

ASPEN CASEBOOK SERIES

THE LAW OF  
ARMED CONFLICT:  
AN OPERATIONAL  
APPROACH

**Geoffrey S. Corn**  
Presidential Research Professor  
South Texas College of Law

**Victor Hansen**  
Professor of Law  
New England Law—Boston

**Richard B. Jackson**  
Colonel, U.S. Army, Retired

**Chris Jenks**  
Assistant Professor of Law  
SMU Dedman School of Law

**Eric Talbot Jensen**  
Associate Professor of Law  
Brigham Young University

**James A. Schoettler, Jr.**  
Adjunct Professor  
Georgetown University Law Center



**Wolters Kluwer**

Law & Business

## IV. The Use of Force

The Charter, much like the Kellogg-Briand Pact before, prohibits the use of force by individual States, with the exception of three specific methods of lawful force. Article 2(3) states that "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." This provision is generally read in conjunction with the next article, Article 2(4), which states that "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."

Article 2(4) has become the accepted norm restricting the use of force among States. However, universal acceptance does not mean universal understanding. Although the international community as a whole accepts Article 2(4) to be binding, nations have very different views on what the language actually means. For example, the prohibition refers to the "threat or use of force," as opposed to words such as "war" or "aggression." The Charter contains no definitions section, leaving each nation to determine what constitutes a "use of force."

One of the terms that has gained in acceptance and that will be used throughout this book in the discussion of the law is "armed conflict." Although this term is mostly applied to the rules governing war (which are the bulk of this book's topic) and is certainly not synonymous with a "use of force," the definition of armed conflict is helpful in analyzing what constitutes a use of force since it is assumed that armed conflict would involve the threat or use of force at its inception. In *Tadic*, the ICTY stated, "[W]e find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached. . . ."<sup>51</sup> It seems clear

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Article 51 of the Charter recognizes an inherent right of self-defense, Israel in this case had not made a claim "that the attacks against it are imputable to a foreign State" in comparison to UNSC practice, which "has repeatedly found that the conduct of nonstate actors can be a threat to international peace and security").

51. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

from this that activities that directly lead to an armed conflict may be a use of force.

Additional insight can be found in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations<sup>52</sup> that was adopted by the UNGA. The Declaration states that:

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special regimes or as affecting their temporary character.

States have a duty to refrain from acts of reprisal involving the use of force.

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.<sup>53</sup>

This list is certainly not exclusive, but it does give some idea as to the types of activities that constitute uses of force and threaten the territorial integrity or political independence of another State.

52. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 25/2625, Annex, U.N. Doc. A/RES/25/2625/Annex (Oct. 24, 1970).

53. *Id.*

Another helpful document is the UNGA Resolution 3314 on the Definition of Aggression. In this resolution, the GA determined that

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.<sup>54</sup>

States that want to abide by the Charter will want to ensure that their actions stay "below the threshold of force" understood to meet the Article 2(4) prohibition. Additionally, if an action is not against the "territorial integrity or political independence" of another State, it is not a violation of Article 2(4).

During the Charter negotiations, Brazil and several others argued that actions other than military-type actions, such as economic pressure, ought to be contemplated under this prohibition, but that idea was specifically rejected.<sup>55</sup> However, with the increase of modern financial dependency, the calls for a prohibition on certain levels of economic pressure are being raised again.<sup>56</sup>

54. Definition of Aggression, G.A. Res. 29/3314, Annex, U.N. Doc. A/RES/29/3314/Annex (Dec. 14, 1974).

55. Doc. 215, I/1/10, 6 U.N.C.I.O. Docs. 559 (1945). See Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. 334-35 (1945) (Summary Report of committee meeting at which the Brazilian amendment was discussed. The San Francisco Conference that drafted the United Nations Charter was considering the prohibition on the use of force that became Article 2(4) of the Charter; it rejected by a 26-2 vote an amendment proposed by Brazil that would have added to the prohibition on the threat or use of force the words "and from the threat or use of economic measures.").

56. Andre Beirlaen, *Economic Coercion and Justifying Circumstances*, 18 *Revue beige de droit international* 58, 67 (1984-85) ("Several GA Resolutions consider economic coercion as an

What about some more modern forms of force that were not contemplated by the Charter signatories, such as computer network operations, or actions in space such as those taken against another State's satellites? Some scholars have argued, particularly with reference to computer operations, that if the results resemble a kinetic use of force (or one using traditional weapons that rely on heat, blast or fragmentation for their damage), then it is a use of force. However, this is not yet a generally accepted view.

The prohibition on the use of force in Article 2(4) is not absolute. As mentioned above, rather than a prohibition, Article 2(4) creates a rebuttable presumption against the use of force. The Charter allows for three lawful methods of resort to force outside a nation's own territory. The use of force by a State is presumed illegal unless it is based on one of these three exceptions. The first method is consent by the State within whose borders that force is being used. The second enhances the principle of collective security by vesting the control of the use of force and the responsibility for the maintenance of international peace and security in the UNSC. Third, the Charter preserves the inherent right of States to act in self-defense after an armed attack until the UNSC takes necessary measures to restore peace. Each of these methods and the institutions that govern them will be discussed below.

### A. Consent

Article 2(7) of the Charter states that "[n]othing 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." This explicit recognition of state sovereignty is important for two reasons. First, it recognizes that States have the right to put down insurrections or other internal threats to the existing government. Second, it confirms the basis for the use of force by consent. If a nation requests the aid of a fellow nation or ally, that fellow nation or ally is free to use force within the boundaries of the requesting nation.

The recognition that States can continue to act within their own borders to ensure their own sovereignty against internal enemies is not in doubt. Note, however, the last phrase of the article. Even a domestic use of force against an internal threat is still subject to some degree of UNSC intervention, as will be explained below.

One way to manifest consent is through a bilateral international agreement. In fact, this was argued as one of the potential bases for the use of force in Panama by the U.S. forces. The Panama Canal Treaty authorized the United

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intervention in domestic affairs."); Justin D. Stalls, Note, *Economic Sanctions*, 11 U. MIAMI INT'L & COMP. L. REV. 115, 134-135 (2003).

States to use force in protecting the Canal. This Treaty provision can be seen as a preexisting condition granting consent, even if against one of the Parties to the Treaty.

## B. Security Council Authorization

As previously mentioned, the UNSC is granted “primary responsibility for the maintenance of international peace and security” and member States agree to “accept and carry out the decisions of the Security Council in accordance with the present Charter.” When the Charter was originally written, an “on-call” force was envisioned that would be at the disposal of the UNSC as needed. Because of the onset of the Cold War, the agreements necessary to establish this force never came into being. However, this has not prevented the UNSC from taking action with respect to the use of force. UNSC practice has been to “authorize” the use of force and then for member States to volunteer forces.

The response to the 1990 invasion of Kuwait by Iraq is a good example of UNSC practice. After the invasion on August 2, 1990, the UNSC passed Resolution 660, which condemned Iraq’s actions and demanded a complete and unconditional withdrawal.<sup>57</sup> The UNSC followed up with UNSCR 661, which imposed sanctions on Iraq and then in UNSCR 678 authorized member States to use “all necessary means” to restore international peace and security and requested all States to provide appropriate support to do so.<sup>58</sup>

The UNSC has taken similar actions in a number of other situations across the world and it is now clear that the UNSC can authorize the threat or use of force in order to maintain or restore international peace and security. Additional examples include Haiti in 1994 (UNSCR 940 authorized States to use all necessary means to facilitate the departure from Haiti of the military leadership and to effect the prompt return of the legitimately elected President); Kosovo in 1999 (UNSCR 1244 authorized an international security force to ensure peace); and Afghanistan in 2001 (UNSCR 1368, which condemned the September 11 attacks, called on all States to work together to bring the perpetrators to justice, to redouble efforts to suppress terrorist acts, and expressed the Security Council’s readiness to take all necessary steps to respond to the attacks).<sup>59</sup> UNSCR 1368 was followed by UNSCR 1373, which decided that all States shall prevent and suppress the financing of terrorist acts, take the necessary steps to prevent the commission of terrorist acts, and deny safe haven to terrorists.<sup>60</sup> Note the use of the “all necessary means” language in UNSCRs.

The UNGA Resolution 337, “Uniting for Peace,” was passed in a time when there was serious doubt as to the continuing effectiveness of the UNSC due to

57. S.C. Res. 660, ¶¶ 1-2, U.N. Doc. S/RES/660 (Aug. 2, 1990).

58. S.C. Res. 661, ¶ 3, U.N. Doc. S/RES/661 (Aug. 6, 1990); S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

59. S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994); S.C. Res. 1244, ¶ 5, U.N. Doc. S/RES/1244 (June 10, 1999); S.C. Res. 1368, ¶¶ 1, 3-5, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

60. S.C. Res. 1373, ¶¶ 1-2, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

the Cold War. The resolution has never been utilized so its effect remains unclear. Israel's Permanent Representative to the United Nations asserts in an article that Resolution 337 "has largely become moot," as a result of the ICJ's Advisory Opinion on *Certain Expenses of the United Nations*.<sup>61</sup> However, it may yet have an impact on the UNSC's role in authorizing the use of force.

## C. Self-Defense and Other Uses of Force

### 1. Self-Defense

At the end of Chapter VII is Article 51, the provision on the exercise of self-defense. Article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>62</sup>

The content of this provision has been often relied on to support military actions, and even more often debated as to its meaning and continuing validity. For example, numerous State actions have been justified by reliance on Article 51, but received simultaneous condemnation as being unlawful.

There is clearly no common understanding of the application of this article to State actions. States who argue for a broad or expansive right of self-defense generally believe that it provides greater deterrence, international stability, and ultimately less uses of force. Opponents are concerned that a broader interpretation erodes the basic prohibition against the unilateral use of force. Despite this disagreement, there is general consensus on the principles that apply to a use of force in self-defense.

#### a. Principles

Three major principles are generally accepted as governing self-defense actions under Article 51: necessity, proportionality, and timeliness. When a nation claims to have responded in self-defense, it will often be questioned on the application of these principles. One such action was the U.S. response to the April 5, 1986 bombing in Berlin, Germany that destroyed the "La Belle Disco" injuring over 200 and killing 2 people, including an American serviceman. Prior to the bombing, in December 1985, Abu Nidal terrorists conducted

61. Yehuda Z. Blum, *The Seventh Emergency Special Session of the UN General Assembly: An Exercise in Procedural Abuse*, 80 AM. J. INT'L L. 587, 588 (1986).

62. U.N. Charter art. 51.

bombings at the Rome and Vienna Airports. The Berlin bombing occurred the day after communications intercepted between the bombers and Libyan government officials in Tripoli, indicating the bombers were acting on orders from Libya. On April 15, the United States executed Operation El Dorado Canyon. U.S. air and naval assets struck targets in and around Tripoli, including an intelligence headquarters, military bases, airfields, and suspected terrorist training camps.

President Reagan announced, "These strikes were conducted in the exercise of our right of self-defense under Article 51 of the United Nations Charter. This necessary and appropriate action was a preemptive strike . . . designed to deter acts of terrorism by Libya. . . ."<sup>63</sup>

The principle of necessity in the context of exercising the right to self-defense requires the nation to have an objective necessity to respond with force in response to an attack or threat. A number of people criticized the U.S. attack on Libya as violative of the principle of necessity because one of the targets was Qaddafi's palace. The necessity of attacking such a target seemed dubious to many observers as the palace had no obvious military benefit.

The principle of proportionality requires that the force utilized in self-defense must be limited in scope, intensity, and duration to that which is reasonably necessary to counter the attack or neutralize the threat. Therefore, if the need for self-defense was occasioned by a small armed band, responding with a nuclear weapon would likely be disproportionate. Again, in connection with the bombing of Libya, some argued that the response by the United States was disproportionate to the initial act of bombing a discothèque.

The principle of timeliness means that the response must happen within some reasonable proximity in time to the hostile act. The idea is that the passage of time also may work to minimize the threat and as a result diminish the need for self-defense. Rather than self-defense, a delayed response may look more like revenge or a reprisal. The passage of ten days from the bombing in Berlin to the U.S. response led some to criticize the United States' reliance on self-defense based upon the principle of timeliness.

A similar event occurred in Iraq in 1993. On 14 April, Kuwaiti authorities thwarted a plot to assassinate former President Bush while he was scheduled to visit Kuwait. On 26 June, the United States launched 23 missiles at Iraqi Intelligence Headquarters from ships in the Persian Gulf and Red Sea. Then-Secretary of State Albright justified U.S. actions by saying, "We responded directly, as we are entitled to do under Article 51 of the United Nations Charter, which provides for the exercise of self-defence in such cases. Our response has been proportionate and aimed at a target directly linked to the operation against President [George H.W.] Bush."<sup>64</sup>

63. Ronald Reagan, Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States Air Strike against Libya, 1 PUB. PAPERS 478 (Apr. 16, 1986).

64. U.N. SCOR, 48th Sess., 3245th mtg. at 3-9, U.N. Doc. S/PV.3245 (June 27, 1993) (speech by Madeleine Albright, U.S. Permanent Representative to the United Nations).

In a recent presentation by John Brennan, President Obama's Assistant for Homeland Security and Counterterrorism, he argued that the United States has taken a "more flexible understanding" of the timeliness of an action in self-defense. While not giving much detail about how that approach is to be applied, Brennan clearly implied that because of the nature of terrorism, an action might be taken significantly in advance of a potential attack if that was the most effective means to prevent the attack. He stated that "[o]ver time, an increasing number of our international counterterrorism partners have begun to realize that the traditional conception of what constitutes an 'imminent' attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations." This broadening of the doctrine of Timeliness would presumably apply not only to actions in advance of an attack, but also actions in response to an attack that would be necessary to prevent further attacks.

Understanding the international legal concept of self-defense may be facilitated by analogy to the domestic criminal doctrine of self-defense. While this analogy is not perfect, and there are certain significant differences between the two doctrines, there are many useful similarities. First and foremost, like domestic self-defense, national or collective self-defense is a concept of absolute necessity. Accordingly, the legal principles related to a legitimate invocation of the right of self-defense are intended to ensure that States invoke this self-help authority only when doing so is the only viable option to protect their national (or collective) interests. These principles, or elements of self-defense, can therefore be best understood as conditions indicating the existence of genuine self-help necessity.

First, the State invoking the right must not have been the first aggressor. This is analogous to the "clean hands" doctrine of individual self-defense: If the State seeking to invoke the right is the initial aggressor, it may not invoke the right. For example, after Iraq invaded Kuwait in 1990, it could not claim a right of self-defense when the Coalition acted to eject Iraq from Kuwait. Second, resort to self-defense is permitted only when a State is the victim of an unlawful attack or when such an attack is imminent. Like individual self-defense, the imminence requirement is in reality a requirement that the State has no viable alternative to protect itself other than resort to a self-help use of force. Accordingly, unless the threat is imminent, the resort to self-defense is not genuinely necessary. Third, the self-defense response must be proportional. This is because the self-help necessity is strictly limited to restoring the *status quo ante*. It may not be used as a subterfuge to transform the self-defense response into a new act of aggression. Finally, the response must be timely. It is only logical that if force is used to defend against an attack or imminent attack, it must be proximate to the attack. Once the attack has terminated, the right essentially expires (although there may be a legitimate claim of ongoing threat that would justify what may appear to be a responsive attack).

Ultimately, like individual self-defense, national and collective self-defense must be based on application of a series of elements intended to limit invocation of the right to situations of true necessity. Of course, like the criminal

law context, the real challenge is determining when the facts and circumstances satisfy these elements.

### b. “Inherent Right” of Self-Defense

The language of Article 51 speaks of an inherent right of self-defense. Some have argued that by using this language, Article 51 incorporated and codified the preexisting right to self-defense as it was then understood. Others have argued that the right is no more than as granted in the Charter and must, therefore, be understood in conjunction with other Charter provisions limiting the resort to force. Still others argue that there remains some right to respond in self-defense outside the Charter.

These differing viewpoints are unresolved and have all been relied on in making arguments both for and against specific uses of self-defense. A nation's position on this question has a significant effect on how a nation interprets its use of force in self-defense, particularly in advance of a known or suspected attack. The following sections detail some specific approaches to acting in self-defense under the Charter.

#### (1) No Action Before Armed Attack

The language of Article 51 states that a nation can act in self-defense “if an armed attack occurs.” The definition of armed attack is controversial and will be discussed below, but many argue that the use of the word “if” means that in the post-Charter world, a nation can only respond in self-defense once the attack has occurred. It is the UNSC's job to maintain international peace and security and allowing nations to act in advance of an actual attack is really just a justification for aggression. Therefore, a nation cannot attack another nation in self-defense until it has been the object of an actual armed attack and then it can do so only until the Security Council takes some action.

#### (2) Anticipatory Self-Defense

Many States argue that there is no requirement to wait until the actual attack has occurred, but rather that if an attack is imminent, the potential victim can act in defense by anticipating that attack and taking action in advance of the attack. Anticipatory self-defense refers to the concept that self-defense is permissible in anticipation of an armed attack. The classic statement of the requirements for anticipatory self-defense was made by U.S. Secretary of State Daniel Webster in correspondence relating to the *Caroline* affair. In 1837, British troops crossed into the United States and seized the *Caroline*, a vessel suspected of being used in attacks into Canada. The ship was set ablaze and adrift on the Niagara River. The *Caroline* grounded, broke up, and its pieces went over Niagara Falls. In response to the event, Webster wrote to British Lord Ashburton concerning self-defense in anticipation of an actual attack. Webster's famous formulation is that anticipatory self-defense should be limited to cases that “show a necessity of

self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>65</sup>

State practice since the *Caroline* incident has expanded the restrictive Webster formulation of the right. In addition to the U.S. bombing of Libya mentioned above, States have relied on the doctrine of anticipatory self-defence in a number of cases.

### (3) Interceptive Self-Defense

Another theory of self-defence, originating with prominent Israeli scholar Yoram Dinstein, is the idea of interceptive self-defence. Under this theory, once an attacker has “committed itself to an armed attack in an ostensibly irrevocable way,”<sup>66</sup> the target has the right to use force in self-defence.

This theory can be illustrated by the situation during the Cold War. Both opposing sides had strategic missiles that carried nuclear weapons. Under this theory, once a missile was launched, but had not yet landed, one could argue that the armed attack had not yet occurred. However, the nation launching the missiles had triggered an action that could no longer be recalled. Therefore, the target nation’s right of self-defence had accrued.

### (4) Preventive Self-Defense

Preventive self-defence is perceived by many to push the limits of State action even further. When a State acts in preventive self-defence, it acts to prevent a potential attack before it is imminent or even capable of being launched. This theory of self-defence has only recently begun to receive acceptance. In 1981, Israel launched an attack against the Osirak nuclear facility south of Baghdad, Iraq. In justifying its attack, Israel claimed, “The atomic bombs which that reactor was capable of producing whether from enriched uranium or from plutonium, would be of the Hiroshima size. Thus a mortal danger to the people of Israel progressively arose.”<sup>67</sup> When this attack occurred in 1981, the world generally condemned it as beyond the scope of appropriate self-defence.<sup>68</sup>

Twenty years later, President George W. Bush clearly articulated the doctrine of preventive self-defence or preemption in the U.S. 2002 National Security Strategy. The Strategy states:

We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends. . . .

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

65. Letter from Daniel Webster, U.S. Secretary of State, to Henry Fox, British Minister in Washington (Apr. 24, 1841), in 29 BRITISH AND FOREIGN STATE PAPERS 1138 (1857).

66. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 191 (4th ed. 2005).

67. Statement by the Government of Israel on the Bombing of the Iraqi Nuclear Facility (June 8, 1981).

68. S.C. Res. 487, ¶ 1, U.N. Doc. S/RES/487 (June 19, 1981).

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.<sup>69</sup>

Some have discussed this theory as applying at the last point at which a State can successfully intervene. Take, for example, a terrorist group meeting to get their final instructions before launching an attack, including details of how the coordinated attack is to transpire, and then will not meet together again until after the attack. Attacking the group at that point in time, even though the attack is far from imminent, might be the last time the target State can successfully intervene.

The international community is dramatically split on this notion of self-defense, but it is clear that some States have already justified the use of armed force against another State under this theory.

### c. Collective Self-Defense

In addition to individual self-defense, Article 51 also recognizes the right to collective self-defense. Many mutual assistance treaties exist that enshrine the collective right to self-defense. Perhaps the most well-known is the North Atlantic Treaty. Article 5 states:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.<sup>70</sup>

However, the exercise of collective self-defense is not unlimited. In the ICJ's *Nicaragua* case discussed above, the Court refused to acknowledge the United States' claim to collective self-defense because El Salvador had not officially requested such help. The Court stated:

It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the

69. U.S. National Security Council, *National Security Strategy* (Sept. 2002), available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html> (last visited Apr. 25, 2011).

70. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243, available at [http://www.nato.int/cps/en/natolive/official\\_texts\\_17120.htm](http://www.nato.int/cps/en/natolive/official_texts_17120.htm) (last visited Apr. 25, 2011).

State for whose benefit this right is used will have declared itself to be the victim of an armed attack.<sup>71</sup>

This ICJ case, as with every case, is only binding between the Parties, and the United States did not take part in the actual case, casting even greater doubt on the importance of the decision. However, many States accept the principle that the right of collective self-defense may only be invoked by the State experiencing the armed attack.

#### d. Armed Attack

As Article 51 clearly states, whatever right of self-defense a nation might rely on, a response involving the use of force is not triggered unless the attack is an "armed attack." Once again, there is no agreed definition of what equates to an armed attack. There is discussion both as to what counts as "armed" and as to what constitutes an attack. For instance, could a computer network attack equate to "armed" or does it require heat, blast, and fragmentation? Despite this lack of clarity, States seem to agree that not all armed military actions equate to an armed attack. The ICJ confirmed this in the *Nicaragua* case. The ICJ decided that Nicaragua's provision of arms to the opposition in El Salvador was not an armed attack.<sup>72</sup>

Additionally, there are unresolved questions about the application of new technologies, such as cyber operations, to armed attack. It is still unclear what level of offensive cyber operations against a State will constitute an armed attack. Some scholars have argued that the decision should be based on the effects of the cyber attack,<sup>73</sup> but the law is still unclear and States have been hesitant to commit themselves to clear rules.

#### e. "Until the Security Council Has Taken Measures"

During the Cold War, when the UNSC was often too deadlocked to take any action, this was rarely an issue. With the UNSC unable to take any combined action, a State was not hindered by the possibility that the UNSC might preempt any action in self-defense. However, now that the UNSC is more active and effective, the question of UNSC action takes on a more significant role.

It is certainly possible that once an armed attack occurs or is even threatened, the UNSC could pass a resolution notifying the target State that the UNSC is seized of the issue and that the State's ability to act under Article 51 has been preempted by the UNSC's authority under Chapter VII. Many States, including the United States, take the view that for the UNSC to remove the right of self-defense, it must take "effective" action.

71. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 195 (June 27).

72. *Id.* ¶ 230.

73. Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 915-916 (1999).

## 2. Other Uses of Force

Along with self-defense of the nation, there are other justifications for threatening or using force without consent or UNSC approval that are rooted in self-defense or defense of others but that are not necessarily accepted as part of one of the theories above.

### a. Protection of Nationals

Nations have also claimed the right to exercise self-defense on behalf of their nationals abroad. Some modern views place this doctrine within the Article 51 right of self-defense. Others believe that since this right was exercised prior to the promulgation of the UN Charter, it is part of the customary "inherent" right that survives outside the Charter provisions. Either way, there are numerous modern exercises of force based on the right of a nation to protect its own nationals.

As a matter of international law, the State in which the nationals reside has the primary responsibility for providing protection within its territory, and it would only be in cases in which that State was unable or unwilling to provide protection that another State would be justified in intervening. This normally arises in the context of hostage situations or general unrest in the host country where the nationals' security is no longer assured. Ostensibly, the threat or use of force to protect a State's nationals requires similar justifications as other customary forms of self-defense discussed above.

Often this use of force is exercised through a "non-combatant evacuation operation" or NEO. In an NEO, the host-nation government is usually collapsed or incapable of sustaining peace and order and the sending nation(s) determines that it needs to evacuate its non-essential nationals from the area. This is usually coordinated from the sending nation's embassy and is a voluntary evacuation for non-sending nation government personnel.

There have been many NEOs in the past two decades. One example is the NEO from Sierra Leone in 1997. As the security in Sierra Leone deteriorated in May 1997, the United States worked with other sending nations to evacuate their nationals. By the end of June 1997, the United States had moved over 450 U.S. citizens and more than 2,000 nationals of other States from Sierra Leone aboard the USS *Kearsarge* to Guinea for safety and repatriation. NEOs are generally well accepted in international law.

Sometimes, the exercise of protection of nationals is not as peaceful as a NEO. For example, in 1983, after the fall of the government of Grenada and the seizure of power by a military council, the United States and several other Caribbean nations sent troops to Grenada to restore peace and protect nationals that were currently in Grenada. The United States justified its actions by claiming that there was a real risk that a group of U.S. medical students who were studying in Grenada at the time could be taken hostage in the ongoing conflict. In order to protect its nationals, the United States used force in self-defense. In response, the UNGA passed a resolution by a vote of 108 to 9, with 27 abstentions, deeply deploring the "armed intervention" by the United States.<sup>74</sup>

74. G.A. Res. 38/7, ¶ 1, U.N. Doc. A/RES/38/7 (Nov. 2, 1983).

### b. Humanitarian Intervention and the Responsibility to Protect

Although not universally recognized, some States contend that there exists a right to intervene within the territory of another State (without that State's consent, and without UNSC authorization) in order to prevent certain large-scale atrocities or deprivations. The argument is that such intervention does not violate Article 2(4) because the purpose is not to affect the territorial integrity or political independence of the State, but rather to prevent a humanitarian disaster. This theory of use of force has gained greater adherence with the rise of human rights as a force in international law.

Because humanitarian intervention is based in human rights and not meant to affect the political independence or territorial integrity of the host nation, the intervening State bears the heavy burden of proving its "pure motive." Any aggressive perceptions or self-serving designs will undermine the legitimacy of the intervention.

The North Atlantic Treaty Organization's (NATO) actions in Kosovo supply the clearest example of humanitarian intervention. Beginning in 1997, violent clashes erupted between the Kosovars and the Serbians in Kosovo. The situation escalated, creating tens of thousands of refugees. Many international organizations involved themselves in the problem and urged both sides to seek peaceful solutions. By September 1998, the United Nations estimated that there were 200,000 refugees.

From the beginning of the Kosovo crisis, the UNSC was "seized" of the issue and passed numerous resolutions dealing with the situation in Kosovo. UNSCR 1199 in September 1998 was especially important and demanded an immediate cease-fire, withdrawal of military and paramilitary forces, complete access for humanitarian organizations, and cooperation on the investigation of war crimes in Kosovo.<sup>75</sup> Belgrade maintained that this was a purely internal matter under Article 2(7) of the UN Charter and that the international community should not get involved.

After no response to UNSCR 1199, NATO decided to take action. Though not specifically authorized by UNSCR 1199, NATO issued an ultimatum to Belgrade, which was followed by a partial withdrawal of Serbian forces and the insertion of UN representatives to verify compliance with the ultimatum. Belgrade continued to resist negotiation efforts, claiming that the conflict in Kosovo was an internal matter. In March 1999, NATO began a bombing campaign that lasted 11 weeks. By the end of the bombing, over 800,000 people were displaced and thousands had been killed. The UNSC issued Resolution 1244 in June, which created a multinational force to ensure the peace and provide an environment for reconstruction.<sup>76</sup>

Despite what some argue was a ratification of the actions of NATO's humanitarian intervention, the international community is still deeply divided on the legality of humanitarian intervention. In the aftermath of Kosovo, Canada (with backing from the UN) created the International Commission

75. S.C. Res. 1199, ¶¶ 1, 4, 13, U.N. Doc. S/RES/1199 (Sept. 23, 1998).

76. S.C. Res. 1244, ¶ 5, U.N. Doc. S/RES/1244 (June 10, 1999).

on Intervention and State Sovereignty. In 2001, the Commission issued a report that first coined the term “Responsibility to Protect” (R2P). Many see R2P as the theoretical successor of humanitarian intervention, though this view is not universal.

In 2004, the UN High Level Panel on Threats, Challenges and Change issued a report titled *A More Secure World: Our Shared Responsibility*, in which it stated that “there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community.”<sup>77</sup> This finding was subsequently endorsed by the UN Secretary-General, adopted by the UN General Assembly in 2005,<sup>78</sup> and referred to approvingly by the Security Council.<sup>79</sup> However, inclusion in these documents does not equal either agreement as to its meaning or as to its applicability.

Generally, R2P<sup>80</sup> is based on three pillars: (1) The domestic State carries the primary responsibility for the protection of its population from mass atrocities; (2) the international community has a responsibility to assist States in fulfilling this responsibility; and (3) the international community should use appropriate domestic, humanitarian, and other peaceful means to protect populations from these crimes. If a State fails to protect its populations or is in fact the perpetrator of these crimes, the international community must be prepared to take stronger measures, including the collective use of force as approved by the UN Security Council. Note that pillar 3 requires Security Council approval before a use of force. Some who see this as the successor to humanitarian intervention are not convinced that Security Council approval is necessary.

On March 17, 2011, in response to the situation in Libya, the UNSC passed Resolution 1973.<sup>81</sup> Based on a deteriorating situation where Libyan State forces were killing civilians who were attempting to overthrow the Qaddafi regime, the UNSCR authorized “all necessary measures” to “protect civilians and civilian populated areas.”<sup>82</sup> The UNSCR further implemented a no-fly zone, an arms embargo, and an asset freeze.<sup>83</sup>

Many have claimed that this is the UNSC’s first exercise of R2P. Given the language of the UNSCR, it seems very similar to the justification for humanitarian intervention used in Kosovo, and seems to comply with the three pillars analysis. To some, this raises questions about the overall validity of humanitarian intervention and R2P as acceptable uses of force, outside the

77. *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, ¶ 201, U.N. Doc. A/59/565 (Dec. 2, 2004), available at [www.un.org/secureworld/report.pdf](http://www.un.org/secureworld/report.pdf).

78. 2005 World Summit Outcome, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

79. S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

80. For an excellent discussion on R2P, see Carsten Stahn, *Responsibility to Protect: Legal Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99 (2007).

81. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

82. *Id.* ¶ 4.

83. *Id.* ¶¶ 6, 13, 19.

Charter. Since the UNSC has authorized an R2P, does that now mean that such actions are only valid with UNSC authorization? Or does it mean that R2P is now viewed as a valid use of force, with or without UNSC authorization?

The answers to these questions are unclear as of now. However, the actions in Libya will undoubtedly be the cause of much discussion over the next few years before we know exactly what it all means for international law and the law of armed conflict (LOAC).

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