RESURRECTING "*ROMANTICS AT WAR*": INTERNATIONAL SELF-DEFENSE IN THE SHADOW OF THE LAW OF WAR—WHERE ARE THE BORDERS?

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I.I NTRODUCTION

Rules relating to the use of force are among the traditional concerns of international law. "Although nowadays provisions of the United Nations Charter mark the starting point in debates about the legality of the use of

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force under international law," until 1945 theologians and international law theorists worked to define limits on permissible use of force.[1]

The horrifying consequences of World Ward II promoted a trend to restrict all means of the use of force, imposing legal restraints on the legitimacy of states to go to war, as well as on the means used in time of war. The victors of World War II re-cast the rules of the use of force, especially through the establishment of the UN Charter in 1945 and the Geneva Conventions in 1949. Ultimately, this trend was represented by the manifest desire of the international community to limit the use of force only to "international legal personalities," namely states,[2] and thus impose clear limits on the conditions by which states may invoke the permissible use of force; and to create a distinction between combatants and noncombatants; a distinction that alludes to what I view as a distinction between war among states and war among nations.

Holding this aspiration, the international community provided an explicit limit to the use of force, permissible only for performing an act of self-defense, as articulated in Article 51 of the UN Charter.[3] In time, the language of Article 51 proved not to be without ambiguities.[4] Among these ambiguities is the discussion on the precise meaning of the term "if an armed attack occurs."[5] This has been the subject of many articles and other discussions. However, in my view, this discussion ought to be led by a wide perspective of the international right to self-defense. Wide perspective requires not a mere inquiry of the historical cases in which the right to self-defense was invoked, or a limited discussion on the context for which Article 51 was established. Instead, wide perspective requires a deep interaction between, what I view as, vertical and horizontal analysis.

From the vertical point of view, it is remarkable that the international right to self-defense is a genuine product of the interplay between the law of war and international law. The development of the doctrine of *jus ad bellum* (the right to go to war) was reinstated by the international community following World War II, but this time with new restricted borders. The international community deemed it of much

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1. Mark W. Janis & John E. Noyes, Cases and Commentary on International Law 504 (West Group 2001) (1997).

2. *See generally* Charter of the United Nations (providing that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. . . ."); *see also* Werner Levi, *Contemporary International Law, in* JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 6 (Erwin Chemerinsky et al. eds., 2002) [hereinafter: DRW].

3. Charter of the United Nations, art. 51 (providing a general prohibition on the use of force).

4. See id.

5. Id.

importance to prohibit all means of the use of force under Article 2(4) of the UN Charter, and thus promoted a new era of peace and security.[6] Nevertheless, considering the right to self-defense as an inherent right of every sovereign state,[7] the international community has acknowledged the right to self-defense as "permissible use of force." This was the "Exception" and not the rule. Therefore, it is the notion of limiting states' power to go to war, limited only to actions of self-defense. Yet the question is: limited to what extent? This is a question for the horizontal analysis to answer.

Horizontal analysis invites to the discussion a parallel phenomenon; it is the domestic theory of self-defense—the original grounds of the concept of self-defense. It is true: one may plausibly argue against the application of a domestic theory over the international sphere, mainly because the actor is a human being in the former case, and a state in the latter. Nonetheless, it has never been denied that the legal philosophy behind both of them is alike. Moreover, the domestic theory can elaborate on the international theory by showing the need to restrict self-defense to an "armed attack," which of course does not include all kinds of "threats." Thus, a sensitive interplay between the two theories may provide the international legal community with a plain and defined notion of self-defense, and thus help to avoid misuse of the vagueness of the contemporary interpretation granted to the international right to self-defense.

Therefore, in the first section, I present the romantic notion of the law of war, by which I mean the traditional concept of the law of war, which is best illustrated by the almost unlimited power to use force both against military targets and civilian targets, and accordingly the horrific implications of such an understanding of the concept. In the second section, I address the post-World War II transition toward what I view as "the golden age of the law of war," namely the post-Charter era, focusing on the outstanding limits imposed by the international community on the use of force. That is, deeming the law of war as war between states, rather than nations, as well as drafting a general prohibition on the use of force, except in self-defense. Focusing on the exception for the general prohibition of the use of force, in the third section I challenge the traditional reading of Article 51 of the UN Charter. I provide three possible defense arguments under Article 51: 1) reactive; 2) anticipatory/preemptive; and 3) preventive. The reactive approach is a very restrictive form of the right to self-defense, for which an act of self-defense is permissible only in response to an armed attack that had already occurred or to an imminent threat of an armed attack. The anticipatory/preemptive approach is a broader form of self-defense. It includes a potential, but not visible, threat that has not reached a level of

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6. *Id.* at art. 2, para. 4.

7. Mark W. Janis, An Introduction to International Law 189 (4th ed. Aspen Publishers 2003) (1988).

"imminent threat." Finally, the preventive approach is the broadest and almost the unlimited form of self-defense. It includes threats that have not yet emerged at all. They are not even potential threats. They are solely threats that might emerge one day. Inquiring these three defense arguments, I assert that the international right to self-defense should be limited solely to reactive self-defense, by which I mean in response to an armed attack or to an imminent threat of an armed attack. This position is best advocated by the general and consistent trend of the international community to restrict all means of the use of force, and ultimately by understanding the essential features of the domestic theory of self-defense. In my view, adopting any defense argument other than the restrictive one would miss the goal that Article 51 was hoped to achieve. Finally, I conclude by criticizing the rise of the preventive approach as a legitimate ground for permissible use of force, argued to be the necessary approach in the contemporary "Age of Terrorism" as well as in the age of the non-conventional and nuclear arming.

II. ROMANTICS AT WAR:[8] NATIONS AND THE "UNLIMITED" JUS AD BELLUM

Medieval writers distinguished between *jus ad bellum*, the justice of war, and *jus in bello*, the justice in war.[9] *Jus ad bellum* requires making judgments about aggression and self-defense. *Jus in bello* is "about the observance or violation of the customary and positive rules of engagement."[10] The distinction between war among nations and war among states is of significant importance under the theory of *jus in bello*.[11] One of the important questions, therefore, is who takes part in the war.

Nationhood refers to people—ordinary people—who may or may not have a state. Something stronger than a state bounds the people together. That is the Shakespearean narrative of brotherhood (family-hood),[12] which encompasses a national identity for the people. The nation

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8. In his book, Professor George Fletcher provides a novel analysis of the law of war from a romantic perspective. *See* GEORGE P. FLETCHER, ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM (2002). On the theory of Romanticism, *see* ISAIAH BERLIN, THE ROOTS OF ROMANTICISM (Henry Hardy ed., Princeton University Press 2001) (1999). In the context of the law of war, I provide the romanticism theory as binoculars by which I can view traditional views throughout modern ones.

9. *See* JANIS & NOYES,*su pra* note 1, at 505.

10. Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations 21 (3d ed. 2000).

11. FLETCHER,*su pra* note 8, at 47, 58 ("This body of rules that legitimates conduct otherwise subject to punishment.").

12. WILLIAM SHAKESPEARE, THE LIFE OF HENRY V ACT 4, SC. 3 ("[W]e band of brothers; For he today that sheds his blood with me [s]hall be my brother . . . ."). The Notion of the brotherhood was raised again in the context of the American war on Iraq and on Afghanistan, namely a "war for honor and glory."

bears the factors that constitute each individual—the language, the history, the culture, the bond between geography and self. [13] The "nation" is what people feel "part of," rather than merely "belong to." It is one large entity, which has its own existence; it is a "self." "Nation" is personal; people have loyalty to it, *e.g.* they can betray the nation whether it is embodied in a state or not. The nation acts in history, achieving greatness and committing crimes, and for its glory as well as its shame. The nation must receive a share of both the credit and the blame.[14] Literally, the concept of nation is derived etymologically from the Latin none *natio* (birth). That is, the nation includes all those born and unborn.[15] Unlike a nation, a state is a political entity. It has no "self" existence. It is derived from the "will of the people" and for the "will of the people." State is what people "belong to," but not necessarily what they feel "part of." If the people are part of the nation, it follows that the nation comes first, and thus legitimizes the establishment of the state. Unlike "nation," state is timeless; it does not exist in time. State is not about death and birth, but about organization of power.

Reading the general context of the Lieber Code,[16] deemed as the first original and official codified rules on the law of war,[17] it is more likely that Francis Lieber viewed the war as among nations. For Lieber, not only combatants take part in the warfare but also noncombatants, as best illustrated by Article 20, which provides: "[P]ublic war is a state of armed hostility between **sovereign nations** or governments. It is a law and requisite . . . **called states or nations,** whose constituents bear, enjoy, and suffer, **advance and retrograde together, in peace and in war.**"[18] However, Lieber was not off track in his time. Six months after the Lieber Code came into existence Abraham Lincoln delivered his famous Gettysburg address, invoking precisely the establishment of "a new nation."[19] This was, therefore, a notion of warfare in the shadow of

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13. The sense of nationhood has played a great role in American history. *See* FLETCHER, *supra* note 8, at Xiii.

14. FLETCHER,*su pra* note 8, at 139.

15. *Id.* at 140. When Lincoln cast his regard back "four score and seven years," he thought not of the American people but of the American nation as the concept embracing generations over time.

16. U.S. War Department, General Orders No. 100 (1863), *reprinted in* Dietrich Schindler & Jiri Toman, The Laws of Armed Conflicts 3 (Martinus Nijhoff Publishers 1988) (1973).

17. It is "the first" in the sense that it had a large impact not only on the United States but also on other comparative jurisprudences. If I had to describe its importance in two words, I would say "*Universal Code*."

18. U.S. WAR DEPARTMENT,*su pra* note 16, at art. 20 (emphasis added). *See also id* at art. 21 ("[T]he citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.").

19. ABRAHAM LINCOLN, GETTYSBURG ADDRESS (Nov. 19, 1863). *Note*: this is an outmoded notion of the 19th century, which replaced the notion of warfare as among religions.

nationhood: "A war energetically carried on cannot be entirely confined to acts against the enemy under arms and his means of defense, but it will tend also to cause the destruction of his materials and moral resources. No consideration can be given to the dictates of humanity, such as consideration for persons and property, unless they are in accordance with the nature and object of the war."[20]

Ultimately, the Lieber Code represents the romantic notion of the law of war—a common perception until the end of the 19th century—namely war between nations. The romantic war at its best is the escape of the quotidian and the pursuit of glory.[21] Every citizen, every woman, every child, and every soldier are all alike. They are all combatants in the field, they all have the glory of the victory and the shame of the defeat, and thus they all have the right to kill and the risk to be killed. This is the romantic thinking; the nation acts as a character in the drama of war and reconciliation. It is an entity of the people; each is a major component of this united fabric. This is a war of all people, namely the nation is the actor in the battlefield. The "nation" is the soldier.[22] That is, once there is a war, all are part of it, and therefore individuals do not exist anymore; they disappear merely as being part of the nation. They become a legitimate target, exactly as they are legitimized for targeting others.[23] This I view as a notion of "heavy war," where no limits on warfare, and where no protected person exists. It is a war with one ultimate goal: "winning the war."[24]

However, the romantic perspective of the law of war affected not only the *jus in bello*, but also the *jus ad bellum* doctrine, which concerns itself with the justice of war. Akin to the ultimate unlimited notion of *jus in bello*, the 19th century imposed fewer restraints, if any, on the right to go to war. It is true: the international community recognized the legitimacy to self-defense long before the United Nations ever existed.[25] Nonetheless, the

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20. *See* PETER MAGUIRE, LAW AND WAR, AN AMERICAN STORY 71 (2000) (quoting German General Staff's *Manual of Land Warfare* (*Kriegsge brauchim Landkriege*)).

21. FLETCHER,*su pra* note 8, at 17.

22. *See generally* JOHN RAWLS, THE LAW OF PEOPLES: WITH "THE IDEA OF PUBLIC REASON REVISITED," (1999) (Rawls uses the word "people" synonymously with "nation").

23. On the "equal right to kill," *see* WALZER,*su pra* note 10, at 41. *See also* FLETCHER, *supra* note 8, at 92.

24. This notion of "heavy war" is a flawed approach, as it exposes innocent people, who are not willing to take part in the warfare, to the harsh conditions of the war, merely because they are part of the nation. *See also* The Prize Cases, 67 U.S. 635 (1862) (J. Nelson, dissenting). On the issue of collective guilt, *see* FLETCHER,*su pra* note 8, at 37.

25. Anthony Clark Arend & Robert J. Beck, International Law and the Use of Force: Beyond the United Nations Charter Paradigm 72 (1993); Ian Brownlie, International Law and the Use of Force by States 5 (1963). *See also* Sean M. Condron, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 Mil. L. Rev. 115, 128 (1999) (discussing the justification of military action in response to the threat that Iraq poses).

right to self-defense was recognized as a vague concept,[26] it was deemed to be more a right to self-preservation,[27] namely an absolute right, laying at the foundation of all of the other rights of states.[28] This was the case until World War II ended.

III. THE GOLDEN AGE OF THE LAW OF WAR: LIMITING STATES' POWER

World War II exposed an inevitable need for re-casting the international rules on the use of force. This was an urgent requisite to minimize, to the greatest extent possible, the exceptions for the use of force. The international community, therefore, promoted the emergence of the UN Charter in 1945 and the Geneva Conventions in 1949. Both documents came into the world with a new terminology on the law of war. The UN Charter limited the international legal personality to states, and provided a general prohibition on the use of force, subject to exceptions.[29] In the same vein, the Geneva Conventions enhanced the international community with the concept of protected persons,[30] as distinguished from states, more precisely, from the combatant forces (the military). In sum, the UN Charter provided a new meaning for the *jus ad bellum*,[31] and the Geneva Conventions superseded the romantic meaning of the *jus in bello*. It is in my view a clear transition from the concept of nationhood to the idea of statehood.

Accordingly, the modern law of war has restricted the reciprocal relationship to combatants. Only combatants are subject to being killed, and therefore only combatants enjoy the collective right to use force.[32] The 1949 Geneva Convention changed the romantic meaning of war: sick people, civilians, and prisoners "cannot be touched."[33] It is a new concept of what I view as "light war," namely, the ultimate goal of the war is not simply

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26. Louis Henkin, Right v. Might, International Law and the Use of Force 37 (2d ed. 1991).

27. As once argued by jurist William Hall: "[International law has] no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up. *See* WILLIAM E. HALL, A TREATISE ON INTERNATIONAL LAW (A. Pearce Higgins ed., Clarendon Press 8th ed. 2001).

28. JANIS,*su pra* note 7, at 189.

29. Charter of the United States, *supra* note 2.

30. Sick people, civilians, and prisoners.

31. W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 281 (1985) (providing criteria for the justification of the lawful use of force in international law).

32. *See* FLETCHER,*s upra* note 8, at 54.

33. The Fourth Geneva Convention, Aug. 12, 1949, 75 U.N.T.S. 973. *See* SHAKESPEARE, *supra* note 122; (Henry V orders his troops neither to humiliate the French language nor to touch the church, women and children. These are innocent persons, unlike the prisoners whom he orders to kill). *See also* Department of Defense, Military Commission Instruction No. 2 5(G) (2003).

winning the war, but rather keeping noncombatants away from the atrocities of war. In the same vein, the UN Charter limited the right to self-defense, both individual and collective, to states.[34] States are the ultimate subject of the Charter; hence it is only for the military forces (the "lawful combatants") to use force.

Unfortunately, whereas the need to restrict the gross means used in the battlefield has been in large consensus among the international community, the meaning and the essence of a state's right to self-defense is still in dispute.[35] That is, what are the borders of the right to self-defense? Under what circumstances may a state invoke it? Is it derived from the same rationales as the domestic right to self-defense? What difference does it make, if any? Is there any interplay between the rules of the UN Charter and the unwritten rules of international law of the pre-Charter era, what modern international lawyers call Customary International Law?

IV. STATES AND THE INTERNATIONAL RIGHT TO SELF-DEFENSE

On June 5, 1967, the turmoil between Israel and its neighboring Arab states escalated into a military confrontation, as Israel commenced a series of air strikes on the Egyptian air forces. Apparently, the crisis had its origin in reports circulated by Soviet officials in mid-May, to the United Arab Republic (UAR),[36] that Israel was amassing its forces on the Syrian border.[37] Upon learning that, Egypt amassed its troops on Israel's border, closed the Straits of Tiran to Israeli shipping, and secured command control over the armies of Jordan, Syria, and Iraq. In addition, Egypt had engaged in hostile propaganda against Israel, and President Nasser of Egypt had repeatedly made bellicose threats, including the total destruction of Israel.[38] The scope and intensity of Egypt's buildup, together with the mobilization of virtually every Arab army, was observed with near-panic in Israel. For Israel, the Egyptian attack was only hours away, and, therefore, Israel launched the first strike on June 5, 1967.

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34. Charter of the United Nations, *supra* note 3. This is unlike the right to self-defense under the Rome Statute of 1998, which grants individuals the right to self-defense. *See* Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, U.N. Doc. A/CONF. 183/9 (1998), 37 I.L.M. 999 [hereinafter Rome Statute]. *Cf.* Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 31 (July 9).

35. Louis Henkin et al, International Law: Cases and Materials 659 (2d ed. 1987).

36. A country that existed as a union between Egypt and Syria, established on February 1, 1958.

37. WALZER,*su pra* note 10, at 82–83.

38. George P. Fletcher, A Crime of Self-Defense: Bernhard Goetz and the Law on Trial 20–21 (1988); Michael B. Oren, Six Days of War: June 1967 and the Making of the Modern Middle East 75, 97, 108–09 (2002).

Whereas Israelis believed that Israel's use of force was justified by the dramatic threatening events of the previous weeks, Arab states argued that in the absence of an armed attack, Israel was not allowed to use any means of force under the UN Charter.[39] That is, unless an armed attack had occurred, Israel was not allowed to invoke a right to self-defense. Nevertheless, the United Nations Security Council took no position, as to whether Israel acted under self-defense or not. The Israeli attacks were neither proscribed nor praised.[40] The question, therefore, is whether Israel could have argued any defensible position under international law?

Under the UN Charter, which introduces the notion of a general prohibition on the unilateral use of force by states,[41] war is inherently unjust. The only "justified war"[42] would be a war against an aggressor,[43] namely in self-defense by a victim state.[44] Under the terms of Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs . . . ."[45]

Reading the simple words of Article 51, it becomes obvious that the international community recognizes, ultimately, a limited right of permissible use of force. However, the international right to self-defense was recognized, though in other versions, long before the international community drafted or ratified the UN Charter. The pre-Charter right to self-defense, known nowadays as the inherent right to self-defense, is considered as not limited to an armed attack. Nevertheless, given the vagueness of the right to self-defense in the pre-Charter climate, known as customary international law, and the narrowness of this right under the post-Charter, the question becomes, did this customary international law survive the establishment of the UN Charter? If yes, in which context, and to what extent?

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39. AREND & BECK, *supra* note 25, at 76–77.

40. Matthew L. Sandgren, *War Redefined in the Wake of September 11: Were the Attacks against Iraq Justified?*, 12 MICH. ST. J. INT'L L. 1, 15–16 (2003) (discussing the legitimacy of attacking Iraq).

41. Charter of the United Nations, *supra* note 2, at art. 2, para. 4.

42. In the fifth century, St. Augustine and other church fathers distinguished just from unjust wars, arguing that:

> [J]ust wars are usually defined as those which avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it. Further that kind of war is undoubtedly just which God Himself ordains.

JANIS,*su pra* note 7, at 171.

43. *Compare* G.A. Res. 3314 (XXIX), ¶ 3, U.N. GAOR, 29th Sess., 2319th plen. mtg., *with* U.N. Doc A/RES/3314 (1974).

44. JANIS & NOYES,*su pra* note 1, at 514.

45. Charter of the United Nations, *supra* note 2.

V. THE INTERNATIONAL RIGHT TO SELF-DEFENSE: A RESTRICTED APPROACH

In time, the language of Article 51 proved not to be without ambiguities. However, it has been accepted that the right to self-defense is subject to limitations of "necessity" and "proportionality."[46] It has also been accepted that self-defense includes both a right to repel an armed attack and to take the war to the aggressor state,[47] in order to terminate the attack and prevent a recurrence. The ambiguity upon Article 51, therefore, is limited to the arguable meaning of the term "if an armed attack occurs."[48] The question, therefore, what is "permissible use of force" under Article 51 of the UN Charter?

A. Reactive Self-Defense

The reactive self-defense approach is derived from the precise meaning of the term "if an armed attack occurs." That is, self-defense to an aggression that is already done or in progress. The classic case[49] is the war on Afghanistan, which is regarded as a response to the September 11 attacks. Nonetheless, the 1967 Israeli-Egyptian case is more controversial, and thus raises the question as to whether the term "if an armed attack occurs" includes "imminent threat" as a legal ground for invoking the right to self-

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46. *See* JANIS & NOYES,*su pra* note 1, at 518.

47. I may note that the notion of taking the war to the aggressor state raises, in my view, several interesting legal questions. The classic rationale behind the right to self-defense is to repel the aggression or the threat of the aggression, but not to go after the aggressor to his "house" and continue the aggression. That would be a clear case of excessive self-defense which is impermissible use of force. Whereas this rationale plainly corresponds to the domestic right to self-defense, it might need to be addressed from a different angle in the context of the international law. However, I leave this issue for a separate inquiry.

48. Charter of the United Nations, *supra* note 2. Note that in the lack of the word "unlawful," besides the term "armed attack," one may plausibly argue that once there is an armed attack, the other side can respond as means of self-defense, but also the one that waged the first attack can respond to the attack waged as means of self-defense, also as means of self-defense. *Remember*: unlike "aggression," "armed attack" does not include in itself the unlawful feature of aggression. However, since I believe that the drafters did not pay much attention to this term, the right to self-defense should be interpreted as limited to "unlawful armed attack." Otherwise, it will be contrary to the rationale behind treating self-defense as permissible use of force rather than aggression, namely as a defense of justification rather than an excuse.

49. It is arguable though if the right to self-defense might be invoked against non-state actor, *e.g.*, Al-Qaeda or PLO. For instance, *see*. Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 31 (July 9).