

The Lawful Resort to Unilateral Use of Force

Oscar Schachter†

A state may lawfully resort to unilateral use of force outside of its territory in the following circumstances:¹

- 1) When it has been subjected to an armed attack on its territory, vessels or military forces;
- 2) When the imminence of an attack is so clear and the danger so great that the necessity of self-defense “is instant (and) overwhelming;”
- 3) When another state that has been subjected to an unlawful armed attack by a third state requests armed assistance in repelling that attack;
- 4) When a third state has unlawfully intervened with armed force on one side of an internal conflict and the other side has requested counter intervention in response to the illegal intervention; or
- 5) When its nationals in a foreign country are in imminent peril of death or grave injury and the territorial sovereign is unable or unwilling to protect them.

Of course, each of the foregoing grounds for use of force requires interpretation to meet the particular conditions involved. A state may also be authorized to resort to force by a decision of a competent international organ pursuant to the United Nations Charter. Such action would fall outside of the “unilateral” use of force.

I have understood the expression “unilateral use of force” to mean coercive military action against a foreign government or an organized insurgency movement. It would not apply normally to the provision of military equipment, materials, training, or technical advice by one state to another under an agreed arrangement. Questions as to the legal admissibility of such aid may arise if the recipient government faces an organized insurgency involving a substantial number of people or control over significant areas of the country. In that circumstance, an external power would not be entitled to assist either side with military means. Such outside support involving armed force would be inimical to the right of the people to decide for themselves the kind of government they want, whether they do so by armed conflict or peaceful means. It would constitute a use of force against the political independence of the state in ques-

† Hamilton Fish Professor of International Law & Diplomacy, Emeritus, Columbia University; Past President of the American Society of International Law; Member, Institut de Droit International.

1. For a fuller explanation of the views expressed here, with appropriate references, see Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620-1646 (1984).

tion. In the event an illegal intervention should occur on one side or the other, a counter-intervention is permissible (as stated in point four above). It would be legally justifiable as a defense of the independence of the state against a prior illegal intervention involving the use of force.

The permissible uses of force summarized above are all subject to the requirements of necessity and proportionality. This presents the question of whether force can be considered necessary if peaceful means are available to undo the wrong. Is there not always an overriding obligation to seek peaceful settlement first? We cannot say there is. To require a state to allow an attack to continue without resistance on the ground that peaceful settlement should be sought first would nullify the right of self-defense. It is enough that an armed attack has taken place to justify the proportionate use of force as an immediate response. A state is not obliged to turn the other cheek when attacked. A similar conclusion is called for in case of an imminent threat to the lives of persons coupled with unreasonable demands for concession.

The issue becomes more complicated when a significant period of time has elapsed after an armed attack has succeeded in the capture of territory, property, or persons. Has a state whose territory was unlawfully taken by armed force a continuing right to self-defense to recover that territory? The element of time cannot be ignored. It is reasonable to require a victim of aggression, no longer faced with the emergency of an armed attack, to seek and exhaust all avenues of peaceful settlement. But what if such avenues prove futile—is self-defense then “necessary”? I suggest that the idea of self-defense contains a temporal element. It refers to a response made close in time to the attack or imminent threat. Without that limitation, self-defense would sanction armed attacks for countless prior acts of aggression and conquest. It would completely swallow up the basic rule against use of force. The difficulty of defining a precise time limit—a statute of limitations, as it were—does not impugn the basic idea. In most cases, irredentist demands for lost territory or claims for restoration of the status quo ante are based on attacks that occurred many years, even decades, ago. To extend self-defense to such cases is to stretch the notion of defense far beyond its essential sense of a response to an attack or immediate threat of attack.

The requirement of proportionality is linked to necessity: acts done in self-defense must not exceed in manner or aim the necessity provoking them. This definition leaves room for difference in particular cases but there is no mistaking its core meaning. A state subjected to an isolated frontier incursion or attack on a naval vessel is not entitled to bomb the cities of the offender or launch a massive invasion. State practice con-

forms, by and large, to this principle of restraint in defense. Security Council decisions have condemned defensive actions that were greatly in excess of the provocation (as measured by scale of weaponry and relative casualties) as illegal reprisals rather than legitimate self-defense. It does not seem unreasonable, however, to allow a state victim of an attack to retaliate with force beyond the immediate area of attack when that state has good reason to expect a continuation of attacks from the same source. Such action would not be merely "anticipatory" since prior attacks took place; nor would it be a reprisal inasmuch as its prime motive would be protective, not punitive.

Self-defense may also be lawful in response to a threat of attack that is imminent, and the necessity "instant and overwhelming" (see point two above). Some believe that this may leave too wide an area of appreciation by a threatened state; others are concerned that it does not take sufficient account of a build-up of military force (and especially nuclear weapons) that would on first strike destroy a victim's defensive capability. Both concerns have substance. They reveal the inability of a general legal principle to capture the full dimensions of the problem. More specific rules are required and regimes for their supervision. Some such regimes have been established in treaties and by practices accepted as rules. We must look to them and to future arrangements for restraints. On the level of principle, it makes sense to recognize a norm that opposes the preemptive resort to force and acknowledges the necessity of self-defense when an attack is clearly imminent. The size and deployment of military forces on a large scale involve implicit, if not explicit, threats of force. To permit states that feel threatened to take defensive measures by preemptive action would open up a wide area for unilateral force. Yet we must acknowledge the possibility of a threat so immediate and massive as to make it absurd to demand that the target state await the actual attack before taking defensive measures. The formula suggested above (based on Daniel Webster's response in the *Caroline* case²) comes closest to a legal standard that meets the opposing concerns and has found support in recent years.³

Finally, I would underline the importance of rejecting the contention that force may be used unilaterally to achieve such laudable ends as freedom, self-rule and human rights. Admittedly that contention has considerable appeal in face of the repression and brutality of governments in many areas of the world. The inability of the United Nations and other

2. 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 409 (1906).

3. See Security Council discussion in 1981, 36 U.N. SCOR (2285-88 mtgs.), U.N. Docs. S/PV 2285-88 (1981).

international agencies to achieve their proclaimed purposes and the apparent ineffectiveness of moral suasion and diplomacy have contributed to the feeling that force is a necessary instrument to attain the ends articulated in the Charter of the United Nations.

Nonetheless, I would reject the interpretation that force may be used for any of those objectives. That construction would deprive Article 2(4) of much of its intended meaning. It is contrary to the interpretation given to that article by virtually all countries since the Charter entered into force. The democratic states of the world have not claimed the right to intervene with force to bring about freedom or self-rule for other countries. Such interventions as have taken place by them have been legally justified on other grounds. The idea that wars waged in a good cause such as democracy or human rights would not involve a violation of territorial integrity or political independence requires an Orwellian construction of these terms. It is no wonder that international lawyers and governments generally have rejected that interpretation.

In the absence of effective international restraints on the use of force, an exception for "good" or "just" wars would give wide latitude to individual powers to decide on the legitimacy of force. Experience has shown how readily more powerful states have used the pretext of a higher good to impose their will and values on weaker states. The implications of this for international violence in a period of superpower confrontation and obscurantist rhetoric are ominous. This is hardly the time to weaken the principal normative restraints against the unilateral use of force. It is most improbable that the world can be made safe for democracy and human rights through new wars or invasions of the weak by the strong.