

# Matthew D. Vandermyde, *Arms Embargoes and the Right of Self-Defense in International Law*

## I. INTRODUCTION

The law on self-defense in international law is the subject of the most fundamental disagreement between states and between writers.<sup>1</sup> Article 51 of the United Nations Charter, the starting point for any self-defense analysis, states that: “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<sup>2</sup> has taken measures necessary to maintain international peace and security.”<sup>3</sup> There is considerable debate over many aspects of the Article, including the significance of the word “inherent,”<sup>4</sup> the significance and definition of

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<sup>1</sup> CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 98 (2d ed. 2004). Disagreement over self-defense in international law ranges from discussion of its origin to disputes arising from its most modern application. Saul Mendlovits & Merav Datan, *Nuclear Weapons, The World Court, and Global Security: Judge Weeramantry’s Grotian Quest*, *Transnat’l L. & Contemp. Probs.* 402, 422 (1997).

<sup>2</sup> The Security Council consists of fifteen nations. U.N. Charter art. 23(1). Five of the fifteen members are permanent, and include China, France, Union of Soviet Socialist Republics, the United Kingdom, and the United States. *Id.* The other ten, non-permanent members serve for two years, and are elected by the General Assembly (which includes all member nations), with “due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.” *Id.* In 2006, the ten non-permanent members include: The United Republic of Tanzania, Argentina, Congo, Denmark, Ghana, Greece, Japan, Peru, Qatar, and Slovakia.

<sup>3</sup> *Id.* at art. 51.

<sup>4</sup> *See infra* Part II.

the phrase “armed attack,”<sup>5</sup> and the definition of “measures necessary to maintain international peace and security.”<sup>6</sup>

The uncertainty of self-defense law is magnified when considering its relationship with Security Council action. One argument that has gained popularity over the past few decades is that mandatory arms embargoes imposed against a nation by the Security Council may violate the nation’s right to self-defense.<sup>7</sup> The International Court of Justice<sup>8</sup> has yet to make a determination on the issue. The Security Council has listened to the arguments and, in some instances, has responded by adjusting the embargo to exclude its application to arms destined for the government, such as in the Rwanda and Sierra Leone conflicts.<sup>9</sup> In other instances, however, the Security Council has rejected the argument and refused to lift or adjust the embargo.<sup>10</sup>

This article will attempt to clarify and assess the validity of self-defense arguments in the face of mandatory arms embargoes by exploring the sources, content, and legal status of right of self-defense,<sup>11</sup> analyzing the substance and success of previous arguments,<sup>12</sup> and reconciling the competing policy interests.<sup>13</sup>

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<sup>5</sup> *See infra* Part II.B.1-2.

<sup>6</sup> *See infra* Part II.B.3.

<sup>7</sup> *See infra* Part III.A.

<sup>8</sup> The International Court of Justice, commonly known as the “World Court” is the principal judicial organ of the United Nations. *See* U.N. Charter art. 36.

<sup>9</sup> *See infra* Part III.A.3-4.

<sup>10</sup> *See infra* Part III.A.2, 5.

<sup>11</sup> *See infra* Part II.

<sup>12</sup> *See infra* Part III.A.

<sup>13</sup> *See infra* Part III.D.

## **II. THE RIGHT OF SELF-DEFENSE**

In order to understand the role the Security Council's actions play in determining and affecting the right of self-defense, it is necessary to first examine the current state of the right itself and its origins.

Article 51 of the Charter of the United Nations provides, in relevant part: "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."<sup>14</sup> There are those who argue that the word "inherent" in Article 51 is merely a "theoretical opinion of the legislator which has no legal importance."<sup>15</sup> They argue that "the meaning of Article 51 is clear; the right of self-defense arises only if an armed attack (French: *aggression armée*) occurs."<sup>16</sup> They believe that "[t]he limits imposed on self-defence in Article 51 would be meaningless if a wider customary law right to self-defence survives unfettered by these restrictions."<sup>17</sup>

However, it is generally accepted that "the right to self-defense is 'inherent,' at least in the sense that Article 51 of the Charter does not impair the pre-Charter customary right of self-

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<sup>14</sup> U.N. Charter art. 51.

<sup>15</sup> HANS KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 791-92 (4th ed. 1964); *See also* YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 170 (1988).

<sup>16</sup> GRAY, *supra* note 1, at 98; *see also* Judith A. Miller, *National Security: NATO's Use of Force in the Balkans*, 45 N.Y.L. SCH. L. REV. 91, 94 (2001).

<sup>17</sup> GRAY, *supra* note 1, at 98.

defense.”<sup>18</sup> Those who support this wider right of self-defense argue that at the time the U.N. Charter was written there was a wide customary right of self-defense that allowed the use of force not only in response to an armed attack, but also to protect nationals and in anticipation of an armed attack.<sup>19</sup>

## **A. The “Inherent” Right of Self-Defense**

### **1. Self-defense in Customary International Law**

Article 38(1) of the Statute of the International Court of Justice recognizes “international custom” as a source of international law.<sup>20</sup> The term “international custom” in Article 38(1) is

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<sup>18</sup> Craig Scott et al., *A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council’s Arms Embargo on Bosnia and Herzegovina*, 16 MICH. J. INT’L L. 1, 56 (1994) (citing JOHN N. MOORE, *CRISIS IN THE GULF: ENFORCING THE RULE OF LAW* 151 n.23 (1992); DEREK W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 184-99 (1958); JULIUS STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION* 92-103, 195 (“And beyond doubt, the Charter reserved to them – reserved, not granted—their ‘inherent right of individual and collective self-defence’”) (1958)).

<sup>19</sup> GRAY, *supra* note 1, at 98 (citing BOWETT, *supra* note 18, at 4; STEPHEN M. SCHWEBEL, *AGGRESSION, INTERVENTION AND SELF-DEFENSE IN MODERN INTERNATIONAL LAW* 136 RCADI (1972-II) 463; MEYERS MCDUGAL AND FLORENTINO FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961)).

<sup>20</sup> Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179. Article 38(1) of the Statute of the International Court of Justice provides a good starting point for addressing the sources of international law:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of the law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of various nations, as subsidiary means for determination of rules of law.

commonly called “customary law”<sup>21</sup> and “results from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>22</sup>

The general practice necessary for a custom to become international law does not need to take place over a long period of time. It may be of “comparatively short duration.”<sup>23</sup> But the practice must be “general and consistent.”<sup>24</sup> It may be “general even if it is not universally followed; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity.”<sup>25</sup>

The sense of legal obligation necessary for a practice to become international law is called *opinio juris sive necessitates*, or just *opinio juris*.<sup>26</sup> A practice that is “generally followed but which states feel legally free to disregard does not contribute to customary law.”<sup>27</sup> It is generally difficult to determine when such a conversion into law occurs.<sup>28</sup> “Explicit evidence of

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*Id.*

<sup>21</sup> See, e.g., Mark P. Popiel, *Redrafting The Right Of Self-Defense In Response To International Terrorism*, 1 ACROSS BORDERS INT’L L. J. 4, ¶ 5 (2003).

<sup>22</sup> Restatement (Third) of the Foreign Relations Law of the United States §102(2) (1987).

<sup>23</sup> *Id.* §102 cmt. b.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* This can be demonstrated by reference to official documents and other evidence of government action. *Id.* §102 cmt. a.

<sup>26</sup> *Id.* §102 cmt. c.

<sup>27</sup> *Id.* Some commentators take issue with *opinio juris* in a couple of ways. See George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 A.J.I.L. 541 (2005). First, commentators wonder whether customary international law can ever come into existence if it requires a sense of legal obligation before it can exist. See *id.* at 544. Second, commentators wonder whether states are ever really motivated by *opinio juris*, or if the motivation always comes from “coincidence of interest, coercion, cooperation predicated on self-interest, or coordination predicated on self-interest.” *Id.*

<sup>28</sup> Restatement (Third) of the Foreign Relations Law of the United States §102(2) cmt. c (1987).

a sense of legal obligation (*e.g.*, by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions.”<sup>29</sup>

The right of states to defend themselves, which has been “defined as ‘a lawful use of force (principally, counterforce), under conditions prescribed by international law, in response to the previous unlawful use (or, at least, the threat) of force’”<sup>30</sup> has been recognized for thousands of years, dating at least back to the Roman era.<sup>31</sup> It is a “concept common to all legal systems.”<sup>32</sup> There is no doubt that each state acknowledges its own right to defend itself, and similarly, acknowledges the legal right that other states have to defend themselves. This acknowledgement creates a sense of legal obligation, or *opinio juris*. Accordingly, the right of self-defense is universally accepted as customary international law.<sup>33</sup> This conclusion is further bolstered by analyzing other sources that contribute to the development of customary law.

## **2. Sources That Contribute to the Establishment of the Right of Self-defense as Customary International Law.**

There are a number of other factors that play a role in the establishment of self-defense as international customary law, including, but certainly not limited to, natural law, judicial

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<sup>29</sup> *Id.*

<sup>30</sup> Ziyad Motala & David T. ButleRitchie, *Self Defense in International Law, The United Nations, and the Bosnian Conflict*, 57 PITT. L. REV. 1, 9 (1995) (quoting YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 175 (2d ed. 1994)).

<sup>31</sup> *Id.*

<sup>32</sup> Scott, *supra* note 18, at 48.

<sup>33</sup> Oscar Schachter, *Self Defense and the Rule of Law*, 83 AM. J. INT’L L. 259, 260 (1989).

decisions, and U.N. resolutions. A brief description of each is important to an understanding of how the law continues to develop.

### **a. Natural Law**

It has been suggested that natural law principles greatly contribute to the establishment of customary law, including the right of self-defense.<sup>34</sup> Natural law is best defined by the words of Marcus Tullius Cicero written over 2,000 years ago:

True law is right reason in agreement with nature. It is of universal application, unchanging and everlasting . . . It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. It cannot be changed by majority. There will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times. There will be one master and ruler, that is, God, over all of us, for he is the author of this law, its promulgator, and its enforcing judge.<sup>35</sup>

Natural rights are those rights that are derived from natural law.<sup>36</sup> In the international law arena, some theorists, starting with renowned Dutch Republic jurist Hugo Grotius in the 17th century, have argued that “self-preservation is an inherent right of both individuals and states and is an integral part of defining ‘just war.’”<sup>37</sup> “The right of self-defence . . . has its origin directly, and chiefly, in the fact that nature commits to each his own protection.”<sup>38</sup> Self-preservation, as a

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<sup>34</sup> See generally, e.g., DAVID J. BEDERMAN, *INTERNATIONAL LAW IN ANTIQUITY* (2001); Sean D. Magenis, Note, *Natural Law as the Customary International Law of Self-Defense*, 20 B.U. INT’L L.J. 413 (2002) (“[N]atural law is becoming recognized as customary international law.”).

<sup>35</sup> M. TULLIUS CICERO, *DE RE PUBLICA* III.xxii.33 (Niall Rudd trans., Oxford Univ. Press 1988).

<sup>36</sup> Magenis, *supra* note 34 at 416.

<sup>37</sup> Maureen F. Brennan, *Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law*, 59 LA. L. REV. 1195, 1198 (1999) (citing BOWETT, *supra* note 18, at 4); see also Schachter, *supra* note 33, at 259.

<sup>38</sup> H. GROTIUS, *DE JURE BELLI AC PACIS*, bk. II, ch. I, pt. III, at 172 (Carnegie Endowment trans. 1925) (1646).

natural right, could not be abrogated or even limited by positive law.<sup>39</sup> Perhaps the United Nations Charter reflects this in characterizing self-defense as an "inherent right."<sup>40</sup>

### **b. Judicial decisions**

Judicial decisions in international law are not really "sources" of law as they are in United States domestic law.<sup>41</sup> "They are not ways in which law is made or accepted, but opinion-evidence as to whether some rule has in fact become or been accepted as international law."<sup>42</sup> Additionally, Article 59 of the Statute of the International Court of Justice states: "The decision of the Court has no binding force except between the parties and in respect of that particular case."<sup>43</sup> That reflects "the traditional view that there is no *stare decisis* in international law."<sup>44</sup>

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<sup>39</sup> Schachter, *supra* note 33, at 259.

<sup>40</sup> *Id.* However, many authorities believe that the right of self-defense cannot exist independently of positive law, and can even be altered by it. *Id.* See also KELSEN, *supra* note 15, at 791-92.

<sup>41</sup> Restatement (Third) of the Foreign Relations Law of the United States §102 note 1 (1987).

<sup>42</sup> *Id.*

<sup>43</sup> Statute of the International Court of Justice, June 26, 1945, art. 59, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

<sup>44</sup> Restatement (Third) of the Foreign Relations Law of the United States §103 cmt. b. (1987). *But see* Raj Bhala, *The Myth about Stare Decisis and International Trade*, 14 AM. U. INT'L L. REV. 845, 865-66 (1999) ("not everyone agrees that Article 59 is concerned with the precedential effect of decisions. Judge Mohamed Shahabuddeen of the ICJ does not locate the rule against stare decisis in Article 59, declaring this provision 'has no bearing on the question of precedents.' This disarming statement rests on two quite plausible claims. First, a literal parsing of the language of Article 59 indicates it is meant 'to ensure that a decision, qua decision, binds only the parties to a particular case.' That is, the language is limited to defining the legal relations of the parties . . . but having nothing to do with whether a decision can serve as a precedent in subsequent litigation . . . Judge Shahabuddeen's second argument begins with the observation that Article 38.1(d) refers to decisions of tribunals other than the ICJ, whereas Article 59 refers only to the ICJ's decisions. Suppose Article 59 was a rejection of stare decisis. Then, it would be a rejection only for ICJ decisions. In contrast, Article 38.1(d) expressly countenances the use of judicial opinions as a subsidiary means of uncovering the meaning of international law. Judge

However, “in the few permanent courts, such as the International Court of Justice, the Court of Justice of the European Communities, and the European Court of Human Rights, there is considerable attention to past decisions.”<sup>45</sup>

The International Court of Justice has recognized that the right of self-defense is rooted in customary law, and is not in some way superseded by the U.N. Charter:

[T]he Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right" (in the French text the "droit naturel") of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.<sup>46</sup>

### **c. U.N. Resolutions**

#### **i. Security Council Resolutions**

United Nations Security Council Resolutions are binding on all parties to the United Nations,<sup>47</sup> and also take precedence over any other international agreement.<sup>48</sup> They contribute to

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Shahabuddeen suggests the result would be that opinions from tribunals other than the ICJ might well have a status higher than ICJ opinions.” (quoting MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 63, 99-101 (1996)).

<sup>45</sup> Restatement (Third) of the Foreign Relations Law of the United States §103 cmt. b. (1987).

<sup>46</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. LEXIS 4 at \*192 (June 27). In this case the World Court ruled that the United States violated international law by supporting contra forces against the Nicaragua government and mining the country’s harbors in 1984. *Id.*

<sup>47</sup> U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

the development of customary law because the binding nature of the resolution enhances the *opinio juris*, or the sense of legal obligation on the part of the states. Additionally, the resolutions provide good evidence of existing customary law because the votes of Security Council members act as “formal state expressions” of *opinio juris*.<sup>49</sup>

The Security Council, in theory, should always be able to pronounce whether a claim of self-defense is justified, but in practice it is very difficult to do so.<sup>50</sup> The difficulties that the parties have in establishing the facts in cases involving a claim of self-defense and the legality of the use of force are especially apparent in recent International Court of Justice cases *Cameroon v. Nigeria* (2002)<sup>51</sup> and *Iranian Oil Platforms* (2003).<sup>52</sup> “The issue is left unresolved in the vast majority of cases; certainly the Security Council does not generally make express pronouncements determining this crucial legal issue . . . it is far more common for this to take the

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<sup>48</sup> U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).

<sup>49</sup> John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PACE INT’L L. REV. 283, 295 (2003). For example, commentators suggest that the United States has enunciated the doctrine of anticipatory self-defense through its conduct in foreign relations. *Id.* Particularly, “the voting patterns of the United States in the U.N. Security Council . . . are formal state expressions of *opinio juris* on the practice at issue.” *Id.*

<sup>50</sup> GRAY, *supra* note 1, at 96.

<sup>51</sup> 2002 ICJ LEXIS 4. This was primarily a boundary dispute, but Cameroon also claimed that Nigeria had used illegal force, including an invasion of Lake Chad in 1987, and attacks into the Bakassi peninsula. Nigeria claimed that any use of force had been in self-defense. Both parties presented extensive arguments on the use of force, but the Court effectively avoided a decision on the claim of self-defense GRAY, *supra* note 1, at 96 n.5.

<sup>52</sup> 2003 ICJ LEXIS 11; GRAY, *supra* note 1, at 96. The parties in this case presented extensive argument on the use of force in the 1980-88 Iran/Iraq war. The Court held that the United States failed to establish Iran’s responsibility for armed attacks which would have entitled the United States to use force in self-defense. *Id.*

form of a call for a cease-fire rather than any attribution of responsibility.”<sup>53</sup> Members of the United Nations see the Security Council’s goal as “the promotion of the restoration of peace rather than as the assignment of responsibility.”<sup>54</sup> Furthermore, attempts to pronounce the validity of self-defense claims are often defeated by veto.<sup>55</sup>

However, in two recent cases, the Security Council has upheld a state’s claim of self-defense.<sup>56</sup> In the 1980-88 Iran/Iraq conflict, Iran persistently claimed that Iraq was responsible for initiating the conflict and the Security Council asked the UN Secretary-General to investigate responsibility.<sup>57</sup> The Secretary-General accepted and reported that Iraq contravened international law through the illegal use of force and disregard for the territorial integrity of Iran when it attacked Iran on September 22, 1980.<sup>58</sup>

Also, in the 1990 Iraq/Kuwait conflict, the Security Council explicitly upheld Kuwait’s right to self-defense when attacked by Iraq.<sup>59</sup> These pronouncements may mark “a new role for

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<sup>53</sup> GRAY, *supra* note 1, at 96.

<sup>54</sup> *Id.* at 97. The United Charter assigns to the Security Council the primary responsibility to maintain international peace and security. U.N. Charter art. 24(1).

<sup>55</sup> Schachter, *supra* note 33, at 264.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (citing 1991 U.N.Y.B. 165; S/23273). Iraqi forces invaded Iran to capture its southern territory and give Iraq greater access to the Persian Gulf. ARTHUR MARK WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II* 47-48 (1997).

<sup>59</sup> GRAY, *supra* note 1, at 96 (citing SC Res 661 (13-0-2)). Iraqi forces invaded Kuwait over border disputes and oil production disputes. DAVID SCHWEIGMAN, *THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER* 68 (2001). After the UN could not convince Iraq to withdraw, more than 20 nations participated in Operation Desert Storm which forced Iraq out of Kuwait. *Id.* at 68-71.

the Security Council and the start of a new legal order.”<sup>60</sup> Hence, in this respect, the customary international law of self-defense may begin to become more clear.

## ii. General Assembly Resolutions

Although United Nations General Assembly resolutions are not binding, they provide good evidence of developing customary law because adoption requires votes of the states themselves.<sup>61</sup> It is often difficult, however, to determine what weight should be afforded the resolutions.<sup>62</sup>

In many cases where the Security Council was unable to pronounce the validity of self-defense claims, they were considered by the General Assembly, “which, unfettered by the veto, generally condemned the alleged self-defense action as a Charter violation.”<sup>63</sup> However, the target states generally do not accept the General Assembly decisions as binding.<sup>64</sup>

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<sup>60</sup> *Id.* at 97.

<sup>61</sup> See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 769 (2001); Restatement (Third) of the Foreign Relations Law of the United States §103 cmt. c. (1987); Cohan, *supra* note 49, at 296. The General Assembly is made up of all 191 member nations. Press Release, List of Member States, U.N. Doc. ORG/1360/Rev. 1 (Feb. 10, 2004). Important General Assembly decisions, including recommendations regarding the maintenance of international peace and security, are made by a two-thirds majority of members present. U.N. Charter art. 36. Decisions on other matters are made by majority. *Id.*

<sup>62</sup> See Roberts, *supra* note 61, at 763.

<sup>63</sup> Schachter, *supra* note 33, at 264. For example, the General Assembly condemned the U.S. bombing in Libya after a similar Security Council resolution failed. See, e.g., G.A. Res. 38, U.N. GAOR, 41st Sess., Supp. No. 53, at 34, U.N. Doc. A/RES/41/53 (1986)

<sup>64</sup> *Id.*

### 3. Self-Defense As A Jus Cogens Norm

There is little dispute that there are “certain peremptory norms within international law. The use of the term *peremptoryis* to classify these norms as ones from which no state can derogate.”<sup>65</sup> Such norms form a body of jus cogens.<sup>66</sup> Article 53 of the Vienna Convention describes the criteria necessary for a norm to become jus cogens:<sup>67</sup>

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>68</sup>

The principle of jus cogens not only invalidates treaties, but also actions of states and international organs that derogate from it.<sup>69</sup>

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<sup>65</sup> Carin Kahgan, *Jus Cogens and the Inherent Right to Self-Defense*, 3 I.L.S.A. J. INT’L & COMP. L. 767, 769 (1997).

<sup>66</sup> *Id.* at 771.

<sup>67</sup> Article 64 of the Vienna Convention provides further that “[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.” Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

<sup>68</sup> *Id.* at art. 53. Many believe that natural law was the cornerstone to the establishment of jus cogens, and that it remains today as an element of jus cogens. See G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 250 (1993). Jus cogens differs from natural by definition, however, in that a jus cogens norm can be changed by “a subsequent norm of general international law having the same character,” but natural law is “unchangeable” and is “valid for all nations and all times.” Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); CICERO, *supra* note 35, at 33.

<sup>69</sup> See, e.g., Scott, *supra* note 18, at 106-13. Examples include slavery, genocide, and torture. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 840 (1997).

There is some difficulty, however, in determining whether the right of self-defense rises to the level of jus cogens.<sup>70</sup> To the extent that a Security Council's action "derogates" from a peremptory norm, and therefore violates jus cogens, the action would be rendered unlawful.<sup>71</sup>

Because no derogation is permitted from a jus cogens norm, and Article 51 seems to limit (and hence derogate from) the right of self-defense, by definition it seems to naturally follow that the right of self-defense could not be a jus cogens norm.<sup>72</sup> But this notion is easily refuted intratextually. A nation's right to defend itself, regardless of whether that right is rooted in customary law, natural law, or is a jus cogens norm, is conditioned upon necessity.<sup>73</sup> If it is not "necessary" to use force in self-defense, there is no right to use force in self-defense. Article 51 merely provides that: "[n]othing in the present Charter shall impair the *inherent* right of individual or collective self-defense . . . *until the Security Council has taken measures necessary to maintain international peace and security.*"<sup>74</sup> Once the Security Council has taken "necessary" measures to protect the victim party, it is no longer "necessary" for the state to use unilateral force in self-defense. Hence, Article 51 is not a limit on self-defense but rather an articulation on the natural limits of self-defense.<sup>75</sup>

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<sup>70</sup> See *id.* at 57; see also, e.g., Thomas K. Plofchan, Jr., *A Concept of International Law: Protecting Systematic Values*, 33 VA. J. INT'L L. 197, 234-37; KELSEN, *supra* note 15, at 791; Kahgn, *supra* note 65, at 791.

<sup>71</sup> See Int'l L. Comm'n Report, U.N. Doc. A/6309/Rev.1, p. 89 (1966).

<sup>72</sup> See Scott, *supra* note 18, at 58.

<sup>73</sup> 30 BRITISH & FOREIGN STATE PAPERS 193 (1843), reprinted in Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89 (1938).

<sup>74</sup> U.N. Charter art. 51 (emphasis added).

<sup>75</sup> See *infra* Part II.B.3. Though Article 51 also contains the phrase "if an armed attack occurs," it cannot seriously be argued that a state may not use necessary and proportionate force against aggression that does not amount to an "armed attack." See U.N. Charter art. 51; see *infra* Part

Self-defense can be shown to be a *jus cogens* norm by considering the legal status of its counterpart, the prohibition on the use of force.<sup>76</sup> Article 2(4) 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.”<sup>77</sup> There is an inextricable linkage between this prohibition on the use of force and the right to use defensive armed force when that prohibition is violated, and each can only be defined in relationship to the other.<sup>78</sup> “[T]he evolution of the idea of self defense in international law goes hand in hand with the prohibition of aggression . . . . Self defense as a legitimate recourse to force is inextricably linked to the antithesis of the employment of unlawful force by . . . its opponent.”<sup>79</sup> The use of force prohibition “necessarily implicates and defines the countervailing permitted self defensive use of armed force as one which encompasses the ability to defend against the use and the threat of armed force as well.”<sup>80</sup> More specifically, so far as “the traditional prohibition on the use of force is . . . *jus cogens*, the integrity of the system, the maintenance of balance between the two components of the system, mandate that its counterpart, the permissible use of armed force, be recognized as having that

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II.B.2. Hence, this phrase is also not a limitation on the right of self-defense, but attempts to define it. Scott, *supra* note 18, at 58.

<sup>76</sup> See Kahgan, *supra* note 65, at 791.

<sup>77</sup> U.N. Charter art. 2(4).

<sup>78</sup> See Kahgan, *supra* note 65, at 791.

<sup>79</sup> DINSTEIN, *supra* note 15, at 174-75 (citing Report of the International Law Commission, 32<sup>nd</sup> Sess., 1980 II (2) Int’l L. Comm’n Y.B. 1, 52).

<sup>80</sup> Kahgan, *supra* note 65, at 791 (citing J.N. SINGH, USE OF FORCE UNDER INTERNATIONAL LAW 10 (1984)).

same normative status.”<sup>81</sup> It is widely accepted that this prohibition on the use of force rises to the level of a jus cogens norm,<sup>82</sup> and accordingly, the right to use defensive armed force must also rise to the level of a jus cogens norm.

### **B. The Scope Of The Right Of Self-Defense**

The concept of legal use of force in international law is commonly expressed as *jus ad bellum*, or just war theory.<sup>83</sup> Though Article 2(4) of the United Nations Charter prohibits the use of force in international relations,<sup>84</sup> Article 51 permits the use of force when an “armed attack” has occurred.<sup>85</sup> However, as noted earlier, it is not clear “whether the drafters of the Charter intended to limit the pre-existing right to only cases of armed attack; [or] whether, as the International Law Commission observed, the Charter merely ‘sets out to state the rule concerning a particular case,’ but does not purport to limit all cases of self- defense.”<sup>86</sup> This section will

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<sup>81</sup> *Id.*

<sup>82</sup> See IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 222-23 (2d ed. 1984) (“There is ample evidence for the proposition that, subject to the necessary exceptions about the use of force in self-defence or under the authority of a competent organ of the United Nations or a regional agency acting in accordance with the Charter, the use of armed or physical force against the territorial integrity or political independence of any State is now prohibited. This proposition is so central to the existence of any international legal order of individual nation States (however nascent that international legal order may be) that it must be taken to have the character of jus cogens.”). See also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J LEXIS 4 at \*192 (June 27).

<sup>83</sup> William V. O’Brien, *Just-War Theory*, in THE ETHICS OF WAR AND NUCLEAR DETERRENCE 30 (James P. Sterba ed., 1985).

<sup>84</sup> U.N. Charter art. 2(4).

<sup>85</sup> *Id.* at art. 51.

<sup>86</sup> Brennan, *supra* note 37, at 1200-01 (quoting Report of the International Law Commission to the General Assembly, 35 U.N. GAOR Supp. (No. 10) at 125-27, U.N. Doc. A/35/10 (1980),

explore areas where states' use of force may be justified without prior Security Council authorization.

### 1. Self-Defense If An Armed Attack Occurs

Although all states agree that there is a right to self-defense if an armed attack occurs, the gravity of the action required to constitute an "armed attack" remains controversial.<sup>87</sup> In *Nicaragua v. U.S.*, the International Court of Justice defined "armed attack" as:

not merely action by regular armed forces across an international border, but also "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" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.<sup>88</sup>

Thus, in order to use self-defense against a state, there must be some action imputable to that state.<sup>89</sup> However, the Court held that an "armed attack" does not include "assistance to rebels in the form of the provision of weapons or logistical or other support," even though such assistance could be regarded as "a threat or use of force" or illegal intervention.<sup>90</sup>

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reprinted in [1980] 2 Y.B. Int'l. L. Comm'n 58-59, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (part 2).

<sup>87</sup> Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 44 (2002).

<sup>88</sup> *See id.*

<sup>89</sup> 1986 I.C.J. LEXIS 4 at \*215-16 (June 27).

<sup>90</sup> *Id.* at 216.

Since the attacks on the World Trade Center and Pentagon on September 11, 2001, the concept of “armed attack” has become less clear.<sup>91</sup> One of the most difficult questions is whether the definition of an “armed attack” has been extended to allow self-defense against states harboring terrorists.<sup>92</sup> After 9/11, President George W. Bush announced that the United States would make no distinction between terrorists and those who harbored them.<sup>93</sup> The Joint Resolution of Congress also authorized force against states which “planned, authorized, committed or aided the terrorist attacks . . . or harbored such organizations.”<sup>94</sup> To many, this was a widening of the right of self-defense.<sup>95</sup>

In any case, if state involvement in a particular aggressive activity does not amount to an “armed attack,” a state must still have the right to use necessary and proportionate force within its inherent right to self-defense.<sup>96</sup>

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<sup>91</sup> See, e.g., GRAY, *supra* note 1, at 166.

<sup>92</sup> *Id.* at 165-66. Some commentators argue that it has not. See, e.g., Carsten Stahn, *International Law Under Fire: Terrorist Acts as “Armed Attack”: The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, FLETCHER F. WORLD AFF. 35, 50 (2003) (“The mere fact that a state does not prevent terrorists from carrying out armed attacks against another state will hardly suffice to allow action against that regime. The necessity test under Article 51 limits the possibility to justify measures of self-defense against a regime that fails to take appropriate action against terrorists operating from its territory.”).

<sup>93</sup> GRAY, *supra* note 1, at 165-66 (citing Sean D. Murphy, *Contemporary Practice of the United States relating to International Law*, 96 AM. J. INT’L L. (2002) 237).

<sup>94</sup> Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, S.J. Res. 23, 107<sup>th</sup> Cong. (2001).

<sup>95</sup> GRAY, *supra* note 1, at 166. Another question that has become more controversial since 9/11 is whether the definition of “armed attack” now includes attacks on nationals abroad. *Id.* at 167.

<sup>96</sup> See Scott, *supra* note 18, at 51.

## 2. Self-Defense Against State Action That Does Not Amount To An Armed Attack

It has been suggested that the lawfulness of force used in self-defense should not be determined by the form that the attack takes, but rather:

it is the seriousness of the threat to the security of a state, coupled with the principles of necessity and proportionality, which should determine what level of response is appropriate. It would be unfruitful to search for evidence in the practice of states that refrain from exercising necessary action in “self-defense” when their fundamental security concerns were imminently threatened, even in situations short of an “armed attack.” . . . . If the term “armed attack” is to have any role in these determinations, it must be given flexible interpretation to cover all cases of fundamental threats to security . . . . Indeed, the principles of necessity and proportionality, strictly applied, generate a basis upon which to determine when armed response is legitimate.<sup>97</sup>

The right to self-defense is vitally necessary to the survival of any state. A “rigid application of a categorical approach” to the right of self-defense would result in the “dangerous (and absurd) legal conclusion that an armed response . . . against an illegal attack which does not, however, meet the requirements of the category ‘armed attack,’ would be illegal under international law.”<sup>98</sup> Judge Jennings in *Nicaragua* advised against adopting such an interpretation.<sup>99</sup>

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<sup>97</sup> *Id.* at 51-52.

<sup>98</sup> *Id.* at 52.

<sup>99</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J 14, 543-44 (June 27) (Jennings, J., dissenting) (“This looks to me neither realistic nor just in the world where power struggles are in every continent carried on by destabilization, interference in civil strife, comfort, aid and encouragement to rebels, and the like. The original scheme of the United Nations Charter, whereby force would be deployed by the United Nations itself, in accordance with the provisions of Chapter VII of the Charter, has never come into effect. Therefore an essential element in the Charter design is totally missing. In this situation it seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent.”).

Aside from the suggested “armed attack” requirement, other criteria exist to determine when the use of force in self-defense is justified. Hugo Grotius lists three such examples: (1) the danger is immediate; (2) the defensive action is necessary to adequately defend the threatened interests; and (3) the necessary defensive action is proportionate to the danger.<sup>100</sup> The U.S. Secretary of State Daniel Webster recognized these standards as customary international norms during the resolution of the Caroline incident in 1842.<sup>101</sup> Webster wrote that a legitimate claim of self-defense requires a “necessity of self-defense, instant, overwhelming, leaving no moment for deliberation.”<sup>102</sup> If indeed Article 51 of the U.N. Charter preserves the well-rooted “inherent” right of self-defense, and does not limit the right to instances where the aggression meets the elusive definition of “armed attack,” these criteria could serve as an adequate basis for determining when armed response is legitimate.<sup>103</sup>

#### **a. Anticipatory Self-Defense**

If, however, the requirements of immediacy, necessity and proportionality discussed above must also be coupled with a requirement that a state actually suffer an armed attack, it must follow that “it is not the first ‘armed attack’ that triggers the right of self-defense; on the

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<sup>100</sup> Motala, *supra* note 30, at 10 (citing HUGO GROTIUS, THE LAW OF WAR AND PEACE bk. II, ch. 1 (1949)).

<sup>101</sup> *Id.* In the Caroline incident, the British burned and destroyed the U.S. steamship Caroline and caused the death of several U.S. citizens while attempting to restrict the flow of supplies to rebels in the Canadian region of Niagara Falls. The British government claimed self-defense. *See id.* (citing BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 1221-23 (1991)).

<sup>102</sup> 30 BRITISH & FOREIGN STATE PAPERS 193 (1843), reprinted in Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 89 (1938).

<sup>103</sup> Scott, *supra* note 18, at 52 (citing ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 205 (1963); 2 A DIGEST OF INTERNATIONAL LAW 217 (John B. Moore ed., 1906)).

contrary, it is the imminent threat of the second attack that triggers such right.”<sup>104</sup> This notion begs the questions: (1) What is it about the first armed attack that opens the door to self-defense? (2) If there is very credible evidence that a state is in danger of a first attack, and there is a “necessity of self-defense, instant, overwhelming, leaving no moment for deliberation,”<sup>105</sup> why should a state first suffer an armed attack, rather than protect itself from the imminent danger? If a state were required to suffer an armed attack before the right to defend itself ripened, even though the imminence of the first and second attacks were equal, it would necessarily follow that the right to self-defense would have an intrinsic element of reprisal. Self-defense would not only be about self-preservation, but would also be about getting back at the aggressor nation. But this consequence would likely offend many of the commentators that support this notion.<sup>106</sup>

The better view is that the right to self-defense is based solely on the principle of self-preservation, and therefore must extend to circumstances when a first attack is imminent.<sup>107</sup> A nation’s right of self-preservation should not be limited to armed responses to imminent second attacks.<sup>108</sup> This natural law principle has been recognized for centuries, at least back to the

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<sup>104</sup> Popiel, *supra* note 21, at ¶ 28.

<sup>105</sup> 30 BRITISH & FOREIGN STATE PAPERS 193 (1843), reprinted in Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 89 (1938).

<sup>106</sup> See, e.g., Popiel, *supra* note 21, at ¶ 28-29 (“use of force under the right of self-defense does not allow States to carryout retaliatory attacks”); GRAY, *supra* note 1, at 163; DINSTEIN, *supra* note 15, at 174-75.

<sup>107</sup> See GROTIUS, *supra* note 38, at 172.

<sup>108</sup> See Major Joshua E. Kastenberg, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption*, 55 A.F. L. REV. 87, 111 (2004). Though the terms “anticipatory self-defense” and “preemption” are most often used interchangeably, some commentators make a distinction between the two. See, e.g., *id.* at 125 (“Where one state threatens another directly or indirectly by granting terrorist groups safe haven or other support, the anticipatory self-defense doctrine may prove to be an acceptable response, provided the response meets the proportionality

writings of Grotius, who believed that nations should enjoy the same right that individuals enjoy: that they may lawfully kill whoever is attempting to kill them.<sup>109</sup> Many international scholars define anticipatory self-defense within the confines of the criteria articulated in the *Caroline* case, as “an entitlement to strike first when the danger posed is instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>110</sup> In the 18th century, Swiss philosopher and legal expert Emmerich de Vattel taught:

"The safest plan is to prevent evil, where that is possible. A nation has the right to resist the injury another seeks to inflict upon it, and to use force and every other just means of resistance against the aggressor. It may even anticipate the other's design, being careful, however, not to act upon vague and doubtful suspicions, lest it should run the risk of becoming itself the aggressor."<sup>111</sup>

Also, most international legal scholars agree that the right to anticipatory self-defense existed before the U.N. Charter.<sup>112</sup> Hence, if Article 51 of the U.N. Charter reserves the “inherent” right of self-defense, that reservation includes the pre-Charter right to anticipatory self-defense.<sup>113</sup> A good example of the survival of this doctrine is the “Six Day War” between

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and necessity tests. Likewise, where a state grants terrorist groups safe haven or offers other support, the state may be subject to military attack through the preemption doctrine.”).

<sup>109</sup> *Id.* (citing HUGO GROTIUS, *THE LAW OF WAR AND PEACE* ch. 1 (1625); *see, e.g.*, Restatement (Second) of Torts §65 (1965).

<sup>110</sup> Kastenberg, *supra* note 108, at 111 (quoting Anthony d'Amato, Open Forum: *Israel's Air Strike Against the Osiraq Reactor: A Retrospective*, 10 TEMP. INT'L & COMP. L. J. 259, 261 (1996) (citing Louis Rene Beres & Yoash Tsiddon-Chatto, *Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor*, 9 TEMP. INT'L & COMP. L.J. 437, 438 (1995))).

<sup>111</sup> EMERICH DE VATTEL, *THE LAW OF NATIONS*, BOOK II (1758).

<sup>112</sup> *E.g.* Kastenberg, *supra* note 108, at 111-12 (citing ANTHONY CLARK & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* 5 (1993)) (“[C]ustomary international law recognized a right to anticipatory self-defense long before Article 51 existed.”).

<sup>113</sup> *See* U.N. Charter art. 51.

Israel on one side, and Egypt, Jordan, and Syria on the other.<sup>114</sup> Israel attacked targets in Egypt after Egypt ordered U.N. peacekeepers out of the Gaza and Sinai regions that bordered Israel, and ordered a massive military buildup to prepare an invasion into Israel.<sup>115</sup> Egyptian and other Arab officials also publicly announced their desire to “drive Israel into the sea.”<sup>116</sup> Though Egyptian forces had not yet crossed into Israel, an attack was imminent, and the Israeli response was necessary and proportional.<sup>117</sup> Consequently, though the Security Council never expressly condoned Israel’s actions, international law scholars have rendered little serious criticism to Israel’s anticipatory actions.<sup>118</sup>

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<sup>114</sup> Kastenber, *supra* note 108, at 112. However, there are instances where claims of anticipatory self-defense have been rejected by the international community, the General Assembly, and the Security Council. For example, in 1981, Israeli aircraft destroyed an Iraqi nuclear reactor capable of supplying fissile material for nuclear weapons. *Id.* at 97 (citing Lt. Col. Uri Shoham, *The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self Defense*, 109 MIL. L. REV. 191, 191-208 (1985)). Israeli officials viewed the possibility of a nuclear strike as a threat to Israel’s security. *Id.* Israel claimed self-defense, but its argument was not well-accepted in the international community. *Id.* Also, the Security Council condemned Israel’s attack as a clear violation of the U.N. Charter. *Id.*; S.C. Res. 478, 36 U.N. SCOR (2288th mtg.) (1981), U.N. Doc. S/Res/487 (1981).

<sup>115</sup> Kastenber, *supra* note 108, at 97 (CITING MICHAEL OREN, *SIX DAYS OF WAR, JUNE 1967, AND THE MAKING OF THE MODERN MIDDLE EAST* 36-67 (2002)).

<sup>116</sup> *Id.*

<sup>117</sup> *See id.*

<sup>118</sup> *Id.* at 112; *see, e.g.*, W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 A.J.I.L. 82, 88 (2003) (“the initiation of the Six-Day War by an Israeli air attack on Egyptian airports was not condemned by the institutions of the international community. The relation that prevailed between Egypt and Israel at the time may have already been one of belligerency, so that the air attack could have been seen as anticipatory . . . self-defense. If a state of war exists, a belligerent need not wait until its adversary strikes in order to respond militarily, but is entitled, itself, to select the moment of initiation or resumption of overt conflict.”)

After 9/11, it seems that the claim of anticipatory self-defense may become more popular.<sup>119</sup> Following the attacks, the United States letter to the Security Council said: “In response to these attacks and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States.”<sup>120</sup> The United Kingdom letter said: “These forces have been employed in exercise of the inherent right of individual and collective self-defence, recognized in Article 51, following the terrorist outrage of 11 September, to avert the continuing threat of attacks from the same source.”<sup>121</sup>

### **b. Reprisal/Retaliation**

It is generally agreed that mere retaliatory use of force is unlawful because of the want of the criteria of immediacy and necessity.<sup>122</sup> The Restatement (Third) states:

The principle of necessity ordinarily precludes measures designed only as retribution for a violation and not as an incentive to terminate a violation or to remedy it. A state may retaliate, however, by acts of "retorsion"<sup>123</sup> which are not otherwise illegal . . . . Retorsion is to be distinguished from "reprisal"; traditionally, reprisal was punitive in character and commonly involved the use of force, such as bombardment or temporary occupation of part of the offending

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<sup>119</sup> Some see this as a “resurrection” of the anticipatory self-defense. See Michael J. Kelly, *Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 *TRANSNAT’L L. & POL’Y* 1, 2-3.

<sup>120</sup> GRAY, *supra* note 1, at 171 (quoting UN Doc. S/2001/946).

<sup>121</sup> *Id.* (quoting UN Doc. S/2001/947).

<sup>122</sup> *Id.* at 121 (quoting UN Doc. S/2001/946).

<sup>123</sup> A retorsion differs from reprisal in that a retorsion uses legal means to coerce a state to suspend an action, while a reprisal uses otherwise illegal means to accomplish the coercion. Kelly, *supra* note 119, at 7 (citing EDWARD KWAKWA, *THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION* 130-31 (1992)).

state's territory. To the extent that reprisal involves threat or use of force, its use is now limited by the principles of the United Nations Charter.<sup>124</sup>

The Security Council also condemned reprisals as “incompatible with the purposes and principles of the United Nations.”<sup>125</sup>

It is important to note, however, that some scholars accept armed reprisals as legitimate so long as they are defensive and preventive.<sup>126</sup> Yoram Dinstein states: “Armed reprisals do not qualify as legitimate self-defense if they are impelled by purely punitive, non-defensive motives. . . [A]rmed reprisals must be future-oriented, and not limited to a desire to punish past transgressions.”<sup>127</sup>

### **c. Protection of Nationals**

“It is generally accepted that Article 2(4) does not forbid limited use of force in the territory of another state incidental to attempts to rescue persons whose lives are endangered there.”<sup>128</sup> Additionally, the Security Council has yet to condemn such a claim.<sup>129</sup>

The generally accepted conditions on the right to use force to protect nationals abroad include: (a) there is an imminent threat of injury to the nationals; (b) the territorial sovereign fails

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<sup>124</sup> Restatement (Third) of the Foreign Relations Law of the United States §102(2) (1987).

<sup>125</sup> S.C. Res. 188, U.N. SCOR, 19th Sess., 1111th mtg. at 10, U.N. Doc. S/INF/19/Rev.1 (1964).

<sup>126</sup> DINSTEIN, *supra* note 15, at 208.

<sup>127</sup> *Id.*

<sup>128</sup> Restatement (Third) of the Foreign Relations Law of the United States §905 cmt. g. (1987). GRAY, *supra* note 1, at 31. *See also* Derek W. Bowett, *The Use of Force for the Protection of Nationals*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 39 (Antonio Cassese, ed. 1986); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 203 (3d ed. 2001).

<sup>129</sup> GRAY, *supra* note 1, at 128.

to or is unable to protect the nationals in question; and (c) the measures of protection are strictly confined to the object of protecting the nationals against injury.<sup>130</sup>

In the Entebbe incident, for example, Palestinian terrorists hijacked a French airliner enroute from Tel Aviv to Paris and diverted it to Uganda where six more terrorists were waiting.<sup>131</sup> After the terrorists freed all of the non-Israelis, the terrorists threatened the lives of the Israelis.<sup>132</sup> The government of Uganda was complacent and appeared to be supporting the terrorist action.<sup>133</sup> In response, Israeli commandos stormed the Entebbe Airport and killed the terrorists.<sup>134</sup> Its actions were limited to the rescue of its nationals.<sup>135</sup> Israel justified its actions to the Security Council, claiming that it had the right to take action to protect its nationals, and that this right was based on the inherent right of self-defense that is rooted in international law, preserved by the U.N. Charter, and supported by state practice.<sup>136</sup> Israel also claimed that its use of force to protect its nationals was consistent with the *Caroline* standards of immediacy,

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<sup>130</sup> *Id.* (citing Geoffrey Marston, *Armed Intervention in the 1956 Suez Canal Crisis: the Legal Advice tendered to the British Government*, 31 INT'L & COMP. L. Q. 773, 795, 800).

<sup>131</sup> Thomas C. Wingfield, *Forcible Protection of Nationals Abroad*, 104 DICK. L. REV. 439, 453 (2000) (citing NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY* 37 (1985)).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* (citing ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* 99 (1993)).

<sup>135</sup> See GRAY, *supra* note 1, at 129.

<sup>136</sup> Wingfield, *supra* note 131, at 453 (citing RONZITTI, *supra* note 131, at 37).

necessity, and proportionality.<sup>137</sup> Though the Security Council never expressly condoned the action, the United States and France both supported the Israeli action.<sup>138</sup>

### **3. Right To Self-Defense Once The Security Council Takes Action**

Not only is it difficult to determine when there is a legitimate right to use force in self-defense, it is also difficult to determine how long that right lasts. Article 51 states that the right to self-defense continues “until the Security Council has taken measures necessary to maintain international peace and security.”<sup>139</sup> There is difficulty, however, in determining: (1) who decides whether the Security Council has taken “necessary” measures, and (2) what are the appropriate measures that terminate the right to unilateral use of force in self-defense.

As for the first question of who decides whether the Security Council’s actions abrogate the right to use force in self-defense, some commentators hold that, “[g]iven that the UN Charter aims not only to limit, but also to centralize, the use of force under UN control, it seems clear that the intention was to give the Security Council itself the right to decide whether such measures terminating the right to self-defense have been taken.”<sup>140</sup> However, this view is problematic

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<sup>137</sup> *Id.*

<sup>138</sup> See U.N. Doc. S/PV 1941 (1976); U.N. Doc. S/PV 1443, at 28-30, 31 (1976). Some commentators have also accepted as legitimate the use of force to rescue hostages and have referred to this action as the “Entebbe Principle.” See Louis Henkin, *Conceptualizing Violence: Present and Future Developments in International Law*, 60 ALB. L. REV. 571, 572 (1997) (“The ‘Entebbe Principle’ would permit a state to penetrate the territory another state for the sole, temporary, ad hoc purpose of liberating hostages.”).

<sup>139</sup> U.N. Charter art. 51.

<sup>140</sup> GRAY, *supra* note 1, at 104.

because if the right of self-defense has acquired the status of a *jus cogens* norm, from which no derogation is permitted, then it cannot be suspended merely by passing a resolution.<sup>141</sup>

Other commentators take the position that the state should determine whether the actions of the Security Council are sufficient to maintain international peace and security.<sup>142</sup> But this position is also problematic because “such auto-interpretation of the adequacy of Security Council measures by the state (or states) in question would vitiate the system contemplated by the Charter of collective security under the aegis of the Security Council.”<sup>143</sup>

Hence, the better view is that the Security Council must make the determination as to whether its actions are sufficient to abrogate the right to use defensive force, but it must be based on objective criteria.<sup>144</sup> That way, if a state disobeys a Security Council order to discontinue its aggression and withdraw forces, the victim state would not be required to “fold his arms and allow the aggressor to continue his aggression and to digest its fruits.”<sup>145</sup> The Security Council could not abrogate the state’s right to self-defense until it could objectively justify its determination that its actions constituted “measures necessary to maintain international peace and

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<sup>141</sup> Scott, *supra* note 18, at 62 (citing Moore, *supra* note 18, at 154).

<sup>142</sup> Malvina Halberstam, *The Right to Self-Defense once the Security Council Takes Action*, 17 MICH. J. INT’L L. 229, 244 (citing KELSEN, *supra* note 15, at 800).

<sup>143</sup> Scott, *supra* note 18, at 61 (citing BOWETT, *supra* note 18, at 196).

<sup>144</sup> *Id.* There is support for this in state practice. *Id.* at 63. For example, when Argentina invaded the Falkland islands in 1982, the United Kingdom argued that the determination of whether Security Council actions were sufficient to terminate its right to use defensive force must be “reached in light of all the relevant circumstances.” *Id.* at 64 (quoting Provisional Verbatim Record, U.N. SCOR, 37th Sess., 2362 mtg. at 103, U.N. Doc. S/PV.2362 (1982)). Argentina similarly said that “[t]he determination of whether such measures have been effective must be reached objectively and cannot be left to the arbitrary judgment of the . . . United Kingdom.” *Id.* at 65.

<sup>145</sup> *Id.* (citing Provisional Verbatim Record, U.N. SCOR, 37th Sess., 2362d mtg. at 103, U.N. Doc. S/PV.2362 (1982)).

security.”<sup>146</sup> The criteria used would also provide the International Court of Justice with the information necessary to review the conflict and to make an objective determination on the issue.

The second question of what measures are appropriate to terminate the right to unilateral use of defensive force is even more difficult. Though some commentators opine that states may lose the right of self-defense once the Security Council becomes involved, regardless of the success and sufficiency of the Security Council action,<sup>147</sup> the better view is that the U.N. Charter should not be interpreted as terminating the right of self-defense at any time before the Security Council has taken the measures “necessary” to control the conflict.<sup>148</sup> This interpretation is overwhelmingly confirmed by Article 51’s legislative history,<sup>149</sup> and is even more poignant when considering the weakness of the Security Council:

It is difficult to believe that some 180 states would have agreed to give up the most fundamental attribute of sovereignty, the right to use force in self-defense, to an international body, and particularly one like the Security Council. The Security Council decides on the basis of the political interests of the states voting - the state attacked may not even have a vote. It is inconceivable that they would have done so in language that affirms the "inherent right of individual or collective self-defence."<sup>150</sup>

“The Charter has provided that Members of the United Nations, when complying with its principles and purposes, should not be left in a defenceless state against any act of aggression

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<sup>146</sup> U.N. Charter art. 51.

<sup>147</sup> Halberstam, *supra* note 142, at 231.

<sup>148</sup> *Id.* at 248.

<sup>149</sup> *Id.* See also W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold World War: Practices, Conditions, and Prospects, in Law and Force in the New International Order*, in Abram Chayes, *THE USE OF FORCE IN THE PERSIAN GULF, IN LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 43 (Lori F. Damrosch & David J. Scheffer eds., 1991).

<sup>150</sup> Halberstam, *supra* note 142, at 248.

perpetrated against its territory or population.”<sup>151</sup> Such a situation would be in derogation of jus cogens.<sup>152</sup> Under Article 51, “measures necessary to maintain international peace and security”<sup>153</sup> “must mean at a minimum the use of armed force, the imposition of economic sanctions, or both,”<sup>154</sup> because only then is unilateral defensive action no longer “necessary” to adequately defend the threatened interests.<sup>155</sup> Anything less cannot be thought to abrogate the right of self-defense because this could force an innocent state to suffer continuing victimization from a non-compliant aggressor.<sup>156</sup>

One of the most famous examples of this controversy is the Falkland Islands crisis in 1982. After Argentina invaded the United Kingdom colonial territory, the Security Council in Resolution 502 condemned the action and determined that there had been a breach of peace.<sup>157</sup> The Council demanded an immediate cessation of the hostilities and withdrawal of Argentine forces, and called on Argentina and the United Kingdom to seek a diplomatic solution.<sup>158</sup> Though Argentina argued that Resolution 502 suspended the United Kingdom’s right to self-

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<sup>151</sup> Provisional Verbatim Record, U.N. SCOR, 37<sup>th</sup> Sess., 2345<sup>th</sup> mtg. at 31, U.N. Doc. S/PV.2345 (1982). This was part of Argentina’s self-defense argument in anticipation of British action to retake the Falkland Islands. *See* Scott, *supra* note 18, at 66.

<sup>152</sup> *See supra* Part II.A.3.

<sup>153</sup> U.N. Charter art. 51.

<sup>154</sup> Scott, *supra* note 18, at 66 (citing HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 101-02 (1992)).

<sup>155</sup> *See* Motala, *supra* note 30, at 10.

<sup>156</sup> Scott, *supra* note 18, at 66 (citing Provisional Verbatim Record, U.N. SCOR, 37<sup>th</sup> Sess., 2362d mtg. at 103-05, U.N. Doc. S/PV.2362 (1982)).

<sup>157</sup> GRAY, *supra* note 1, at 105.

<sup>158</sup> *Id.*

defense,<sup>159</sup> the U.K. argued that its inherent right of self-defense was not impaired by the resolution because it was not effective—Argentina had not withdrawn its forces.<sup>160</sup> Both nations urged the Security Council to use an objective test to determine whether its actions could constitute “measures necessary” to terminate the United Kingdom’s right to self-defense.<sup>161</sup> Though no express announcement had been made, the United Kingdom had the better position: that the resolution could not “by itself be a sufficient alternative to the victim state’s right to meet and repulse the aggression.”<sup>162</sup>

#### 4. Self-Defense In Domestic Matters

Article 2(4) of the U.N. Charter is a prohibition on the “use of force against the territorial integrity or political independence of any state.”<sup>163</sup> Accordingly, internal conflicts such as civil wars are seen as domestic matters, “except in so far as they might constitute a threat to international peace and security.”<sup>164</sup> It is sufficient for the present purposes to say that it is clear

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<sup>159</sup> See Provisional Verbatim Record, U.N. SCOR, 37<sup>th</sup> Sess., 2360th mtg. at 21, U.N. Doc. S/PV.2360 (1982) (“It is known that under Article 51 of the Charter unilateral actions must cease when the Security Council has already taken measures. There is a legal obligation to suspend self-defence once the Security Council ‘has taken measures necessary to maintain international peace and security.’ The determination of whether such measures have been effective must be reached objectively and cannot be left to the arbitrary judgment of the Government of the United Kingdom itself.”).

<sup>160</sup> See Letter from the Permanent Representative of the United Kingdom to the President of the Security Council, U.N. SCOR, 37th Sess. At 1-2, U.N. Doc. S/1517 (Readex 1982).

<sup>161</sup> Scott, *supra* note 18, at 66.

<sup>162</sup> MCCOUBREY, *supra* note 154, at 101.

<sup>163</sup> U.N. Charter art. 2(4).

<sup>164</sup> GRAY, *supra* note 1, at 59.

that states also have the right to use force to defend themselves against threats within their own borders, though Article 51 does not directly govern such matters.<sup>165</sup>

### **III. MANDATORY ARMS EMBARGOES**

The Security Council has the “primary responsibility for the maintenance of international peace and security.”<sup>166</sup> In order to accomplish this goal, “[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations,” which includes prohibitions on the shipment of arms.<sup>167</sup> A Security Council mandated provision, such as an arms embargo, creates a legal obligation on all United Nations members to comply.<sup>168</sup>

An imposition of a U.N. arms embargo on a country requires the affirmative vote from all five of the permanent members (rule of “great power unanimity” or “veto” power), and at least four votes from the remaining ten countries.<sup>169</sup> None of the non-permanent members have authority to veto a Security Council decision.<sup>170</sup>

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<sup>165</sup> See generally UN. Charter art. 2(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.”). However, the U.N. Charter does regulate matters of invitation and intervention of other states assisting in domestic matters. See U.N. Charter art. 51; G.A. Res. 375 (IV), U.N. GAOR, 4<sup>th</sup> Sess., (Dec. 6, 1947).

<sup>166</sup> U.N. Charter art. 24(1).

<sup>167</sup> *Id.* at art. 41.

<sup>168</sup> *Id.* at art. 40.

<sup>169</sup> *Id.* at art. 27.

<sup>170</sup> *Id.*

Arms embargoes are one of the most powerful tools available for international peacekeeping.<sup>171</sup> “By denying aggressors and human rights abusers the implements of war and repression, arms embargoes contribute directly to preventing and reducing the level of armed conflict.”<sup>172</sup> Additionally, “in constricting only selected weapons and military-related goods and services, and in denying these to ruling elites, their armies, and other violent combatants, arms embargoes constitute the quintessential example of a smart sanction.”<sup>173</sup> They are an important contributor to the protection of innocent civilians.<sup>174</sup> Perhaps this is why the Security Council imposes arms embargoes more frequently than any other type of economic sanction.<sup>175</sup>

In addition to Security Council mandated arms embargoes, these sanctions are also often imposed by regional organizations, such as the European Union and the Economic Community of West African States, and by individual countries.<sup>176</sup> The United States alone has unilaterally imposed arms restrictions against dozens of countries in recent years.<sup>177</sup> These unilateral arms embargoes often remain in place, even after U.N. arms embargoes are lifted.<sup>178</sup>

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<sup>171</sup> David Cortright et al., *Sanctions Sans Sommitment: An Assessment of U.N. Arms Embargoes* (April 2002), <http://www.fourthfreedom.org/pdf/ArmsEmbargoes.pdf>.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* Examples include Iran, Iraq, Libya, and North Korea. See William M. McGlone and Michael L. Burton, *Economic Sanctions and Export Controls*, 34 INT’L LAW 383 (2000).

<sup>178</sup> Cortright, *supra* note 171. Such was the case of Libya in 1999. *Id.*; Cortright, *supra* note 171; see McGlone, *supra* note 177

However, while any state is free to choose to deny the supply of arms to another state, it has occasionally been argued that a mandatory arms embargo imposed by the Security Council may interfere with a nation's right to self-defense.<sup>179</sup> The following section provides a non-exhaustive, but representative sample of this argument.

## **A. Past Arguments**

### **1. South Africa**

The first time this argument was used was in 1977 when the Security Council adopted Resolution 418 imposing a mandatory arms embargo on South Africa.<sup>180</sup> After the Nationalist party assumed power in South Africa in 1948, legislation passed that would form the pillars of the apartheid system, restricting the rights of blacks and other minorities.<sup>181</sup> The United Nations General Assembly called on U.N. members to break diplomatic relations with and boycott against South Africa in Resolution 1761 on November 6, 1962.<sup>182</sup> Then on August 7, 1963, the U.N. Security Council adopted Resolution 181, recommending a non-mandatory arms embargo against Africa.<sup>183</sup> The United Kingdom and France both stated that they would distinguish between weapons for internal suppression and external defense, and also (along with the United

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<sup>179</sup> See, e.g., Kahgan, *supra* note 65.

<sup>180</sup> GRAY, *supra* note 1, at 105-06; S.C. Res. 418, U.N. Doc. S/RES/418 (Nov. 4, 1977).

<sup>181</sup> Institute for International Economics, Case Studies in Sanctions and Terrorism, <http://www.iie.com/research/topics/sanctions/southafrica.cfm> [hereinafter Institute] (citing Mark David, *United-States-South African Relations—1962-67*, in *ECONOMIC COERCION AND U.S. FOREIGN POLICY: IMPLICATIONS OF CASE STUDIES FROM THE JOHNSON ADMINISTRATION* 215 (Sidney Weintraub ed., 1982); Robert Kinlock Massie, *LOOSING THE BONDS: THE UNITED STATES AND SOUTH AFRICA IN THE APARTHEID YEARS* 21 (1997)).

<sup>182</sup> See G.A. Res. 1761 (XVII), U.N. Doc. A/1761 (Nov. 6, 1962).

<sup>183</sup> See S.C. Res. 181, U.N. Doc. S/RES/181 (Aug. 7, 1962).

States) opposed a mandatory arms embargo.<sup>184</sup> But, in 1976, hundreds of blacks were killed in riots in the township of Soweto during a protest against inequities in the educational system, which sparked an intensification of international condemnation of the apartheid regime.<sup>185</sup> Also, in September 1977, the leader of the Black Consciousness movement, Stephen Biko, died in police custody.<sup>186</sup> Finally, on November 4, 1977, primarily as a result of Sowet riots, subsequent disturbances and repression in South Africa, the U.N. Security Council adopted Resolution 418 which declared arms trade with South Africa a “threat to peace” and made the arms embargo mandatory.<sup>187</sup> The representative of France said that no country could be denied the right of self-defense as provided in Article 51 of the U.N. Charter.<sup>188</sup> But, because the intention of the arms embargo was to protest against the stockpiling of weapons intended for purposes of internal repression, especially in the aftermath of the recent crackdown by the South African Government, the French Government decided to vote in favor of a mandatory embargo on arms shipments to South Africa.<sup>189</sup> The Security Council did not lift the mandatory arms embargo until Nelson Mandela was elected president in 1994.<sup>190</sup>

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<sup>184</sup> Institute, *supra* note 181 (citing MARGARET P. DOXEY, ECONOMIC SANCTIONS AND INTERNATIONAL ENFORCEMENT 62 (2nd ed. 1980); Mark David, *United-States-South African Relations—1962-67*, in ECONOMIC COERCION AND U.S. FOREIGN POLICY: IMPLICATIONS OF CASE STUDIES FROM THE JOHNSON ADMINISTRATION 219 (Sidney Weintraub ed., 1982)).

<sup>185</sup> *Id.* (citing DOXEY, *supra* note 182, at 64; ROBERT KINLOCK MASSIE, LOOSING THE BONDS: THE UNITED STATES AND SOUTH AFRICA IN THE APARTHEID YEARS 444 (1997)).

<sup>186</sup> *Id.* (citing MASSIE, *supra* note 185, at 421-26).

<sup>187</sup> *Id.* (citing DOXEY, *supra* note 184, at 64); *see* S.C. Res. 418, U.N. Doc. S/RES/418 (Nov. 4, 1977).

<sup>188</sup> Repertoire of Practice of the Security Council 1975-1980, 311.

<sup>189</sup> *Id.*

<sup>190</sup> *See* S.C. Res. 919, U.N. Doc. S/RES/919 (May 26, 1994).

## 2. Yugoslavia

The most profound example of a state claiming that an arms embargo violates its inherent right to self-defense is that of Bosnia-Herzegovina.<sup>191</sup> In late 1991, four of the six republics of the Socialist Federal Republic of Yugoslavia declared their independence, including Croatia, Slovenia, Macedonia and Bosnia-Herzegovina.<sup>192</sup> These declarations of independence were opposed by the Serbian members of the former Yugoslav national government and pro-Serbian elements of the Yugoslav People's Army ("JNA").<sup>193</sup> The elements of the JNA had retained almost all of the arms it had maintained as the armed forces of Yugoslavia, and invaded Slovenia almost immediately to try to reverse its expression of independence.<sup>194</sup> Croatia shortly became involved in the conflict.<sup>195</sup> As the violence escalated, representatives of the European Community ("E.C.") tried to negotiate a diplomatic solution, but failed.<sup>196</sup> "Brokered cease-fires were routinely violated by the parties, who probably viewed the legitimacy of E.C. diplomatic intervention with skepticism."<sup>197</sup>

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<sup>191</sup> See *Bosnia v. Serbia II*, 1993 I.C.J. 325

<sup>192</sup> Motala, *supra* note 30, at 5 (citing 37 KEESING'S RECORD OF WORLD EVENTS 38,019 (1991)).

<sup>193</sup> *Id.* (citing KEESING'S, *supra* note 192, at 38,513).

<sup>194</sup> *Id.* (citing KEESING'S, *supra* note 192, at 38,513).

<sup>195</sup> *Id.* (citing KEESING'S, *supra* note 192, at 38,374).

<sup>196</sup> *Id.* at 5-6 (citing KEESING'S, *supra* note 192, at 38,375, 38,512, 38,559, 38,849).

<sup>197</sup> *Id.* at 6.

After almost three months of conflict, the U.N. Security Council adopted Resolution 713, imposing a mandatory arms embargo on the states of former Yugoslavia.<sup>198</sup> However, this did not put an end to the aggression. Ethnic Serbs within Bosnia, supported by Slobodan Milosevic and the Serbian government, began attacking Muslims and Croats.<sup>199</sup> It seemed that Serbia wanted to “ethnically cleanse” Bosnia-Herzegovina of Muslims and Croats, and ultimately link the Serbia-controlled area to a greater Serbia.<sup>200</sup> The Muslim and Croat population (who were the numerical majority) became victims of aggression, torture, detention, and mass rape.<sup>201</sup> Many of them were killed or put into concentration camps.<sup>202</sup> The General Assembly recognized Serbia’s actions as genocidal in nature.<sup>203</sup>

Serbia’s aggression triggered Bosnia’s legal right to use force in self-defense. Even if an armed attack were required to trigger that right, the Serbian mass killing of Muslims and Croats

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<sup>198</sup> *Id.*; see S.C. Res. 713, U.N. Doc. S/INF/47 (Sept. 25, 1991) (“[A]ll States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia.”).

<sup>199</sup> Motala, *supra* note 30, at 6 (citing Laura Silber, *Clashes Rage in Bosnian Capital Despite Warnings to Serbia*, WASH. POST, Apr. 22, 1992, at A26.)

<sup>200</sup> *Id.* at 7.

<sup>201</sup> *Id.* (citing Steve Coll, *In the Shadow of the Holocaust*, WASH. POST. MAG., Sept. 25, 1992, at 8).

<sup>202</sup> *Id.* at 6-7 (citing HUMAN RIGHTS WATCH WORLD REPORT 1993 262 (1992)).

<sup>203</sup> See G.A. Res. 49/10, U.N. Doc. A/RES/49/10 (Nov. 3, 1994).

would easily fit into the strictest definition of an armed attack.<sup>204</sup> The threat was immediate, and armed response was necessary to protect against the aggression.<sup>205</sup>

Furthermore, the Security Council's imposition of a mandatory arms embargo could not conceivably be considered a measure "necessary to maintain international peace and security."<sup>206</sup> On the contrary, the embargo "effectively sanctioned a situation where an aggressor state (and its paramilitary allies) could overrun a weaker victim state."<sup>207</sup> The Security Council's action did not make a Bosnian armed response unnecessary, and hence, it did not abrogate Bosnia's right to self-defense.<sup>208</sup> In reality, the arms embargo made it all but impossible for Bosnia to exercise that legal right.

Because the right to self-defense is a jus cogens norm, and because the mandatory arms embargo was interfering with that right, it follows that the maintenance of the embargo was in conflict with international law.<sup>209</sup>

The U.N. recognized Bosnia as a sovereign state on May 22, 1992, following the European Community's recognition on April 6, 1992.<sup>210</sup> As the world gained knowledge of the Serbian atrocities, individual countries increasingly called for the arms embargo to be lifted.<sup>211</sup>

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<sup>204</sup> See generally *supra* Part II.B.1.

<sup>205</sup> See Motala, *supra* note 30, at 10 (citing HUGO GROTIUS, THE LAW OF WAR AND PEACE bk. II, ch. 1 (1949)).

<sup>206</sup> U.N. Charter art. 51.

<sup>207</sup> Motala, *supra* note 30, at 29.

<sup>208</sup> See *supra* Part II.B.3.

<sup>209</sup> Motala, *supra* note 30, at 33; see Scott, *supra* note 18, at 62.

<sup>210</sup> See KEESING'S, *supra* note 192, at 38,848, 38,918).

<sup>211</sup> See Motala, *supra* note 30, at 8.

This eventually led to the General Assembly's adoption of Resolution 47/121, urging the Security Council to lift the embargo.<sup>212</sup> However, the Security Council did not lift the embargo as applied to Bosnia, even though the U.N. identified Serbia as the chief aggressor in the conflict.<sup>213</sup>

The embargo against Bosnia was not lifted until November 22, 1995,<sup>214</sup> and “was not based on Bosnia's right to self-defense, but was instead contingent on the Croat, Bosnian and Serb leadership signing the Dayton Peace Agreement initialed by the respective leaders in Dayton, Ohio, on November 22, 1995.”<sup>215</sup>

Bosnia attempted to persuade the International Court of Justice to consider the legality of the arms embargo imposed against it, and “clarify the legal situation for the entire international community.”<sup>216</sup> Specifically, Bosnia wanted to know whether its right to self defense, including the means (arms), prevailed over a Security Council mandated arms embargo.<sup>217</sup> However, the Court determined it lacked the jurisdiction to rule on the issue because the states that issued the embargoes were not parties to the case.<sup>218</sup>

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<sup>212</sup> See G.A. Res. 47/121, ¶ 7(b), U.N. Doc. A/RES/47/121 (Dec. 18, 1992) (“The General Assembly . . . urges the Security Council . . . [t]o exempt the Republic of Bosnia and Herzegovina from the arms embargo as imposed on the former Yugoslavia under Security Council Resolution 713 (1991) of September 1991”).

<sup>213</sup> See Motala, *supra* note 30, at 8.

<sup>214</sup> See S.C. Res. 1021, U.N. Doc. S/RES/1021 (1995).

<sup>215</sup> Motala, *supra* note 30, at 8 (citing S.C. Res. 1021, U.N. Doc. S/RES/1021 (1995)).

<sup>216</sup> Scott, *supra* note 18, at 9-12 (quoting *Bosnia v. Serbia II*, 1993 I.C.J. 325, 344-45).

<sup>217</sup> *Id.* at 10 (citing *Bosnia v. Serbia II*, 1993 I.C.J. 325, 344-45).

<sup>218</sup> See *id.* at 12. Bosnia then intended to implead the United Kingdom, a permanent member of the Security Council, in another attempt to persuade the Court to determine the issue of the legality of the embargo. *Id.* However, Bosnia decided not to pursue its intention—likely because

### 3. Rwanda

The argument surfaced again with regard to the conflict in Rwanda.<sup>219</sup> Before 1994, Rwanda was one of the most densely populated countries in the world. Its population consisted of two major ethnic groups: The Hutus accounted for 85 percent of the population, and the Tutsis comprised about 14 percent of the population.<sup>220</sup> Although the Hutus were the numerical majority, the Tutsis had ruled over the Hutus for the last half of a millennium<sup>221</sup> until 1961. In 1973, General Habyarimana (a Hutu) gained power in a military coup and ruled for the next twenty years.<sup>222</sup> During the years leading up to the massacre, the Habyarimana government promoted ethnic hatred within Rwanda.<sup>223</sup> “The floodgate of ethnic hatred opened on April 6, 1994, when Habyarimana’s airplane was shot down as he was returning from a regional peace summit in Dar es Salaam. His death set off a chain reaction of indiscriminate killing of Tutsis

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it could have compromised Bosnia’s “already precarious political position at the peace negotiations, the success of which depended in significant measure on the role played by the United Kingdom.” *Id.* Ultimately, Bosnia decided not to include any arguments related to the arms embargo in its Memorial on the merits, especially after the cool reception that the majority of the Court gave the arms embargo at the Provisional Measures stages. *Id.* at 13. It seems that Bosnia decided that its best course of action would be to “secure a Court judgment that Serbia ha[d] violated the Genocide Convention and not to cloud the Court’s inquiry with the controversial and jurisdictionally uncertain issue of the arms embargo.” *Id.*

<sup>219</sup> GRAY, *supra* note 1, at 107.

<sup>220</sup> Ved P. Nanda et al., *Tragedies In Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention Under International Law—Part II*, 26 DENV. J. INT’L L. & POL’Y 827, 847 (1998) (citing U.S. Agency for International Development, Rwanda - Civil Strife/ Displaced Persons 1 (Situation Report No. 4, 1994)).

<sup>221</sup> *Id.* (citing JASON A. DZUBOW, THE INTERNATIONAL RESPONSE TO CIVIL WAR IN RWANDA 513 (1994)).

<sup>222</sup> *Id.* at 847-48.

<sup>223</sup> *Id.* at 847.

and Hutu opposition members led by the Presidential Guard.”<sup>224</sup> In just over three months, between 500,000 and 800,000 Rwandans, mostly Tutsis, were killed.<sup>225</sup> The U.N. had previously deployed battalions in an attempt to bring peace to the region, but had failed.<sup>226</sup> The deeper the crisis became, the more the U.N. Members’ support faltered.<sup>227</sup>

A month into the genocide, the Security Council passed Resolution 918 imposing an arms embargo on Rwanda to try to prevent the escalation of violence, and expanding the number of United Nations Assistance Mission for Rwanda (“UNAMIR”) forces from 1,515 to 5,500.<sup>228</sup> However, the deployment of the additional forces was drastically delayed due to the unwillingness of Member States to contribute troops and equipment.<sup>229</sup> After gaining control, the Rwandese Patriotic Front (“RPF”), comprising Tutsis who had earlier fled from Rwanda, established a government with a broad representative base.<sup>230</sup>

The severe internal conflict had made Rwanda vulnerable to outside interference.<sup>231</sup> Accordingly, Rwanda pursued a similar line of argument as that of Bosnia, that the arms embargo should be lifted to allow the country to protect itself against an outside threat.<sup>232</sup> “This time the Security Council did respond, noting with concern the reports of military preparations

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<sup>224</sup> *Id.* at 848.

<sup>225</sup> *Id.* at 846.

<sup>226</sup> *Id.* at 849.

<sup>227</sup> *Id.* at 846.

<sup>228</sup> S.C. Res. 918, U.N. Doc. S/RES/918 (May 17, 1994).

<sup>229</sup> Nanda, *supra* note 220, at 850.

<sup>230</sup> *Id.* at 848.

<sup>231</sup> GRAY, *supra* note 1, at 107.

<sup>232</sup> *Id.*

and incursions into Rwanda by supporters of the former government.”<sup>233</sup> Though Rwanda had not yet suffered an “armed attack,” there was an immediate threat, and armed response would be necessary if the threat materialized.<sup>234</sup> Further, because the U.N. could not provide sufficient forces or pressure to protect Rwanda from an outside attack, its action did not amount to “measures necessary to maintain international peace and security,”<sup>235</sup> and therefore it did not abrogate Rwanda’s right to defend itself from the threat.<sup>236</sup> Maintenance of the arms embargo against the legitimate government would be in violation of jus cogens.<sup>237</sup>

Recalling that the original purpose of the mandatory embargo on the delivery of arms was to prevent the massacre of innocent citizens, the Security Council responded by lifting the arms embargo as applied to arms destined for the government,<sup>238</sup> thereby allowing Rwanda to exercise its right of self-defense should the outside threat materialize.

#### 4. Sierra Leone

The issue arose again with respect to the arms embargo imposed against Sierra Leone. The rebels of Revolutionary United Front (“RUF”) began in 1991 and attempted to introduce

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<sup>233</sup> *Id.*

<sup>234</sup> *See supra* Part II.B.2.

<sup>235</sup> *See supra* Part II.B.3.

<sup>236</sup> *See Nanda, supra* note 220, at 850.

<sup>237</sup> *See Motala, supra* note 30, at 33; Scott, *supra* note 18, at 62

<sup>238</sup> GRAY, *supra* note 1, at 107 (citing S.C. Res. 1011, I.N. Doc. S/RES/1011 (Aug. 16, 1995) (“the restrictions imposed by paragraph 13 of resolution 918 (1994) shall not apply with regard to the sale or supply of arms and related materiel to the Government of Rwanda through named points of entry on a list to be supplied by that Government to the Secretary-General, who shall promptly notify all Member States of the United Nations on the List.”)).

themselves as the new power in Sierra Leone.<sup>239</sup> The military government of Sierra Leone hired Executive Outcomes (“EO”), “a private South African mercenary outfit consisting of former Apartheid troops, to fight the rebels” in 1991.<sup>240</sup> “With experience gained from fighting South Africa’s wars in Angola and Namibia, EO checked the RUF’s advance and in less than a month had nearly cleared them from the country.”<sup>241</sup> By 1996, the EO had forced the RUF into peace negotiations.<sup>242</sup> The RUF was to register as a political party and disarm.<sup>243</sup> However, the RUF did not disarm or demobilize, and overthrew the civilian administration of President Habbah in May 1997 and assumed power.<sup>244</sup> Since 1991, the RUF had claimed more than 75,000 lives, caused half a million refugees, internally displaced 2.25 million people, and left thousands of mutilated people.<sup>245</sup> In October of 1997, the Security Council imposed an arms embargo on Sierra Leone.<sup>246</sup> Some U.N. Member states attempted to defend the supply of arms to the

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<sup>239</sup> Ian Martinez, *Conflict Resolution in Africa: Sierra Leone’s “Conflict Diamonds”: The Legacy of Imperial Mining Laws and Policy*, 10 U. MIAMI INT’L & COMP. L. REV. 217, 233 (2001).

<sup>240</sup> *Id.* at 234 (citing IBRAHIM ABDULLAH & PATRICK MUANA, *THE REVOLUTIONARY UNITED FRONT OF SIERRA LEONE* 185 (Christopher Clapham ed. 1998)).

<sup>241</sup> *Id.* (citing ABDULLAH, *supra* note 240, at 187).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* (citing K. Nowrot & E. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT’L L. REV. 321, 326 (1998)).

<sup>244</sup> *Id.* at 235 (citing GEORGE AYITTEY, *AFRICA IN CHAOS* 70 (1998)).

<sup>245</sup> S.C. Res. 1132, U.N. Doc. S/RES/1132, (Oct. 8, 1997).

<sup>246</sup> *Id.*

legitimate government to allow it to defend itself, claiming that the embargo applied only to the RUF.<sup>247</sup> However, this distinction was not expressed in the Resolution.<sup>248</sup>

Because the RUF posed a threat to Sierra Leone's legitimate government, Sierra Leone had the right to defend itself against the threat.<sup>249</sup> The threat was immediate, and armed response was necessary to protect against the RUF aggression.<sup>250</sup> Additionally, the U.N. had not taken any action that could amount to "measures necessary" to maintain the peace, and hence Sierra Leone's right to use defensive force could not be abrogated. Maintenance of the arms embargo against the legitimate government would be in violation of jus cogens.<sup>251</sup> Accordingly, the Security Council again responded by allowing arms to be supplied to the legitimate government.<sup>252</sup>

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<sup>247</sup> GRAY, *supra* note 1, at 106 n. 39 (citing United Kingdom Parliamentary Report of the Sierra Leone Arms Investigation (1998)).

<sup>248</sup> *Id.*; see S.C. Res. 1132, U.N. Doc. S/RES/1132, (Oct. 8, 1997).

<sup>249</sup> See *supra* Part II.B.4. See generally U.N. Charter art. 2(7). Liberia support for the RUF escalated the threat to Sierra Leone. See S.C. Res. 1343, U.N. Doc. S/RES/418 (Mar. 7, 2001); see *infra* Part III.A.5. However, because Liberia was not sending forces on behalf of the state, its conduct likely did not amount to an "armed attack" under Article 51, though it could be considered an illegal intervention under Article 2(7). See S.C. Res. 1343, U.N. Doc. S/RES/418 (Mar. 7, 2001); *Nicaragua v. U.S.*, 1986 I.C.J. LEXIS 4 at \*215-16; U.N. Charter art. 2(4), 2(7), 51.

<sup>250</sup> See Motala, *supra* note 30, at 10 (citing HUGO GROTIUS, THE LAW OF WAR AND PEACE bk. II, ch. 1 (1949)).

<sup>251</sup> See Motala, *supra* note 30, at 33; Scott, *supra* note 18, at 62

<sup>252</sup> See S.C. Res. 1171, U.N. Doc. S/RES/1171 (June 6, 1998).

## 5. Liberia

Liberia also attempted to argue that the embargo imposed against it was unlawful as it denied its right to self-defense, but in this instance the situation was quite different because the government of Liberia itself posed a threat to international security.<sup>253</sup> The U.N. Security Council imposed an arms embargo against Liberia in Resolution 1343 as a sanction for the country's continuing illegal intervention in the Sierra Leone conflict.<sup>254</sup> It was intended to stop Liberia's support of the RUF rebels.<sup>255</sup> When Liberia was later attacked by Liberians United for a Reconciliation and Democracy ("LURD") within its own borders, it urged the Security Council to lift the embargo, claiming that the embargo denied its right to defend itself.<sup>256</sup> Although Liberia did have the legal right to use armed force to resist the attacks,<sup>257</sup> the Security Council did not accept the argument, likely because the embargo continued to be effective in accomplishing its purpose of ceasing Liberia's support of the RUF rebels in Sierra Leone.<sup>258</sup>

## 6. Somalia

Perhaps the most recent attempt to lift a Security Council arms embargo based on the right of self-defense is that of Somalia. The arms embargo in Somalia was imposed in 1992<sup>259</sup>

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<sup>253</sup> GRAY, *supra* note 1, at 107.

<sup>254</sup> See S.C. Res. 1343, U.N. Doc. S/RES/418 (Mar. 7, 2001).

<sup>255</sup> *Id.*

<sup>256</sup> See, e.g., Letter dated May 10, 2001 from Monie R. Captan, Minister of Foreign Affairs of the Republic of Liberia, addressed to the Secretary-General, U.N. Doc. S/2001/474, (May 11, 2001).

<sup>257</sup> See *supra* Part II.B.4. See generally U.N. Charter art. 2(7).

<sup>258</sup> See S.C. Res. 1408, U.N. Doc. S/RES/1408 (May 6, 2002).

<sup>259</sup> S.C. Res. 733, ¶5, U.N. Doc. S/RES/733 (Jan. 23, 1992).

in an attempt to establish peace after civil war broke out in 1991 when President Mohammed Siad Barre was ousted by nationalist guerillas.<sup>260</sup> Though U.N. peacekeepers were deployed, success was impeded by heavily armed militant factions, and the peacekeepers were eventually withdrawn completely.<sup>261</sup>

Since then, there have been continuing difficulties in establishing a government because militias refuse to recognize new officials and continue their attacks.<sup>262</sup> Finally, in September 2004, a 275-member parliament was convened (in Kenya) under a new charter, and Abdullahi Yusuf Ahmed, a former general who had served as president of Puntland, was elected as president in October 2004.<sup>263</sup>

The new government was slow to move to Somalia because there were disputes over who would be in the cabinet, whether neighboring nations would contribute troops to African Union peacekeeping forces, and where the government would be established.<sup>264</sup> These disputes produced fighting in Somalia in March and May of 2005, when two warlords battled for control of Baidoa, one of the proposed temporary capitals.<sup>265</sup> After returning to his home region of Puntland, the president announced in July 2005 that he planned to move south to Jowhar, the other proposed temporary capital.<sup>266</sup> The president made the move, even though a coalition of

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<sup>260</sup> Infoplease.com, Somalia, <http://www.infoplease.com/ce6/world/A0861179.html>.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

Mogadishu warlords announced that they would attack Jowhar if the president tried to establish a temporary capital there.<sup>267</sup>

In December 2005, the leaders of Somalia, along with the leaders of Yemen, Sudan and Ethiopia, urged the Security Council to lift the embargo to help the transitional government establish its authority over feuding warlords.<sup>268</sup> It has been reported that many Somali warlords, including ministers in the administration, have been purchasing shipments of weapons in case fighting breaks out.<sup>269</sup>

However, because Yusuf and his government may themselves pose a threat to international security if they procure arms, the Security Council will likely not lift the embargo in this case, even as applied to arms destined for the government.<sup>270</sup> While Yusuf was president of Puntland, political problems were often solved by turning to arms.<sup>271</sup> He also participated in the ousting of Barre in 1991.<sup>272</sup> Many see him as a war criminal and a dictator, and fear that he will destabilize Somaliland if he is able to procure arms.<sup>273</sup>

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<sup>267</sup> *Id.*

<sup>268</sup> Reuters, Somalia Neighbours Ask U.N. to End Arms Embargo, <http://www.alertnet.org/thenews/newsdesk/L29100201.htm> (Dec. 29, 2005). These countries form the Sana'a Forum for Cooperation, established in 2002. Banadir, Yemen, Sudan, Ethiopia and Somalia to Conclude Today, [http://www.banadir.com/4\\_TO\\_CONCLUDE\\_TODAY.shtml](http://www.banadir.com/4_TO_CONCLUDE_TODAY.shtml) (Dec. 30, 2005).

<sup>269</sup> Reuters, *supra* note 268.

<sup>270</sup> See Afrol News, Somalia's New President Gets Mixed Welcome, <http://www.afrol.com/articles/14495> (October 11, 2004).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

## **B. Discussion On Mandatory Arms Embargoes In Relation To The Right Of Self-Defense**

A discussion of the legality of mandatory arms embargoes in light of the right to self-defense first requires a recognition that Security Council resolutions are entitled to a presumption of validity.<sup>274</sup> The International Court of Justice has definitively stated that “[a] resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ’s rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted.”<sup>275</sup> However, the presumption is not irrebuttable.<sup>276</sup>

An analysis of the legality and validity of a mandatory arms embargo against a legitimate claim of self-defense may turn on whether the current right of self-defense is: (1) governed solely by Article 51 and its customary international law history; or (2) the right rises to the level of a peremptory norm (*jus cogens*) from which no derogation is permitted.<sup>277</sup>

Article 103 of the U.N. Charter provides that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”<sup>278</sup> Therefore, the obligations created by the Security Council under the authority granted by the Charter, including mandatory arms embargoes imposed under the authority

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<sup>274</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 22 (1971).

<sup>275</sup> *Id.*

<sup>276</sup> See Elihu Lauterpacht, *The Legal Effect of Illegal Acts of International Organisation*, in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR 88, 117 (1965).

<sup>277</sup> See Kahgan, *supra* note 65, at 796; Scott, *supra* note 18, at 51.

<sup>278</sup> U.N. Charter art. 103.

granted in Article 41,<sup>279</sup> would seem to prevail over the nation's right to self-defense. This would likely be true if the right to self-defense did not rise to the level of jus cogens.

However, “[t]he status of jus cogens norms as a body of law superior to . . . customary international law . . . requires, as a matter of the hierarchy of legal norms . . . that Article 103 provides no relief where Council conduct conflicts with jus cogens.”<sup>280</sup> “It is not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of jus cogens . . . . But the possibility that a Security Council resolution might inadvertently or in an unseen manner lead to such a situation cannot be excluded.”<sup>281</sup> As discussed, a nation's right to protect itself rises to the level of jus cogens,<sup>282</sup> and accordingly, the Security Council may not derogate from it by passing a resolution.<sup>283</sup>

The question remains, however, whether a mandatory arms embargo is in “derogation” of a state's valid claim of the right to self-defense. Some commentators suggest that:

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<sup>279</sup> *Id.* at art. 41 (“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”).

<sup>280</sup> Scott, *supra* note 18, at 52. *See* *Bosnia v. Serbia II*, 1993 I.C.J. 325 at 440 (separate opinion of Judge Lauterpacht) (“The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and jus cogens. Indeed, one only has to state the opposite proposition thus – that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent.”).

<sup>281</sup> *Bosnia v. Serbia II*, 1993 I.C.J. 325 at 436-41 (separate opinion of Judge Lauterpacht).

<sup>282</sup> *See supra* Part II.A.3.

<sup>283</sup> Scott, *supra* note 18, at 62.

[t]o the extent that this inherent right of self-defense is a peremptory norm, not even the Security Council can institute mandatory measures such as an arms embargo, imposed on all the reputed parties to an ongoing armed conflict, as such effectively undermines the ability of a victim state to engage in self-defense and, thereby, prevents a state from availing itself of that right.<sup>284</sup>

Others argue that “an arms embargo may affect the right to self-defence but does not actually deny that right.”<sup>285</sup> In other words, in the face of a mandatory arms embargo, a nation may continue to legally use armed force to protect itself—the embargo does not deny that right, even though it may be affected by the inability to procure additional arms from other nations.<sup>286</sup>

An evaluation of the meaning of the word “derogation” is necessary to determine which view is most appropriate. There has been little discussion in the International Court of Justice or elsewhere with respect to what constitutes “derogation” in the context of a jus cogens norm. Webster’s dictionary defines derogation as: “partly repealing, or lessening in value.”<sup>287</sup> Thus, a complete denial of a right is not required before there has been a derogation; on the contrary, an action that affects a jus cogens norm, such as the right of self-defense, arguably is in “derogation” of jus cogens, and hence is unlawful, at least in situations when the subject nation does not pose a threat to international security and is otherwise in compliance with international law. The embargo will continue to be in derogation “until the Security Council has taken measures necessary to maintain international peace and security.”<sup>288</sup>

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<sup>284</sup> Kahgan, *supra* note 65, at 825-26 (1997).

<sup>285</sup> GRAY, *supra* note 1, at 107.

<sup>286</sup> *See id.*

<sup>287</sup> WEBSTER’S DICTIONARY 1912.

<sup>288</sup> U.N. Charter art. 51; *see supra* Part II.B.3.

There is substantial evidence for this interpretation among commentators.<sup>289</sup> There is also substantial evidence of this interpretation among individual nations, such as when the United States, Russia and Great Britain suggested lifting the embargo against Bosnia in order to allow it to exercise its inherent right of self-defense.<sup>290</sup> There is also acceptance of this interpretation among the General Assembly as a whole as demonstrated by General Assembly Resolution 47/121, which urged the Security Council to lift the embargo imposed against Bosnia.<sup>291</sup> There seems to also be an acknowledgement of this interpretation by the Security Council after the Bosnian conflict. Since then, Rwanda and Sierra Leone both argued that the arms embargo was affecting their inherent right of self-defense, and the Security Council responded both times by lifting the embargoes as applied to arms destined for the government.<sup>292</sup> And finally, at least one

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<sup>289</sup> See, e.g., Kahgan, *supra* note 65, at 825-26 (“[B]inding measures imposed by the Security Council that interfere with a victim state’s inherent right to engage in armed self-defense . . . violates jus cogens.”); Scott, *supra* note 18, at 59 (“[A] state’s exercise of the right to self-defense may be suspended by the Security Council only in certain limited circumstances and then only where the Security Council replaces a state’s inherent right to self-defense with its functional equivalent: effective collective intervention in lieu of self-defense.”); Motala, *supra* note 30, at 33 (“An action by the Security Council . . . that prevents a victim state . . . from effectively defending itself is invalid.”).

<sup>290</sup> See Motala, *supra* note 30, at 8 n. 57.

<sup>291</sup> See G.A. Res. 47/121, ¶ 7(b), U.N. Doc. A/RES/47/121 (Dec. 18, 1992) (“The General Assembly . . . [r]eaffirming . . . that the Republic of Bosnia and Herzegovina has the inherent right to individual or collective self-defense in accordance with Chapter VII, Article 51, of the Charter, until the Security Council has taken the measures necessary to maintain international peace and security . . . urges the Security Council . . . [t]o exempt the Republic of Bosnia and Herzegovina from the arms embargo as imposed on the former Yugoslavia under Security Council Resolution 713 (1991) of September 1991”).

<sup>292</sup> See S.C. Res. 1011, I.N. Doc. S/RES/1011 (Aug. 16, 1995); S.C. Res. 1171, U.N. Doc. S/RES/1171 (June 6, 1998).

member of the International Court of Justice seems to recognize this interpretation as expressed in Judge Lauterpacht's separate opinion in *Bosnia v. Serbia II*.<sup>293</sup>

It does seem, however, that the situation is quite different when the embargo is imposed against a government that poses a threat to international security.<sup>294</sup> In such instances, a valid claim of self-defense may not prevail over the embargo. For example, the embargo against Liberia was imposed to sanction its continuing illegal support of the RUF rebels in the Sierra Leone conflict.<sup>295</sup> When Liberia was later attacked by LURD rebels and asked the Security Council to lift the embargo, claiming that it was a denial of the right of self defense, this time the Council did not respond, likely because the embargo was still fulfilling its purpose of preventing Liberia's continuing violations of international law.<sup>296</sup> Likewise, in Somalia, president Yusuf and his administration may pose a threat to international security if they procure additional arms, and hence the Security Council will likely refuse to lift or adjust the embargo imposed against it.<sup>297</sup>

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<sup>293</sup> 1993 I.C.J. 325 at 436-41 (separate opinion of Judge Lauterpacht) (“The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and jus cogens. Indeed, one only has to state the opposite proposition thus – that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent.”).

<sup>294</sup> GRAY, *supra* note 1, at 107.

<sup>295</sup> See S.C. Res. 1343, U.N. Doc. S/RES/418 (Mar. 7, 2001).

<sup>296</sup> See S.C. Res. 1408, U.N. Doc. S/RES/1408 (May 6, 2002).

<sup>297</sup> See *supra* Part III.A.6.

### **C. Implications Of Unlawful Maintenance Of An Arms Embargo**

If a mandatory arms embargo derogates from jus cogens due to a legitimate claim of self-defense, are Member states then free to disregard it? This view has been suggested by some commentators:

[B]inding measures imposed by the Security Council that interfere with a victim state's inherent right to engage in armed self-defense . . . violates jus cogens. Such measures are nullities which no state can be compelled to comply with, without itself engaging in an agreement and acts that violate the most widely recognized and fundamental peremptory norm for the maintenance of world order.<sup>298</sup>

However, such a defiant response to an inadvertent situation would do little to contribute to international peace and security, and would do much to promote anarchy. Consider the statement made by then United States Deputy Secretary of State Strobe Talbott regarding the embargo against Bosnia:

We were convinced at the time, and remain convinced now, that unilateral lift would have been a disaster. It would have put the United States in direct violation of a binding U.N. Security Council Resolution. It would have encouraged others to pick and choose the resolutions they would abide by, such as sanctions against Saddam Hussein.<sup>299</sup>

The better view is that the individual states should not make the determination as to whether to comply with the embargo. Such action could only do more harm than good. They should honor the embargo until lifted. However, the Security Council should be cognizant of the precarious position in which an innocent nation could find itself in the face of a mandatory arms embargo, and adjust the embargo as necessary. It seems that this is what is taking place, such as

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<sup>298</sup> See Kahgan, *supra* note 65, at 825.

<sup>299</sup> Senate Select Committee on Intelligence (May 23, 1996).

when the Security Council adjusted the embargoes imposed against both Rwanda and Sierra Leone, allowing shipment of arms destined for the government.<sup>300</sup>

If the Security Council does not adjust an unlawful embargo as appropriate, then the International Court of Justice should be prepared to hear arguments from both the subject nation and the Security Council and make a determination. Although such a process would probably be too lengthy to be helpful in the particular case, it would create helpful guidelines for similar subsequent conflicts.<sup>301</sup> Because the Court's determinations play an important role in the establishment and interpretation of international law, a determination on this issue would provide much needed clarification. Furthermore, it is the responsibility of the Court, "the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute."<sup>302</sup>

#### **D. Competing Policy**

There are important policies to consider when arguing that the maintenance of an arms embargo is depriving a nation of its inherent right to self-defense. One commentator, Christene Gray, has said:

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<sup>300</sup> See S.C. Res. 1011, I.N. Doc. S/RES/1011 (Aug. 16, 1995); S.C. Res. 1171, U.N. Doc. S/RES/1171 (June 6, 1998).

<sup>301</sup> See *supra* Part II.A.2.b.

<sup>302</sup> Case Concerning United States Diplomatic And Consular Staff in Tehran (U.S. v. Iran) 1980 ICJ. LEXIS 3 at \*46-47. See also U.N. Charter art. 36 ("In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.").

If every arms embargo is automatically inconsistent with Article 51 this would restrict the Security Council's discretion to take measures under Article 41<sup>303</sup> and deprive it of a useful tool to put pressure on a wrongdoing state or to try to limit the escalation of a conflict. All states subject to an arms embargo could claim that their rights under the Charter prevailed over the arms embargo.<sup>304</sup>

The argument set forth here, of course, is not that every embargo is automatically inconsistent with Article 51, but that some embargoes, in some instances, might be. Furthermore, a nation that is guilty of some "wrongdoing" would have extreme difficulty persuading the Security Council, or anybody else for that matter, that their right to self-defense is being affected.<sup>305</sup>

However, if an innocent government's right to defend itself is unduly affected by the maintenance of a mandatory arms embargo, the Security Council ought to adjust the embargo to allow the innocent government to defend itself. This solution does not set a "dangerous precedent and one that would undermine the freedom of the Security Council to maintain an arms embargo" as Christene Gray suggests.<sup>306</sup> On the contrary, it assists the Security Council to perform its central duty of maintaining international peace and security<sup>307</sup> and does not in any way affect the Council's freedom to maintain arms embargoes against "wrongdoing" states.

#### **IV. CONCLUSION**

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<sup>303</sup> See generally U.N. Charter art. 41 ("The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.").

<sup>304</sup> GRAY, *supra* note 1, at 106.

<sup>305</sup> See *supra* Part III.A.5.

<sup>306</sup> GRAY, *supra* note 1, at 107.

<sup>307</sup> U.N. Charter art. 24(1).

Article 51 preserves the “inherent” right of self-defense developed through customary international law and rooted in natural law.<sup>308</sup> Accordingly, states are permitted to use armed force to defend themselves against any threat of wrongful force without themselves being in violation of international law. This right of self-preservation ripens immediately in the face of an imminent threat, regardless of whether a previous attack has occurred, and regardless of whether any previous attack met the elusive definition of an “armed attack.”<sup>309</sup> A nation’s right to use armed force in self-defense only disappears once the necessity for armed response disappears, such as when the Security Council “takes measures necessary to maintain international peace and security,”<sup>310</sup> or the threat evaporates.

Because the prohibition on the wrongful use of force articulated in Article 2(4) of the U.N. Charter rises to the level of a jus cogens norm, its counterpart, the right to defend against the wrongful use of force, also rises to that level.<sup>311</sup> As a jus cogens norm, the right to self-defense may not be unduly affected, as this would be an impermissible derogation of a jus cogens norm. So far as a mandatory arms embargo conflicts with a legitimate right to use defensive armed force, the embargo must be adjusted to permit a nation to exercise the right.<sup>312</sup>

Because mandatory arms embargoes are an extremely effective tool to assist the Security Council in performing its central responsibility of maintaining international peace and security, the Council must have the ability to impose such embargoes against nations that pose a threat to

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<sup>308</sup> See *supra* Part II.A.

<sup>309</sup> See *supra* Part II.B.

<sup>310</sup> U.N. Charter art. 51.

<sup>311</sup> See Kahgan, *supra* note 65, at 791.

<sup>312</sup> See *supra* Part III.B.

international security.<sup>313</sup> However, the Council can best perform its central function if it is careful to protect legitimate claims of self-defense by adjusting embargoes as applied to arms destined for innocent governments, while at the same time maintaining embargoes against nations and governments that continually violate international law and pose a threat to peace.<sup>314</sup>

In situations where a mandatory arms embargo unduly deprives a nation of its right to self-preservation, it is the Security Council, and not individual nations, that should act to remedy the circumstance.<sup>315</sup> If the Council fails to do so, then the responsibility lies with the International Court of Justice to resolve the legal questions and provide clarification and workable guidelines to prevent recurrence and the regrettable consequences that follow.<sup>316</sup>

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<sup>313</sup> *See supra* Part III.D.

<sup>314</sup> *See id.*

<sup>315</sup> *See supra* Part III.C.

<sup>316</sup> *See id.*