

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

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I.I NTRODUCTION

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

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

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

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

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

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

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

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

4. See *id.*

5. *Id.*

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

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

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

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

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

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

II. ROMANTICS AT WAR:⁸ NATIONS AND THE “UNLIMITED” *JUS AD BELLUM*

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

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

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

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

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

11. FLETCHER, *supra* note 8, at 47, 58 (“This body of rules that legitimates conduct otherwise subject to punishment.”).

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

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

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

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

14. FLETCHER, *supra* note 8, at 139.

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

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

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

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

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

