

A STATE’S RIGHT TO MILITARY POWER: THE INTERNATIONAL LEGAL IMPLICATIONS OF POTENTIAL SDF ACTION

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INTRODUCTION	237
I. STRUCTURE OF THE UNITED STATES ARMED FORCES	239
A. Federal Forces	239
B. The National Guard	240
C. State Defense Forces	241
II. HISTORICAL SIGNIFICANCE AND CONSTITUTIONAL AUTHORITY FOR SDFS	244
A. History of SDFs Prior to the Constitution	245
B. The Constitution	246
C. Interpreting the Constitutional Grant of Power	247
III. FOREIGN RELATIONS POWERS IN THE UNITED STATES	250
A. International Relations Power and Preemption	250
B. Declaring War and Engaging in War.....	251
C. Categorizing Mexican Drug Cartels as Political Entities Capable of Provoking the Internationally Legal Use of Force by SDFs.....	252
IV. INTERNATIONAL LAW	252
V. ANALYSIS & CONCLUSION	255

INTRODUCTION

In the United States, governors and state-level leadership are responsible for providing the initial response to an attack on their citizens.¹ With this great responsibility, however, comes only a few resources. Governors rely on state police and the National Guard to respond to situations.² These forces are often ill-equipped to handle major incidents,

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1. DEP’T HOMELAND SEC., FED. EMERGENCY MGMT. AGENCY, NATIONAL RESPONSE FRAMEWORK 3 (Jan. 2008); Mitch Frank, *Governors Prepare for Terror*, TIME, (Oct. 12, 2001), available at <http://content.time.com/time/nation/article/0,8599,179305,00.html>.

2. John R. Brinkerhoff, *Who Will Help the Emergency Responders?*, THE HERITAGE FOUNDATION (June 2, 2005), available at <http://www.heritage.org/research/lecture/who-will-help-the-emergency-responders>.

much less catastrophes which often involve more than five hundred casualties.³ Twenty-two states have groups of civilians, separate from the police and National Guard, whose training is similar to armed forces reserve components.⁴ Today, these forces are called state defense forces (SDFs), and they originate from the state militias so important to the original American colonies' defense.⁵

While the governors of states with SDFs may call on the SDFs to defend against invasion,⁶ the SDFs' validity and the effect of any action or armed engagement by such a force has not been tested in international law. If an SDF mobilized and engaged another force, either a non-national actor or a nation itself, would the use of force be legal?⁷ What if the force was used at or across a United States border, for instance, engaging the citizens or soldiers of Mexico?⁸ These questions raise constitutional questions domestically⁹ and legal use of force questions internationally.¹⁰ Ultimately, because the Constitution and federal law authorize the use of SDFs, the United States could be held responsible for their acts under the international theory of attribution.¹¹ Because of this potential international

3. *See id.*

4. Michael J. Golden, *The Dormant Second Amendment: Exploring the Rise, Fall, and Potential Resurrection of Independent State Militias*, 21 WM. & MARY BILL RTS. J. 1021, 1037 (2013). Armed forces reserve components can take many forms but often consist of units of men and women service members who serve "one weekend a month, two weeks a year," thus keeping their training and readiness current without being a full time active duty service member. *Guard and Reserve Frequently Asked Questions*, MILITARY.COM, <http://www.military.com/join-armed-forces/guard-and-reservefaqs.html#Whatis> (last visited Sept. 4, 2014).

5. Golden, *supra* note 4, at 1037.

6. James Jay Carafano and Jessica Zuckerman, *The 21st-Century Militia: State Defense Forces and Homeland Security*, THE HERITAGE FOUNDATION 5 (Oct. 8, 2010), <http://www.heritage.org/research/reports/2010/10/the-21st-century-militia-state-defense-forces-and-homeland-security>.

7. In an attempt to avoid confusion in discussion of sovereign nations as opposed to the fifty states of the United States, for the purposes of this Note, the word "state" refers to one of the fifty states of the United States. The word "nation" refers to any sovereign body. Any quotes have bracketed changed language to reflect this convention and, hopefully, avoid confusion.

8. Mexican drug violence occurring at and near the United States border makes the possibility of altercation with Mexican citizens, police, or soldiers much more likely than any engagement with Canada at the United States-Canada border. *See* Bill Piatt & Rachel Ambler, *Border Wars & the New Texas Navy: International Treaties, Waterways, and State Sovereignty after Arizona v. United States*, 15 SCHOLAR 535, 537-40 (2013).

9. *See* U.S. CONST. art. I, § 10, cl. 3 (giving constitutional legal authority to the states' right to self-defense if invaded or "in such imminent danger as will not admit of delay").

10. *See* U.N. Charter art. 2, para. 4 (giving international legal authority about the right to self-defense "against the territorial integrity or political independence of any [nation]").

11. Cedric Ryngaert & Jean d'Aspremont, INTERNATIONAL LAW ASSOCIATION NON STATE ACTORS COMMITTEE, 3RD REPORT, at 8 (draft 2014), available at <http://www.ila-hq.org/download.cfm/docid/9B5612DF-6DEF-4AFD-BB8A408EAB402DBE>. This discussion focuses on the potential humanitarian violations of armed opposition groups and is not specific to SDFs.

legal responsibility, the United States should either (1) adopt strict limits with more specificity delineating exactly when and how SDFs should engage international forces, or (2) eliminate SDFs as an outdated historical relic no longer necessary for national protection.

I. STRUCTURE OF THE UNITED STATES ARMED FORCES

Understanding how SDFs fit within the United States' overall military structure clarifies analysis of the international legal effect of SDF actions. The United States' military structure is tiered, including dedicated federal forces, hybrid National Guard forces, and locally focused SDFs.¹² The SDFs are ultimately subject to national control, but their local character both makes them a potent tool for immediate state-level defense and colors the legality of their actions in international law.¹³

A. Federal Forces

The United States military is divided into five main branches, including the Army, Navy, Marine Corps, Air Force, and Coast Guard.¹⁴ All of these branches, except the Coast Guard, operate under the Department of Defense and report to their respective secretaries, but the Marine Corps reports to the Secretary of the Navy.¹⁵ The Army, Navy, and Air Force secretaries report to the Secretary of Defense who, in turn, reports to the President as commander in chief.¹⁶

The Coast Guard operates under the Department of Homeland Security.¹⁷ However, after a declaration of war or when the President so directs, the Coast Guard operates under authority of the Department of the Navy.¹⁸ When the Coast Guard operates as a component of the Department of Homeland Security, the Coast Guard's top officer, the Commandant,¹⁹ reports directly to the Secretary of Homeland Security,²⁰ who, in turn,

12. See *DOD 101*, DEPT. OF DEFENSE, <http://www.defense.gov/about/dod101.aspx> (last visited May 17, 2015).

13. See *infra* Part II.C.

14. DIRECTORATE FOR ORG. & MGMT, PLANNING, OFFICE OF THE DIR. OF ADMIN. & MGMT, OFFICE OF THE SEC. OF DEFENSE, ORGANIZATION OF THE DEPARTMENT OF DEFENSE (2012), available at http://odam.defense.gov/Portals/43/Documents/Functions/Organizational%20Portfolios/Organizations%20and%20Functions%20Guidebook/DoD_Organization_March_2012.pdf.

15. *Id.*

16. ORGANIZATION OF THE DEPARTMENT OF DEFENSE, *supra* note 14.

17. *About Us*, U.S. COAST GUARD, <http://www.uscg.mil/top/about> (last visited Jan. 23, 2015).

18. *Missions*, U.S. COAST GUARD, <http://www.uscg.mil/top/missions> (last visited Jan. 23, 2015).

19. DEP'T OF HOMELAND SEC., U.S. COAST GUARD CHART, available at <http://www.dhs.gov/xlibrary/assets/org-chart-uscg.pdf>.

20. DEP'T OF HOMELAND SEC., DEP'T OF HOMELAND SECURITY CHART, available at <http://www.dhs.gov/xlibrary/assets/org-chart-uscg.pdf>.

reports to the President as a member of the Cabinet.²¹ When operating as a national force, any of these federal military divisions are authorized to use force internationally in self-defense,²² as permitted by a United Nations Security Council resolution,²³ or potentially under the humanitarian intervention and responsibility to protect doctrines.²⁴

B. The National Guard

In addition to the dedicated federal branches of the military, the National Guard serves as a “dual mission force.”²⁵ National Guard units are by default under the control of a state or territory, but can be called into federal service by the President.²⁶ The National Guard is divided into the Army National Guard and the Air National Guard.²⁷ Because of its status as a dual mission force, each branch of the National Guard has both state and federal missions.²⁸ When a National Guard unit is in state service, a state’s governor²⁹ is the commander in chief of the state’s National Guard.³⁰ When a unit is in federal service, the president is its commander in chief.³¹ National Guard units must be properly trained, combat-ready forces that

dhs.gov/xlibrary/assets/dhs-orgchart.pdf.

21. THE WHITE HOUSE, THE CABINET, *available at* <http://www.whitehouse.gov/administration/cabinet>.

22. U.N. Charter art. 51.

23. *Id.* art. 42.

24. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Sept. 16, 2005). Note, the responsibility to protect doctrine is not necessarily universally accepted and thus may not be the strongest justification for the United States to rely on if using force internationally. *See* Ralph Zacklin, Comment, *Beyond Kosovo: The United Nations and Humanitarian Intervention*, 41 VA. J. INT’L L. 923, 934–36 (2001); *see also* Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 VAND. J. TRANSNAT’L L. 1231, 1239–41 (1999).

25. ORGANIZATION OF THE DEPARTMENT OF DEFENSE, *supra* note 14.

26. *Id.*

27. *About the Guard*, ARMY NAT’L GUARD, <http://www.nationalguard.mil/AbouttheGuard.aspx> (last visited Jan. 23, 2015).

28. *See ARNG Federal Mission*, ARMY NAT’L GUARD, <http://www.arng.army.mil/aboutus/Pages/ARNGFederalMission.aspx> (last visited Jan. 23, 2015) [hereinafter *Federal Mission*] (stating the Army National Guard’s federal mission); *ARNG State Mission*, ARMY NAT’L GUARD, <http://www.arng.army.mil/aboutus/Pages/ARNGStateMission.aspx> (last visited Jan. 23, 2015) [hereinafter *State Mission*] (stating the Army National Guard’s state-level mission); *Air National Guard – Welcome*, ARMY NAT’L GUARD, <http://www.ang.af.mil/main/welcome.asp> (last visited Jan. 23, 2015) [hereinafter *ANG Welcome*] (showing the Air National Guard’s federal and state missions).

29. *See* ORGANIZATION OF THE DEPARTMENT OF DEFENSE, *supra* note 14 (explaining the organization specific to the Army National Guard). If the SDF is operating in a territory or district rather than a state, the territory or district’s leader is the commander in chief. *Id.*

30. *Id.*

31. *Id.*

will be prepared and equipped to mobilize if called into federal service.³²

A state governor may request that the federal government deploy its National Guard.³³ If such a request is granted, the National Guard will operate using federal funds.³⁴ A state governor also has the ability to directly call the National Guard into service when there is a local emergency, such as a natural disaster, civil unrest, or search and rescue operations.³⁵ If called into service directly by the governor, the National Guard will operate using state funds.³⁶ The federal government can trump state power by simply denying a state's request if it does not agree with that state's need or means of using the National Guard to fulfill a certain mission.³⁷ If a state attempts to mobilize its National Guard without federal funding, the federal government can preempt the state's attempt. It can hold the National Guard in federal service by claiming supremacy of mission.³⁸ Thus, National Guard units provide an important service to states but are ultimately answerable to the federal government. Like dedicated federal forces, when operating internationally on behalf of the United States, the National Guard can legally use force when acting in self-defense, when authorized by a United Nations Security Council resolution, or, arguably, when the United States asserts a responsibility to protect.³⁹

C. State Defense Forces

While states still have some control over their National Guard units, the Guard is now primarily a national reserve for the federal military forces.⁴⁰ Therefore, many states maintain independent forces that are more directly controlled at the state level.⁴¹ These citizen forces, or SDFs, currently operate in twenty-two states.⁴² Historically, state-level forces were intended to “[assist] the state in its responsibility to protect [its]

32. *Federal Mission*, *supra* note 28.

33. See Heather Dwyer, *The State War Power: A Forgotten Constitutional Clause*, 33 U. LA. VERNE L. REV. 319, 354 (2012).

34. *Id.*

35. *State Mission*, *supra* note 28.

36. Dwyer, *supra* note 33, at 354.

37. *Id.*

38. *Id.*

39. See *supra* notes 22–24 and accompanying text.

40. Dwyer, *supra* note 33, at 354.

41. Golden, *supra* note 4, at 1037.

42. *Id.* (citing Brent Bankus, *State Defense Forces, an Untapped Homeland Defense Asset*, State Defense Force Monograph Series (Winter 2005), available at <http://www.minutemaninstitute.org/writing-program/SDF.pdf>). Note, SDFs are organized units separate from the unorganized militias consisting of all qualified persons available for service who are at least seventeen years of age.

citizens,” while also allowing citizens themselves to resist government overreaching.⁴³

Today, states and territories with SDFs are solely responsible for supporting such forces by organizing, training, equipping, funding, managing, and employing the SDFs legally.⁴⁴ SDF members are not full-time members of an armed service. Instead, they are trained in short, weekend-long or week-long sessions, consistent with their mission to come together and act only in response to specific incidents.

SDFs are generally ground forces; however, some SDFs have naval and air components as well.⁴⁵ Specifically, Alaska, New York, New Jersey, Ohio, South Carolina, Texas, and Virginia, have active state naval militias.⁴⁶ The state naval militias in Alaska,⁴⁷ New York,⁴⁸ New Jersey,⁴⁹ and Virginia⁵⁰ qualify for federal funding. These state naval militias are subject to the laws and regulations related to the National Guard because they require membership overlap with members of the National Guard or other federal military force.⁵¹ The active state naval militias in Ohio,⁵²

43. Golden, *supra* note 4, at 1028–29.

44. See NAT'L GUARD BUREAU, NGR 10-4, NATIONAL GUARD INTERACTION WITH STATE DEFENSE FORCES, 1-5(a) (2011), available at www.ngbpdc.ngb.army.mil/pubs/10/ngr10_4.pdf (particularly pertaining to SDFs organized under 32 U.S.C. § 109). NGR 10-4 is a part of 32 C.F.R. § 564 (2012).

45. See Bankus, *supra* note 42, at 31–32.

46. See *infra* notes 47–58.

47. Control of Alaska National Guard and Alaska Naval Militia, ALASKA STAT. § 26.05.060 (2012); Composition of Organized Militia, ALASKA STAT. § 26.05.030(c) (2014) (“The Alaska Naval Militia consists of units . . . organized, trained, and administered as prescribed by state and federal law and regulation, and manned by personnel who are (1) members of the United States Naval Reserve or the United States Marine Corps Reserve and (2) enlisted, appointed, commissioned, or warranted under the laws and regulations of the United States.”). Note that this is not true of the Alaska State Defense Force, which is state run and does not require overlap with and does not receive funding from the federal government. See ALASKA STAT. § 26.05.030(d) (2014) (“The Alaska State Defense Force consists of units authorized by the governor and manned by volunteer personnel qualifying under state law and regulation.”); see Alaska State Defense Force, ALASKA STAT. § 26.05.100 (2014).

48. N.Y. MIL. LAW § 43 (McKinney 2004). Note that the New York law specifies that ninety-five percent of the naval reserve must be comprised of United States Naval, Marine Corps, or Coast Guard reservists.

49. N.J. STAT. ANN. § 38A:8-1 (West 2013) (“The Naval Militia shall consist of such organizations and units of the Naval Reserve of the United States as may be prescribed by the Governor and shall be composed of officer and enlisted men who meet the qualifications for membership in such Naval Reserve and are so enrolled therein.”).

50. VA. CODE ANN. § 44-62 (West 1973) (“Unless within one year after the organization of any unit of the naval militia at least ninety-five per centum of its personnel has been appointed or enlisted in the naval reserve, it shall be disbanded, and thereafter, unless its organization, administration, and training conform to the standard prescribed by the Secretary of the Navy for such units, it shall be disbanded.”).

51. See Bankus, *supra* note 42, at 32.

South Carolina,⁵³ and Texas⁵⁴ are independent from federal forces. In fact, these forces are specifically intended to step in when the National Guards of their respective states are called to federal service or are otherwise unable to maintain public peace in the face of a disaster or emergency.⁵⁵ SDF air components, often referred to as state air wings, are currently active in only three states: California,⁵⁶ Texas,⁵⁷ and Vermont.⁵⁸

Although SDFs are intended as state-centered forces, they are not totally independent of national control.⁵⁹ First, SDFs are authorized by federal statute.⁶⁰ SDFs can be used domestically, at the president's direction, to suppress rebellion or to enforce laws not practically enforceable via judicial proceedings.⁶¹ However, they can neither be considered part of the federal armed forces⁶² nor can they be deployed abroad.⁶³ SDFs may train and cooperate with National Guard units during domestic operations, so long as federal funds and federal equipment are not used for the primary purpose of training or supporting SDFs.⁶⁴ However, members of SDFs may not concurrently be members of a reserve

52. See OHIO REV. CODE ANN. § 5921.01 (West 1976).

53. See S.C. CODE ANN. § 54-17-40 (2003).

54. See TEXAS STATE GUARD, Maritime Regiment, available at <http://www.txsg.state.tx.us/maritime-regiment.aspx>.

55. See OHIO REV. CODE ANN. § 5921.01 (West 1976) ("The governor shall organize and maintain . . . naval forces capable of being expanded and trained to defend this state whenever the Ohio national guard . . . is employed so as to leave this state without adequate defense.").

56. CALIF. STATE MILITARY RESERVE, BASIC HANDBOOK 15 (2013), available at <http://www.calguard.ca.gov/CSMR/Documents/HANDBOOKREVISIONv5.pdf>.

57. TEXAS STATE GUARD, Air Component Command, <http://www.txsg.state.tx.us/air-component-command.aspx> (last visited May 17, 2015).

58. VERMONT STATE GUARD, Organization, <http://www.vermontstateguard.org/organization/> (last visited May 17, 2015).

59. See Authority of President to Send Militia into a Foreign Country, 29 U.S. OP. ATTY. GEN. 322, 323 (1912).

60. 32 U.S.C. § 109(c) (2012) ("In addition to its National Guard, if any, a State, the Commonwealth of Puerto Rico, the District of Columbia, Guam, or the Virgin Islands may, as provided by its laws, organize and maintain defense forces.").

61. 10 U.S.C. § 332 (2012) ("Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.").

62. 32 U.S.C. § 109(c) (2014) ("[SDFs] may not be called, ordered, or drafted into the armed forces."); see, e.g., Golden, *supra* note 4, at 1037.

63. BARRY M. STENTIFORD, THE AMERICAN HOME GUARD: THE STATE MILITIA IN THE TWENTIETH CENTURY 219 (Robert Doughty et al. eds., 1st ed. 2002); see also Authority of President to Send Militia into a Foreign Country, 29 U.S. OP. ATTY. GEN. 322, 323 (1912).

64. NATIONAL GUARD BUREAU, NGR 10-4, *supra* note 44.

component of the armed forces.⁶⁵

Unlike forces operating on the international stage under direct federal command, SDFs operate under state-level command.⁶⁶ Thus, the international legality of action taken against foreign actors by an SDF is murkier than the international legality of self-defensive action, action authorized by the United Nations Security Council, or action taken as part of an asserted responsibility to protect by a federal United States military force.⁶⁷ Recently, there has been discussion in the international law community about the legality of the use of force *against* non-national actors.⁶⁸ As considered further below, this discussion could be interpreted to indicate that the use of force *by* non-national actors such as SDFs is attributable to the United States under international law.

II. HISTORICAL SIGNIFICANCE AND CONSTITUTIONAL AUTHORITY FOR SDFS

This section will discuss the historical development of SDFs in American society and law in order to explain their treatment in international law. The historical purpose of SDFs to protect citizens against outside invasion by other sovereign nations or tribes hints at possible international legal categorization of SDFs as non-national armed actors.⁶⁹ Because SDFs historically stem from state militias designed, in part, to protect citizens from oppressive or overbearing governments, SDFs treatment under international law might also be analogized to that of armed opposition groups (AOGs).⁷⁰

65. *Id.* This restriction does not apply to state naval militias, discussed above, which often *require* concurrent membership in a reserve component of the federal forces or National Guard. *See supra* notes 47–51 and accompanying text.

66. James Jay Carafano and Jessica Zuckerman, *The 21st-Century Militia: State Defense Forces and Homeland Security*, THE HERITAGE FOUNDATION (Oct. 8, 2010), *available at* <http://www.heritage.org/research/reports/2010/10/the-21st-century-militia-state-defense-forces-and-homeland-security>.

67. *See supra* notes 22–24 (providing citations to authority of assertion as to the United States federally commanded military's right to use force).

68. *See* INTERNATIONAL LAW ASSOCIATION USE OF FORCE COMMITTEE, REPORT ON AGGRESSION AND THE USE OF FORCE, at B.2.c (draft 2014), *available at* <http://www.ila-hq.org/download.cfm/docid/DA12E88E-5E44-4151-9540DC83D4A0EA78> (containing a section on the current international legal discussion surrounding the use of force by nations against non-national groups).

69. Referred to as “non-state actors” in most publications, but here referred to as “non-national” so as to avoid confusion with references to the fifty states of the United States. Non-national actors in international law are generally discussed in the context of terrorist organizations, private cyber groups, and other extremist political, ideological, or religious groups. *See id.*

70. AOGs are “collective entities that use organized military force, have an authority responsible for their acts, and have the means of respecting and ensuring at least the rules of international humanitarian law.” Ryngaert, *supra* note 11, at 5.

A. History of SDFs Prior to the Constitution

The concept of state militias came to America from England during colonization.⁷¹ Militia duty in England was based on the idea that land-owning individuals bore responsibility to assist in defending the sovereign's land.⁷² While capable men were continuous members in a militia, responsibility to assist in defense only applied on an as-needed basis.⁷³ Before the United States became a nation, the colonies followed this model and provided for their own defense against incursions.⁷⁴ Men aged sixteen to around sixty⁷⁵ were automatically considered part of the militia⁷⁶ and were required to own and maintain necessary arms.⁷⁷

When the states began to form a union, they were motivated in part by the need to provide for a common defense.⁷⁸ The need for a common defense was reflected in the writings of the time, including in the *Federalist Papers*. In *Federalist No. 43*, James Madison defended the idea of the federal government guaranteeing every state protection against invasion, stating “[a] protection against invasion is due from every society to the parts composing it.”⁷⁹ However, Anti-Federalists sought to preserve the states' power to make war, arguing that adopting the Federalist position would leave the states powerless to control the national government's ability to make war and allow for the possibility of the president becoming a military despot.⁸⁰

Militias, in their original form in American history as precursors to SDFs, can be analogized to modern AOGs as a useful tool for understanding SDFs' potential treatment under international law. The militias' purpose aligned closely with the AOGs' purposes.⁸¹ Militias were expected to fight against an oppressive government as well as an outside invading force.⁸² AOGs are groups that use force, take authoritative

71. Golden, *supra* note 4, at 1026.

72. *Id.* at 1025.

73. *Id.*

74. Dwyer, *supra* note 33, at 321.

75. Golden, *supra* note 4, at 1026.

76. Though certain exceptions apply, such as exemptions for unwilling men who could pay a fine to avoid service. *Id.* at 1027.

77. *Id.*

78. Dwyer, *supra* note 33, at 320–21 (citing the Federalist Papers generally).

79. THE FEDERALIST NO. 43 (James Madison).

80. John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. R. 1639, 1658 (2002) (“In other words, it was not enough that the purse and sword would be in separate hands—Anti-Federalists wanted the purse and sword to be in different governments.”).

81. Ryngaert, *supra* note 11, at 5.

82. Dwyer, *supra* note 33, at 320–21 (citing the Federalist Papers generally).

responsibility for their acts, and “have the means of respecting and ensuring at least the rules of international humanitarian law.”⁸³ AOGs are typically identified by their engagement in armed violence with an official national government,⁸⁴ such as the groups currently opposing the incumbent regime in Syria.⁸⁵

B. The Constitution

The individual colonies began to fear they would be unable to independently defend against a superior, larger, or better-organized force.⁸⁶ After much debate, the colonies agreed that the federal government would provide for the common defense.⁸⁷ As such, the Constitution includes the Guarantee Clause, also called the Invasion Clause, which guarantees protection against invasion to every state in the Union: “[t]he United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.”⁸⁸

Based on the constitutional protection afforded by the Guarantee Clause, if a state is invaded, the United States has a federal duty to protect it.⁸⁹ The invaded state has a concurrent right, however, to defend itself.⁹⁰ In fact, there is evidence in the transcripts of the ratifying convention’s debates that the Guarantee Clause was designed to complement, not usurp, the states’ inherent right of self-defense.⁹¹ The constitutional text specifically addresses the states’ right to defend itself in Article I, which otherwise focuses on Congress’ power:

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such

83. *Id.*

84. *Id.*

85. JOSEPH HOLLIDAY, SYRIA’S ARMED OPPOSITION 6–7 (March 2012), available at http://www.understandingwar.org/sites/default/files/Syrias_Armed_Opposition.pdf.

86. Dwyer, *supra* note 33, at 320–21.

87. *Id.*

88. U.S. CONST. art IV, § 4.

89. *Id.*

90. Dwyer, *supra* note 33, at 319–20.

91. *Id.* at 321–22 (citing James Madison, Debate From Virginia Ratifying Convention (June 16, 1788), reprinted in 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 425 (Jonathan Elliot 2d ed. 1836)).

imminent danger as will not admit of delay.⁹²

While this language generally restricts state power, it also grants states a single affirmative right: the right to engage in war when invaded or in imminent danger.⁹³ This right is referred to as the State War Power.⁹⁴ *Houston v. Moore* expressly interpreted the State War Power, providing that “[t]he power of the States over the militia . . . existed . . . before the establishment of the [C]onstitution, and there being no negative clause prohibiting its exercise by them, it still resides in the States.”⁹⁵

Under international law, this constitutional grant of power and affirmation in case law could mean that the SDFs’ actions are legally attributable to the United States. Specifically, Article 5 of the United Nation’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts specifically states that the conduct of an entity “which is empowered by the law of that [nation] to exercise elements of the governmental authority shall be considered an act of the [nation] under international law” when that entity is acting in such “capacity in a particular instance.”⁹⁶ The entrenchment of SDFs in United States’ law, evidenced by both constitutional and judicial authority, shows that SDFs are “empowered” by national law.⁹⁷ Because of this, an SDF’s actions would be legally attributable to the United States.⁹⁸ If an SDF uses force in self-defense under international law, no question of legality should arise.⁹⁹ However, if an SDF uses force not clearly sanctioned under international law, the United States could thus be held accountable for a rogue SDF’s conduct.¹⁰⁰

C. Interpreting the Constitutional Grant of Power

In the early years of the United States, the state militias thrived, even developing volunteer companies that specialized in areas such as cavalry

92. U.S. CONST. art. I, § 10, cl. 3.

93. Dwyer, *supra* note 33, at 319.

94. *Id.*

95. *Houston v. Moore*, 18 U.S. 1, 9 (1820). Note the quoted language goes on to clarify that the states may so act only if their action is not “absolutely repugnant to the authority of the Union.” *Id.*

96. Responsibility of States for internationally wrongful acts, Rep. of the Int’l Law Comm’n, 56th sess, Dec. 12, 2001, U.N. Doc. A/56/83 [hereinafter ILC Draft Articles].

97. *See id.* (explaining that by being empowered by U.S. law, SDFs’ conduct will be considered an act of the U.S. under international law).

98. *See id.*

99. *See* U.N. Charter art. 51 (providing for the legality of the use of force in international law only when defensive in nature); *see also* ILC Draft Articles, *supra* note 96, art. 21 (“The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self- defence [sic] taken in conformity with the Charter of the United Nations.”).

100. *See* ILC Draft Articles, *supra* note 96.

and artillery.¹⁰¹ These strong and specialized militias helped the United States survive early conflicts like the War of 1812 and conflicts with Native Americans.¹⁰²

Soon, however, disputes over the Constitution's grant of state control over militias led to judicial refinements. The Constitution grants Congress the power to "call[] forth the militia to execute the laws of the union, suppress insurrections and repel invasions"¹⁰³ and to "provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States."¹⁰⁴ However, that power is limited, and militias are subject to the control of the states in all other respects and purposes.¹⁰⁵ So, a state may use its militia to repress insurrection.¹⁰⁶ The militia may also be used to repel invasion of a state within its own territory when that invasion is directed against the state's own existence or authority.¹⁰⁷ A state's power to use its militia in these ways exists concurrent to Congress's authority to call forth a states' militia to do the same in aid of the United States.¹⁰⁸ Additionally, states preserve the power to both legislate for and organize their militias.¹⁰⁹ When a state is faced with an insurrection or invasion, it has discretion to determine whether the incident warrants calling forth the militia rather than relying on civil authority such as the police force.¹¹⁰

By the time early cases like *Houston v. Moore* distinguished and defined the states' power over their militias, the militias themselves had moved from a mandatory commitment to a voluntary model.¹¹¹ SDFs now survive only on a voluntary basis, which is necessary given today's large and diverse population.¹¹² Additionally, the contemporary absence of significant SDF use signals, to a certain extent, the alignment of state and national interests in the United States and the representative nature of the United States government in the international arena.¹¹³

101. Golden, *supra* note 4, at 1027.

102. *Id.*

103. U.S. CONST. art I, § 8, cl 14.

104. *Id.* at cl. 15.

105. Houston, *supra* note 95, at 50.

106. *Id.* at 54.

107. *Id.*

108. *Id.*

109. Dunne v. People, 94 Ill. 120, 126–27 (1897).

110. Luther v. Borden, 48 U.S. 1, 45 (1849).

111. Golden, *supra* note 4, at 1028.

112. *Id.*

113. See Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 124 (2013)

More recent case law has led scholars to question whether SDFs are included in the broader definition of “militia” and thus subject to similar federal obligations as the National Guard.¹¹⁴ *Perpich v. Department of Defense* consigned the original militias to federal authority, emphasizing that National Guard units could be ordered to active duty of the United States without the consent of the unit’s state governor, and without a declaration of a national emergency.¹¹⁵ However, *Perpich* expressly affirms the power of states to organize their own militias, thus upholding the right of states to use their SDFs in self-defense as provided for in the Constitution.¹¹⁶

The constitutional, statutory, and judicial treatment of SDFs cement their legal place in the United States state-level national security response system. Such treatment also has implications in international law. Because United States law condones the existence and limited use of SDFs, the United States could be held responsible on the international legal stage should an SDF use force against a foreign nation or commit any other transgression of international law.¹¹⁷ However, the United States could seek to defend itself in international law by asserting that an SDF acted outside of its legal authority¹¹⁸ so that the SDFs’ actions are not attributable to the United States because they were not sanctioned.¹¹⁹ The next section discusses the boundaries of SDFs’ power in the context of federalism and domestic international relations.

(citing Jan Klabbers, *(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors*, NORDIC COSMOPOLITANISM: ESSAYS IN INT'L LAW FOR MARTTI KOSKENNIEMI, 351, 359 (Jarna Petman & Jan Klabbers eds., 2003) (“to argue that non-state entities are by definition represented by their governments is implausible where the very raison d’être of those nonstate (sic) entities is to deny the representative nature of their governments.”)).

114. Thaddeus Hoffmeister, *An Insurrection Act for the Twenty-First Century*, 39 STETSON L. REV. 861, 903 n. 255 (2010).

115. 496 U.S. 334, 335 (1990).

116. *Id.* at 353–54 (“Were it not for the Militia Clauses, it might be possible to argue on like grounds that the constitutional allocation of powers precluded the formation of organized state militia. The Militia Clauses, however, subordinate any such structural inferences to an express permission while also subjecting state militia to express federal limitations.”).

117. *See supra* notes 96–100 and accompanying text.

118. An SDF would act outside its legal authority if it engaged in any action other than that protecting against insurrection or invasion or if it acted under the authority of a leader other than state or federal authorities. *See supra* III.B, III.C.

119. It is unclear whether this defense would succeed as Article 7 of the ILC Draft Articles, *supra* note 96, provides that conduct of entities empowered by the nation “shall be considered an act of [that nation] under international law . . . even if [the act] exceeds [the entity’s] authority or contravenes instruction.”

III. FOREIGN RELATIONS POWERS IN THE UNITED STATES

Prior sections of this Note establish that SDFs exist under state control separate from federal forces and that their historical and constitutional origins establish their domestic legality. This section discusses the states' power in the foreign relations field. It addresses the implications under domestic and international law of a hypothetical situation in which a state uses its SDF to respond to a border incursion or invasion in violation of the United States' international relations policy.

A. International Relations Power and Preemption

United States case law generally restricts international powers to nations themselves. Although the Tenth Amendment provides that powers not otherwise disposed of in the Constitution are reserved to the states,¹²⁰ *United States v. Curtiss-Wright Export Corporation* holds that international powers cannot be reserved to the states because the states never possessed international powers.¹²¹ "International powers" pursuant to *Curtiss-Wright* include the power to levy war, conclude peace, and contract alliances.¹²² These same international powers, as well as the power to "make treaties [and] to maintain diplomatic relations" are, according to *Curtiss-Wright*, vested in the federal government because these powers are inherent in nationality.¹²³ The Court also explains that the president is the "sole organ" of the nation's international relations.¹²⁴

While the international relations power is vested in the federal government, more specifically, in the president, SDFs are described as part of the states' concurrent power to protect themselves from incursion or invasion.¹²⁵ In other words, the states' power to protect themselves coexists with the federal international relations and war making powers. Concurrent powers can, however, fall victim to preemption.¹²⁶ Federal law preempts state law when Congress enacts a statute that expressly preempts a state provision ("express preemption"); when Congress has legislated so heavily in a field that there is no room left for states to regulate conduct in that field ("field preemption"); and when state laws conflict with federal law, making it impossible to comply with both laws or fulfill the purpose and objectives

120. U.S. CONST. amend. X.

121. 299 U.S. 304, 316 (1936).

122. *Id.*

123. *Id.* at 318.

124. *Id.* at 320.

125. See *supra* note 90 and accompanying text.

126. See *Arizona v. United States*, 132 S. Ct. 2492, 2500–01 (2012) (delineating circumstances under which concurrent powers are preempted.).

of the federal law (“conflict preemption”).¹²⁷ While there exists a general presumption against preemption, the presumption is “restricted to the narrowest of limits” in international relations cases.¹²⁸ This explains the primacy of federal law and the president’s ability to control not only the primarily federal forces, but also the SDFs.¹²⁹

B. Declaring War and Engaging in War

The Constitution clearly delineates the power to declare war to Congress.¹³⁰ A declaration of war essentially publicizes the legal relations between the United States and other entities.¹³¹ It also gives the United States government enhanced domestic powers, including the powers to seize foreign property, conduct warrantless surveillance, arrest enemy aliens, and control transportation systems.¹³² However, a declaration of war is, to some extent, a technicality or formality.¹³³ Nations can be engaged in hostilities and limited combat without a formal declaration of war.¹³⁴ For instance, American history includes only five formal declarations of war,¹³⁵ while reports suggest there are approximately 234 instances in which the United States has used its armed forces for non-normal peacetime purposes.¹³⁶

As set forth above, states using their SDFs can engage invading forces outside of a declared war, within certain limitations.¹³⁷ Specifically, states may act when exposed to armed hostility from another political entity.¹³⁸ A political entity is generally an organized unit with political objectives and

127. *Id.*

128. *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941).

129. *See supra* note 59–61 and accompanying text.

130. U.S. CONST. art. I, § 8 (the “Declare War Clause”).

131. *Yoo, supra* note 80, at 1672.

132. *Id.* at 1672–73.

133. *See id.* at 1672 (“Declarations do simply what they say they do: they declare.”).

134. *Id.*

135. They are: the War of 1812, the Mexican War of 1846, the Spanish American War of 1898, World War I declared in 1917, and World War II declared in 1941. Ellen C. Collier, *Instances of Use of United States Forces Abroad, 1798-1993*, NAVAL HISTORY AND HERITAGE COMMAND (Sept. 12, 1997), available at <http://www.history.navy.mil/wars/foabroad.htm>.

136. *Id.* The Korean War, the Vietnam War, the Persian Gulf War, and the wars in Afghanistan and Iraq are among the United States’ modern undeclared wars. *See* BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2014, 2–29 (Jan. 13, 2014); *see also* George Friedman, *What Happened to the American Declaration of War?*, FORBES (March 3, 2011, 5:10 PM), <http://www.forbes.com/sites/beltway/2011/03/30/what-happened-to-the-american-declaration-of-war/>.

137. *Dwyer, supra* note 33, at 332.

138. *California v. United States*, 104 F.3d 1086, 1091 (9th Cir. 1997).

characteristics.¹³⁹ Political entities that could foreseeably provoke action from an SDF include, for example, Mexican drug cartels and transnational gangs.¹⁴⁰ These gangs and cartels are discussed in the next section.

C. Categorizing Mexican Drug Cartels as Political Entities Capable of Provoking the Internationally Legal Use of Force by SDFs

Drug cartels currently operating throughout Mexico threaten the security of United States' citizens¹⁴¹ and could be considered political entities under international law. The cartels, arguably, are engaged in a non-international armed conflict with the Mexican government, which rises above the level of rebellion to the level of insurgency.¹⁴² Additionally, the cartels are well-organized and well-trained. For instance, the Los Zetas cartel is composed of former Mexican Army Airborne Special Forces, indicating they understand the importance of command structures and also have intimate knowledge of military equipment and techniques.¹⁴³ These cartels could thus justifiably be categorized as entities with enough political and internal structural organization to legalize an SDFs' use of force against a cartel.¹⁴⁴ Thus, the United Nations Charter and other sources of international law do not address the applicability of international law to non-national entities such as SDFs.

IV. INTERNATIONAL LAW

The United Nations Charter guides the use of force in international

139. Dwyer, *supra* note 33, at 324.

140. See Letter from Rick Perry, Governor, State of Texas, to Barack Obama, President, The United States of America (Aug. 9, 2010), http://governor.state.tx.us/files/press-office/080910_PerryObamaletter.pdf [hereinafter Perry Letter] (informing President Obama of the threat to the safety of citizens along the Texas-Mexico border and requesting heightened federal assistance in responding to this threat).

141. See TEX. DEPT. OF PUB. SAFETY, TEXAS PUBLIC SAFETY THREAT OVERVIEW 2013 13–25 (2013), available at http://www.txdps.state.tx.us/director_staff/media_and_communications/threatoverview.pdf; see, e.g., *Rogue Bullet Shot Across Mexico Border Hits El Paso Woman*, NBC NEWS (Feb. 21, 2012), http://usnews.nbcnews.com/_news/2012/02/21/10471871-rogue-bullet-shot-across-mexico-border-hits-el-paso-woman; *Texas Governor Condemns Stray Bullets Fired Across U.S. Border*, CNN JUSTICE (Aug. 23, 2010), <http://www.cnn.com/2010/CRIME/08/23/texas.border.bullet.investigation/>; Adriana Gómez Licón, *Mexican Gunman Fires Across Border Toward U.S. Highway Workers*, EL PASO TIMES (Jan. 14, 2011), http://www.elpasotimes.com/ci_17087113 (providing only several of countless examples of cross-border violence happening often across the U.S.-Mexico border).

142. Nagesh Chelluri, *A New War on America's Old Frontier: Mexico's Drug Cartel Insurgency*, 210 MIL. L. REV. 51, 56, 78 (2011).

143. *Id.* at 53 n. 3.

144. See *infra* notes 154–165 and accompanying text.

law.¹⁴⁵ Article 2(4) of the Charter prohibits the use of force or threatened use of force “against the territorial integrity or political independence of any [nation].”¹⁴⁶ Under Article 51, U.N. member nations—as opposed to states and territories that employ SDFs—may only resort to the use of force in self-defense when an armed attack occurs against that nation.¹⁴⁷ These articles focus on national actors and national borders as primary to triggering the right to use force in defense against an armed attack. Other forms of international law emulate this, considering only those rules put in place by national actors as relevant in international law.¹⁴⁸ Thus, the U.N. Charter and other historic international law sources do not address the applicability of international law to non-national entities such as SDFs.

Recently, however, there has been a surge in international law (including treaties and customary international law) recognizing the growing importance of non-national actors in general and in the law governing armed conflict.¹⁴⁹ The current accepted theory is that non-national entities, such as armed groups, may “enjoy rights, obligations, and enforcement capacities under international law” as those that “are created or recognized by [nations].”¹⁵⁰

This means that a rogue SDF using unprovoked force against a United Nations member nation would act in violation of international law.¹⁵¹ The United States federal government would almost certainly condemn that SDF's actions because SDFs are limited to defense against actual or imminent invasions.¹⁵² Such an attack would also violate domestic law since the Constitution limits SDFs' actions to defense against actual or imminent invasions.¹⁵³ However, if an incursion or invasion of a state is considered an armed attack under Article 51 of the U.N. Charter, an SDF's potential defensive action may be legal under international law.

The most prominent elucidation of armed attacks under international

145. U.N. Charter art. 2, para. 4.

146. *Id.*

147. U.N. Charter art. 51.

148. Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 111 (2012).

149. *Id.* at 108; see also INTERNATIONAL LAW ASSOCIATION USE OF FORCE COMMITTEE, REPORT ON AGGRESSION AND THE USE OF FORCE, at B.2.c (draft 2014), available at <http://www.ila-hq.org/download.cfm/docid/DA12E88E-5E44-4151-9540DC83D4A0EA78> (containing a section on the current international legal discussion surrounding the use of force by nations against non-national groups).

150. Sivakumaran, *supra* note 113, at 115.

151. See U.S. CONST. art 1, § 10, cl. 3.

152. *Id.*

153. *Id.*

law is found in the International Court of Justice's (ICJ's) decision in *Nicaragua v. United States*.¹⁵⁴ *Nicaragua* distinguishes between "armed attack" and "mere frontier incidents."¹⁵⁵ This distinction allegedly created a gap allowing low-level attacks to occur because an attack characterized as a mere frontier incident does not trigger the victim nation's self-defense rights.¹⁵⁶ However, cumulative attacks "could reach the gravity threshold" to be considered armed attacks given sufficient evidence.¹⁵⁷ And armed attack includes both actions by an official armed force across an international border, as well as actions by armed bands, groups, irregulars, or mercenaries sent by or acting on behalf of a nation.¹⁵⁸ Based on this case alone, it appears that SDF actions can only be legal under international law if a major invasion occurs

The ICJ further elucidated the concept of armed attack in *Iran v. United States* (the Oil Platforms Case), by including "the mining of a single military vessel" in the concept of armed attack.¹⁵⁹ However, the Oil Platforms Case makes clear that a nation cannot respond to attacks on unmarked vessels of that nation.¹⁶⁰ The Oil Platforms Case further limits the circumstances under which a nation can respond in self-defense; it finds that a missile that hit a United States ship fell below the threshold of armed attack because the missile could not have been aimed "at the specific vessel."¹⁶¹ Since there was no armed attack on the United States, its right to use force in self-defense was not justified.¹⁶² This opinion signals to states that their SDFs should not defend against unintentional or minor border incursions, even if those minor incursions are recurring. Such incursion or invasion does not rise to the level of armed attack justifying the use of force in self-defense under international law.¹⁶³

154. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 103, ¶ 195 (June 27).

155. Abdulqawi A. Yusuf, *The Notion of "Armed Attack" in the Nicaragua Judgment and its Influence on Subsequent Case Law*, LEIDEN J. INT'L L. 461, 462 (2012).

156. *Id.* at 464–65.

157. *Id.* at 465.

158. *Id.* at 463.

159. Oil Platforms Case (Iran v. U.S.), 2003 I.C.J. 324, ¶ 72 (Nov. 6).

160. *Id.* at ¶ 64. The ship in question "was not flying a United States flag, so that an attack on the vessel is not in itself to be equated with an attack on that State."

161. *Id.*

162. *Id.*

163. Note that this decision is not without controversy. Judge Buergenthal of the ICJ criticized the Court's evidentiary approach in his separate opinion in this case. John Norton Moore, *Jus ad Bellum Before the International Court of Justice*, 52 VA. J. INT'L L. 903, 940–41 (2011–12). Additionally, the ICJ "applied an overly cabined assessment of necessity and proportionality in" its analysis of the facts. *Id.* at 941. Thus, this opinion may lend less persuasive authority for its propositions in international law

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (the Wall Opinion) refines the conception of an armed attack as it applies to non-national actors.¹⁶⁴ The Wall Opinion explains that non-national actors can carry out an armed attack triggering the right to self-defense.¹⁶⁵ Thus, a state need not be invaded by a nation to trigger its right to employ an SDF in self-defense legally under international law.¹⁶⁶

Finally, the ICJ's decision, *Armed Activities on the Territory of the Congo* (the Congo Case), influences the contemporary conception of non-national armed groups' right to use force internationally.¹⁶⁷ The Congo Case addresses the international legal responsibility of Congolese non-state military forces and is therefore relevant to the potential international legal treatment of SDFs using force internationally.¹⁶⁸ The opinion relays that armed attacks "by bands or irregulars directly or indirectly supported by" a nation give rise to a right of defense against the nation itself.¹⁶⁹ So, if an SDF could be considered a "band or irregular[]" supported by the United States, its actions could trigger a right to self-defense against an opponent.¹⁷⁰ However, given the domestic legal role of SDFs as forces employed solely in self-defense against foreign forces when a state is invaded,¹⁷¹ an SDF acting legally should never provoke a right of self-defense. The Congo Case shows non-national armed groups' applicability by finding that such groups can trigger the right to use force in self-defense.¹⁷²

V. ANALYSIS & CONCLUSION

Because of the potential international legality of SDFs acting in self-defense,¹⁷³ the United States should maintain clear federal policy and strict

than other more widely accepted ICJ opinions.

164. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 242 (Jul. 9).

165. *Id.*

166. *See id.* (explaining that non-state actors can trigger self-defense rights).

167. *See Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19).

168. Moore, *supra* note 163, at 945.

169. *Id.* at 945–46.

170. *See id.* (explaining the Congo Case's holding that non-state actors can trigger the right to self-defense).

171. *See U.S. CONST.* art. I, § 10, cl. 3 (lending constitutional legal force to the states' right to self-defense if invaded or "in such imminent danger as will not admit of delay").

172. U.N. Charter art. 51.

173. Only self-defense, not U.N. Security Council sanctioned or humanitarian intervention use of force, is discussed because only self-defensive actions of SDFs are legal under United States law. Also,

unified guidance to govern SDFs. To better understand this reasoning, consider the current tension at the United States-Mexico border instigated by Mexican drug cartel violence. In recent years, Americans have been negatively affected by increasing drug cartel and gang related violence at the borders in Texas and New Mexico.¹⁷⁴ Stray bullets from the Mexican side of the border have hit at least one innocent woman in the United States.¹⁷⁵ Stateside-based gangs and north-of-the-border factions of Mexican cartels possess weapons such as vehicle-borne improvised explosive devices (VBIEDs) and improvised explosive devices (IEDs).¹⁷⁶ Mexican pirates have attacked fishing boats in border reservoirs, killing innocent American citizens.¹⁷⁷

These acts of aggression provoked the Texas Governor to author a letter to President Obama in 2010 calling for heightened federal assistance.¹⁷⁸ In order to better secure the border, the governor requested 1,000 additional National Guard troops and recommended deploying unmanned aerial vehicles to provide surveillance and intelligence.¹⁷⁹ The letter also referenced the important role that Texas state law enforcement and military forces play in defending the border.¹⁸⁰ While the letter contains no indication that the governor intends to use the SDFs available to him for acts of overt aggression against Mexico or the drug cartels, the letter puts President Obama on notice of the governor's Invasion Clause (referred to above as the Guarantee Clause) responsibilities by outlining the specific threats and proposed responses.¹⁸¹

In response to the letter, John Brennan, former Assistant to President Obama for Homeland Security and Counterterrorism, ensured that about 255 additional National Guard troops would be sent to the border.¹⁸²

it is unlikely that an SDF would ever be sanctioned to use force by the U.N. Security Council, and it is unlikely that an SDF would attempt to intervene internationally in protection of human rights.

174. See *infra* notes 175–180 and accompanying text.

175. *Mother Pushing Stroller in Texas Hit by Bullet from Mexico*, BORDERLAND BEAT (Feb. 21, 2012), <http://www.borderlandbeat.com/2012/02/mother-pushing-stroller-in-texas-hit-by.html>.

176. TEX. DEPT. OF PUB. SAFETY, TEXAS PUBLIC SAFETY THREAT OVERVIEW 2013 16 (2013), available at http://www.txdps.state.tx.us/director_staff/media_and_communications/threatoverview.pdf.

177. William Booth, *Mexican Pirates Attack Texas Fishermen on Falcon Lake, Which Straddles Border*, WASHINGTON POST (May 30, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/29/AR2010052903707.html>.

178. Perry Letter, *supra* note 140.

179. *Id.*

180. *Id.*

181. See U.S. CONST. art IV, § 4; see also Perry Letter, *supra* note 140.

182. *Rick Perry Says He Awaits Answer from Barack Obama to August 2010 Letter on Border Security*, AUSTIN AMERICAN-STATESMAN (Apr. 25, 2013), <http://www.politifact.com/texas/statements/>

Further, President Obama's current policy toward Mexico and his recent meeting with President Enrique Peña Nieto of Mexico indicate that border security is a topic of discussion for both countries.¹⁸³ Presidents Obama and Nieto agree that border security is necessary to foster a healthy economic relationship and important to promote a collaborative approach to citizen security.¹⁸⁴ Thus, the federal government has responded to this conflict.

Because the federal government is currently maintaining relations with Mexican officials to respond to and monitor border violence,¹⁸⁵ a possible SDF action could undermine United States foreign policy or the war-making power, both of which are rightfully assigned to the executive branch and the federal government as a whole, respectively.¹⁸⁶ An SDF could defend its state legally by asserting that any action taken is a lawful response to an actual invasion or an imminent threat that could not be delayed—the two preconditions to SDF action pursuant to the Constitution.¹⁸⁷ This defense, and the outcome of any domestic legal case, might be a question of fact, dependent on whether there was a threat of sufficient imminence or an invasion requiring action.

Irrespective of the outcome of such domestic legal squabbles, international law would most likely find the SDF's action attributable to the United States.¹⁸⁸ The United States could thus find itself answerable in the international legal arena for the acts of a rogue domestic group that is constitutionally sanctioned but whose actions directly contravene current United States foreign policy.¹⁸⁹ Additionally, if an initial response by an SDF to a threat or invasion continued and escalated from the first shots fired to an enduring campaign, the United States could find itself dragged into an international conflict as the SDF's resources would likely not support a prolonged engagement.¹⁹⁰ Because of this danger, the United

2013/apr/25/rick-perry/rick-perry-says-he-awaits-answer-barack-obama-augu/.

183. *Joint Statement Between the United States and Mexico*, THE WHITE HOUSE (May 2, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/02/joint-statement-between-united-states-and-mexico>.

184. *Id.*

185. *See Rick Perry Says He Awaits Answer from Barack Obama to August 2010 Letter on Border Security*, AUSTIN AMERICAN-STATESMAN (Ap. 25, 2013), <http://www.politifact.com/texas/statements/2013/apr/25/rick-perry/rick-perry-says-he-awaits-answer-barack-obama-augu/>; *see also Joint Statement Between the United States and Mexico*, THE WHITE HOUSE (May 2, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/02/joint-statement-between-united-states-and-mexico>.

186. *See supra* notes 120–129 and accompanying text.

187. U.S. CONST. art. I, § 10, cl. 3.

188. *See supra* notes 96–100 and accompanying text.

189. *See supra* notes 93–100 and accompanying text.

190. The Invasion Clause would provide the obligation for the United States to become involved in a prolonged engagement.

States should either adopt strict and clear guidelines delineating the actions SDFs can take, or outlaw these entities as historical relics no longer necessary for protection against armed invasion.