COLLECTIVE SELF-DEFENSE:
A REPORT OF THE YALE LAW SCHOOL CENTER FOR GLOBAL LEGAL CHALLENGES

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Executive Summary

Collective self-defense is an express exception to the U.N. Charter's prohibition on the use of force by states. It permits a member state to intervene in the defense of another member state when that state has been subject to an unlawful armed attack. Here we consider (1) the obligations that international law places on an intervening state and (2) the best practices for an intervening state that may be derived from past state practice.

1. The doctrine of collective self-defense requires an intervening state to independently evaluate the legal basis of the requesting state's right to resort to force in self-defense.

An intervening state may, at a maximum, deploy the level of force the requesting state would be permitted to deploy were it acting for itself. The intervening state's inquiry must turn on an objective assessment of the requesting state's rights under the doctrine of individual self-defense. For this reason, an intervening state may not intervene in the requesting state—even when it receives an unequivocal request—without independently evaluating the legal basis for the use of force.

2. In the vast majority of past interventions justified in whole or in part by collective self-defense, the question of whether collective self-defense was properly invoked was contested. We therefore recommend a set of best practices that should be undertaken by any state invoking collective self-defense.

Of the twelve interventions we surveyed, only two were considered legitimate by large segments of the international community: the interventions in Kuwait (1991) and Afghanistan (2001). We therefore propose best practices for a state invoking collective self-defense—practices that, while not generally regarded as legally required, could strengthen the legitimacy of any invocation of the doctrine. Those best practices are: (1) providing prior notification to the Security Council, (2) offering public assessments of the factual and legal assessments that support an assertion of collective self-defense, and (3) developing objective criteria to guide future applications of Article 51's collective self-defense provision.

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INTRODUCTION

This report examines the obligations that the doctrine of collective self-defense places on an intervening state before it may come to the assistance of a requesting state.[1] We consider both legal requirements of, and best practices for, the intervening state.

Part I demonstrates that an intervening state must independently evaluate whether a requesting state has a legal right to use force in its own self-defense before resorting to force in defense of the requesting state. The intervening state's inquiry must turn on an objective assessment of the requesting state's rights under the doctrine of self-defense.[2] Moreover, an intervening state may, at a maximum, deploy the level of force the requesting state would be permitted to deploy were it acting in its own defense.

This conclusion is supported by the drafting history of Article 51, which shows that the Charter was merely intended to codify the existing law of collective self-defense and not to expand states' right to invoke the doctrine. It is also supported by the history of state practice in the U.N. Charter era. A review of state practice demonstrates that no intervening state has attempted to argue that its authority to act in collective self-defense exceeds the authority of a requesting state; it also demonstrates that intervening states recognize the requirement to independently evaluate, and provide justifications for, their actions. Finally, our conclusion is reinforced by the International Court of Justice's (ICJ) decision in *Military and Paramilitary Activities in and Against Nicaragua* and by the work of international legal scholars.

Part II broadens the lens to develop best practice recommendations that go beyond the narrow legal requirements identified in Part I. In the vast majority of interventions in which collective self-defense has been asserted as a legal justification, there was debate and contestation over whether the doctrine provided a legitimate basis for intervention.[3] In light of this history, the report recommends that any state seeking to intervene on the basis of collective self-defense follow three best practices:

1. Provide prior notification to the Security Council;
2. Provide public factual (in addition to) legal assessments that support an assertion of collective self-defense; and
3. Develop objective criteria to guide future applications of Article 51's collective self-defense provision.

Though these best practices may not be strictly required by international law, adherence to them would strengthen the legitimacy of any future collective self-defense interventions.

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[1] While some of the literature refers to "requesting" states as "victim" states, we have elected to use the former label due to the latter's normative implications.

[2] We recognize that the scope of an individual state's right of self-defense is hotly contested. *See, e.g.*, JACKSON NYAMUYA MAOGOTO, BATTLING TERRORISM: LEGAL PERSPECTIVES ON THE USE OF FORCE AND THE WAR ON TERROR 111-34 (2005). This report does not address these debates.

[3] We surveyed twelve examples where intervening states claimed to be coming to the assistance of the following states: Hungary (1956), Lebanon (1958), Jordan (1958), the Dominican Republic (1965), South Vietnam (1965), Czechoslovakia (1968), Afghanistan (1979), El Salvador/Honduras/Costa Rica (1979), Grenada (1983), Chad (1983, 1986), Kuwait (1991), and the United States (2001).

I. AN INTERVENING STATE MUST INDEPENDENTLY EVALUATE ITS LEGAL BASIS FOR RESORTING TO FORCE WHEN ASSISTING A REQUESTING STATE.

The United States has interpreted its rights under the collective self-defense doctrine to be bounded by the rights of the requesting state. In an address to the American Society of International Law, Abraham Sofaer—then the Legal Adviser to President Reagan's Department of State—observed that the United States "assume[s] that we could engage in collective self-defense lawfully in any situation in which the nation we assist is entitled to act *and to the same extent*."[4] Such language indicates that the United States does not rely solely on the representations of the requesting state when evaluating whether it may lawfully act.[5] Because an intervening state is limited to those actions available to the requesting state, it must independently assess the legal basis for the use of force lest it exceed the authority conferred by Article 51.

This conclusion is supported by (1) the drafting history of Article 51, (2) state practice, and (3) international law doctrine and scholarship. We discuss each in turn.

A. The Drafting History of Article 51

The U.N. Charter prohibits the use of force by any member state against any other state. It includes, however, an express exception for self-defense and collective self-defense—where a state subject to an unlawful armed attack by another state requests a third state to assist its defense with force. The exception appears in Article 51, which in relevant part provides that

> [n]othing in the present Charter shall impair the inherent right of self-defence or collective self-defence 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.[6]

To pass legal muster, an intervention taken under the auspices of collective self-defense must meet two conditions. First, the requesting state must issue a legitimate request, and second, the requesting state must have been the subject of an armed attack. Notably, the intervening state may act out of a "general interest in preserving international peace and security," and may do so absent a formal treaty so long as the requesting state provides valid consent.[7]

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[4] Abraham D. Sofaer, *International Law and the Use of Force*, 82 AM. SOC'Y INT'L L. PROC. 420, 422 (1988) (emphasis added). These remarks are especially significant because they were presented as part of an extended attack on the ICJ's reasoning in the *Nicaragua* case.

[5] Sofaer's language also reveals a central distinction between the collective self-defense under the Charter and the collective security regimes established by institutions like the North Atlantic Treaty. Under the Charter's rules, "the exercise of collective defense . . . under Art[icle] 51 [is] merely a right and not a legal duty." Josef L. Kunz, Editorial Comment, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 875 (1947). Only a treaty regime can transform a mere *entitlement* to act into an *obligation*. *Id.*

[6] U.N. Charter art. 51.

[7] George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT'L L.J. 321, 353 (1998). Though some scholars have suggested that an intervening state must have substantive rights or interests affected by an aggressor state's actions before it can lawfully come to a requesting state's aid, this suggestion has not gained traction. *See id.*

Although collective self-defense arrangements significantly predate the Charter,[8] the Charter's framers drew inspiration from a modern framework when crafting the collective self-defense provision that would later become Article 51. That framework was the 1945 Act of Chapultepec, a "declaration of principles and a recommendation for the conclusion of an inter-American treaty of reciprocal assistance" later codified in treaty form, two years later, at Rio de Janeiro.[9] Indeed, as originally submitted, the Dumbarton Oaks Proposals contained nothing approaching the collective self-defense language of Article 51. That now-familiar text was only added as a "diplomatic step" to solve the "Latin-American crisis" during negotiations in San Francisco.[10] The Latin American states—which comprised the largest single voting bloc at the table—feared that the vesting of the Security Council veto in the Permanent Five would void the Act of Chapultepec and leave future decisions about collective self-defense at the mercy of a single recalcitrant veto-wielding government.[11] Article 51, proposed and supported by the United States delegation, was designed to address their concerns.[12]

Collective self-defense does not require a pre-existing treaty framework. The language that later became Article 51 was initially placed in Chapter VIII of the draft Charter.[13] However, negotiators grew concerned that locating such language in a section concerned with regional security arrangements would imply that collective self-defense depended on a preexisting regional arrangement.[14] Thus, Article 51 was "deliberately transferred . . . from Chapter VIII to Chapter VII," thereby liberating collective self-defense doctrine from any suggestion that it could only be invoked by a Chapultepec-like treaty.[15]

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[8] For a review of collective self-defense arrangements prior to the Charter era, see *id.* at 325-47.

[9] Walter S.G. Kohn, *Collective Self-Defense Under a Revised UN Charter*, 22 SOC. RES. 231, 232 (1955).

[10] Kunz, *supra* note 5, at 872.

[11] Kohn, *supra* note 9, at 232-33.

[12] *Id.* As the delegate from Colombia observed after the Conference unanimously approved the insertion of collective self-defense into the Dumbarton Oaks Proposals:

> [T]he origin of the term "collective self-defense" is identified with the necessity of preserving regional systems like the Inter-American one. The Charter, in general terms, is a constitution, and it legitimizes the right of collective self-defense to be carried out in accord with . . . regional pacts . . . . If a group of countries with regional ties declare[s] their solidarity for their mutual defense . . . they will undertake such defense jointly if and when one of them is attacked . . . . This is the typical case of the American system.

Fourth Meeting of Committee III/4, May 23, 1945, 12 DOC. U.N. CONF. ON INT'L ORG. 678, 680-81 (1945). Mexico, Costa Rica, Paraguay, Venezuela, Chile, Ecuador, Bolivia, Panama, Uruguay, Peru, Guatemala, El Salvador, Brazil, Honduras, and Cuba all associated themselves with the Colombian delegate's statement. *Id.* at 681.

[13] *See, e.g.*, *Proposal for the Amalgamation of Amendments Offered to Chapter VIII, Section C, Prepared by the Delegation of the United States in Consultation with the Other Sponsoring Governments and France*, 3 DOC. U.N. CONF. ON INT'L ORG. 634, 635 (1945); *Replacement for Pages 19-21 of Skeleton Charter—Second Draft*, 17 DOC. U.N. CONF. ON INT'L ORG. 531, 532-33 (1945); *see also* Walker, *supra* note 7, at 353.

[14] Walker, *supra* note 7, at 353. Though certain states—particularly France—desired to keep collective self-defense limited to regional organizations, they eventually acquiesced to the majority view. *See Summary Report of Thirty-Fifth Meeting of Coordination Committee, June 20, 1945*, 17 DOC. U.N. CONF. ON INT'L ORG. 276, 288 (1945).

[15] Walker, *supra* note 7, at 353 (quoting STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 101-02 (1996)).

Apart from this narrow modification, the drafting history of Article 51 does not signify a willingness on the part of the contracting states to expand collective self-defense beyond the rights to which states were entitled in the pre-Charter world. Indeed, the San Francisco Conference described Article 51 as providing that "the use of arms in legitimate self-defense remains admitted and unimpaired."[16] For this reason, scholars have generally interpreted the Article as "leaving unimpaired the right of self-defense as it existed prior to the Charter."[17] The ICJ has embraced this reading of Article 51 as well.[18]

In sum, scholarship on the Charter and the Charter's *travaux préparatoires* establish that Article 51 merely codified the law of collective self-defense as it existed at the time the Charter was adopted.[19] That law was given its most succinct formulation by the Latin American states at San Francisco:

> [A]n aggression against one . . . state constitutes an aggression against all the other . . . states and all of them exercise their right of legitimate defense by giving support to the state attacked, in order to repel such aggression. *This is what is meant by the right of collective self-defense*.[20]

B. State Practice

Since the Charter entered into force in 1945, many interventions have implicated Article 51's collective self-defense provision. But although the doctrine is frequently cited, it is rarely cited *independently*. Rather, collective self-defense is typically just one of several legal arguments advanced by a state to legitimize its use of force.[21] And even when intervening or

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[16] Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633-34 (1984) (quoting text from *Report of the Rapporteur of Committee I to Commission I, June 13, 1945*, 6 DOC. U.N. CONF. ON INT'L ORG., 446, 459 (1945)).

[17] *Id.* at 1634.

[18] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 176 (June 27) [hereinafter *Nicaragua*] ("On one essential point, [the Charter] itself refers to pre-existing customary international law; this reference . . . is contained in . . . Article 51, which mentions the 'inherent right' . . . of individual or collective self-defence, which 'nothing in the present Charter shall impair' and which applies in the event of an armed attack. The Court . . . finds that Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.").

[19] Indeed, when Article 51 is read in conjunction with Article 2(4), it becomes clear that the Charter regime actually *narrowed* the preexisting customary international law right to use force. *See* Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415, 423 (2006) (explaining that before the Charter's adoption, "the existence of an 'armed attack' was not a threshold requirement for the use of force," and that instead, the right to use force was deemed an inherent element of state sovereignty, and states could resort to force in response to any breach of their legal rights" when diplomatic efforts had failed). For a more detailed discussion of the customary international law origins of the right to self-defense, see Jane A. Meyer, Note, *Collective Self-Defense and Regional Security: Necessary Exceptions to a Globalist Doctrine*, 11 B.U. INT'L L.J. 391, 394-97 (1993).

[20] Kunz, *supra* note 5, at 873 (quoting *Fourth Meeting of Committee III/4, May 23, 1945*, 12 DOC. U.N. CONF. ON INT'L ORG. 678, 687 (1945)).

[21] Many scholars have described the difficulty of isolating examples of collective self-defense because multiple justifications for the use of force are often provided. *See, e.g.*, CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 168 (3d ed. 2008) ("[A]lthough in theory there is a distinction between collective self-defence and assistance in reply to an invitation by a government to respond to external intervention against that government, in

requesting states do not invoke the doctrine, states opposed to an intervention sometimes argue that military action is not warranted by using the language of collective self-defense. For these reasons, the academic community has not settled on a consistent set of examples of the doctrine's use.[22] We therefore engaged in our own survey of state practice. To ensure completeness, our survey of past interventions includes all frequently cited examples of collective self-defense that appear in the scholarly literature, even those in which neither the intervening state nor requesting state invoked the doctrine.

We identified twelve prior interventions that are often described as instances of collective self-defense.[23] We summarize the interventions' salient features in Table 1. The table first identifies the date of the intervention, the requesting state, the intervening state or regional organization, and the alleged aggressor state. When the armed attack was attributed not to a state but to "indirect aggression"—that is, to Great Power involvement in Third World conflicts—the table notes this as well. It then explains whether the intervening state expanded its operations beyond the territory of the requesting state to reach the territory of the alleged aggressor. Next, it illustrates whether the existence of either of the two conditions upon which any lawful collective self-defense claim must meet—an armed attack and a legitimate request—was disputed at the time the intervention took place. Finally, it describes any condemnatory action taken by the United Nations in response to the intervention. Narrative explanations of each table entry are provided in the attached Appendix.

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practice the line may not be a clear one."); Rein Mullerson, *Self-Defense in the Contemporary World*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 13 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (arguing the same).

[22] In conducting our survey, we principally relied on the following sources: STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW (1996); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1991); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE (2001); Jean Combacau, *The Exception of Self-Defence in U.N. Practice, in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 9 (A. Cassese ed., 1986); Eustace Chikere Azubuike, *Probing the Scope of Self Defense in International Law,* 17 ANN. SURV. INT'L & COMP. L. 129 (2011); Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189 (1985); GRAY, *supra* note 21; Mullerson, *supra* note 21; and Rein Mullerson, *Intervention by Invitation*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 127 (Lori Fisler Damrosch & David J. Scheffer eds., 1991). For information on the Vietnam War, we consulted Richard A. Falk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, *in* THE VIETNAM WAR AND INTERNATIONAL LAW 445 (Richard A. Falk ed., 1968); and Quincy Wright, *Legal Aspects of the Viet-nam Situation*, *in* THE VIETNAM WAR AND INTERNATIONAL LAW 271 (Richard A. Falk ed., 1976) [hereinafter Wright, *Viet-nam Situation*]. For information on the response to the September 11th attacks, we consulted Elena Katselli & Sangeeta Shah, *September 11 and the UK Response*, 52 INT'L & COMP. L.Q. 245 (2003); and *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 237 (Sean D. Murphy ed., 2002).

[23] The interventions in Hungary, Lebanon, Jordan, Czechoslovakia, Afghanistan, Grenada, El Salvador/Costa Rica/Honduras, and Kuwait are the most frequently cited examples of collective self-defense. The interventions in the Dominican Republic, Vietnam, Chad, and Afghanistan (defending the United States after 9/11) are less frequently cited, but we include them because they illuminate the issues involved and clarify the relationship between collective self-defense and intervention by invitation. We do not include the interventions in Korea (1950), Guatemala (1954), South Arabian Federation (1964), Tajikistan (1993), and the Congo (1998) because they receive minimal treatment in the scholarly literature, though we flag their existence here.