

# THROUGH THE LOOKING GLASS: RE- IMAGINING LEGAL AND LEGITIMATE FORCE IN THE CONTEMPORARY OPERATING ENVIRONMENT

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“Why, it’s a Looking-glass book, of course!

And if I hold it up to a glass, the words will all go the right way again.”<sup>1</sup>

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1. LEWIS CARROL, THROUGH THE LOOKING GLASS 31 (1897).

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## I. INTRODUCTION

On January 3, 2020, the United States conducted a unilateral attack near Baghdad International Airport, killing Iranian Major General Qassim Soleimani.<sup>2</sup> President Trump initially justified the attack by telling reporters from Mar-A-Lago that “Soleimani was plotting imminent and sinister attacks on American diplomats . . . .”<sup>3</sup> Days later, the United States transmitted a formal notification to the United Nations reporting the action as an exercise of self-defense under Article 51 of the United Nation’s Charter.<sup>4</sup> Instead of claiming the action as a response to an imminent threat, this notification cited “an escalating series of armed attacks . . . by the Islamic Republic of Iran . . . against the United States.”<sup>5</sup>

The United States’ justification generated no shortage of commentary ranging from approval to condemnation of the attack as an illegal assassination.<sup>6</sup> Even some members of the United States Congress, after

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2. Throughout this piece, there will be several footnote references to articles in which authors spell Iranian Major General Soleimani’s full name differently, as either “Qassim Suleimani” or “Qasem Soleimani.” Michael Crowley, Falih Hassan & Eric Schmitt, *U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces*, N.Y. TIMES (Jan. 2, 2020), <https://www.nytimes.com/2020/01/02/world/middleeast/qasem-soleimani-iraq-iran-attack.html>.

3. Remarks by President Trump on the Killing of Qasem Soleimani, NAT’L SEC. & DEF. (Jan. 3, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-killing-qasem-soleimani/> (last accessed Mar. 23, 2020) [hereinafter President Trump Remarks, Jan. 3, 2020].

4. Letter from Ambassador Kelly Craft, U.S. Permanent Representative, to Ambassador Dang Dinh Quy, Pres. SCOR (Jan. 8, 2020) [hereinafter Ambassador Craft Letter, Jan. 8, 2020].

5. *Id.* (citation omitted).

6. See Oona A. Hathaway, *The Soleimani Strike Defied the U.S. Constitution*, ATLANTIC (Jan. 4, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/soleimani-strike-law/604417/> (citing a lack of domestic and international legal basis for the strike and noting a disagreement amongst people regarding the legality of the strike); Agnes Callamard, *The Targeted Killing of General Soleimani: Its Lawfulness and Why It Matters*, JUST SECURITY (Jan. 8, 2020), <https://www.justsecurity.org/67949/the-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters/> (arguing in part that the so-called “first shot” theory might justify this act under international law); Alan M. Dershowitz, *Easy Call: The Strike on Soleimani was Lawful*, WALL STREET J. (Jan 5, 2020, 5:06 PM), <https://www.wsj.com/articles/easy-call-the-strike-on-soleimani->

receiving a classified briefing on the Soleimani strike, expressed skepticism, stating that the threat did not appear to be imminent.<sup>7</sup> However, a focus on imminence, as a requirement precedent to action, reveals a critical misunderstanding of the law regarding the use of force in self-defense. While the imminence of a potential attack is a relevant factor in an ex-ante assessment of a potential use of force in self-defense, the *necessity* of responding to a threat is the key factor.

#### A. *The Problem*

The confusions stems, in my estimation, from a flawed reading of the exchange between U.S. Secretary of State Daniel Webster and U.K. Special Minister Lord Ashburton in response to the 1837 *Caroline* incident. In an exchange of letters after British troops set afire and destroyed the United States flagged ship, the *Caroline*, Webster described the standard for use of force in self-defense as a “*necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation.*”<sup>8</sup> In shorthand, this may be described as “imminence.”<sup>9</sup>

Today, over-reliance on imminence hoists it to a level of necessary pre-condition to action. Editors Henry Shue and David Rodin, in the introduction to their excellent volume on preemption, call this imminence-required view the traditional “Websterian” view, and attribute it to Michael Walzer.<sup>10</sup> Unfortunately, while this view may be well-followed, I believe it diverts from the original meaning of Webster’s statement. As Shue and Rodin note, even Walzer himself would likely condone action before a potential attack is imminent.<sup>11</sup>

The idea that imminence is a pre-condition to action is a dangerous proposition because as Yoram Dinstein explains, “imminence may mean

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was-lawful-11578261997 (arguing the killing was lawful as an authorized and proportionate response to the actions of a combatant).

7. See Rebecca Shabad & Mike Felan, *‘Insulting and Demeaning’: Two GOP Lawmakers Rip Trump Administration After Iran Briefing*, NBC NEWS (Jan. 8, 2020, 2:17 PM), <https://www.nbcnews.com/politics/congress/insulting-demeaning-lawmakers-rip-trump-administration-after-iran-briefing-n112596>.

8. Letter from Daniel Webster, United States Secretary of State, to Mr. Fox, British Foreign Minister (Apr. 24, 1841), [https://avalon.law.yale.edu/19th\\_century/br-1842d.asp](https://avalon.law.yale.edu/19th_century/br-1842d.asp) [hereinafter Webster Letter, Apr. 24, 1841] (emphasis added).

9. See Ashley Deeks, *“Imminence” in the Legal Adviser’s Speech*, LAWFARE (Apr. 6, 2016, 7:00 AM), <https://www.lawfareblog.com/imminence-legal-advisers-speech> (describing a speech by U.S. State Department legal advisor, Brian Egan, on the concept of imminence in self-defense).

10. Henry Shue & David Rodin, *Introduction*, in PREEMPTION: MILITARY ACTION AND MORAL JUSTIFICATION 1, 4 (Henry Shue & David Rodin, eds., 2007).

11. *Id.*

different things to different people: either too little or too much.”<sup>12</sup> One might imagine an imminent threat that does not necessitate an immediate response, such as a mere border skirmish that offers no threat to national security. Conversely, some have argued that immediate military action might be authorized in response to non-imminent threats.<sup>13</sup> Yet imminence continues to permeate the intellectual landscape of self-defense.

What we need is a proverbial looking glass to make the words “go the right way again,” with a renewed focus on the *necessity* of action as opposed to the imminence of a threat. In this article, I will argue that Article 51 of the U.N. Charter supplements the pre-existing customary international law of self-defense as embodied in the *Caroline Case*. While nearly 200 years old, the *Caroline* standard, when properly interpreted, allows for the use of force to address all contemporary needs under one coherent rule which accounts for pre-attack self-defense and comports with the U.N. Charter’s purposes.<sup>14</sup>

#### B. *Why This Matters*

An over-reliance on the concept of imminence risks both over and under-inclusion of threats that trigger the right of self-defense. More importantly, a narrow view of imminent threats as the limiting factor may preclude potential uses of force that are necessary from a national security interest and simultaneously protect humanitarian interests. Without clear and delineated legal options, states may resort to using vague references to “national security interests” as convoluted attempts to justify action.

For example, on April 13, 2018, the United States, in conjunction with allies, including the United Kingdom and France, conducted a limited use of force attack against the Assad regime in Syria.<sup>15</sup> The United Kingdom justified its actions in a detailed memorandum, stating “[t]he legal basis for the use of force is humanitarian intervention.”<sup>16</sup> The United States offered

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12. YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 205 (5th ed. 2011).

13. See generally Ashley S. Deeks, *Taming the Doctrine of Pre-Emption*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 661, 662-63, 665-68 (Marc Weller, ed. 2015) (describing theories of self-defense to include anticipatory self-defense, preemptive self-defense, and preventative self-defense).

14. Article 1 of the U.N. Charter lists four purposes, which may be summarized as: to maintain international peace and security; to develop friendly relations; to achieve international co-operation and promotion of respect for human rights; and to harmonize the actions of nations in the attainment of these ends. U.N. Charter art. 1.

15. *International Response to Assad Chemical Weapons*, U.S. DEP’T OF DEF., <https://www.defense.gov/News/Special-Reports/Syria/> (last visited May 3, 2018).

16. The UK explained that such humanitarian intervention is lawful when three conditions are met: (1) there is convincing evidence, generally accepted by the international community as a

no such legal justification, but Defense Secretary James N. Mattis opined that the strikes were an attempt to stop President Bashar al-Assad from using inhumane weapons, and to protect the national security interest of the United States.<sup>17</sup>

While the United Kingdom expressed definitively its legal authority to carry out the attack under a theory of humanitarian intervention, the question of its legality remains open on the international stage. Some international lawyers have expressed skepticism towards the concept of humanitarian intervention because it might be viewed as a violation of state sovereignty.<sup>18</sup> Indeed, during years of turmoil in the former Yugoslavia, the United Nations Security Council seemed ill-suited to act, perhaps due to uncertainty over the sovereignty issue, fueled by the lack of a discernable imminent threat to Member States.

As a general matter, doubt regarding the legal basis for the use of force may cause hesitation to use such force. Perhaps this is a good thing, but in critical situations, when the decision to act concerns a matter of moral imperative to humanity, hesitation may prove deadly. Louis Henkin, former President of the American Society of International Law and Professor at Columbia University, considered the issue of humanitarian intervention and argued that it would be “highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention.”<sup>19</sup>

Henkin wondered whether it would be “better to leave the law alone, while turning a blind eye (and deaf ear) to violations that had compelling moral justification . . . [or] push the law along to bring it closer to what the law ought to be?”<sup>20</sup> In his estimation, the concern of abuse in the form of

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whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief; (2) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and (3) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian suffering and must be strictly limited in time and in scope to this aim (i.e., the minimum necessary to achieve that end and for no other purpose). Prime Minister’s Office, Syria Action – UK Government Legal Position, GOV.UK (Apr. 14, 2018), <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>.

17. See Jim Garamone, *Mattis, Dunford Detail Attacks on Syrian Chemical Arsenal*, U.S. DEP’T OF DEF. (Apr. 13, 2018), <https://www.defense.gov/News/Article/Article/1493636/mattis-dunford-detail-attacks-on-syrian-chemical-arsenal/> (stating the strike sends a “clear message” to Syria that “they should not perpetrate another chemical weapons attack,” and that “allied forces are ready to continue the action if Assad continues to use these banned weapons”).

18. Anthony F. Lang, Jr., *Introduction: Humanitarian Intervention – Definitions and Debates*, in JUST INTERVENTION 6 (Anthony F. Lang, Jr. ed., 2003).

19. Louis Henkin, Editorial Comments: *NATO’s Kosovo Intervention: Kosovo and the Law of “Humanitarian Intervention,”* 93 AM. J. INT’L L. 824, 826 (1999).

20. *Id.* at 827 (citation omitted).

increased unilateral force justified states to “acquiesce in violation[s] considered necessary and desirable.”<sup>21</sup>

Though Henkin’s powerful voice provides noteworthy commentary, I believe a precedent of tolerable illegality is a dangerous one which should give reason for pause. Consider, for example, a situation in which the same justification is proposed on the subject of torture. In an essay proposing judicial warrants for torture, Alan Dershowitz argued that “unless a democratic nation is prepared to have a proposed action governed by the rule of law, it should not undertake, or authorize, that action.”<sup>22</sup> His point is that “willful blindness” to torture without limits or standards may in fact increase the use of torture.<sup>23</sup>

Similarly, if actions deemed “humanitarian” are given no safe-harbor in legality, repeated acquiescence by the international community of so-called illegal acts carried out in the name of humanity might embolden states acting under a humanitarian mantle (e.g., Crimea) to take further “actions,” which is a slippery slope problem in its own right. A requirement of showing imminence of attack against a third-party helping state increase the slope because such an attack is unlikely in crises of a humanitarian nature. By requiring only the demonstration of the necessity of action (with or without imminence), states may justify actions that benefit humanity with a plausible grounding in national security interests.

It is foreseeable that Security Council action in response to a humanitarian crisis may at times be restricted due to the veto power. In these moments, it seems far preferable to ground unilateral or even multilateral action in necessity of action to defend national security than to turn a blind eye to illegal uses of force, legitimizing their use.

Henkin’s implicit suggestion is that there is a gap between lawful action and humanitarian need, but this itself is tortured logic (pun intended). It has been argued that the U.N. Charter, and by implication customary international law, includes “an element of ambiguity that enables some degree of reinterpretation based on changing international conditions.”<sup>24</sup> With a renewed focus on necessity at the center of customary self-defense law, we can harmonize traditional uses of force under the U.N. Charter not

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21. *Id.*

22. Alan Dershowitz, *Tortured Reasoning*, in *TORTURE* 257, 264 (Sanford Levinson ed., 2004).

23. *Id.* at 265 (stating that “without limitations, standards, principles, or accountability the use of such techniques will continue to expand”).

24. AIDEN WARREN & INGILD BODE, *GOVERNING THE USE-OF-FORCE IN INTERNATIONAL RELATIONS: THE POST 9/11 U.S. CHALLENGE ON INTERNATIONAL LAW* 12-13 (Stuart Croft ed., 2014) (explaining that the U.N. Charter is an “evolving organ,” drafted in a way to allow for reinterpretation of its provisions based on changing circumstances).

only to protect national security interests, but also to assist in resolving humanitarian crises.

Such a coherent rule would enable the international community to defend humanity in the open. On the same note, but in connection with the United States' targeted killings program, Harold Koh stated, "a swift and thorough public explanation is needed, so that . . . others who will be affected can assure themselves that the government action is indeed justified under international law."<sup>25</sup> Necessity-based analyses allow for such justifications, and would provide legitimacy to the actions taken by states, and to the international legal regimes supporting them.

Part II will summarize the traditional theories for the use of force, as written in the U.N. Charter. This will set the stage for a discussion in Part III of the customary rule of self-defense, in which I will re-cast the customary self-defense analysis from the perspective of necessity. Additionally, Part III will also consider potential problems and objections to this proposed analytical tool. Part IV will discuss pre-attack self-defense and consider how a necessity-based analysis might help harmonize the various theories of pre-attack uses of force.

## II. TRADITIONAL THEORIES FOR THE USE OF FORCE

Christine Gray once noted, "[t]he law on the use of force is one of the most controversial areas of international law and one where the law may seem ineffective."<sup>26</sup> Before delving into its potential inadequacies, it is important to take measure of the state of the law. Article 2(4) of the U.N. Charter prohibits the "threat or use of force against the territorial integrity or political independence of any state."<sup>27</sup> In essence, the sovereignty of states is protected against the use of force except in specific circumstances.<sup>28</sup>

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25. Harold Hongju Koh, *The Legal Adviser's Duty to Explain*, 41 YALE J. INT'L L. 189, 195 (2016) (citation omitted). In the case of targeted killings, states may expand the concept of imminence to allow for action at the "last window of opportunity" before an enemy becomes untraceable and commences the preparations for an attack. See U.S. DEP'T OF J., *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force* (Nov. 8, 2011), <https://fas.org/irp/eprint/doj-lethal.pdf>.

26. Christine Gray, *The Use of Force and the International Legal Order*, in INTERNATIONAL LAW 618, 618 (Malcolm D. Evans, ed., 4th ed. 2014).

27. U.N. Charter art. 2, ¶ 4.

28. GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* 36-37 (2008).

### A. *U.N. Charter Self-Defense*

The only delineated exception is Article 51 of the U.N. Charter, which provides for the use of force in self-defense in at least two circumstances.<sup>29</sup> The Article is provided in full here as it will be frequently referenced in the following pages:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>30</sup>

The first circumstance is the use of force to respond to an armed attack, or when an armed attack occurs. The right to use force lasts until the Security Council acts (or “takes measures”) to maintain peace and security.

One might debate when an armed attack “occurs” for the purposes of Article 51. The strict textualist approach would seem to require an actual armed attack to have at least begun, suggesting a requirement to “take the first punch.”<sup>31</sup> But in an era involving Weapons of Mass Destruction (“WMD”), absorbing the first volley of an attack certainly does not appear consistent with a state’s “inherent” right to defend itself. And while nuclear war seems a distant and remote possibility, new technologies with massive destructive force may require similar analysis. For example, hypersonic weapons, currently under development, are difficult to stop once fired.<sup>32</sup>

Advocates of a broader right to self-defense might dismiss Article 51 as inept draftsmanship, but as Professor Dinstein opines, the language is “quite satisfactory once it is recognized that the right of self-defence is deliberately circumscribed to counter-force stimulated by an armed attack.”<sup>33</sup> This is an instructive point, as it implies a difference between an armed attack and a *threat* of an armed attack. In Dinstein’s learned

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29. *Id.* at 36.

30. U.N. Charter art. 51.

31. WARREN & BODE, *supra* note 24 at 28.

32. See Jen Judson, *Pentagon’s Major Hypersonic Glide Body Flight Test Deemed Success*, DEFENSE NEWS (Mar. 21, 2020), <https://www.defensenews.com/smr/army-modernization/2020/03/20/pentagons-major-hypersonic-glide-body-flight-test-deemed-success/> (last accessed Mar. 23, 2020).

33. DINSTEIN, *supra* note 12, at 198.



opinion, the right to use force begins once an attack is in its “incipient stage,” meaning there is no need to wait for “bombs to fall.”<sup>34</sup>

Interestingly, the French version of Article 51 (also considered official) triggers the right to self-defense where a state becomes the object of armed *aggression*, which might support a broader interpretation when aggression is considered something short of an attack.<sup>35</sup> The 1998 Rome Statute of the International Criminal Court envisioned a crime of aggression falling within the Court’s jurisdiction, but the State parties could not agree initially on a definition.<sup>36</sup>

In 2010, during the first review conference for the Rome Statute held in Kampala, Uganda, State parties agreed on a definition of aggression that criminalizes state use of force that contravenes the U.N. Charter.<sup>37</sup> The second part of the definition provides a non-exclusive list of acts which would constitute aggression. It follows that when a state observes a listed act entering the “incipient state,”<sup>38</sup> it might be argued that the act then crosses the necessary threshold, from threat to attack, justifying the use of force in self-defense.

It should be noted that under Article 51 self-defense, the right to use force lasts only until the Security Council acts to maintain peace and security.<sup>39</sup> In other words, while the Charter acknowledges a state’s sovereign right to defend itself from attack, the Charter vests in the Security Council, as the action arm of the United Nations, the authority to take whatever actions it deems necessary to *maintain and restore* international peace and security.<sup>40</sup>

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34. *Id.* at 200 (emphasis added).

35. WARREN & BODE, *supra* note 24 at 29 (translating the French text of Article 51, “dans le cas ou un membre... est l’objet d’une agression armee” to “in the case where a member ... is the object of an armed aggression”).

36. Article 5, Part 2 of the Rome Statute of the International Criminal Court states: “The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.” Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

37. *Id.* at art. 8 *bis*; *Report of Review Conference of the International Criminal Court: Kampala, 31 May – 11 June 2010*, COALITION FOR THE INT’L CRIM. CT. (2010), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP9/OR/RC-11-Part.I-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-Part.I-ENG.pdf) [hereinafter *Kampala Conference Report*].

38. The term “incipient state” is a term borrowed from author, Yoram Dinstein. DINSTEIN, *supra* note 12, at 198.

39. U.N. Charter art. 51.

40. One note worth consideration: Article 51 contemplates a right of self-defense that is bound/ended by Security Council action to *maintain* peace. It is interesting that the word “restore” is not included in this first clause, but is included later in describing the Security

B. *Security Council Action to Maintain or Restore International Peace and Security*

The Security Council's power to act to maintain and restore peace and security stems from Chapter VII of the U.N. Charter. As originally conceived, the United Nations would have a standing army that the Security Council could call upon to respond to acts of aggression.<sup>41</sup> This idea obviously did not come to fruition but does not diminish the Security Council's role in maintaining peace.

Indeed, the articles falling within Chapter VII give tremendous power to the Security Council to respond to security concerns. A controversial topic regarding self-defense involves how soon a state may act before an actual attack. Interestingly, it is at least one author's opinion that the Security Council has no such limits.<sup>42</sup> Article 39 empowers the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and . . . decide what measures shall be taken . . . to maintain or restore international peace and security."<sup>43</sup>

Articles 41 and 42 grant the Security Council authorities to take non-armed and armed actions, respectively, to enforce its decisions.<sup>44</sup> When non-armed measures prove (or are determined to be) inadequate, the Security Council may authorize force. In modern usage, the typical language of a Security Council Resolution allowing force will call upon states to take "all necessary means" to achieve the stated goal.<sup>45</sup>

While it appears that state use of force under Article 51 (which falls within Chapter VII) is limited by a triggering attack or aggression, the use of force by the Security Council is not so limited. This is an important point. When arguing for an expansive right of state resort to force, it is worth noting that one interpretation sees the U.N. Charter as seemingly striking a balance: clear attacks or acts of aggression are left to states, but less-overt threats not amounting to attacks are reserved to the Security Council.<sup>46</sup> Other states disagree and see no gap between Article 2(4)

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Council's plenary authority to "maintain and restore." Is this simply a scrivener's error or perhaps an intentional omission? Might the absence of "restore" indicate space in which customary law fills the void? I will leave this discussion for another time.

41. Gray, *supra* note 27 at 636.

42. WARREN & BODE, *supra* note 24, at 28.

43. U.N. Charter art. 39 (citation omitted).

44. U.N. Charter arts. 41, 42.

45. See, e.g., S.C. Res. 678, ¶ 2 (Nov. 29, 1990).

46. It should be noted that there is disagreement regarding the language in arts. 2(4) and 51 of the U.N. Charter. While certain states believe the art. 2(4) language, "threat or use of force" is analogous to the art. 51 language, "armed attack," other states see them as distinct levels of force. It may be said that the latter states see a "gap" between the language.

threats/uses of force and Article 51 armed attacks. That said, there exist “deep divisions between States and between scholars as to where the right of self-defense” begins.<sup>47</sup> These divisions are due to actual or perceived gaps in the law and it is into those gaps we will now proceed.

### III. CUSTOMARY SELF-DEFENSE

One point of disagreement involves whether Article 51 fully encapsulates the right of self-defense, or whether there exists outside of it some additional inherent right.<sup>48</sup> The teleological approach to treaty interpretation would consider the object and purpose<sup>49</sup> of the U.N. Charter in concluding that the drafters purposely “constructed the *jus ad bellum* regime so as to decrease the unilateral use-of-force...”<sup>50</sup> One might respond that it would be illogical to presume that the Charter’s object and purpose would require a state to absorb a military strike before allowing for the right of self-defense to vest.<sup>51</sup>

The benefit of requiring an actual attack before allowing for lawful actions in self-defense is certainty. But this certainty comes at the cost of potential death and destruction, and a reduced chance that states will follow a rubric requiring such a cost. Conversely, allowing for force in self-defense absent some limiting principle would engender a sense of lawlessness contrary to the ideals of the U.N. Charter. To help sort out the contours of a customary right to self-defense, let us turn to the case that changed self-defense “from a political excuse to a legal doctrine.”<sup>52</sup>

#### A. *The Caroline Incident*

The historical setting for the *Caroline* incident and the lessons we will draw from it places us in colonial Canada in 1837.<sup>53</sup> Geographically, the incident occurred in the border region between the United States and British

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47. Gray, *supra* note 26, at 627, 639.

48. *Id.* at 628.

49. The Vienna Convention is a multilateral treaty created by the U.N. that codifies the customary international canons governing international agreements. In the article, I write “object and purpose,” as dictated by art. 31, sec. 1 of the Vienna Convention, which states, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (entered into force Jan. 27, 1980).

50. WARREN & BODE, *supra* note 24, at 31.

51. *Id.* at 32.

52. R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AMER. J. INT’L. L. 82, 82 (1938).

53. *Id.*

Canada, in the vicinity of Niagara Falls.<sup>54</sup> Canadian rebels actively recruited support for their cause along the border with the United States. Given the relatively recent fight for independence from British rule in the United States, the rebels had little difficulty finding sympathy.<sup>55</sup>

An armed group of rebels captured a British possession called Navy Island and began shipping fighting men and supplies to the island via a ship named the “Caroline” from the territory of New York.<sup>56</sup> There is some indication that the British appealed to the Governor of New York for assistance in stemming the flow of support, but no such help came.<sup>57</sup> In response, Colonel McNab, then the commander of British forces, determined that “destruction of the Caroline would serve the double purpose of preventing further reinforcement and supplies from reaching the island, and depriving the rebels of their means of access to the mainland of Canada.”<sup>58</sup>

On December 29, 1837, the *Caroline* made routine stops in Buffalo, Black Rock Harbor, and Navy Island, before stopping for the night in Fort Schlosser, in the United States.<sup>59</sup> That evening, British soldiers boarded the *Caroline* by force, lit her on fire, and set her adrift over Niagara Falls. The British claimed that the United States failed to assist the British when requested, and also failed to enforce its own laws in the border region.<sup>60</sup> In essence, the British claimed the incursion was necessary as a matter of self-defense.

#### B. *It is All About Necessity*

As one scholar, R.Y. Jennings, wrote in his analysis of *Caroline*, “the conception [of self-defense] was rescued from . . . an absolute primordial right of self-preservation . . . and was subjected to the limiting condition of necessity; and necessity is nowhere more carefully defined than in [Secretary of State] Webster’s letter.”<sup>61</sup> The diplomatic exchange that yielded this self-defense actually started before Webster’s tenure, beginning

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54. GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 176 (2d ed. 2016); *1837- Caroline Affair*, HISTORY CENTRAL, <https://www.historycentral.com/Ant/caroline.html> (last visited March 28, 2020).

55. Jennings, *supra* note 52, at 82.

56. *Id.* at 83.

57. *Id.*

58. *Id.* at 83-84.

59. *Id.* at 84.

60. *Id.* at 85.

61. *Id.* at 92 (citation omitted).

with an exchange between American Secretary of State John Forsyth and the British Foreign Minister, Mr. Fox.

Daniel Webster, succeeding John Forsyth, concluded the exchange in a letter presciently detailing the law of self-defense to the newly appointed special minister, Lord Ashburton.<sup>62</sup> Secretary of State Webster wrote:

The Government of the United States . . . does not think that the transaction can be justified by any reasonable application or construction of the right of self-defence under the laws of nations. It is admitted that a just right of self-defence attaches always to nations, as well as to individuals, and is equally necessary for the preservation of both . . . and when its alleged exercise has led to the commission of hostile acts, within the territory of a power at peace, nothing less than a clear and absolute necessity can afford ground of justification . . . *It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation . . . even supposing the necessity of the moment [they must show they] . . . did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.*<sup>63</sup>

Webster left quite a bit of law to unpackage in this short statement. First, we will start with an assessment of imminence, what Webster meant by the term, and where certain modern interpretations have gone wrong. Second, we will turn to the concept of proportionality as it is embedded in this letter. Finally, we will return to our starting point to consider necessity as the driving force in the law of self-defense.

1. The imminence of a particular threat is important but not dispositive to a right to use force in self-defense

Months before becoming National Security Advisor, John Bolton penned an opinion editorial in the Wall Street Journal making the “legal” case for striking North Korea.<sup>64</sup> He argued, “[t]he threat is imminent, and the case against pre-emption rests on the misinterpretation of a standard...”<sup>65</sup> Bolton concluded that an American strike on North Korea would “[c]learly not” violate Webster’s test.<sup>66</sup>

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62. *Id.* at 88.

63. Webster Letter, Apr. 24, 1841, *supra* note 8 (citation omitted) (emphasis added).

64. John Bolton, *The Legal Case for Striking North Korea First*, WALL STREET J. (Feb. 28, 2018, 6:59 PM), <https://www.wsj.com/articles/the-legal-case-for-striking-north-korea-first-1519862374?ns=prod/accounts-wsj>.

65. *Id.*

66. *Id.*

Bolton's analysis may prove to be an example of the risk presented by an over-reliance on the imminence standard. In his opinion editorial regarding the legality of striking North Korea first, Bolton claims, "[p]re-emption opponents argue that action is not justified because Pyongyang does not constitute an 'imminent threat.' They are wrong."<sup>67</sup> While Bolton correctly states the test is one of necessity, he seems to equate future imminence with a present necessity to act. While this could be true in some circumstances, this case in hindsight proves a lack of necessity.

At issue is the difference between the terminology of theories of self-defense in advance of an actual attack. Terminology such as "anticipatory," "preemptive," "precautionary," and "interceptive self-defense" have all found their way into academic debates and even national doctrine.<sup>68</sup> Shue and Rodin offer a helpful distinction that "[t]he normative conceptions of preemptive attack and preventative war can be made mutually exclusive by requiring, by definition, that a military action is preemptive only if it responds to an imminent attack and that a military action is preemptive only if it does not respond to an imminent attack..."<sup>69</sup>

Dinstein's proposal of *interceptive self-defense* offers an interesting addition to the discussion. Dinstein uses the term "interceptive" to refer to the use of force to counter an armed attack that "the other side has committed itself to . . . in an ostensibly irrevocable way."<sup>70</sup> His use of the term interceptive avoids the policy-laden discussion that typically surrounds anticipatory self-defense. To Dinstein, the issue "is not who fired the first shot but who embarked upon an apparently irreversible course of action, thereby crossing the legal Rubicon."<sup>71</sup> I argue that the corollary to this point of no return is a necessity to act.

The presence of imminence (or lack thereof) is important, but must be considered as part of a larger test that includes, by the very language of *Caroline*, whether there is a choice of means or a moment for deliberation. In other words, the totality of the circumstances matter to determine whether there is a necessity to act in the present. Returning to Bolton and the North Korean example, while it is beyond the scope of this article to speculate on the imminence of the North Korean threat at the time of occurrence or even today, there certainly appears to have been a choice of means. Diplomatic measures have produced high-level talks and perhaps a

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67. *Id.*

68. See DINSTEIN, *supra* note 12, at 194 (stating that the United States' claim to a preemptive right is often termed "anticipatory" self-defense).

69. Shue & Rodin, *supra* note 10, at 2 (citation omitted).

70. DINSTEIN, *supra* note 12, at 204-05 (citation omitted).

71. *Id.* at 204.

commitment to end a state of war on the Korean Peninsula.<sup>72</sup> At the very least, diplomatic measures have delayed the necessity of military action.

2. If force is used in self-defense, that force should be neither unreasonable, nor excessive, and must be limited by the necessity that compels the use of force

As a preliminary note, it is important to distinguish between the *jus ad bellum* and *jus in bello* concepts of proportionality. To describe the latter, a disproportionate attack is one “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>73</sup>

Proportionality in the *jus ad bellum* sense means something entirely different. Dinstein describes it as a reasonableness standard “in the response to force by counter-force.”<sup>74</sup> But the question remains -- what is reasonable? Some suggest that “[t]here is a profound lack of clarity and consensus as to the test to be applied with regard to the proportionality requirement...”<sup>75</sup>

One approach, specifically the equivalent retaliation approach, would countenance force commensurate in strength with the attack but last only so long as necessary to neutralize the threat.<sup>76</sup> Another approach might attempt to align force in self-defense with the pursued objective.<sup>77</sup> If, for example, the objective was deterrence, this theory would allow a minimum level of force necessary to persuade the aggressor not to attack.<sup>78</sup>

The *Caroline* standard provides a level of guidance that at least establishes the floor for proportionality analysis. It requires that the force used be neither unreasonable nor excessive and limited by the necessity that compelled the force in the first place.<sup>79</sup> Hence, we return to the issue of necessity.

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72. See James Griffiths, *North and South Korea Vow to End the Korean War in Historic Accord*, CNN (Apr. 28, 2018, 6:03 PM), <https://www.cnn.com/2018/04/27/asia/korean-summit-intl/index.html>.

73. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, art. 51, June 8, 1977, 1125 U.N.T.S. 17512.

74. DINSTEIN, *supra* note 12, at 233.

75. Dapo Akande & Thomas Lieflander, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense*, 107 AMER. J. INT'L L. 563, 566 (2013).

76. WARREN & BODE, *supra* note 24, at 38.

77. Akande & Lieflander, *supra* note 75, at 566.

78. WARREN & BODE, *supra* note 24, at 41.

79. Webster Letter, Apr. 24, 1841, *supra* note 8.

3. Viewed through the prism of necessity, *Caroline* requires three conditions precedent to the use of force in self-defense

In consideration of the scope of the necessity standard under *Caroline*, a state must satisfy the following three conditions precedent to the use of force in self-defense: 1) a state or actor must threaten or commit an armed attack or measures tantamount to an armed attack;<sup>80</sup> 2) alternatives to force must fail or must be deemed impracticable, and 3) competent intelligence must suggest that an armed response is presently required to protect national security interests.

This restatement tracks Webster's formula, but attempts to phrase it in a manner more applicable to circumstances in the modern operational environment. The requirement of a threat or commitment to an armed attack aligns with the U.N. Charter's prohibition against threats to the political independence or territorial integrity of other states.<sup>81</sup> The addition of the language, "or measures tantamount to an armed attack,"<sup>82</sup> raises the possibility of attacks that are not "armed" in the normal sense, such as those that originate in cyberspace, but have effects that are roughly equivalent to an armed attack.

The requirement to attempt practicable alternatives highlights that the use of force in self-defense is a last resort. As Webster noted, the force must be "nothing less than a clear and absolute necessity."<sup>83</sup> Finally, even if alternatives have failed, the situation must still require the resort to an armed response that is aimed at protecting national security interests.

The protection of national security interests originates from the phrase, "[i]t is admitted that a just right of self-defence attaches always to nations, as well as to individuals, and is equally necessary for the preservation of both."<sup>84</sup> It should be noted that the word "preservation" had a special meaning at the time Webster penned it – it was a concept without limitation, and as Jennings notes, one that "[w]ould serve to cloak with an appearance of legality almost any unwarranted act of violence on the part of a state."<sup>85</sup> While there is language in Webster's formulation to guard against unrestrained action, there is certainly room for concern that a

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80. The addition of "measures tantamount to an armed attack" might account for actions such as cyber attacks that have an equivalent effect or potential effect of an armed attack.

81. U.N. Charter art. 2, ¶ 4.

82. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, para. 184, at 87 (June 27).

83. Webster Letter, Apr. 24, 1841, *supra* note 8.

84. *Id.*

85. Jennings, *supra* note 52, at 91.



necessity-based analysis, unrestrained by imminence, might increase the resort to force.

C. *Necessity – The Mother of In(ter)vention?*

If the analytical framework of self-defense shifts away from a requirement of an imminent threat, one concern ought to be whether there are sufficient constraints to prevent frequent resort to force under the guise of necessity. It should not strain the imagination to think of examples where a state might falsely claim a necessity to act where none exists. The risk of the slippery slope argument is a real concern – one would only need to look to Crimea for an example of the legal undulations a state might attempt in citing an increasingly nebulous “necessity” of action.<sup>86</sup>

However, I believe this concern is overstated for two reasons. First, if the concern is that states might concoct a necessity to justify action, it is not at all clear that they would not also create an imminent (and imagined) threat. Second, although the idea that a necessity-centric analysis could lead to the conclusion that force is permissible, it is not at all clear that force would not *also* be justified under an imminence analysis.

Perhaps a deeper criticism is that a necessity-based self-defense argument risks bypassing the safeguards inherent in collective action. Louis Henkin offers that the collective character of NATO’s decision-making in Kosovo, although not initially approved by the Security Council, at least offered the protection against abuse by individual states pursuing purely national interests.<sup>87</sup> For this reason, Henkin argues for ratification of illegal but legitimate collective action when the Security Council is deemed “unavailable” to authorize intervention due to a threat or likelihood of veto.<sup>88</sup>

In response, I would ask how individual state action in the face of potential Security Council veto is any different. Is not the requirement to notify the Security Council of actions taken in self-defense sufficient to reign in rogue unilateral action?<sup>89</sup> One might anticipate a stern rebuke by the Security Council or the General Assembly in response to individual state action deemed outside the bounds of self-defense.

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86. See Steven Pifer, *Five Years After Crimea’s Illegal Annexation, the Issue is No Closer to Resolution*, BROOKINGS (Mar. 18, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/03/18/five-years-after-crimeas-illegal-annexation-the-issue-is-no-closer-to-resolution/>.

87. *Id.* at 826-27.

88. *Id.* at 826.

89. U.N. Charter art. 51 (requiring Member States to immediately report actions taken in self-defense to the Security Council).

Indeed, the Security Council is charged with maintaining international peace and security, as suggested by the temporal limit on state action in self-defense. Article 51 allows states to engage in self-defense, but only “until the Security Council has taken measures necessary to maintain international peace and security.”<sup>90</sup> But if the beginning limit does not start with an imminent threat, when does the right to pre-attack self-defense begin?

Returning to the concept of self-defense as an inherent right, it seems natural that defining the threat is a political calculation. In a detailed account of pre-war attacks throughout history, Hew Strachan notes that the notion of preemption “grew from the operational level of war . . . whereas preventive war was a political one.”<sup>91</sup>

#### IV. HARMONIZING THEORIES OF PRE-ATTACK USES OF FORCE IN SELF-DEFENSE

As the foregoing discussion demonstrated, the questions regarding when force can be used prior to an actual attack can be quite challenging. At least two types of pre-attack defensive military action permeate scholarship and discussion: preemption and prevention.<sup>92</sup> One scholar defines preemptive acts as “those initiated on the basis of an expectation that an enemy attack is imminent” and preventative acts “as those initiated in the belief that armed conflict, while not imminent, is inevitable, and that delay would involve great risk.”<sup>93</sup>

In the days leading up to the 1967 Six-Day War, Israel observed armies from Egypt, Syria, and Jordan massing on its border.<sup>94</sup> Israel executed an attack on these forces in anticipation of an imminent attack across its border; this preemptive attack enabled Israel to prevail. This is an excellent example of a lawful use of preemptive force. Israel saw clear indications of a potential attack growing along its border. But no matter how good the intelligence, Israel based its action on its *prediction* of an attack.

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90. U.N. Charter art. 51; *see also* MICHAEL NEWTON & LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW 64 (2014).

91. Hew Strachan, *Preemption and Prevention in Historical Perspective*, in PREEMPTION: MILITARY ACTION AND MORAL JUSTIFICATION 23, 27 (Henry Shue & David Rodin eds., 2007) (citation omitted).

92. WARREN & BODE, *supra* note 24, at 24; *see also* DINSTEIN, *supra* note 12, at 194 (stating that the United States terms what is here called “preemptive” self-defense as “anticipatory” self-defense).

93. PHILIP BOBBITT, TERROR AND CONSENT: THE WARS OF THE TWENTY-FIRST CENTURY 136 (2009).

94. WARREN & BODE, *supra* note 24, at 26.

As Professor Dinstein notes, the theories' "common denominator is that they are all conjectural."<sup>95</sup> Henry Shue explored the limits of conjecture to see what might justify a preventative attack absent an imminent threat.<sup>96</sup> Consider the example of potential WMD in Iraq in 2003.<sup>97</sup> Assume intelligence credibly suggests that Iraq has stockpiles of WMD that are currently stored in several locations. Further, consider that intelligence suggests an intent by Iraq to distribute the WMD to a wide network of terrorists in the near future. Under these conditions, one can see that use of force might be justified to destroy the stockpiles *before* they are disseminated. Shue terms this the "last chance" or "last resort" theory.<sup>98</sup> The idea is that although an attack is not imminent, immediate action is required to reduce the threat. Otherwise, the opportunity will be permanently lost.

What brings the preemption and prevention theories together is not the immediacy of the threat, but rather the necessity of immediate action. The emergent principle is that "[n]o military action is ever justified unless it is necessary."<sup>99</sup> But it *cannot* be said that *necessity justifies all military action*. Indeed, if necessity is to be the guiding principle, it must be constrained. As discussed in Part III, those constraints involve a state or actor that has threatened or committed to an armed attack or measures tantamount to an armed attack, alternatives to force that have failed or are not practicable, and competent intelligence that has suggested that an armed response is presently required to protect national security interests.

Interestingly, Shue suggests a fourth possible requirement: multilateral authorization.<sup>100</sup> Certainly, this requirement would align with the U.N. Charter's preference for Security Council authorization of force. Yet, is it reasonable to assume states will yield to the decisions of multinational bodies? In the case of an imminent attack, there may be no time for such an appeal, much less deliberation. While procedural multilateralism is likely beyond the pale of what might be expected, perhaps *substantive* multilateralism is not. As Shue notes, "[f]or 'substantive multilateralism' to work, major states would need to feel a responsibility to protect their security only in ways that accorded with widely shared norms."<sup>101</sup>

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95. DINSTEIN, *supra* note 12, at 195.

96. Henry Shue, *What Would a Justified Preventative Military Attack Look Like?*, in PREEMPTION: MILITARY ACTION AND MORAL JUSTIFICATION 222, 228 (Henry Shue & David Rodin eds., 2007).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 232.

101. *Id.* at 244.

It is here that a necessity-based analysis proves useful. While states may bolster their assessments of threats, a focus on the necessity of action acknowledges that decisions to resort to force are inherently political. Where states have already abjured the requirement of imminence in their calculations, at the very least, a carefully crafted necessity test provides stability in the sense that it makes state action more predictable.

Returning to where we started, a necessity-based analysis might help explain the 2020 Soleimani attack. While the classified details are beyond the reach of this article, it is possible to discern a necessity-based justification by taking facts as stated by the Trump Administration. To satisfy the first prong, Ambassador Craft, in her letter to the Security Council President, cited an “escalating series of armed attacks.”<sup>102</sup> Moreover, President Trump’s expression of a future threat of attack supports the third prong.<sup>103</sup> And while it is less clear that alternatives failed or were not practicable, given the number of cited attacks in the series, it appears at least plausible that a determination of impracticability would not be irrational.

## V. CONCLUSION

A faithful interpretation of the principles in *Caroline* allow for harmony between customary self-defense and the U.N. Charter’s rules controlling the use of force. By returning the focus to necessity instead of imminence, we avoid the need to deem certain uses of force as legitimate but illegal. With the necessity analysis as the guide, intervening states will not be able “to plead self-defense as a mere shibboleth.”<sup>104</sup>

This reinterpretation will make the words of *Caroline* and the U.N. Charter “go the right way again,” provide a coherent rule that enables states to defend their actions in the open, and allow the international community to defend humanity in the open. Refusal to sanction illegal acts will restore legitimacy to acts of self-defense and to the international legal regimes supporting them.

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102. Ambassador Craft Letter, Jan. 8, 2020, *supra* note 4.

103. President Trump Remarks, Jan. 3, 2020, *supra* note 3.

104. Jennings, *supra* note 52, at 92.