

THE BASIS OF UNIT SELF-DEFENSE AND IMPLICATIONS FOR THE USE OF FORCE

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INTRODUCTION

One of the most important responsibilities for a military commander is the protection of his or her own troops. Military personnel are informed that they have a right, and even an obligation, to use force to defend themselves and their units against attack or imminent attack. This right, often called “unit self-defense,” is recognized by militaries around the world and serves as a key element of militaries’ Rules of Engagement (ROE).¹

A significant amount of legal scholarship has focused on the meaning of national self-defense under international law, particularly following the September 11 attacks and the 2003 U.S. invasion of Iraq. Legal scholars, practitioners, and international courts have parsed the meaning of “armed attack,”² argued over the legitimacy of anticipatory self-defense,³ and debated application of the Caroline doctrine⁴ in states that are unwilling or unable to prevent armed attacks by non-state actors.⁵ These articles

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1. J. Ashley Roach, *Rules of Engagement*, 14 SYRACUSE J. INT’L L. & COM. 865, 870 (1983).

2. See, e.g., TOM RUYTS, *ARMED ATTACK AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE* (2011).

3. See, e.g., Sean Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699 (2005).

4. The 1837 case of *The Caroline* provides the basic rules for the use of anticipatory self-defense. The dispute arose when UK troops set fire to a steamer called *The Caroline*, located on the U.S. side of the Niagara River, which had been used to transport Canadian rebels across the border to commit attacks against British forces. The United States strongly objected to the Brits’ use of force within its territory. After the British argued that its actions were justified under the right of self-defense, the U.S. Secretary of State, Daniel Webster, demanded that the British show that the necessity of self-defense had been “instant, overwhelming, leaving no choice of means, and no moment for deliberation.” For a more thorough discussion of this case, see generally Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT’L L. 493 (1990).

5. See Ashley Deeks, “Unwilling or Unable”: Toward a Normative Framework for

generally focus on when and how *states* can use force against another state, or within the territory of another state, in self-defense. Yet there has been little attention to when soldiers can use force under international law to defend *themselves* against attacks or threatened attacks.

In particular, the source and scope of the right of unit self-defense has not been carefully examined in academic literature. Military ROEs assert the right of unit self-defense and numerous articles presuppose that such a right exists—it seems intuitive that this must be the case. Yet there is no clear source for this right as it is not codified in any international convention or treaty. Perhaps for this reason, several scholars have stated that the right of unit self-defense must be a subset of the right of national self-defense reflected in Article 51 of the United Nations Charter.⁶ But, as this Article argues, the right of unit self-defense does not fit comfortably within the national self-defense framework.

This is the first thorough examination of the jurisprudential basis for unit self-defense in military Rules of Engagement under international law.⁷ This Article argues that the right of unit self-defense is derived from customary international law and that it must be separate and distinct from the right of national self-defense. This is not a purely academic distinction, as states are required to report all actions taken in *national* self-defense to the U.N. Security Council. Moreover, maintaining a distinction between unit and national self-defense would mitigate concerns generated by the International Court of Justice's (ICJ) conservative interpretation of the right of national self-defense under Article 51 of the U.N. Charter.

Part I of this Article describes the concept of unit self-defense, drawing on various countries' Rules of Engagement. Part II critiques the arguments that unit self-defense is a subset of national self-defense, noting key differences regarding when and how these rights can be exercised. Part III explains that unit self-defense, although not derived from Article 51, is nevertheless recognized under customary international law, as evidenced by state practice and *opinio juris*. Part IV argues that understanding unit

Extraterritorial Self-Defense, 52 VA. J. INT'L L. 483 (2012).

6. "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." U.N. Charter art. 51.

7. This Article is primarily concerned with the exercise of unit self-defense during peacetime, when soldiers are not acting as combatants and, thus, do not have authority to target enemy forces. In situations of armed conflict, the use of force is governed by *jus in bello*. The right of unit self-defense during armed conflict is less relevant than in peacetime, as combatants' authority to use force against enemy combatants is not limited to situations of self-defense. Nevertheless, unit self-defense may be relevant during armed conflict in situations in which units are attacked by non-combatants, or other civilians who are not considered to be directly participating in hostilities.

self-defense as an independent right can help make sense of several of the perceived inconsistencies in the ICJ's jurisprudence on self-defense, most notably in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*.⁸ Part V discusses the similarities between individual and unit self-defense, and raises some additional questions that warrant further attention in the academic literature.

I. AN OVERVIEW OF UNIT SELF-DEFENSE

The right of unit self-defense is “fundamental to all international military codes” and Rules of Engagement.⁹ It “allows a commander, or an individual soldier, sailor or airman the automatic authority to defend his or her unit, or him or herself, in certain well defined circumstances.”¹⁰ United States’ military doctrine has traditionally defined “unit self-defense” as follows: “The act of defending a particular US force element, including individual personnel thereof, and other US forces in the vicinity, against a hostile act or demonstrated hostile intent.”¹¹

Unit self-defense is “an inherent right and not dependent or contingent on a mandate or mission.”¹² In the United States military, unit self-defense is considered both a “right and obligation.”¹³ This right extends to the entire unit, regardless of its nature, which in this context can consist of “an army platoon, a ship, an aircraft, or can encompass a national or

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

9. Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 126 (1998). Rules of Engagement “are issued by competent authorities and assist in the delineation of the circumstances and limitations within which military force may be employed to achieve their objectives.” INT’L INSTITUTE OF HUMANITARIAN LAW, RULES OF ENGAGEMENT HANDBOOK 1, (2009) [hereinafter SANREMO HANDBOOK]. Many countries’ ROEs are classified. Accordingly, this Article draws primarily on the United States Standard Rules of Engagement, de-classified ROEs from other US operations, the SANREMO HANDBOOK, and academic writings that discuss other countries’ ROEs.

10. Stephens, *supra* note 9, at 126; *see also* Hans Boddens Hosang, *Force Protection, Unit Self-Defence, and Extended Self-Defence*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 420 (Terry D. Gill & Dieter Fleck eds., 2010) (“Unit self-defence consists of the right of a commander to take all necessary measures to defend his unit against an (imminent) attack.”).

11. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01A, STANDING RULES OF ENGAGEMENT FOR US FORCES A-4 (2000) (hereinafter 2000 SROE). An updated version of the SROE went into effect in 2005. The 2005 SROE are classified, but include an unclassified attachment. This Article will thus draw from both the 2000 SROE and the unclassified portion of the 2005 SROE. The unclassified portion of the 2005 SROE refers to unit self-defense in the definition of “inherent right of self-defense.” *See* Chairman of the Joint Chiefs of Staff Instruction 3121.01B, A-2 (June 13, 2005) (*reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 82-96 (2011) (hereinafter 2005 SROE)).

12. Hosang, *supra* note 10, at 426.

13. 2000 SROE, *supra* note 11, at A-5; 2005 SROE, *supra* note 11 at A-2.

international task force which is operating as a single unit.”¹⁴ In most circumstances, however, it does not apply to the protection of non-military personnel and property or to foreign forces.¹⁵

Pursuant to the SROE, unit commanders “always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.”¹⁶ A “hostile act” generally refers to “an attack,” while “hostile intent” means the “threat of imminent attack”¹⁷ and is “manifested by actions which are immediately preparatory to that armed attack.”¹⁸ According to the United States Commander’s Handbook on the Law of Naval Operations (“Commander’s Handbook”), “[t]he determination of whether or not an attack is imminent will be based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level.”¹⁹ This determination, often made “in a dynamic operational context on the basis of incomplete and often conflicting information,” is one of the more difficult decisions for a commander.²⁰

After unit self-defense is triggered, the use of force may be exercised “so long as the *hostile act* or *hostile intent* continues.”²¹ In all circumstances, the use of force must be both necessary and proportional to the underlying threat or attack.²² In many national ROEs, “[d]eadly force is to be used only when all lesser means have failed or cannot be reasonably

14. Hosang, *supra* note 10, at 420.

15. Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate’s Primer*, 42 A.F. L. REV. 245, 252 (1997). In situations in which U.S. forces are acting as part of a multi-national force, the ROEs for that operation may extend unit self-defense to members of foreign forces. See SANREMO HANDBOOK, *supra* note 9, at 3.

16. 2005 SROE, *supra* note 11, at A-2.

17. SANREMO HANDBOOK, *supra* note 9, at 3.

18. Stephens, *supra* note 9, at 131.

19. DEPARTMENT OF THE NAVY OFFICE OF THE CHIEF NAVAL OPERATIONS AND HEADQUARTERS, U.S. MARINE CORPS, DEPARTMENT OF HOMELAND SECURITY AND U.S. COAST GUARD, COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP-1-14M) 4-6 (2007) [hereinafter COMMANDER’S HANDBOOK].

20. Grunawalt, *supra* note 15, at 253.

21. SANREMO HANDBOOK, *supra* note 9, at 4 (emphasis in original); 2005 SROE, *supra* note 11, at A-4 (“Self-defense includes the authority to pursue and engage forces that have committed a hostile act or demonstrated hostile intent, if those forces continue to commit hostile acts or demonstrate hostile intent.”).

22. See 2005 SROE *supra* note 11, at A-3 (stating that unit self-defense must comply with the principles of necessity and proportionality); see also SANREMO HANDBOOK, *supra* note 9, at 4 (“The use of force must be proportional, which means that the nature, duration, and scope of force used should not exceed what is required.”); see also Grunawalt, *supra* note 15, at 252 (“The responsive action must be reasonable in intensity, duration and magnitude based upon all of the facts known to that commander at that time.”).

employed.”²³ If the situation permits, potentially hostile forces should be warned and given the opportunity to withdraw before deadly force is employed.²⁴

Consider how unit self-defense might apply in the following hypothetical scenarios. In the first, Troy has a small Air Force base located in Atlantis, even though the countries have a tense relationship at times. One day, a mob of Atlantean citizens gathers around the main gate to the base and hurls rotten fruit and stones inside the base’s perimeter. As tensions grow, a few unruly Atlanteans launch Molotov cocktails at the base guards, injuring several of them. The base commander calls for the Atlantis police to break up the mob, but they are slow to respond. As the violence escalates, Trojan guards fire tear gas into the crowd and detain individuals caught holding cans of gasoline.

In the second scenario, Macedonia has requested the assistance of Sparta to help defend itself against armed groups operating in Macedonian territory. Macedonia and Sparta sign a treaty stating that all of Sparta’s military operations will be coordinated with Macedonian authorities, except in cases of self-defense. On several occasions, armed groups attack Spartan patrols. Sparta has intelligence that the leaders of these attacks are meeting in an abandoned warehouse. Spartan authorities are in a position to destroy the building but do not have time to coordinate the mission with Macedonia’s authorities.

In the first example, it is clear that the Troy military guards would have the right to use force to defend themselves against the aggressive acts committed by Atlantean civilians. Throwing Molotov cocktails constitutes a clear “hostile act,” triggering the right of unit self-defense. This right would in some circumstances include the authority to temporarily detain the attackers, pending their transfer to Trojan law enforcement authorities.²⁵ The second example is more complicated. Although the

23. See, e.g., COMMANDER’S HANDBOOK, *supra* note 19, at 4.

24. See SANREMO HANDBOOK, *supra* note 9, at 3; see also HEADQUARTERS DEPARTMENT OF THE ARMY, FM 100-23, PEACE OPERATIONS 17 (1994) [hereinafter FIELD MANUAL] (“[T]he use of force should be a last resort and, whenever possible, should be used when other means of persuasion are exhausted.”).

25. See Ben F. Klappé, *International Peace Operations*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 635, 663 (Dieter Fleck ed., 2008) (stating that in peacetime, detention measures are the exclusive domain of law enforcement officials, although “the same measures may be applied by peacekeepers in situations where law enforcement agencies of the host country are unable to take appropriate action or when individuals are about to commit hostile acts or have shown hostile intent against peacekeepers”); see also INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, OPERATIONAL LAW HANDBOOK 97 (2009). (The Handbook reprints the ROE Card issued to U.S. forces operating as part of the peacekeeping mission (KFOR) in Albania. The card states that “[s]oldiers may search, disarm, and detain persons as required to protect the force. Detainees will be turned over to

Spartan forces have intelligence that the perpetrators of prior attacks are located in a warehouse, there is no indication that these terrorists are preparing an *imminent* attack against Spartan units. Accordingly, Spartan forces could not likely rely on the self-defense exception to the treaty requirement that all military actions be coordinated with the Macedonian authorities.

II. UNIT SELF-DEFENSE: A SUBSET OF NATIONAL SELF-DEFENSE?

The right of unit self-defense is widely asserted by militaries around the world, yet its source has been examined only cursorily. The most common argument in academic literature is that unit self-defense is derived from the inherent right of national self-defense recognized by Article 51 of the U.N. Charter.²⁶ This Part examines those arguments and ultimately finds them unpersuasive.

A. Arguments that Unit Self-Defense is a Subset of National Self-Defense

Yoram Dinstein, a preeminent scholar on the law of war, argues that unit self-defense—which he refers to as “on the spot reaction”—is a subset of national self-defense.²⁷ He states that “[t]here is a quantitative but no qualitative difference between a single unit responding to an armed attack and the entire military structure doing so.”²⁸ According to Dinstein, self-defense is always exercised by the state; the actions of the lowest-ranking soldier and the highest-ranking general are attributed to the state that put them in charge. He concludes: “Once counter-force of whatever scale is employed by military units of whatever size—in response to an armed attack by another State—that is a manifestation of national self-defence, and the legitimacy of the action is determined by Article 51 as well as by customary international law.”²⁹

Hans Hosang similarly argues that the “right to unit self-defence is primarily derived from the right of national self-defence.”³⁰ He explains that “military units [are] representatives of the sovereign State to which they belong” and thus share the “sovereign rights enjoyed by the State.”³¹

appropriate host nation authorities ASAP.”) The same logic would arguably apply to the military forces operating in the territory of another country in a non-peacekeeping capacity.

26. See U.N. Charter art. 51.

27. YORAM DINSTEIN, WAR AGGRESSION AND SELF-DEFENCE 220 (2005).

28. *Id.*

29. *Id.*

30. Hosang, *supra* note 10, at 420.

31. *Id.* at 422.

Although Hosang acknowledges some important differences between national and unit self-defense, he argues that these differences can be “addressed by viewing unit self-defence as a tactical level right, whereas the right of national self-defence is a strategic level right.”³² Other commentators have similarly stated that “[t]he most relevant and applicable view of [unit] self-defense in international law resides in Article 51 of the U.N. Charter.”³³

B. Criticisms of the National Self-Defense Theory

There has been little critical analysis of the theory that unit self-defense is a manifestation of the right of national self-defense. The lack of analysis is surprising given the implications that such a theory would have for states, including the obligation to report actions taken in national self-defense to the Security Council and for how states characterize unit self-defense in treaty practice. This Section examines the weaknesses in the national self-defense theory and argues that it is unsustainable.

First, it is inconsistent with what many states say and do. The 2000 SROE, for example, state: “The exercise of the right and obligation of national self defense by competent authority is separate from and in no way limits the commander’s right and obligation to exercise unit self-defense.”³⁴ The San Remo Handbook on Rules of Engagement, which was drafted by experts from several military powers, also recognizes the distinction between unit and national self-defense.³⁵ The Israeli Turkel Commission similarly endorsed this distinction, stating that “[f]rom a doctrinal perspective, the right [of self-defense] is often divided into individual, unit, and national self-defense.”³⁶

Second, it blurs the legal personality of the nation and the individual (or unit of individuals). The U.N. Charter regulates inter-state conduct and does not speak to individuals’ right to defend themselves (as opposed to

32. *Id.* at 422.

33. Major David Bolgiano et al., *Defining the Right of Self-Defense: Working Toward the Use of a Deadly Force Appendix to the Standing Rules of Engagement for the Department of Defense*, 41 U. BALT. L. REV. 157, 163 (2002); see also Lieutenant Colonel W.A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, THE ARMY LAWYER 1, 5 (2000) (“The concept of self-defense in the Standing ROE . . . stems from a state’s right of self-preservation.”).

34. 2000 SROE, *supra* note 11, at A-5.

35. SANREMO HANDBOOK, *supra* note 9, at 3.

36. The Turkel Commission, *The Public Comm’n to Examine the Maritime Incident of 30 May 2010*, Rep., 245 (2010) (footnotes omitted). By acknowledging these separate categories, the Commission suggested, but did not explicitly state, that the right of unit self-defense and national self-defense are derived from different legal authorities.

their nation) against an attack or imminent attack.³⁷ The Rome Statute, which established the International Criminal Court, makes this distinction clear. Article 31(1) states that a person shall not be held criminally liable for conduct if “[t]he person acts reasonably to defend himself or herself or another person . . . against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.”³⁸ The second sentence in Article 31(1)(c) recognizes the dual nature of self-defense. It states: “The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.”³⁹ In other words, the fact that a soldier uses force under a national self-defense theory does not necessarily exclude him from criminal liability for acts taken in his “official capacity as agent of a collective entity, like a State.”⁴⁰ Rather, the “exclusion of criminal responsibility . . . depends on whether the individual defended himself (merely or also) in his (non-official) capacity (‘private self-defence’).”⁴¹ Accordingly, the Rome Statute suggests that international law recognizes an independent right for soldiers to exercise self-defense in their *private* capacity in response to an imminent and unlawful use of force, distinct from the right of national self-defense that soldiers exercise in their *official* capacity.

Third, the decisions to exercise unit and national self-defense are made at different levels. National self-defense is a right reserved to the sovereign. The decision to exercise this right is generally made “at the highest levels of government, involving aspects of foreign policy, national security, and possible constitutional requirements.”⁴² The decision to exercise unit self-defense, on the other hand, must be made by the unit commander, or in many cases the individual soldiers under attack.⁴³ It would be dubious to claim that every single soldier has the ability, much less the obligation, to exercise a right reserved to the nation.

Similarly, understanding unit self-defense as a part of national self-

37. See Hays Parks, *Deadly Force IS Authorized*, PROCEEDINGS 32, 35 (Jan. 2001) (“Nothing in the history of the Charter suggests it was intended to apply to the actions of individual service personnel”); see also ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 223 (2003) (“Plainly this [right of individual self-defence] must not be confused with self-defence under public international law. The latter relates to conduct by States or State-like entities, whereas the former concerns actions by individuals against other individuals.”).

38. Rome Statute of the International Criminal Court art. 31(1)(c).

39. *Id.*

40. Albin Eser, *General Principles of Criminal Law*, in COMMENTARY ON THE ROME STATUTE: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 863, 879 (Otto Triffterer ed., 2008).

41. *Id.*

42. Hosang, *supra* note 10, at 422.

43. See Grunawalt, *supra* note 15, at 252-53.

defense is inconsistent with the view held by many states, including the U.S., that unit self-defense is an “inherent” and non-derogable right.⁴⁴ As stated above, national self-defense is a sovereign right. After suffering an armed attack, a nation has the option, but not the duty, to use force in response. A state may decide to forego its right of self-defense for myriad reasons, including the risk of a costly escalation of hostilities.⁴⁵ If the sovereign is to maintain its discretion to exercise national self-defense, it must have the authority to restrict the ability of units to exercise this same right on its behalf, even if it decides to delegate this responsibility to field commanders in certain circumstances. Many states, however, take the position that the “inherent” right of unit self-defense cannot be restricted by ROEs.⁴⁶ The United States’ ROE Handbook for Judge Advocates, for example, states: “No rule of engagement may ever limit this inherent right and obligation.”⁴⁷ Indeed, in the United States, commanders have an “obligation” to exercise unit self-defense in the event of an attack. Thus, two commonly accepted positions—that national self-defense is a right reserved to the sovereign and that unit self-defense is an inherent, non-derogable right—can only be reconciled if unit and national self-defense are distinct rights.

Fourth, the theory that unit self-defense is a subset of national self-defense fails to account for United Nations peacekeeping operations. As discussed further in Part III, peacekeepers operating under U.N. command have the same inherent right of self-defense as units operating under national command.⁴⁸ The use of force by U.N. peacekeepers to defend their

44. SHERROD LEWIS BUMGARDNER ET AL., NATO, LEGAL DESKBOOK 259 (2d ed. 2010) (“Individuals and units have an inherent right to defend themselves against attack or an imminent attack, and NATO ROE issued for a mission do not limit this right.”). U.S. military manuals state that the “inherent right of self defense, front unit to individual level, applies in all peace operations at all times.” FIELD MANUAL, *supra* note 24, at 17; *see also* COMMANDER’S HANDBOOK, *supra* note 19, at 4 (stating that the right of unit self-defense is an “inherent right”). The Australian military similarly states that the commander’s discretion to act in unit self-defense is a “non-derogable right.” Stephens, *supra* note 9, at 144 (citing the Australian Defense Force Publication 3 (1st ed)).

45. For an example of a state’s decision to not use force in response to an armed attack, *see* Associated Press, *U.S. Backs South Korea in Punishing North*, NBCNEWS, May 24, 2010, http://www.msnbc.msn.com/id/37309788/ns/world_news-asia_pacific/t/us-backs-south-korea-punishing-north/#.TsxqN2CfuTU (describing non-forceful measures that South Korea took in response to a North Korean torpedo attack that sank a South Korean warship and killed forty-six sailors).

46. *See* Roach, *supra* note 1, at 865 (stating that “[m]ost every peacetime ROE contains a warning to the effect that ‘nothing in these rules is intended to limit the commander’s right of self-defense’”); FIELD MANUAL, *supra* note 24, at 90 (“Nothing in these rules negates your inherent right to use reasonable force to defend yourself against dangerous personal attack.”).

47. CENTER FOR LAW AND MILITARY OPERATIONS, RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES 3-26 (2000).

48. *See, e.g.,* Katherine E. Cox, *Beyond Self-Defense: United Nations Peacekeeping Operations and the Use of Force*, 27 DENV. J. INT’L L. & POL’Y 239, 249 (1999); *see also* Hosang, *supra* note 10,

units cannot reasonably be considered an exercise of national self-defense, as the United Nations is not a state and an attack against U.N. peacekeepers cannot under many circumstances be construed as an attack against any individual country.

Fifth, the right of unit self-defense applies equally to hostile acts by state and non-state actors. ROEs do not differentiate between threats posed by armed forces, non-state armed groups, or individual actors: the right of unit self-defense is triggered by a hostile act or hostile intent, regardless of the source of the threat. This poses problems for those who argue that unit self-defense is a manifestation of national self-defense, as there is significant debate as to whether non-state actors can commit “armed attacks” as envisioned by Article 51. On the one hand, a number of scholars, and many countries, argue that non-state actors can commit armed attacks, and that the use of force in response to such an attack is justified if the host state is “unwilling or unable to take effective action” to mitigate the threat posed by the armed group.⁴⁹ Under this theory, a military unit that responds to an attack by a non-state actor could plausibly claim that its use of force was justified, assuming the host government (even if able or willing to combat terrorism in general) was not able to mitigate the imminent threat posed. On the other hand, the ICJ, ICTY, and numerous scholars have taken the position that an attack by an armed group may only be considered an “armed attack” under Article 51 if the host state exercises “overall control” of the armed group.⁵⁰ Under this theory, a unit exercising

at 417 (“United Nations forces under United Nations command and control have the right to defend themselves against an imminent attack”).

49. See Ashley S. Deeks, *“Unwilling or Unable”: Toward a Normative Framework for Extra-Territorial Self-Defense*, 52 VA. J. INT’L L. 483, 486 (2012) (“More than a century of state practice suggests that it is lawful for State X, which has suffered an armed attack by an insurgent or terrorist group, to use force in State Y against that group if State Y is unwilling or unable to suppress the threat.”); Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT’L L. 244, 251 (2011); John B. Bellinger III, *Terrorism and Changes to the Laws of War*, 20 DUKE J. COMP & INT’L L. 331, 335 (2010) (stating that “the United States has a right to use force against al Qaeda *only* in those places where a country is unable or unwilling, to contain the threat itself, which really results in just a couple of countries in the world”); Permanent Representative of Turkey to the United Nations, Letter dated January 3, 1997 from the Permanent Representative of Turkey to the Secretary-General and the President of the Security Council, S/1996/479, January 3, 1997 (stating that Turkish actions against the PKK in Iraq were justified due to Iraq’s inability to exercise its authority over the northern parts of its territory which facilitated terrorist attacks against Turkey coming from Iraqi territory).

50. Prosecutor v. Tadic, Judgment, Case No. IT-94-I-A (July 15, 1999), 38 ILM 1518 (1999); Military and Paramilitary Activities Case, *supra* note 8, at 65 (setting forth an “effective control” test); see also Independent International Fact Finding Mission on the Conflict in Georgia, Rep., at 259 (Sept. 2009), available at <http://www.ceiig.ch/Report.html> (stating that “North and South Ossetian military operations are attributable to Russia if they were sent by Russia and if they were under the effective control by Russia”).

the right of self-defense against a non-state actor unaffiliated with the host state could not argue that Article 51 of the U.N. Charter provided the justification for its use of force. Thus, at least for those states that do not endorse the theory that non-state actors can commit armed attacks, their theory of unit self-defense against such actors must be divorced from national self-defense.

Finally, despite Dinstein's claim to the contrary, there is a *qualitative* difference between unit self-defense and national self-defense. The right of unit self-defense permits soldiers to take action to repel an attack or imminent attack. Significantly, the responsive use of force must be temporally interwoven with the event triggering it, and directed at the source of the threat itself. Unit self-defense would not likely authorize a unit to use force days after the hostile act occurred, to attack an entity other than that responsible for the attack or threatened attack, or to take action to prevent future (but not necessarily imminent) attacks.

As with unit self-defense, the use of force in national self-defense must comply with the principles of necessity, proportionality, and immediacy.⁵¹ A state has significantly more flexibility, however, in exercising its right of national self-defense. The "immediacy" requirement⁵² in national self-defense is less demanding than in unit self-defense. Following an armed attack, states are not required to act instantly and without deliberation.⁵³ To the contrary, international law requires states to first determine whether the use of force is necessary, to exhaust reasonably available alternatives to the use of force, and to consider the appropriate response.⁵⁴ Accordingly, states invoking their right under Article 51 often act weeks, or even months, after the armed attack against them. The United States, for example, did not respond militarily to the September 11 attacks against the World Trade Center and the Pentagon

51. Case Concerning Oil Platforms, (Iran v. U.S.) 2003 I.C.J. 161, 183 (November 6); THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS, *supra* note 10, at 195-96. ("Under customary international law, the requirements of necessity, proportionality, and immediacy are well established as complementing the requirements in the Charter in relation to the exercise of self-defence.").

52. Although often phrased as a condition of national self-defense, "immediacy" is generally understood to mean that the responsive action must be taken "within a reasonable time." THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS, *supra* note 10, at 197.

53. The United States' brief to the ICJ in the Oil Platforms case made this clear. U.S. brief, para. 4.37 ("Of greater importance, neither the concept of self-defense, nor the concept of necessity, demands instant response to an armed attack.") ("International law does not require that a State choose between resorting to armed force instantly and without reflection, or sacrificing its right to take prudent and considered defensive action.").

54. See, e.g., DINSTEIN *supra* note 27, at 198; William H. Taft IV, *Self Defense and the Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 303-04 (2004).

until October 7.⁵⁵

Moreover, unlike force taken in unit self-defense, many states and scholars argue that measures taken in national self-defense are not necessarily limited to repelling the armed attack (or imminent attack) that triggered the right of self-defense. After suffering an armed attack, a state can “also use force in self-defense to remove *continuing threats* to its future security.”⁵⁶ Accordingly, states can target military objectives that may not have been directly responsible for the armed attack, so long as the response is proportionate to the armed attack and necessary to prevent further attacks.⁵⁷

The United States’ response to the 1998 bombings against its embassies in Nairobi, Kenya and Dar es Salaam, Tanzania is illustrative of the discretion that nations have in responding to an armed attack. On August 20, 1998, U.S. cruise missiles targeted a terrorist training camp in Afghanistan and a pharmaceutical plant in Sudan.⁵⁸ In its letter to the Security Council, the United States stated that its response was intended to “prevent and deter” future terrorist attacks by Osama Bin Laden’s organization, al-Qaeda.⁵⁹ Although the Al-Shifa chemical factory did not play a role in the embassy bombings, U.S. officials believed that the factory was a legitimate target given evidence suggesting that al-Qaeda was using the factory to manufacture chemical weapons that would pose an ongoing (but not necessarily imminent) threat to U.S. national security.⁶⁰

In sum, the right of unit self-defense is fundamentally different from national self-defense in several key aspects, including the level of authority at which the decision to use force may be made and the nature and scope of the force that may be employed in response to an attack. These key differences between the rights of unit and national self-defense suggest that

55. UN Doc. S/2001/947 (October 7, 2011) (emphasis added).

56. United States Brief, Oil Platforms Case, para. 4.27; see Taft, *supra* note 54, at 305 (stating that proportionality requires an assessment of “what force could reasonably be judged to be needed to successfully deter *future* attacks”) (emphasis added).

57. As Dinstein acknowledges, “The choice of the time and place for putting into operation defensive armed reprisals, like that of the objective against which they are directed, is made by the victim state.” DINSTEIN, *supra* note 27, at 222; see also OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 154 (1991) (“It does not seem unreasonable as a rule to allow a State to retaliate beyond the immediate area of the attack when that State has sufficient reason to expect continuation of attacks (with substantial military weapons) from the same source.”).

58. TOM RUYTS, “ARMED ATTACK” AND ARTICLE 51 OF THE UN CHARTER: CUSTOMARY LAW AND PRACTICE 152 (citing UN Doc. S/1998/780, 20 August 1998).

59. UN Doc. S/1998/780.

60. *Id.*; see also Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT’L L. 559 (1999); *Al-Shifa Pharm. Indus. Co. v. United States*, 559 F.3d 578, 581 (D.C. Cir. 2009).

the right of unit self-defense is not derived from Article 51 of the U.N. Charter. Accordingly, the basis for unit self-defense under international law, if it exists, must be found elsewhere.

III. UNIT SELF-DEFENSE IN CUSTOMARY INTERNATIONAL LAW

This Part argues that customary international law recognizes a right of unit self-defense separate from the right of national self-defense. Customary international law results from a general and consistent practice of states acting under a sense of legal obligation, or *opinio juris*.⁶¹ As explained below, state practice—as evident in military manuals and ROEs, bilateral treaties, U.N. practice, and the writing of scholars—supports the argument that the right of unit self-defense is reflected in customary international law.⁶² These sources also indicate *opinio juris*, or states' belief, that unit self-defense is an inherent right that they are obliged to respect rather than a policy preference. This state practice also indicates that states do not understand unit self-defense to be a manifestation of national self-defense.

A. Rules of Engagement

Rules of Engagement can serve as a useful indicator of customary international law as they are premised upon states' understanding of their international legal obligations.⁶³ The NATO SROE and the San Remo Handbook both state that “[i]t is universally recognised that individuals and units have a right to defend themselves against *attack* or imminent *attack*.”⁶⁴ U.S. military manuals similarly assert that the “inherent right of

61. Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987).

62. See Stephens, *supra* note 9, at 130 (stating that unit self-defense is “a right *sui generis* which exists independently under customary international law”).

63. See Guy Phillips, *Rules of Engagement: A Primer*, THE ARMY LAWYER 4, 9 (1993); Steven R. Ratner, *The Gulf of Sidra Incident of 1981: A Study of the Lawfulness of Peacetime Aerial Engagements*, 10 YALE J. INT'L L. 59, 61 (1984). One commentator states that Rules of Engagement are “somewhat self-evident expressions of State *opinio juris*.” Stephens, *supra* note 9, at 130. An exhaustive review of states' ROEs is not possible due to their classified nature.

64. NATO MC 362/1, NATO Rules of Engagement (quoted in John J. Merriam, *Natural Law and Self-Defense*, 206 MILITARY L. REV. 43, 78 (2010)); SAN REMO HANDBOOK, *supra* note 9, at 4. The San Remo Handbook, published by the International Institute of Humanitarian Law and drafted by members of the U.S., Canadian, Australian, and United Kingdom militaries, can be considered representative of various nations' ROEs. It was presented and critiqued “at many varied venues, including two multinational ROE workshops and two naval operations courses held at IIHL. After three years of drafting and testing, the IIHL Council approved publication of the Handbook in September of 2009.” *Id.* at Preface. The Turkel Commission, which was established by the Israeli government to review the legality of the Israeli Defense Forces' actions to enforce the blockade of the Gaza Strip on May 31, 2010, endorsed the San Remo Handbook in its report, stating that it “provides a helpful overview of how the law regarding the use of force in self-defense, defense of others, and mission

self defense, from unit to individual level, applies in all peace operations at all times.”⁶⁵ Another commentator observes, “The right for individual soldiers to use force in self-defence, including action in anticipation of an imminent attack, seems to be generally accepted.”⁶⁶

As discussed in greater detail *infra*, United Nations Peacekeeping ROEs also acknowledge a right akin to unit self-defense. Peacekeepers are generally not combatants, and thus are not privileged under the laws of war to participate in hostilities.⁶⁷ The ROE for the United Nations Mission in Liberia (UNMIL), for example, authorized the use of force “to defend oneself, other U.N. personnel, or other international personnel against a hostile act or a hostile intent.”⁶⁸ Peacekeepers operating as part of the United Nations Interim Force in Lebanon (UNIFIL) were authorized to exercise the “inherent right of self-defence.”⁶⁹ Similarly, the U.N. ROE for the United Nations Operations in Somalia (UNOSOM) authorized peacekeepers to use deadly force in self-defense, which it defined as “action to protect oneself or one’s unit against a hostile act or hostile intent.”⁷⁰

States’ characterizations of the nature of unit self-defense are also indicative of *opinio juris*.⁷¹ By characterizing unit self-defense as a “right” and/or “obligation,” many states make clear their understanding that unit self-defense is grounded in law rather than in the policy preferences of individual nations. States do not view their ROEs as authorizing unit self-defense, which they could presumably do if unit self-defense was merely a subset of national self-defense. Rather, self-defense is a right that cannot be limited by ROEs⁷² or even other international legal obligations.⁷³

accomplishment is generally interpreted and communicated to military personnel.” The Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Commission 245, <http://www.turkel-committee.com/files/worddocs/8808report-eng.pdf>.

65. FIELD MANUAL, *supra* note 24, at 17.

66. See DIETER FLECK, THE HANDBOOK OF THE LAW OF VISITING FORCES 546 (2001); NATO LEGAL DESKBOOK 259 (2d ed. 2010) (“Individuals and units have an inherent right to defend themselves against attack or an imminent attack, and NATO ROE issued for a mission do not limit this right.”).

67. Peacekeepers can lose their protection from attack if they directly participate in hostilities.

68. U.N. Secretary-General, Letter dated 29 September 2003 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2003/926 (Sep. 29, 2003).

69. United Nations Peace Operations Year in Review 2006, *UN helps Lebanon recover, as Europe returns to peacekeeping*, <http://www.un.org/en/peacekeeping/publications/yir/2006/lebanon.htm>

70. TREVOR FINDLAY, THE USE OF FORCE IN UN PEACE OPERATIONS, Appendix 2. Rules of Engagement (Oxford Press 2002) (reprinting the rules of engagement for UNOSOM II, May 1993).

71. One commentator states that Rules of Engagement are “somewhat self-evident expressions of State *opinio juris*.” Stephens, *supra* note 9, at 130.

72. *Id.*; see also Roach, *supra* note 1 (stating that “[m]ost every peacetime ROE contains a warning to the effect that ‘nothing in these rules is intended to limit the commander’s right of self-

B. Treaties

The right of unit self-defense is reflected in a number of bilateral and multilateral treaties. In the treaties cited below, it appears that parties are referring to unit self-defense rather than national self-defense. Significantly, the treaties mention the inherent right of self-defense of the “officials,” “security forces,” the “American force,” and the “United States forces” rather than the “United States” or the “parties.” The description of the right of self-defense as “inherent” is also evidence of *opinio juris*.

1. Narcotics Interdiction Treaties

References to the right of self-defense are most common in bilateral narcotics interdiction treaties. The *Agreement between the Government of the United States and the Government of the Republic of Nicaragua concerning Cooperation to Suppress Illicit Traffic by Sea and Air*, for example, sets forth the terms between Nicaragua and the United States for implementing several multilateral conventions on suppression of drug-trafficking.⁷⁴ Article 15 states that “[a]ll uses of force by a Party pursuant to this Agreement shall be in strict accordance with applicable laws and policies of that Party and shall in all cases be the minimum reasonably necessary under the circumstances.”⁷⁵ The treaty reaffirms, however, that “[n]othing in this Agreement shall impair the exercise of the inherent right of self defense by law enforcement or other officials of the Parties.”⁷⁶

2. Proliferation Security Initiative (PSI) Treaties

In 2003, President Bush convened a number of like-minded States to participate in a Proliferation Security Initiative (PSI) to counter the proliferation of weapons of mass destruction (WMDs).⁷⁷ As a result of this initiative, the United States entered into a number of treaties with these like-minded countries, authorizing the parties to take various steps,

defense.”); Grunawalt, *supra* note 15, at 252.

73. 2005 SROE, *supra* note 11, at A-2 (“International agreements (e.g., status-of-forces agreements) may never be interpreted to limit U.S. forces’ right of self-defense.”); Lieutenant Colonel Mark S. Martins, *Deadly Force Is Authorized, but Also Trained*, THE ARMY LAWYER 1, 4 (2001) (“[T]he SROE is replete with caveats that make clear that no international obligation may be interpreted to infringe upon individual self-defense.”).

74. The Agreement between the Government of the United States and the Government of the Republic of Nicaragua concerning Cooperation to Suppress Illicit Traffic by Sea and Air, U.S.-Nicar., Jun. 1, 2001, 2001 U.S.T. LEXIS 63 (entered into force Nov. 15, 2001).

75. *Id.* art. 15.

76. *Id.* art. 15-16. Although the treaty refers to “law enforcement officials,” the U.S. Coast Guard, a branch of the U.S. military, is primarily responsible for narcotic interdiction efforts at sea.

77. James C. Kraska, *Averting Nuclear Terrorism: Building a Global Regime of Cooperative Threat Reduction*, 20 AM. U. INT’L L. REV. 703, 718-19 (2005).

including boarding their respective flagged vessels at sea or in port, in support of interdiction efforts to prevent the shipment of WMDs, their delivery systems and related materials.⁷⁸ These treaties contain language regarding security forces' "inherent right" to use force in self-defense. The *Agreement Between the Government of the United States of America and the Government of the Republic of Cyprus Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems and Related Materials by Sea* (entered into force January 12, 2006), provides a good example. Article 9(4) of the agreement states: "Boarding and search teams and Security Force vessels have the inherent right to use all available means to apply that force reasonably necessary to defend themselves or others from physical harm."⁷⁹ Several other ship boarding treaties, including those between the United States and Liberia, and the United States and the Marshall Islands contain identical provisions.⁸⁰ Even in the absence of a treaty, the authority to use force to intercept, board, and search such vessels may be derived from the boarding state's right under customary international law, a U.N. Security Council authorization, the right of self-defense under Article 51 of the U.N. Charter, or, in some circumstances, "the unit's or individual's right of self defense."⁸¹

3. Basing Agreements

A number of basing agreements also refer, at least implicitly, to the right of unit self-defense. In 1982, Lebanon and the United States effectuated an agreement authorizing the deployment of 1,200 U.S. troops to serve with the Multi-National Force in the Beirut area.⁸² The treaty

78. Sandra L. Hodgkinson et al., *Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap*, 22 AM. U. INT'L L. REV. 583, 660-61 (2007) (noting that the United States had concluded six ship-boarding agreements).

79. Agreement Between the Government of the United States of America and the Government of the Republic of Cyprus Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, U.S.-Cyprus, art. 9(4), Jul. 25, 2005, 2005 U.S.T. LEXIS 188.

80. Agreement between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, U.S.-Liber., art. 9, Feb. 11, 2004; Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, U.S.-Marsh.Is., art. 9, Aug. 13, 2004.

81. Craig Allen, *Limits on the Use of Force in Maritime Operations*, 35 ISRAEL YEARBOOK ON HUMAN RIGHTS 115, 124 (2005).

82. This agreement was effected by an exchange of diplomatic notes between the Lebanese Deputy Prime Minister and Minister of Foreign Affairs and the United States Ambassador to Lebanon on September 25, 1982. It entered into force on the same day. See 34 U.S.T. 2608.

provided, “In carrying out its mission, the American Force will not engage in combat. It may, however, exercise the right of self-defense.”⁸³ Similarly, the *Agreement Regarding the Military Use and Operating Rights of the Government of the United States in the Republic of the Marshall Islands* states:

External security for the defense sites will be conducted by the Government of the Republic of the Marshall Islands in close coordination with U.S. forces. If the Government of the Marshall Islands cannot provide adequate external defense of the defense sites, United States forces will be permitted to exercise their inherent right of self-defense.⁸⁴

4. United Nations Convention on the Safety of United Nations and Associated Personnel

The *United Nations Convention on the Safety of United Nations and Associated Personnel* also reflects states’ shared view of the right of unit self-defense.⁸⁵ The Convention was adopted by the General Assembly in 1994 and was intended to create a legal regime for the prosecution or extradition of persons accused of attacking U.N. personnel who were not engaged as combatants in armed conflict.⁸⁶ Significantly, the Convention contains a savings clause in Article 21, which states: “Nothing in this convention shall be construed so as to derogate from the right to act in self defense.” A few delegations resisted the inclusion of this provision on the grounds that the right of self-defense was self-evident, making this provision redundant.⁸⁷ A member of the U.S. negotiating team later wrote that the “United States delegation accepted this clause because it does not

83. *Id.*

84. The Agreement Regarding the Military Use and Operating Rights of the Government of the United States in the Republic of the Marshall Islands Concluded Pursuant to Sections 321 and 323 of the Compact of Free Association, as Amended, U.S.-Marsh.Is., 2003 U.S.T. LEXIS 194 (entered into force March 23, 2004); *see also* The Japan Maritime Self-Defense Force of Japan: The Exchange of Military Personnel, 2010 U.S.T. Lexis 8 (2010), Art. 6.12 (stating that the “Military Exchange Personnel assigned to the unit shall not actively participate in the hostilities . . . [but that] [t]his requirement shall not be read to restrict Military Exchange Personnel’s right to act in self-defense.”).

85. U.N. Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 34 I.L.M. 482, adopted by consensus in General Assembly Resolution 49/59 (December 9, 1994). The Convention was drafted and negotiated after states recognized a number of legal inadequacies in their ability to prosecute an increasing number of attacks committed against peacekeeping personnel.

86. The Convention does not apply to situations covered by common article 2 of the 1949 Geneva Conventions. *See id.* art. 2(2).

87. Evan Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT’L L. 621, 630 (1995).

in any event alter the basic legal framework, which establishes the right to self defense under customary international law, the U.N. Charter, and relevant resolutions of the Security Council.”⁸⁸ The Secretary of State’s letter submitting the treaty to the President makes this point clear. It states, “This Article [21] reflects a basic tenet of international law: that forces may defend themselves when attacked or threatened by imminent attack.”⁸⁹ Significantly, the Secretary of State refers to the right of self-defense by “forces” rather than “nations,” indicating that the peacekeepers’ right to defend themselves is distinct from the right of national self-defense reflected in Article 51.

C. United Nations Practice

U.N. resolutions, statements, and practice also indicate a widely shared understanding of the right to unit self-defense. Security Council Resolution 1088, for example, established a multinational stabilization force (SFOR) to help implement and enforce the Peace Agreement in Bosnia Herzegovina following the violent disintegration of Yugoslavia.⁹⁰ Among other things, the resolution “[a]uthorize[d] Member States to take all necessary measures, at the request of SFOR, either in defence of SFOR or to assist the force in carrying out its mission, and recognize[d] the right of the force to take all necessary measures to defend itself from attack or threat of attack.”⁹¹ The fact that the Security Council “recognized” rather than “authorized” the right of unit self-defense, indicates its belief that this right exists independent of the authorities bestowed to the SFOR by the Security Council acting under Chapter VII of the U.N. Charter.

The U.N. has also taken the position that its peacekeepers have a right of self-defense, independent from the right of national self-defense. U.N. peacekeeping operations (unlike enforcement actions taken under Chapter VII) are based on the consent of the concerned states. U.N. peacekeepers are not combatants and thus do not have the authority to engage in hostilities.⁹² Nevertheless, “the right of U.N. peacekeeping operations to exercise force in self-defense . . . may be thought of as an ‘inherent right’ of the peacekeepers” and has been “consistently provided for in the rules of

88. *Id.*; see also M. Bourlogannis-Vrailas, *The Convention on the Safety of United Nations and Associated Personnel*, 44 INT’L COMP. L.Q. 560 (1995).

89. Letter of Submittal, from Secretary of State Madeleine Albright to President Clinton (Nov. 8, 2000).

90. S.C. Res. 1088, U.N. Doc. S/RES/1088 (Dec. 12, 1996).

91. *Id.* ¶ 20.

92. Katherine E. Cox, *Beyond Self-Defense: United Nations Peacekeeping Operations and the Use of Force*, 27 DENV. J. INT’L L. & POL’Y 239, 246 (1999) (“[T]he use of force by UN peacekeeping forces has been limited to that used in self-defense.”).

engagement established for each peacekeeping operation since their inception.”⁹³

The right of self-defense for U.N. peacekeepers closely mirrors (and in some cases exceeds) the right of unit self-defense in national ROEs.⁹⁴ In 1964, for example, the U.N. Secretary General reaffirmed that the use of force by troops in the United Nations Peace-Keeping Force in Cyprus (UNFICYP) was “permissible only in self-defence,” which includes: “(a) the defence of United Nations posts, premises and vehicles under armed attack; [and] (b) the support of other personnel of UNFICYP under armed attack.”⁹⁵ The Secretary General added that, as with unit self-defense, “[t]he decision as to when force may be used under these circumstances rests with the commander on the spot.”⁹⁶

The U.N. has actually broadened its definition of self-defense over the past few decades. As one commentator explains, the U.N. realized that a broader definition of self-defense “would make peacekeeping operations more viable and would enable the United Nations to effectively carry out peacekeeping mandates without the need to resort to ‘enforcement measures.’”⁹⁷ Accordingly, in more recent peacekeeping missions, the U.N. “interpreted this right of self-defense very broadly, so as to justify not only the use of force to protect United Nations and associated personnel and property from attacks, but also to justify the use of force in response to armed resistance to the discharge of the force’s mandate.”⁹⁸

In sum, state practice and indications of *opinio juris* strongly support the position that there is a right of unit self-defense under international law. This right, which extends to all military units, cannot be restricted by Rules of Engagement or even by bilateral treaties.⁹⁹ For the reasons stated in Part II, the right of unit self-defense should not be confused with the right of national self-defense recognized by Article 51 of the U.N. Charter.

93. *Id.* at 249 (1999); *see also* Hosang, *supra* note 10, at 417 (“United Nations forces under United Nations command and control have the right to defend themselves against an imminent attack”).

94. See D.W. BOWETT, UNITED NATIONS FORCES 196-205 (1964) for a description of the right of self-defense during the peacekeeping operation in the Congo.

95. U.N. Secretary-General, note dated Apr. 11, 1964 addressed to the General Assembly, at 4, U.N. Doc. S/5653 (Apr. 11, 1964).

96. *Id.* at 2, 4.

97. Cox, *supra* note 92, at 249.

98. Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP. & INT’L L. 185, 198 (1996).

99. See Martins, *supra* note 73, at 4; *see also* Roach, *supra* note 1, at 870 (“Most every peacetime ROE contains a warning to the effect that ‘nothing in these rules is intended to limit the commander’s right of self-defense.’”); Grunawalt, *supra* note 15, at 252.

IV. UNIT SELF-DEFENSE AND THE ICJ

Parts II and III argued that the rights of unit and national self-defense are distinct rights under international law. This Part argues that maintaining this distinction can help resolve some inconsistencies in the ICJ opinion in the *Military and Paramilitary Activities in and Against Nicaragua* case. Specifically, understanding unit self-defense as an independent right allows us to acknowledge that the use of force might be justified in response to the ICJ's category of "frontier incidents" that do not arise to the level of an armed attack under Article 51 of the U.N. Charter, without abandoning strict adherence to the fundamental prohibition on the use of force set forth in Article 2(4) of the Charter.

A. Overview of the Case

The dispute underlying the *Military and Paramilitary Activities* case centered on a series of events following the demise of the Somoza Government in Nicaragua in 1979 and the establishment of the Frente Sandinista de Liberación Nacional (FLSN).¹⁰⁰ The United States initially supported the new Nicaraguan government, but the relationship soon soured as the Sandinista regime curtailed human rights and instituted socialist reforms.¹⁰¹ The FLSN also significantly expanded the size of its military and provided logistical support, including the provision of arms, to guerrillas in El Salvador and other countries in Latin America.¹⁰² The United States in turn cut off aid to Nicaragua and started to provide covert support for the armed resistance, the *Contras*, in Nicaragua.¹⁰³

On April 9, 1984, Nicaragua initiated proceedings against the United States at the ICJ. Nicaragua alleged that U.S. actions, including its support for the *Contras*, constituted a violation of Article 2(4) of the U.N. Charter, as well as the customary law obligation to refrain from the threat or use of force.¹⁰⁴ The United States argued during the jurisdiction stage¹⁰⁵ that

100. See generally *Military and Paramilitary Activities*, *supra* note 8. For an in-depth overview of the events leading up to the ICJ case, see John Norton Moore, *The Secret War in Central America and the Future of the World Order*, 80 AM. J. INT'L L. 43 (1986).

101. Moore, *supra* note 100, at 45 ("[T]he commandants curtailed civil and political rights, denied free elections, initiated massive militarization of society and, in general, began to move sharply toward Cuban-style totalitarianism.").

102. See *id.* at 48 (stating that the Sandinistas were "beginning a massive military buildup and joining with the Cubans in launching an intense secret guerrilla war against El Salvador and Guatemala and an armed subversion against Costa Rica and Honduras").

103. *Id.* at 69, 72.

104. *Military and Paramilitary Activities*, *supra* note 8, ¶ 15.

105. The United States did not appear at the merits stage due to the ICJ's decision to adjudicate the case on the merits notwithstanding the United States' multilateral treaty reservation to the ICJ's

Nicaragua's support and supply of arms to armed groups operating in neighboring countries, primarily El Salvador, constituted an "armed attack," and that its own actions were justified under the right to collective self-defense.¹⁰⁶ The United States also alleged that Nicaragua had made armed incursions into both Honduras and Costa Rica, and that these incursions similarly constituted armed attacks that triggered the right of collective self-defense.¹⁰⁷

In addressing the U.S. claim that Nicaragua had committed an armed attack against El Salvador that triggered the right of collective self-defense, the Court noted that not all uses of force amount to an armed attack.¹⁰⁸ The Court explained that it is "necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms."¹⁰⁹ The Court further stated that certain operations "because of [their] scale and effects" may be classified as an "armed attack" rather than a mere "frontier incident."¹¹⁰ It then concluded that the concept of armed attack does not include "assistance to rebels in the form of the provision of weapons or logistical or other support."¹¹¹ Nevertheless, the Court found that "[s]uch assistance may be regarded as a threat or use of force," which is prohibited by the U.N. Charter and customary international law.¹¹² Accordingly, El Salvador, as the victim of the unlawful use of force, would have been permitted to take certain counter-measures, possibly including the use of force.¹¹³ The United States, however, could not invoke the principle of collective self-defense in the absence of an armed attack.¹¹⁴

The Court also rejected the claim that Nicaragua had committed

jurisdiction. The so-called "Vandenberg reservation" excludes from the Court's jurisdiction "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States specially agrees to jurisdiction."

106. Military and Paramilitary Activities, *supra* note 8, ¶¶ 126-30.

107. *Id.*

108. *Id.* ¶ 191.

109. *Id.*

110. *Id.* ¶ 195.

111. *Id.*

112. *See id.* ¶¶ 195-96.

113. The Court suggested, but did not affirmatively state, that a victim state's counter measures may include the use of force in response to an unlawful use of force short of an armed attack. John Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self Defense*, 81 AM. J. INT'L L. 135, 136-37 (1987); *see also* DINSTEIN, *supra* note 27, at 194 ("Unfortunately, the Court carefully refrained from ruling out the possibility that such counter-measures may involve the use of force by the victim state."); Dale G. Stephens, *The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations*, 29 CAL. W. INT'L L.J. 283, 298 (1999) (stating that although the "court did not expressly admit that such 'proportionate countermeasures' could themselves include an element of force . . . the better view is that this is what was intended").

114. Military and Paramilitary Activities, *supra* note 8, ¶ 229.

armed attacks against Honduras and Costa Rica, even though it considered “as established the fact that certain transborder military incursions into the territory of Honduras and Costa Rica [were] imputable to the Government of Nicaragua.”¹¹⁵ Despite a statement from the representative of Honduras to the contrary, and without further explanation, the Court concluded: “these incursions . . . may [not] be relied on as justifying the exercise of the right of collective self-defence.”¹¹⁶

B. Criticisms of the ICJ Decision

A number of scholars have sharply criticized the ICJ’s opinion, and especially its narrow view of the meaning of armed attack.¹¹⁷ Much of the criticism focuses on the Court’s distinction between uses of force that amount to an “armed attack” and those that are better characterized as mere “frontier incidents.” Dinstein called the Court’s opinion “baffling” and stated that the Court’s new category of “frontier incidents” as “particularly bothersome.”¹¹⁸ Hargrove called the opinion “not merely unwarranted as a matter of law, but . . . deeply unwise.”¹¹⁹

The primary concerns with the Court’s opinion are two-fold. First, it creates significant uncertainty as to the meaning of “armed attack” by introducing criteria (i.e., scale and effect) that are arguably not based in customary international law.¹²⁰ As William Taft, former Legal Adviser to the State Department, observed, “the gravity of an attack may affect the proper scope of the defensive use of force . . . , but it is not relevant to determining whether there is a right of self defense in the first instance.”¹²¹ Under the Court’s opinion, for example, it is unclear whether a few mortars fired across an international border would have the requisite “scale and effect” to constitute an armed attack, triggering the right to self-defense.

Second, according to many commentators, the Court’s opinion creates

115. *See id.* ¶ 164.

116. *Id.* ¶¶ 231, 234. The only detail that the Court offered in reaching this conclusion was the fact that Honduras had not reported to the Security Council that it had requested the assistance of the United States in defending Nicaragua’s incursions, although it did inform the Council that Nicaragua had engaged in aggression against it.

117. *See, e.g.,* Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT’L L. 244, 245 (2011) (stating that the “conservative pronouncements of the International Court of Justice (ICJ) on self-defense have further muddied already murky waters”); Michael J. Glennon, *The Fog of War: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 541 (2002).

118. DINSTEIN, *supra* note 27, at 195.

119. Hargrove, *supra* note 113, at 140.

120. *Id.* at 139 (stating that the Court’s distinction is “unsupported by the language of the Charter . . . which in no way limits itself to especially large, direct or important armed attacks”).

121. Taft, *supra* note 54, at 300.

“an open-ended and wholly new category of exception to Article 2(4) of the [U.N.] Charter, of unknown content and limit.”¹²² Article 2(4) establishes the baseline rule that states “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.”¹²³ The one exception to this rule is in Article 51, which states that “[n]othing 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.”¹²⁴ These two provisions establish a bright line rule that “only an armed attack—and nothing short of an armed attack—can precipitate a forcible reaction by way of self-defence.”¹²⁵ The Court’s opinion casts significant doubt on this bright line rule by suggesting that forceful countermeasures may be taken in situations where no armed attack has occurred.¹²⁶ This position is difficult to reconcile with the text of the U.N. Charter.

The Court’s ruling was likely motivated by a desire to limit the involvement of third states, and thus the likelihood for escalation, in what might otherwise be minor disputes between two states.¹²⁷ According to some commentators, however, by creating a new category of lawful use of force (i.e., forceful countermeasures), the Court relaxed the bar on the use of force and may have actually encouraged low-intensity conflicts.¹²⁸

C. Unit Self-Defense and Frontier Incidents

The primary concerns with the Court’s opinion may be at least partially mitigated if we recognize the distinction between unit and national self-defense. There is some intuitive appeal to the Court’s desire to conclude that an “armed attack” must entail some threshold level of force. Self-defense is a concept that “lends itself to abuse,”¹²⁹ as victim states are unlikely to have a dispassionate view as to the necessity or proportionality

122. Hargove, *supra* note 113, at 142.

123. UN Charter, art. 2, para. 4.

124. *Id.* art. 51.

125. DINSTEIN, *supra* note 27, at 194.

126. See Tom J. Farer, *Drawing the Right Line*, 81 AM. J. INT’L L. 112, 113 (1987) (interpreting the Court’s opinion to mean that the victim of illegal use of force that does not amount to an armed attack “may retaliate by means short of an armed attack and which in addition comply with the tests of necessity and proportionality”).

127. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 133 (2000); see also Farer, *supra* note 126, at 114 (stating that the Court was seeking to reduce the direct involvement in regional disputes by superpowers, “which tend to impute cosmic significance to minor conflicts”).

128. GRAY, *supra* note 127, at 132 (describing arguments that the Court’s ruling may encourage low-intensity conflicts).

129. Military and Paramilitary Activities, *supra* note 8, at 543 (Jennings, J., dissenting).

of responsive measures. Accordingly, there is some support for the notion that not every incident involving the use of force, such as “an isolated instance in which border forces may be acting without authority,”¹³⁰ constitutes an armed attack against a nation.¹³¹ It must also be acknowledged, however, that some use of force must be permitted in response to frontier incidents (especially those that pose a threat to individual soldiers) that do not rise to the level of an armed attack. As explained in Part II, it is widely accepted that the individual victims of a frontier incident (e.g., the soldiers under fire) must have the right to protect themselves.

This poses the following dilemma for those who argue that self-defense can be exercised only by the state. Since the U.N. Charter permits the use of force only by states in self-defense, and if all unit self-defense is an exercise of national self-defense, one must logically conclude that every isolated (and possibly even unauthorized) frontier incident constitutes an armed attack in order to justify the victim unit’s inherent right to defend itself with force. This conclusion reduces the gravity threshold of “armed attack” that the ICJ and many scholars believe is important and could thus lead to the types of abuse that these commentators are understandably concerned about.¹³² Alternatively, one can maintain the gravity threshold for armed attack, accept the ICJ’s category of “forceful countermeasures” outside the context of self-defense, and ignore the textual problems in reconciling Articles 2(4) and 51 of the U.N. Charter.

We do not confront the same dilemma, however, if unit self-defense is understood to be distinct from national self-defense. Under this theory, we can acknowledge that certain frontier incidents may not constitute an armed attack but also maintain that the use of force to repel such attacks may be lawful, without creating a new exception to Article 2(4). Under this reading, the “forceful countermeasures” that the Court hypothesized might be lawful in the absence of an armed attack are simply those measures that

130. Taft, *supra* note 54, at 302.

131. See GRAY, *supra* note 127, at 134 (noting that in the debates on the Definition of Aggression, there was “general support for a distinction between frontier incidents and aggression”); see also 2009 Independent Fact-Finding Report on Georgia, *supra* note 40, at 245 (adopting the ICJ’s “scale and effects” test, stating that “[t]here may be military operations which amount to a use of force but nevertheless do not yet constitute an armed attack in the sense of Art. 51 of the UN Charter”); Eritrea v. Ethiopia, 2006 ILM 430, ¶ 11 (Eritrea-Ethiopia Claims Comm’n 2005) (adopting an extremely conservative definition of armed attack, stating that “[l]ocalized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter”).

132. Farer, *supra* note 126, at 113-14 (arguing “anything other than a high and conspicuous threshold between an armed attack justifying the exercise of self-defense and lesser forms of intervention . . . would invite internationalization of essentially civil conflicts”).

are consistent with the right of unit self-defense. Accordingly, a nation may not be entitled to exercise its right of national self-defense when confronted with a run-of-the-mill “frontier incident.” The units under attack (and only those units) may, however, use force to combat the threat consistent with the principle of unit self-defense.

Imagine, for example, that a drunken soldier from Pacifico fires a single shot across the border at an Atlantico barrack. Atlantico forces take immediate action, firing a warning shot back across the border. Under the Dinstein view, Atlantico’s use of force would be justified only if the Pacifico soldier’s action could be characterized as an armed attack against Atlantico. Such a determination may cause some anxiety for the reasons stated above. Alternatively, by recognizing the independent right of unit self-defense, we can avoid this somewhat problematic conclusion. The firing of a single shot across the border can properly be considered a frontier incident, triggering the right of unit self-defense, but not an armed attack against Atlantico, triggering the right to both national and collective self-defense.

In sum, recognizing the distinction between unit and national self-defense mitigates some of the concerns regarding the implications of the ICJ opinion in the *Military and Paramilitary Activities* case. Of course, it would not alter the Court’s holding that the Sandinistas’ massive, but covert, support for the guerrillas did not constitute an armed attack against El Salvador, or that the United States’ support for the *Contras* was not justified on the basis of collective self-defense. Maintaining this distinction would, however, allow the international community to acknowledge that military forces may use force in response to true frontier incidents (that do not amount to armed attacks) notwithstanding the general prohibition in Article 2(4) on the threat or use of force by states against the territorial integrity or political independence of another state.

V. UNIT SELF-DEFENSE AND INDIVIDUAL SELF-DEFENSE

This Article has argued that there are key differences between unit and national self-defense, that unit self-defense is properly understood as a separate right derived from customary international law, and that maintaining this distinction can help address some criticisms in the ICJ jurisprudence on self-defense. One question remains to be addressed: is the concept of unit self-defense simply military jargon for a right of individual self-defense also recognized by international law? The International Criminal Tribunal for Yugoslavia (ICTY), for example, noted that the right of individual self-defense is enshrined in the domestic law of every country, and “may be regarded as constituting a rule of customary

international law.”¹³³ Assuming that this is true, is there really any difference between unit and individual self-defense? A thorough analysis of this question is beyond the scope of this Article. Yet, there are substantial similarities in the way that the rights of individual and unit self-defense are commonly described.

First, like unit self-defense, the right of individual self-defense extends to the defense of others. In *Prosecutor v. Kordic and Cerkez*, the ICTY stated that the “notion of self-defence may be broadly defined as providing a defence to a person who acts to defend or protect himself or his property (or another person or person’s property) against attack.”¹³⁴ As stated above, the Rome Statute similarly provides that a person shall not be held criminally liable for conduct if “[t]he person acts reasonably to defend himself or herself or another person.”¹³⁵ The U.N.’s Basic Principles on the Use of Force and Firearms by Law Enforcement Officials state: “Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury”¹³⁶ If law enforcement and ordinary citizens are permitted to use force to defend others, including strangers, it is hardly surprising that soldiers are afforded the right to defend others within their unit.¹³⁷

Second, similar to unit self-defense, individual self-defense is subject to the rules of necessity and proportionality. The Rome Statute, for example, states that a person shall not be criminally responsible if he “acts reasonably to defend himself . . . against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person.”¹³⁸ In the *Kordic and Cerkez* case, the ICTY wrote that self-defense may excuse criminal liability under international law “provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack.”¹³⁹ The Basic Principles similarly affirm that the use of force should

133. *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T, Judgment, ¶ 451 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001) The right of individual self-defense is also grounded in the natural law tradition. Blackstone, for example, stated that the right to self-defense is “the primary law of nature, so it is not, neither can it be . . . , taken away by the law of society.” John J. Merriam, *Natural Law and Self-Defense*, 206 MILITARY L. REV. 43, 70 (2010) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *4).

134. *Id.* ¶ 449.

135. Rome Statute, *supra* note 38, art. 31(1)(c).

136. U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, ¶ 9 (Sept. 7, 1990), <http://www2.ohchr.org/english/law/firearms.htm> [hereinafter Basic Principles].

137. The 2005 SROE make clear that “[b]oth unit and individual self-defense includes defense of other U.S. military forces in the vicinity.” 2005 SROE, *supra* note 11, at A-2.

138. Rome Statute, *supra* note 38, art. 31(1)(c).

139. *Kordic and Cerkez*, ¶ 449.

be taken only when it is “unavoidable” and that it must be “in proportion to the seriousness of the offense.”¹⁴⁰

In sum, although this question warrants further attention, there is an argument that the right of unit self-defense is merely a “logical extension” of every soldier’s (or civilian’s) right to exercise individual self-defense.¹⁴¹ Viewing unit self-defense in this manner would ground the right in a legal doctrine that is generally accepted in domestic and international law, add clarity to the circumstances in which soldiers can use force in self-defense, and help avoid discrepancies between local laws and the ROEs under which soldiers operate.

VI. CONCLUSION

Despite the fact that soldiers around the world are informed that they have a right, and even an obligation, to use force when confronted with a hostile intent or hostile act, there is no consensus on the source of this right in international law. The operating assumption of some academics—that unit self-defense is a manifestation of national self-defense—is unsustainable. Naturally, in many circumstances, the right of unit and national self-defense will be co-extensive. An attack against a country’s armed forces might—due to its gravity, source, or target—trigger the right of both unit and national self-defense. Nevertheless, there are good reasons to maintain a distinction with respect to the international law bases for these rights. Significantly, the right of unit self-defense may be triggered even where the right of national self-defense is not. Although there is significant debate regarding the definition of “armed attack” in Article 51 of the U.N. Charter, unit self-defense may be triggered in situations that few countries would consider to be an “armed attack” against a state, due to the gravity of the attack, the lack of a state nexus to the attack, or the fact that the attack was directed against individual soldiers (for example, those participating in a multi-national peacekeeping operation) rather than a particular nation.

The stronger argument is that unit self-defense is an independent right recognized in customary international law, as evidenced by the numerous national and U.N. rules of engagement and treaties that implicitly or explicitly acknowledge this right. To be sure, this conclusion would be

140. Basic Principles, *supra* note 136, at ¶ 5.

141. Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 85 (1996) (“The commander’s right to protect the force is a logical extension of every soldier’s inherent right of self defense.”); *see also* Stephens, *supra* note 9, at 137 (stating that unit self-defense is “a right sui generis which exists independently under customary international law”).

bolstered by a more exhaustive review of nations' ROE, which is difficult due to the fact that many ROEs are classified. Nevertheless, those ROEs that are available, as well as the literature on ROEs, indicate that governments generally accept the right of unit self-defense.

The theory that unit self-defense is an independent right under international law can also help make sense of perceived inconsistencies in ICJ jurisprudence on the use of force. Most importantly, in the *Case Concerning Military And Paramilitary Activities in and Against Nicaragua*, the ICJ arguably created a gap between the prohibition on the use of force in Article 2(4) of the U.N. Charter and the right of self-defense in Article 51. According to the ICJ, only those attacks that meet an undefined "scale and effects" threshold trigger the right of national self-defense. Following the ICJ's lead, some international bodies have concluded that even cross border military incursions do not constitute "armed attacks." This line of thought is especially problematic for those who argue that unit self-defense is a subset of national self-defense, as military units would not be authorized to defend themselves against certain unlawful uses of force. Yet, the ICJ's "scale and effects" test is less problematic once we acknowledge that the right of unit self-defense exists independently from the right of national self-defense. Regardless of the definition of "armed attack" in Article 51, soldiers always have the right to take necessary and proportionate measures to defend themselves (and their units) against a hostile act.

Understanding the distinction between unit and national self-defense helps resolve some of the concerns described in this Article, but it also raises some additional questions. For one, the relationship between unit self-defense in military ROEs and the right of self-defense afforded to law enforcement personnel (and even civilians) deserves more attention. Like members of the armed forces, it is generally accepted that law enforcement officials can use force in self-defense or defense of others against the imminent threat of death or serious injury. Is the right of unit self-defense for members of the armed forces any different from the right afforded to law enforcement personnel? Similarly, can the right of unit self-defense extend to situations in which the use of force is necessary to accomplish mission objectives, as suggested by recent U.N. ROEs? This Article has taken the first step in clarifying the legal basis for unit self-defense, but also calls for further discussion on a topic that deserves greater attention by states and academics.