally, W. Mallison, *Aggression or Self-Defense in Lebanon in 1982*, 77 PROC. AM. SOC'Y INT'L L. 174 (1983); Oliver, *Remarks, id.* at 168. On Israel's claim of self-defense, see *Provisional Verbatim Record of the 2375th Security Council Meeting*, S/PV. 2375 at 17 (1982) [hereinafter *2375th Security Council Meeting*] (statement of Ambassador Yehuda Blum).

3. In the Falkland-Malvinas conflict, Argentina claimed a right to use force to recover the islands which, Argentina contended, Great Britain had unlawfully taken through the use of force in 1833. See *Provisional Verbatim Record of the 2350th Security Meeting*, S/PV. 2350 (1982) [hereinafter *2350th Security Council Meeting*] (statement of Ambassador Costa Mendez), reported in R. PERL, *THE FALKLAND ISLANDS DISPUTE IN INTERNATIONAL LAW AND POLITICS* 432, 433-43 (1983); 1982 U.N.Y.B. 1320-22 (1982). Prior to the Israeli invasion of Lebanon on June 6, 1982, Lebanon had attacked Israel on May 9, 1982. See *Report of the Secretary-General on the United Nations Interim Force in Lebanon*, para. 50, U.N. Doc. S/15194 (1982). Israel also referenced the attack on the Israeli Ambassador to Great Britain in London on June 3, 1982, *2375th Security Council Meeting, supra* note 2, at 28-30. But as Robbie Sabel, Counsellor of the Israeli Embassy to the United States said, the invasion may have been an act of self-defense "in . . . response to 17 years of PLO terror." Sabel, *Remarks; Problems of the Law of Armed Conflict in Lebanon*, 77 PROC. AM. SOC'Y INT'L L. 240 (1983).

4. Oster, *Brzezinski Poses Prospect of Using Preemptive Force*, Wash. Post, Dec. 20, 1979, at A22, col. 3.

defense may serve as a justification for armed action against economic coercion.⁵

Other incidents implicate anticipatory self-defense, that is, the right to use defensive force in advance of an armed attack. The gravamen of these incidents is not their contribution to resolving the long-standing debate over the permissibility of preemptive action generally,⁶ but, rather, their introduction of even more troublesome issues.

The June 1981 Israeli aerial attack on the Tamuz I nuclear reactor in Baghdad, Iraq,⁷ for instance, raised the question of whether anticipatory action can be lawful when it is taken against a threat of attack that will not materialize until the future.⁸ The problem of the "window of vulnerability" resulting from the strategic missile asymmetry between the United States and the Soviet Union throughout the latter years of the Cold War,⁹ the rise to power of the Sandanistas in Nicaragua in 1979,¹⁰ and the "neutron bomb" controversy of the late

5. On military force against economic coercion generally, see Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM. J. INT'L L. 405 (1985); Moore, *Foreign Policy Dimensions of the Crisis in Oil*, 17 WILLAMETTE L. REV. 111, 138 (1980) (force used in response to a dispute involving oil supplies being cut off); Zedalis, *Some Thoughts on the United Nations Charter and the Use of Military Force Against Economic Coercion*, 17 TULSA L.J. 487 (1982).

6. Several commentators take the view that preemptive action is impermissible. I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 275-79 (1963); L. HENKIN, *HOW NATIONS BEHAVE* 141-44 (2d ed. 1979); P. JESSUP, *A MODERN LAW OF NATIONS* 166-67 (3d ed. 1968); H. KELSEN, *THE LAW OF THE UNITED NATIONS* 797-98 (1950); Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947); Tucker, *The Interpretation of War Under Present International Law*, 4 INT'L L.Q. 11, 29-30 (1951). Commentators who argue in favor of preemptive action include D. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 188-89 (1958); M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 232-41 (1961); Fawcett, *Intervention in International Law: A Study of Some Recent Cases*, 103 RECUEIL DES COURS 341, 360-63, 365-69 (1961); Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 1, 171-74 (1957); Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 497-98 (1952). An assessment of the law and policy surrounding both positions is set forth in Zedalis, *On the Lawfulness of Forceful Remedies for Violations of Arms Control Agreements: "Star Wars" and Other Glimpses at the Future*, 18 N.Y.U. J. INT'L L. & POL. 73, 97-116 (1985).

7. See generally D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM. J. INT'L L. 584 (1983); Mallison & Mallison, *The Israeli Aerial Attack on June 7, 1981 Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?*, 15 VAND. J. TRANSNAT'L L. 417 (1982); Note, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187 (1984); Note, *The Sun Sets on Tamuz I: The Israeli Raid on Iraq's Nuclear Reactor*, 13 CAL. W. INT'L L.J. 86 (1983).

8. See Zedalis, *Preliminary Thoughts on Some Unresolved Questions Involving the Law of Anticipatory Self-Defense*, 19 CASE W. RES. J. INT'L L. 129 (1987).

9. The seminal work in this area is Nitze, *Assuring Strategic Stability in an Era of Détente*, 54 FOREIGN AFF. 207 (1976). See also Bissell & Sichertman, *Reflections on the Quarter: Judging SALT II*, 23 ORBIS 251 (1979); Frye, *Strategic Build-Down: A Context for Restraint*, 62 FOREIGN AFF. 293, 295-300 (1983/84).

10. See generally Cruz, *Nicaragua's Imperiled Revolution*, 61 FOREIGN AFF. 1031 (1983); Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43 (1986); Rowles, "Secret Wars," *Self-Defense and the Charter—A Reply to Professor Moore*, 80 AM. J. INT'L L. 568 (1986).

1970s¹¹ each raised the issue of whether an anticipatory self-defense theory may be used to justify the use of force to preempt threats that disrupt the military equilibrium.¹² The Reagan administration's "Strategic Defense Initiative"¹³ presented the related question of whether defensive military systems, as opposed to offensive systems, are subject to lawful anticipatory action.¹⁴ And finally, there is the question of whether the availability of countermeasures able to neutralize an external threat affects the right to take anticipatory action to meet the threat directly.¹⁵ This problem was graphically illustrated by the United States announcement in early 1989 of a contemplated military strike against a Libyan plant suspected of manufacturing chemical weapons.¹⁶

Separate from the preceding questions, the distinct question of whether self-defense may be used to justify the use of force to protect nationals abroad has become very apparent in the context of national efforts to combat international terrorism. The United States aerial strike on Tripoli and Benghazi, Libya in April 1986,¹⁷ the dispatch of the United States Army's Delta Force to rescue

11. The problem leading to the debate over the deployment of neutron weapons was the four-to-one tank advantage held by Warsaw Pact forces over NATO forces. See Brennan, *The Soviet Military Build-Up and its Implications for the Negotiations on Strategic Arms Limitations*, 21 ORBIS 107, 113 (1977); Evans & Novak, *The Heated Debate Over The Neutron Bomb*, Wash. Post, Mar. 31, 1978, at A19, col. 5. On the question of deployment itself, see Cohen & Van Cleave, *In Comment*, 21 ORBIS 967 (1978); Shreffler, *The Neutron Bomb for NATO Defenses: An Alternative*, 21 ORBIS 959 (1978).

12. Professor Farer suggests disequilibrating consequences are not enough to justify a claim of self-defense since a state must show threat of imminent attack. Farer, *Law and War*, in 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: CONFLICT MANAGEMENT 62-63 (C. Black & R. Falk eds. 1971). For a contrary view expressed in the context of the Cuban Missile Crisis of 1962, see McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 601-02 (1963).

13. On the Strategic Defense Initiative (SDI), see *Controlling Space Weapons: Hearing Before the Subcomm. on Arms Control, Oceans, International Operations and Environment of the Senate Comm. on Foreign Relations*, 98th Cong., 1st Sess. (April 14, 1983); U.S. Congress, Office of Technology Assessment, *Ballistic Missile Defense Technologies* (1985); C. GRAY, AMERICAN MILITARY SPACE POLICY 1-75 (1982); Bethe, Garwin, Gottfried & Kendall, *Space-Based Ballistic-Missile Defense*, 251 SCI. AM. 39 (No. 4) (1984); Burrows, *Ballistic Missile Defense: The Illusion of Security*, 62 FOREIGN AFF. 843 (1984); Payne & Gray, *Nuclear Policy and Defensive Transition*, 62 FOREIGN AFF. 820 (1984); Thompson, *"Directed Energy" Weapons and the Strategic Balance*, 23 ORBIS 697 (1970). SDI was originally proposed in D. GRAHAM, *THE HIGH FRONTIER: A NEW NATIONAL STRATEGY* (1982).

14. This difficulty arises both from article 51's reference to self-defense if an "attack" occurs and the customary concept of a threat as involving imminent "attack," which has led commentators to discuss self-defense solely in terms of offensive systems. See, e.g., L. HENKIN, *supra* note 6, at 142-45; M. MCDUGAL & F. FELICIANO, *supra* note 6, at 238-40; J. STONE, *OF LAW AND NATIONS* 9 (1974).

15. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938) (speaking of a necessity "leaving no choice of means."). The mandate of article 2(3) of the Charter requires states to settle disputes through peaceful means. U.N. CHARTER art. 2, para. 3.

16. See generally D'Amato, *International Law in the Public Forum: The New York Times and the Libyan Chemical Weapons Plant*, 83 AM. J. INT'L L. 527 (1989).

17. See generally 86 DEP'T ST. BULL., June 1986, at 1-23; TIME, Apr. 28, 1986, at 16-33; NEWSWEEK, Apr. 28, 1986, at 18-30; *U.S. Calls Libya Raid a Success; 'Choice is theirs,' Reagan says; Moscow Cancels Schultz Talks*, N.Y. Times, April 16, 1986, at A1, col 6.

the hijacked passengers aboard TWA flight 847 in June 1985,¹⁸ the invasion of Grenada in October 1983,¹⁹ the ill-fated Tehran hostage rescue attempt in April 1980,²⁰ and the successful Israeli raid on the Entebbe airport in July 1976²¹ present the question in pronounced form.²² When taken together with all the other matters alluded to, the complexity of the modern law of self-defense becomes apparent.

The questions highlighted by the incidents recounted above are important for the insights they provide about the content and meaning of the doctrinal standards of self-defense. If doctrinal standards are to have any value, they must be understandable in the context of their real world application. The significance of any effort designed to add to our understanding of the standards regulating the use of force cannot be underestimated, especially today, when there appears to be a marked increase in the disposition of states to use force directly or through surrogates to accomplish their ideological objectives.²³ But these questions are important for even more valuable reasons. In posing problems that lie at the periphery of existing legal doctrine, they invite reflection on the relationship between law and other disciplines. The outer boundary of the conventional conception of law—a conception which has the greatest relevancy in straightforward cases—rapidly shades into the behavioral, social, and philosophical sciences. These questions provoke inquiry into the very nature of law, especially the extent to which “legal” standards can be understood only when the conventional concept of law is unified with the accumulated knowledge and wisdom gained by those in other fields of study. Oliver Wendell Holmes may have had the relationship between law and other disciplines in mind more than a century ago when he wrote:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories,

18. Gwertzman, *U.S. Said to Send Commando Squad*, N.Y. Times, June 16, 1985, § 1, at 1, col. 5 (force was never actually used for rescue attempt).

19. See generally Joyner, *The United States Action in Grenada*, 78 AM. J. INT'L L. 131 (1984); J. MOORE, *LAW AND THE GRENADA MISSION* (1984); R. RUBENSTEIN, *THE LESSONS ON GRENADA AND THE ETHICS OF MILITARY INTERVENTION* (1984); U.S. DEPT. OF STATE AND U.S. DEPT. OF DEFENSE, *GRENADA DOCUMENTS: AN OVERVIEW AND SELECTION* (1984).

20. See generally Schachter, *Self-Help in International Law: U.S. Action in the Iranian Hostage Crisis*, 37 J. INT'L AFF. 231 (1984); Stein, *Contempt, Crisis and the Court: The World Court and the Hostage Rescue Attempt*, 76 AM. J. INT'L L. 499 (1982); Note, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality Under International Law*, 21 VA. J. INT'L L. 485 (1981).

21. See generally Boyle, *International Law in Time of Crisis: From The Entebbe Raid to the Hostages Convention*, 75 NW. U. L. REV. 769 (1980); Margo, *The Legality of the Entebbe Raid in International Law: Humanitarian Intervention or Barbaric Aggression?*, 11 INT'L LAW. 331 (1977); Note, *Use of Force for the Protection of Nationals Abroad: The Entebbe Incident*, 9 CASE W. RES. J. INT'L L. 117 (1977).

22. See *infra* notes 36-51 and accompanying text.

23. The use of terrorism by radical political regimes has increased. See R. CLINE & Y. ALEXANDER, *TERRORISM: THE SOVIET CONNECTION* (1984); S. HOSMER & T. WOLFE, *SOVIET POLICY AND PRACTICE TOWARD THIRD WORLD CONFLICTS* (1983); C. STERLING, *THE TERROR NETWORK* (1981).

intuitions of public policy, avowed or unconscious, even the prejudices which [decisionmakers] share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.²⁴

By attempting to understand the relationship between actual experience and legal doctrine in the context of political aggression, international lawyers may be able to improve the quality of both. A few examples should illustrate how an analysis of each of the incidents recounted above would improve the understanding of both simple doctrine and broader legal theory.

Many international scholars agree that the traditional standard for anticipatory self-defense is reflected in article 51 of the United Nations Charter.²⁵ In 1841, Secretary of State Webster stated this standard in *The Caroline* and *McLeod Cases* as being a necessity of self-defense "leaving no moment for deliberation."²⁶ Commentators interpret the standard as requiring a threat of "imminent attack."²⁷ The combination of articles 2(3), 2(4), and 51 of the Charter prohibits the use of force, except in self-defense whenever "an armed attack occurs," and compels nations to resolve disputes through peaceful means.²⁸

24. O. HOLMES, *THE COMMON LAW* 1 (1881).

25. Article 51 provides:

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

U.N. CHARTER art. 51.

26. Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841), reprinted in 29 BRIT. & FOREIGN ST. PAPERS 1129, 1138 (1857). See generally Jennings, *supra* note 15.

27. See, e.g., D. BOWETT, *supra* note 6, at 191-92; W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 259 (1964); M. MCDUGAL & F. FELICIANO, *supra* note 6, at 231; Fawcett, *supra* note 6, at 361; J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 244 (1954); Schachter, *supra* note 1, at 1634-1635; Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 134-36 (1986); Waldock, *supra* note 6, at 498.

28. Article 2 provides, in full:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

In its attack on the Iraqi nuclear reactor, Israel could not have made an argument for the presence of an imminent attack. The Tamuz I reactor had not produced nuclear weapons, and was not even to the point of being able to produce weapons-grade nuclear fuel.²⁹ If Webster's statement could be interpreted as stressing the essentiality of a necessity to use force, that is, the genuine need to resort to an armed response, as opposed to emphasizing temporal proximity as an imperative, the situation might be different. The threat of an armed attack from Iraq in the future, as opposed to the immediate present, might then be sufficient to characterize the Israeli bombing as lawful. But it is only by philosophizing on language, seeking to understand the full meaning of human expression, that one may begin to unravel the mystery of whether an interpretation inconsistent with plain language and a century and a half of accepted understanding has any true claim to accuracy. If the search for meaning were limited to conventional legal reasoning, there would be little doubt of the outcome: force used without a precipitating threat of imminent attack could not be justified as self-defense. "Imminent" would mean what it says, and both practice and authoritative comment would be marshalled to confirm this.

The Falkland-Malvinas Islands conflict also emphasizes the importance of the proximity between the armed attack and the response. Argentina's claim of a right to use military action to recover the islands³⁰ directs attention to the meaning of "occurs" and to the relationship between self-defense and the obligation to settle disputes peacefully. The claim raises a question not answerable through the use of conventional techniques. At what point does a nation with a right to resort to force in self-defense lose that right with the passage of time and become obligated to seek resolution solely through peaceful means?³¹ How soon after one suffers an attack must a response be made in order for it to be considered defensive? There is nothing inherent in the reference to "occurs" and the relationship between self-defense and peaceful settlement that delineates the boundary separating permissible defensive force from impermissible retaliation. Perhaps the way to locate where that demarcation is best situated is by turning to the social and behavioral sciences. After all, given the decentralized character of the international legal system, practicality supports rules that mark

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. CHARTER art. 2.

29. Israel's Ambassador, Yehuda Blum, did not dispute this, but suggested in the United Nations Security Council debates on the attack that the reactor had "less than a month to go before" it "might have become critical" and thus capable of producing weapons-grade nuclear fuel. 36 U.N. SCOR (2280th mtg.) at 11, U.N. Doc. S/P.V.2280 (1981).

30. See 2350th Security Council Meeting, *supra* note 3. See also Hassan, *supra* note 1, at 64-65; Schachter, *supra* note 1, at 1636.

31. Schachter, *supra* note 1, at 1636, questions "whether the right [of self-defense] remains available for a substantial period after the attack."

the limits of legality by reference to empirical evidence of generally expected community behavior.

The "window of vulnerability" scenario, involving at least a theoretical threat to United States security by a superior Soviet strategic nuclear arsenal, provides another excellent example of how study of the incidents previously set forth can shed light on doctrinal and theoretical considerations. While there is nothing to suggest that the asymmetry in nuclear forces might prompt the United States to launch a preemptive nuclear strike, the situation focuses attention on the doctrinal issue of whether armed force is legitimately defensive if used to redress an imbalance in the military equilibrium when the acting state can neutralize the threat caused by the imbalance through the use of nonforceful countermeasures.³² Since the traditional formulation of the test for anticipatory self-defense requires not only a necessity for the use of force leaving no moment for deliberation, but also one leaving "no choice of means,"³³ the answer seems obvious. Yet there may be occasions when the threat, or the nation that creates the imbalance, is so invidious and the potential benefit to society of using force is so great that it would seem difficult to accept the development of countermeasures as being the only lawful course. Ethical considerations could provide an answer to this dilemma;³⁴ a conventional approach to the traditional doctrine of self-defense seems rather ill-equipped for the task. The result would always be to deprecate force, regardless of how costly that approach might be in both economic and human terms. By enlisting ethical concepts, however, the values that are placed in competition by this dilemma are identified, weighted, and balanced accordingly.

B. Protection of Nationals Abroad: Illustrations and Themes

Thorough study of all of the issues presented by the foregoing would prove to be an effort of major proportions. This Article will take as its point of departure the more modest task of looking at the discrete category of intervention to protect nationals abroad, and examine whether this sort of intervention can be supported doctrinally by the right of self-defense. The Article then turns to the fundamental question of what is revealed, as a result of the reflection on doctrine, about the accepted belief that consent is the basis of legal obligation.

The right of self-defense has been invoked in several recent cases involving the use of force to protect nationals abroad. But if one accepts that article 51 means what it says, that "a *Member* of the United Nations" has the right to take defensive action whenever attacked by armed force—if the words are

32. See *supra* note 12.

33. See *supra* note 26.

34. The connection between law and language must be made before ethical principles are consulted. This is the same connection found in the instance of temporal proximity, *supra* notes 1-3, and it must also be made here because the customary standard's reference to "no choice of means" suggests that whenever a choice exists, force cannot be used.

“plain” or the original intent of the drafters can be discerned in some way—how can attacks on nationals that do not involve violations of the territorial integrity of a United Nations member claiming defensive action suffice to trigger that right?³⁵ Is the distinction between a state and its nationals now to be ignored? Additionally, since the terms of the Charter represent rights and obligations forged through the consent of the community of nations, how is it possible to explain the incorporation of a right to protect nationals without going beyond the discernible limits imposed by established consensual arrangements?

The apparent ambiguity of doctrinal standards raises an even more fundamental question: Is there anything about rules of law that are arrived at consensually that makes them binding? Those subject to such rules may follow them in practice, and those charged with applying them may do so regularly. But what is there about such law that obligates those subject to it to give it effect? Article 51 of the United Nations Charter and the right to protect one's nationals abroad provide a frame of reference within which to explore this issue in the context of international law. The reason the issue is so often shunned, however, probably has to do with the lack of willingness to expose the fundamental notions on which the modern legal world rests to a reassessment which might produce surprises.

The most dramatic recent incident concerning article 51 of the Charter in which the use of force was justified by the need to protect nationals abroad

35. For situations presenting questions about the meaning of the language of article 51 in a stark way, see *supra* text accompanying notes 25-31. Throughout this study, it is assumed that the reference of article 51 to “against a Member of the United Nations” is clear, and attention is instead focused on whether the consensual nature of article 51 creates an obligation to act as the article directs. In reality questions concerning the meaning of article 51 are not confined to the situations discussed above, but also include instances involving the protection of nationals abroad. The words “against a Member of the United Nations” are not as clear as one might assume. In every case in which the question involves giving effect to some established standard that reflects a consensual arrangement, something must be said not only about the matter of whether words mean what they say, but also about whether things that have traditionally been viewed as part of consent really signify consent, and whether those who consented intended to bind themselves forever to what they understood the words to mean.

For some tentative conclusions on the meaning of words, see Zedalis, *supra* note 8, at 134-44. On the very reality of consent itself, see, for example, R. DWORKIN, *A MATTER OF PRINCIPLE* 278 (1985) (discussing the reality of consent in the context of “hard cases” in which principles are susceptible to judicial interpretation); P. SOPER, *A THEORY OF LAW* 116 (1984) (on the same theme); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 209-17, (1980) (discussing the difficulties of divining intent even in easy cases where the language seems perfectly clear); Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 9 (1987) (consent is questionable if it is given simply because the alternative is more objectionable than consenting). For a discussion of the distinction between discovering what the drafters of a particular standard intended the standard to mean, and discerning whether the drafters of that standard intended their understood meaning to bind all of those individuals subsequently called upon to apply the standard, see J. Grodin, *Do Judges Make Law?*, CAL. LAW. 61, 69 (May 1989). In light of these discussions, it should come as no surprise that the task of inquiring into whether law binds is somewhat narrow and confined.

was the April 14, 1986 United States aerial strike on Tripoli and Benghazi, Libya.³⁶ On that date thirteen F-111 attack aircraft³⁷ and twelve Navy A-6 aircraft³⁸ attacked the International Airport and the Bab al Azizia barracks in Tripoli, as well as the Sidi Bilal naval commando school and the Benina Airfield in Benghazi.³⁹ The aerial strike, officially justified by reference to self-defense under article 51,⁴⁰ reportedly killed thirty-seven and injured ninety-three. The strike was apparently precipitated by evidence that linked Libyan leader Colonel Muammar Kaddafi to the April 5, 1986 bombing of a West Berlin disco that killed United States Army Sergeant Kenneth Ford⁴¹ and injured seventy-nine other Americans. The evidence further indicated that Kaddafi was planning to carry out future terrorist attacks against more than thirty additional American targets overseas.⁴²

Self-defense to protect nationals was also cited as one of the justifications for the use of force by the United States in its October 25, 1983 invasion of the Caribbean island of Grenada.⁴³ In that incident, some 1000 Americans,

36. See 86 DEPT ST. BULL., *supra* note 17, at 1-23.

37. Once over the Atlantic Ocean, the F-111 strike force, originally twenty-four in number, was joined by five EF-111s (electronic jamming planes) from the Royal Air Force Base at Upper Heyford, England, and twenty-eight tankers from the Royal Air Force Bases at Mildenhall and Fairford, England. TIME, *supra* note 17, at 29. After the first refueling over the Bay of Biscay, six F-111s and one EF-111 returned to their home base. NEWSWEEK, *supra* note 17, at 27. The number of F-111s was further reduced when five of the remaining eighteen planes developed malfunctions in targeting equipment. TIME, *supra* note 17, at 30.

38. Originally, fourteen A-6 aircraft were launched from the two United States carriers. NEWSWEEK, *supra* note 17, at 31. The number of A-6s was reduced to twelve when malfunctions resulted in two of them aborting their missions and returning to their ship. *Id.*

39. These targets were selected because of their association with terrorist activity. The military section of Tripoli International Airport served as a base for Soviet-made planes used to supply and transport terrorists. Bab al Azizia served as a residence and command center for Libyan leader Muammar Kaddafi. The Sidi Bilal Naval Commando School served as a training center for international terrorists. TIME, *supra* note 17, at 29. The attack on the Benina Airfield is thought to have destroyed four MIG-23s, two MI-8 lightweight helicopters, and two F-27 propeller driven aircraft. *Id.* at 31. At the Tripoli International Airport, five Soviet-made I1-76 transports and several buildings were destroyed. *Id.*

40. President Reagan stated, "Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight—a mission fully consistent with Article 51 of the U.N. Charter." *Address to the Nation*, 22 WEEKLY COMP. PRES. DOC. 491, 492 (Apr. 16, 1986). Ambassador Vernon A. Walters, United States permanent representative to the United Nations, reiterated the claim of self-defense to the United Nations Security Council. See DEPT ST. BULL., *supra* note 17, at 18, 19-21.

41. A second American injured in the bombing, United States Army Staff Sergeant James E. Goins, died in early June of 1986. *Victim of Berlin Blast Dies*, N.Y. Times, June 8, 1986, § 1, at 16, col. 1.

42. Ambassador Walters claimed that there was "direct, precise, and irrefutable evidence" that Libya bore responsibility for the LaBelle disco bombing in West Berlin on April 5, 1986. 86 DEPT ST. BULL., *supra* note 17, at 19. Walters stated that orders to carry out the terrorist attack against Americans were sent to the Libyan Peoples' Bureau in East Berlin. *Id.*

43. J. MOORE, *supra* note 19, at 156 ("lawful humanitarian protection . . . in conformity with Articles 2(4) and 51"). Moore acknowledges the dispute among commentators as to whether protec-

including approximately 650 students at St. George's University School of Medicine, were said to be imperiled by the political upheaval and breakdown of domestic authority surrounding the arrest and murder of Marxist Prime Minister Maurice Bishop by fanatical elements under the leadership of General Hudson Austin. The military action was led by 1900 United States Marines and Army Airborne Rangers operating with the assistance of 300 troops from Jamaica, Barbados, the Dominican Republic, St. Lucia, Antigua, and St. Vincent, all representing the Organization of Eastern Caribbean States.⁴⁴ Though the invasion encountered resistance from Grenadian units and so-called Cuban paramilitary "construction workers," fewer than ninety individuals were killed on all sides,⁴⁵ and those Americans wishing to return to the United States were allowed to do so without further incident.

The Tehran hostage rescue attempt on April 24, 1980, launched only after repeated efforts through various channels had failed to secure the release of the Americans taken six months earlier, evoked an official claim of self-defense under article 51 as a justification for the use of force to protect nationals abroad.⁴⁶ Eight helicopters stationed aboard the carrier *Nimitz* in the Indian Ocean and six cargo planes carrying ninety commandos were originally scheduled to rendezvous in the Dasht-Kavir Desert, 200 miles southeast of Tehran. Only six of the helicopters reached the site, with another helicopter developing serious hydraulic difficulties shortly thereafter. Without further

tion of nationals "should be viewed as simply not violating Article 2(4) or as permitted defense under Article 51." *Id.* at 154.

It is not clear whether self-defense was officially invoked by the United States government in the Grenada action. On November 2, 1983, before the House Committee on Foreign Affairs, Deputy Secretary of State Kenneth W. Dam stated one of the justifications as "action to secure and evacuate endangered U.S. citizens . . . undertaken in accordance with well-established principles of international law regarding the protection of one's nationals." Leich, *Contemporary Practice to the United States Relating to International Law*, 78 AM. J. INT'L L. 200, 203 (1984).

Since the official United States government position both before and after the Grenada invasion characterized the protection of nationals as an action in self-defense, perhaps this position was the gist of the "principles" to which Deputy Secretary Dam referred.

44. See Hoagland, *U.S. Invades Grenada, Fights Cubans; Reagan Cites Protection of Americans*, Wash. Post, Oct. 26, 1983, at A1, col. 5; Banta, *Spice Island Power Play*, TIME, Oct. 31, 1983, at 78; *Army in Grenada Takes Over Power*, N.Y. Times, Oct. 17, 1983, at A1, col. 1; Thomas, *From a Grenadian Diplomat: How Party Wrangle Led to Premier's Death*, N.Y. Times, Oct. 30, 1983, at §20, col. 1; Cannon, *Strategic Airport, Hostage Fears Lead to Move*, Wash. Post, Oct. 26, 1983, at A1, col. 2.

45. J. MOORE, *supra* note 19, at 151.

46. *Text of Carter's Message to Congress*, N.Y. Times, Apr. 28, 1980, at A11, col. 1. President Carter stated: "In carrying out this operation, the United States was acting wholly within its right, in accordance with article 51 of the United Nations Charter, to protect and rescue its citizens where the government of the territory in which they are located is unable or unwilling to protect them." For the viewpoint of the International Court of Justice on the action, see *Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 43-44; see also Stein, *supra* note 20 at 499-504.

pursuit of the rescue attempt, President Carter ordered the mission aborted. The only casualties resulting from the incursion were eight American commandos, who died when one of the remaining five operational helicopters collided with a C-130 transport plane during departure from the rendezvous site.⁴⁷

Arguably the most widely discussed and least challenged of the recent incidents involving protection of nationals abroad was the attack on the Entebbe Airport by Israeli commandos on July 4, 1976.⁴⁸ On June 27, 1976 four members of the Popular Front for the Liberation of Palestine hijacked an Air France jet en route from Tel Aviv to Paris via Athens, carrying 256 passengers and a crew of twelve, shortly after departure from Athens. The hijackers ordered the plane to Libya for refueling and then on to Entebbe, Uganda, where it received permission to land. Upon arrival, the Ugandan authorities sought to assist the hijackers in compelling the release of terrorists in custody in Israel and elsewhere.⁴⁹ Following the release of 147 non-Israeli passengers, and after it was evident that Uganda was unwilling to secure freedom for the remaining passengers, Israel decided to attack in order to prevent the terrorists from executing the hostages. Justification for the attack, which freed 105 Israelis, was rested squarely on the right of self-defense.⁵⁰ Fatalities included three hostages, one Israeli commando, seven terrorists, and between twenty and thirty Ugandan soldiers.⁵¹

The four episodes recounted above illustrate the conviction and frequency with which states claim self-defense as a justification for the use of force to protect nationals abroad. Sifting through all of the factual evidence and assessing the merits of each of the preceding claims is beyond the scope of this Article. The emphasis will be on the exploration of doctrine to determine the accuracy of the argument that protection of nationals can be justified as self-defense under article 51, and on the exploration of theory to better understand the nature of legal obligation and thus develop a coherent picture of the contours of the right of self-defense. On the issue of theory, the focus will be confined to examining the idea that consent is the basis of legal obligation.

47. See Taubman, *Months of Plans, Then Failure in the Desert*, N.Y. Times, Apr. 26, 1980, at A1, col. 2.

48. See generally Y. BEN-PORAT, E. HABER & Z. SCHIFF, *ENTEBBE RESCUE* (1977); H. KYEMBA, *A STATE OF BLOOD* (1977); Y. RABIN, *THE RABIN MEMOIRS* 282-89 (1979); W. STEVENSON, *90 MINUTES AT ENTEBBE* (1976).

49. N.Y. Times, June 28, 1976, at A1, col. 2.

50. Boyle, *supra* note 21, at 811 ("founding its defense . . . squarely upon the right of individual self-defense in international law"). The Legal Advisor of the United States Department of State apparently took the same position. See Internal Memorandum of July 8, 1976 from Legal Advisor Monroe Leigh to Secretary of State Henry Kissinger, *excerpted in* 73 AM. J. INT'L L. 122, 123 (1979) ("The right [to protect nationals], like the right of self-defense from which it flows" permits the use of "necessary and appropriate" force.).

51. See Internal Memorandum of July 8, 1976 from Legal Advisor Monroe Leigh to Secretary of State Henry Kissinger, *excerpted in* 73 AM. J. INT'L L. 122. One hostage, left behind at a Kam-

Justifications not grounded in consent that might support intervention to protect nationals abroad in particular circumstances will not be addressed.

II. "NON SELF-DEFENSE" PROTECTION THEORIES

Self-defense is not the only theory advanced to support the use of force to protect nationals abroad. Before examining the self-defense theory, it may be useful to look at the other theories upon which proponents of the right to use force have relied. Two points bear noting. First, there seems to be no dispute that traditional international law permitted states to use force to protect nationals abroad.⁵² Second, with the adoption of the United Nations Charter most states understood that this traditional right no longer existed.⁵³ The first point is important because any claim to use force to protect nationals today is a claim to a preexisting right; the second point is noteworthy because if self-defense can justify the use of force to protect nationals, a majority of states have an erroneous impression of the effect of the Charter on that preexisting right.

A. *The Use of Force to Protect Nationals Abroad Does Not Violate Article 2(4)*

One of the "non self-defense" theories put forth to legitimize the use of force to protect nationals is that force used for such a purpose is not violative of article 2(4) of the Charter and, thus, is not prohibited.⁵⁴ The premise is that only force contravening article 2(4) is prohibited; actions not falling within the definitions of that provision need not be justified by reference to article 51 or any other Charter provision. Since force used to protect nationals abroad is not, in the terms of article 2(4), "against the territorial integrity or political independence of any state,"⁵⁵ its use is not prohibited by the Charter, and it needs no further justification. The purpose of using force is to protect nationals abroad, not to change territorial boundaries or impair the political sovereignty of another state.

pala Uganda hospital, was later taken by Ugandan authorities and killed. See H. KYEMBA, *supra* note 48, at 166-78.

52. I. BROWNLIE, *supra* note 6, at 289-90.

53. See generally R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 167-222 (1963) (noting that the practice from 1945 to 1960 was restrictive); Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS*, 197 app. B, at 216-18 (R. Lillich ed. 1973) [hereinafter *HUMANITARIAN INTERVENTION*] (noting that the practice from 1960 to 1970 continued to be restrictive); Note, *supra* note 20, at 487.

54. See, e.g., L. HENKIN, *supra* note 6, at 145 (Israel "could plausibly argue" that the raid on Entebbe Airport was lawful since it was not violative of article 2(4)); Reisman & McDougal, *Humanitarian Intervention to Protect the Ibos*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS*, app. A at 167-78 (making the argument with regard to force to protect nationals and non-nationals).

55. U.N. CHARTER art. 2, para. 4.

Article 2(4), however, provides for more than just a prohibition on force against territorial integrity or political independence. It also prohibits, in its final clause, force "in any other matter inconsistent with the purposes of the United Nations."⁵⁶ The extent to which force used to protect nationals abroad is prohibited depends on whether the force used to accomplish such an objective is inconsistent with the purposes of the United Nations as set forth in article 1. Further, one must decide whether the use of force must be inconsistent with each and every one of those purposes if it is to be prohibited, or whether conflict with any single purpose is enough to deem the action unlawful.

The use of force to protect nationals abroad would be inconsistent with the United Nations purpose of "maintain[ing] international peace and security" through "collective measures for the prevention and removal of threats to the peace"⁵⁷ The unilateral use of force to address a threat to the peace arising from maltreatment of one's nationals located in another state is not encompassed in article 1, paragraph 1.⁵⁸ Members of the international community are to deal with problems of that nature by acting in concert.⁵⁹ Unilateral force to protect nationals is also inconsistent with article 1, paragraph 2, in that it would hinder, though perhaps only briefly, the development of "friendly relations among nations."⁶⁰

On the other hand, the use of force for the benefit of nationals abroad may not be inconsistent with paragraphs 3 and 4 of article 1. Paragraph 3's command that the United Nations "achieve international cooperation in . . . promoting and encouraging respect for human rights and for fundamental freedoms,"⁶¹ and the exhortation of paragraph 4 to "be a center for harmonizing the actions of nations in the attainment of these common ends,"⁶² may in fact be furthered by the use of force. It would not stretch credulity to imagine that in protecting its nationals threatened with harm or subjected to maltreatment, a state using force promotes respect for the basic human interest in freedom from abuse. Furthermore, the use of force by the acting state puts the maltreating state and other states that may be disposed toward similar conduct on notice of the type of response such behavior might generate. Such action would serve to encourage respect for human rights through deterrence of the violation of those rights and help overcome the difficulty facing United Nations efforts to har-

56. *Id.*

57. *Id.* art. 1, para. 1.

58. See R. HIGGINS, *supra* note 53, at 220 (maltreatment of nationals constitutes a threat to peace).

59. See D. BOWETT, *supra* note 6, at 154 (stating that article 1(1) has the effect of limiting the use of force, except in self-defense, to instances where the use or threat of force is a matter of collective action).

60. U.N. CHARTER art. 1, para. 2.

61. *Id.* art. 1, para. 3.

62. *Id.* art. 1, para. 4.

63. *Id.* art. 2, para. 4.

monize nations in attaining the common end of the observance of human rights and the preservation of fundamental freedoms.

The use of force by a state to protect its nationals is inconsistent with paragraphs 1 and 2 of article 1 of the Charter, but not necessarily inconsistent with paragraphs 3 and 4. This incongruity reveals the importance of the textual question raised above: Must such force be inconsistent with each and every purpose stated in article 1 in order to be prohibited by the final clause of article 2(4)? The use of "the Purposes,"⁶³ rather than "a Purpose," in article 2(4) suggests that only force inconsistent with all the purposes enumerated in article 1 is prohibited.⁶⁴ Force that is not inconsistent with at least one of the several purposes stated in that article lies beyond the ambit of article 2(4)'s prohibition.

There is some evidence that makes it somewhat difficult to accept such a literal reading of article 2(4)'s final clause. During the San Francisco Conference on International Organization in 1945, the delegate from Brazil indicated that the referenced clause could restrict the interpretation of article 2(4).⁶⁵ Since the opening language of 2(4) prohibited threats or uses of force, the final clause could be viewed as limiting that prohibition to apply only to threats or uses of force inconsistent with the purposes of the United Nations. In response to that suggestion, the United States delegate observed that "the phrase 'or in any other manner' was designed to ensure that there should be no loopholes" in article 2(4)'s prohibition.⁶⁶ Significantly, this observation went unchallenged, indicating possible recognition that article 2(4) applied to the use of any force inconsistent with the terms of article 1, even though such force was not inconsistent with each and every one of the purposes stated in that article. The major weakness in this argument is that the thrust of the "no loopholes" observation may have been to note that article 2(4)'s prohibition went beyond the threat or use of armed force against a state's territorial integrity or political independence to include any other kind of force that might prove inconsistent with the purposes of the United Nations. The United States delegate emphasized the "or in any other manner" phraseology⁶⁷ and followed not only the Brazilian delegate's remark about the possible limiting effect of article 2(4)'s final clause, but also followed another remark by the Brazilian delegate suggesting the inclusion of a specific reference to the prohibition of economic coercion in article 2(4).⁶⁸ This discussion supports, but does not resolve, the

64. *But cf.* article 1 of the Consensus Definition of Aggression, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 143, U.N. Doc. A/9631 (1974) (aggression is the use of armed force "against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations"). This suggests that an action inconsistent with any single portion of the Charter would be considered aggression.

65. Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. at 334-335 (1945).

66. *Id.*

67. *See supra* note 66 and accompanying text.

68. *See* Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. 334 (1945). One might ask what this says about the effect of article 2(4) in regulating economic coercion. The "no loopholes" observation might suggest that the United States felt that the language of article 2(4) was sufficiently broad to encompass such regulation, particularly since, as already noted, the word "force" is not qualified. Con-

relevancy of the "no loopholes" observation in deciphering the meaning of "the Purposes" language in article 2(4).

There is additional evidence that is more persuasive in challenging a literal reading of article 2(4)'s final clause. During the San Francisco Conference, the original draft of article 2(4) appeared in Chapter II, paragraph 4, of the Dumbarton Oaks Proposals.⁶⁹ The language of that provision was virtually identical to article 2(4) of the Charter as adopted.⁷⁰ The principal variation was the absence of the words "against the territorial integrity or political independence of any state," which were included after the adoption of an amendment proposed by Australia.⁷¹ Norway suggested that the Australian version of article 2(4) be changed to prohibit "any use of force not approved by the Security Council."⁷² Though the Norwegian suggestion was rejected because of the ambiguity of the specific words "not approved," it was later described in a report of a subcommittee of the first committee "as clarifying the Australian amendment,"⁷³ with the report to Commission I from the first committee noting that "in view of the [rejected] Norwegian amendment, the unilateral use of force or similar coercive measures is not authorized or admitted" by article 2(4).⁷⁴ The Committee's report then stated that with the exception of self-defense, the "use of force, therefore, remains legitimate only to back up decisions of the organization."⁷⁵ This approach was adopted without dissent in the report to the Plenary Session of the Conference.⁷⁶

Given this background, it would not seem fair to view the reference to "the Purposes" to mean that only action inconsistent with every one of the purposes stated in the opening provision of the Charter falls within the purview of the prohibition contained in article 2(4). Under such a reading, unilateral uses of force other than in self-defense would be permissible under the Charter so long as they were not inconsistent with each of the several purposes stated in article 1. Yet the official records surrounding the adoption of article 2(4) clearly indicate that, with the exception of self-defense, force remained legitimate after the adoption of the Charter only to support decisions of the organization. Thus,

versely, it could indicate that the United States felt that the concluding clause of article 2(4) had no limiting effect on that article's opening language.

69. *Proposals for the Establishment of a General International Organization*, 11 DEPT. ST. BULL. 368 (Oct. 8, 1944).

70. "All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization." *Id.*

71. Doc. 2, G/14(l), 3 U.N.C.I.O. Docs. 543 (1945); Doc. 215, I/1/10, 6 U.N.C.I.O. Docs. 557 (1945).

72. Doc. 215, I/1/10, 6 U.N.C.I.O. Docs. 564 (1945).

73. Doc. 739, I/1/A/19(a), 6 U.N.C.I.O. Docs. 720 (1945).

74. Doc. 885, I/1/34, 6 U.N.C.I.O. Docs. 400 (1945).

75. *Id.*

76. Doc. 1179, I/9/(1), 6 U.N.C.I.O. Docs. 247 (1945).

“the Purposes” cannot mean that only force inconsistent with every single one of the purposes falls within the scope of article 2(4) and is therefore prohibited.

The text of article 2(4) itself supplies additional evidence that confirms this conclusion. The prohibition on force inconsistent with the purposes of the United Nations applies to force inconsistent with those purposes “in any other manner.” The term “other” refers to the prohibition on force against a state’s territorial integrity or political independence contained in article 2(4)’s opening clause. If “the Purposes” were to mean that only uses of force inconsistent with all of the purposes stated in article 1 fall within article 2(4), then “other” must mean that force against another state’s territorial integrity or political independence is inconsistent with all of article 1’s purposes. Force against another state’s territorial integrity or political independence, though, may not always be inconsistent with each and every one of the purposes set forth in article 1. There could well be instances in which force against a state’s territorial integrity and political independence may not be inconsistent with the purposes of achieving international cooperation in solving economic, social, cultural, and humanitarian problems, or in helping the United Nations address the difficulties facing the world community.⁷⁷ Nevertheless, force against territorial integrity or political independence is still prohibited by the plain meaning of article 2(4).

At least two prominent international legal scholars have argued that the reference to “the Purposes” does not require that force be inconsistent with all of the purposes of the United Nations in order to be limited by the terms of article 2(4), while still contending that if the use of force is consistent with one or more of the several purposes, even if simultaneously inconsistent with other purposes, it may be permissible.⁷⁸ Whenever force is used to protect nationals, the action is inconsistent with “collective” efforts to maintain peace but may be consistent with the purpose of promoting and encouraging respect for human rights. When these dual purposes of the United Nations happen to conflict, “it is distortion to argue that [force] is precluded by article 2(4).”⁷⁹ Human rights are a fundamental concern of the Charter which can outweigh the maintenance of peace. Unilateral action to promote those rights is a substitute for collective measures to prevent or remove threats to the peace arising from the violation of those rights.⁸⁰

77. The Grenada invasion is one example. *See supra* note 19. United States action was initially designed to rescue imperiled United States nationals. One could assert that the invasion promoted respect for human rights. To the extent, however, that the objective was to oust Marxist elements and to restore democracy, the invasion constituted prohibited force against the territorial integrity or political independence of another state.

78. *See* Reisman & McDougal, *supra* note 54.

79. *Id.* at 177.

80. *Id.* at 168-78.

An argument to the contrary is that since force need not be inconsistent with each and every single purpose stated in article 1 in order to fall within the prohibition of article 2(4), inconsistency with any one of the first article's several purposes results in force being included in article 2(4)'s prohibition. This would eliminate the need to balance conflicts between competing purposes and make for a much clearer decision. The negotiating documents support this interpretation because no other interpretation of article 2(4) would go as far to close loopholes and prohibit all uses of force, except in self-defense, not designed to "back up decisions of the organization."⁸¹

The weakness in this argument is that inconsistency with a purpose stated in article 1 can result not just from the use of force, but also from the failure to use force in specific instances. An example would be the lack of respect for human rights and the consequent fettering of the United Nations efforts to promote and encourage such rights, resulting from the failure of a nation to use force to protect its nationals subjected to maltreatment abroad. If inconsistency with any one of the United Nations several purposes is impermissible, inconsistency resulting from the failure to use force should also be impermissible.

This criticism lacks merit because although the failure to use force may create an inconsistency with one of the purposes stated in the Charter's opening article, the aim of the Charter is to regulate decisions involving the use of force, not decisions declining to use force. Article 2(4) calls upon states to refrain from the "threat" or "use" of force. Although a decision declining to use force may be inconsistent with article 1, it is not enough to come within the limitations of article 2(4). For the Charter's limitations to apply, the decision that produces the inconsistency must be one resulting from the use of force. Acknowledging that a failure to use force might be inconsistent with the purposes of the United Nations does not weaken the argument that article 2(4)'s reference to "the Purposes" means inconsistency with any one of the United Nations purposes stated in article 1.

Articles 55 and 56 of the Charter indicate that the balancing approach to resolving conflicts between competing purposes should be rejected in favor of an approach prohibiting uses of force inconsistent with any one of the United Nations several purposes.⁸² These articles address the matter of human rights

81. See *supra* notes 65-76 and accompanying text.

82. The relevant Charter provisions provide:

Article 55. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

(a) higher standards of living, full employment, and conditions of economic and social progress and development;

(b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

and are therefore likely to be implicated when one nation maltreats the nationals of another country. Article 55 obligates the United Nations to promote the observance of human rights and the respect for fundamental freedoms.⁸³ Article 56 contains a pledge by all members of the Organization to take "joint and separate action in cooperation with the Organization" to achieve those objectives.⁸⁴ The question is whether the pledge contained in article 56 contemplates military force unilaterally taken by one state to achieve the promotion of human rights in another state. If so, then the balancing test may be acceptable. If not, then the balancing test should be rejected in favor of the approach prohibiting use of force inconsistent with any single purpose of the United Nations stated in article 1 of the Charter.⁸⁵

Assuming that article 56's reference to "action" envisions military force, there are several reasons why the reference to such action being "separate" cannot encompass the use of unilateral military force by one state to protect nationals of that state located within the borders of another state. Although article 56 mentions "separate" action, the article also states that such action must be "in cooperation with the Organization."⁸⁶ The obvious need for celerity and secrecy in operations to protect nationals suggests that cooperation is extremely infeasible. Yet without such cooperation, the conditions of article 56 cannot be satisfied.

Another reason for not interpreting "separate action" as unilateral military action is derived from the chronology surrounding the adoption of article 56. Article 56 was added as a compromise to the recommendation from a drafting subcommittee of Committee Three at the 1945 San Francisco Conference obligating members to "cooperate jointly and severally with the Organization."⁸⁷ The subcommittee recommendation emerged after the full committee referred an Australian proposal,⁸⁸ which the subcommittee had adopted earlier,⁸⁹ back to the subcommittee. The proposal pledged the members of the United Nations

Article 56. All members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

U.N. CHARTER arts. 55 & 56.

83. U.N. CHARTER art. 55.

84. *Id.* art. 56.

85. Article 56 promotes the interests set forth in article 55. These interests parallel the purposes of the United Nations, other than the maintenance of peace, which is provided for in article 1 of the Charter. If unilateral action to advance the interests set out in article 55 is not contemplated by article 56, then the use of forceful action of a unilateral nature to advance the purposes of the United Nations set forth in article 1 would also not be contemplated. If so, then a balancing test to resolve conflicts between the maintenance of peace and other purposes stated in article 1 is meaningless and inapplicable.

86. U.N. CHARTER art. 56.

87. Doc. WD-46, II/3/35, 10 U.N.C.I.O. Docs. 394 (1945).

88. See L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 380-81 (3rd rev. ed. 1969).

89. Doc. WD-18, II/3/A/3, 10 U.N.C.I.O. Docs. 382 (1945).

to take "separate and joint action and cooperate with the Organization and with each other."⁹⁰ If Committee Three had endorsed the Australian proposal and if the proposal had found its way into the Charter, the text of that proposal would have provided greater latitude to argue for the unilateral use of military force, since the reference to "separate action" was not qualified by the phrase "in cooperation with the Organization." The adoption by the Conference and subsequent incorporation into the Charter, of a provision which does qualify "separate action" in this manner suggests that the article should be given its plain meaning.

Finally, rejecting the idea of unilateral military action involves Australia's understanding of the significance of not qualifying "separate action" by requiring it to be taken "in cooperation with the Organization." The effort to decouple these two concepts was not intended to create a basis for unilateral national intervention in the affairs of another state.⁹¹ During Committee discussions of the recommendation requiring states to "cooperate jointly and severally with the Organization,"⁹² Australia offered substitute language proposing that members pledge themselves "to cooperate with the Organization and with each other and to take such independent action as they deem appropriate . . . within their own territories."⁹³ The objective in providing for action of a separate nature, without the need for cooperation with the United Nations, was apparently to require each state to employ measures within its own borders to assure adequate protection of fundamental human rights.⁹⁴ Thus, even had the language of the original Australian proposal been incorporated into article 56 of the Charter, unilateral military action in another state would still not have been authorized.

In light of this background of article 56, it would seem reasonable to conclude that unilateral national action to enforce human rights in another state is not contemplated by articles 55 and 56. It is therefore difficult to accept the idea that conflicts between the maintenance of peace and other purposes of article

90. *Id.*

91. *But see* Reisman & McDougal, *supra* note 54, at 175 (giving a broad interpretation to article 56 in allowing states to act "singly").

92. *See supra* note 90.

93. Doc. 699, II/3/40, 10 U.N.C.I.O. Docs. 139 (1945) (emphasis added).

94. *See* Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 299, n.109 and accompanying text. In addition to articles 55 and 56 of the Charter, one might cite the following documents as authority for unilateral intervention: *Universal Declaration of Human Rights*, G.A. Res. 217, 3 U.N. GAOR at 12, U.N. Doc. A/810 (1948); *International Covenant on Civil and Political Rights*, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966). Although these instruments do endorse human rights, they do not authorize unilateral intervention by one state to enforce such rights in another state. The Universal Declaration refers to "teaching and education" to promote its goals, while the International Covenant refers to periodic nationally prepared reports and the receipt of complaints by a Human Rights Committee.

1 are to be resolved by a balancing test, for there is nothing against which to balance the purposes set out in article 1 if unilateral action to enforce human rights is itself beyond the scope of article 56. But might not the disapproval of unilateral action in article 56 merely indicate that in the estimation of the drafters, whenever a balancing test is applied to an action to promote human rights, the scales invariably tip in favor of the maintenance of peace as mentioned in article 1? Given the parallelism between article 55 and paragraphs 2 and 3 of article 1 describing the purposes of the United Nations, the distinction between rejecting the balancing test for a test based on inconsistency with any one of the purposes of the United Nations, and arguing that the drafters acknowledged the applicability of a balancing test, but simply fashioned the Charter such that the maintenance of peace can never be outweighed by other concerns, seems meaningless. In either case, unilateral military action to enforce human rights in another state would be prohibited.

B. Practical Considerations Affect Assessment of Legitimacy

The preceding discussion has dealt with efforts to justify the use of force to protect nationals abroad on the grounds that such action does not violate paragraph 4 of article 2 of the Charter. A second theory admits that such action violates the terms of the Charter's prohibition, but maintains that the legitimacy of action to protect one's nationals hinges ultimately on practical considerations—namely, all of the conditions that provide the context in which international decisions are generally made and evaluated. This theory attempts to develop the case for the legitimacy of action to protect nationals abroad based on two lines of argument, which have been described as the “subsequent reinterpretation” and the “second-tier criteria” approaches.⁹⁵ While recognizing that maltreatment of nationals abroad can empower the Security Council to use military force,⁹⁶ the subsequent reinterpretation approach holds that the frequent inability of the United Nations to act swiftly enough, or to act at all, and the reality that states will take measures to protect nationals abroad, have subjected the Charter limitation on the unilateral use of force to a revival of the traditional right to intervene for such purposes.⁹⁷ The second-tier criteria approach asserts that the ultimate consideration in assessing the legitimacy of unilateral use of force to protect nationals is “reasonableness,” and that reasonable objective and

95. HUMANITARIAN INTERVENTION, *supra* note 53, at 61-62 (comment by Lillich).

96. Under article 42, the Council is authorized to use military force. U.N. CHARTER, art. 42. That authorization depends on a determination that there exists a “threat to the peace” under article 39. *Id.* art. 39. While maltreatment by a state of its own nationals *may* not constitute a “threat to the peace” and would be outside of the ambit of United Nations power due to the “domestic jurisdiction” limitation of article 2(7), maltreatment by a state of alien nationals residing in that state could arguably endanger international peace because of the risk of action by the aliens’ home state.

97. HUMANITARIAN INTERVENTION, *supra* note 53, at 61 (comment by Lillich); *see* Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 326, 344-45 (1967).

subjective factors can mitigate or overcome rule-oriented determinations of illegality.⁹⁸

The most obvious problem with the subsequent reinterpretation approach is that nothing in the Charter indicates that the obligation to refrain from the threat or use of force in international relations was conditioned upon the United Nations ability to take effective action to assure the preservation of human rights.⁹⁹ The preamble of article 2 provides that members "shall act" in accordance with several principles, one of which declares that members "shall refrain" from threats or use of force.¹⁰⁰ This obligation upon members to avoid the use or threat of force is absolute and arose at the instant the Charter became effective. As we have seen, the obligation does not provide a loophole for unilateral measures of one state to enforce fundamental human freedoms in another state,¹⁰¹ and applies notwithstanding the fact that the Charter framework for Security Council action may be paralyzed by the veto of a permanent member.¹⁰²

Positions taken by various member states in General Assembly resolutions following the adoption of the Charter also suggest that the obligation of article 2(4) is not conditioned upon the effectiveness of the United Nations itself, but rather that, regardless of how the organization functions, the members of the world community are expected to behave in a certain manner. If nothing else, these resolutions are valuable as indications of the intent of state members. The earliest United Nations resolution reflecting this notion is the "Declaration on the Inadmissibility of Intervention"¹⁰³ (Declaration on Nonintervention) of 1965. After noting that "armed intervention is synonymous with aggression" and is a "violation of the Charter of the United Nations," the Declaration condemned intervention in the internal or external affairs of another state "for any reason whatever."¹⁰⁴ Such a broad condemnation seems unlikely if states had perceived the Charter's limitation on the use of force as predicated on the effective functioning of the organization. Otherwise, the condemnation of force would have been drafted much more narrowly.

The 1970 "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States"¹⁰⁵ (Declaration Concerning

98. Cf. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415, 437-39 (1969) (taking this approach with respect to reprisals).

99. See Hassan, *Realpolitik in International Law: After Tanzanian-Ugandan Conflict "Humanitarian Intervention" Reexamined*, 17 WILLAMETTE L. REV. 859, 890 (1981).

100. See *supra* note 28.

101. See *supra* notes 65-94 and accompanying text.

102. See *supra* note 28.

103. Declaration on the Inadmissibility of Intervention, G.A. Res. 2131, 20 U.N. GAOR Supp. (No. 14) at 11, U.N. Doc. A/6014 (1965) [hereinafter Declaration on Nonintervention].

104. *Id.* at 12.

105. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) [hereinafter Declaration Concerning Friendly Relations].

Friendly Relations) is only slightly less clear in expressing disapproval of intervention to protect nationals. The introductory statements of the Declaration Concerning Friendly Relations observe that "any form of intervention" violates the Charter, while the opening paragraph, which elaborates the third principle of friendly relations solemnly proclaimed in the Declaration, contains language virtually identical to that of article 1 of the Declaration on Nonintervention.¹⁰⁶ The Declaration Concerning Friendly Relations goes further than the Nonintervention Declaration by holding that intervention is not simply condemned, but actually violative of international law,¹⁰⁷ and by extending the idea of who can be involved in violative activity beyond individual states to groups of states.¹⁰⁸

The language of elaboration contained in the Declaration Concerning Friendly Relations is attached to principle number three, which imposes a duty not to intervene in "matters within the domestic jurisdiction"¹⁰⁹ of another state. This might indicate a paring down of the obligation of nonintervention first stated in the 1965 Declaration because that earlier stated obligation, which is just like that in the 1970 Declaration, was not associated with qualifying language similar to that in the third principle. Maltreatment of foreign nationals threatens international peace and creates an international problem, thereby causing the situation to fall beyond the domestic jurisdiction of the maltreating state.¹¹⁰ The 1970 Declaration could be interpreted as permitting unilateral intervention to protect nationals abroad because such action falls outside of the "domestic jurisdiction" qualification. The weakness in this conclusion is that maltreatment of foreign nationals should not result in the sanction of unilateral action prohibited by article 2(4),¹¹¹ but rather trigger the powers of the United Nations to take collective action.¹¹²

Like the Declaration on Intervention and the Declaration Concerning Friendly Relations, the "Definition of Aggression" of 1974¹¹³ suggests that the use of force to protect nationals is impermissible, and that the Charter is not to be interpreted in light of the effectiveness of the United Nations in addressing international difficulties. After reaffirming the Declaration Concerning Friendly Relations and noting that "aggression is the most serious and dangerous form of the illegal use of force,"¹¹⁴ article 1 of the 1974 General Assembly resolution provides a definition of aggression that follows the language of article 2(4) of

106. Compare Declaration Concerning Friendly Relations, *supra* note 105 with Declaration on Nonintervention, *supra* note 103.

107. *Id.*

108. *Id.*

109. *Id.*

110. See *supra* note 96.

111. See *supra* notes 54-94 and accompanying text.

112. See *supra* note 96. See also P. JESSUP, *supra* note 6, at 169-70 (modern law envisions collective action to protect nationals abroad).

113. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974) [hereinafter Definition of Aggression].

114. *Id.* at 143.

the Charter, except that it is expressly made applicable only to "armed" force.¹¹⁵ If armed intervention to protect nationals is prohibited by article 2(4) of the Charter as argued above, then it also constitutes aggression under the 1974 Definition, since both documents use virtually identical language.

Article 2 of the Definition refers to Security Council conclusions that armed force in some situations is not aggression under the "relevant circumstances."¹¹⁶ This provision would not save intervention to protect nationals, though it might approve force used for other purposes. The provision is qualified by article 6, which states that "[n]othing in this Definition shall be construed as in any way enlarging . . . the scope of the Charter, including its provisions concerning cases in which the use of force is lawful."¹¹⁷ The Charter's limited approval of the use of force does not now include, nor has it ever included, the protection of nationals. The Security Council provision cannot enlarge the scope of approved force under the Charter.

A third problem with accepting the subsequent reinterpretation approach was first raised in the opinion of the International Court of Justice in the *Corfu Channel* case.¹¹⁸ This litigation involved a dispute between the United Kingdom and Albania in 1949 over passage of British ships through the North Corfu Strait. In May 1946, Albanian shore batteries fired upon British ships exercising the right of innocent passage through the Strait. That October, the British sent four warships through the Strait with guns ready to fire. The Court did not view the United Kingdom's measure as prejudicing innocent passage.¹¹⁹ In November 1946, the British dispatched a large force of vessels to the North Corfu Strait to sweep mines planted by Albania. The British defended this mission as a means of collecting evidence of Albanian illegality and removing an international nuisance. The Court observed that the operation was a "manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, *whatever be the present defects in international organization*, find a place in international law."¹²⁰

This case may well be inapposite to the matter of intervention to protect nationals. The Court faced only the question of how to characterize the British naval activities in November 1946, which were not limited to mere passage through the North Corfu Strait. Nevertheless, it would seem that the Court's comments in that context bear on the more general question of whether the failure of the United Nations to accomplish its purposes warrants the view that traditional rights are thereby revived. The opinion of the Court recognized the existence of defects in the Charter system, and deemed them insufficient to permit the assertion of rights of intervention under traditional international law.

115. *Id.*

116. *Id.*

117. *Id.* art. 6, at 144.

118. *Corfu Channel* (U.K. v. Alb.) 1949 I.C.J. 4.

119. *Id.* at 30-31.

120. *Id.* at 35.

Based on this analysis, the subsequent reinterpretation approach seems untenable.

Problems also exist with the second-tier criteria approach for justifying the legitimacy of the protection of nationals through force. First, there is the recurrent problem of the language of the Charter itself. Just as the Charter contains no explicit qualification indicating that the prohibition on the use of force is only to be effective if the United Nations itself is effective in controlling international violence, neither does the Charter invite an alternative higher level of legal analysis regarding the legality of particular uses of force. As noted above, article 2(4)'s obligation to refrain from the use of force is absolute. During the San Francisco Conference in 1945, a proposal that could have supplied the basis for the argument that the article's prohibition is not absolute received consideration by Conference delegates and was rejected. The proposal would have altered the first of "the Purposes" of the United Nations, as stated in article 1(1), to be the maintenance of international peace and security "in conformity with the principles of justice and international law."¹²¹ Had that qualification been adopted, the use of force would not have been inconsistent with a purpose of the United Nations simply because it hampered the maintenance of international peace and security. Only force that hampered just and lawful peace and security would be inconsistent with the Charter. Any final determination of whether a specific use of force violated the Charter would necessitate consideration of a variety of contextual factors, both objective and subjective. Since there could be occasions in which the use of force would advance a just and lawful peace, some uses of force would produce no inconsistency with article 1 of the Charter. As it stands, however, the Charter's prohibition of force is extraordinarily strict and does not accept the use of force simply because it is designed to advance justice and international law.¹²²

121. Doc. 742, I/1/23, 6 U.N.C.I.O. Docs. 318 (1945). Another proposal that also failed would have inserted "justice" between "security" and "and to that end." *Id.* See also Doc. 885, I/1/34, 6 U.N.C.I.O. Docs. 393-95 (1945); Doc. 926, I/1/36, 6 U.N.C.I.O. Docs. 422-23 (1945); Doc. 944, I/1/34/(1), 6 U.N.C.I.O. Docs. 453 (1945). Before unanimously adopting the language of the first Committee, which eventually became article 1(1) of the Charter, Commission 1 considered and rejected another attempt to insert "in conformity with the principles of justice and international law." Doc. 1179, I/9(1), 6 U.N.C.I.O. Docs. 245-46 (1945); Doc. 1187, I/13, 6 U.N.C.I.O. Docs. 203 (1945).

122. The reference to "the principles of justice and international law" that appears in article 1(1) does not state a *purpose* of the United Nations; it merely points out the requisite character of the terms of a peaceful resolution to an international dispute. U.N. CHARTER art. 1. Therefore, one cannot argue that a use of force to promote justice and international law is a use of force that advances one of the purposes of the international organization.

But, article 2(3) of the Charter refers to "international peace and security, and *justice*." *Id.* art. 2 (emphasis added). While it cannot be maintained that the reference sets out a purpose of the United Nations that might be promoted by the use of force, it might be argued that article 2(3) states an exception for the use of force that is otherwise prohibited under article 2(4). See J. STONE, OF LAW AND NATIONS 5, 8 (1974). Despite this argument, the location in article 2(3) of the reference to "justice" suggests that it was included only to affect the nature of settlements of international disputes. See L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 88, at 27-28, 41.

The 1974 Definition of Aggression presents another problem with the second-tier criteria approach.¹²³ The opening article of the Definition characterizes intervention to protect nationals as illegal aggression because the intervention is inconsistent with the objectives of the United Nations Charter.¹²⁴ The language of article 2 of the Definition cannot save such intervention from censure because article 6 prevents the Definition from broadening the scope of cases for which the use of force is permitted.¹²⁵ Article 5 of the Definition provides that "[n]o consideration of whatever nature, whether political, economic, military, or otherwise, may serve as a justification for aggression."¹²⁶ Consequently, it appears that the use of force to protect nationals, an act considered by the Definition to be illegal aggression, cannot be justified by reference to the surrounding circumstances. The restrictive approach in article 5 would not have been chosen if the General Assembly had believed that exceptions should be permitted.

The final problem with the idea that the legitimacy of the use of force is ultimately determined by reference to factors that can mitigate or overcome rule-oriented appraisals of illegality arises from two recent opinions of the International Court of Justice. In the first, the *Case Concerning United States Diplomatic and Consular Staff in Tehran*,¹²⁷ the Court had occasion to comment on the failed United States attempt to rescue the hostages held in Iran. Although accepting that Iran held the hostages in contravention of all precepts of international law, the Court could not bring itself to endorse the United States action. Judges Morozov¹²⁸ and Tarazi¹²⁹ condemned the action, with the thirteen other judges joining with the majority in holding that the action was an "incursion" that, "from whatever motive, [was] of a kind calculated to undermine respect for the judicial process" initiated in November of 1979.¹³⁰ If circumstances such as these are not viewed as sufficiently mitigating to overcome rules and constitute lawful conduct, some hesitancy should be expressed by others urging such an approach.

The Court's 1986 opinion in *Military and Paramilitary Activities In and Against Nicaragua*¹³¹ evidenced a similar aversion to claims that use of force is lawful when based on justifiable humanitarian objectives. Admittedly, the dispute between Nicaragua and the United States did not involve the maltreat-

123. *Supra* note 113.

124. *See supra* note 115 and accompanying text.

125. *See supra* notes 116-117 and accompanying text.

126. Definition of Aggression, *supra* note 113, art. 5, at 143.

127. *Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)* 1980 I.C.J. 3.

128. *Id.* at 51, 56-57 (Morozov, J. dissenting).

129. *Id.* at 58, 64-65 (Tarazi, J. dissenting).

130. *Id.* para. 93 (emphasis added).

131. *Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (Judgment of June 27).

ment of United States nationals, as did the earlier dispute between the United States and Iran. Nevertheless, one of the contentions advanced by the United States to justify its military activity in Nicaragua related to ongoing human rights violations said to have been committed by Nicaragua's ruling Sandinista government. In response to this contention, the Court observed that "the use of force by the United States could not be the appropriate method . . . to insure respect for [human rights]."¹³² While it is possible that such a clear statement would not have been voiced had the claim of humanitarianism involved protection of United States nationals, the Court's disapproval of the use of force in the narrower circumstances of a claim to redress the violation of human rights seems beyond doubt.

III. "SELF-DEFENSE" PROTECTION THEORY

Other theories aside, the inherent right of self-defense¹³³ recognized by article 51 of the United Nations Charter has also provided a basis for arguing the legitimacy of the protection of nationals subjected to maltreatment while located in another country.¹³⁴ But, as discussed above, the text of article 51 refers to the right existing whenever an armed attack occurs "against a *Member* of the United Nations;"¹³⁵ therefore, it would seem difficult to view any claim to self-defense as legitimate in the absence of a specific border violation or trespass on the territory of the retaliating state. Setting aside instances in which maltreatment of individuals accompanies an attack on naval vessels, aircraft, vehicles, bases, installations, embassies, compounds, or offices of one state located in another state,¹³⁶ at least two explanations might be advanced for the use of force to deal with attacks on individuals. One explanation is that an attack on nationals abroad is indeed an attack on the nationals' home state, whenever the attack is motivated by political hostility.¹³⁷ The other explanation maintains that the adoption of article 51 has not displaced the traditional law of self-defense, which included the defense of nationals abroad.¹³⁸

132. *Id.* at 134 (para. 268).

133. On the inherent nature of the right of self-defense, the United States delegate to the drafting of the Kellogg-Briand Treaty of 1928 observed that the right "is inherent in every sovereign state and is implicit in every treaty." 1 U.S. FOREIGN REL. 36 (1928).

134. THE DOMINICAN CRISIS 1965, at 11-24 (R.W. Mansbach ed. 1971). See, e.g., Bowett, *The Use of Force in the Protection of Nationals*, 43 TRANS. GROT. SOC'Y 111, 117 (1957); Fawcett, *supra* note 6, at 360-63, 365-69; Fitzmaurice, *supra* note 6, at 171-74; Waldock, *supra* note 6 at 467.

135. U.N. CHARTER art. 51.

136. For the view that an attack on naval vessels, aircraft, or other property alone constitutes an attack on the "state," see Schachter, *supra* note 1, at 1636.

137. See *id.* at 1632; Schachter, *supra* note 27, at 139, n.107.

138. See, e.g., Waldock, *supra* note 6, at 496-98.

A. *Attack on Nationals Abroad is an Attack on a "Member"*

The idea that an attack on nationals abroad is an attack on the home state of the nationals seems difficult to accept, even when there is evidence of political motivation. Article 51 affirms the right of self-defense in response to an attack against a "Member," a state belonging to the United Nations.¹³⁹ Other provisions of the Charter seem to indicate that the term "Member" does not include attacks on nationals of a member state when such nationals are located beyond that state's borders.¹⁴⁰ In each of these provisions, "Member" refers to nothing more than the territorial and governmental entity known as a state. Article 2(4) of the Charter, in some respects the other side of the self-defense coin, provides an excellent illustration of this point. Article 2(4)'s obligation to refrain from the threat or use of force is enjoined on "Members."¹⁴¹ While the applicability of the obligation to non-members might be questioned,¹⁴² there seems to be no doubt that it does not apply to individuals acting on their own and without state supervision or assistance.¹⁴³ Article 2(6), which obligates the United Nations itself to ensure that non-members act in accordance with the principles of the organization to the extent necessary to maintain international peace,¹⁴⁴ uses the term "Members" in precisely the same way. Indeed, it specifically provides that this obligation is designed so that "states which are not Members"¹⁴⁵ follow the Charter. With the possible exception of inserting a definition of "Member" in the Charter itself, it would seem hard to imagine a clearer way of establishing that "Member" refers to "states." Any uncertainty in this regard is addressed by articles 3 and 4(1). Article 3 notes that the original "Members" of the United Nations shall be the "states" participating in the San Francisco Conference,¹⁴⁶ and article 4(1) indicates that "Membership" is open to all other peace-loving "states."¹⁴⁷

Another reason that use of force in response to a politically motivated attack upon nationals abroad cannot be justified is that the right to self-defense pos-

139. States that are not members of the United Nations would be entitled to exercise self-defense, but only by virtue of traditional international law, not through article 51 of the Charter.

140. See discussion of articles 2(4), 2(6), 3, and 4(1), *infra* notes 141-47.

141. U.N. CHARTER art. 2, para. 4.

142. See L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 910 (1st ed. 1980) (article 2(4) has been accepted into the corpus of customary international law and therefore binds member and non-member states alike). See also D. BOWETT, *supra* note 6, at 152-53.

143. One commentator argues that in the absence of control by one state over individuals located in another state, even giving military aid to such individuals would be insufficient to conclude that a "Member" has used force upon another state in violation of article 2(4). I. BROWNLIE, *supra* note 6, at 370. If that is so, *unaided* attacks upon a state by individuals not under the control of another state would compel the same conclusion.

144. U.N. CHARTER art. 2, para. 6.

145. *Id.* (emphasis added).

146. *Id.* art. 3.

147. *Id.* art. 4, para. 1.

sessed by each "Member" state under article 51 of the Charter¹⁴⁸ is a right to defense of "self."¹⁴⁹ By its very nature, article 51 is designed to permit states to take up arms in legitimate defense of themselves when attacked.¹⁵⁰ An attack by one state that threatens the security or independence of another state would justify a claim of self-defense, but the same could not be said for an attack on a state's nationals while those nationals are outside of the state's territory and in the territory of the attacking state.¹⁵¹ To imperil the safety of nationals abroad is not *ipso facto* to imperil the security or independence of the nationals' home state. Even in instances where the number of nationals threatened with or suffering an attack is significant, there would be no attack on the state itself, since it would be difficult to imagine a situation where an attack on nationals abroad jeopardizes the actual survival of the state itself.¹⁵² To the extent that

148. On the role of proportionality in protection cases, see D. BOWETT, *supra* note 6, at 93-94.

149. See R. HIGGINS, *supra* note 53, at 220; Wright, *United States Intervention in Lebanon*, 53 AM. J. INT'L L. 112, 116-17 (1959).

150. All uses of force do not rise to the level of an "attack" under article 51. M. McDOUGAL & F. FELICIANO, *supra* note 6, at 227 (attack requires "severe deprivations of values so important that their loss or destruction will substantially impair the functioning of the territorially organized community or preclude its continued existence as a distinct polity"). See Brownlie, *International Law and the Activities of Armed Bands*, 7 INT'L & COMP. L.Q. 712, 731 (1958) ("grave breach of the peace, or invasion of a large organized force" is required); Schwarzenberger, *The Fundamental Principles of International Law*, 87 RECUEIL DES COURS 195, 333 (1955) (self-defense invoked to protect "vital, or at least important, rights or interests").

151. One might question whether the use of force by one state which resulted in a trespass to the border of another state would entitle the violated state to use force in self-defense. Such situations might include "frontier incidents" (e.g., guards firing across the demilitarized zone separating North and South Korea) or raids by armed bands resulting in death or injury to the nationals of the state that was raided (e.g., the Pancho Villa incident). For positions on "frontier incidents," see I. BROWNIE, *supra* note 6, at 366 (skeptical about force used in "frontier incidents" being defended as self-defense); M. McDOUGAL & F. FELICIANO, *supra* note 6, at 227-28 (apparently taking the same view, though not expressly stating it, since the presence or absence of territorial trespass was not viewed as determinative). With respect to raids by armed bands, there is no doubting the right of self-defense against an ongoing attack. With respect to pre-Charter law and the pursuit of attackers into their countries of origin, see *infra* notes 183-204 and accompanying text. D. BOWETT, *supra* note 6, at 38-41 (considering it to be too similar to impermissible reprisal to be self-defense in most cases); P. JESSUP, *A Modern Law of Nations* 165-66, 168 (1948) (hesitant to characterize such actions as lawful self-defense). On post-Charter law, see Brownlie, *supra* note 150, at 731-34 (doubtful that it qualifies as self-defense).

Another question is whether self-defense can be invoked only in the context of a territorial trespass threatening security or independence. This relates to whether modalities that can be imposed from outside the borders of the target state, such as economic or political coercion, can also trigger self-defense. D. BOWETT, *supra* note 6, at 106-14. On this, see M. McDOUGAL & F. FELICIANO, *supra* note 6, at 240-41.

152. *But see* D. BOWETT, *supra* note 6, at 92-93; M. McDOUGAL & F. FELICIANO, *supra* note 6, at 228; W. MALLISON & S. MALLISON, *THE PALESTINE PROBLEM* 306-09 (1986) (taking the position that attacks on a small number of nationals abroad do not trigger self-defense, although expressing no view on whether attacks on a large number of nationals would permit responsive action under article 51). *Cf.* I. BROWNIE, *supra* note 6, at 301 (protection of nationals is not legitimate under article 51, but compelling reasons do exist for the state to act).

article 51 limits the use of force to occasions capable of threatening a state's survival or its political freedom, there would be little possibility of justification for military measures to protect nationals abroad on the basis of the right to self-defense in the Charter.

B. Article 51 Did Not Displace Traditional Right to Protect

If the bases for adopting article 51 had nothing to do with decreasing traditional self-defense and the history of article 2(4) suggests that self-defense "remains" admitted and unimpaired, then the traditional right of self-defense, which included the right to protect nationals, survived the adoption of the Charter.¹⁵³ The essence of this argument is that article 51 simply speaks to a right of self-defense if an armed attack occurs on a member state, and does not address whether or not such a right exists in other circumstances.¹⁵⁴ The article states that "[n]othing in the present Charter shall impair the inherent right of . . . self-defense if an armed attack occurs against a Member of the United Nations."¹⁵⁵ The negotiating history of the Charter must be reviewed to determine whether a right of self-defense exists in situations involving something other than an armed attack on a member state. This history reveals that self-defense, as conceived in traditional international law, was left unaffected by the document's adoption. The Report of the Rapporteur of Committee 1 to Commission I at the San Francisco Conference indicates that despite the Charter's prohibition on the use of force, "self-defense *remains* admitted and unimpaired."¹⁵⁶ Furthermore, the objective in adopting article 51 was simply to integrate the system envisioned by the Charter with existing mutual defense arrangements.¹⁵⁷

A major weakness in this argument is whether or not the right to protect nationals was part of the traditional concept of self-defense at the time of the adoption of the Charter. One indication that it was not part of that concept lies in the absence of any reference to either the doctrine of self-defense or the rule of the *Caroline* incident, regarded as the principal illustration of self-defense.¹⁵⁸ An examination of some of the most frequently cited episodes involving the use of force by the United States and Great Britain, the modern proponents of the self-defense theory, during the one hundred years prior to 1945, corroborates the assertion that neither of those states relied on the theory of self-defense to justify protection of nationals.

153. D. BOWETT, *supra* note 6, at 87-105. See Waldock, *supra* note 6, at 466-67, 496-98, 503.

154. See D. BOWETT, *supra* note 6, at 187-88.

155. U.N. CHARTER art. 51.

156. Doc. 885, I/1/34, 6 U.N.C.I.O. Docs. 400 (1945) (emphasis added).

157. See M. McDUGAL & F. FELICIANO, *supra* note 6, at 235; Waldock, *supra* note 6, at 496-97.

158. I. BROWNLIE, *supra* note 6, at 299-300 (expressing this concern).

For example, the United States intervened in Vera Cruz, Mexico in 1860 to protect United States citizens from threats by hostile forces. The unsettled state of affairs in Mexico found the government of populist Benito Juarez in Vera Cruz face to face with the Miramon government based in Mexico City. Eventually Juarez prevailed, only to be ousted shortly thereafter by the French, who established Archduke Maximilian as emperor.¹⁵⁹ During the Juarez-Miramon struggle, the United States minister in Vera Cruz, Mr. McLane, was directed to request the landing of forces from nearby United States naval vessels if he considered the political hostility dangerous to American lives or property. The action properly should be considered one of protection, not of self-defense.¹⁶⁰

Likewise, several motivations prompted the United States 1898 intervention in Cuba, then controlled by Spain. These included territorial expansion, the desire to satiate interventionist sentiment stimulated by the Yellow Journalism of the times, and avenging the February 15, 1898 destruction of the United States battleship *Maine* in Havana harbor, which left countless people dead and injured.¹⁶¹ Intervention by the United States occurred in the context of a long and bloody period of revolt by Cuban insurrectionists against the Spanish colonial government which pursued responsive measures that shocked the United States.¹⁶² President McKinley's April 11, 1898 message to Congress declared that intervention would be justified on four separate grounds, one of which was that "[w]e owe to our citizens in Cuba to afford them protection and indemnity for life and property which no government there can or will afford."¹⁶³ McKinley did not seek to justify intervention by a right of self-defense. On April 25, 1898, the United States declared war on Spain.

The United States and Great Britain also justified their intervention in the Boxer Rebellion in China in 1900 with the claim of protecting nationals, again without reference to the right of self-defense.¹⁶⁴ The troubles in China, which began as anti-foreign sentiment, threatened the frequently unprotected missionaries operating in the countryside as well as the diplomatic legations and associated personnel stationed in Peking.¹⁶⁵ An international force of approximately nineteen thousand troops was sent in to quell the disturbance.¹⁶⁶ In a July 3, 1900 diplomatic circular from Secretary of State John Hay (often described as the second "open door" note¹⁶⁷ because of its recognition of the territorial integrity of China), the United States indicated that its contribution to the international expeditionary force was prompted by an interest "first, in

159. See R. FERRELL, *AMERICAN DIPLOMACY: A HISTORY* 274-75 (3d ed. 1975).

160. See 2 J. MOORE, *A DIGEST OF INTERNATIONAL LAW* 400 (1906).

161. See R. FERRELL, *supra* note 159, at 347-57.

162. *Id.* at 350.

163. FOREIGN REL. U.S. 750, 757-58 (1898).

164. See *infra* notes 173-81 and accompanying text.

165. See 5 J. MOORE, *A DIGEST OF INTERNATIONAL LAW* 476-81 (1906).

166. See R. FERRELL, *supra* note 159, at 376.

167. *Id.* at 375-76.

opening up communications with Peking and rescuing the American officials, missionaries, and other Americans who are in danger; secondly, in affording all possible protection everywhere in China to American life and property"¹⁶⁸ Great Britain agreed with this position.¹⁶⁹

When the United States intervened in Nicaragua in late 1926 and early 1927, the claim of protecting nationals was again advanced. Nicaragua was in the midst of a civil war that pitted conservatives, under the leadership of long-time United States ally Adolfo Diaz, against the liberal, revolutionary forces headed by Dr. Juan Sacasa.¹⁷⁰ The situation was thought to threaten United States citizens living and working in Nicaragua. President Coolidge dispatched Marines to the area to establish neutral zones. By March 1927 the troops numbered almost two thousand.¹⁷¹ The United States Department of State justified the intervention by arguing that the Marines had landed "to maintain the neutral zones and protect Americans and other foreign lives and property."¹⁷² The State Department did not rely on self-defense as supporting a right of protection.

In January 1927 three brigades of British soldiers under the command of Major-General John Duncan were ordered to Shanghai, China.¹⁷³ Earlier that month, unruly mobs, teeming with nationalist fervor ignited by leaders such as Sun Yat-sen and Chiang Kai-shek, attacked British citizens in the city.¹⁷⁴ On January 27 of that year, the first detachments of British troops arrived.¹⁷⁵ A communique from Great Britain to the League of Nations Secretariat justified the intervention as being necessary for the protection of British nationals. Again, the communique made no reference to the intervention as being one of self-defense.¹⁷⁶

The final incident of intervention to protect nationals abroad involving the United States or Great Britain during this time period involved the landing of American Marines in Fukien Province in southern China, during January 1934.¹⁷⁷ On November 20, 1933, General Tsai Ting-kai declared the Fukien

168. FOREIGN REL. U.S. 299 (1900).

169. *Id.* at 345 (a July 7, 1900 expression of agreement by Britain's Foreign Secretary, Lord Salisbury).

170. See R. FERRELL, *supra* note 159, at 412-13.

171. 1 C. HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 271, n.1 (1945).

172. *Id.*

173. See 9 BRIT. Y.B. INT'L L. 228 (1928).

174. *Id.*

175. *Id.*

176. Letter from the British Government to the Secretary-General of the League, Feb. 8, 1927, para. 6, LEAGUE OF NATIONS O.J. 292, 293 (1927). The indication is that the dispatch of troops was a "precautionary measure . . . required for the *protection* of the British community at Shanghai." (emphasis added). The Letter's reference to "self-defence" by marine guards then present does not detract from this indication, since the self-defense referenced in the Letter was in an *individual* capacity; it did not reference self-defense by the *state*.

177. See 1 C. HYDE, *supra* note 171, at 648, n.8.

Province independent from the Chinese Nationalist Government. By the middle of January 1934, the Nationalists had dispatched a naval landing party to the Province.¹⁷⁸ In the estimation of Mr. Burke, United States Vice Consul for the area, the ensuing conflict with the rebellious forces under General Tsai's command was endangering nationals residing in the vicinity. Mr. Burke apparently requested military protection for the nationals, which was provided when the United States, under the charge of Commander Reinicke, landed Marines at Foochow.¹⁷⁹ Self-defense was never officially raised as a justification for Reinicke's action.¹⁸⁰ Given the then existing Navy regulations governing the use of force to protect nationals abroad, the absence of a self-defense argument may have been the result of justifying this action under the broader concept of self-preservation.¹⁸¹

Prior to the adoption of the Charter, states repeatedly cited self-defense as the justification for invading a neighboring state to protect nationals at home against armed bands that would violate national boundaries, invade foreign territory, complete their attacks, and flee back across national boundaries to avoid repercussions.¹⁸² Four important incidents reflect this practice and support the notion that states recognized the difference between defense of self and defense of nationals abroad.

The first incident concerned Major-General, and later President, Andrew Jackson's expedition into Florida in 1818 against Seminole Indians under

178. See 28 AM. J. INT'L L. 353 (1934); CURRENT HISTORY, Feb.-March 1934.

179. See 1 C. HYDE, *supra* note 171, at 648, n.8.

180. See 3 FOREIGN REL. U.S. 462-67 (1951).

181. See UNITED STATES NAVY REGULATIONS (1932). Section 722 of the Regulations states:

On occasions where injury to the United States or to citizens thereof is committed or threatened, in violation of the principles of international law or treaty rights, the commander in chief shall consult with the diplomatic representative or consul of the United States, and take such steps as the gravity of the case demands, reporting immediately to the Secretary of the Navy all the facts. The responsibility for any action taken by a naval force, however, rests wholly upon the commanding officer thereof.

Id., quoted in Woodward, *The Relations Between the Navy and the Foreign Service*, 33 AM. J. INT'L L. 283, 286-87 (1939).

Section 723 implies the preceding by stating:

The use of force against a foreign and friendly state, or against anyone within the territories thereof, is illegal. The right of self-preservation, however, is a right which belongs to States as well as to individuals, and in the case of States it includes the protection of the State, its honor, and its possessions, and the lives and property of its citizens against arbitrary violence, actual or impending, whereby the State or its citizens may suffer irreparable injury. The conditions calling for the application of the right of self-preservation cannot be defined before-hand, but must be left to the sound judgment of responsible officers, who are to perform their duties in this respect with all possible care and forbearance

Id. at 286-87.

Section 723 notably does not refer to the right of self-defense, but to the broader notion of self-preservation.

182. See D. BOWETT, *supra* note 6, at 38-39; Brownlie, *supra* note 150, at 732.

Spanish control.¹⁸³ Spain controlled Florida through the Pinckney Treaty of 1795¹⁸⁴ and had agreed to restrain Indians in the area from conducting raids on Americans living along the frontier.¹⁸⁵ Spain was either unable or unwilling to do this, which led the United States to take action against what Secretary of State John Quincy Adams described as a "horrible combination of robbery, murder, and war, with which the frontier of the United States bordering Florida has for several years past been visited."¹⁸⁶ In the late winter and the early spring of 1818, Jackson crossed into Florida, attacked the Seminoles, secured a Spanish fortress at St. Mark's, and moved westward to occupy Pensacola, where he understood the Indians enjoyed free access.¹⁸⁷ Jackson's activities were defended by Secretary Adams as "a necessary measure of self-defense."¹⁸⁸

The second incident occurred in 1836, when the territory of Texas was in revolt against the Mexican government, and Indian hostilities in the territory aroused fear in United States officials. An 1831 treaty,¹⁸⁹ similar to the Pinckney Treaty, existed between the United States and Mexico obligating Mexico to restrain Indians deemed likely to attack frontier settlements.¹⁹⁰ In a series of diplomatic exchanges between Secretary of State John Forsyth and the Mexican Minister to Washington, Mr. Gorostiza, the United States expressed concern over the Indian raids from across the border and indicated that necessity might compel pursuing Indian raiders back to Mexico.¹⁹¹ A December 10, 1836 communique from Secretary Forsyth to Mr. Ellis, the American Minister to Mexico, justified such pursuit as resting "upon principles of the law of nations, entirely distinct from those on which war is justified—upon the immutable principles of self-defense."¹⁹²

The third incident in which intervention to pursue armed bands was sought to be justified as self-defense arose when, in accordance with the rationale expressed in Secretary Forsyth's 1836 statement, the United States military pursued marauding Indians back into Mexican territory on several occasions during the nineteenth century.¹⁹³ Mexican claims arising from such actions resulted in the appointment of a commission of experts by the United States Secretary of War in August 1912. After some reflection, the commission followed the

183. See R. FERRELL, *supra* note 159, at 161-65.

184. Pinckney Treaty, art. V, T.S. No. 325, 11 Bevens 516, entered into force Apr. 25, 1796.

185. See 2 J. MOORE, *supra* note 160, at 404-05.

186. *Id.* at 405 (letter from Secretary of State Adams to Spanish Minister to Washington, Don Luis de Onis, dated Nov. 30, 1818).

187. See 2 J. MOORE, *supra* note 160, at 403-04.

188. *Id.* at 405-06 (Instructions from Secretary of State Adams to the U.S. Minister to Madrid, Mr. Erving, Nov. 28, 1818).

189. Treaty of Amity, Commerce and Navigation, art. 33, T.S. No. 203, 9 Bevens 764, entered into force Apr. 5, 1832.

190. See 2 J. MOORE, *supra* note 160, at 420.

191. *Id.* at 418-20.

192. *Id.* at 420.

193. *Id.* at 421-24.

longstanding position that the use of force in pursuing armed bands across international boundaries was acceptable in international law and grounded on a "right of self-defense . . . superior in the particular circumstances to the right of territorial inviolability."¹⁹⁴

Finally, there were the series of cross-border raids of the notorious Mexican bandit Pancho Villa. These raids arose during a period of violent political strife in Mexico, marked by the power struggle between Venustiano Carranza, who had deposed President Victoriano Huerta in August 1914,¹⁹⁵ and Villa, who had originally supported Carranza. Villa and other bandits operated in northern Mexico near the United States border. As early as September 1915, the bandits raided Americans living in Texas,¹⁹⁶ and apparently continued to do so throughout that year.¹⁹⁷ On January 11, 1916, in Santa Ysabel, Villa seized and subsequently executed American college students travelling under safe conduct passes from the Carranza government.¹⁹⁸ Following his attack on Columbus, New Mexico on March 9, 1916, which resulted in several deaths and in the burning of the town,¹⁹⁹ President Wilson ordered 6,000 United States troops, under the command of Brigadier-General John J. Pershing, to pursue Villa into Mexico.²⁰⁰ Raids by Mexican bandits on Glen Springs, Texas on May 5, 1916 resulted in another American expedition into Mexico on May 10 of that same year.²⁰¹ United States Secretary of State Robert Lansing defended both of these efforts to pursue Mexican bandits in a June 20, 1916 communication to the Mexican Foreign Secretary. Though Lansing did not explicitly mention self-defense, he did state that the efforts were measures of "hot pursuit."²⁰² American commentators of the time considered such measures to be an aspect of self-defense.²⁰³ As these incidents illustrate, there was no strong basis for a claim of self-defense justifying use of force to address attacks on nationals abroad in the Pre-Charter era. Self-defense claims were used to justify the use of force only in instances in which the territorial boundaries of the defending state had been violated.

Aside from the evidence suggesting a separation of the traditional right to protect nationals from the concept of self-defense as it existed prior to the adop-

194. 2 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 289 (1941).

195. See R. FERRELL, *supra* note 159, at 420-21.

196. See FOREIGN REL. U.S. 581-82 (1916) (letter from U.S. Secretary of State Lansing to the Mexican Foreign Secretary).

197. *Id.* at 582 (referring to the October 1915 attack on a train seven miles north of Brownsville, Texas).

198. See R. FERRELL, *supra* note 159, at 421.

199. See 1 C. HYDE, *supra* note 171, at 241.

200. See R. FERRELL, *supra* note 159, at 421-22.

201. See 1 C. HYDE, *supra* note 171, at 242.

202. FOREIGN REL. U.S. 581, 588 (1916).

203. See, e.g., 2 J. MOORE, *supra* note 160, at 418-25 (classifying the pursuit of marauders under the general heading of "Plea of Necessary Self-Defense"); Hershey, *Incursions into Mexico and the Doctrine of Hot Pursuit*, 13 AM. J. INT'L L. 568 (1919).

tion of the Charter, the argument that the adoption of article 51 did not displace the traditional right to intervene for the benefit of nationals abroad has a second weakness. As noted earlier, the Charter envisioned only action of a collective, and not a unilateral, nature to enforce or secure human rights.²⁰⁴ The reference to "separate" action to promote human rights in article 56 of the Charter was apparently intended to do nothing more than require each nation to take measures within its own territory to assure the observance of such rights.²⁰⁵ It seems peculiar that the traditional right to resort to the unilateral use of force to protest the maltreatment of nationals abroad would be preserved by article 51 of the Charter while being renounced elsewhere in that same instrument.²⁰⁶ The only explanation is that the drafters of the Charter wanted to subject this traditional right to the same limitations that were imposed on the exercise of the right of self-defense. While the plausibility of this explanation is supported by the fact that critics of the argument advocating the survival of the traditional right have acknowledged that the right itself was not under similar limitations,²⁰⁷ there is absolutely nothing in the negotiating documents concerning article 51 to even remotely suggest that this was one of the purposes behind the incorporation of that provision into the Charter itself.²⁰⁸

Another weakness in the argument that the traditional right was not displaced by article 51 is found in the International Court of Justice opinion regarding the dispute between the United States and Iran in 1980.²⁰⁹ The majority found the United States rescue attempt to be an incursion that undermined respect for the previously instituted judicial process.²¹⁰ Justices Morozov and Tarazi evaluated the action more harshly and thought it to be clearly unsupportable by article 51.²¹¹ The argument that the ratification of the right of self-defense in article 51 includes the traditional right to use force to protect nationals abroad

204. See *supra* notes 82-94 and accompanying text.

205. See *supra* notes 93-94 and accompanying text.

206. On the rejection of broader language that may have permitted unilateral actions, see *supra* notes 87-90 and accompanying text.

207. See, e.g., I. BROWNIE, *supra* note 6, at 299-300.

208. On the principal purpose for the adoption of article 51, see sources cited *supra* note 159.

209. *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran) 1980 I.C.J. 3.

210. *Id.* at 43.

211. J. Morozov argued:

Article 51 of the Charter, establishing the right of self-defence, may be invoked only 'if an armed attack occurs against a Member of the United Nations.' [The opinion of the Court] should have added that in the documentation officially presented by the United States to the Court in response to its request relating to the events of 24-25 April, 1980, there is no evidence that any armed attack had occurred against the United States.

Id. at 56-57. J. Tarazi argued:

Yet Article 51 provides for the eventuality of that kind of operation only 'if an armed attack occurs against a Member of the United Nations.' One can only wonder, therefore, whether an armed attack attributable to the Iranian Government has been committed against the territory of the United States, apart from its Embassy and Consulates in Iran.

Id. at 64-65.

suggests that force used to protect nationals would be lawful whenever article 51 is properly consulted. Therefore, the only question that should occupy those having to decide an issue of self-defense would be the question of what facts actually existed, because if protection efforts are lawful in principle, then the facts alone determine lawfulness in a particular situation. Yet even the majority opinion in the *Hostage Case* did not concern itself with whether the facts justified the United States action. The justices appeared to assume that only self-defense permitted the unilateral use of force and that self-defense did not include the protection of nationals abroad. The Court gives little regard to the argument that the protection of nationals abroad survived the adoption of article 51 of the Charter.

United Nations practice related to whether article 51 includes the traditional right to use force for the protection of nationals abroad also merits examination. Several claims that involved the protection of nationals abroad and eventually led to United Nations consideration were disputed as to their factual sufficiency. These incidents included Great Britain's actions to protect nationals during the Suez Crisis of 1956,²¹² the United States intervention in Lebanon in 1958,²¹³ the Dominican Republic situation of 1965,²¹⁴ the *Mayaguez* incident of 1975,²¹⁵ and the invasion of Grenada in 1983.²¹⁶ Two incidents that cannot be factually disputed, however, are the rescue operation in the Congo in 1964 by the United States and Belgium and the Israeli raid on Entebbe Airport in 1976. Thus, these incidents cast light on whether the United Nations recognizes the traditional right to protect nationals abroad as part of the right of self-defense guaranteed by article 51 of the Charter.

In the Congo, the Leopoldville central government under the leadership of Prime Minister Moïse Tshombe had been contending with rebels led by Christopher Gbenye. The rebels had taken approximately one thousand residents as hostages. The hostages were citizens of eighteen nations, including the United States and Belgium, and were held in Stanleyville. When the concessions that the rebels demanded from Tshombe were not met, thirty-five of the hostages, including nineteen Belgians, two Americans, and one Englishman, were

212. See, e.g., D. BOWETT, *supra* note 6, at 104; I. BROWNLIE, *supra* note 6, at 297; R. HIGGINS, *supra* note 53, at 221.

213. Compare R. HIGGINS, *supra* note 53, at 221 (not warranted) with Potter, *Legal Aspects of the Beirut Landing*, 52 AM. J. INT'L L. 727, 728 (1958) (warranted).

214. Compare HUMANITARIAN INTERVENTION, *supra* note 53, at 80-81 (comment of Harry Almond to the effect that the facts warranted intervention) with sources cited in Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order-Part 1*, 43 DENVER L.J. 439, 464-65 (1966) (unwarranted on the facts).

215. Compare Paust, *The Seizure and Recovery of the Mayaguez*, 85 YALE L.J. 774, 800 (1976) (unwarranted) with Finch, *Pueblo and Mayaguez: A Legal Analysis*, 9 CASE W. RES. J. INT'L L. 79, 108-10 (1977) (warranted on facts, but questions whether diplomatic efforts had been exhausted).

216. Compare Boyle, *International Lawlessness in Grenada*, 78 AM. J. INT'L L. 172 (1984) (the Reagan administration did not establish "that there did in fact exist an immediate threat to the safety of U.S. citizens in Grenada") with MOORE, *supra* note 19, at 12 (warranted on facts).

executed.²¹⁷ The Gbenye faction indicated that "we will make our fetishes with the hearts of the Americans and Belgians . . . and dress ourselves with the skins of the Americans and Belgians."²¹⁸ A captured telegram from a rebel general to a field commander indicated that more executions would follow.²¹⁹ Beginning on November 24, 1964, United States aircraft operating from Ascension Island in the South Atlantic dropped Belgian commandos into the rebel stronghold to begin the rescue operation.²²⁰ The United States Department of State reported at first that American participation in the mission was justified "in exercise of our clear responsibility to protect United States citizens under the circumstances existing in the Stanleyville area."²²¹ Later, the State Department indicated that the United States had been invited to participate by the Tshombe government.²²² In any case, the mission succeeded in evacuating all but about sixty to eighty Europeans.²²³

In the United Nations Security Council there was prolonged discussion of the rescue operation.²²⁴ The final result was the unanimous adoption of Security Council Resolution 199, as proposed by the Ivory Coast and Morocco and amended by Guinea.²²⁵ The most relevant portion of the Resolution provided that the Security Council "[r]equests all States to refrain or desist from intervening in the domestic affairs of the Congo."²²⁶ Although some might consider the absence of any condemnation of the rescue operation as significant, given that the Tshombe government had invited Belgium and the United States to undertake the rescue mission, the better view would be that the pertinent language of the Resolution was not designed to address anything more than intervention by outside forces to assist the combatants in the Congo Civil War. Intervention to rescue nationals was not addressed, as the invitation from the Central government eliminated the need to do so. The unanimous adoption of the Resolution supports this reading, in that Security Council members with diametrically opposed views on the lawfulness of the operation²²⁷ joined in agreement on the phraseology of a particular Resolution.

217. See Lillich, *supra* note 97, at 339.

218. 52 DEPT ST. BULL. 18 (1965).

219. See Reisman & McDougal, *supra* note 54, at 185.

220. See L. SOHN, *THE UNITED NATIONS IN ACTION* 268, note (1968).

221. 51 DEPT ST. BULL. 841 (1964).

222. See Cleveland, *The Evolution of Rising Responsibility*, 52 DEPT ST. BULL. 7, 9 (1965).

223. See Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 288 (1973).

224. See 2 UN MONTHLY CHRON. 7-21 (1965) (reviewing the eleven Security Council meetings on the rescue mission).

225. See L. SOHN, *supra* note 220.

226. S.C. Res., 19 U.N. SCOR at 19, U.N. Doc. S/INF/19/Rev. 1 (1964).

227. On the one hand, the United States argued that the mission was lawful, see 2 UN MONTHLY CHRON., *supra* note 224, at 10, 13, while the Soviet Union, among others, argued that it violated international law, see *id.* at 19.

The facts of the Entebbe incident have been detailed above.²²⁸ The Security Council proposed two draft resolutions after the Ambassador of Mauritius placed the issue of the Israeli commando raid before the Council. One resolution, sponsored by Benin, Libya, and Tanzania, condemned the raid as a flagrant violation of international law,²²⁹ while the other resolution, sponsored by the United States and the United Kingdom, condemned hijacking and other matters, but did not explicitly deal with the legality of Israel's rescue effort.²³⁰ Neither of the two proposals was adopted.²³¹ The draft condemning hijacking failed to obtain the necessary two-thirds vote,²³² while the other draft was never submitted for a vote.²³³

The Security Council's lack of comment on the raid on Entebbe prompted Israel to conclude that the Council recognized that the action was consistent with international legal principles.²³⁴ However, as with Security Council Resolution 199 addressing the Congo intervention in 1964, the Council's failure to voice any opinion on the Israeli operation could be seen as expressing no opinion at all on whether the Security Council viewed the traditional right to protect nationals as having survived the adoption of article 51. Only six states had supported the hijacking resolution, which had implicitly seemed to accept Israel's action as lawful,²³⁵ while the seven states that refused to participate contended that in addressing the hijacking itself the draft resolution went far beyond the scope of the matter being considered.²³⁶ During the Security Council debates, several of the same seven states strongly criticized the Israeli commando operation.²³⁷ That criticism was never converted into an official Security Council position, since the other draft resolution that would have accomplished that objective was withheld from formal vote. Israel's conclusion, therefore, would seem incorrect because the resolution implicitly embracing the idea of the continuation of the traditional right to protect nationals was formally rejected. It would also be incorrect to conclude that the rejection of that draft resolution demonstrated Security Council disapprobation of the survival of the right to protect nationals abroad. The states supporting that approach did not take the opportunity provided by the draft proposed by Benin, Libya, and Tanzania to establish that position in the official record of the

228. See *supra* notes 49-52 and accompanying text.

229. 31 U.N. SCOR Supp. (July-Sept. 1976) at 15-16, U.N. Doc. S/12139 (1976).

230. 31 U.N. SCOR Supp. (July-Sept. 1976) at 15, U.N. Doc. S/12138 (1976).

231. See 31 U.N. SCOR (1941st mtg.) at 1-21, U.N. Doc. S/PV.1941 (1976).

232. 31 U.N. SCOR (1943d mtg.) at 81, U.N. Doc. S/PV.1943 (1976).

233. See *Council Fails To Adopt Draft Resolution After Considering Uganda Hijacking Issue*, UN MONTHLY CHRON., Aug.-Sept. 1976, at 15.

234. See Teltsch, *Africans Abandon Anti-Israel move in U.N.'s Council*, N.Y. Times, July 15, 1976, at 1, col. 1.

235. See Boyle, *supra* note 21, at 801.

236. See, e.g., *supra* note 232, at 78-80 (statement by representative from Guyana).

237. After all, the non-participants Benin, Libya, and Tanzania sponsored the counter draft resolution referenced above.

Security Council. In the final analysis, United Nations practice is inconclusive. The Council's failure to pass judgment on the Entebbe incident tells us no more about the relationship between the traditional right to protect nationals and article 51 than the adoption of Security Council Resolution 199 concerning the Congo told us in 1964.

IV. CONSENT AND OBLIGATION

In view of the preceding analysis of articles 51 and 2(4) of the United Nations Charter, the justification for unilateral use of force to protect nationals abroad based on legitimate self-defense appears strained at best. For purposes of argument, however, assume the even stronger case that the Charter cannot possibly be used to justify protective action on the basis of self-defense. Indeed, after examining every appropriate item, assume the Charter was deliberately designed to eliminate the traditional right to protect nationals abroad and that its language on this point is perfectly clear.²³⁸ Subscribing to a conviction as unequivocal as this would require considering force used to defend nationals abroad as unlawful. In arriving at this determination, the operative premise must be that consent creates legal obligation.

This kind of understanding about consent is a virtually universal belief, embraced by the international judicial community as long ago as the *Lotus* case,²³⁹ endorsed by the members of the world community in the Vienna Convention on the Law of Treaties,²⁴⁰ and reiterated very recently by a prominent foreign legal scholar.²⁴¹ But, before proceeding to analyze the merits of this widely-held traditional belief,²⁴² a few thoughts will be offered about the practical significance of such a seemingly esoteric academic undertaking and about the existence of reasons to believe that international bodies might be inclined to accept arguments that consent does not bind.

The easiest way to demonstrate the practical significance of examining the seemingly remote and impractical question of whether consent binds is to assume momentarily that it does not bind. The result permits conduct inconsistent with a consensual rule to be understood as something that is not necessarily unlawful, because a failure to do as promised would not determine the legal

238. There is reason to wonder whether language can ever be so clear, and whether what one has consented to can ever be so certain.

239. The S.S. "Lotus," 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

240. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/39/27 (1969), 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969) (entered into force Jan. 27, 1980). In particular see articles 7(1), 9(1), 11, 12(1), 13, 14(1), 14(2), 15, 16, 17(1), and 17(2) (referring to "consent of a state to be bound"), and article 26 (*pacta sunt servanda*).

241. See, e.g., Lukashuk, *The Principle of Pacta Sunt Servanda and the Nature of Obligation Under International Law*, 83 AM. J. INT'L L. 513 (1989) (characterizing consent as "the only way to establish rules that legally bind," and therefore suggesting that consent has the power to bind).

242. For an earlier examination, see J. BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* 9-18 (1959).

character of the act. This approach would have tremendous influence on how actors decide to act, on how advocates decide to argue, and on how judges decide to rule. The assumption that a particular standard does not bind one simply through consent creates a new way of looking at legal problems, and makes extremely valuable what would otherwise appear to be a purely theoretical discussion.

This position should not be interpreted to mean that if consent does not bind, then states are free to disregard each and every commitment they make. There may be another basis of obligation (*e.g.*, sense of right,²⁴³ social instinct,²⁴⁴ or rationality as an end²⁴⁵) or, apart from obligation, another impetus for finding that a certain consensual standard is to be observed, given the specific facts of the situation. All that is meant by what is stated above is that if consent does not bind, then conduct inconsistent with a consensual rule is able to be understood as not "*necessarily*" unlawful. In other words, the mere fact that a promise has not been kept does not automatically mean that something illegal has occurred. The only point intended to be made concerning the practical value of finding that consent does not bind is that, once freed from the notion that consent creates obligation, the perspective of actors, advocates, and decision-makers can take on an entirely new dimension.

Now to the second matter, the willingness of international bodies to accept arguments that produce decisions contrary to the notion that consent binds. Because of the apprehension that any such direct and explicit indication could erode respect for law generally and conventions in particular, it is difficult to find formal statements to the effect that nations are not obligated to keep their commitments. The International Court of Justice, for instance, has not gone beyond the observation that occasionally nations can be bound by principles to which they have never given their consent.²⁴⁶ This is far from saying that

243. See generally Krabbe, *L'Idée moderne de l'état*, 13 RECUEIL DES COURS 513, 570-71 (1926); F. KRABBE, *THE MODERN IDEA OF THE STATE* (Sabina & Shephard trans. 1922).

244. See generally H. GROTIUS, *DE JURE BELLI AC PACIS* 12-13, 15-18. For a review of Grotius's ideas, see Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. YB. INT'L L. 1, 24 (1946). See also L. DUGUIT, *LE DROIT SOCIAL, LE DROIT INDIVIDUEL, ET LA TRANSFORMATION DE L'ÉTAT* (2d ed. 1911); Duguit, *Objective Law*, 20 COLUM. L. REV. 817 (1920); S. PUFENDORF, *DE JURE NATURAE ET GENTIUM*, § bk. II, ch. III, §§ 4-5 (1672), reprinted in G. CHRISTIE, *JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW* 161, 169-71 (1972).

245. See generally Kant, *Groundwork of the Metaphysics of Morals* (1785), in *KANT'S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS (AS FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS)* (T. K. Abbott trans. 6th ed. 1909); I. KANT, *CRITIQUE OF PURE REASON* (M. Muller trans. 2d ed. 1921). For an examination of Kant's views on rationality as an end, see 6 F. COPLESTON, *A HISTORY OF PHILOSOPHY* 283-343 (Image Books ed. 1985).

246. In his individual opinion in *Corfu Channel*, Judge Alvarez stated, "[w]e can no longer regard sovereignty as an absolute and individual right of every state, as used to be done under the old law founded on the individualist regime, according to which states were only bound by the rules which they had accepted. Today . . . states are bound by many rules which have not been ordered by their will." *Id.*, 1949 I.C.J. at 39, 43.

nations are not bound by the principles to which they have consented. Nevertheless, there are subtle indications that international bodies charged with evaluating legal claims are capable of arriving at precisely that conclusion. Most often such indications result from the use of concepts permitting the avoidance of obligations. The invocation of these concepts may indicate a willingness to recognize that consent is not the irrefutable standard by which to judge one's obligation.

The most useful concept in the avoidance of consensual obligations is *jus cogens*, the idea that there are certain rules of international law from which states are simply not competent to deviate by consensual arrangement.²⁴⁷ The traditional example is the prohibition of the use of force in article 2(4) of the Charter.²⁴⁸ Regardless of one's consent to escape from that prohibition, it will not be recognized as creating an enforceable commitment. In the words of the International Law Commission, such an agreement is void because it conflicts with a peremptory norm of international law from which states cannot depart, "even by mutual consent."²⁴⁹ The implication is that the enforcement of consensual arrangements is not always the most important matter. But if consent obligates, such a proposition could never be accepted. Whether or not a consensual arrangement contravened a fundamental norm of international law, the agreement would be enforced.

A similar concept challenging the link between consent and obligation is the notion of equity. Article 38(2) of the Statute of the International Court of Justice allows the resolution of disputes *ex aequo et bono* ("in justice and fairness") whenever the parties so agree.²⁵⁰ But even in the absence of such an agreement, equitable principles have been invoked by the Court in order to produce decisions that the Court considered appropriate, most noticeably in the *North Sea Continental Shelf Cases*²⁵¹ and the *Anglo-Norwegian Fisheries Case*.²⁵² As best determinable, the rationale used by the Court for the invocation of equity, without an agreement under article 38(2), rests on the idea that equity is inherently part of the "general principles of law recognized by civi-

247. See *Reports of the Commission to the General Assembly*, [1966] 2 Y.B. INT'L L. COMM'N 169, 247, para. (1), U.N. Doc. S/6309/Rev.1 1966.

248. See generally on the *jus cogens* rules J. SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION* (1974); Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law*, 172 RECUEIL DES COURS 227 (1981).

249. See *Reports of the Commission to the General Assembly*, *supra* note 247, at 249, para. (6).

250. *Statute of the International Court of Justice*, 59 Stat. 1055, T.S. No. 993; art. 38, para. 2.

251. *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 53, para. 98 (Judgment of Feb. 20) (delimitation of shared shelf to be undertaken in accordance with "equitable principles").

252. *Anglo-Norwegian Fisheries* (U.K. v. Nor.), 1951 I.C.J. 128, 133 (Judgment of Dec. 18) (particular circumstances of the case can be considered so as to avoid inappropriate results). See also *United Kingdom-France Continental Shelf Arbitration* (1977), in J. ODA, *THE INTERNATIONAL LAW OF THE OCEAN DEVELOPMENT: BASIC DOCUMENTS* (Supp. Oct. 1978). Decision examined in Blecher, *Equitable Delimitation of Continental Shelf*, 73 AM. J. INT'L L. 60 (1979).

lized nations."²⁵³ This understanding dates back to the decision of the Permanent Court of International Justice in *The Diversion of Water From the Meuse*,²⁵⁴ and reflects the interpretation of the Court's power, under article 38, considered to be the most accurate by several influential commentators.²⁵⁵

The use of equity and fairness as decisional principles certainly presents the possibility of judgments that do not perfectly comport with consensual arrangements. This can result from the decision to supplement consent by identifying interstitial principles that close gaps left by the use of consent alone (*i.e.*, decisions *praeter legem*), or from the decision to depart from consensual agreements and to identify controlling principles that produce judgments opposed to what consent itself seems to direct (*i.e.*, decisions *contra legem*). In the *Gulf of Maine* case, the Court relied upon equitable principles to resolve a dispute between Canada and the United States concerning maritime boundaries.²⁵⁶ Since it did so in the face of a powerful dissent by Judge Gros, who insisted that reliance on equity rendered the decision "beyond the law," it would seem the decision suggests that both the *contra legem* and the *praeter legem* approaches are viable alternatives for taking the edge off of consent.²⁵⁷

The teachings of the most highly qualified scholars also weaken the theory of consent and obligation.²⁵⁸ Their writings are of lesser force in this matter, primarily because they fail to show examples of *international bodies* having recourse to notions opposed to consent when called upon to determine the lawfulness of claims made by specific actors. Nevertheless, the teachings of these scholars are recognized as one of the sources of international law to which international judicial bodies may resort. Interestingly enough, these writers often refer to concepts quite different from consent as being the root of international law. Briery, for example, extols "order,"²⁵⁹ De Visscher speaks of "social ends considered desirable,"²⁶⁰ and McDougal expounds "reasonableness in particular context."²⁶¹ These comments might cause a decision-making body to reconsider

253. *Statute of the International Court of Justice*, 1947 Acts & Docs. 46. To the extent that equity is seen as a part of the law of civilized nations, this statute authorizes the invocation of equity even in instances where the parties have not agreed to a resolution *ex aequo et bono*. *Id.* at art. 38, para. 1(c).

254. *Diversion of the Water From the Meuse* (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70, at 76-78 (June 28).

255. See M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942* 617 (1943); H. LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* § 28 (1927); De Visscher, *Contribution 'a L'Etude des Sources du Droit International*, 60 *REVUE DE DROIT INTERNATIONAL ET LEGISLATION COMPAREE* 325, 414 (1933).

256. *Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1982 I.C.J. 15, 59, para. 70 (Order of Feb. 24).

257. See Judge Gros's statement, *id.* at 143-56.

258. Teachings of scholars identified by article 38, paragraph 1(d) of the statute of the I.C.J. as a secondary means for determining the law.

259. J. BRIERLY, *THE LAW OF NATIONS* 56 (6th ed. 1963).

260. C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 157 (Corbett trans. rev. ed. 1968).

261. M. MCDUGAL & F. FELICIANO, *supra* note 6, at 218.

the traditional belief that consent creates obligation, since the obligation may well be inconsistent with the basic purpose of international law. As a result, these arguments have the potential to weaken the consent rationale. If the Court accepted the idea that "reasonableness," "order," or "socially desirable ends" provided the litmus test for a particular decision, it would open the way for judgments that might not give effect to the consensual obligations of the disputants.

Any decision-making body attempting to maintain respect for the law would still display a natural reluctance to state that consent does not serve as the basis of obligation. Given this, arguments supportive of a position inconsistent with consent are likely to prove successful only when the arguments are phrased in terms that follow familiar legal justifications for departing from consensual arrangements. A direct attack on consent would be rather ill-advised. Even though there is evidence that consent is not always the sole basis of legal obligation, there is an inclination to reject arguments that appear too novel. The better course of attack would be to speak in terms of the equity or fairness of allowing a particular consensual arrangement or legal rule to be avoided in a specific case, or the fundamental and preemptory nature of the interests promoted by conduct at variance with a conventional understanding. Since there is no way to determine what is equitable or fair, fundamental or preemptory, other than by considering what seems most rational or sensible, consent becomes but one factor among many other factors capable of affecting decisions.

The difference between this approach and that suggested by the proponents of the second-tier criteria bears noting. The second-tier approach argued that "reasonableness" ultimately determined whether intervention to protect nationals was lawful. In attacking the consensual arrangement on force contained in the United Nations Charter by drawing on what is equitable, fair, or fundamental, thereby necessitating consideration of what is rational or sensible, we appear to be following exactly the same approach. Both efforts find "reasonableness" to be the test of the acceptability of particular conduct. Nevertheless, the distinction between the two approaches is well-defined. The second-tier criteria approach does not question the power of consent to fix obligation; it merely maintains that the obligation must be understood in the context of what is reasonable. The argument that law is rooted in what is equitable, fair, or fundamental rests squarely on the position that it is not consent that is the basis of legal obligation. Its appeal to what is reasonable is designed to clothe in legal terminology an attack on a concept that few question. The following summary and criticism of several prominent consensual theories of obligation will demonstrate that the basic idea of a linkage between consent and obligation is questionable, and that any approach building on such an idea is flawed.

A. *The Essence Theory*

The first of the consensual theories might be described as the essence theory. The essence theory maintains that free consent to a particular arrangement com-

municates an intent to bring volition in line with the terms of that arrangement. The essence of consent is the expression of commitment. The very act of freely giving consent restricts the alternatives available for selection. One cannot think of consent being communicated without also thinking of consent as obligating the one who has communicated it. Obligation may not imply consent, but consent implies obligation. In the absence of an agreement to act or not to act in a particular fashion, the entire range of courses of action remain open. Once consent to reduce the number of options has been voiced, this fact circumscribes the number of courses of action from which selection can be made. Through the relation of one's promise to another, the promisor becomes bound to respect what he or she has said. In promising that they shall act or refrain from acting in a particular fashion, promisors obligate themselves to honor their commitments.²⁶²

The essence theory focuses on the expression to do something or to not do something; some outward manifestation of one's internal intention is the crucial ingredient in determining whether a binding commitment is created. Hence the name of the theory—the essence of obligation is the existence of consent itself. From the consent alone flows the duty to act in accord with that to which one has consented. By virtue of nothing more than the making of a promise, the promisor is obliged to avoid departing from it.

The simplest way to demonstrate the falsity of the essence theory is to imagine a situation in which one manifests an internal intention to observe a particular proposition, and then later manifests an internal intention to no longer continue such an observance. If obligation proceeds from consent alone, the communication of an internal intention and nothing more, it would seem impossible to maintain that the expression of an intention to no longer observe the earlier standard is incapable of freeing one from an earlier agreement without casting doubt on whether the earlier agreement itself must be observed. To deny that a later contrary intention can nullify one previously revealed is to also deny that that at which the contrary intention is directed may bind the

262. Though I am not aware of any authority that has adopted such a puristic view, in early Roman law, agreements were typically viewed as conventions or pacts, as distinguished from contracts. Contracts required an agreement and an obligation. Obligation was seen as a *vinculum juris* ("legal chain") that made an agreement binding. In most instances this was created by some special formality. See H. MAINE, *ANCIENT LAW* 268-70 (The World's Classics ed. 1931). Further, contracts, as distinguished from conventions, were considered as falling within one of four categories: verbal, literal, real, or consensual. As to the first three, agreement and a formality were essential for enforcement. *Id.* at 270-77. But with regard to consensual contracts, those involving agency, partnership, sale, or hire, Sir Henry Sumner Maine has stated that "mutual assent of the parties, is the final and crowning ingredient . . . , and . . . as soon as the assent of the parties has supplied this ingredient, there is *at once* a Contract." *Id.* at 277 (emphasis in original). The act of consent alone, therefore, supplied the *vinculum juris* or obligation for Romans with regard to at least one of the four categories of contracts.

speaker.²⁶³ After all, if the essence of obligation is the external revelation of internal intentions, then the manifestation of an intent to end an observance should be just as significant as the manifestation designed to initiate it. Given that few would be willing to accept the conclusion inherent in the logic of this statement,²⁶⁴ there seems legitimate reason to doubt whether the mere fact that one's promise reveals one's innermost intentions proves that consent binds.

B. *The Self-Limitation Theory*

Perhaps in recognition of the essence theory's inability to explain why consent binds, the self-limitation theory was developed.²⁶⁵ The self-limitation theory focuses not on the special significance of consent, but rather on the significance of the limitation imposed by one's self on one's freedom to do as one wishes.²⁶⁶ In other words, the self-limitation theory emphasizes individual choice that is arrived at freely, rather than that choice made through internal processes is externally communicated.

Self-limitation theory acknowledges that externally disclosing one's internal intentions is insufficient to create an obligation. While conceding that expressions of intention occur whenever an agreement is made, self-limitation theory argues that consent is merely the instance of agreement or the device employed in the agreement. Consent alone cannot create the obligation to honor one's commitments. Obligation is linked to the free, autonomous nature of every promisor and arises because one commits one's self to do or not to do certain things. Everyone possesses the power of self-determination to the extent that he or she can make conscious decisions and act on them in an effort to accomplish a result. If freedom and autonomy actually mean what they imply, then each person who decides to agree to act in a particular way exercises his freedom to determine his own actions and effectively limits the realm of alternatives otherwise available to him. Self-limitation theory emphasizes that

263. See J. BRIERLY, *supra* note 242, at 11-12.

264. See, e.g., In the Matter of an Arbitration Between the Osaka Shosen Kaisha and the Owners of the S.S. Prometheus, 2 HONG KONG L. REV. 207, 225 (1904), reprinted in L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 14 (1st ed. 1980), in which it is stated that:

The resistance of a nation to a law to which it has agreed *does not derogate from the authority of the law* Such resistance merely makes the resisting nation a *breaker of the law* to which it has given its adherence . . . (emphasis added).

While this statement is made with regard to resistance, one need be reminded that resistance is simply the external manifestation of a change of internal intentions.

265. This position took form in the late 19th to early 20th century under the German scholar G. Jellineck. See G. JELLINECK, DIE RECHTLICHE NATUR DER STAATENVERTRÄGE (1890); ALLGEMEINE STAATSLHRE (1900); GESETZ UND VERORDNUNG (1895). For a discussion of Jellineck's views, see H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 407-15 (1966).

266. The "will" theory is related to the self-limitation theory. See generally C. FRIED, CONTRACT AS PROMISE (1981). For a review of Fried's book, see Kronman, *A New Champion for the Will Theory*, 91 YALE L.J. 404 (1981).

something beyond the act of consent, the mere formality of revealing one's intentions, is necessary in order to make the argument for viewing consent as binding. The theory identifies the capacity to choose to restrict the options from which future choices can be made as creating the obligation. If self-determination is to be understood as genuine, then self-limitation must be understood as effective.

The self-limitation theory suffers from the same deficiency as the essence theory, although on a different level. The essence theory is unacceptable because, if the mere act of externally manifesting one's internal intentions creates obligation, then a subsequent change of mind should also create obligation. The self-limitation theory is subject to the same kind of attack, but on the level of the inherent capacity of promisors to fix obligation on themselves, rather than on the level of the act of consent, which is seen as nothing more than the instance of agreement or the device for making the agreement. Specifically, if the intention to limit one's will must be viewed as effective in order to give full meaning to freedom, autonomy, or self-determination, then it would seem that the intention to change one's earlier expression of will must be viewed as equally effective. In considering the conduct of one's affairs and then deciding to behave in a manner inconsistent with an earlier decision, the liberty to select whatever one deems appropriate is given effect by viewing the selection as binding one to the most recent choice made. Considering this, it seems fair to say that the location in self-determination of the reason why consent binds does not address the problem affecting the essence theory.

Self-limitation suffers from an additional problem by arguing that the capacity possessed by one's self to determine one's own will explains why consent binds, which suggests something quite antithetical to our usual understanding of the nature of legal obligation. The very notion of legal obligation implies something designed to constrain the will of one who is obligated, and constraint implies an obligation from a source outside of the will of the entity being regulated. A self-imposed limitation is a limitation only as long as behavior is in conformance with that limitation and can never rise beyond the level of mere limitation to that of legal obligation.²⁶⁷ Any limitation imposed from within could therefore never be considered to be a legal obligation.

Another problem with the self-limitation theory is more practical in nature. Consent supposedly binds because a promisor, capable of self-determination, can agree to some proposition and thereby effectively limit his future choices. But, if we are ever to know the precise extent of the obligation itself, we must know the exact content of the promisor's agreement.²⁶⁸ Since the self-limitation

267. See J. BRIERLY, *supra* note 242, at 14.

268. D. HUME, *AN INQUIRY CONCERNING THE PRINCIPLES OF MORALS* 30 n.5 (C. Hendel ed. 1957) (1751), states: "a metaphysical schoolman might think, that where an intention was supposed to be requisite, if that intention really had no place, no consequences ought to follow, and no obligation be imposed."

theory emphasizes the significance of one's capacity to decide from among the various choices available, the only way to know whether a commitment has indeed been violated is to know the subjective state of mind of the promisor. The inherent difficulties of such a task are apparent. Moreover, any notion of giving effect to subjective intention is fraught with the possibility of fraud and prevarication. One seeking an expedient escape from the clear terms of some onerous commitment might represent their intention at the time of agreement as something patently inconsistent with the terms used to express the agreement itself. Problems like this should give pause to any wholesale endorsement of the self-limitation theory.

C. *The Reliance Theory*

In moving the central focus away from the mere act of consent, or the ability to determine one's choices, the reliance theory²⁶⁹ looks to a wholly external source for evidence that consent binds. The reliance theory is that disclosures of internal intention, resulting in a change of the positions of others based on the expectation that future action will conform with an agreement, create an obligation to avoid frustrating that expectation by conduct of an inconsistent nature. The theory must do more than simply refer to the connection between consent and reliance, however, if it is to demonstrate that reliance creates obligation. That alone would simply beg the question of why others changing their position in reliance on a promise compels respect for the promise. The reliance theory presumably argues that promises which lead to reliance upon them must be kept because ignoring them would undermine cooperative efforts to address societal problems. If there were no assurance that such promises would be viewed as obligatory, we would all be reduced to having to deal with the menaces of life through our own ingenuity, cleverness, and insight. Everyone would avoid entering into agreements that required a change in position, since the agreement would come with no guarantee that the other parties would observe it.

The first problem with the reliance theory is its circularity. The theory holds that consent binds because there has been reliance, and unless this is considered to obligate, then the possibility of mutual action will be undermined. Normally the theory then asks whether the reliance has been reasonable or justifiable,²⁷⁰ for only then is the theory likely to find that the given promise or consent obligates. Yet in asking whether the reliance has been reasonable or justifiable, the theory again raises the question of whether this is the kind of promise that

269. See generally G. GILMORE, *THE DEATH OF CONTRACT* 71-72 (1974).

270. This is certainly true on the municipal level. See Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 656-659 (1982). Internationally, the Court has referred to "reliance," but has often stayed away from qualifications such as "reasonable." See, e.g., *North Sea Continental Shelf*, 1969 I.C.J. at 26, para. 30. See also *Concerning the Temple of Preah Vihear* (Cambodia v. Thailand), 1962 I.C.J. 6, 63-64.

binds.²⁷¹ To hold that consent binds simply because of reliance is not enough. The theory itself returns us to the problem of whether this is the kind of promise that should be enforced, a question that is not even purported to be answered on the basis of simple reliance.

The theory is also based on an entirely erroneous premise; it considers cooperative action to be doomed unless reliance creates obligation. Interestingly enough, many international conventions contain provisions allowing parties to withdraw and pursue activities otherwise in violation of the convention,²⁷² but these provisions do not seem to have dampened willingness to make additional agreements. Most seem to indicate that the impetus behind the process of agreement is hope—hope that rests not so much on the belief that reliance will result in the agreement being understood as binding, but rather hope that rests on the reality that unless one takes a chance on a party keeping his or her word, problems not amenable to resolution through unilateral action will go entirely unaddressed. It would be improper to characterize such agreements as non-binding or non-legal because of their aspirational nature; the desire to accomplish something beyond the pale of unilateral activity is, perhaps, the driving force behind the process of agreement. It not only serves to bring parties together, but also to keep them together once agreement has been reached. As the distinguished legal historian Sir Henry Sumner Maine related so many years ago with regard to an ancient people known as the Troglodytes, a people he claimed paid little attention to the obligations of contract, society need not necessarily collapse if promises are not seen as obligatory because other more powerful influences may nurture cooperation.²⁷³ This should caution those who insist on the reliance theory because of a preoccupation with the need to find obligation, as well as those who believe that if promisors are free to disregard their commitments, everyone who perceives themselves as no longer interested in complying with some earlier agreements will simply walk away from them.²⁷⁴

The final problem with the reliance theory presents itself even if the criticism that the theory rests on an unsound factual premise is rejected. The theory's

271. See Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 275 (1986).

272. See, e.g., Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Oct. 10, 1967, United States-United Kingdom-U.S.S.R., 18 U.S.T. art. 16, T.I.A.S. No. 6347.

273. See H. MAINE, *supra* note 262, at 258-59.

274. In addition to interest in the original aspiration serving to assure continued observance by states and parties in the face of violations by others, self-interest in perpetuating an international diplomatic environment is a better explanation of why promises are honored than the claim that consent that creates reliance fixes obligation. In such an environment, compliance leads to cooperation which leads to effective resolution of important problems. Self-interest in such a case is utilitarian in that it recognizes the link between the good of the community and the good of the individual state. See D. HUME, *A TREATISE OF HUMAN NATURE*, bk. III, pt. II, § V (L. Selby-Bigge ed. 1888), reprinted in G. CHRISTIE, *supra* note 244, at 432 ("I learn to do a service to another . . . because I foresee that he will return my service, in expectation of another of the same kind.").

conclusion is that arrangements that create reliance are obligatory because they need to be understood as such in order to maintain society. But, something cannot become obligatory because it needs to be perceived as obligatory. The source of legal obligation cannot be that which necessitates the rule. It may be that it is necessary to honor consent that creates reliance if society is to be maintained, but this need alone cannot be the source of obligation. Just as obligation must, as was stated above,²⁷⁵ spring from some source beyond the will of the promisor, so must it spring from some source other than the practical need for the obligation. If every need resulted in the precept necessary to meet that need acquiring binding force, then every precept directed at the accomplishment of some objective could effectively command obedience. But there is a vast difference between acknowledging that observance of a rule is necessary to the attainment of a particular end and calling that rule "obligatory." To say that something is necessary in order for another thing to happen merely suggests that it is a precondition. On the other hand, to say that something is obligatory implies at least a duty on the part of one able to determine whether the precondition occurs to undertake efforts to assure its occurrence.²⁷⁶

D. *The Common Will Theory*

The common will theory is an effort to break through the self-limitation theory's restrictions and identify, in a source beyond individual will, something that brings obligation to consent. This theory suggests that the capacity of every promisor to determine how to conduct his affairs can be effectively limited by joining with others in a fusion of individual wills. The consequence of this conjunction of wills is the creation of a "super-will" that is more than the reflection of each of the individual wills involved. As a super-will, it stands apart from each of the individual wills. And by its very nature as separate from and in addition to each of the individual wills comprising it, the super-will establishes a standard from which any one will is incompetent to depart. The standard is framed by the contours of consent evidenced in the expressions of will by all agreeing to a particular commitment. Its capacity to bind flows from the product of the common will, the amalgam of individual wills which, by its very nature, embodies the strength of each of the wills partaking in the act leading to its conception.²⁷⁷

The common will theory overcomes the self-limitation theory's problem of failing to explain why consent binds by locating an explanation outside the very thing consent claims to regulate. Nonetheless, the idea of pointing to the product of the fusion of individual wills as the source of obligation for consent

275. See *supra* note 267 and accompanying text.

276. See *infra* text accompanying notes 278-97 (§IV E, "Metaphysical Theory").

277. See TRIEPEL, *VOLKERRECHT UND LANDESRECHT* (1899). Triepel restates his super-will theory in Triepel, *Rapports Entre le Droit Interne et le Droit International*, 1 *RECUEIL DES COURS* 77 (1923).

is flawed. The central weakness in the common will theory is its failure to explain how the conjunction of several individual wills gives rise to a "super-will" able to command obedience. The capacity of promisors to determine for themselves how they will conduct their affairs can be seen as leading to agreements designed to limit what is permissible. But it is unclear how such an agreement creates a will which is independent, separate, and superior to any of the individual wills it reflects, or how the common will captured by an agreement is anything more than a collective expression of a uniform desire.

The sharing of a uniform desire by several promisors followed by an agreement directed at narrowing the permissible alternatives of choice does not suggest that the agreement is anything more than a collaborative statement indicating a single view with regard to some specific problem. This view may be described as the common will, but there is nothing about the fact that the commonality emerged from a shared desire which necessarily invests it with the power to command observance. The transition from individual desire to common agreement can be made without compelling the conclusion that the agreement represents a will superior to any of the discrete wills that the agreement implements. The common will does comprise the sum of all of the individual wills consenting to a particular proposition at any point in time, but it gains no power beyond that of any one of the individual wills involved. The process of joining one will with another increases the size of the notion that a problem be resolved in a certain fashion, but in no way increases the force of the will that it be so resolved. It is the capacity of self-determination that stands for individual will, and there would be no self-determination left if, after joining with others, one did anything more than vest the common will with a power beyond what the individual will wished at the time of the union.

Even if the common will theory is assumed to explain how several individual wills can become a super-will able to command observance, a second weakness exists because the theory does not explain why such a super-will must be observed. The mere fact that several individual wills can be fused into a separate, independent, superior will does not explain why the superior will is to be obeyed. To say that it is through the process of conjoining of individual wills that the super-will is given life indicates how the super-will comes to be, but it fails to explain how the super-will creates an obligation. Actions inconsistent with the super-will may bring immediate and harsh penalties. Nevertheless, to speak of something as obligatory means that it "should" be observed; it does not simply imply that the failure to do so will result in penalties. Thus a will may be superior in the sense of wielding the power to punish, and yet lack superiority in the important sense of possessing a claim, on a normative level, of expecting obedience.

E. The Metaphysical Theory

There are extensions of the preceding theories that raise the importance of explaining consent as obligatory because of an all-powerful authority immanent

in the universe. The self-limitation theory, for instance, might be extended to argue that "one is obligated to keep one's word because it is the only *just and fair* thing to do." The reliance theory might be extended to argue that "allowing one to disregard promises which result in others changing their position would be *immoral*." The common will theory might be extended to account for the missing normative element by holding that "expressions of consent incident to agreement involving similar expressions on the part of others must be honored because that is *right and proper*." These extensions locate the basis for holding a promisor obligated based on his consent in some timeless, unchanging, transcendent authority.

This metaphysical theory is of ancient pedigree.²⁷⁸ In its classical form, it maintained that there was a grand plan or systematic order to the universe which was discoverable by mankind through the use of the senses or the power of rational reflection.²⁷⁹ Further, since the plan is the product of an uncreated creator, it must be viewed as obligatory, for not only does all that has been or will ever be owe its very existence to the creator, but a force that precedes both time and creation is by its nature alone entitled to obedience.²⁸⁰ The modern form of the theory refrains from a reliance on an uncreated creator or on plans evident in creation and speaks instead of practical reasonableness,²⁸¹ the original position,²⁸² or just entitlements.²⁸³ All of these concepts are simply subspecies of the classical form of the theory. In the end, their own compulsion depends on whether they are concepts enjoined on us, which depends on whether that which enjoins them, regardless of it being termed an uncreated

278. The tradition of explaining obligation by reference to a metaphysical power dates back to the Greek Stoics. See generally R. ADAMSON, *THE DEVELOPMENT OF GREEK PHILOSOPHY* 79-83, 257-94 (1908). The essence of their thinking was expressed by Chrysippus who believed divine providence animates the world, that animation is expressed through nature, nature is rational, that man is unique in that man has reason, and that the good life consists in living in accordance with nature and resigning one's self to the purposes of the divine being. See generally J. GOULD, *THE PHILOSOPHY OF CHRYSIPPUS* (1970).

The Roman Stoic, Cicero, had similar views. He maintained that man was born for justice, that justice comes from natural law, that natural law is the sense of right that is common to man and God, and that the sense of right is derived from Nature. See CICERO, *ON THE LAWS: BOOK ONE*, in *SELECTED WORKS OF CICERO* 218, 228-33 (H. Hubbell trans. Classics Club ed. 1948).

279. See T. AQUINAS, *SUMMA THEOLOGICA*, Pt. 1, 2d pt., ques. 91, art. 2, at 996-97, ans; ques. 94, art. 1, ans. & reply 2, at 1008 (1947); CICERO, *LAWS*, bk. III § 19 (C. Keyes trans. Loeb Classical Library ed. 1928); H. GROTIUS, *DE JURE BELLI AC PACIS* (F. Kelsey trans. The Classics of International Law ed. 1925); F. De Vitoria, *De Potestate Civili* (1528), translated in J. SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW*, Part 1, Francisco de Vitoria and his Law of Nations, app. C (1934); F. SUAREZ, *DE LEGIBUS AC DEO LEGISLATORE* (G. Williams, A. Brown & J. Waldron trans., The Classics of International Law ed. 1964) (1612).

280. See 2 S. PUFENDORF, *DE JURAE NATURAE ET GENTIUM*, ch. III, § 20 (C. H. & W. A. Oldfather trans. The Classics of International Law ed. 1934) (1627).

281. See J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 100-128 (1980).

282. See generally J. RAWLS, *THEORY OF JUSTICE* (1971).

283. See R. NOZICK, *ANARCHY, STATE AND UTOPIA* 149-64 (1974).

creator, an inexorable immanent force, or something else, is itself something to be obeyed.²⁸⁴

Considering both the classical and modern forms of the metaphysical theory together, the former openly relying on some transcendent, omnipresent force, and the latter doing so only implicitly, there still remains the question of how the theory translates consent or promise into obligation. It might be argued that the very existence of a universal order or plan suggests a commitment to integrity, fidelity, and honesty. Without these goals the plan could never flourish and unfold, and the inherent rhythm or workings of life and all existence could never develop and mature. As a consequence, integrity, fidelity, and honesty are obligatory standards in accordance with which the most mundane aspects of daily existence must be conducted. Therefore, a promisor has an obligation to keep his promises. The failure to respect one's commitments not only triggers the possibility of sanctions, but also results in the violation of a normative standard enjoined upon us all.

The metaphysical theory's explanation of why consent binds, however, seems as unsatisfactory as that of any of the other theories already offered. Even if one accepts both the existence of some supreme, immanent force and the necessity for obeying the supreme force's will,²⁸⁵ points certainly open to debate,²⁸⁶

284. An excellent illustration of this awareness is found in Barnett, *supra* note 271, at 296-97. In the context of using entitlement analysis to explain the consensual basis of contract law, Barnett refers to the underlying *moral* approach of the entitlement theory. See also *id.* at 293 (referring to "shared intuitions"). See also J. FINNIS, *supra* note 281, at 406-07. With regard to practical reasonableness, Finnis admits that ultimately "God is the basis of obligation," but he uses "obligation" in a much weaker sense than that in which it is usually used.

285. With respect to why the supreme, immanent force should be obeyed, see *supra* note 280 and accompanying text and *infra* note 286. With regard to the existence of such a force, it might be reasoned that everything in the universe must have come into being as a consequence of something being able to create the original matter from which all that has ever been can be said to have descended. Things that we see today are the result of mechanisms of creation that existed prior to today's things coming into being. Long before the mechanisms of today's creation came into being, there existed still more antecedent and earlier mechanisms, going back to the first of all creative mechanisms. Yet the very first creative mechanism was itself created out of matter, and that matter, because there existed no earlier creative mechanism in the universe to create it, had to have been created by something. Whatever created the matter from which the first creative mechanism was created had to have been either itself the uncreated creator, or created by something that was, or could trace its lineage back to, the uncreated creator. See generally G. GRISEZ, *BEYOND THE NEW THEISM: A PHILOSOPHY OF RELIGION* (1975) (on the existence of an uncreated creator).

286. The fact that the supreme, immanent force is able to bring things into being does not mean that its will is to be obeyed. There are numerous things that are able to bring new and independent things into being. The mere fact that this power is possessed does not mean that there is some obligation on the part of that which is given existence to follow what its creator desires. Obligation suggests a need, in a normative rather than a practical or emotional sense, to follow some particular course of behavior. An awareness that existence itself is owed to a creative force may evoke in that which is created a feeling of or a sense of commitment, a feeling or sense born out of loving gratitude for conception, to act in accord with the will of the creator. Standing alone, the bare fact of creation does not suggest an obligation to the wishes of the creative force. The simplest illustration is that a child would not be obligated to follow the will of its parents, were that will directed at securing odious, heinous acts. The relationship between obligation and morality is evident, and the relative meaninglessness of the fact of creation is apparent. Nevertheless, it is still conceivable

the problem of whether mankind can ever really know the will of that force still remains.²⁸⁷ It might be suggested that its will is known by observing the natural order.²⁸⁸ A transcendent power responsible for every aspect of creation must have been in a position to choose from among an infinite variety of creative plans, each of which would have differed in its final product. Since choice itself suggests some deliberation with regard to what is ultimately chosen, and deliberation connotes the existence of some desired objective or goal, the creative plan ultimately selected by that transcendent power revealed the will of that power.²⁸⁹

Perhaps this suggestion is entirely correct and what is seen about us does reveal the true objective or goal of some omnipotent primal force. Yet it seems

that the will of the supreme, immanent force, the uncreated creator, is to be obeyed. But if so, the explanation must lie not in the fact that the force created all things, but rather in the ethical pull of its will. Such an obligation might be found in the desire to follow the will of such a force simply out of a commitment to friendship with it. J. FINNIS, *supra* note 281, at 406-07. In the event that the latter explanation is accepted, "obligation" must be understood to mean something different from what it is usually taken to mean. *See supra* note 284.

On the matter of the existence of a supreme, immanent force, it might be suggested that the argument of an uncreated creator demonstrates nothing more than that an *uncreated creator* exists. If we label the force or creator "God," discussion about God's existence is not just carried on for its own benefit. Rather, its objective is to lay the foundation for the exploration of other questions, particularly whether the will of the supreme force is to be obeyed. When examining the question of whether the will of one is to be obeyed, the attribution of the will to a being labelled "God" certainly has the effect of creating a predisposition toward perceiving that will as binding. Merely using the term "God" carries connotations that might otherwise require independent demonstration. If something is said to proceed from God, then it is virtually taken as a given that it has a force which it would not be assumed to possess were it to have come from a source given a different appellation. Thus, while the argument regarding the existence of an uncreated creator, something that has caused to come into being all that has been or ever will be, may be an argument that is viewed as basically sound and persuasive, there is nothing about the argument to suggest that it establishes the existence of God, that is, the existence of One whose will is necessarily regarded as obligatory. The argument does demonstrate that, but for the existence of an uncreated creator nothing else would exist. If one is content to leave all assertions concerning an uncreated creator at that point, then the term "God" would be an acceptable substitute for a supreme, immanent, and timeless force or power. God would be synonymous with the uncreated creator or the supreme, immanent power. *Cf.* J. FINNIS, *supra* note 281, at 388-89 (indicating a similar reluctance to fix an "uncaused cause" with the label "God").

287. Even St. Thomas Aquinas noted that "the will of God cannot be investigated by reason, except as regards those things which God must will of necessity; and what He wills about creatures is *not* among these, as was said above." T. AQUINAS, *supra* note 279, Pt. 1, ques. 46, art. 2, at 243 (emphasis added).

288. *See* CICERO, *supra* note 278, at 225-27 (suggesting that the metaphysical theory is linked to sensory perception and careful reflection). Several variations of the metaphysical theory have existed. Cicero proposed that humans draw rational inferences from what is known about humankind and the environment, and that justice is to be sought in what is natural to man. *Id.* *See also* S. Clarke, *A Discourse Concerning the Unchangeable Obligations of Natural Religion*, reprinted in BRITISH MORALISTS: 1650-1800 para. 244 (D. Raphael ed. 1969) (1706) (the duties of natural law "may . . . be deduced from the nature of man . . ."). Another variation holds that humans must focus their reflection inward in order to obtain an awareness and deeper understanding of what they already know. *See* T. AQUINAS, *supra* note 279, Pt. 1, 2d pt., ques. 94, art. 2, ans., at 1009.

289. *Cf.* J. FINNIS, *supra* note 281, at 389.

that, in moving from what we observe in nature to the conclusion that nature evidences the will of such a force, we overlook the possibility that choice or selection of a creative plan does not necessarily mean there has been deliberation. In the event there has been a conscious rejection of all but the adopted plan, or at the minimum a conscious choice from alternatives considered less attractive, deliberation may indeed reveal one's will. But we can never be sure that such a process has been utilized.²⁹⁰ The suggestion that the choice of a creative plan discloses the will of some universal, transcendent power assumes that the power's choice has been deliberate. It may well be that in choosing the plan which resulted in what we perceive to be nature, the power simply acted for its own delight and did not attempt to display a normative structure that man was intended to follow.²⁹¹ Alternatively, it may be that the choice of plans was no more the product of deliberation and considered reflection than any course pursued when one chooses merely in order to get the job of choice out of the way. Indeed, in light of the many examples of disorder in nature (*e.g.*, natural disasters, defective offspring), it would not seem strange for one to subscribe to the position that nature reveals nothing more than that the inherent limitations of physical forces can, over a long period of time, bring about enough evolutionary advances to produce some modicum of order from chaos.

Beyond the matter of knowing the will of an immanent, all-powerful force, there is a second and perhaps even more important problem that undercuts any theory that draws on metaphysical explanations. The theory holds that all of existence reveals some inexorable force's will and that these manifestations of will contain, at their core and awaiting discovery, the essential aspects of an inherent normative structure. Since such a force's will is understood as being obligatory, the normative structure revealed in nature is seen as commanding obedience, and what prevails in nature reflects a "natural law" binding on all of mankind. Yet the mere existence of certain natural facts in mankind or in the environment does not, without more, create an obligation.²⁹²

The problem of inferring obligation from natural facts is similar to that concerning whether a supreme and limitless power's will is something to be obeyed. If one accepts that the will of such a power is revealed in creation, then asking whether that will is to be obeyed is like asking whether the facts of creation fix an obligation. Yet it is quite possible to accept that the supreme power's will is to be obeyed, and still ask whether the facts resulting from that

290. See *supra* note 287 (Aquinas's skepticism).

291. To be sure, creation has been described as a play or drama in both the Western and Eastern philosophical traditions. See PLATO, *THE LAWS OF PLATO: BOOKS VII-XII* 803b-c (1921) (man as God's plaything); F. CAPRA, *THE TAO OF PHYSICS* 78 (2d ed. 1982) (Hinduism and creation seen as a play).

292. See D. HUME, *A TREATISE OF HUMAN NATURE*, bk. III, Pt. 1, § 1 (L. Selby-Bigge ed. 1888) (one cannot conclude that what "is" indicates what one "ought" to do). See also H. KELSEN, *WHAT IS JUSTICE?* 137, 144, 174-97 (1957); Nielsen, *The Myth of Natural Law*, in *LAW AND PHILOSOPHY* 122, 132 (S. Hook ed. 1964).

power's creative plan establish obligation. The facts of nature may exist as a result of a manifestation of will of an immanent and timeless force, and with regard to those facts it might be that the selection of a creative plan could not have been disobeyed. Once the facts demonstrating that force's will were brought into being, and the force's selected plan had come to fruition, the final result remains nothing more than a mere set of facts. The facts may be that humans were endowed with reason, that every living creature was given the instinct for survival, or any number of things. Nonetheless, they are still nothing but facts. They may be binding in a physical sense, in that they must be observed in the sense of natural occurrence, because it can be no other way. This is distinct from having force in a normative sense. In selecting from among the infinite variety of creative plans available, a transcendent power presumably evidenced its will that the existing facts were preferable over some other alternative. Since that power's will is to be obeyed, there may have been no alternative but for those facts to have come into being. Once in being, those facts may have to be followed in the physical sense; yet that alone cannot make them binding in the normative sense. Normative obligation implies that a thing "ought" to be done, while physical obligation implies simply that it exists or will come into existence.²⁹³

Contending that a normative structure is deeply imprinted on the mind of all human beings does not avoid these difficulties.²⁹⁴ This contention does obviate the need to deduce the "natural law" from observable aspects of man's nature and his environment.²⁹⁵ The claim that a natural normative system is simply a part of humanity's intellectual "hardwiring" avoids the need to move from facts of nature to specific normative principles. Nevertheless, as with approaches to "natural law" theories that suggest that the essential aspects of that law are found in nature and await discovery through careful, painstaking, and reasonable reflection, the notion that natural law is already within humans, although we do not fully appreciate it, leads to the same problems. Even accepting the idea that, in the deep recesses of the human mind, right and wrong are known from the first moment of cognitive recognition, a point which seems of dubious validity in view of evidence indicating that what we might think of as intuitive knowledge is sometimes totally inaccurate,²⁹⁶ there is still the problem of whether some transcendent power, in placing intuitive knowledge in humankind, actually manifested its will. Even if the matter of the manifestation of will is taken as a given, there remains the additional problem of whether a

293. H. KELSEN, *supra* note 292, at 139.

294. On the "imprint" theory, see T. AQUINAS, *supra* note 279, at Pt. 1, 2d pt., ques. 94, art. 2, ans., at 1009.

295. Cf. D. O'CONNOR, AQUINAS AND NATURAL LAW 68 (1967).

296. See R. RESTAK, THE MIND 238 (1988) (intuitively people feel, though quite incorrectly, that more words have consonants as their first letter than as their third letter).

transcendent power's will that humans be endowed with innate knowledge of a normative structure can, as a mere fact of nature, give rise to obligation.²⁹⁷

F. *The Intellectual Construct Theory*

The final theory that might be used to explain consent as the basis of obligation is the intellectual construct theory. As with the metaphysical theory and the common will theory, the idea is to identify what makes promises binding by looking to sources beyond the will of the promisor. The intellectual construct theory does this through the creation of a hierarchy of rules. The suggestion is that at the everyday level, rules of one sort establish the parameters designed to directly regulate the interrelationships of life. These rules might be termed first-order rules. At another level, rules of an entirely different sort exist to determine whether the first-order rules are valid. These rules might be called second-order rules.²⁹⁸

Among the second-order rules might be a rule providing that everyone should behave as others have customarily behaved.²⁹⁹ And since promises are usually, though not always, observed, a first-order rule considering consensual undertakings to be obligatory would be deemed valid and enforceable. Consequently, in order to determine the ultimate explanation or basis for the idea that consent binds, one would need to look behind the first-order rule to the second-order rule that gives the first its force. In other words, the intellectual construct theory would explain consent as the basis of obligation by virtue of reference to a second-order master rule which maintains that behavior ought to proceed as it has customarily proceeded, that is, in accordance with the keeping of promises. The theory avoids the problems created by other theories that look no further than the consenting individual since it seeks to identify the basis of consent in an outside source. Nevertheless, the use of a second-order master rule to explain the obligatory nature of consent has problems of its own.

297. The arguments made above on knowing and obeying God's will do not affect one's commitment to religious principles, at least to the extent that commitment is based on loving God out of friendship. See J. FINNIS, *supra* note 281, at 403-10. Indeed, if one views the Old Testament as emphasizing a powerful, intimidating, and wrathful God, and the New Testament as emphasizing a loving, forgiving, and gentle God, it makes sense to follow religious principles out of friendship and respect rather than out of obligation and imposition.

298. On advancing similar hierarchical rule systems, see D. ANZILLOTI, *CORSO DI DIRITTO INTERNAZIONALE* 43 (3d ed. 1928) ("a complex of norms which derive their obligatory character from a fundamental norm"); H. HART, *THE CONCEPT OF LAW* 78-98 (1961); H. Kelsen, *GENERAL THEORY OF LAW AND STATE* (A. Wedberg trans. 1945), reprinted in G. CHRISTIE, *supra* note 244, at 621-23; J. SALMOND, *JURISPRUDENCE* 137 (11th ed. 1957) ("ultimate legal principles").

299. Kelsen certainly suggests this in the international realm. See H. Kelsen, *PURE THEORY OF LAW* 215-17 (Knight trans. 1967). A similar approach is taken by Kelsen with regard to the municipal or domestic realm. See H. Kelsen, *GENERAL THEORY OF LAW AND STATE*, *supra* note 298, at 625 ("one ought to behave as the individual, or the individuals, who laid down the first constitution have ordained").

The intellectual construct theory presupposes the existence of second-order master rules such as the one approving behavior consistent with the customary behavior of others.³⁰⁰ In doing so, the theory fails to demonstrate the existence of such rules. Given that the entire hierarchical system that the theory erects hinges on the second-order rules, this matter should not be left aside and unsubstantiated.

The intellectual construct theory must demonstrate two vital facts. First, the theory must address the actual existence of observable forms of repetitive, widespread, customary behavior within the given community. In the absence of the recurring practice upon which second-order rules are based, presuppositions regarding the occurrence of such practices are subject to the criticism of being mere figments of the imagination.³⁰¹ Also, the customary practice must take on a normative quality. To suggest that a second-order rule maintaining that one "ought" to behave as others have traditionally behaved implies that there is something about traditional or customary behavior that appeals to the conscience. Unless the link between custom and normativity is established, second-order rules would only indicate that behavior of a customary nature exists.

The second problem with the intellectual construct theory is also a derivative of the hypothetical nature of second-order rules. Even if both the existence and the normative character of customary behavior are conceded, the theory says nothing about the obligational validity of second-order rules. The intellectual construct theory does not address why the pull of custom that appeals to the conscience is obligatory in the sense that it is to be accepted and not resisted.³⁰² It may be that the kind of repetitive behavior that gives rise to custom can be shown to exist. It may also be that custom takes on a normative quality that tugs at one's sense of rightness. Nevertheless, the intellectual construct theory says nothing about why the tension resulting from that tug must be accepted and not opposed.

Given that the primary proponents of the intellectual construct theory belong to the jurisprudential school of positivism, it is not surprising to find an absence of discussion about the obligational validity of second-order rules.³⁰³ Obliga-

300. See H. KELSEN, *PURE THEORY OF LAW*, *supra* note 299, at 215-17 ("a basic norm [that individuals ought to behave as others have customarily behaved] is presupposed"). See also H. KELSEN, *WHAT IS JUSTICE?*, *supra* note 292, at 262 (in speaking of domestic law he states, "The basic norm that we ought to obey the provisions of the historically first constitution is not created by . . . legal authority . . . ; it is a norm which . . . we presuppose as a hypothesis.").

301. There would probably be little difficulty in showing the existence of repetitive, customary behavior.

302. This problem of obligational validity, as distinct from the validity of the existence of second-order rules, was noted by Hart as a criticism of Kelsen. See H. HART, *supra* note 298, at 105, 245.

303. Positivists have long insisted on the separation of law and morality. To the extent that the question of why second-order rules bind requires one to consider the connection between the law and morality, positivists view this as beyond the scope of jurisprudence. See generally Austin, *The Province of Jurisprudence Determined*, in 1 *LECTURES ON JURISPRUDENCE* (R. Campbell 5th ed. 1885).

tional validity can be observed in the context of the first-order rules that regulate everyday life. In that setting, obligational validity is demonstrated by first-order rules being recognized as consistent with the empowering second-order rules.³⁰⁴ In other words, to think of first-order rules as possessing validity that gives them force merely requires thinking of them as measuring up to the requirements of second-order rules. But obligational validity is never to be considered in the context of second-order rules, which are presumed to have obligational validity. To ask why the pull that they exert on the conscience is to be understood as obligatory is to ask a question that the positivist considers outside of the proper realm of jurisprudential inquiry.

The analytical purity of positivism is intellectually sufficient for some purposes, but is quite dissatisfying for one who wants to know what it is about consent that makes it binding. The formulation of a theory containing first- and second-order rules may allow one to determine which rules suggested as valid first-order rules indeed are valid. But since the theory does not profess to explain why the second-order rules used to judge first-order rules possess the power to obligate, the theory does not go far enough.³⁰⁵ The intellectual construct theory does take us beyond the limitations of theories explaining consent as binding by reference to the will of a promisor. Yet in failing to go beyond the hypothesized nature of second-order rules, the theory is no less deficient than any of the other Hart's theories that have been offered to show how consent binds.

V. CONCLUSION

To many, the suggestion that consent is incapable of serving as the basis of legal obligation may seem novel and inconsistent with deeply felt intuition. On the contrary, the suggestion is not only far from new, but has been powerfully offered in one form or another by scholars whose thoughtfulness, balance, perspective, and stature are truly impressive. Included in this collection would be such prominent internationalists as James Brierly,³⁰⁶ Sir Humphrey Waldock,³⁰⁷ and Sir Gerald Fitzmaurice.³⁰⁸ To find that consent is not the basis of obligation does not necessarily mean that every rule consensually agreed to lacks the force to obligate. As stated earlier,³⁰⁹ some other basis of obligation may give force to all or some standards arrived at consensually. The best way

304. This is the thrust of Hart's "rule of recognition." See H. HART, *supra* note 298, at 89-93. On ascertaining the nature of the "rule of recognition" in the United States, see Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987).

305. See P. SOPER, *supra* note 35, at 27-28.

306. See J. BRIERLY, *supra* note 242, at 9-18.

307. See Waldock, *General Course on Public International Law*, 2 RECUEIL DES COURS 1, 52-53 (1962) (observing, in the context of new states being bound by existing customary international law, that something more than consent is involved).

308. See Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 9 (1956) ("[consent] cannot *per se* be the reason").

309. See *supra* notes 243-47 and accompanying text.

to persuade decision-makers to turn to such a basis is by stressing that decisions founded on consent must prove to be equitable, fair, and reasonable. In moving in that direction and recognizing that consent cannot explain why one is bound to do as one has promised, we may position ourselves to evaluate each situation on the basis of every relevant consideration, keeping in the forefront of our minds the idea that all law grew out of a need to regulate societal affairs in a fashion that promoted the order necessary to allow the greatest possible development of mankind. Requiring that commitments be honored is an element, but only one element, in the promotion of that order. As Professor Michael Reisman so aptly put it: "Though . . . decision may diverge from the purport of . . . international law . . . , the test of the decision's lawfulness is not its conformity to these secondary [*i.e.*, legal] expressions of international policy, but its consonance with the fundamental goals of the international community."³¹⁰ If we ignore the problems associated with the claim that consent is the basis of obligation and insist on following the letter of consensual undertakings, we turn our backs on the goal that led to the creation of law in the first instance and deprive each member of society of the opportunity to experience the kind of development that leads to a sense of satisfaction that the complete measure of life has been attained.

As regards the use of force to protect nationals abroad, the notion that consent cannot serve as the basis of obligation means that states are not invariably required to refrain from using military measures to defend nationals located in foreign countries. Once consent is rejected as the basis of obligation, the indication in the Charter that states agreed to a regime outlawing the use of force for the protection of nationals abroad is cast in a new and different light. Though some other explanation may be advanced for why the Charter regime is to be followed, by moving away from an explanation founded on consent, we open up the possibility of being able to benefit from an approach that revives the original connection of the law with societal development. Examined in factual context, some instances involving force to protect nationals may be deemed consistent with that goal while others may be found wanting. The only point made here is that in liberating ourselves from the power imputed to consent, an entirely new perspective is gained for the analysis of legal problems affecting international affairs.

Admittedly, this new perspective is one rife with the possibility of increased uses of force. That genuinely troubling concern should not be casually shunted aside. With the rules of law seen as not necessarily obligatory just because they have been consented to, and, with subjective judgment given more flexibility, the chances for abuse rapidly multiply. Nonetheless, the new perspective has the advantage of confronting all of us with the stark and unal-

310. M. REISMAN, NULLITY AND REVISION 562 (1971) (statement made in regard to tribunals using equitable principles to produce results inconsistent with the law when they are not authorized to decide *ex aequo et bono*).

terable reality that we, and not the law, serve as the true architects of our ultimate destiny. History is replete with instances of concerted efforts at regulation followed by cataclysmic violence or widespread lawlessness.³¹¹ In the final analysis, the future of mankind hinges not on the development of a sophisticated system of legal rules to govern societal relationships, but on whether each individual has the courage and determination to labor unremittingly at husbanding the compassion and judgment of others. Legal rules, no matter how finely crafted, can never deter the use of force or antisocial behavior as effectively as can a committed effort to inculcate in every individual a sense of the real value of human life and a full respect for the dignity of every person.

It may also be true that, by deprecating consent and inviting efforts to locate the source of obligation elsewhere, one runs the risk of being left with the conclusion that there is nothing at all about law that makes it inherently obligatory. Does this mean that there are no alternatives to social cacophony? If there is merit to the earlier observation that we must look beyond legal rules to *effectively* resolve the problems society faces, then an orientation that downplays the tradition of reliance on law is the mark of true wisdom. Responsible judgment and heartfelt compassion should be raised to the privileged position that has been reserved too often for faith in the law's ability to improve the human condition. Couple this elevation with a recognition by decision-makers of the inability of the law to truly fix obligation, and it is just possible that the world could be better off. Surely through a widespread and genuine effort to nurture responsibility and compassion, the general level of civil behavior would be improved. And if those who evaluate actions that have been taken, or are about to be taken, recognize the somewhat limited force that legal rules really have, then law can be restored to its proper role as the handmaiden, rather than the master, of humankind. In the final analysis, both specific rules of law and personal promises may be deemed as entitled to respect. But if that is to be the case, it will come as a result of that decision being rationally considered more appropriate in an ordered society, not because of a blind devotion to rules and promises for the sake of devotion itself.

Finally, there should be no mistake about the position regarding the use of force implicit in the foregoing analysis. The view that consent does not necessarily bind, indeed that law itself may not possess the power essential to establish obligation, holds out the probability that some instances involving the use of force to protect nationals abroad could be judged differently than under traditional technical analysis. Despite this, one who decides, in the face of the solemn consensual standard contained in article 51 of the United Nations Charter, that the use of force is indeed appropriate should first brood long and searchingly over John Milton's eloquent admonition that "force overcomes but

311. Recall, for example, that the Second World War followed on the heels of numerous international arrangements designed to control military power. On the national level, the Prohibition Era involved much regulation that had little effect in controlling the consumption of alcoholic beverages.

half one's foe."³¹² For what has been suggested in these pages is by no means an apology for those who may cavalierly resort to military measures to resolve international tensions. Quite to the contrary, it is but a call, by one who deeply detests violence, for an honest examination of the nature of law and the best way to ameliorate the human condition.

312. J. MILTON, *PARADISE LOST* 110 (M. Kelley ed. 1943).