

CHAPTER 1

LEGAL BASIS FOR THE USE OF FORCE

I. INTRODUCTION

In both customary and treaty law, there are a variety of internationally-recognized legal bases for the use of force in relations between States. Generally speaking, **modern jus ad bellum** (the law governing a State's use of force) is reflected in the United Nations (UN) Charter. The UN Charter provides two bases for a State's choice to resort to the use of force: Chapter VII enforcement actions under the auspices of the UN Security Council, and self-defense pursuant to Article 51 (which governs acts of both individual and collective self-defense).

A. Policy and Legal Considerations

1. Before committing U.S. military force abroad, decision makers must make a number of fundamental policy determinations. The President and the national civilian leadership must be sensitive to the legal, political, diplomatic, and economic factors inherent in a decision to further national objectives through the use of force. The legal aspects of such a decision, both international and domestic, are of primary concern in this determination. **Any decision to employ force must rest upon the existence of a viable legal basis in international law as well as in domestic law** (including application of the 1973 War Powers Resolution (WPR), Public Law 93-148, 50 U.S.C. §§ 1541-1548).

2. Though these issues will normally be resolved at the national political level, Judge Advocates (JAs) must understand the basic concepts involved in a determination to use force abroad. Using the mission statement provided by higher authority, JAs must become familiar with the legal justification for the mission and, in coordination with higher headquarters, be prepared to brief all local commanders on that legal justification. This will enable commanders to better plan their missions, structure public statements, and conform the conduct of military operations to U.S. national policy. It will also assist commanders in drafting and understanding mission specific Rules of Engagement (ROE), which must be tailored to calibrate the authority to use force consistent with national security and policy objectives.

3. The JA must also remember that the success of any military mission abroad will likely depend upon the degree of domestic support demonstrated during the initial deployment and sustained operation of U.S. forces. A clear, well-conceived, effective, and timely articulation of the *legal* basis for a particular mission is essential to sustaining support at home and gaining acceptance abroad.

B. Article 2(4): The General Prohibition Against the Use of Force

1. The UN Charter mandates that all member States resolve their international disputes peacefully.¹ It also requires that States refrain in their international relations from the *threat or use of force* against the territorial integrity or political independence of any State.² The majority of international law experts agree that "use of force" refers to armed force, in contrast to other forms of coercion such as economic sanctions. This ban on aggression, taken from Article 2(4) of the UN Charter, is regarded as the heart of the UN Charter and the basic rule of contemporary public international law.³ An integral aspect of Article 2(4) is the principle of non-intervention,

¹ UN Charter, Article 2(3): "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered." The UN Charter is reprinted in full in various compendia, including the International and Operational Law Department's Law of Armed Conflict Documentary Supplement, and is also available at <http://www.un.org/en/documents/charter/>.

² UN Charter, Article 2(4): "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

³ During the drafting of the United Nations charter, the delegation from Brazil proposed that economic coercion be included in the definition of force. This proposal was defeated 26-2. This proposal is depicted in the *travaux preperatoires* of the UN Charter. See 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 116-117 (Bruno Simma ed., Oxford Univ. Press 2nd ed., 2002).

which provides that States must refrain from interference in other States' internal affairs.⁴ Put simply, non-intervention stands for the proposition that States must respect each other's *sovereignty*.

2. U.S. policy statements have frequently affirmed the principle of non-intervention, which itself has been made an integral part of U.S. law through the ratification of the Charters of the United Nations and the Organization of American States (OAS),⁵ as well as other multilateral international agreements which specifically incorporate nonintervention as a basis for mutual cooperation. The emerging concept of **humanitarian intervention**, however, has placed pressure on the principle of non-intervention and respect for State sovereignty in circumstances when a State is unable or unwilling to avert a humanitarian catastrophe, or is itself responsible for massive violations of human rights against its citizens.⁶

II. THE LAWFUL USE OF FORCE

Despite the UN Charter's broad legal prohibitions against the use of force and other forms of intervention, specific exceptions exist to justify a State's recourse to the use of force or armed intervention. While States have made numerous claims, using a wide variety of legal bases to justify uses of force, it is generally agreed that there are only two exceptions to the Article 2(4) ban on the threat or use of force: (1) actions authorized by the UN Security Council under Chapter VII of the UN Charter, and (2) actions that constitute a legitimate act of individual or collective self-defense pursuant to Article 51 of the UN Charter and/or customary international law (CIL).⁷

A. UN Enforcement Action (Chapter VII)

1. **The UN Security Council.** The UN Charter gives the UN Security Council both a powerful role in determining the existence of an illegal threat or use of force and wide discretion in mandating or authorizing a response to such a threat or use of force (enforcement). The unique role is grounded primarily in Chapter VII of the UN Charter, which demonstrates **the Charter's strong preference for collective responses to the illegal use of force over unilateral actions in self-defense**. Chapter V of the UN Charter establishes the composition and powers of the Security Council. The Security Council includes **five permanent members** (China, France, Russia, the United Kingdom, and the United States) and ten non-permanent, elected members. Decisions within the Security Council require nine votes, and in those cases involving a non-procedural (i.e., substantive) matter, they also require the concurring votes of all five permanent members.⁸ In practice, anything other than a veto by one of the permanent five members is considered a concurring vote. Article 24 states that UN members "confer on the Security Council primary responsibility for the maintenance of international peace and security" and, in Article 25, members "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

⁴ UN Charter, Article 2(7): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

⁵ OAS Charter, Article 18: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements." See also Inter-American Treaty of Reciprocal Assistance (Rio Treaty), Art. I: "... Parties formally condemn war and undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or this Treaty."

⁶ See Report of the International Commission on Intervention and State Sovereignty, December 2001 ("Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."). The United States does not accept humanitarian intervention as a separate basis for the use of force; however, the United Kingdom has expressed support for it. See Prime Minister's Office, *Guidance: Chemical weapon use by Syrian regime: UK government legal position*, Aug. 29, 2013, available at <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>.

⁷ As stated above, a minority of States would include humanitarian intervention as a separate exception to the rule of Article 2(4). In addition, consent is sometimes stated as a separate exception. However, if a State is using force with the consent of a host State, then there is no violation of the host State's territorial integrity or political independence; thus, there is no need for an exception to the rule as it is not being violated.

⁸ Per Article 27 of the UN Charter, non-procedural decisions must include "the concurring votes of the permanent members."

2. **Chapter VII of the UN Charter**, entitled “Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression,” gives the UN Security Council authority to identify and label illegal threats and uses of force, and then determine what measures should be employed to address the illegal behavior. Before acting, **the Security Council must first, in accordance with Article 39, determine the existence of a threat to the peace, a breach of the peace, or an act of aggression.** Provided the Security Council makes such a determination, the UN Charter gives several courses of action to the Security Council: 1) make recommendations pursuant to Article 39; 2) call upon the parties involved to comply with provisional measures pursuant to Article 40; 3) mandate non-military measures (i.e., diplomatic and economic sanctions) pursuant to Article 41; or 4) authorize military enforcement measures (“action by air, land, or sea forces”) pursuant to Article 42.

a. **Article 39**, the same article through which the Security Council performs its “labeling” function, allows the Council to make non-binding recommendations to maintain or restore international peace and security.

b. **Article 40** serves essentially a preliminary injunction function. The security council may call upon the parties to cease action or take some action with respect to the dispute, but the parties compliance with those provisions will not prejudice the claims of the state in later dispute resolution proceedings. Failure to comply with Article 40 measures may have deleterious effects for later claims. The purpose of this Article is to prevent the aggravation of the situation that is causing a threat to international peace and security.

c. **Article 41** lists several non-military enforcement measures designed to restore international peace and security. These include “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” **Article 41 measures are stated as a mandate, binding on all UN members.** Article 42 implies that Article 41 measures must be attempted (or at least considered) before the Security Council adopts any of the military measures available to it.

d. **Article 42** contemplated that the Security Council would be able to mandate military action by forces made available to it under special agreements with UN member States under Article 43. However, because no Article 43 special agreement has ever been made, Article 42 has not operated as envisioned. This means that the Security Council is unable to mandate military enforcement action in response to illegal threats or uses of force. Consequently, **military measures taken pursuant to Chapter VII are fundamentally permissive, phrased by the Security Council in the form of an authorization rather than a mandate.**

3. In the absence of special agreements between member States and the Security Council, UN peacekeeping operations enable the Security Council to carry out limited enforcement actions through member States on an ad hoc, voluntary basis. While these operations were traditionally grounded in Chapter VI of the UN Charter, which deals with peaceful means of settling disputes, today more peace operations are considered peace enforcement operations and carry with them a Chapter VII authorization from the Security Council. The authorization that accompanies these operations is usually narrowly worded to accomplish the specific objective of the peace operation. For example, UN Security Council Resolution (UNSCR) 794 (1992) authorized member States to use “all necessary means to establish, as soon as possible, a secure environment for humanitarian relief operations in Somalia.”

B. **Regional Organization Enforcement Actions.** Chapter VIII of the UN Charter recognizes the existence of regional arrangements among States that deal with such matters relating to the maintenance of international peace and security, as are appropriate for regional actions (Article 52). Regional organizations, such as the OAS, the African Union, and the Arab League, attempt to resolve regional disputes peacefully, before referral to the UN Security Council. Regional organizations do not, however, have the ability to unilaterally authorize the use of force (Article 53). Rather, the Security Council may utilize the regional organization to carry out Security Council enforcement actions. In other words, regional organizations are subject to the same limitation on the use of force as are individual States, with the same two exceptions to the general prohibition against the use of force (i.e., enforcement actions under Chapter VII, and actions in individual or collective self-defense under Article 51 of the UN Charter or CIL).

III. SELF-DEFENSE

A. Generally

1. The right of all nations to defend themselves was well-established in CIL prior to adoption of the UN Charter. Article 51 of the Charter 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 measures necessary to maintain international peace and security.”

2. The questions that inevitably arise in conjunction with the UN Charter’s “codified” right of self-defense involve the scope of authority found therein. Does this right, as the language of Article 51 suggests, exist only *after* a State has suffered an “armed attack⁹,” and then only *until* the Security Council takes effective action? Did the UN Charter thus limit the customary right of self-defense in such a way that eliminated the customary concept of *anticipatory self-defense* (see *infra*) and extinguished a State’s authority to act independently of the Security Council in the exercise of self-defense?

3. Those in the international community who advocate a **restrictive approach** in the interpretation of the UN Charter—and in the exercise of self-defense—argue that reliance upon customary concepts of self-defense, to include anticipatory self-defense, is inconsistent with the clear language of Article 51 and counterproductive to the UN goal of peaceful resolution of disputes and protection of international order.

4. In contrast, some States, including the United States, argue that an **expansive** interpretation of the UN Charter is more appropriate, contending that the customary law right of self-defense (including anticipatory self-defense) is an inherent right of a sovereign State that was not “negotiated” away under the Charter. Arguing that contemporary experience has demonstrated the inability of the Security Council to deal effectively with acts and threats of aggression, these States argue that, rather than artificially limiting a State’s right of self-defense, it is better to conform to historically accepted criteria for the lawful use of force, including circumstances which exist outside the “four corners” of the Charter. Also note that the UN Charter, and the majority of international law experts agree that the threshold for “armed attack” is higher than that for “use of force.” Put another way, a state could conceivably launch an operation that qualified as a use of force but fell below the standard needed for armed attack. Thus, a so-called “gap” exists between the two terms. The size of this gap is unclear. Some writers such as Yoram Dinstein in *WAR, AGGRESSION, AND SELF-DEFENSE*, argue that this gap is “but a hiatus.” In any event, the United States adopts the position that the right of self defense exists against any illegal use of force, even if the use of force does not rise to the level of armed attack. Thus, the United States rejects the view that a “gap” exists between the two terms. This policy was repeated as recently in September 2012, at the USCYBERCOM Legal Conference. Harold Koh, then the State Department Legal Advisor, stated that “the United States has long held the position that the inherent right of self-defense potentially applies against any illegal use of force.”

B. Self-Defense Criteria: Necessity and Proportionality

1. It is well-accepted that the UN Charter provides the essential framework of authority for the use of force, effectively defining the foundations for a modern *jus ad bellum*. Inherent in modern *jus ad bellum* is the customary requirement that all uses of force satisfy both the *necessity* and *proportionality* criteria.¹⁰

2. **Necessity.** To comply with the necessity criterion, States must consider the exhaustion or ineffectiveness of peaceful means of resolution, the nature of coercion applied by the aggressor State, the objectives of each party, and the likelihood of effective community intervention. In other words, force should be viewed as a “last resort.”

3. **Proportionality.** To comply with the proportionality criterion, States must limit the magnitude, scope, and duration of any use of force to that level of force which is reasonably necessary to counter a threat or attack. In

⁹ The use of the term “armed attack” leads some to interpret article 51 as requiring a state to first suffer a completed attack before responding in self-defense. This is likely the cause of much of the debate between the restrictive approach and the expansive approach. However, the French version of the Charter uses the term *aggression armee*, which translates to “armed aggression” and is amenable to a broader interpretation in terms of authorizing anticipatory self-defense.

¹⁰ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 234-41 (5th ed. 2011). Yoram Dinstein would include a third criterion called immediacy. *Id.* at 242. “War may not be undertaken in self-defence long after an isolated armed attack.” *Id.* In other words, the timeliness of the action in self-defense matters because a delay in response to an attack or the threat of attack attenuates the immediacy of the threat and the necessity to use force in self-defense. It should be noted that necessity and proportionality mean different things in *jus ad bellum* and *jus in bello*. *Jus ad bellum* defines these terms for purposes of using force, whereas *jus in bello* (law of armed conflict) defines these terms for purposes of targeting analysis. For further discussion of *jus in bello* principles, see *infra* Chapter 2, Law of War.

the context of *jus ad bellum*, proportionality is sometimes referred to as “proportionate force.” However, the principle does not require limiting the response to mirror the type of force constituting the threat or attack.¹¹

C. Types of Self-Defense

1. **Individual Self-Defense.** Within the bounds of both the UN Charter and customary practice, the inherent right of self-defense has primarily found expression in three recurring areas: 1) protection of a nation’s *territorial integrity*; 2) protection of a nation’s *political independence*; and 3) protection of *nationals* and their property located abroad. Judge Advocates must be familiar with these foundational issues and basic concepts of self-defense as they relate to overseas deployments, responses to State-sponsored terrorism, and the rules of engagement.

a. Protection of Territorial Integrity. States possess an inherent right to protect their national borders, airspace, and territorial seas. No nation has the right to violate another nation’s territorial integrity, and force may be used to preserve that integrity consistent with the Article 51 (and customary) right of self-defense.

b. Protection of Political Independence. A State’s political independence is a direct attribute of sovereignty, and includes the right to select a particular form of government and its officers, the right to enter into treaties, and the right to maintain diplomatic relations with the world community. The rights of sovereignty or political independence also include the freedom to engage in trade and other economic activity. Consistent with the principles of the UN Charter and CIL, each State has the duty to respect the political independence of every other State. Accordingly, force may be used to protect a State’s political independence when it is threatened and all other avenues of peaceful redress have been exhausted.

c. Protection of Nationals. Customarily, a State has been afforded the right to protect its citizens abroad if their lives are placed in jeopardy and the host State is either unable or unwilling to protect them. This right is cited as the justification for non-combatant evacuation operations (NEO), discussed in greater detail later in a separate chapter of this handbook.¹²

(1) The protection of U.S. nationals was identified as one of the legal bases justifying U.S. military intervention in both Grenada and Panama. However, in both cases, the United States emphasized that protection of U.S. nationals, standing alone, did not necessarily provide the legal basis for the full range of U.S. activities undertaken in those countries. Thus, while intervention for the purpose of protecting nationals is a valid and essential element in certain uses of force, it cannot serve as an independent basis for continued U.S. military presence in another country after the mission of safeguarding U.S. nationals has been accomplished.

(2) The right to use force to protect citizens abroad also extends to those situations in which a host State is an active participant in the activities posing a threat to another State’s citizens (e.g. the government of Iran’s participation in the hostage-taking of U.S. embassy personnel in that country in 1979-81; and Ugandan President Idi Amin’s support of terrorists who kidnapped Israeli nationals and held them at the airport in Entebbe in 1976).

2. **Collective Self-Defense.** Also referred to in Article 51, the inherent right of collective self-defense allows victim States to receive assistance from other States in responding to and repelling an armed attack. To constitute a legitimate act of collective self-defense, all conditions for the exercise of an individual State’s right of self-defense must be met, along with the additional requirement that **assistance must be requested by the victim State**. There is no recognized right of a third-party State to unilaterally intervene in internal conflicts where the issue in question is one of a group’s right to self-determination and there is no request by the *de jure* government for assistance.

a. Collective defense treaties, such as that of the North Atlantic Treaty Organization (NATO), the Inter-American Treaty of Reciprocal Assistance (the Rio Treaty), the **Security** Treaty Between Australia, New Zealand, and the United States (ANZUS), and other similar agreements, do not provide an international legal basis for the use of U.S. force abroad, per se. Such agreements simply establish a commitment among the parties to

¹¹ The term *Proportionality in jus ad bellum* should not be confused with the same term in the *jus in bello* or targeting context. The proportionality analysis in targeting is a balancing test to ensure that the civilian loss is not excessive in relation to the concrete and direct military advantage anticipated. This is not the test for a *proportionate response* in the *jus ad bellum* context.

¹² See *infra* Chapter 9.

engage in “collective self-defense” as required by specified situations, and provide the framework through which such measures are to be taken. From an international law perspective, a legal basis for engaging in measures involving the use of military force abroad must still be established from other sources of international law extrinsic to these collective defense treaties (i.e., there still must be a justifiable need for collective self-defense or a UN Security Council authorization to use force).

b. The United States has entered into *bilateral military assistance agreements* with numerous countries around the world. These are not defense agreements, and thus impose no commitment on the part of the United States to come to the defense of the other signatory State in any given situation. Moreover, such agreements, like collective defense treaties, also provide no intrinsic legal basis for the use of military force.

3. **Anticipatory Self-Defense.** As discussed above, some States embrace an interpretation of the UN Charter that extends beyond the black letter language of Article 51, under the CIL principle of anticipatory self-defense. Anticipatory self-defense justifies using force in anticipation of an imminent armed attack. Under this concept, a State is not required to absorb the first hit before it can resort to the use of force in self-defense to repel an imminent attack.

a. Anticipatory self-defense finds its roots in the 1837 Caroline case¹³ and subsequent correspondence between then-U.S. Secretary of State Daniel Webster and his British Foreign Office counterpart Lord Ashburton. Secretary Webster posited that a State need not suffer an actual armed attack before taking defensive action, but may engage in anticipatory self-defense if the circumstances leading to the use of force are “instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation.” As with any form of self-defense, the principles of necessity and proportionality serve to bind the actions of the offended State.

b. Because the invocation of anticipatory self-defense is fact-specific in nature, and therefore appears to lack defined standards of application, it remains controversial in the international community. Concerns over extension of anticipatory self-defense as a pretext for reprisal or preventive actions (i.e., the use of force before the coalescence of an actual threat) have not been allayed by contemporary use. It is important to note, however, that **anticipatory self-defense serves as a foundational element in the Chairman of the Joint Chiefs of Staff’s Standing Rules of Engagement (CJCS SROE), as embodied in the concept of hostile intent**, which makes it clear to commanders that they do not, and should not, have to absorb the first hit before their right and obligation to exercise self-defense arises.¹⁴

c. **Preemptive Use of Force.** In the 2002 National Security Strategy (NSS), the U.S. Government took a step toward what some view as a significant expansion of use of force doctrine from anticipatory self-defense against an imminent attack to pre-emptive self defense against an attack which exists but *may not* be imminent.¹⁵ This position was reinforced in the 2006 NSS, which reaffirmed the doctrine of preemptive self-defense against “rogue states and terrorists” who pose a threat to the United States based on their expressed desire to acquire and use weapons of mass destruction.¹⁶ The “Bush Doctrine” of preemption re-casted the right of anticipatory self-defense based on a different understanding of imminence. Thus, the NSS stated, “We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.” It concluded: “The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.”¹⁷ The 2010 NSS, however, suggests a possible movement away from the Bush Doctrine, as the Obama Administration declares in the NSS that, “[w]hile the use of force is sometimes necessary, [the United States] will exhaust other options before war whenever [it] can, and [will] carefully weigh the costs and risks of action versus the costs and risks of inaction.”¹⁸ Moreover, according to the 2010 NSS, “[w]hen force is necessary . . . [the United States] will seek broad international support,

¹³ The Case of the Caroline is not a court case, but rather an international incident in which British forces attacked a U.S. merchant riverboat – the Caroline. The Caroline was ferrying supplies to Canadian rebel forces located on an island above the Niagara Falls. Following the incident, a series of letters between the U.S. Secretary of State and the British Foreign Office established the common international understanding of imminence in the context of anticipatory self-defense.

¹⁴ See CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES, (13 June 2005). A new version of the CJCSI was due for publication in 2014. As of this publishing however (June 2015) the new SROE was still not available.

¹⁵ THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, (2002).

¹⁶ THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, (2006).

¹⁷ THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, (2002). at 15.

¹⁸ THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, 22 (2010) at 22.

working with such institutions as NATO and the U.N. Security Council.”¹⁹ Nevertheless, the Obama Administration maintains that “[t]he United States must reserve the right to act unilaterally if necessary to defend our nation and our interests, yet we will also seek to adhere to standards that govern the use of force.”²⁰

d. A modern-day legal test for imminence, consistent with the above, was perhaps best articulated by Professor Michael Schmitt in 2003. He stated that States may legally employ force in advance of an attack, at the point when (1) evidence shows that an aggressor has committed itself to an armed attack, and (2) delaying a response would hinder the defender’s ability to mount a meaningful defense.²¹

e. Anticipatory self-defense, whether labeled anticipatory or preemptive, must be distinguished from preventive self-defense. **Preventive self-defense—employed to counter non-imminent threats—is illegal under international law.**

D. Self-Defense Against Non-State Actors. Up to now, this handbook has discussed armed attacks launched *by* a State. Today, however, States have more reasons to fear armed attacks launched by non-state actors *from* a State. The law is still grappling with this reality. While the answer to this question may depend on complicated questions of state responsibility, **many scholars base the legality of cross border attacks against non-state actors on whether the host State is unwilling or unable to deal with the non-state actors who are launching armed attacks from within its territory.**²² Some scholars have posited that a cross border response into a host State requires the victim State to meet a higher burden of proof in demonstrating the criteria that establish the legality of a State’s use of force in self-defense.²³

E. Operation Enduring Freedom (OEF). In the wake of the attacks on the World Trade Center on 11 September 2001, the UN Security Council passed, on the very next day, UNSCR 1368. This resolution explicitly recognized the United States’ inherent right of individual or collective self-defense pursuant to Article 51 of the UN Charter against the terrorist actors (nonstate actors) who perpetrated the 9/11 attacks. The basis for the United States’ use of force in OEF is, therefore, the Article 51 right of individual or collective self-defense. Many writers argue that UNSCR 1368 signals a change where the right of self-defense against nonstate actors is recognized, even if the UN Charter did not originally envision this. United States forces involved in the North Atlantic Treaty Organization (NATO) International Security Assistance Force (ISAF) mission must also, however, be aware of UNSCR 2011 (dated 12 October 2011), which “[a]uthorizes the Member States participating in ISAF to take all necessary measures to fulfill its mandate.” The mandate of ISAF per the UNSCR is to assist the Afghan Government in improving “the security situation and build its own security capabilities.” Thus, forces operating within the ISAF mission do so legally on the basis of a Security Council resolution, whereas forces operating within the OEF mission do so legally on a self-defense basis.

IV. DOMESTIC LAW AND THE USE OF FORCE: THE WAR POWERS RESOLUTION

A. In addition to the requirement that a use of force have an *international* legal basis, **there must also be domestic legal support.** In every situation involving the possible use of U.S. forces abroad, a legal determination that embraces U.S. Constitutional principles and the 1973 War Powers Resolution must be made.²⁴

B. The Constitution divides the power to wage war between the Executive and Legislative branches of government. Under Article I, Congress holds the power to declare war; to raise and support armies; to provide and maintain a navy; and to make all laws necessary and proper for carrying out those responsibilities. Balancing that legislative empowerment, Article II vests the Executive power in the President and makes him the Commander-in-Chief of the Armed Forces. This bifurcation of the war powers created an area in which the coordinate political

¹⁹ *Id.*

²⁰ *Id.*

²¹ Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT’L L. 513, 535 (2003).

²² See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 226 (5th ed. 2011); Ashley Deeks, ‘*Unwilling or Unable*’: *Toward a Normative Framework for Extra-Territorial Self-Defense*, 52 VA. J. INT’L L. 483 (2012).

²³ See Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework*, 56 NAVAL L. REV. 1 (2008).

²⁴ Public Law 93-148, 50 U.S.C. §§ 1541-1548. The Department of Justice, Office of Legal Counsel (OLC) has a series of opinions that address the executive interpretation of the 1973 War Powers Resolution. See *Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. 173 (1994); *Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327 (1995). The most recent addition to this line of OLC opinions concerns the use of United States Armed Forces in the Libya operation in 2011. *Authority to Use Military Force in Libya*, 35 Op. O.L.C. 1 (2011).

branches of government exercise concurrent authority over decisions relating to the use of Armed Forces overseas as an instrument of U.S. foreign policy.

C. Until 1973, a pattern of Executive initiative, Congressional acquiescence, and Judicial deference combined to give the President primacy in decisions to employ U.S. forces. In order to reverse the creeping expansion of Presidential authority and to reassert its status as a full partner in decisions relating to the use of U.S. forces overseas, Congress passed, over Presidential veto, the War Powers Resolution (WPR). **The stated purpose of the WPR is to ensure the “collective judgment” of both the Executive and Legislative branches, in order to commit to the deployment of U.S. forces, by requiring consultation of and reports to Congress** in any of the following circumstances: 1) Introduction of troops into actual hostilities; 2) Introduction of troops, equipped for combat, into a foreign country; or 3) Greatly enlarging the number of troops, equipped for combat, in a foreign country.

D. **The President is required to make such reports within forty-eight hours of the triggering event, detailing:** the circumstances necessitating introduction or enlargement of troops; the Constitutional or legislative authority upon which he bases his action; and the estimated scope and duration of the deployment or combat action.

E. The issuance of such a report, or a demand by Congress for the President to issue such a report, triggers a sixty-day clock. If Congress does not declare war, specifically authorize the deployment/combat action, or authorize an extension of the WPR time limit during that period, the President is required to withdraw deployed forces. The President may extend the deployment for up to thirty days, should he find circumstances so require, or for an indeterminate period if Congress has been unable to meet due to an attack upon the United States.

F. Because the WPR was enacted over the President’s veto, one of the original purposes of the statute—establishment of a consensual, inter-branch procedure for committing our forces overseas—was undercut. Although the applicability of the WPR to specific operations will not be made at the Corps or Division level, once U.S. forces are committed overseas, a deploying JA must be sensitive to the impact of the WPR on the scope of operations, particularly with respect to the time limitation placed upon deployment under independent Presidential action (i.e., the WPR’s 60-90 day clock).

G. **Procedures have been established which provide for CJCS review of all deployments that may implicate the WPR.** The Chairman’s Legal Advisor, upon reviewing a proposed force deployment, is required to provide to the DoD General Counsel his analysis of the WPR’s application. If the DoD General Counsel makes a determination that the situation merits further inter-agency discussion, he or she will consult with both the State Department Legal Adviser and the Attorney General. As a result of these discussions, advice will then be provided to the President concerning the consultation and reporting requirements of the WPR.

H. In the unlikely event that a JA or his or her supported commander is presented with a question regarding the applicability of the WPR, the appropriate response should be that the operation is being conducted at the direction of the National Command Authority, and is therefore presumed to be in accordance with applicable domestic legal limitations and procedures.