NATURAL LAW AND SELF-DEFENSE

MAJOR JOHN J. MERRIAM*

There is in fact a true law—namely, right reason—which is in accordance with nature, applies to all men, and is unchangeable and eternal.[1]

If a man by the terrour of present death, be compelled to doe a fact against the Law, he is totally Excused; because no Law can oblige a man to abandon his own preservation.[2]

I. Introduction

The United States is currently engaged in combat and counterinsurgency operations in Iraq and Afghanistan, with over 137,000 U.S. soldiers on the ground in those two countries alone.[3] As troops have been drawn down in Iraq, they have been shifted to Afghanistan based on President Obama's decision to surge up to 30,000 additional soldiers and

---

* Judge Advocate, U.S. Army. Presently assigned as the Group Judge Advocate, 10th Special Forces Group (Airborne), Fort Carson, Colorado. LL.M., 2010, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; J.D., 2001, Case Western Reserve University School of Law; B.A., 1996, University of Notre Dame. Previous assignments include Brigade Judge Advocate, 12th Combat Aviation Brigade, Ansbach, Germany; Trial Defense Counsel, Fort Lewis, Washington; Brigade Judge Advocate, 1st Brigade, 25th Infantry Division, Fort Lewis, Washington and Mosul, Iraq; Chief, International and Operational Law, I Corps, Fort Lewis, Washington; Administrative Law Attorney, Fort Lewis, Washington. Member of the bar of Ohio. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course. The article received the Major General George S. Prugh Award for Writing Excellence in International & Operational Law, which is awarded by The Judge Advocate General's Legal Center and School for the best scholarly paper written in International & Operational Law.

[1] MARCUS TULLIUS CICERO, DE RE PUBLICA bk. 3, *quoted in* Robert N. Wilkin, *Cicero and the Law of Nature*, *in* ORIGINS OF THE NATURAL LAW 23 (Arthur L. Harding ed., 1954).

[2] THOMAS HOBBES, LEVIATHAN 345 (C.B. MacPherson ed., Penguin Classics 1985) (1651).

[3] *See* BROOKINGS INST., IRAQ INDEX: TRACKING VARIABLES OF RECONSTRUCTION AND SECURITY IN POST-SADDAM IRAQ 23 (2009), *available at* http://www.brookings.edu/~/media/Files/Centers/Saban/Iraq%20Index/index.pdf (indicating a total of 47,000 U.S. troops); BROOKINGS INST., AFGHANISTAN INDEX: TRACKING VARIABLES OF RECONSTRUCTION AND SECURITY IN POST-9/11 AFGHANISTAN 10 (2009) [hereinafter AFGHANISTAN INDEX], *available at* http://www.brookings.edu/~/media/Files/Programs/FP/afghanistan%20index/index.pdf (indicating a total of 90,000 U.S. troops).

Marines into Afghanistan.[4] These warriors are committed to a complex and ever-changing battlefield, in which identifying the enemy often constitutes the chief obstacle to successfully engaging him. Under such conditions, the primary rationale for the use of lethal force is quite often self-defense. Self-defense as a form of self-help is universally recognized as a legitimate basis for the use of force by states[5] and their soldiers[6] under international law. However, when, exactly, the right to self-defense is triggered has been the subject of vigorous debate.[7] The concept of anticipatory self-defense—action taken in self-defense before an "aggressor" strikes—has many critics, and even those who support its validity disagree over the exact temporal limits of its use.[8]

Debate over the validity of anticipatory self-defense has raged for decades, though the arguments were generally confined to the right of states to engage in pre-emptive military action and did not necessarily impact the immediate actions of soldiers on the battlefield. In 2005, however, the United States changed the Standing Rules of Engagement (SROE)[9] that govern its soldiers in combat.[10] While the SROE had always authorized self-defense in response to an "imminent threat," the 2005 SROE defined that term for the first time, stating that "imminent does not necessarily mean immediate or instantaneous."[11] As a result, the matter of the temporal boundaries surrounding anticipatory self-defense now directly affects individual soldiers in combat.[12] By defining "imminent" in this way, the UnitedStates has effectively opened the door to the use of force in self-defense against non-immediate threats.[13]

This article argues that the original basis for the right of self-defense is the natural law and that the natural law requires that self-defense only be used in response to an immediate threat.[14] Consequently, the U.S.

---

[4] AFGHANISTAN INDEX, *supra* note 3, at 10.
[5] YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 175 (2005).
[6] Commander Albert S. Janin, *Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage*, ARMY LAW, July 2007, at 82, 90 (arguing that "[t]he rights of nations are delegated to their agents on the battlefield").
[7] *See generally* Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 703–06 (2005).
[8] *Id.*
[9] CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01.B, STANDING RULES OF ENGAGEMENT (13 June 2005) [hereinafter 2005 SROE].
[10] *See infra* Part V.C.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *See infra* Part II.

SROE are no longer in accord with natural law, which may result in friction in two forms.[15] First, because U.S. domestic law on self-defense draws heavily on the natural law,[16] the SROE may now allow actions that U.S. law does not.[17] Secondly, natural law consists of principles that are universally understood by all rational beings,[18] but the blurring of the definition of imminence has created enormous uncertainty over what actions may trigger a lethal response by U.S. soldiers in Iraq and Afghanistan, especially among civilians.[19] This uncertainty, in turn, undermines the perceived legitimacy of U.S. actions and hinders cooperation between U.S. forces and civilians.

Part II of this article will trace the origins of natural law theory from the Romans through Thomas Aquinas and Hugo Grotius, and will show that the natural law allows for the use of force in self-defense only in response to an immediate threat.[20] Part III will then explain the influence of natural law over international law, including the Caroline Doctrine and Article 51 of the U.N. Charter, and will argue that both Caroline and Article 51 adhere to a natural law standard and, consequently, require an immediate threat.[21] Part IV will explore the influence of natural law on the domestic law of the United States and will show that U.S. law also requires the existence of an immediate threat before self-defense is allowed.[22] In Part V, this article will demonstrate how these two strains of law—international and domestic—are synthesized in the Rules of Engagement and will explain how the 2005 changes to the SROE represented a dramatic departure from the imminent threat standard articulated by natural law.[23] Finally, Part VI will explore the friction caused by this departure from natural law and the expected consequences of it.[24] The article will conclude by arguing that the United States should abandon its expanded definition of imminence and adhere to a stricter requirement of immediacy.[25]

---

[15] *See infra* Part VI.
[16] *See infra* Parts IV & V.
[17] *See infra* Part VI.
[18] *See infra* Part II.
[19] *See infra* Part VI.
[20] *See infra* Part II.
[21] *See infra* Part III.
[22] *See infra* Part IV.
[23] *See infra* Part V.
[24] *See infra* Part VI.
[25] *See infra* Part VII.

II. Natural Law as the Origin of the Right to Self-Defense

The right of self-defense is as old as history and has long been founded on the simple notion that every rational being, no matter what society he lives in or what tradition he draws upon, must conclude that it is permissible to defend himself when his life is threatened with immediate danger. This is not a lesson that must be taught or justified on the basis of some system of positive law; rather, it is "a law . . . not written, but born with us . . . which we have taken from nature herself . . . that if our life be in danger from . . . open violence, or from the weapons of robbers or enemies, every means of securing our safety is honorable."[26] Natural law is thus "the fount of the right of self-defense."[27]

The natural law, "which we have taken from nature herself,"[28] and the logic that underlies it deeply informs both the right of individuals and the right of states to take action in the face of an immediate threat, and may therefore provide a method for discerning the degree to which the American position on self-defense is more or less legitimate. In other words, using the natural law as the baseline for the right of self-defense and comparing the degree to which a state diverges from the natural law may demonstrate where state conduct has gone astray.

To understand the justification for self-defense under the natural law, the term "natural law" must first be defined. This is by no means an easy task, as the natural law has been the subject of literally millennia of thought, debate, scholarship, and critique. For the purposes of this article, natural law is "the view that there are a number of true directives of human action [that] every person can easily formulate for himself."[29]

The natural law has several primary components.[30] First, it is universal in nature; every person can easily access it.[31] Natural law does

---

[26] Marcus Tullius Cicero, Oration for Titus Annius Milo ch. IV [hereinafter Oration for Milo], *available at* http://www.uah.edu/society/texts/latin/classical/cicero/promilone1e.html; *see also* Wilkin, *supra* note 1, at 23.
[27] DINSTEIN, *supra* note 5, at 179.
[28] Oration for Milo, *supra* note 26.
[29] Ralph McInerny, *The Principles of Natural Law*, *in* 1 NATURAL LAW 325, 326 (John Finnis ed., 1991).
[30] S.B. Drury, *H.L.A. Hart's Minimum Content Theory of Natural Law*, 9 POLITICAL THEORY 534 (1981). Drury identifies the components as

not derive from the positive law of any particular society; rather, it consists of directives that every person will always, easily understand.[32] Second, it is a rule of reason; that is, every person can formulate the dictates of the natural law.[33] It does not derive solely from instinct but from rational thought.[34] Moreover, it is a rule of human reason. Natural law is not the same as "the law of nature," when the latter term is used to denote mere instinct, though the terms have often been conflated or interchanged.[35] Natural law is a principle of ordering things that derives from human nature. It derives its essence from the particularly human capacity to reason and is in that sense distinguishable from mere animal instinct.[36] Finally, the natural law is a set of commands or directives, imposing a moral obligation to do or refrain from doing.[37]

A. Roman Natural Law

Most discussions of natural law begin with Saint Thomas Aquinas, but in fact the idea of a universal law of nature is far older. Roman jurists, influenced by Aristotle[38] and the Greek Stoics,[39] began groping toward a concept of a universal natural law that applied to all people. In his famous *Institutes*, the Emperor Justinian attempted to identify a *jus gentium* or "law of nations," that was universal and derived from

> (1) the conviction that there exists a universal justice that transcends the particular expressions of justice in any given set of positive laws; (2) that the universal principles of justice are accessible to reason and independent of human volition (i.e., they are discovered, not made by man); (3) that a positive law contrary to these universal principles is not properly speaking a law, since it lacks the moral content necessary to put us under obligation.

Id.

[31] McInerny, *supra* note 29, at 326.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *See, e.g.*, J. INST. (J. B. Moyle trans., Oxford Univ. Press 2d ed. 1889); *see also infra* notes 42–43. What Justinian defined as the "law of nations" is, in modern parlance, called "the natural law." *See* J. INST. 1.2.1.

[36] McInerny, *supra* note 29, at 326.

[37] Drury, *supra* note 30, at 534.

[38] *See generally* ARISTOTLE, THE NICOMACHEAN ETHICS bk. V, ch. 10, at 132–33 (David Ross trans., Oxford Univ. Press 1991) (c. 350 BCE).

[39] For an excellent discussion of the early Greek Stoic school of natural law and the manner in which it was incorporated by Roman jurists to round out their *jus gentium*, see generally Wilkin, *supra* note 1, at 13–25.

reason.[40] "Those rules which a state enacts for its own members are peculiar to itself, and are called civil law: those rules prescribed by natural reason for all men are observed by all peoples alike, and are called the law of nations."[41] Justinian also attempted to preserve a distinction between instinct and a law of reason. "The law of nature is that which she has taught all animals; a law not peculiar to the human race, but shared by all living creatures . . . ."[42] On the other hand, "the law of nations is common to the whole human race; for nations have settled certain things for themselves as occasion and the necessities of human life required."[43]

These early Roman efforts to establish a universal natural law were important but tended to be derived empirically by observing the customs and laws of those they came in contact with.[44] Still, the Romans at least identified that human reason must lie at the source of this law of nations. Moreover, from the earliest times, the Roman conception of natural law was perhaps best exemplified in their view on self-defense. Arguably Cicero's most famous oration, his defense of Milo on a charge of murder, grounded self-defense firmly in the natural law, not on the civil law of Rome or, for that matter, on any human-created legal regime.[45]

What the Romans lacked, however, was an explicitly moral justification for their law of nations. Growing as it did out of empirical observation and common sense, the Roman concept of natural law had a certain logical force, yet it could easily be twisted to justify immoral ends. When Cicero defended Milo on the grounds of self-defense, he was defending a thuggish street-brawler who had incited and led organized and unlawful violence in the streets of Rome.[46] In that sense, the Roman

---

[40] Justinian, of course, drew on the earlier work of Roman scholars, beginning with Cicero and culminating with the work of the jurist known only as Gaius. *Id.* In his *Institutes*, written around A.D. 160, the Roman scholar Gaius grounded Roman law in two separate bodies of law. The *ius proprium* (later *ius civile*) constituted that law peculiar to the Roman people, and the *ius gentium* or *ius natural* that which "natural reason establishes among all mankind [and] is followed by all peoples alike." THE OXFORD HANDBOOK OF COMPARATIVE LAW 5 (2006) (citing G. INST. 1.55 (Francis de Zuleta trans.)).

[41] J. INST. 1.2.1.

[42] *Id.* 1.2.pr.

[43] *Id.* 1.2.2.

[44] *See* Wilkin, *supra* note 1, at 13.

[45] Oration for Milo, *supra* note 26.

[46] *See generally* TOM HOLLAND, RUBICON: THE LAST YEARS OF THE ROMAN REPUBLIC 280–82 (2005).

concept of natural law did much to describe law, but did very little to explain its essence by providing a moral justification for it.

B. Saint Thomas Aquinas

Thomas Aquinas, while drawing on the work of the Romans as preserved by the Roman Catholic Church during the dark ages, took the concept of natural law and rooted it firmly in a moral code in a way that impacted philosophical thought and jurisprudence in the West for centuries. In his *Summa Theologica*, Aquinas included a "Treatise on Law"[47] that succinctly and cogently argued that individuals may discern certain precepts that arise in all human beings "*per se nota*—known through themselves, not derived [but rather] self-evident."[48]

> Because this interpretation was clear-cut and exact, it served as an instrument by means of which he could refine the concept of law into its basic and essential elements. His predecessors, such as Plato, Aristotle, and Cicero, did not have such an instrument and hence their concept of law was formulated in terms of a description of law and not its essence, as Aquinas' was.[49]

1. Natural Law Reasoning

Aquinas's proof of the principle of natural law is rather lengthy, but understanding the fundamental concepts underlying it is central to appreciating its specific application to self-defense. Beginning with the notion that there are two forms of reason, speculative and practical,[50] Aquinas shows that the concept of "the good" is "the first thing to fall within the apprehension of practical reason, which is ordered toward action."[51]

---

[47] SAINT THOMAS AQUINAS, SUMMA THEOLOGICA, pt. I.2, *quoted in* THOMAS AQUINAS, TREATISE ON LAW: THE COMPLETE TEXT (Alfred J. Freddoso trans., St. Augustine's Press 2009).
[48] McInerny, *supra* note 29, at 327.
[49] Thomas E. Davitt, *St. Thomas Aquinas and the Natural Law*, *in* ORIGINS OF THE NATURAL LAW, *supra* note 1, at 31.
[50] AQUINAS, *supra* note 47, pt. I.2.94., art. 2.
[51] *Id.*

> For every agent acts for the sake of an end, which has the character of a good. And so the first principle in practical reasoning is what is founded on the notion *good*, which is the notion: the good is what all things desire. Therefore, the first precept of law is that good ought to be done and pursued and that evil ought to be avoided. And all the other precepts of the law of nature are founded upon this principle . . . . [A]ll the things to be done or avoided that practical reason naturally apprehends as human goods are such that they belong to the precepts of the law of nature.[52]

Aquinas thus argues that the natural law is that imperative, discerned rationally by all human beings, to seek the good and avoid the evil. In order to determine how that principle of practical reason applies to the world of men and human action, one must identify those things that all men accept as "goods."

Aquinas's precepts of natural law flow from certain "natural inclinations"[53] of all human beings, beginning with self-preservation.[54] "What belongs to the natural law in light of this inclination is everything through which man's life is conserved or through which what is contrary to the preservation of life is thwarted."[55] This may seem self-evident—and indeed, that is entirely the point of natural law.[56] A man's strongest inclination is the preservation of his own life, and thus the natural law compels man to do those things that preserve his life and thwart those things that would threaten it. This is the very essence of self-defense, and yet, it is not enough to form the basis of a natural law of self-defense, for self-preservation would allow many things otherwise characterized as "evils" to be done. Self-preservation is an instinct that is shared by all living beings, including animals, but it is not the only inclination that human beings are directed by their rational faculties to pursue.

---

[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] This natural law argument is powerfully echoed in the founding documents of the United States. The Declaration of Independence, for example, states "We hold these truths to be *self-evident*, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life . . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

What gives shape and substance to Aquinas's vision of natural law is a different category of inclinations: those that drive him "toward the good with respect to the rational nature that is proper to him,"[57] which includes the inclination to know God and the inclination "toward living in society."[58] It is this latter precept—that man is a social animal—that serves as the counterweight to the otherwise unrestrained pursuit of self-preservation. "[T]hose things that are related to this sort of inclination belong to the natural law, e.g. . . . that [man] not offend the others with whom he has to live in community . . . ."[59] For Aquinas, this "basic inclination to live in community with other men" derives from the fact that man is endowed with reason and "depends upon other men for the fulfillment of his many needs."[60]

Having defined these several "goods," Aquinas then makes clear that all goods are not equal. There is "an ordering of the precepts of the natural law that corresponds to the ordering of the natural inclinations."[61] Self-preservation is placed first because it is in the position of primacy, and the natural law is superior in the same way to positive, human law. Certainly, man is bound to seek to preserve all the goods when possible, but he must preserve his own life first and foremost. Thus "one is bound to take more care of one's own life than of another's."[62]

Finally, Aquinas laid down the proposition that natural law could not be circumvented or destroyed by the positive law. Again, in so doing, he echoed Cicero, who declared that the natural law cannot be abrogated. "To invalidate this law by human legislation is never morally right . . . and to annul it wholly is impossible."[63] Aquinas agreed, stating that "the law of nature is unchangeable with respect to its first principles."[64] If human law, or positive law (*jus positivum*), is opposed to natural law, "then it is no longer a law, but a corruption of law."[65]

---

[57] AQUINAS, *supra* note 47, pt. I.2.94, art. 2.
[58] *Id.*
[59] *Id.*
[60] Davitt, *supra* note 49, at 31.
[61] AQUINAS, *supra* note 47, pt. I.2.94, art. 2.
[62] *Id.* pt. II.2.64, art. 7.
[63] CICERO, *supra* note 1.
[64] AQUINAS, *supra* note 47, pt. I.2.94, art. 5.
[65] *Id.* pt. I.2.95, art. 2.

2. Aquinas on Self-Defense

Aquinas, therefore, defines the natural law as a command to protect the good, and his ordering of self-preservation as the highest good forms the natural law justification for the lawfulness of self-defense. But by balancing the drive for self-preservation against the need to avoid killing others, he goes further and justifies the morality of self-preservation. If one kills solely in order to protect one's life, and lacks any other alternative, the killing is not simply morally neutral, but morally good, because "moral acts take their species from what is intended, and not according to what is beside the intention."[66]

Lack of intent is a vital component of self-defense according to the natural law; it morally justifies self-defensive killing because there is no real intent to kill. Rather, the intent is to preserve one's life, and the killing is merely the way this can be accomplished. "Therefore this act, since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in 'being,' as far as possible."[67] Additionally, if the killing is truly an act of necessity, there is no requirement to go to great lengths to "avoid killing the other man, since one is bound to take more care of one's own life than of another's."[68] According to Aquinas, the natural law justification for killing in self-defense is entirely predicated on the inability to choose another course while still preserving one's own life. In other words, Aquinas has stated the principle of necessity, but has given it a moral quality that it would otherwise have lacked.

While Aquinas's justification of self-defense allows for killing based on its morality, he also allows for the exigencies of war. "[I]t is not lawful for a man to intend killing a man in self-defense, except for such as have public authority, who while intending to kill a man in self-defense, refer this to the public good, as in the case of a soldier fighting against the foe . . . ."[69] More broadly, Aquinas distinguishes between acts of self-defense (which are moral because their intention is not to kill but to preserve life) and other just acts (particularly the waging of just war)

---

[66] *Id.* pt. II.2.64, art. 7.
[67] *Id.*
[68] *Id.*
[69] *Id.*

which can be characterized as morally neutral.[70] In other words, Aquinas divided the forms of morally acceptable killing into two broad spheres: self-defense on the one hand and a separate set of just acts of violence on the other.

Remarkably, given the fact that he was writing centuries before the formation of anything resembling modern international law, Aquinas also invoked the principle of proportionality in response to the threat.

> And yet, though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end. Wherefore if a man, in self-defense, uses more than necessary violence, it will be unlawful: whereas if he repel force with moderation his defense will be lawful, because according to the jurists, 'it is lawful to repel force by force, provided one does not exceed the limits of a blameless defense.'[71]

Therefore, as early as the 13th century, Thomas Aquinas had outlined both of what would later become the two prongs of the law of self-defense: necessity and proportionality.

3. Influence of Aquinas

Aquinas's impact on juristic and philosophical thought was profound, immediate, and lasting. Moreover, it continued to pervade western jurisprudential thought even after the Reformation and the beginning of the Enlightenment. While Aquinas certainly wrote from a theological perspective, his reasoning was not inherently religious in that it was not based on some form of divine revelation. If it had been,

> then Natural Law is not natural, it is supernatural. No, the truths of the Natural Law are assented to by the human mind simply because of the evidence that is observable in man's natural inclinations: the evidence of an ordering that ultimately is recognized as a law. That

---

[70] *Id.* pt. II.2.40. For a good summary of just war theory, see Major Jennifer B. Bottoms, *When Close Doesn't Count: An Analysis of Israel's Jus ad Bellum and Jus in Bello in the 2006 Israel-Lebanon War*, ARMY LAW, Apr. 2009, at 27–30.

[71] AQUINAS, *supra* note 47, pt. II.2.64, art. 7.

> is why numerous men—from Plato, Aristotle, and Cicero on down to Hooker, Grotius, Locke, Vattel, Burlamaqui, Stammler, and many others—could hold "Natural Law" without its being related to religious faith.[72]

Natural law's foundation in human reason that is observable by every man forms the basis for its universality and for the profound effect Aquinas had on subsequent thinkers.[73]

C. Hugo Grotius

In the late medieval period, a series of thinkers operating out of nascent universities in continental Europe took Aquinas's vision and considered its application to the law of nations, as well as to the civil law of states themselves.[74] Vitoria and Suarez, scholastics from universities in Spain, wrote extensively on natural law as it related to the actions of states, and their influence began to be felt across the Continent.[75] It was not until the end of the 16th Century, however, that the idea of natural law manifested itself in such a way as to affect the formation of a true international law. In 1625, the Dutch jurist Hugo Grotius published his great work *De Jure Belli ac Pacis*,[76] which earned him the title of the "father of international law."[77] His book was published during the Thirty Years' War and quickly gained widespread acceptance; Gustavus Adolphus, the Swedish King and foremost military commander of the age, famously kept a copy beneath his pillow on campaign.[78] The Peace of Westphalia, which concluded the Thirty Years' War, resulted in the recognition of a host of petty nation-states and, in so doing, propelled the rise of the nation-state in Europe. Grotius's work "furnished the intellectual foundation for the political development"[79] of the nation-state and an international order organized around it.

---

[72] Davitt, *supra* note 49, at 39–40.
[73] *Id.*
[74] *See generally* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 7–13 (Clarendon Press 1963).
[75] *Id.*
[76] HUGO GROTIUS, DE JURE BELLI AC PACIS (1625).
[77] EDWARD DUMBAULD, THE LIFE AND LEGAL WRITINGS OF HUGO GROTIUS 58 (1969).
[78] DAVID J. HILL, *Introduction* to HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 11 (A.C. Campbell ed. & trans., M. Walter Dunne Publ. 1901).
[79] *Id.*

1. Grotius and Thomistic Natural Law

Grotius defined the natural law as "the dictate of right reason, showing the moral turpitude, or moral necessity, of any act from its agreement or disagreement with a rational structure."[80] Grotius was heavily influenced by Aquinas and the subsequent works of the late medieval scholastics who interpreted Aquinas, and he fully embraced the natural law as the great unifying source of law for mankind. For Grotius, as for Aquinas, the natural law flowed directly from man's nature as a rational being. "There is, therefore, a Natural Law, which, when properly apprehended, is perceived to be the expression and dictate of right reason. It is thus upon the nature of man as a rational intelligence that Grotius founds his system of universal law."[81]

The universality of the natural law made it the ideal basis for rules governing the conduct of men at war, and adherence to the natural law was imperative for man to retain his humanity.

> As this law of human nature is universally binding wherever men exist, it cannot be set aside by the mere circumstances of time and place . . . . Those laws which are perpetual, which spring from the nature of man as man, and not from his particular civil relations, continue even during strife and constitute the laws of war . . . . To disavow the imperative character of these perpetual laws, is to revert to barbarism.[82]

The natural law was distinct from, and superior to, the "law of nature" common to all living things. Man, unlike animals, is imbued with reason, "that part of a man, which is superior to the body,"[83] and the agreement of the principles of natural law "with reason . . . should have more weight than the impulse of appetite; because the principles of nature recommend right reason as a rule that ought to be of higher value than bare instinct."[84] This rule of right reason is universal to mankind, since "the truth of this is easily assented to by all men of sound judgment without any other demonstration."[85]

---

[80] GROTIUS, *supra* note 78.
[81] HILL, *supra* note 78, at 9.
[82] *Id.*
[83] GROTIUS, *supra* note 78, at 31.
[84] *Id.*
[85] *Id.*

2. Grotius on Self-Defense

Grotius, of course, recognized the drive for self-preservation as forming the basis of self-defense, but while the principle of self-preservation is vital to any law of self-defense, it is only one component. The law of self-defense lacks validity and force without bounds placed on the right to self-preservation by a second requirement, to protect another primary good: community or society. "Now right reason and *the nature of society* which claims the second, and indeed more important place in this inquiry, prohibit not all force, but only that which is repugnant to society, by depriving another of his right."[86] One is entitled to defend one's life but must accept limits on that right that are necessary to the preservation of peaceable society.

What are those bounds? Like Aquinas, Grotius described two concepts that would later become the basic principles of self-defense under international law: necessity and proportionality. In contrast, Grotius explicitly addressed what Aquinas had only implied: the requirement of immediacy as a component of, or precondition to, the element of necessity. "[W]hen our lives are threatened with immediate danger, it is lawful to kill the aggressor . . . ."[87] The immediate danger and the lack of alternatives make self-defensive force necessary; the obvious corollary is that if there is enough time to take an alternative course, then deadly force is not, strictly speaking, necessary.

This lack of alternatives underlies the legitimacy of self-defense. Grotius cites Aquinas for the proposition that when acting in "actual self-defense, no man can be said to be purposely killed."[88] This lack of real choice gives the act of killing the moral quality required to justify it under natural law. The temporal requirement of immediacy is simply a manifestation of the lack of alternatives that gives rise to the necessity to use deadly force. Grotius confronts this point squarely: "the danger must be immediate, which is one necessary point."[89] Presumably, when danger is not immediate, alternative courses of action may be available.

---

[86] *Id.* at 33 (emphasis added).
[87] *Id.* at 76.
[88] *Id.* at 77.
[89] *Id.*

However, Grotius also allows for the possibility of anticipatory self-defense: "Though it must be confessed, that when an assailant seizes any weapon with an apparent intention to kill me I have a right to anticipate and prevent the danger. For in the moral as well as the natural system of things, there is no point without some breadth."[90] Yet, in allowing for anticipatory self-defense, Grotius does not sacrifice the requirement of immediacy, nor does he suggest that the mere apprehension of harm is enough to satisfy the requirements of the natural law. "They are . . . mistaken . . . who maintain that any degree of fear ought to be a ground for killing another, to prevent his supposed intention." Self-defense must still satisfy the requirement of necessity; there must truly be no other option. Advance knowledge of hostile intent, if coupled with an available alternative, requires recourse to some other measure short of killing.[91] In sum, Grotius characterizes individual self-defense as a kind of "private war, [which] may be considered as an instantaneous exercise of natural right."[92] The emphasis placed on this temporal requirement is of paramount importance; immediacy forms the core of the rule of right reason that allows for killing in self-defense.

As one would expect, given his reliance on Aquinas, Grotius also embraces other forms of just, and thus justified, violence. He accepts just war theory and holds that the natural law also favors reprisals and acts to punish wrongdoers.[93] Grotius does not characterize these acts as self-defense but rather assigns them their own sphere of legitimacy within the natural law paradigm.[94] This division is important because it provides an independent basis for legitimate uses of force based not on moral self-defense, but rather on justice. In the Thomistic tradition then, violent acts may be justified when committed in self-defense, whose morality and legitimacy are universally accepted under natural law, or when committed by the proper authority having a just cause and right intention, acts which are morally neutral but still legal, such as war, reprisal, and punishment.[95]

---

[90] *Id.*
[91] *Id.* at 78.
[92] *Id.* at 83.
[93] *See generally id.* at 31–54.
[94] *Id.*
[95] *See* Bottoms, *supra* note 70, at 27–30 (providing a good discussion of the principles of Just War Theory).

3. Summary of Self-Defense in Natural Law

The natural law theory of self-defense can be broadly characterized as having both restrictive and unrestrictive qualities. Self-defense under natural law is unrestrictive because, while it can be limited to some extent, it can never be taken away entirely; a law that purports to eliminate the right to self-defense would be unjust.[96] On the other hand, the natural law theory of self-defense is restrictive in actual application; it can only be exercised when necessary, in response to an immediate threat to life.

Immediacy is thus at the core of the natural law theory of self-defense; it is the essential component of the doctrine of necessity. Aquinas laid the philosophical groundwork for natural law jurisprudence and established the moral legitimacy of self-defensive killing.[97] Grotius then used natural law to build a framework for both the private right of self-defense and an international order that incorporated the state's right to self-defense.[98] In both cases, Thomistic reasoning justified self-defense on moral grounds, but it did so by emphasizing the lack of other options and the truly immediate nature of the threat.

III. Natural Law in International Law

Grotius wrote *De Jure Belli ac Pacis* at the height of the Protestant Reformation and consequently took great pains to emphasize that his natural law theory of self-defense did not depend on religious faith.[99] Subsequent writers essentially secularized the concept of natural law, and by the beginning of the 20th century, scholarly work on self-defense was devoid of the religious overtones that characterized Thomistic writing.[100] Positivism and its emphasis on treaty law gradually eroded the influence of natural law on international legal theory, but it never entirely

---

[96] *See supra* notes 63–65 and accompanying text.
[97] *See supra* Part II.B.2.
[98] *See supra* Part II.C.2.
[99] HUGO GROTIUS, PROLEGOMENA TO THE LAW OF WAR AND PEACE para. 11, *available at* http://www.lonang.com/exlibris/grotius/gro-100.htm. This introductory passage is often omitted in modern texts. Grotius famously stated that his principles of natural law would remain true "even if we should concede what cannot be conceded without the utmost wickedness, that there is no God." *Id.*
[100] *See generally* BROWNLIE, *supra* note 74, at 16–50.

eliminated it.[101] In the early 20th century, the eminent scholar Hersch Lauterpacht wrote that

> [T]he second main . . . agency [after the expressed will of states found in treaties and the like] through which the objective basis of international law is given form . . . are the principles and rules of law which are due not to an ascertained direct expression of the will of States, but to the reason of the thing . . . .[102]

The continued relevance of natural law theory is perhaps nowhere more evident than on the vital matter of self-defense. Two key sources of law on the state's right to self-defense arose in the 19th and 20th centuries, respectively: the *Caroline* incident, and the establishment of the United Nations. Each of these instances provides an example of the continuing influence of the natural law on international law, and each places great importance on the requirement of immediacy.

A. The Caroline Doctrine

The modern formulation of the right to self-defense in international law is often held to be the so-called "Caroline Doctrine." The *Caroline* was a U.S.-flagged ship operating on Lake Erie in 1837 during a period of unrest known as the MacKenzie Rebellion in British Canada.[103] The steamboat *Caroline* was allegedly engaged in transporting men and materials from U.S. territory to a rebel-held island in the Niagara River.[104] After making several ineffectual protests to the government of the United States in an effort to have this supply line cut, the British learned that a merchant vessel called the *Caroline* was in the process of

---

[101] M.A. Weightman, *Self-Defense in International Law*, 37 VA. L. REV. 1096, 1100 (1951) ("Naturalism in international law has never regained the prestige and acceptance it enjoyed in the Middle Ages, although Catholic scholars have kept it vigorously alive, and in recent years it has staged an impressive comeback. The Grotians have to a lesser extent been eclipsed by the positivists.").

[102] HERSCH LAUTERPACHT, INTERNATIONAL LAW—THE GENERAL PART (1954), *reprinted in* 1 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 52 (E. Lauterpacht ed., 1975). Lauterpacht described these rules arising from the "reason of the thing" as being "the modern, the less controversial and probably more articulate expression of the law of nature which nurtured the growth of international law and which assisted powerfully in its development." *Id.*

[103] *See generally* DINSTEIN, *supra* note 5, at 248–49.

[104] *Id.*

ferrying arms to the insurgents. Acting on what would now be called "time-sensitive intelligence," British forces crossed the border, seized the *Caroline*, set her afire, and sent her over the Niagara Falls, killing several American citizens.[105]

The U.S. Secretary of State, Daniel Webster, wrote the British government in protest, and there followed a series of letters back and forth between U.S. and British envoys. When the British insisted that they had acted legitimately, Daniel Webster countered by asserting that the right to self-defense does not exist unless one can "show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[106] Further, Webster reasoned, the British must also show that in their response they "did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[107] This formulation—necessity, proportionality, and immediacy—was ultimately accepted by the British and eventually became the classic expression of the customary right to anticipatory self-defense in international law.[108]

The Caroline Doctrine, when read against the natural law principles outlined above, appears to be almost entirely a restatement of the natural law formulation, and this should come as no surprise, given the influence of natural law on both British and American lawyers.[109] Webster was himself heavily influenced by the natural law, and it often lay at the root of his arguments in court. He famously advocated, for example, that slavery "was contrary to the law of nations because it violated natural law."[110] Webster had been trained in the same common law tradition as all other British and early American lawyers, drawing on the work of Blackstone and Coke, and influenced by the writings of Hobbes, Locke, and other political and legal thinkers.[111]

---

[105] *Id.*
[106] Letter from Sec'y of State Daniel Webster, to Lord Ashburton (Apr. 24, 1841) [hereinafter Webster Letter], *available at* http://avalon.law.yale.edu/19th_century/br-1842d.asp.
[107] *Id.*
[108] DINSTEIN, *supra* note 5, at 249.
[109] *See infra* Part IV.A.
[110] ROBERT VINCENT REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 183 (W.W. Norton & Co. 1997) (1921).
[111] *See infra* Part IV.A.

If it seems odd that the British should rely so heavily on Roman sources of law and on the Thomistic tradition, despite the fact that the common law of Britain evolved with scant Roman influence, it is perhaps because "English writers on international law, although closely following the practice of States, had never lost sight of what may be called the natural law foundation of international law."[112] The British and American tradition of law "had its origin in the desire to establish those principles of reason . . . which . . . could assist the cause of individual liberty against the encroachments and tyranny of the newly risen territorial national State. . . . And much indeed of the Law of Nations was due to the law of nature thus resurrected."[113]

Thus, when Webster articulated his famous formula for anticipatory self-defense in the language of the natural law, it was easily understood and accepted by his British counterparts because they drew on the same natural law tradition of self-defense. This doctrine was limited by the principles of necessity, immediacy, and proportionality but recognized that the right to self-defense was otherwise indefeasible. Caroline cannot properly be understood without grounding it in the natural law, and it should be viewed as a restatement of the Aquinas-Grotius natural law argument for self-defense.

B. U.N. Charter and the Inherent Right to Self-Defense

The United Nations was formed in the aftermath of the Second World War precisely in order to "ensure . . . that armed force shall not be used, save in the common interest."[114] The primary vehicle for achieving this end is the clear prohibition on the use of force contained in Article 2(4), which directs all Member States to "refrain in their international relations from the threat or use of force."[115] The Charter admits of only two exceptions to this general prohibition. First, after determining "the existence of any threat to the peace . . . or act of aggression,"[116] the

---

[112] HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1935), *reprinted in* 2 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 201 n.1 (E. Lauterpacht ed., 1975).
[113] Hersch Lauterpacht, Remarks to the Royal Institute of International Affairs, Chatham house, London (27 May 1941), *in* 2 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT, *supra* note 112, at 50.
[114] U.N. Charter pmbl.
[115] *Id.* art. 2, para. 4.
[116] *Id.* art. 39.

Security Council may authorize the use of force by such means "as may be necessary to maintain or restore international peace and security."[117] Secondly, the Charter expressly recognizes the "inherent right of individual or collective self-defense"[118] in response to an "armed attack,"[119] at least "until the Security Council has taken measures necessary to maintain international peace and security."[120]

1. Debate Regarding Anticipatory Self-Defense

The meaning of Article 51 and the right to anticipatory self-defense are the subject of much of the scholarly dispute in the post-Charter world. There is no real disagreement that the use of force is generally illegal, with certain specific and narrow exceptions.[121] There is likewise no disagreement that states maintain a right in law to self-defense.[122] Disagreement arises on the margins of those exceptions. Specifically, if and when a right to anticipatory self-defense arises, what constitutes an armed attack? What temporal requirement governs the concept of anticipation? And how far can a state go in its armed response?[123] More broadly, many scholars continue to debate whether the *jus ad bellum* is fixed or whether it continues to evolve in response to changing circumstances and unique, particularized factual scenarios.[124]

Sean Murphy argues that there are essentially four schools of thought that address the extent to which a customary right to anticipatory self-defense still exists.[125] Those who believe the U.N. Charter has preempted

---

[117] *Id.* art. 42.
[118] *Id.* art. 51.
[119] *Id.*
[120] *Id.*
[121] *Id.* art. 2, para. 4.
[122] *Id.* art. 51.
[123] *See* Murphy, *supra* note 7, at 706.
[124] *Id.*
[125] *See generally id.* at 706–17. Murphy is careful to make clear that he has drawn these distinctions broadly and that they allow for a wide range of opinion within and between these schools of thought. *Id.* at 706. In addition to the strict constructionists, Murphy identifies several other broad groups. The "imminent threat school" allows for a right of anticipatory self-defense but insists on a strict temporal requirement of true imminence. The "qualitative threat school" changes the focus from temporality to the quality or nature of the threat, because the threats of the modern age, including terrorism and nuclear war, dictate an analysis of (1) the consequences of the threat should it become real, (2) the lack of other options short of force, and (3) the probability, rather than near-certainty, of attack. Finally, the "Charter-is-dead school" argues that widespread state

the field on the matter of self-defense, a group Murphy calls "strict constructionists,"[126] argue that "when the UN Charter was adopted in 1945, it enshrined a complete prohibition on the use of force in inter-state relations."[127] That prohibition had two exceptions: Security Council action and Article 51 self-defense in response to an armed attack. "No other exceptions . . . are permitted,"[128] whether for the rescue of nationals, humanitarian intervention, or "acting preemptively against a grave but distant threat."[129] If this view is correct, then any right of anticipatory self-defense is strictly limited by the terms of Article 51, which "would seem to preclude preventive action."[130]

This strict constructionist school [131] relies on the language of the Charter. Since "the Charter has a specific provision relating to a particular legal category, to assert that this does not restrict the wider ambit of the customary law relating to that category or problem is to go beyond the bounds of logic. Why have treaty provisions at all?"[132] Further, "even if it can be asserted that Article 51 was meant to be read as an expression of, or in accord with, customary law, should it not be that customary law in existence at the time of the Charter's adoption?"[133] In that case, whatever the customary law of self-defense may have been in earlier times, anticipatory self-defense should be interpreted according to the law as it was understood in 1945.[134] Consequently, "[i]t can only be concluded that the view that Article 51 does not permit anticipatory action is correct."[135]

---

practice in direct contravention of the prohibition on the use of force has essentially vitiated any legal affect of the Charter. It has been ignored to such an extent that, at this point, it cannot be held to still have binding legal effect in any but the most formal sense of the word. *Id.*

[126] *Id.*

[127] Sean D. Murphy, *Protean* Jus Ad Bellum, 27 BERKELEY J. INT'L L. 22 (2008).

[128] *Id.*

[129] *Id.*

[130] BROWNLIE, *supra* note 74, at 367.

[131] Murphy, *supra* note 7, at 706.

[132] BROWNLIE, *supra* note 74, at 273.

[133] *Id.* at 274.

[134] *Id.* at 275.

[135] *Id.* at 278.

On the other extreme, one group of scholars holds a more expansive view of anticipatory self-defense. This group argues that the temporal component of imminence is meaningless unless it is also coupled with consideration of the magnitude and probability of attack.[136] John Yoo, summarizing the U.S. position on anticipatory self-defense in 2003, noted that "[i]nternational law does not supply a precise or detailed definition of what it means for a threat to be sufficiently 'imminent' to justify the use of force in self-defense as necessary."[137] Given the nature of terrorism and the destructiveness of weapons of mass destruction, anticipatory self-defense should allow for the use of force well in advance of an actual armed attack because allowing a terrorist attack occur could have devastating consequences.

The middle view is held by Yoram Dinstein, one of the most pre-eminent modern writers on the law of war. Dinstein argues that the Charter has preempted customary law and that "any other interpretation of the Article would be counter-textual, counter-factual and counter-logical."[138] Dinstein, however, does not rule out anticipatory action, but would limit such action to what he calls "interceptive self-defense"[139] when an armed attack has been launched in "an ostensibly irrevocable way."[140] In so doing, Dinstein effectively calls for a self-defense regime that allows for anticipatory self-defense, but only when the immediacy component is strictly satisfied; the irrevocability of an imminent attack makes the threat truly immediate and thus makes self-defense truly necessary.

Despite the extensive scholarship on the Charter, "[t]o date . . . no authoritative decision-maker within the international community has taken a position on whether preemptive self-defense is permissible under international law, or whether it is permissible but only under certain conditions."[141] Thus, "states and scholars are left arguing its legality based principally on their interpretation of the meaning of the U.N. Charter and on state practice since the Charter's enactment."[142]

---

[136] *Id.*
[137] John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 572 (2003).
[138] DINSTEIN, *supra* note 5, at 183.
[139] *Id.* at 190.
[140] *Id.* at 191.
[141] Murphy, *supra* note 7, at 702.
[142] *Id.*

2. Inherent Right as an Expression of Natural Law

What often gets lost in the debate is the fact that the language of Article 51 of the U.N. Charter appears to give continued life to the natural law; the right to self-defense is called an "inherent right,"[143] not a positive or derivative one. The term "inherent right" has clear natural law overtones.[144] The essence of natural law is the idea that there are certain first principles that cannot be abrogated, exist everywhere, and are understood by all by the operation of right reason.[145] A right arising from such principles must, therefore, be inherent.[146] If the customary right to self-defense is in fact derived from the natural law, then it must continue even in the face of the Charter's prohibition on the use of force.

Of the various arguments concerning the temporal requirement of imminence outlined above, Yoram Dinstein's "interceptive self-defense" may represent the closest expression of the type of self-defense recognized by the natural law.[147] The requirement of immediacy is satisfied by the irrevocable nature of the acts done by the aggressor.[148] Dinstein's formulation does not allow for pre-emptive self-defense, but rather strictly enforces a rule of true immediacy.[149]

Dinstein has thus restated the natural law justification of self-defense, a great irony considering that Dinstein expressly rejects the idea that the natural law is the source of Article 51's inherent right.[150] Calling such an assertion "unwarranted,"[151] Dinstein argues that the natural law

---

[143] Importantly, this terminology is not merely an accident of language. "The French expression, equally authentic, is *droit naturel* [natural right]; in Spanish it is *derecho inmanente* [inherent right]; and in Russian, *neotemlemoe pravo* (indefeasible right)." Oscar Schacter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 259 (1989). Translations of Article 51 to the UN Charter in French, Russian, and Spanish are available at http://www.un.org/fr/documents/charter/chap7.shtml, http://www.un.org/ru/documents/charter/chapter7.shtml, and http://www.un.org/es/documents/charter/chapter7.shtml, respectively.

[144] DINSTEIN, *supra* note 5, at 179.

[145] *See generally supra* Part II.

[146] See the definition of "right" in BLACK'S LAW DICTIONARY (7th ed. 1999); "inherent right" is equated to "inalienable right" and is identified with natural law.

[147] DINSTEIN, *supra* note 5, at 190.

[148] *Id.*

[149] *Id.*

[150] *Id.* at 179–80.

[151] *Id.*

> may be conceived as an anachronistic residue from an era in which international law was dominated by ecclesiastical doctrines. At the present time, there is not much faith in transcendental truths professed to be derived from nature. A legal right is an interest protected by law, and it must be validated within the framework of a legal system. Self-defense, as an international right, must be proved to exist within the compass of positive international law.[152]

Rather than ascribing the term "inherent right" to natural law, Dinstein adopts the position taken by the International Court of Justice that "inherent right" simply refers to the right preserved or enshrined in customary law.[153]

While many other scholars agree,[154] this interpretation does not preclude the natural law as the original basis for self-defense in international law.[155] It may well have been superseded by the operation of customary international law, but to the extent that customary law adheres to the same formula as natural law, this is a distinction without a difference.[156] Advocates of a customary right—as opposed to a natural right—to anticipatory self-defense share the basic premise that Articles 2(4) and 51 "were not intended to, and do not, restrict the right of member states to use force in self-defense within the meaning of that concept to be found in the customary law."[157] Since that customary law was heavily influenced by the natural law, the latter certainly retains its relevance in the modern era.

Criticisms like that of Dinstein are, moreover, intellectually dissatisfying. Dinstein bristles at the notion that modern lawyers could be

---

[152] *Id.* at 180.
[153] *Id.* at 181 (citing Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27)).
[154] *See, e.g.*, Weightman, *supra* note 101, at 1114 ("Despite frequent references to the 'inherent' nature of the right of self-defense, it cannot be supposed that any renaissance of natural-law thinking was implied.").
[155] *See* DINSTEIN, *supra* note 5, at 179; *see also* Schachter, *supra* note 143.
[156] Sean D. Magenis, *Natural Law as the Customary International Law of Self-Defense*, 20 B.U. INT'L L. J. 413, 430 (2002) ("In situations where the conditions of immediacy, necessity and proportionality, as construed in the prevalent view of customary international law, are met . . . there is no practical distinction between a natural law analysis and an analysis under customary international law.").
[157] BROWNLIE, *supra* note 74, at 269.

swayed by mysterious transcendental concepts of universal justice underlying the term "inherent right,"[158] yet he apparently sees no problem supporting the somewhat tortuous efforts to define "armed attack" broadly enough to allow for anticipatory action, however limited.[159] He also never offers a satisfactory alternative explanation for the presence of the word "inherent" in the text of the Charter.[160] In the positivist tradition, he rejects the broad basis in right reason and justice found in natural law in favor of a legalistic, textual interpretation of Article 51, which may seem over-lawyered and which further fuels the unresolved, and unresolvable, debate over the meaning of the Charter and its effect on customary law. In so doing, he ignores the great power of the natural law to provide purpose for positive law.[161]

Indeed, the primary argument raised against natural law-based self-defense is its principle of indefeasibility. Most modern scholars reject the notion contained in natural law that self-defense is both indefeasible and obligatory.[162] They do not contend that the natural law standard of necessity and immediacy is flawed. Moreover, they concede that the law as it currently exists, in both its international and domestic forms, preserves the right of self-defense.[163] Instead, they have focused their ire on the unrestrictive quality of natural law rights as inherent and indefeasible rights, without considering the virtues of its restrictive application.[164] Thus, while there is an argument that natural law is no longer truly the source of the right under international law, there is little argument that the Thomistic limitations on self-defense—necessity, immediacy, and proportionality—continue to control the exercise of the right.

---

[158] DINSTEIN, *supra* note 5, at 180.
[159] *Id.* at 190.
[160] *Id.* at 180–81. Nor does he address the use of similar terms in the various translations of the Charter, all of which seem to intend to preserve some natural or inherent, as opposed to derivative, right of self-defense. *See supra* note 143.
[161] J. L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE LAW OF PEACE 57 (4th ed. 1949).
[162] *See* DINSTEIN, *supra* note 5, at 181 ("It is not beyond the realm of the plausible that a day may come when States will agree to dispense completely with the use of force in self-defense . . . ."); *see also* Schacter, *supra* note 143, at 259–60 ("[M]any scholars reject the idea that the right of self-defense exists independently of positive law and cannot be changed by it.").
[163] DINSTEIN, *supra* note 5, at 181.
[164] *See supra* Part II.C.3.

C. British and American Views of the Inherent Right of Self-Defense

Ever since the *Caroline* incident, the British and U.S. governments have consistently asserted the existence of a right to self-defense arising out of customary law.[165] Moreover, both governments trace this right back to the classic formulation from the *Caroline* case.[166] For example, when British forces intervened in Egypt in 1956, the British government argued that "the Charter and in particular Article 51 did not restrict the customary right of self-defense and that the customary right included action to protect nationals provided the tests of exigency laid down in the *Caroline* case were satisfied."[167] Likewise, the United States "has traditionally taken the position that a State may exercise 'anticipatory self-defense,' in response not only to a 'hostile act' but even to a 'hostile intent.'"[168] Indeed, "[i]n the past two decades, the United States has used military force in anticipatory self-defense against Libya, Panama, Iraq, Afghanistan, and the Sudan."[169]

For both states, the bounds of self-defense are outlined in the *Caroline* formulation of necessity, immediacy, and proportionality, which restates the natural law argument for self-defense. Until 2002, while periodically taking slightly different positions on the legality of specific military actions, both states shared a common stated view of the rule of *Caroline*.

---

[165] *See, e.g.*, House of Lords Debate (Apr. 21, 2004) [hereinafter House of Lords], *available at* http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text//40421-07.htm#40421-07_head0, wherein the Attorney-General of the U.K. stated,

> It is clear that the language of Article 51 was not intended to create a new right of self-defence. Article 51 recognises the inherent right of self-defence that states enjoy under international law. That can be traced back to the "Caroline" incident in 1837. . . . It is not a new invention. The charter did not therefore affect the scope of the right of self-defence existing at that time in customary international law, which included the right to use force in anticipation of an imminent armed attack."

Id.

[166] *Id.*

[167] BROWNLIE, *supra* note 74, at 265.

[168] DINSTEIN, *supra* note 5, at 182.

[169] Yoo, *supra* note 137, at 573.

In 2002, however, this shared tradition diverged dramatically. President Bush promulgated the 2002 National Security Strategy (NSS) of the United States, which "took a step toward what some view as a significant expansion of use of force doctrine from anticipatory self-defense to preemption."[170] According to some commentators, "the 'Bush Doctrine' of preemption basically re-casted the right of anticipatory self-defense based on a different understanding of imminence."[171] The NSS stated, "we must adapt the concept of imminent threat to the capabilities of today's adversaries"[172] and noted that the inherent uncertainty of the time and place of terrorist attacks required that we prosecute military actions in self-defense aggressively.[173]

The British did not necessarily agree with this change in position. In April 2003, in a remarkable exchange in the House of Lords, the Attorney-General of the United Kingdom appeared to reject the Bush Doctrine as an expression of the customary right to anticipatory self-defense. "It is therefore the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote."[174]

At least facially, the British insistence on adhering to *Caroline* means that they hew closer to the line established by the natural law, which emphasizes immediacy; the act of self-defense is morally justified as not being the result of a true choice at all, but rather done out of pure necessity. The U.S. position, on the other hand, appears to have abandoned the inherently reactive nature of natural law-based self-defense in favor of something more expansive, such as that advocated by John Yoo.[175]

---

[170] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 6 (2009) [hereinafter OPERATIONAL LAW HANDBOOK].
[171] *Id.*
[172] WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002) [hereinafter NSS], *available at* http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss.pdf.
[173] *Id.*
[174] House of Lords, *supra* note 165.
[175] *See generally* Yoo, *supra* note 137.

IV. Natural Law in the Common Law

A. The Natural Law Heritage

Natural law theory clearly played a large role in the formation of the international law of self-defense, but it also had profound influence over the common law of self-defense in the United States and Britain. William Blackstone was a proponent of a natural law right of self-defense, and his views heavily influenced common law jurisprudence in England and America; indeed, Blackstone's reasoning "constituted the preeminent authority on English law for the founding generation"[176] in the United States. The same was true of other eminent British legal thinkers such as Edward Coke and Richard Hooker. These scholars shaped the common law of the United Kingdom and, by extension, the United States. "No well-trained legal thinker fails to realize the enormous influence of Coke's *Institutes* on early American decisions. Coke and Blackstone were the authorities who educated the developing legal minds of the early nineteenth century."[177]

Blackstone called the right to self-defense "the primary law of nature, so it is not, neither can it be . . . , taken away by the law of society."[178] Thomas Hobbes presaged this formulation of the indefeasibility of the right of self-defense in *Leviathan*, writing that "[i]f a man by the terrour of present death, be compelled to doe a fact against the Law, he is totally Excused; because no Law can oblige a man to abandon his own preservation."[179] If a state were to make self-defense illegal, it would not prevent men from relying on it: "supposing such a Law were obligatory; yet a man would reason thus, If I doe it not, I die presently; if I doe it, I die afterwards; therefore by doing it, there is time of life gained."[180]

Political theorists like Thomas Hobbes and legal scholars such as Blackstone and Hooker had an enormous influence both in the United Kingdom and over the founders of the United States, and the natural law tradition was thus woven into the framework of early American law.[181]

---

[176] Alden v. Maine, 527 U.S. 706, 715 (1999).
[177] John S. Marshall, *Richard Hooker and the Origins of American Constitutionalism*, *in* ORIGINS OF THE NATURAL LAW, *supra* note 1, at 55.
[178] 3 WILLIAM BLACKSTON, COMMENTARIES *4.
[179] HOBBES, *supra* note 2.
[180] *Id.* at 346.
[181] *See* Marshall, *supra* note 177, at 56–57.

The Constitution[182] was itself a powerful expression of the natural law theory of rights, and while the political theory derived from Hobbes and Locke, its legal reasoning flowed from Blackstone and Coke. "In the hands of Chief Justice Marshall and his successors, the Constitution proved to be more and more a document which is essentially an expression of Edward Coke and Blackstone."[183]

However, that influence did not end with the passing of the founding generation. Far from being treated as quaintly anachronistic, Blackstone's *Commentaries* continues to influence modern jurisprudence, particularly his description of the natural law right to self-defense. Writing in the 2008 case *District of Columbia et al. v. Dick Anthony Heller*,[184] perhaps the signature case on the right to bear arms under the Second Amendment, Justice Scalia described the Founders' understanding of a right to self-defense:

> They understood the right to enable individuals to defend themselves. As the most important early American edition of Blackstone's Commentaries . . . made clear . . . , Americans understood the "right of self-preservation" as permitting a citizen to "repe[l] force by force" when "the intervention of society in his behalf, may be too late to prevent an injury."[185]

Throughout the *Heller* opinion, Scalia repeatedly returns with approval to the Founders' understanding of the natural law right of self-defense. In

---

> The fathers of the American Revolution knew Hooker and quoted him. The authors of our Constitution did not quote Hooker, but they did work out the Constitution in terms which reflect the principles defended by Hooker, and which were mediated to them by Locke and Blackstone. Locke specifically tells us that his notion of the Constitution was derived from Hooker. Blackstone, also in the tradition of Hooker, was always in the background when the American Constitution was written, and he was used in the interpretation of what the Constitution was meant to imply.

Id.

[182] "[The Constitution] was influenced by the school of thought which interpreted the law of nature as an obvious set of principles. The French school of Natural Law reflected the seventeenth century notion that legal wisdom could be reduced to a very simple set of self-evident propositions." *Id.* at 57.

[183] *Id.*

[184] District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

[185] *Id.* at 2799 (internal citations omitted).

another long citation from Blackstone, Scalia quotes, "This may be considered as the true palladium of liberty. . . . The right to self-defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible."[186] Self-defense under U.S. law is thus firmly grounded on the natural law. The right is indefeasible and yet narrowly limited. It cannot be entirely taken away but must be confined to those instances in which it is truly necessary in response to some immediate threat.

It is admittedly rare to see legal opinions that so explicitly reference natural law theory. Rather, the influence of the natural law often shows itself in the language adopted by the courts and the rules they construct to regulate it. When the common law of self-defense adheres to the basic requirements of necessity, proportionality, and immediacy, it carries forward the Thomistic tradition of self-defense.

B. Self-Defense Under the Uniform Code of Military Justice

1. Military Law in the United States

The United States has a single statutory regime, the UCMJ,[187] which provides for a body of criminal law that is distinct to the military. Because of this separation, the deployed U.S. soldier need not concern himself with varying interpretations of the law arising out of different domestic state jurisdictions; the UCMJ provides a single source of criminal law and jurisdiction over deployed soldiers.[188] Adopted in 1952 and modified by Congress several times since, the UCMJ provides a statutory and regulatory scheme, as well as establishes a system of courts-martial and appellate courts to enforce that scheme.[189] Within this military court system, the common law continues to develop, but it remains distinct from the law to be found in civilian federal courts or in the courts of the several states. The U.S. Supreme Court remains at the apex of the military court system, just as it does for the civilian system, and yet the Supreme Court has acknowledged the unique nature of the military as allowing for the development of a separate body of common

---

[186] *Id.* at 2805.
[187] Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 [hereinafter UCMJ].
[188] UCMJ art. 2 (2008).
[189] *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008) [hereinafter MCM].

law.[190] The U.S. soldier then, is bound by the UCMJ, and that code is interpreted by both military courts and the Supreme Court.

Having one UCMJ system enormously simplifies the task of defining the boundaries of self-defense for U.S. soldiers. Self-defense is an affirmative defense available to an accused charged with a crime of violence.[191] Once asserted, the prosecution must prove beyond a reasonable doubt that the violent act was not done in self-defense in order to obtain a guilty verdict.[192]

Before considering the specifics of the UCMJ, it must be stressed that this law applies on the battlefield only to killings done in self-defense, not to the killing of lawful combatants during a period of international armed conflict as defined by Common Article 2 to the Geneva Conventions.[193] The latter activity has long been protected by the doctrine of combatant immunity, which allows soldiers in the performance of their duties to kill the enemy without fear of sanction.[194] When that occurs, the killing is justified and does not constitute a crime.[195] The domestic law of self-defense would only apply on the battlefield to other kinds of killings, where the decedent is not a lawful combatant but, rather, a civilian.

---

[190] Parker v. Levy, 417 U.S. 733 (1974).
[191] MCM, *supra* note 189, R.C.M. 916(a).
[192] *Id.* R.C.M. 916(b)(1).
[193] All four of the Geneva Conventions contain the same definition of international armed conflict. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 2, Aug. 12, 1949 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
[194] *See, e.g.*, United States v. Lindh 212 F. Supp. 2d 541, 553 (E.D.Va. 2002) ("Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets.").
[195] *Id. See also*, *e.g.*, MCM, *supra* note 189, R.C.M. 916(c) (outlining justification as a legal excuse for killing).

2. Self-Defense Rules Under the UCMJ

The simplest explanation of the law of self-defense under the UCMJ may be the one contained in the *Military Judges' Benchbook*.[196] This document is not law but serves as a restatement of the law, and it is used by military judges to instruct members of the court-martial on the law. The *Benchbook* explains the defense of self-defense, outlined by Rule for Court-Martial (RCM) 916(e)(1) in the context of a homicide charge, as consisting of two parts, and right away one can discern the natural law requirement of immediacy.[197]

> First, the accused must have had a reasonable belief that death or grievous bodily harm was about to be inflicted on himself. . . . The test here is whether, under the same facts and circumstances present in this case, an ordinarily prudent adult person faced with the same situation would have believed that there were grounds to fear *immediate* death or serious bodily harm.[198]

Having determined the necessity of self-defense by virtue of an objective test of reasonableness, the law then analyzes the proportionality of the use of force using a subjective test. "Second, the accused must have actually believed that the amount of force he used was required to protect against death or serious bodily harm."[199] The question is whether the belief was actually and honestly held, not whether the amount of force used was objectively reasonable.[200] So long as the accused believed

---

[196] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 5-2-1 (15 Sept. 2002) [hereinafter BENCHBOOK].
[197] *Id.*
[198] *Id.* (emphasis added).
[199] *Id.*
[200] *Id.* The honesty of the belief is the key to the legitimacy of the action. *See, e.g.*, New Orleans & N.E.R. Co. v. Jopes, 142 U.S. 18, 23 (1891).

> The familiar illustration is that, if one approaches another, pointing a pistol, and indicating an intention to shoot, the latter is justified by the rule of self-defense in shooting, even to death; and that such justification is not avoided by proof that the party killed was only intending a joke, and that the pistol in his hand was unloaded. Such a defense does not rest on the actual, but on the apparent, facts, and the honesty of belief in danger.

Id.

it was reasonable, the fact that it is later determined to be excessive is of no import.[201]

This objective-subjective test makes sense in the context of natural law, where necessity and immediacy are absolute requirements. Self-defense is only legitimate when it is truly necessary,[202] and a natural law-based theory of self-defense must, therefore, insist that the belief in its necessity is an objectively reasonable one. Necessity is predicated, in part, on the immediacy of the threat. Only when reacting to an immediate threat, without the ability to choose otherwise, can a person kill in self-defense with the moral sanction of the natural law, since in that case "no man can be said to be purposely killed."[203] Once force is reasonably believed to be necessary, however, it follows that the person facing immediate peril has "no moment for deliberation"[204] and, therefore, cannot be required to weigh to a nicety the amount of force to be used. As the famous jurist Oliver Wendell Holmes aptly put it, "detached reflection cannot be demanded in the presence of an uplifted knife."[205] Immediacy is thus a critical component of self-defense under U.S. law, because it is the factor that prevents Holmes's "detached reflection."[206]

This distinction also explains why the UCMJ rejects the concept of "imperfect self-defense."[207] Under the theory of imperfect self-defense, murder could be downgraded to some less culpable form of homicide, such as manslaughter, if the accused acted on an unreasonable belief that he faced immediate threat of death. Military courts have explicitly rejected this position.[208] Allowing imperfect self-defense would contradict the natural law, because it sanctions an inherently unreasonable act lacking the necessity that would otherwise justify it. Above all else, "right reason" forms the cornerstone of natural law,[209] and it is the inability to choose another course that makes self-defensive killing necessary and reasonable.

---

[201] *Id.*
[202] Rorie v. United States, 882 A.2d 763 (D.C. 2005) ("The law of self-defense is a law of necessity; the right of self-defense arises only when the necessity begins, and equally ends with the necessity.").
[203] GROTIUS, *supra* note 780, at 77.
[204] Webster Letter, *supra* note 106.
[205] Brown v. United States, 256 U.S. 335, 343 (1921).
[206] *Id.*
[207] *See, e.g.*, United States v. Calley, 46 C.M.R. 1131, 1176 (C.M.R. 1973).
[208] *See id.*; United States v. Maxie, 25 C.M.R. 418, 420 (C.M.R. 1958).
[209] CICERO, *supra* note 1.

This raises the central question of this article: what exactly does "imminent threat" mean? The law clearly requires an imminent threat before self-defense is justified, but how immediate must that threat be? The U.S. military jury instruction uses the words "immediate death," whereas the actual Rule for Courts-Martial uses the phrase "that death . . . was about to be inflicted."[210] In either case, the temporal boundary clearly leans towards something instantaneous or nearly so; the threat must be truly temporally immediate. Words have meaning, and the choice of words in this case must have some import.[211] United States law seems clear that the term "immediate" is the proper definition to be used to describe "imminent danger."[212]

V. ROE as a Synthesis of Domestic and International Law

Most modern states employ some form of "Rules of Engagement" to translate the legal right of self-defense into action for their soldiers.[213] These rules, generally in the form of a lawful order to the military forces of the state, are not themselves law per se, although most are enforceable under the law, either as a military order or through some executing domestic law.[214] Rather, the ROE constitute a conscious limitation on the use of force that is constrained, at its maximum extent, by the law—both the law of armed conflict and domestic law—but which may be further constrained by concerns of a political (policy) or military nature. [215] The

---

[210] MCM, *supra* note 195, R.C.M. 916(e)(1)(A).

[211] Consider the definition from: "immediate, *adj.* 1. Occurring without delay; instant." BLACK'S LAW DICTIONARY, *supra* note 146, at 751.

[212] New Orleans & N.E.R. Co. v. Jopes, 142 U.S. 18, 23 (1891) ("[T]he law of self-defense justifies an act done in honest and reasonable belief of immediate danger.").

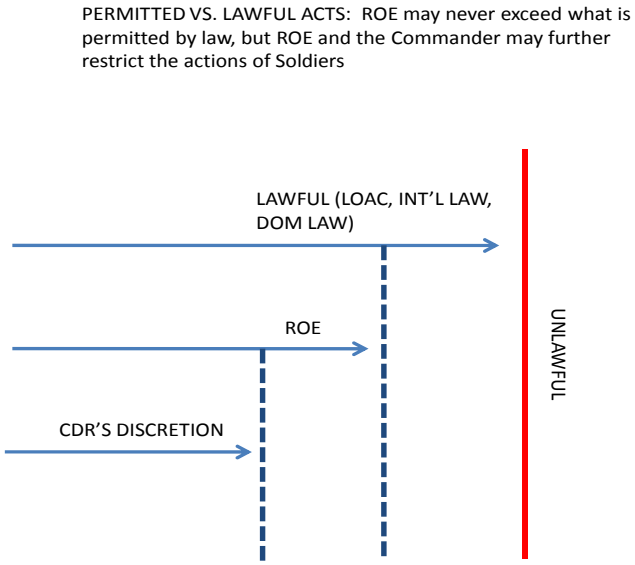
[213] *See generally* Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 34–50 (1994) (discussing the historical evolution of ROE in the United States and United Kingdom).

[214] *See, e.g.*, *id.* at 62–63 (discussing the prosecution of ROE violations as a separate offense).

[215] *See, e.g.*, OPERATIONAL LAW HANDBOOK, *supra* note 170, at 73.

> ROE are the primary tools for regulating the use of force. . . . The legal factors that provide the foundation for ROE, including customary and treaty law principles regarding the right of self-defense and the laws of war, are varied and complex. However, they do not stand alone; non-legal issues, such as political objectives and military mission limitations, also are essential to the construction and application of ROE.

range of permissible actions available under the ROE may extend to the limit of the law but may also be somewhat less.[216] This distinction is perhaps made more clear by the following diagram:



ROE thus have the great virtue of providing a synthesis of both domestic and international law, as well as military and political considerations, in order to formulate one set of rules that soldiers can follow.

A. ROE for Offense and Defense

Comparing the U.S. SROE[217] with the current NATO ROE[218] highlights the effect recent changes to the U.S. SROE have had, because the two sets of rules offer dramatically different standards for anticipatory self-defense. Notably, both the United States and the NATO ROE make a critical distinction between the inherent right of self-defense and the use of force for mission accomplishment, often referred

---

Id.

[216] *Id.*

[217] 2005 SROE, *supra* note 9.

[218] NORTH ATLANTIC TREATY ORGANIZATION, NATO MC 362/1, NATO RULES OF ENGAGEMENT [hereinafter NATO ROE].

to as "offensive ROE."[219] For both, the ROE do not restrict the inherent right of self-defense.[220] There are critical differences, however, in how that right is defined. More importantly, by dividing the use of force into offensive and defensive types, the ROE echo the same division found in Aquinas and Grotius between self-defense and other just acts of violence.[221]

B. NATO ROE: Manifest, Instant, and Overwhelming

The NATO SROE restate the proposition that "[i]t is universally recognized that individuals and units have a right to defend themselves against attack or imminent attack."[222] The NATO SROE define self-defense as "the use of such necessary and proportional force . . . to defend . . . against attack or an imminent attack."[223] By including "imminent attack," the NATO ROE authorize the use of force in anticipatory self-defense. The NATO ROE go on to define what imminent means: "the need to defend is *manifest, instant, and overwhelming*."[224] Those three words—manifest, instant, and overwhelming—leave no doubt as to the temporal limits of self-defense. In particular, the word "instant" indicates that the self-defense contemplated is that which responds to a truly immediate threat.

In defining imminence in this way, the NATO ROE use terms that are remarkably consistent with those used by Webster in the *Caroline* formulation: "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[225] Thus the NATO ROE can be said to be entirely consistent with the natural law because they justify self-defensive force on the basis that the threat is so immediate that it does not allow for detached reflection. The NATO ROE authorize the use of force because time does not allow for another choice; in essence, there is no true choice available, it is either use force or face immediate death.

---

[219] 2005 SROE, *supra* note 9, at 6.b; *see also* OPERATIONAL LAW HANDBOOK, *supra* note 170, at 74 (noting the different categories of ROE for self-defense and ROE for mission accomplishment).

[220] *Compare* 2005 SROE, *supra* note 9, para. 6.b.1 ("[C]ommanders always retain the inherent right and obligation to exercise . . . self-defense . . . ."), *with* NATO ROE, *supra* note 218, para. 1 ("ROE do not limit the inherent right of self-defence.").

[221] *See supra* notes 69–70, 93–95, and accompanying text.

[222] NATO ROE, *supra* note 218, para. 7.

[223] *Id.*

[224] *Id.* (emphasis added).

[225] Webster Letter, *supra* note 106.

C. U.S. SROE: Imminent May Not Mean Imminent Anymore

In 2005, subsequent to the newly-advanced U.S. position on anticipatory self-defense articulated in the NSS,[226] the U.S. SROE were revised. The critical changes respecting self-defense were subtle but extraordinarily important and impactful. The new SROE appeared to alter, and perhaps do away with, the temporal requirement of immediacy that had traditionally been present. Until 2005, the 2000 SROE, which defined "hostile intent" as including the threat of "imminent use of force," were in effect; however, there was no further discussion of what was meant by "imminent."[227] Presumably, the natural language and meaning of the term "imminent" controlled. Certainly, "imminent" implies some fairly immediate threat, such that a response was authorized because there was not time for consultation or deliberation. However, the term was, perhaps deliberately, left undefined.

The 2005 SROE changed that. Once again, use of force in self-defense was authorized in response to a hostile act or hostile intent. The definition of "hostile intent" likewise did not change.[228] What did change was the addition of a definition of the term "imminent," which stated that "imminent does not necessarily mean immediate or instantaneous."[229] In imminent does not really mean imminent anymore.

This definition immediately calls to mind the language used by Webster in the *Caroline* incident. Webster said that self-defense was authorized only when the need to defend was "instant" and "allowed no moment for deliberation."[230] It cannot be understated that international law is designed to prevent, where possible, the use of force.[231] Force is prohibited, unless there is an exception, and that exception must be one that is so important that it justifies derogation from the general prohibition. It must, in other words, be an emergency, and one of a particular type.

> It is . . . of the nature of the emergency . . . that action, if it is to be effective, must be immediate. . . . To wait for

---

[226] NSS, *supra* note 172.
[227] CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01.A, STANDING RULES OF ENGAGEMENT (15 Jan. 2000) [hereinafter 2000 SROE].
[228] 2005 SROE, *supra* note 9, encl. A, para. 3.f.
[229] *Id.* para. 3.g.
[230] Webster Letter, *supra* note 106.
[231] U.N. Charter art. 2, para. 4.

> authority to act from any outside body may mean disaster, either for a state or for an individual, and either may have to decide *in the first instance* whether [to use force in self-defense].[232]

The United States's new definition of imminence reflects a further move towards a position on anticipatory self-defense articulated in the NSS,[233] one which our closest ally, the United Kingdom, cannot see fit to join.[234] Writing in 2005, but before the publication of the new SROE, Yoram Dinstein noted that "[i]n the past, the U.S. was careful to underscore that anticipatory self-defense—or response to hostile intent—must nevertheless relate to the 'threat of *imminent* use of force.' The emphatic use of the qualifying adjective 'imminent' is of great import."[235] The doctrine of anticipatory self-defense requires both necessity and immediacy before force in self-defense is authorized, and if imminence is defined as some more extended period of time, one has to question[236] whether either of those two prongs of the analysis have been met. Our "emphatic use of the qualifying adjective 'imminent'"[237] must not have had great import after all.

It is not clear what drove this change, but a likely explanation is the adoption of the "Bush Doctrine" in the 2002 NSS, which appeared to expand the temporal scope of "imminence."[238] A second factor was undoubtedly the perceived need to broaden soldiers' ability to use force against an enemy concealed within the civilian population. Whatever the reason, this step—to define, for the first time, the meaning of "imminent"—contains the seeds of great confusion and legal friction.

VI. The Problem of Disharmony

Comparing the U.S. SROE with the natural law highlights the fundamental problem facing the United States: There is disharmony between U.S. ROE and the natural law, as found in the international and

---

[232] BRIERLY, *supra* note 161, at 296 (emphasis in original).
[233] NSS, *supra* note 172.
[234] House of Lords, *supra* note 165.
[235] DINSTEIN, *supra* note 5, at 182 (emphasis in the original) (internal citations omitted).
[236] The British have openly questioned our new definition of imminence. *See, e.g.*, House of Lords, *supra* note 165.
[237] DINSTEIN, *supra* note 5, at 182.
[238] NSS, *supra* note 172.

domestic law that flow from it. The natural law of self-defense stresses the immediacy of the threat as a precondition to the legitimate use of self-defensive force. The U.S. SROE contradicts that immediacy requirement. Whereas the natural law favors strict immediacy as a route toward achieving the moral good identified by Aquinas, the 2005 SROE favors a looser temporal standard designed to increase the options available to soldiers on the ground. While it certainly does do that, this increase in the ability to use force in self-defense may come at some cost.

First of all, since the 2005 SROE standard does not match the standard under the UCMJ, a U.S. soldier is potentially at risk for violating the law by taking actions that do not violate the ROE. The 2005 SROE allows for the use of force in self-defense in response to an imminent threat, and yet it defines imminent as "not necessarily [meaning] immediate or instantaneous."[239] The UCMJ and military case law, on the other hand, simply require that the threat be "immediate."[240] Conceivably, a soldier could kill in self-defense in response to a threat he considers imminent, though not immediate or instantaneous, and find his judgment questioned by his commander, who charges him with a homicide. If he were to assert the affirmative defense of self-defense, a military judge would instruct the court-martial in accordance with the *Benchbook*, which requires a reasonable belief that the threat was immediate.[241]

This does not serve the United States well. One of the chief goals of the ROE is to facilitate swift decision-making on the battlefield by providing clear, concise rules that neither erode initiative through over-restrictiveness, nor allow the killing of innocents.[242] When the ROE simply allowed self-defensive force in response to an "imminent threat," without further defining that term, the ROE mirrored the law in military courts-martial. Now, however, the ROE may be applying a different standard, and that standard may subject a soldier to prosecution under a law that requires true immediacy. Our quest to expand the soldier's ability to use force may actually make it harder for him to do so, by introducing doubt over its legality.

---

[239] 2005 SROE, *supra* note 9, encl. A., para 3.g.
[240] *See supra* Part IV.B.2.
[241] BENCHBOOK, *supra* note 196.
[242] *See* Martins, *supra* note 213, at 5.

Secondly, this expansive standard for imminence may actually cause more mistaken killings and, thereby, undermine the perception of legitimacy surrounding the use of force in self-defense. The chief virtue of the natural law as a baseline by which to measure self-defense is the fact that, by definition, the natural law is understood by all people by the operation of reason.[243] In other words, an Afghan tribesman with no education in the formal, positive law, still inherently understands the legitimacy of killing in response to an immediate threat. He knows, without being taught,[244] that if he points his weapon at a U.S. soldier in a threatening manner, he may be killed immediately. More importantly, a second Afghan who observed such an encounter would also understand why the first Afghan was killed.

Conversely, as the concept of imminence slips or becomes blurred, there is an increasing likelihood that the civilian population will not understand the inherent logic underlying the use of force in self-defense. When the threat is not immediate, it may not be apparent at all, to anyone other than the soldier perceiving it. This may lead to several problems.

One problem is that civilians interacting with U.S. soldiers are not equipped to understand where the line is between threatening and non-threatening conduct. While all would agree that pointing a weapon at an armed soldier may lead to a self-defensive engagement, the same is not necessarily true with respect to driving a car towards a traffic control point, talking on a cell phone in the vicinity of a U.S. patrol, or other forms of conduct that do not obviously pose an immediate threat. Is that man digging in his fields in the middle of the night planting an IED, or is he just farming at night because daytime temperatures sometimes reach 130 degrees? Is he talking on a cell phone on a hilltop because he is targeting mortar fire or because Afghanistan is a mountainous country with no land lines and higher elevation is necessary for good cell phone reception? What may be perceived as a threat by U.S. forces may be entirely innocent conduct to a local civilian. Thus, civilians with no ill intent may find themselves engaged soldiers who perceive a threat that is "not necessarily immediate or instantaneous."[245] This may result in an increase in mistaken killings.

---

[243] *See* McInerny, *supra* note 29, at 326.
[244] Drury, *supra* note 30, at 534.
[245] 2005 SROE, *supra* note 9, at encl. A, para 3.g.

Likewise, a third party observing such an engagement may not have the same perception of the legitimacy of U.S. soldiers' actions that they might were the threat truly immediate. To such an observer, the soldiers' actions in "self-defense" may appear oppressive, violent, and aggressive. The effect of this difference of perception is obvious: more mistaken killings cause more angst and disaffection among civilians, who perceive the United States as a heavy-handed occupier rather than an agent of the common good.[246] They are less likely to form close contacts with U.S. soldiers in their area and more prone to either avoid them in order to avoid being mistakenly killed, or (much worse) actually join the insurgency against them. In other words, broadening the availability of self-defensive force may result in a decrease in close contact with the civilian population[247] and a corresponding decrease in vital intelligence.[248] The broad temporal bounds of the U.S. standard for imminent threat are directly counter to the goals of counterinsurgency warfare.[249]

---

[246] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY paras. 1-141, 1-142 (15 Dec. 2006) [hereinafter FM 3-24] (emphasizing the restrained use of force to avoid this disaffection).

[247] *Id.* para. 1-161 ("Popular support allows counterinsurgents to develop the intelligence necessary to identify and defeat insurgents.").

[248] *Id.* para. 1-149. Intelligence collected through close contact is the core of counterinsurgency warfare.

> Ultimate success in COIN is gained by protecting the populace, not the COIN force. If military forces remain in their compounds, they lose touch with the people, appear to be running scared, and cede the initiative to the insurgents. Aggressive saturation patrolling, ambushes, and listening post operations must be conducted, risk shared with the populace, and contact maintained. The effectiveness of establishing patrol bases and operational support bases should be weighed against the effectiveness of using larger unit bases. These practices ensure access to the intelligence needed to drive operations. Following them reinforces the connections with the populace that help establish real legitimacy.

Id.

[249] *Id.* para. 1-150.

> Any use of force produces many effects, not all of which can be foreseen. The more force applied, the greater the chance of collateral damage and mistakes. Using substantial force also increases the opportunity for insurgent propaganda to portray lethal military activities as brutal. In contrast, using force precisely and discriminately strengthens the rule of law that needs to be established.

In contrast, the NATO ROE maintain complete harmony with the natural law. There is no real difference between "manifest, immediate and overwhelming"—the standard under the NATO ROE[250]—and the *Caroline* formula of "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[251] Neither leaves any doubt as to the meaning of imminent threat; it is a threat of such immediacy that there is no actual choice available to the soldier other than the use of force. The immediate nature of the threat means that his actions in defense of his life are morally good, because he literally had no other choice.

Some evidence suggests that the disharmony between the U.S. SROE and the natural law is already understood by battlefield commanders. The SROE do allow commanders to restrict the use of force in self-defense within limits.[252] One example of this is the Tactical Directive issued by General Stanley McChrystal, the former Commander ISAF, on 6 July 2009.[253] General McChrystal's tactical directive revealed his understanding of the importance of the perception of legitimacy. "[T]here is a struggle for the support and will of the population. Gaining and maintaining that support must be our overriding operational imperative—and the ultimate objective of every action we take."[254] He essentially conceded that our use of force in self-defense may be excessive and, therefore, may directly undermine our operational objectives in Afghanistan. "[E]xcessive use of force resulting in an alienated population will produce far greater risks,"[255] which include the risk of "suffering strategic defeats . . . by causing civilian casualties and thus alienating the people."[256]

As a result, General McChrystal imposed a variety of controls to limit the use of force in self-defense.[257] In so doing, he acknowledged the inherent difficulty in regulating self-defense.

Id.
[250] NATO ROE, *supra* note 218.
[251] Webster Letter, *supra* note 106.
[252] 2005 SROE, *supra* note 9, para. 6.b.2(b)–(c).
[253] HEADQUARTERS, INT'L SECURITY ASSISTANCE FORCE, TACTICAL DIRECTIVE, 6 July 2009 [hereinafter TACTICAL DIRECTIVE], *available at* http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (describing the use of force in self-defense). General McChrystal resigned as Commander of ISAF in June 2010. *See* President Barack Obama, Statement by the President in the Rose Garden (June 23, 2010).
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.*

> I cannot prescribe the appropriate use of force for every condition that a complex battlefield will produce, so I expect our force to internalize and operate in accordance with my intent. Following this intent requires a cultural shift within our forces—and a complete understanding at every level—down to the most junior soldier.[258]

The first sentence states the age-old problem that bedevils all attempts to define self-defense: it is never possible to anticipate every possible situation, so ultimately, the discretion of the soldier or commander on the ground must come into play. The second sentence, however, is even more telling. General McChrystal saw a need for a "cultural shift within our forces."[259] In other words, the problem is not with language, but the way soldiers think, operate, react, and fight. They have been conditioned to justify every act of force as an exercise of self-defense, and this is a cultural problem that must be addressed.

General McChrystal's effort to rein in the use of force in self-defense reflects an intuitive recognition that the military has strayed from the natural law justification for self-defense, and, by doing so, has created a gulf between our forces and the Afghan population. Prior to his Tactical Directive, the battle for Afghan hearts and minds was slowly losing ground; rather than perceiving us as helping them, Afghans increasingly saw us as heavy-handed and indiscriminate.[260] The goal now must be to "respect and protect the population from coercion and violence—and operate in a manner which will win their support."[261] Only a cultural shift towards using self-defensive force only against an immediate threat will address this problem.

So far, the emphasis on restraint seems to be working. In 2009, the percentage of civilian casualties in Afghanistan caused by United States and NATO forces dropped to 22 percent from 38 percent in 2008, a decline some attributed to "concerted efforts on the part of the military to

---

[258] *Id.*
[259] *Id.*
[260] Gary Langer, *Support for U.S. Efforts Plummets Amid Afghanistan's Ongoing Strife*, ABC NEWS, Feb. 9, 2009, *available at* http://abcnews.go.com/images/PollingUnit/1083a1Afghanistan2009.pdf (describing results of a poll of Afghan adults conducted by ABC News, the BBC, and ARD German TV); *see also* Gary Langer, *Frustration with War, Problems in Daily Life Send Afghans' Support For U.S. Efforts Tumbling*, ABC NEWS, Feb. 9, 2009, http://abcnews.go.com/PollingUnit/story?id=6787686&page=1.
[261] TACTICAL DIRECTIVE, *supra* note 253.

put civilians at the fore of military planning."[262] This appears to be winning more support for both the Afghan government and the U.S. mission there.[263] However, while directly limiting the use of force through tactical orders may prove effective in the short term, the only long-term solution capable of causing a cultural shift is to return the application of self-defense under the SROE to its natural law foundations.

VII. Conclusion

The goal of this article was not to argue that the U.S. SROE violate international law. Rather, this article argues that the increasing reliance on an expanded temporal limitation for the use of force in self-defense conflicts with natural law. Aquinas and other natural law scholars justify the use of force in self-defense on moral grounds by insisting that the use of deadly force in self-defense is legitimate only when circumstances permit no other option, and temporal immediacy is the strongest indicator that no other option was available.

Because natural law stands for the idea that all men everywhere accept the use of force in self-defense by operation of reason, it provides a baseline that, if adhered to, maximizes the likelihood that the use of force in self-defense will be accepted as legitimate. This "truth" does not require legal training or cultural awareness to be understood; it is apparent simply by "the reason of the thing."[264] When force is used to respond to an immediate threat, even those who are unintentionally harmed are likely to accept that force was necessary under the circumstances. On the other hand, the farther we push the temporal boundaries of immediacy to allow force in response to arguably non-immediate threats, the more we raise questions regarding the legitimacy of our actions.

Likewise, because our domestic law standard also insists on immediacy as a component of self-defense, expanding the temporal

---

[262] Amin Jalali, *Afghans Protest Civilian Deaths in Foreign Raid*, REUTERS, Dec. 30, 2009, http://www.reuters.com/article/idUSTRE5BT11V20091230.

[263] Gary Langer, *Views Improve Sharply in Afghanistan, Though Criticisms of the U.S. Stay High*, ABC NEWS, Jan. 11, 2009, http://abcnews.go.com/PollingUnit/afghanistan-abc-news-national-survey-poll-show-support/story?id=951196 1 (last visited Jan. 15, 2010).

[264] LAUTERPACHT, *supra* note 102, at 52.

boundary places our soldiers in potential legal jeopardy. If forced to justify their acts in a court of law on self-defense grounds, they may find themselves held to a standard that is much narrower than what the ROE now allow.

If the goal is to provide soldiers with more options for the use of force against insurgents, perhaps a better course would be to refine the rules regarding the offensive, rather than defensive, use of force. The law allows for other just forms of violence, and if the offensive ROE allow U.S. forces to attack identified enemy forces, they will have all the latitude they need. The United States should shift its emphasis away from expanding self-defense beyond what is recognized by natural law, and towards designing offensive ROE measures that allow soldiers to target identified enemy fighters without overly cumbersome processes. This could take the form of a hybrid between conduct- and status-based targeting, based on direct participation in hostilities by civilians; however, the precise offensive measures that could be adopted are beyond the scope of this article.

We can easily return to a natural law-based self-defense and accomplish the cultural shift called for by battlefield commanders by simply deleting the new definition of "imminent threat" and allowing those words to mean what they traditionally have. There is little evidence that soldiers failed to understand, and exercise, their right to self-defense prior to the 2005 change to the SROE, so it is not clear what this change accomplished. "Imminent threat" ought to mean what the term itself naturally suggests: a threat of death that is "about to happen," one that is "immediate." This would return our self-defense doctrine to its natural law roots, enhance the perceived legitimacy of defensive uses of force, and bring our ROE firmly in line with our domestic law.