The US Army War College Quarterly: Parameters

Volume 25
Number 1 *Parameters 1995*

Article 26

7-4-1995

Nature's Eldest Law: A Survey of a Nation's Right To Act in Self-Defense

Richard G. Maxon

Nature's Eldest Law: A Survey of a Nation's Right To Act in Self-Defense

RICHARD G. MAXON

From *Parameters*, Autumn 1995, pp. 55-68.

On 14 April 1993, Kuwaiti authorities uncovered an assassination plot against former US President George Bush.[1] This plot was to be carried out against President Bush during a three-day visit to Kuwait. From an intensive two-month investigation, the United States government determined that the explosive device contained features found only in bombs made by groups linked to Iraq.[2] Further, public statements by the Saddam Hussein government following the Gulf War claimed that Iraq would hunt down President Bush and punish him.[3] The United States concluded that the Iraqi Intelligence Service had been ordered to carry out the attack on President Bush. On 26 June 1993, President Clinton, claiming his actions were in self-defense under Article 51 of the United Nations Charter, ordered the US military to launch an attack on the headquarters of the Iraqi Intelligence Service. Twenty-three cruise missiles were fired, destroying the headquarters and killing six people.[4] An assassination attempt by a foreign government against a former United States President: this was a clear case warranting a military response in self-defense. Or was it? The answer to this question is not as clear as it initially may seem.

With the increase in terrorism, the proliferation of weapons of mass destruction, border disputes, and ethnic unrest, it is becoming increasingly ambiguous when a nation may lawfully resort to the use of armed force for its self-defense and the defense of other nations.[5] Article 51 of the United Nations Charter attempts to codify the circumstances in which a nation may act in self-defense. Despite the express language of Article 51, much debate has taken place concerning the meaning of this article, when the right to act in self-defense accrues, and, perhaps more important, when it ceases. This article briefly reviews the customary international law concepts of a nation's right to resort to military force in its self-defense. Next, self-defense under the United Nations Charter, and various arguments concerning its application, are examined. Finally, the article suggests criteria to assist in the analysis of when the use of military force in self-defense is lawfully justified.

Customary International Law

To understand the right of a nation to use military force in its own self defense, it is necessary to understand why this right exists. The recognized purpose of self-defense is to deter aggression and to protect the interests of the state.[6] Its goal is preventive in nature and not retributive.[7]

Seventeenth-century Spaniards believed that the right of self-defense was limited to the protection of territory. Other writers of the day believed that the right extended to the violation of any national right.[8] Fault by the other party was seen as a precondition to the legitimate exercise of the right of self- defense. Unfortunately, these early writers failed to provide much guidance on the degree of injury or fault necessary to justify military action.[9]

Historically, states demanded a right of self-defense of considerable scope. Customary international law authorized a state targeted by another state to employ military force as necessary to protect itself.[10] The law recognized, as a minimum, the right of a state to act to protect against threats to its political independence or territorial integrity.[11] The right to act in self-defense was not limited only to instances of actual armed attack. States were permitted to act when the imminence of attack was of such a high degree that a nonviolent resolution of a dispute was precluded.[12]

The "Caroline" Case

The *Caroline* case is the most often cited precedent in the customary international law of self-defense. In 1837, during the revolt in Canada against the British, a ship named the *Caroline* would periodically sail from US territory into Canada. It would reinforce and resupply the rebels and then return to the United States. To put an end to this, British forces entered the United States, seized the *Caroline*, and destroyed her, killing two US citizens.[13] Upon receiving a

protest from the United States, the British claimed they had acted lawfully in self-defense.

In an exchange of letters with the British government, Secretary of State Daniel Webster outlined what he believed were the conditions for a proper claim of self defense. Secretary Webster stated that there "must be a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation." He further argued that the act should involve "nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it."[14] While never admitting culpability, the British apologized to the United States for the incident. Secretary Webster's *Caroline* criteria, described in the literature as those of "necessity" and "proportionality," continue to form the basis for analysis of the right of self-defense.

"Necessity" is the most important precondition to the legitimate use of military force in self-defense. In determining whether the use of military force is necessary, many factors must be carefully balanced. These factors include the nature of the coercion being applied by the aggressor state, the aggressor state's relative size and power, the nature of the aggressor's objectives, and the consequences if those objectives are achieved.[15] The target state makes the initial determination of the necessity of using military force in self-defense.[16]

"Proportionality" is the "requirement that the use of force or coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense."[17] Because the purpose of self-defense is to preserve the status quo, proportionality requires that military action cease once the danger has been eliminated.

Despite widespread reference to the *Caroline* factors, they have not been accepted without criticism. Many argue that these criteria are too restrictive, having been written in an era when an enemy literally had to be massed on the border to be a threat. With nuclear weapons and rapid delivery techniques, the requirement that no action be taken until "force be overwhelming, leaving no choice of means and no moment for deliberation" is seen by some commentators as unrealistic in today's world.[18] Nonetheless, the *Caroline* factors continue to be relied upon in the analysis of potential self-defense situations.

When Does the Right of Self-Defense Arise?

The prerequisite to the lawful right to act in self-defense is an injury (violation of a legal obligation), inflicted or threatened, by one state against a substantive right of another state.[19] It is generally accepted that military force may be used to:

- *Protect a nation's political independenc*e. Every state has a responsibility to respect the political independence of every other state. Force may be used to protect such independence when it is threatened and all reasonably available avenues of peaceful resolution have proved unavailing.
- *Protect a nation's territorial integrity*. Each state has an inherent right to protect its national borders, airspace, and territorial waters from acts of aggression.
- *Protect citizens and their property abroad*. A state has a right to protect its citizens abroad if their lives are placed in jeopardy and the host state is either unwilling or unable to provide the necessary protection.[20]

While these rights are widely acknowledged in the customary international law, they are not absolute. They must be balanced against similar rights enjoyed by other states and the maintenance of peace in the international community.[21] When, in the judgment of the injured state, the necessity of acting in self-defense outweighs any harm such act imposes, it may lawfully resort to the use of military force.[22]

The United Nations Charter

Following World War II, the United Nations was created to, among other things, establish global order and provide a forum in which international disputes may be resolved without the use of armed force. The United Nations Charter has as a central theme the maintenance of peace and security between nations. Its aim is to substitute a community response for unilateral action in deterring aggression.[23] Three objectives form the foundation of this order. They include:

- The maintenance of an orderly world that emphasizes cooperation among states.
- A preference for change by peaceful processes rather than coercion.
- The minimization of destruction.[24]

The United Nation Charter condemns aggression and requires the use of peaceful means to settle disputes. To facilitate this process, the Charter establishes the Security Council, which is given the responsibility for maintaining international peace. While preferring community action, the Charter also recognizes a state's inherent right to take unilateral action in self defense.[25]

Self-Defense Under the United Nations Charter

The United Nations Charter recognizes the use of military force as lawful in only two instances, either as part of a United Nations authorized military operation to restore the peace under Article 42 or for self-defense under Article 51.[26] Article 51 provides:

> 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 the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of the 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.

Despite the seemingly clear language of this article, considerable controversy surrounds the extent to which a member may take action in self-defense under the Charter. Many international law scholars argue that the customary international law doctrine of self-defense, as developed from the *Caroline* case, survives under the Charter. These scholars believe that the Charter was not intended to restrict the right of a nation to take defensive action in any material way.[27]

Others argue that while the right to self-defense exists in the customary international law, each member of the United Nations, by adopting the Charter, has waived its rights to those aspects of self-defense that are not specifically permitted under Article 51.[28] They reason that the United Nations was established to create order and that reliance on the customary international law would be counterproductive to that goal.[29] While the majority of the experts in the field hold the opinion that the right of self-defense remains unimpaired under the Charter, this dispute remains largely unresolved.

Anticipatory Self-Defense Under the United Nations Charter

The most intense debate concerning the right to act in self-defense under the Charter focuses on the right of a nation to act in self-defense in anticipation of an armed attack. There is little question that before the Charter, a right to act in self-defense, as recognized by the customary international law, included the right to act in anticipatory self-defense.[30] Article 51 with its language "if an armed attack occurs," has been seen by some commentators as restricting a nation's ability to lawfully invoke that right. Others believe no such limitation was intended and that the right to act in anticipation of an attack remains intact. The main arguments of each position are briefly outlined below.

Restrictivist View. Critics of the customary right to engage in acts of anticipatory self-defense have been referred to as belonging to the "restrictive school."[31] These critics believe that member states have only those rights affirmatively granted by the Charter. One such right permits actions in self-defense only once an armed attack occurs. Two policy considerations are advanced to support this position. First, determining whether an armed attack is imminent is extremely difficult.[32] An error in calculation could lead a militarily powerful nation to start a war of massive proportions based on the mistaken belief that it was about to be attacked.[33] Second, anticipatory self- defense is grounded in customary international law that provides no clear guidelines for its use.[34] In the restrictivist view, the conditions in which such law may be relied upon are too vague to be of much help for the decisionmaker. This philosophy represents the minority view.

Expansivist School. The predominant view, to which the United States subscribes,[35] has been termed by one

commentator as the "Expansive School."[36] Those who hold this view advocate that Article 51 permits anticipatory self-defense in response to an imminent armed attack.

Expansivists argue that the restrictive view is a marked departure from the customary international law and that such a departure should not be lightly presumed. They believe that since Article 51 does not unequivocally limit the right of self-defense, it should not be construed as eliminating the customary law right to use military force against a threatened attack.[37]

One advocate for the expansive reading of Article 51 states: "It would be a travesty of the purposes of the Charter to compel a defending state to allow its assailant to deliver the first, and perhaps fatal, blow. . . . To read Article 51 otherwise is to protect the aggressor's right to the first strike."[38] This observation is particularly compelling in the era of nuclear weapons and modern delivery systems. The destructive capability of modern weapons, and reduced reaction times, pose a tremendous threat to the nonaggressor nation. As one commentator has put it, "No one could seriously contend that any nation in the world should commit suicide by failing to prevent an imminent armed attack by its enemies."[39]

Drafters Intent. The debates that took place during the drafting of the Charter suggest that there was no intent to exclude anticipatory self-defense from the application of Article 51.[40] In a report issued before the adoption of the Charter, the drafting committee said, "The use of arms in legitimate self-defense remains admitted and unimpaired."[41] This language, which implies that the Committee intended to adopt the customary international law, is consistent with the position that anticipatory self-defense is considered to fall within the intent of the Charter. There is no clear indication that the drafters of the Charter intended any other result. Quite the contrary, the practice of most member states since the Charter was adopted has been to recognize acts of anticipatory self-defense as legitimate.[42]

The Effect of Security Council Actions on the Right to Self-Defense

Article 51 requires member states to immediately report to the Security Council any measures taken in self-defense. These reporting requirements are intended to provide the Security Council with notice of the events surrounding the use of force.[43] Once defensive military actions are reported by a member state, the Security Council is charged with determining and implementing the measures designed to restore the international peace. What happens to a nation's right to continue to act in self-defense once the Security Council has taken action? Two opposing views are advanced in the literature.

One point of view holds that the Security Council has plenary authority in this area and that its actions preclude further self-defense measures. Advocates of this position believe the right of self-defense may be exercised only before the United Nations takes action.[44] They argue it would be inconsistent with the creation of international order to allow nations to invoke Article 51 after the Security Council has decided what measures are necessary to end the conflict.

The opposing position is that Security Council actions do not prevent continued self-defense measures if those actions have not had the necessary effect of halting acts of aggression.[45] One commentator argues it would be absurd to conclude that Security Council action terminated the right to engage in self-defense activities.[46] He reasons that Security Council action cannot be intended to deprive a state its right to defend itself when the invader has not complied with the Council's order.[47]

It is tempting to claim that the root issue in this debate concerns who decides whether the Security Council has taken the measures necessary to maintain international peace and security. This issue is, in reality, just food for academic thought. It would be a rare case when a state would cease defending itself and place its fate totally in the hands of a third party (the United Nations). This is particularly true when one considers the limited success rate of the United Nations. As a practical matter, each party--the Security Council and the defending state--must make its own determination of the effectiveness of the UN measures. Should the individual state reach a conclusion different from the Security Council, it will continue its military response as it deems appropriate. The defending state, however, runs the risk of being declared the aggressor by the Security Council. Such a finding would subject the defending state to sanctions or enforcement actions.

While the United Nations Charter does not specifically recognize this parallel decisionmaking process, the interests of

all parties are well served by it. The defending state is allowed to take the actions it believes are necessary for its own defense.[48] At the same time, the international community is permitted to review that decision under the necessity and proportionality criteria and impose sanctions if necessary.[49]

Collective Self-Defense

The Charter in general, and Article 51 in particular, adopt the customary international right of collective self-defense. To constitute a legitimate exercise of collective self-defense, all conditions for the exercise of individual self-defense must be met with one additional requirement.[50] The defending state must have declared itself the victim of an armed attack and requested assistance.[51] Further, there is no recognized right of a third-party state to intervene in internal conflicts where the issue in question is one of a group's right of self-determination.[52] Finally, treaties alone do not provide adequate justification for a third-party state to intervene.[53] There must be an independent, underlying legal justification that meets the requirements of self-defense. [54]

Self-Defense Criteria

Questions concerning whether a nation is entitled to act in self- defense often spring from an ambiguous conglomeration of facts. While it is difficult to create a model that will resolve all issues in all cases, it is useful to have some method for analyzing differing fact patterns. The following questions are offered as a basis for evaluating the legitimacy of the use of military force in self-defense.[55] Accompanying each question is a brief discussion of its significance to the analysis.

1. Is the proposed response aimed at protecting the status quo? Actions in self-defense, like those taken in the Gulf War, are preventive in nature. Actions that have retribution as the objective are not self-defense and are aggressive in nature.

2. Has there been a violation of a legal obligation? Each member state of the United Nations is obligated by Article 2(4) to refrain from using force or threats of force against the territorial integrity or political independence of any state. Threats to either of these fundamental values would violate that legal duty. Some commentators have included threats to citizens, with a concurrent failure, or inability, of the host government to afford protection, as sufficient grounds for invoking Article 51 self-defense rights. The United States has adopted this position. This policy may be seen in the US actions taken in the failed attempt to rescue US hostages in Iran (1981), as well as in the successful operations in Grenada (1982) and Panama (1989).

3. Has there been an actual armed attack from an external source? As distinguished from anticipatory self-defense, which will be discussed later, the clearest case for self-defense arises when one state has been subjected to armed attack by another state or an organization sponsored by another state. Article 2(7) cautions that entities internal to the state are not subject to the jurisdiction of the Security Council and are not governed by Article 51.

4. Is the response, or proposed response, timely? Actions in self-defense must not be remote in time from the initial aggression. A delayed response may be seen by the international community as a threat to international peace and security. The need for immediacy (necessity) of action is lost if too much time lapses between the initial overt act of aggression and the defensive reaction.

5. Is the military response in self-defense necessary? Article 2(3) of the Charter cautions all member states to resolve their disputes by peaceful means. Article 33 requires parties to a dispute to refer it to the Security Council should they fail in its resolution. Before military force may be used in self- defense, the threatened state is required to attempt all practicable, peaceful means to resolve the dispute. If there is a realistic, meaningful alternative to military action, self-defense is not available. There is, however, no requirement to exhaust all peaceful means if it would be fruitless to do so. If, however, the need for military action is not clear, it is not justified.

6. Is the military response in self-defense proportionate to the threat? A nation acting in self-defense may use force no greater than that needed to halt the danger posed by an aggressor nation. The response must be proportional in terms of both the nature and the amount of force employed to repel the attack. An excessive response may be viewed by the Security Council as an aggressive action and subject the defending nation to sanctions or enforcement actions.

7. Has any military response been immediately reported to the Security Council? Article 51 requires military actions taken in self-defense to be immediately reported to the Security Council. This permits the Security Council to take the actions it deems appropriate to restore international peace and security. The failure to report such actions quickly may create the impression that the defending state lacks conviction that its actions were lawful. Further, quick notification of the Security Council allows a more rapid response aimed at terminating the armed aggression.

8. Has the Security Council taken meaningful, effective measures to stop the aggressive conduct? Once the Security Council takes effective action to end the aggressive acts of a state, the target state must cease its self-defense activities. The failure to do so will be viewed as an aggressive act itself. Each nation must decide for itself whether the acts of the Security Council are sufficient to restore international peace and security. Should a nation acting in self-defense decide the UN actions are insufficient, it may continue to act in its own self-defense. That nation, however, runs the risk of the international community reaching a different conclusion and imposing sanctions.

Anticipatory Self-Defense

The circumstances for acting in anticipatory self-defense are the same as those for self-defense except that an actual armed attack has not yet occurred. They often arise in situations involving state-supported terrorism, such as when the United States found it necessary to attack Libya in 1986. The conduct of a nation engaging in preemptive actions will be reviewed against the totality of the circumstances existing at the time the decision to take action was made. In other words, the reasonableness of the conduct will be examined. The key question is this: *Is there an imminent or immediate threat of an armed attack?* In determining whether an attack is imminent, justifying preemptive action, several factors should be considered:

Are there objective indicators that an attack is imminent? Factors such as troop buildups, increased alert levels, increased training tempo, and reserve call-ups may suggest that an attack is imminent.

Does the past conduct or hostile declarations of the alleged aggressor reasonably lead to a conclusion that an attack is probable? A pattern of aggressive past conduct or hostile public statements may demonstrate an intention by an aggressor nation to launch an armed attack.

What is the nature of the weapons available to the alleged aggressor nation, and does it have the ability to use them effectively? Weapons of mass destruction and modern delivery systems make waiting for an actual armed attack exceedingly dangerous. While possession of such weapons alone is not indicative of an intent to use them, it is a factor that must be considered with all other relevant factors.

Is the use of force the last resort after exhausting all practicable, peaceful means? Unlike actions in self-defense following an armed attack, preemptive actions generally mean some time is available for peaceful resolution. There will be closer scrutiny of the efforts made to resolve a dispute when a nation acts in a preemptive manner. The failure to exhaust practicable remedies may result in sanctions for aggressive conduct.

Collective Self-Defense

One additional criterion exists when collective self-defense is contemplated:

Has the target state requested assistance? Without such a request, as was made by Kuwait in 1990, a third-party nation will be seen as having improperly intervened in the situation. This intervention may be seen as an aggressive act justifying the imposition of sanctions by the United Nations.

Self-Defense Criteria Applied

Returning to the missile attack on Iraq described in the introduction, how would the United States claim of self-defense fare when compared against the proposed criteria? A review of the criteria demonstrates that this claim, which on its face has a certain appeal, falls short of requirements for properly invoking Article 51. Each element is briefly reviewed below.

1. Was the response aimed at protecting the status quo? With the alleged attack occurring in April and the response conducted in June, it is difficult to conclude that the actions of the United States were preventive in nature. The attempted attack had already been averted when the Kuwaiti government exposed the plot and arrested those involved.

2. Was there a violation of a legal obligation? If the conclusion by the United States that the assassination attempt against former President Bush was ordered by the Iraqi government is correct, there has been a violation of a legal obligation. Iraq is required to respect the territorial integrity and political independence of the United States. These rights, absent a state of war, are infringed when a political leader is identified for assassination by a foreign government.

3. Was there an actual attack? A state-directed assassination attempt against a former President may properly be seen as an attack against the United States and its sovereignty. Such an attempt was not merely a random act, but a carefully designed plot to punish President Bush for his actions in executing his office as the head of the United States government.

4. Was the response timely? This criterion represents one of the biggest obstacles to the US claim of self-defense under Article 51. More than two months passed from the date the assassination attempt was exposed to the date military action was taken. During this time the United States conducted an investigation to determine who was behind the plot. Only upon satisfying itself as to its origins did the United States respond militarily. The need for immediacy of action, however, is difficult to support after the passage of more than two months. No current or imminent attack was being thwarted by the US actions.

5. Was the military response necessary? This requirement also poses some difficulty for the US claim of self-defense. No attempt was made to resolve this issue through peaceful means. With the passage of time the need for a military response became more and more remote. It cannot be determined whether further UN sanctions or enforcement actions would have been futile, because that option does not appear to have been explored.

6. Was the response proportionate? The attack was aimed at the headquarters of the Iraqi Intelligence Service, the organization identified as being behind the assassination plot. Collateral damage was minimized. Twenty-three cruise missiles were fired with the resultant loss of life limited to six people. The requirement for a proportionate response appears to have been met by its restrictive nature and limited collateral damage.

7. Was the action immediately reported to the Security Council? This criterion was also met. The United States requested a special meeting of the Security Council for the next day. At that meeting the United States advised the Security Council of the actions it had taken and the reasons therefor.

8. Did the Security Council take meaningful, effective measures to stop the aggressive conduct? The Security Council only learned of the actions after they had taken place. The United States did not request any formal statement or resolution approving its actions. As the military response by the United States had been completed, there was little for the Security Council to do.

Perhaps the more plausible claim of self-defense available to the United States is that it was acting to preempt future attacks by Iraq against the national interests of the United States. This argument, however, is not without its problems. The United States did not demonstrate that an imminent threat of armed attack existed at the time military actions took place in June. There were, however, several factors that would have supported this claim. First, public declarations by Iraqi government officials indicated an intent to take action against a former US President. Their actions in April clearly indicated an intent to take steps to carry out those threats. Further, as a nation identified as supporting terrorism, Iraq has demonstrated a willingness and an ability to use those tactics against the interests of the United States.

The difficulty the United States has in sustaining a claim of anticipatory self-defense is that it has not pointed to any evidence that Iraq was planning any further attempts against the United States. It is difficult, therefore, to conclude that the missile attack in June 1993 preempted any aggressive actions by Iraq.

In matching the response of the United States against the proposed criteria, a claim of the need to act in self-defense

under Article 51 of the United Nations Charter lacks substance. In pressing its claim of self-defense before the United Nations, the United States was no doubt aided by a general lack of respect by the world community for Saddam Hussein and Iraq. Little criticism was leveled at the United States for the actions it took. This lack of criticism resulted not so much from a consensus that the actions of the United States were a legitimate exercise of the right to act in self-defense but rather from a general disapproval of the Iraqi government.

Conclusion

The use of military force in national self-defense is a right long recognized by the international community. Under customary international law nations are permitted to act in self-defense if there is a need to do so and the extent of the military response is not disproportionate to the threat. With the establishment of the United Nations, whose goal is to establish a world order aimed at maintaining international peace and security, the extent of a nation's right to act in self-defense is less clear.

Considerable controversy surrounds the ability of a nation to take preemptive action to defend against a perceived imminent threat or to continue its defensive efforts after the Security Council has taken measures aimed at ending the hostilities. Most scholars support the right of nations to take these actions in their own defense. Those in the minority, however, make many valid points in arguing that such conduct is contrary to the purposes of the United Nations and undermines the authority of the Security Council. The extent of the right to act in self-defense is not always clear, and considerable debate continues over these issues.

The criteria above are offered to assist in the analysis of whether the legal right to act in self-defense has accrued. They are intended as a guide for policymakers in reviewing a particular set of circumstances and making informed decisions concerning an appropriate course of conduct.

Even the best analysis may be overcome by the politics of the situation. In the case of the attack on the Iraqi Intelligence Headquarters, the argument that the actions of the United States conformed with the requirements of Article 51 appears to be insupportable by the facts. The despicable actions of Saddam Hussein and his government, however, allowed the United States to take this action without fear of being chastised by the international community.

In any particular set of circumstances, it is the reasonableness of the actions taken by a nation which will be the key factor in appraising whether defensive actions are justified. It is on this basis that the international community will ultimately judge a nation's conduct.

NOTES

The title of this article refers to a quotation from Dryden: "Self-defense is nature's eldest law."

1. Richard Bernstein, "U.S. Presents Evidence to U.N. Justifying its Missile Attack on Iraq," *The New York Times*, 28 June 1993, Section A, Page 7.

2. "Excerpts From U.N. Speech: The Case For Clinton's Strike," *The New York Times*, 28 June 1993, Section A, Page 7.

3. Ibid.

4. "Clinton's First Strike," *The Economist*, 3 July 1993, p. 16.

5. It is necessary to distinguish self-defense from self-help. A nation may act in self-defense to protect essential national rights from irreparable harm when no reasonable, alternate means of protection is available. Its purpose is the deterrence of aggression and the preservation or restoration of the legal status quo. Self-help, on the other hand, is remedial or repressive in character. It is a punitive or retributive action in response to either some past unlawful act or as a sanction to enforce legal rights. Common forms of self-help are reprisal or intervention.

6. James Francis Gravelle, "The Falkland (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain." *Military Law Review*, 107 (1985), 56.

7. D. W. Bowett, *Self-Defense In International Law* (New York: Fredrick A. Praeger, 1958), p. 20.

8. D. P. O'Connell, *International Law* (Dobbs Ferry, N.Y.: Oceana Publications, 1965), p. 339.

9. Ibid.

10. Myres S. McDougal, "The Soviet-Cuban Quarantine and Self-defense," *The American Law Journal of International Law*, 57 (No. 3, 1963), 597-98.

11. Brunson MacChesney, "Some Comments on the `Quarantine' of Cuba," *The American Journal of International Law*, 57 (No. 3, 1963), 595.

12. McDougal, "The Soviet-Cuban Quarantine and Self-Defense," p. 598.

13. O'Connell, 343.

14. Sir Robert Jennings, and Sir Arthur Watts, eds., *Oppenheim's International Law* (9th ed.; London: Longman Group UK Limited, 1993), p. 420. See also O'Connell, p. 343.

15. Uri Shoham, "The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense," *Military Law Review*, 109 (Summer 1985), 193.

16. McDougal, "The Soviet-Cuban Quarantine and Self-Defense," p. 598.

17. Myres McDougal and Florentino Feliciano, *Law and Minimum World Public Order* (New Haven, Conn.: Yale Univ. Press, 1961), p. 242.

18. McDougal, "The Soviet-Cuban Quarantine and Self-Defense," p. 598.

19. Bowett, p. 9.

20. Department of the Army, *Operational Law Handbook*, 2d ed. (Draft, 1992), pp. 38-39. See also Bowett, p. 270.

21. Bowett, p. 270.

22. Ibid.

23. MacChesney, p. 593.

24. John Norton Moore, *Law and the Indo-China War* (Princeton, N.J.: Princeton Univ. Press, 1972), pp. 170-71.

25. Gravelle, p. 57.

26. Lung-Chu Chen, *An Introduction to Contemporary International Law: A Policy Perspective* (New Haven, Conn.: Yale Univ. Press, 1989), p. 122.

27. For example, see Moore, p. 363.

28. Kathryn S. Elliott, "The New World Order and the Right of Self-Defense in the United Nations Charter," *Hastings International and Comparative Law Review*, 15 (Fall 1991), 67.

29. See generally: Elliott, pp. 55-81; and Isaak I. Dore, "The United States, Self-Defense and the U.N. Charter: A Comment on Principle and Expediency in Legal Reasoning," *Stanford Journal of International Law*, 24 (Fall 1987), 1-

19.

30. Bowett, pp. 188-89. See also M. McDougal, *Law and Minimum World Order*, p. 219.

31. Richard J. Erickson, *Legitimate Use of Military Force Against State-Sponsored International Terrorism* (Maxwell AFB, Ala.: Air Univ. Press, 1989), p. 136.

32. Ibid, p. 138.

33. Wolfgang Friedman, *The Changing Structure of International Law* (New York: Columbia Univ. Press, 1964), p. 259.

34. Erickson, p. 138.

35. Examples of the United States following the "Expansivist" view would include the Cuban blockade in 1962 and the 1986 raid on Libya.

36. Ibid.

37. Elliott, p. 67, n. 64.

38. Sir Claud Humphrey Meredith Waldock, "The Regulation of the Use of Force by Individual States in International Law," 81 Hague Recueil 45 (1952), p. 498.

39. Shoham, p. 198.

40. O'Connell, p. 341.

41. Report of Rapporteur of Committee 1 to Commission I, 6 U.N.C.I.O. Docs. 446, 459.

42. Bowett, p. 188.

43. Jennings, p. 423, n. 22. These reports are not a precondition to the lawfulness of the use of force. The absence of such a report, however, may be construed by the international community as an indication the state was not convinced it was legitimately acting in self-defense.

44. Elliott, p. 70.

45. Jennings, p. 423, n. 22.

46. Oscar Schachter, "United Nations Law in the Gulf Conflict," *American Journal of International Law*, 85 (July 1991), 488.

47. Ibid.

48. Ibid., p. 193. See also Gravelle, pp. 60-61.

49. McDougal, "The Soviet-Cuban Quarantine and Self-Defense," p. 599.

50. Erickson, p. 163.

51. Jennings, p. 422.

52. *Operational Law Handbook*, p. D-39.

53. Ibid., p. D-40

54. Elliott, p. 56, n. 6.

55. See generally: Bowett, p. 269; Dore, p. 2; Erickson, pp. 217-26; Jennings, p. 422; Shoham, p. 204; *Operational Law Handbook*, pp. D-39 - D-40.

Lieutenant Colonel Richard G. Maxon is a Judge Advocate with the Arizona Army National Guard. A 1995 graduate of the US Army War College, Colonel Maxon holds B.S., M.B.A., and J.D. degrees from Arizona State University. He is currently assigned to the Office of the Chief of Staff, Arizona Army National Guard.

Reviewed 25 November 1996. Please send comments or corrections to carl_Parameters@conus.army.mil.