

**U.S. AD BELLUM:
LAW AND LEGITIMACY IN UNITED STATES USE OF
FORCE DECISIONS**

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I. Introduction

The United Nations (UN) was created in 1945¹ in part to “save succeeding generations from the scourge of war”² and to regulate the threat or use of force among nations.³ It has failed on both counts.⁴ Although virtually every nation on Earth is a member of the UN⁵ and has therefore pledged to “refrain in their international relations from the

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¹ *UN at a Glance*, <http://www.un.org/en/aboutun/index.shtml> (last visited May 19, 2014); JOHN F. MURPHY, *THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE: A LEGAL AND POLITICAL ANALYSIS* 11 (1982).

² U.N. Charter pmb1.

³ *Id.* art. 2, para. 4; Press Release, Secretary-General, Secretary-General Says Renewal of Effectiveness and Relevance of Security Council Must Be Cornerstone of Efforts to Promote International Peace in Next Century, U.N. Press Release SG/SM/6997 (May 18, 1999) [hereinafter Secretary-General Press Release].

⁴ Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFF., May/June 2003, at 16, 22 (“Since 1945, so many states have used armed force on so many occasions, in flagrant violation of the charter, that the regime can only be said to have collapsed.”); Press Release, United States Dep’t of State, Statement by the Honorable John Foster Dulles Sec’y of State Before the Charter Review Subcomm. of the Senate Foreign Relations Comm. (Jan. 18, 1954), history.state.gov/historicaldocuments/frus1952-54v03/d47.

⁵ The UN has 193 member states. UN AT A GLANCE, <http://www.un.org/en/aboutun/index.shtml> (last visited Feb. 17, 2014).

threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations,”⁶ history is replete with examples of member states threatening and using force against each other.⁷ Similarly, the UN Security Council, which is supposed to be the “sole source of legitimacy on the use of force,”⁸ has consistently shown itself impotent to carry out its principal responsibility.⁹

The United States not only is a signatory to the Charter, but also was it a driving force behind the creation of the UN.¹⁰ Nonetheless, the United States has acted contrary to the requirements and restrictions of the UN Charter on several occasions. Whether this is a cause or an effect of the Charter’s impotence is beyond the scope of this article.

In the absence of an effective UN Charter framework, the United States has acted on certain principles in determining when the use of armed force is appropriate. These principles are based in domestic and international law but are not purely legal matters. Rather, the appropriate standard used to evaluate use of force decisions is not whether they are legal but whether they are legitimate.¹¹ This article identifies the factors that U.S. decision-makers consider in deciding whether the use of force is appropriate.

⁶ U.N. Charter art. 2, para. 4.

⁷ MEREDITH REID SARKEES & FRANK WHELON WAYMAN, *RESORT TO WAR: A DATA GUIDE TO INTER-STATE, EXTRA-STATE, INTRA-STATE, AND NON-STATE WARS, 1816–2007*, at 76–77 (2010); RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R42738, *INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2012* (2012).

⁸ Secretary-General Press Release, *supra* note 3.

⁹ Monica Hakimi, *To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization*, 40 VAND. J. TRANSNAT’L L. 643, 644–47 (2007); W. Michael Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, in *The United Nations Charter and the Use of Force: Is Article 2(4) Still Workable?*, 78 AM. SOC’Y INT’L L. PROC. 68, 77 (1984).

¹⁰ Wilhelm G. Grewe & Daniel-Erasmus Khan, *Drafting History*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1–12 (Bruno Simma et al., eds., 2d ed. 2002); Robert Kagan, *America’s Crisis of Legitimacy*, FOREIGN AFF., Mar./Apr. 2004, at 65, 79 (“Despite its role in helping to create the UN and draft the UN Charter, the United States has never fully accepted the organization’s legitimacy or the charter’s doctrine of sovereign equality.”).

¹¹ John F. Troxell, *Military Power and the Use of Force*, in U.S. ARMY WAR COLLEGE GUIDE TO NATIONAL SECURITY POLICY AND STRATEGY 217, 234 (J. Boone Bartholomees, Jr., ed., 2d ed. 2006) (“[D]emocracies have the unique challenge of dealing with the elusive and malleable concept of legitimacy . . . Today, more than ever, the key question concerning the use of force is not whether it is lawful, but whether it is wise.”).

Part II of this article briefly discusses the legal regime established by the UN Charter to regulate the threat or use of force in international relations and suggests critical reasons for the Charter's failure to live up to its promise. This will establish a baseline to evaluate when and how far the United States strays from the Charter rules. Part III surveys and analyzes U.S. policy and practice since 1945 regarding the use of military force. Part IV distills the past practice and policy pronouncements into general principles on which the United States relies in making the decision whether to use force in international relations. The article concludes that there is no practical legal obstacle to the United States' use of force, and that if the United States can justify the use of force as legitimate, it will use force regardless of its legality.

II. The United Nations and Regulation of the Use of Force

The UN Charter contains a comprehensive regime intended to prevent the use of force and, when prevention fails, to regulate the use of force in international relations. In fact, prevention and regulation of the use of force among nations were primary purposes for the creation of the UN. The Charter's preamble "highlight[s] some of the motivations of the [UN's] founders,"¹² including

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, . . . and for these ends to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest¹³

Similarly, the first purpose of the UN is maintenance of "international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace."¹⁴

¹² Rüdiger Wolfrum, *Preamble*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 10, at 37.

¹³ U.N. Charter pmbl.

¹⁴ *Id.* art. 1, para. 1.

A. Article 2(4)

Article 2(4) is the cornerstone of the Charter's regulation of the use of force.¹⁵ It states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."¹⁶ The language in Article 2(4) is expansive, barring not only the use of force (as opposed to the more narrow prohibition of "war" in the Kellogg-Briand Pact¹⁷) but also the mere threat of force. This broad prohibition on the use or threat of force establishes the general rule, subject to two exceptions contained in the Charter: Security Council authorization for the use of force and self-defense.¹⁸

B. Security Council Regulation of the Threat or Use of Force

The UN Security Council has the "primary responsibility for the maintenance of international peace and security."¹⁹ Chapter VII of the UN Charter governs the Security Council's authority to address "threat[s] to the peace, breach[es] of the peace, or act[s] of aggression."²⁰ When the Security Council determines that a threat to the peace, breach of the peace, or act of aggression has occurred, it has three options available to assist in the "maint[enance] and restor[ation of] international peace and security."²¹

First, the Security Council can recommend that the parties to a dispute "comply with such provisional measures as [the Security Council] deems necessary."²² These measures may include "suspension

¹⁵ Albrecht Randelzhofer, *Article 2(4)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 10, at 117.

¹⁶ U.N. Charter art. 2, para. 4.

¹⁷ General Treaty for Renunciation of War as an Instrument of National Policy Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57. Fifteen nations signed the treaty, which "condemn[ed] recourse to war for the solution of international controversies, and renounce[d] it as an instrument of national policy in their relations with one another."). *Id.*

¹⁸ Michael J. Glennon, *The Rise and Fall of the U.N. Charter's Use of Force Rules*, 27 HASTINGS INT'L & COMP. L. REV. 497, 506 (2004).

¹⁹ U.N. Charter art. 24, para. 1.

²⁰ *Id.* art. 39.

²¹ *Id.*

²² *Id.* art. 40.

of hostilities, troop withdrawal, and the conclusion of or adherence to a truce.”²³ Second, the Security Council can impose sanctions on a party determined to have threatened or breached the peace or to have committed an act of aggression.²⁴ Finally, pursuant to Article 42, the Security Council can authorize the use of force to “maintain or restore international peace and security.”²⁵

Originally, the Security Council was expected to enforce Article 42 resolutions with a military force consisting of units placed at its disposal by member states in accordance with a “special agreement or arrangement.”²⁶ However, these agreements or arrangements were never concluded, and as a result, the only method by which the Security Council can enforce an Article 42 resolution is by voluntary action of member states.²⁷ With Security Council approval, therefore, nations may be authorized to threaten or to use force that would otherwise violate Article 2(4).

In addition to the substantive powers of the Security Council, its composition and procedures play a significant part in its regulation of the use of force. The Security Council is comprised of fifteen member states.²⁸ Ten are elected from the member states of the UN and five are permanent members of the Security Council.²⁹ Any Security Council action other than procedural matters requires the affirmative vote of at least nine members, but any one of the permanent members can veto any non-procedural action.³⁰ As a result, it is practically impossible for the Security Council to adopt a resolution authorizing the use of force against a permanent member, criticizing the actions of a permanent member, or in any way contrary to the interests of a permanent member.³¹

²³ Jochen Abr. Frowein & Nico Krisch, *Article 40*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 10, at 732.

²⁴ U.N. Charter art. 41.

²⁵ *Id.* art. 42.

²⁶ *Id.* art. 43, para. 1.

²⁷ Jochen Abr. Frowein & Nico Krisch, *Article 42*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 10, at 732.

²⁸ U.N. Charter art. 23.

²⁹ *Id.*

³⁰ *Id.* art. 27.

³¹ A notable exception was the Security Council’s authorization to use force in response to the North Korean invasion of South Korea. China was still represented on the Council by the Republic of China. The Soviet Union was boycotting the Security Council to protest its refusal to recognize the People’s Republic of China as the legitimate

C. Self-Defense

Another exception to Article 2(4)'s general prohibition on the threat or use of force is action taken in self-defense.³² Article 51 of the Charter protects the "inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."³³ However, self-defense is only authorized by the Charter "until the Security Council has taken measures necessary to maintain international peace and security," and any Member exercising self-defense must immediately report its actions to the Security Council.³⁴

Article 51's scope is a matter of great disagreement. Some scholars argue that the term "inherent right" suggests that nations have a right to self-defense, including anticipatory self-defense, that predates the Charter and is not substantially affected by the Charter.³⁵ Others claim that the textual prerequisite of an "armed attack" negates the pre-Charter right of anticipatory self-defense and requires a nation to wait until an armed attack actually occurs before responding in self-defense.³⁶

D. Regional Arrangements of Agencies

The Charter recognizes a role for other international organizations such as NATO and similar bodies in the maintenance of international peace and security. Chapter VIII of the Charter addresses the use of "regional arrangements or agencies" to maintain international peace and security.³⁷ Although Chapter VIII provides recognition of the

government of China. As a result, only the United States, United Kingdom, France, or the then-named Republic of China could veto the resolution, and none did. The Soviet Union quickly realized its tactical error and resumed its seat on the Council. Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT'L L. 1, 7 (1990).

³² U.N. Charter art. 51.

³³ *Id.*

³⁴ *Id.*

³⁵ Major John J. Merriam, *Natural Law and Self-Defense*, MIL. L. REV. 43, 65–66 (Winter 2010); William C. Bradford, "The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War, 79 NOTRE DAME L. REV. 1365, 1375–77 (2004).

³⁶ Albrecht Randelzhofer, *Article 51*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 10, at 792–94; IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 272–73 (1963).

³⁷ U.N. Charter art. 52, para. 1.

contribution that regional agencies can make to international peace and security, it prohibits them from taking any enforcement action without Security Council approval.³⁸ Therefore, it is not actually an exception to the Article 2(4) prohibition on the threat or use of force. Rather, regional enforcement actions are a subset of the Security Council's Article 42 power to authorize the use of force.

E. United Nations' Effectiveness in Regulating the Use of Force

The UN has failed to prevent and effectively to regulate the threat or use of force in international relations for two primary reasons. First, nations have not acted as though the Charter is binding law. Nations, including the United States, frequently violate the Charter without sanction and, in some cases, with approval of the international community. When the stakes are sufficiently high, a nation will act in its own interest, even if that action violates the Charter.³⁹

Second, the structure and procedure of the Security Council, specifically the so-called veto power of the permanent members,⁴⁰ prevents the Council from taking effective action that is contrary to the interests of one or more of the permanent members.⁴¹ The early expectation that the permanent members, who cooperated during World War II, would continue to cooperate in the post-war world proved to be unrealistic. Security Council dysfunction was at its zenith during the cold war years, saw a brief respite during the early 1990s,⁴² but then resurged as other permanent members, particularly Russia, China, and France, sought to rein in the power of the United States.⁴³

³⁸ *Id.* art. 53, para. 1.

³⁹ Glennon, *supra* note 18, at 499 (“[W]hen the individual interest of the state is at odds with the collective interest, states choose their own national interest over the collective interest.”).

⁴⁰ U.N. Charter art. 27, para. 3 (“Decisions of the Security Council on [non-procedural] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members . . .”).

⁴¹ MURPHY, *supra* note 1, at 21; Press Release, United States Dep't of State, Statement by the Honorable John Foster Dulles Sec'y of State Before the Charter Review Subcomm. of the Senate Foreign Relations Comm. (Jan. 18, 1954).

⁴² Troxell, *supra* note 11, at 232.

⁴³ Glennon, *supra* note 4, at 18–19 (“Reactions to the United States' gradual ascent to towering preeminence have been predictable: coalitions of competitors have emerged. Since the end of the Cold War, the French, the Chinese, and the Russians have sought to return the world to a more balanced system.”).

The UN, and the Security Council in particular, was intended to have established a legal framework upon which nations could rely in determining whether the use of force was appropriate. Because they have failed, nations have had to look elsewhere for legal guidance in making these decisions.

III. The United States' Justification for the Use of Force

The decision to use military force is one of the most serious and most complicated decisions an administration faces.⁴⁴ It requires consideration of international and domestic law and policy.

No administration has ever published an exhaustive, or even reasonably detailed, explanation of what circumstances would cause the United States to use force in its international relations.⁴⁵ Policymakers, including those who make the decision to use military force, have no crystal ball and cannot foresee every circumstance that might justify the use of force.⁴⁶ Therefore, when they do pronounce policy regarding the potential use of force, they tend to be vague and leave abundant room for interpretation.

For example, for decades before September 11, 2001, the United States treated international terrorism as a criminal matter rather than a matter of war.⁴⁷ The scale of the September 11 attacks caused the U.S. government to change its policy and treat international terrorism, at least in some respects, as a matter of armed conflict justifying the use of military force.⁴⁸ Similarly, prior to the Korean War, the United States had declared an Asian "defense perimeter" identifying those Asian

⁴⁴ GEORGE W. BUSH, DECISION POINTS 184 (2010); Troxell, *supra* note 11, at 225.

⁴⁵ Troxell, *supra* note 11, at 234 ("there can be no single or simple set of fixed rules for the use of force, the prudent strategist needs to keep in mind relevant questions and issues he should evaluate in each particular circumstance that might require military force.").

⁴⁶ President George H.W. Bush, Remarks at the United States Military Academy in West Point, New York, 2 PUB. PAPERS 2230 (Jan. 5, 1993) ("I know that many people would like to find some formula, some easy formula to apply, to tell us with precision when and where to intervene with force. Anyone looking for scientific certitude is in for a disappointment. In the complex new world we are entering, there can be no single or simple set of fixed rules for using force. Inevitably, the question of military intervention requires judgment. Each and every case is unique.").

⁴⁷ JENNIFER ELSEA, CONG. RESEARCH SERV., RL 31191, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS 1 (2001).

⁴⁸ *Id.*

nations that were important to U.S. national security.⁴⁹ The declared perimeter did not include South Korea.⁵⁰ After North Korea invaded South Korea, the United States quickly reoriented its priorities to make clear that the defense of South Korea was a vital national security interest.⁵¹

Because there is no comprehensive “checklist” that enumerates the circumstances in which the United States will use force, to discern the United States’ understanding of the limits of its authority to use force requires analysis of U.S. policy and practice. The remainder of this Part will analyze the history of use of force policy and decisions since the implementation of the UN Charter to determine the contours of the United States’ understanding of *jus ad bellum*, and is organized in three sections: the Cold War Period (roughly 1945 through the Reagan Administration), the Post-Cold War Period (roughly 1989 through September 10, 2001), and the Post-9/11 Period (September 11, 2001, through the present).

A. Cold War

The Cold War was a period of constant tension between the United States and the West, on one hand, and the Soviet Union and the East, on the other.⁵² Militarily, this period was characterized by proxy wars with only occasional direct confrontations between the United States and the Soviet Union, all taking place under the shadow of potential nuclear war.⁵³

U.S. foreign policy in the early part of the Cold War centered around the doctrine of containment.⁵⁴ Containment was a doctrine that

⁴⁹ Dean Acheson, U.S. Sec’y of State, Address to the National Press Club (Jan. 12, 1950), <http://teachingamericanhistory.org/library/document/speech-on-the-far-east/>.

⁵⁰ *Id.*

⁵¹ U.S. Dep’t of State, *Authority of the President to Repel the Attack in Korea*, DEP’T ST. BULL., July 31, 1950, at 173, 176–77. The United States framed its “paramount” interest as “[t]he continued existence of the United Nations as an effective international organization” and justified the use of force in Korea on North Korea’s violation of Security Council resolutions. *Id.*

⁵² WILLIAM G. HYLAND, *THE COLD WAR IS OVER* 7–10 (1990).

⁵³ W. Michael Reisman, *International Law After the Cold War*, 84 AM. J. INT’L L. 859, 859–60 (1990).

⁵⁴ Memorandum from Clark Clifford, Special Counsel to the President, to President Harry S. Truman, *American Relations with the Soviet Union: A Report to the President*

employed all aspects of foreign policy, including military force, to prevent the spread of communism.⁵⁵

1. Korea

On June 25, 1950, North Korean armed forces crossed the 38th Parallel, the dividing line with South Korea, and began swiftly pushing back South Korean defenders.⁵⁶ North Korean forces entered the South Korean capital of Seoul on June 28, and South Korean soldiers “withdrew in disorder and abandoned most of their equipment.”⁵⁷

On June 25, the UN Security Council met to consider the North Korean invasion and adopted Resolution 82, which condemned the action as a “breach of the peace” and “[called] upon the authorities of North Korea to withdraw forthwith their armed forces to the 38th parallel.”⁵⁸ When North Korea did not comply with Resolution 82, the Security Council adopted Resolution 83, calling on member states to provide military assistance to South Korea to “repel the armed attack and to restore international peace and security in the area.”⁵⁹ The United States committed armed forces to the defense of South Korea along with other nations that responded to the Security Council’s call for assistance.⁶⁰

UN Security Council resolutions, particularly Resolution 83, provided the United States with a firm justification in international law for its use of armed force. The existence of a coalition of more than twenty nations cooperating in the fight added legitimacy to the action as well.⁶¹

Domestically, President Truman did not seek a congressional declaration of war or authorization to commit the armed forces to combat

by the Special Counsel to the President 71–79 (Sept. 24, 1946), <http://www.trumanlibrary.org/4-1.pdf>.

⁵⁵ *Id.* at 73.

⁵⁶ 2 UNITED STATES ARMY, AMERICAN MILITARY HISTORY 223 (Richard W. Stewart ed., 2d ed. 2009).

⁵⁷ *Id.*

⁵⁸ S.C. Res. 82, ¶ 6, U.N. Doc. S/RES/82 (June 25, 1950).

⁵⁹ S.C. Res. 83, ¶ 6, U.N. Doc. S/RES/83 (June 27, 1950).

⁶⁰ MURPHY, *supra* note 1, at 30; 2 UNITED STATES ARMY, *supra* note 56, at 224.

⁶¹ 2 UNITED STATES ARMY, *supra* note 56, at 228.

in Korea. Congress neither authorized nor prohibited U.S. military involvement in the war.⁶² Truman determined that “[t]he continued existence of the United Nations as an effective international organization [was] a paramount United States interest.”⁶³

The UN reaction to the North Korean invasion of South Korea was an early, but short-lived, success for the Security Council. When the conflict erupted, the Soviet Union was boycotting the Security Council because China was represented by the Republic of China rather than the communist People’s Republic of China.⁶⁴ Due to the Soviet Union’s absence and the nature of the Chinese representation, the Security Council unanimously condemned the North Korean invasion.⁶⁵ After the Soviet Union returned to the table and the People’s Republic of China took China’s seat on the Security Council, East-West tensions dominated the Security Council’s actions through the Cold War period.

2. *Cuban Missile Crisis*

In October of 1962, the United States learned that the Soviet Union was deploying nuclear missiles in Cuba, ninety miles from the Florida coast.⁶⁶ In response, the United States demanded that the Soviet Union remove the missiles and, on October 24, instituted a naval quarantine to prevent offensive weapons from reaching Cuba.⁶⁷

President Kennedy’s advisers discussed justifying the quarantine as an act of anticipatory self-defense under Article 51 of the UN Charter, but they ultimately determined that they could not characterize the threat

⁶² James P. Terry, *The President As Commander in Chief*, 7 AVE MARIA L. REV. 391, 406 (2009).

⁶³ *Authority of the President to Repel the Attack in Korea*, *supra* note 51, at 176.

⁶⁴ DEAN ACHESON, *THE KOREAN WAR* 18–19 (1971).

⁶⁵ S.C. Res. 82, *supra* note 58.

⁶⁶ ROBERT F. KENNEDY, *THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS* 19 (1968); Hakimi, *supra* note 9, at 654.

⁶⁷ KENNEDY, *supra* note 66, at 52. Although sometimes referred to as a “blockade,” the term “quarantine” was deliberately chosen because a blockade is an act of war. Richard N. Gardner, *A Life in International Law and Diplomacy*, 44 COLOM. J. TRANSNAT’L L. 1, 6 (2005) (“[W]e don’t want a war, and that’s why we’re not calling it a blockade, but only a quarantine for a very limited purpose.”).

of “armed attack” as imminent.⁶⁸ They settled on justifying the quarantine as a regional enforcement action by the Organization of American States (OAS) under Chapter VIII of the UN Charter.⁶⁹ As discussed in Part II.D. above, however, Chapter VIII actions still require Security Council approval. In addition to approving the quarantine, three OAS nations, Argentina, the Dominican Republic, and Venezuela, actively participated in enforcing the quarantine, and several other OAS nations provided port facilities.⁷⁰

On October 22, the United States requested a meeting of the UN Security Council to address the situation and proposed a draft resolution calling for the removal of the missiles from Cuba.⁷¹ The Cuban and Soviet ambassadors also sought assistance from the Security Council, and the Soviet Union also proposed a draft resolution condemning the United States and insisting that it end the quarantine.⁷² Because the United States and the Soviet Union were both permanent members of the Security Council with veto power, there was little possibility that any resolution of the Cuban missile crisis would come out of that body and, in fact, the Security Council never took official action regarding the Cuban Missile Crisis.⁷³

3. Vietnam

In the mid-1950s, the United States began providing military advisors and assistance to the Republic of Vietnam, which was fighting a counterinsurgency war against communist guerillas.⁷⁴ This was part of President Eisenhower’s “domino theory” of containment: “You have a row of dominoes set up, you knock over the first one, and what will happen to the last one is the certainty that it will go over very quickly.”⁷⁵ Vietnam was the first domino in the analogy, and Eisenhower

⁶⁸ James E. Hickey, Jr., *Challenges to Security Council Monopoly Over the Use of Force in Enforcement Actions: The Case of Regional Arrangements*, 10 IUS GENTIUM 77, 101 (2004).

⁶⁹ *Id.* at 102.

⁷⁰ *Id.* at 106.

⁷¹ U.N. S.C. Rep. of the Security Council, July 16 1962–July 15 1963, U.N. Doc. A/5502; GAOR, 18th Sess., Supp. No. 2 (1963).

⁷² *Id.*

⁷³ *Id.*; Hickey, *supra* note 68, at 107.

⁷⁴ 2 UNITED STATES ARMY, *supra* note 56, at 293.

⁷⁵ President Dwight D. Eisenhower, Remarks at Presidential Press Conference (Apr. 7, 1954), *quoted in* STEPHEN E. AMBROSE, EISENHOWER: THE PRESIDENT 180 (1984).

determined that, if communist expansion was not stopped there it would continue unchecked in neighboring countries and become more difficult to stop.⁷⁶

The United States continued a limited involvement in Vietnam through the Eisenhower and Kennedy administrations, although that involvement increased in numbers of personnel and scope of action. By 1964, under President Johnson, nearly 24,000 U.S. military personnel were in Vietnam, up from under 700 in 1960.⁷⁷ During this period, U.S. military operations were geographically limited to South Vietnam because the legal basis for U.S. involvement was a request by the government of the Republic of Vietnam to the United States for assistance in fighting the insurgents. The United States had justified its actions as a matter of collective self-defense under Article 51 of the UN Charter.⁷⁸

On August 2, 1964, torpedo boats of the North Vietnamese Navy attacked the U.S. destroyer USS *Maddox* in international waters.⁷⁹ In response to President Johnson's request, Congress passed a joint resolution authorizing the use of military force.⁸⁰ Known as the "Tonkin Gulf Resolution" after the location of the naval clash that led to its passage, the resolution authorized the President to "take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression" and to "take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom."⁸¹ As a matter of international law, the United States continued to invoke collective self-defense under Article 51 of the UN Charter.⁸²

As the war dragged on and congressional and the American public support diminished, Congress passed further legislation limiting the

⁷⁶ *Id.*

⁷⁷ 2 UNITED STATES ARMY, *supra* note 56, at 301.

⁷⁸ U.S. Dep't of State, *The Legality of the United States Participation in the Defense of Viet Nam*, 75 YALE L.J. 1085, 1094 (1966).

⁷⁹ MICHAEL MACLEAR, *THE TEN THOUSAND DAY WAR: VIETNAM, 1945-1975*, at 111 (1981). There were initial reports of a second attack on August 4, but it was ultimately determined that the second attack did not occur. *Id.*

⁸⁰ Tonkin Gulf Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964).

⁸¹ *Id.* § 1.

⁸² U.S. Dep't of State, *supra* note 78, at 1094.

scope of U.S. involvement in Southeast Asia⁸³ and ultimately mandating withdrawal of U.S. forces from Vietnam.⁸⁴ The 1970 Department of Defense Appropriations Act prohibited the use of funds for “the introduction of American ground combat troops into Laos or Thailand.”⁸⁵ Two years later, after President Nixon ordered U.S. ground troops into Cambodia, Congress prohibited the use of funds to “finance the introduction of United States ground combat troops into Cambodia.”⁸⁶ In response to President Nixon’s decision to bomb Cambodia from the air, which did not violate the prohibition on funding for “ground combat troops,” Congress passed a bill to proscribe the use of funds for any combat activity in Cambodia and Laos.⁸⁷ Nixon vetoed the bill.⁸⁸ After the Paris Peace Treaty was concluded, Nixon signed a bill prohibiting the use of funds for combat operations in North Vietnam, South Vietnam, Laos, and Cambodia.⁸⁹

4. War Powers Resolution

In response to perceived executive abuses of the use of armed force abroad, Congress passed the War Powers Resolution⁹⁰ on October 12, 1973.⁹¹ President Nixon vetoed the bill,⁹² but Congress overrode the veto and the Resolution became law on November 7, 1973.⁹³

The stated purpose of the War Powers Resolution is to

[e]nsure that the collective judgment of both the Congress and the President will apply to the introduction

⁸³ See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1065–67 (2008).

⁸⁴ *Id.* at 1067.

⁸⁵ *Id.* at 1065; U.S. Department of Defense Appropriations Act, 1970, Pub. L. No. 91-171, § 643, 83 Stat. 469, 487 (1969).

⁸⁶ Barron & Lederman, *supra* note 83, at 1065–66 (quoting Special Foreign Assistance Act of 1971, Pub. L. No. 91-952, § 7(a), 84 Stat. 1942, 1943 (1971)).

⁸⁷ *Id.*

⁸⁸ *Id.* at 1067.

⁸⁹ *Id.*

⁹⁰ 50 U.S.C. §§ 1541–1548 (2012).

⁹¹ War Powers Resolution, H.R.J. Res. 542, 93d Cong. (1973); 119 CONG. REC. H8948-63 (daily ed. Oct. 12, 1973).

⁹² Veto of the War Powers Resolution, 5 PUB. PAPERS 893 (Oct. 24, 1973).

⁹³ War Powers Resolution, H.R.J. Res. 542; 119 CONG. REC. H9661, S20116 (daily ed. Nov. 7, 1973).

of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.⁹⁴

To achieve that purpose, the Resolution requires the President to “consult with Congress” in “every possible instance” before committing U.S. forces to hostilities or situations in which they could be imminently involved in hostilities.⁹⁵ Once the President commits U.S. forces to such a situation, he must report to Congress within forty-eight hours “(A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement.”⁹⁶ The Resolution further requires the President to withdraw U.S. forces within sixty days unless Congress declares war or enacts specific legislative authorization for the operation.⁹⁷

Although Presidents have submitted more than 130 reports to Congress “consistent with” the War Powers Resolution,⁹⁸ every President since its enactment has considered it an unconstitutional infringement on the President’s authority as commander in chief of the armed forces.⁹⁹ Courts have consistently invoked the political question doctrine or standing requirements to abstain from resolving this conflict between the executive and legislative branches.¹⁰⁰ As a result, one author has observed that “it is probably only a slight exaggeration to state that the most significant effect of the War Powers Resolution has been to provide separation of powers scholars with an interesting subject to analyze and debate.”¹⁰¹

⁹⁴ 50 U.S.C. § 1541 (2012).

⁹⁵ *Id.* § 1542.

⁹⁶ *Id.* § 1543.

⁹⁷ *Id.* § 1544.

⁹⁸ RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 14 (2012).

⁹⁹ *Id.* at 2.

¹⁰⁰ *Id.* See, e.g., *Doe v. Bush*, 323 F.3d 133, 144 (1st Cir. 2003); *Crockett v. Reagan*, 720 F.2d 1355, 1357 (D.C. Cir. 1983); *Campbell v. Clinton*, 52 F. Supp. 2d 34, 45 (D.D.C. 1999); *Lowry v. Reagan*, 676 F. Supp. 333, 341 (D.D.C. 1987); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 602 (D.D.C. 1983).

¹⁰¹ Major Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1152 (2001).

5. Recovery of the S.S. Mayaguez

As U.S. involvement in Vietnam was drawing to a close, the United States became involved in an unexpected conflict with the new Khmer Rouge government in Cambodia. On May 12, 1975, the Cambodian military seized a U.S. merchant ship, the S.S. *Mayaguez*, and detained its crew on a nearby island.¹⁰² The Ford administration was concerned that, if the crew was taken to the mainland, the situation could devolve into a protracted and embarrassing negotiation for their release, or worse, result in harm to the crew.¹⁰³ President Ford ordered the U.S. military to use force to prevent the Cambodians from moving the crew to the mainland.¹⁰⁴ On May 13, U.S. military aircraft attacked Cambodian gunboats escorting a ship containing the crew.¹⁰⁵ The Cambodians took the crew to an island off the mainland, where they detained and interrogated the crew.¹⁰⁶

On May 15, 1975, U.S. Marines landed on the island to rescue the crew and met stiff resistance.¹⁰⁷ U.S. Navy and Air Force aircraft also attacked targets on the island and on the mainland.¹⁰⁸ The U.S. government did not know it, but, as the attack began, the Cambodians were in the process of releasing the crew.¹⁰⁹

As a matter of international law, the Ford administration justified the use of force to recover the *Mayaguez* and its crew as an act of self-defense. In a letter to the Secretary General of the UN seeking assistance in arriving at a diplomatic resolution, the U.S. Ambassador to the UN wrote:

In the absence of a positive response to our appeals through diplomatic channels for early action by the Cambodian authorities, my Government reserves the right to take such measures as may be necessary to protect the lives of American citizens and property,

¹⁰² Major Thomas E. Behuniak, *The Seizure and Recovery of the S.S. Mayaguez: A Legal Analysis of United States Claims, Part 1*, MIL. L. REV. 41, 46–49 (Fall 1978).

¹⁰³ *Id.* at 53–54.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 63.

¹⁰⁶ *Id.* at 66–67.

¹⁰⁷ *Id.* at 74–75.

¹⁰⁸ *Id.* at 79–81.

¹⁰⁹ *Id.* at 77–78.

including appropriate measures of self-defense under Article 51 of the United Nations charter.¹¹⁰

After U.S. military operations had begun, the Ambassador notified the Security Council that “the United States Government has taken certain appropriate measures under Article 51 of the UN Charter whose purpose it is to achieve the release of the vessel and crew.”¹¹¹

As a matter of domestic law, when President Ford ordered the rescue the legislative restriction on using funds for combat activities in Cambodia was still in effect.¹¹² Nevertheless, while conceding that the rescue operation violated the letter of law, the Ford Administration argued that Congress could not have intended to prohibit the armed forces rescuing American citizens.¹¹³

The *Mayaguez* rescue operation was the fourth instance that implicated the War Powers Resolution, and the executive and legislative branches were still exploring the Resolution’s contours.¹¹⁴ President Ford notified congressional leaders immediately prior to the first use of force on May 13 and contended that that satisfied the consultation requirement of the War Powers Resolution even though he neither sought nor considered advice or opinions from Congress.¹¹⁵

6. *Operation Urgent Fury*

In October 1983, Marxist revolutionaries who sought to align themselves with Cuba and the Soviet bloc overthrew the government of the Caribbean Island nation of Grenada.¹¹⁶ In addition to the issue of containment of communist expansion, a sizable population of U.S. citizens lived on the island.¹¹⁷ The Iran hostage crisis was fresh in the

¹¹⁰ Behuniak, *supra* note 102, at 59, 119.

¹¹¹ *Id.* at 120–21.

¹¹² Barron & Lederman, *supra* note 83, at 1072–73.

¹¹³ *Id.* at 1073.

¹¹⁴ RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R42699, THE WAR POWERS RESOLUTION: AFTER THIRTY-EIGHT YEARS 10 (2012).

¹¹⁵ *Id.*

¹¹⁶ 2 UNITED STATES ARMY, *supra* note 56, at 399; COURTNEY GLASS, AMERICAN INTERVENTION IN GRENADA: THE IMPLICATIONS OF OPERATION “URGENT FURY” 10–11 (Peter M. Dunn & Bruce W. Watson eds., 1985).

¹¹⁷ Major Ronald M. Riggs, *The Grenada Intervention: A Legal Analysis*, MIL. L. REV. 1, 34 (Summer 1985); UNITED STATES ARMY, OPERATION URGENT FURY: THE INVASION

minds of the nation and the Reagan Administration was concerned that, if U.S. citizens were not evacuated from Grenada, a new hostage crisis could be in the making.¹¹⁸ Consistent with, if not in compliance with, the War Powers Resolution, President Reagan consulted with congressional leaders before ordering U.S. forces to execute *Operation Urgent Fury*.¹¹⁹

On October 25, 1983, U.S. armed forces invaded Grenada and, over four days, rescued U.S. citizens on the island and restored the previous government.¹²⁰ Later that day, President Reagan notified Congress of the invasion “consistent with the War Powers Resolution.”¹²¹

The United States laid out its legal justification for the invasion in a letter from the State Department Legal Advisor to the American Bar Association’s Section on International Law and Practice.¹²² The letter identified three justifications for *Operation Urgent Fury*. First, the United States relied on an invitation by the legitimate government of Grenada.¹²³ The Governor General of Grenada, who was under house arrest at the time, managed to communicate a request to the United States and the Organization of Eastern Caribbean States for military intervention.¹²⁴ Second, *Operation Urgent Fury* was a regional enforcement action executed by the Organization of Eastern Caribbean States under Chapter VIII of the UN Charter.¹²⁵ Finally, the United States argued that protection of U.S. nationals abroad was a legitimate justification for the use of force.¹²⁶

OF GRENADA, OCTOBER 1983, at 5 (2010), available at http://www.history.army.mil/html/books/grenada/urgent_fury.pdf.

¹¹⁸ Robert J. Beck, *International Law and the Decision to Invade Grenada: A Ten Year Retrospective*, 33 VA. J. INT’L L. 765, 771 (1993) (“In October 1983, memories of the Iran hostage crisis were still fresh; no one in the administration needed to be reminded that Jimmy Carter’s inability to effect the release of American hostages had greatly facilitated Ronald Reagan’s electoral victory. Might Americans again be taken hostage? This frightful spectre was raised frequently during administration deliberations.”).

¹¹⁹ JOHN NORTON MOORE, LAW AND THE GRENADA MISSION 77 (1984).

¹²⁰ Riggs, *supra* note 117, at 1.

¹²¹ MOORE, *supra* note 119, at 77, 95–96.

¹²² *Id.* at 125–29.

¹²³ *Id.* at 125–26.

¹²⁴ *Id.* at 126.

¹²⁵ *Id.* at 126–28.

¹²⁶ *Id.* at 128.

The letter did not take a position on whether any of the three bases on their own would have justified the use of force but stated that the United States determined that, taken together, they provided a “solid basis for the action.”¹²⁷ The letter also specifically stated that the United States did not consider *Operation Urgent Fury* to be self-defense under Article 51 of the UN Charter.¹²⁸

The United States never approached the UN Security Council seeking authorization for the use of armed force in Grenada.¹²⁹ Nevertheless, after the invasion, Nicaragua introduced a resolution to the Security Council condemning the U.S. action.¹³⁰ Eleven of the fifteen member states voted for the resolution; three abstained; and the United States cast the sole vote against the resolution.¹³¹ Nevertheless, under the UN charter, the sole negative vote of a permanent member of the Security Council was sufficient to negate all of the votes in favor of a resolution.¹³²

B. Post-Cold War

With the collapse of the Soviet Union in 1991, U.S. foreign policy and use of force decisions developed a new focus. Containment of communism was no longer an issue. The 1991 National Security Strategy Report signaled a military focus on regional conflicts rather than an effort to block Soviet expansionism.¹³³

¹²⁷ *Id.* at 126.

¹²⁸ *Id.* at 128.

¹²⁹ Riggs, *supra* note 117, at 14–15.

¹³⁰ U.N. S.C. Rep. of the Security Council, June 16 1983–June 15 1984, 26–27, U.N. Doc. A/39/2; GAOR, 39th Sess., Supp. No. 2 (1985).

¹³¹ *Id.* at 27.

¹³² *Id.*; U.N. Charter art. 27.

¹³³ THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 25 (1991) (“In a world less driven by an immediate, massive threat to Europe or the danger of global war, the need to support a smaller but still crucial forward presence and to deal with regional contingencies—including possibly a limited, conventional threat to Europe—will shape how we organize, equip, train, deploy and employ our active and reserve forces.”); DON M. SNIDER, THE NATIONAL SECURITY STRATEGY: DOCUMENTING STRATEGIC VISION 9 (2d ed. 1995), available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub332.pdf>.

I. Operation Just Cause

By 1988 the long-running mutually beneficial relationship between Panamanian leader Manuel Noriega and successive U.S. administrations had come to an end.¹³⁴ Noriega had become involved in various criminal activities including drug trafficking. In May of 1989, Panama held elections and Noriega's preferred candidate lost.¹³⁵ Noriega nullified the election and had opposition candidates brutally beaten.¹³⁶ Through 1988 and 1989 Panamanian antagonism and intimidation of U.S. servicemembers and civilians and attacks on U.S. military installations in the Canal Zone had become rampant.¹³⁷ On December 15, 1989, the Panamanian legislature declared that a state of war existed between Panama and the United States.¹³⁸ The next day Panama Defense Forces shot and killed an off-duty U.S. Marine Officer and detained a Navy Officer and his wife, beating him and threatening her with sexual assault.¹³⁹

On December 20, 1989, the United States commenced *Operation Just Cause*, an invasion of Panama by 24,500 U.S. military personnel, which quickly defeated the Panama Defense Forces, secured U.S. citizens, and sent Noriega into hiding at the Vatican Embassy in Panama City.¹⁴⁰ Noriega surrendered two weeks later, and he was sent to the United States where he was convicted of several drug offenses.¹⁴¹

The United States offered three justifications for *Operation Just Cause* in international law. First, the Bush Administration argued that the invasion of Panama was an act of self-defense under Article 51 of the UN Charter.¹⁴² The Panamanian declaration of war, the attacks on U.S. military installations and the abuse of U.S. servicemembers and other citizens led to the conclusion that an armed attack had already occurred

¹³⁴ 2 UNITED STATES ARMY, *supra* note 56, at 401; Jeffrey C. Tuomala, *Just Cause: The Thread That Runs So True*, 13 DICK J. INT'L L. 1, 5-6 (1994).

¹³⁵ Tuomala, *supra* note 134, at 7.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 8.

¹³⁹ *Id.*; 2 UNITED STATES ARMY, *supra* note 56, at 401.

¹⁴⁰ Tuomala, *supra* note 134 at 8; 2 UNITED STATES ARMY, *supra* note 56, at 402-06.

¹⁴¹ Tuomala, *supra* note 134 at 8; 2 UNITED STATES ARMY, *supra* note 56, at 406.

¹⁴² Letter from President George H. W. Bush to House Speaker Thomas Foley, in H.R. DOC. NO. 127 (1989).

or was imminent.¹⁴³ Second, the United States contended that the Panama Canal Treaties obligated the United States to ensure the Canal's continued operation and Noriega's actions threatened the operation of the Canal.¹⁴⁴ Third, the United States justified the invasion on the lawful request of the legitimate government of Panama.¹⁴⁵ Guillermo Endara, the candidate whose election Noriega nullified, welcomed and approved of the U.S. intervention.¹⁴⁶

President Bush informed congressional leaders of the operation shortly before it began and, on December 21, 1989, he notified the whole Congress of the invasion "consistent with the War Powers Resolution."¹⁴⁷ On February 7, 1990, the Senate and the House of Representatives adopted a concurrent resolution retroactively approving of *Operation Just Cause*.¹⁴⁸

The United States never sought a UN Security Council resolution authorizing *Operation Just Cause*. In fact, on December 23, 1989, the Security Council voted on a draft resolution "[s]trongly deplor[ing] the intervention in Panama by the armed forces of the United States of America, which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of States."¹⁴⁹ The draft resolution received ten votes in its favor, four votes in opposition, and one abstention.¹⁵⁰ Despite receiving a majority of votes of the members of the Security Council, the draft resolution was defeated because three of the four votes against were by permanent members of the Security Council.¹⁵¹

¹⁴³ Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT'L L. 281, 284–86 (1991).

¹⁴⁴ *Id.* at 287–88.

¹⁴⁵ *Id.* at 288–90.

¹⁴⁶ *Id.*

¹⁴⁷ Tuomala, *supra* note 134, at 8.

¹⁴⁸ H.R. Con. Res. 262, 101st Cong. (1990).

¹⁴⁹ U.N. S.C. Rep. of the Security Council, June 16, 1989–June 15, 1990, U.N. Doc. A/45/2; GAOR, 45th Sess., Supp. No. 2 (1993).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* The four votes against were cast by Canada, France, the United Kingdom, and the United States. *Id.*

2. Operation Desert Storm

On August 2, 1990, three divisions of Iraq's elite Republican Guard invaded the neighboring nation of Kuwait and quickly defeated the Kuwaiti armed forces.¹⁵² Iraq declared that oil-rich Kuwait was annexed to Iraq as its nineteenth province.¹⁵³ The United States, as well as Saudi Arabia and other nations, became concerned that Saudi Arabia could be next.¹⁵⁴ Recognizing the threat to world oil supplies, the United States sought, and was granted, Saudi permission to deploy U.S. troops in Saudi Arabia.¹⁵⁵ On August 8, the first units of the 82nd Airborne Division arrived in the Saudi desert, the first step in a massive military buildup to challenge Iraq's aggression. The force assembled in the Saudi desert eventually comprised nearly 700,000 troops from twenty-eight nations.¹⁵⁶

The UN Security Council adopted a series of resolutions condemning Iraq's invasion of Kuwait and demanding an immediate withdrawal of Iraqi troops.¹⁵⁷ The first, Resolution 660, declared that Iraq's invasion of Kuwait constituted a "breach of international peace and security," condemned the invasion, and demanded that Iraq withdraw all its forces from Kuwait.¹⁵⁸ On November 29, 1990, the Security Council adopted Resolution 678, which gave Iraq a deadline of January 15, 1991, to comply with the earlier resolutions and authorized member states to use force to enforce compliance if Iraq refused.¹⁵⁹

Iraq refused to comply with the Security Council's resolutions, and *Operation Desert Storm* began on January 16, 1991, with a multiphase

¹⁵² 2 UNITED STATES ARMY, *supra* note 56, at 416.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 416–18.

¹⁵⁵ *Id.* at 416–17.

¹⁵⁶ UNITED STATES ARMY, THE WHIRLWIND WAR 130 (Frank N. Schubert & Theresa L. Kraus, eds. 1995).

¹⁵⁷ S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990); S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990); S.C. Res. 662, U.N. Doc. S/RES/662 (Aug. 9, 1990); S.C. Res. 664, U.N. Doc. S/RES/664 (Aug. 18, 1990); S.C. Res. 665, U.N. Doc. S/RES/665 (Aug. 25, 1990); S.C. Res. 666, U.N. Doc. S/RES/666 (Sept. 13, 1990); S.C. Res. 667, U.N. Doc. S/RES/667 (Sept. 16, 1990); S.C. Res. 670, U.N. Doc. S/RES/670 (Sept. 25, 1990); S.C. Res. 674, U.N. Doc. S/RES/674 (Oct. 29, 1990); S.C. Res. 677, U.N. Doc. S/RES/677 (Nov. 28, 1990); S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

¹⁵⁸ S.C. Res. 660, *supra* note 157.

¹⁵⁹ S.C. Res. 678, *supra* note 157.

air campaign to prepare the battlefield for a ground assault.¹⁶⁰ On February 23, 1991, the ground attack began and, four days later, Iraqi forces were expelled from Kuwait.¹⁶¹

The U.S. decision to use force in *Operation Desert Storm* was supported in international law by a series of UN Security Council Resolutions, particularly Resolution 678, which specifically authorized the use of force by member states to expel Iraq from Kuwait.¹⁶² The large coalition assembled by the Bush Administration also added significant international legitimacy to the effort, especially as many of Iraq's Arab neighbors were members of the coalition.¹⁶³

As a matter of domestic law, President Bush maintained that he had constitutional authority unilaterally to order the deployment of U.S. armed forces to participate in *Operation Desert Storm* without congressional authorization.¹⁶⁴ Nevertheless, he asked Congress for a resolution supporting his decision.¹⁶⁵ On January 14, 1991, two days before the start of the air campaign, Congress passed the Authorization for Use of Military Force Against Iraq Resolution, which authorized the President "to use United States Armed Forces pursuant to UN Security Council Resolution 678."¹⁶⁶

3. Somalia

In 1992, Somalia was experiencing a grave humanitarian crisis. In 1991, rebels overthrew President Mohammed Siad Barre, the dictator who had ruled Somalia for more than two decades.¹⁶⁷ The rebels soon

¹⁶⁰ 2 UNITED STATES ARMY, *supra* note 56, at 419–20; John Quigley, *The United States and the United Nations in the Persian Gulf War: New Order or Disorder?*, 25 CORNELL INT'L L.J. 1, 9 (1992).

¹⁶¹ 2 UNITED STATES ARMY, *supra* note 56, at 424–27.

¹⁶² S.C. Res. 678, *supra* note 157.

¹⁶³ U.S. DEP'T OF DEF., CONDUCT OF THE PERSIAN GULF WAR 487–89, 521 (1992).

¹⁶⁴ JENNIFER K. ELSEA & RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 12–13 (2011).

¹⁶⁵ *Id.*

¹⁶⁶ Authorization of the Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991).

¹⁶⁷ WALTER S. POOLE, OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, THE EFFORT TO SAVE SOMALIA, AUGUST 1992–MARCH 1994, at 5–6 (2005), <http://www.dtic.mil/doctrine/doctrine/history/somalia.pdf>.

turned on each other, and the ensuing violence and drought resulted in widespread famine.¹⁶⁸

The UN began working to distribute food and other humanitarian relief to Somalia,¹⁶⁹ and the U.S. Government and U.S. citizens working for relief organizations were heavily involved in this effort.¹⁷⁰ Unfortunately, the warring Somali clans looted and hoarded the supplies meant for the Somali population.¹⁷¹ In response, the UN Security Council adopted Resolution 794, authorizing member states to “use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.”¹⁷² The United States responded by deploying 13,000 troops to Somalia to secure the distribution of relief supplies in *Operation Restore Hope*.¹⁷³

As a matter of international law, the U.S. justified its operations in Somalia on Security Council Resolution 794.¹⁷⁴ An Office of Legal Counsel (OLC) Opinion set forth the domestic legal justification for *Operation Restore Hope*, listing four bases for the introduction of U.S. combat forces into Somalia.¹⁷⁵

First, the OLC opined that the President’s constitutional authority as Chief Executive and Commander in Chief permitted him to order U.S. armed forces to conduct operations to further national interests such as protecting the lives of Americans in other nations.¹⁷⁶ In Somalia, U.S. troops would be protecting U.S. citizens and servicemembers assisting in the delivery and distribution of food aid.¹⁷⁷

Second, the opinion noted that UN Security Council Resolution 794 authorized member states to “use all available means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia,” and “[called] on Member States which are in a position to do so to provide military forces.”¹⁷⁸ Resolution 794 provided clear authority

¹⁶⁸ *Id.* at 6.

¹⁶⁹ *Id.* at 6–7.

¹⁷⁰ Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6, 6 (1992).

¹⁷¹ 2 UNITED STATES ARMY, *supra* note 56, at 433.

¹⁷² S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992).

¹⁷³ 2 UNITED STATES ARMY, *supra* note 56, at 433–34.

¹⁷⁴ S.C. Res. 794, *supra* note 172.

¹⁷⁵ Memorandum Opinion for the Attorney General, 16 Op. O.L.C. 8 (1992).

¹⁷⁶ *Id.* at 9–10.

¹⁷⁷ *Id.* at 10.

¹⁷⁸ *Id.* at 11–12; S.C. Res. 794, *supra* note 172.

in international law for the United States to use armed force in Somalia, but Resolution 794 also justified the Bush Administration's actions as a matter of domestic policy as well.¹⁷⁹

Third, the OLC opined that "maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest," justifying the use of armed force in Somalia.¹⁸⁰ Consequently, while Somalia itself may not have been a vital U.S. interest,¹⁸¹ the reputation of the UN and the Security Council was.¹⁸²

Finally, the OLC determined that recent legislation had evinced congressional approval of the President's decision.¹⁸³ In April 1992, Congress passed the Horn of Africa Recovery and Food Security Act, which set forth U.S. policy toward distribution of relief and rehabilitation assistance and international relief efforts in the Horn of Africa.¹⁸⁴ Section 3(b)(3) of the Act declared that "[i]t is the sense of Congress that the President should . . . ensure, to the maximum extent possible and in conjunction with other donors, that emergency humanitarian assistance is being made available to those in need."¹⁸⁵ Section 4 of the Act declared that "it should be the policy of the United States . . . to assure noncombatants (particularly refugees and displaced persons) equal and ready access to all food, emergency, and relief assistance"¹⁸⁶ and that "[i]t should be the policy of the United States in seeking to maximize relief efforts for the Horn of Africa to redouble its commendable efforts to secure safe corridors of passage for emergency food and relief supplies in affected areas."¹⁸⁷ From these sections of the Act, the OLC opined that "Congress appears to have contemplated that the President

¹⁷⁹ Memorandum Opinion for the Attorney General, *supra* note 175, at 11–12.

¹⁸⁰ *Id.* at 11.

¹⁸¹ POOLE, *supra* note 167, at 8 (quoting a message from the United States Ambassador to Kenya, "Tragic as the situation is in Somalia . . . the dissolution of the Somali nation-state does not affect vital [United States Government] security interests").

¹⁸² Memorandum Opinion for the Attorney General, *supra* note 175, at 11–12.

¹⁸³ *Id.* at 13.

¹⁸⁴ Horn of Africa Recovery and Food Security Act, Pub. L. No. 102-274, 106 Stat. 115 (1992).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

might find it necessary to make use of military forces to ensure the safe delivery of humanitarian relief in Somalia.”¹⁸⁸

Operation Restore Hope took a sudden turn for the worse on June 5, 1993, when Somali warlord Mohammed Farrah Aidid’s forces killed twenty-three Pakistani soldiers participating in the UN relief efforts.¹⁸⁹ The UN Security Council adopted Resolution 837 in response to Aidid’s actions and “[urged] Member States to contribute, on an emergency basis, military support and transportation, including armoured personnel carriers, tanks and attack helicopters, to provide [UN forces] the capability appropriately to confront and deter armed attacks directed against it in the accomplishment of its mandate.”¹⁹⁰

The United States dispatched a Joint Special Operations Task Force to Somalia with the mission to find and arrest Mohammed Farrah Aidid.¹⁹¹ This expanded mission relied on the same legal justifications as *Restore Hope*: the Security Council resolution and the Horn of Africa Recovery and Food Security Act.

4. Haiti

In 1991, a military coup led by Lieutenant General Raul Cedras ousted Haitian President Jean-Bertrand Aristide, the first democratically elected President in Haiti’s history.¹⁹² The UN and the Organization of American States responded with trade and economic sanctions against the illegitimate regime.¹⁹³ In 1993, Cedras appeared to concede to the sanctions regime and agreed to retire, to permit Aristide to return, and to

¹⁸⁸ Memorandum Opinion for the Attorney General, *supra* note 175, at 13.

¹⁸⁹ 2 UNITED STATES ARMY, *supra* note 56, at 434–35.

¹⁹⁰ S.C. Res. 837, U.N. Doc. S/RES/837 (June 6, 1993).

¹⁹¹ 2 UNITED STATES ARMY, *supra* note 56, at 435. United States forces never captured Mohammed Farrah Aidid. On October 3, 1992, during a raid to capture Aidid lieutenants, Somali militants shot down two U.S. Army Blackhawk helicopters. A fierce firefight ensued as U.S. forces tried to secure the two crash sites and evacuate dead and wounded crewmembers. *Id.* Eighteen U.S. servicemembers died and 84 were wounded. UNITED STATES ARMY, UNITED STATES FORCES, SOMALIA AFTER ACTION REPORT 139 (2003), <http://www.history.army.mil/html/documents/somalia/SomaliaAAR.pdf>. After televised reports aired of Somalis dragging the bodies of U.S. Soldiers through the streets of Mogadishu, public and political support for military operations dissipated. All U.S. forces left Somalia by March, 1994. 2 UNITED STATES ARMY, *supra* note 56, at 435–37.

¹⁹² *Id.* at 437.

¹⁹³ *Id.*

ensure the retraining of Haitian security forces.¹⁹⁴ Cedras' cooperation was short-lived; his forces fired on a U.S. ship attempting to deliver UN troops, attacked the U.S. Chargé d'Affaires, and assassinated Aristide supporters.¹⁹⁵

In 1994, the UN Security Council adopted Resolution 940, authorizing the establishment of a multinational force to facilitate "the departure from Haiti of the military leadership . . . , the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti."¹⁹⁶ President Clinton ordered the U.S. armed forces, as part of a multi-national coalition, to implement Resolution 940.¹⁹⁷

President Clinton relied on Resolution 940 and implicit congressional authorization as legal bases for his order. The Department of Defense Appropriations Act of 1994 contained language limiting the use of funds "for United States military operations in Haiti" unless Congress specifically authorized such action or the President makes certain findings and reports on them to the Congress prior to any military operation.¹⁹⁸ President Clinton made the appropriate findings and reported them to Congress on September 18, 1994, the day before the operation was scheduled to begin.¹⁹⁹ President Clinton further determined that stopping Cedras' repression of the Haitian people and ensuring that Cedras kept his promises to the United States and United Nations was an important national security interest, further justifying the use of force.²⁰⁰

¹⁹⁴ *Id.* at 438.

¹⁹⁵ *Id.*

¹⁹⁶ S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994).

¹⁹⁷ 2 UNITED STATES ARMY, *supra* note 56, at 438; President William J. Clinton, Television Address to the Nation on Haiti Agreement (Sept. 18, 1994) ("Under the terms of United Nations Security Resolution 940, an international coalition from twenty-five nations will soon go into Haiti to begin the task of restoring democratic government.").

¹⁹⁸ U.S. Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8147, 107 Stat. 1418, 1474 (1993); Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 173-75 (1994).

¹⁹⁹ Deployment of United States Armed Forces into Haiti, *supra* note 198, at 173-75.

²⁰⁰ President William J. Clinton, Address to the Nation on Haiti (Sept. 15, 1994) ("Beyond the human rights violations, the immigration problems, the importance of democracy, the United States also has strong interests in not letting dictators, especially in our own region, break their word to the United States and the United Nations.").

As U.S. forces were en route to Haiti to remove Cedras from power, a last minute diplomatic effort succeeded in convincing Cedras to step down. U.S. envoys told Cedras that a military operation was imminent, and this information helped to persuade him that his position was untenable.²⁰¹

5. Bosnia

The nation of Yugoslavia began to break apart in 1991. In 1992, when Bosnia and Herzegovina attempted to secure its independence, its ethnically Serbian population revolted, beginning a “gruesome campaign of murder, rape, and intimidation labeled ‘ethnic cleansing’ [that] forced dispossessed refugees from areas the Serbs wanted to control.”²⁰² UN member states dispatched peacekeeping troops to monitor agreed-upon cease-fires. Serbian troops regularly defied the peacekeepers, including an attack on a so-called UN safe area in Srebrenica which resulted in a massacre of Bosnian Muslims,²⁰³ the seizure of UN peacekeepers to use as shields against United States and NATO airstrikes,²⁰⁴ and the shelling of a Sarajevo marketplace.²⁰⁵ Finally, in 1995, the various factions met and negotiated a peace agreement that would be overseen by an Implementation Force, or IFOR, consisting of troops from the United States, other NATO nations, and Russia.²⁰⁶

The justification in international law for the U.S. action in Bosnia was straightforward. The UN Security Council adopted several resolutions authorizing member states to use force in support of UN operations in Bosnia²⁰⁷ and one specifically to participate in IFOR.²⁰⁸

²⁰¹ 2 UNITED STATES ARMY, *supra* note 56, at 438–39.

²⁰² *Id.* at 444.

²⁰³ *Id.*

²⁰⁴ *Id.* at 445.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 445–46.

²⁰⁷ S.C. Res. 816, U.N. Doc. S/RES/816 (Mar. 31, 1993) (authorizing the use of force to enforce a no-fly zone); S.C. Res. 836, U.N. Doc. S/RES/836 (June 4, 1993) (authorizing the use of force to protect U.N.-designated safe areas); S.C. Res. 844, U.N. Doc. S/RES/844 (June 18, 1993) (authorizing the use of force to protect U.N.-designated safe areas).

²⁰⁸ S.C. Res. 1031, U.N. Doc. S/RES/1031 (Dec. 15, 1995).

NATO also endorsed the operation, giving it additional international legitimacy.²⁰⁹

The U.S. Department of Justice's Office of Legal Counsel opined that the President had authority unilaterally to order U.S. military forces to participate as part of IFOR.²¹⁰ The OLC opinion begins by noting that, although Congress has authority to declare war, Presidents have inherent authority to order U.S. military forces into action in circumstances short of war when vital national interests are at stake.²¹¹ The opinion notes that, due largely to the fact that U.S. forces had been invited to participate by the former warring parties, there was a reduced likelihood of combat and casualties, leading the administration to conclude that the proposed operation would not constitute a war in the constitutional sense.²¹²

Next, the opinion describes three "significant national security interests" served by U.S. participation in IFOR. First, the United States has a fundamental interest in the security and stability of Europe. If the war in the former Yugoslavia were to continue, it could spread to other European nations, particularly new democracies in Eastern Europe.²¹³ Second, the United States has a vital national interest in maintaining the credibility of the UN Security Council and ensuring the effectiveness of UN peacekeeping operations.²¹⁴ Third, the United States has a similar interest in the stability of the NATO alliance, which is "the anchor of America's and Europe's common security."²¹⁵

Finally, the opinion addresses the War Powers Resolution and determines that it does not prohibit the President from initially ordering the unilateral deployment of troops.²¹⁶ The opinion argues that Congress recognized the President's authority unilaterally to order the use of armed force without prior congressional authorization because the Resolution requires the President to report to Congress within forty-eight hours of introducing U.S. armed forces into hostilities or situations where

²⁰⁹ Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 327 (1995).

²¹⁰ *Id.*

²¹¹ *Id.* at 329–30.

²¹² *Id.* at 330.

²¹³ *Id.* at 331.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 332–33.

hostilities are imminent.²¹⁷ The opinion notes the Resolution's sixty and ninety day timelines, but does not address them, presumably because the OLC was concerned only with the President's authority to begin the operation.²¹⁸

6. Kosovo

The next region of the former Yugoslavia to boil over was Kosovo, a region of Serbia that was populated mostly by ethnic Albanians.²¹⁹ When Kosovo tried to exert its independence and gain a measure of autonomy from Serbian rule, the result was ruthless suppression aimed at cleansing the region of ethnic Albanians.²²⁰

The United States joined a NATO air campaign to punish Serbian aggression against the Kosovar Albanians.²²¹ Neither the United States nor its NATO allies sought a Security Council resolution authorizing the air campaign, expecting that Russia, and possibly China, would veto such a resolution.²²² After seventy-eight days of bombings, Serbia relented and agreed to remove its forces from Kosovo and permit peacekeepers into the region to oversee the cease fire.²²³ The UN Security Council adopted Resolution 1244, "[authorizing] Member States and relevant international organizations to establish the international security presence in Kosovo . . . with all necessary means to fulfill its responsibilities."²²⁴

Congress never specifically authorized the U.S. involvement in the NATO air campaign.²²⁵ Although U.S. Presidents had, many times

²¹⁷ *Id.* at 333.

²¹⁸ *Id.*

²¹⁹ 2 UNITED STATES ARMY, *supra* note 56, at 450.

²²⁰ *Id.*

²²¹ *Id.* (noting that NATO had decided to avoid ground operations and that this decision was based more on political concerns than military realities).

²²² Hakimi, *supra* note 9, at 672–73; Anthea Roberts, *Legality vs. Legitimacy: Can Uses of Force be Illegal but Justified?*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 179, 181–82 (P. Alston & E. Macdonald, eds., 2008), available at <http://ssrn.com/abstract=1518290>.

²²³ 2 UNITED STATES ARMY, *supra* note 56, at 452.

²²⁴ S.C. Res. 1244, ¶ 7, U.N. Doc. S/RES/1244 (June 10, 1999).

²²⁵ Gerald G. Howard, *Combat in Kosovo: Ignoring the War Powers Resolution*, 38 HOUS. L. REV. 261, 285–88 (2001). The U.S. Senate did adopt a nonbinding resolution suggesting that the President was authorized to conduct "military operations and missile

previously, ordered U.S. armed forces into hostilities without congressional approval, Kosovo was the first instance since the passage of the War Powers Resolution in which hostilities exceeded the Resolution's sixty-day limit without congressional authorization.²²⁶ Under the War Powers Resolution, the President was required to withdraw U.S. forces unless Congress authorized the action.²²⁷ Twenty-six members of Congress filed a lawsuit alleging that President Clinton had violated the War Powers Resolution and seeking a declaratory judgment to that effect.²²⁸ The court ruled that the plaintiffs lacked standing, as individual members of Congress, to bring the lawsuit and, therefore, dismissed the complaint.²²⁹

C. Post-9/11

The terrorist attacks of September 11th, 2001, resulted in a fundamental change in the nature of the threat facing the United States and, at least temporarily, in the United States' view of *jus ad bellum*. The 2002 National Security Strategy Report stated that "[t]he gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing so with determination."²³⁰

In addition to identifying the principal threat facing the United States, the 2002 Report announced the "Bush Doctrine" of preemptive self-defense:

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. . . . The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the

strikes in cooperation with our NATO allies against the Federal Republic of Yugoslavia (Serbia and Montenegro)," but, without House concurrence, this carried no congressional authority. S. Con. Res. 21, 106th Cong., 145 CONG. REC. S3110, S3118 (1999).

²²⁶ GRIMMETT, *supra* note 114, at 35.

²²⁷ 50 U.S.C. § 1544 (2012).

²²⁸ Campbell v. Clinton, 52 F. Supp. 2d 34, 35 (D.D.C. 1999).

²²⁹ *Id.* at 45.

²³⁰ THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES, at iv (2002).

risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.²³¹

This extension of the traditional concept of imminence was controversial, but President Bush determined that, if the United States had to wait until a terrorist attack using weapons of mass destruction was imminent in the traditional sense, it would be too late to act.²³²

1. Operation Enduring Freedom

The United States quickly identified the al-Qaeda terrorist organization as the perpetrator of the September 11, 2001 attacks and set out to respond.²³³ Al Qaeda operated from Afghanistan under the protection of the Taliban and, on October 7, 2001, *Operation Enduring Freedom* began with air and missile strikes.²³⁴ Twelve days later U.S. Special Operations Forces began operating on the ground, providing support to Afghans who had been fighting the Taliban.²³⁵ U.S. and Afghan forces quickly removed the Taliban from power but the Taliban and al Qaeda began an insurgent campaign against the new Afghan government.²³⁶

The international law justification for *Operation Enduring Freedom* was self-defense under Article 51 of the UN Charter.²³⁷ The United States claimed that the September 11, 2001, attacks constituted an armed

²³¹ *Id.* at 15.

²³² *Id.*

²³³ 2 UNITED STATES ARMY, *supra* note 56, at 468.

²³⁴ *Id.* at 469.

²³⁵ *Id.*

²³⁶ *Id.* at 473.

²³⁷ Permanent Rep. of the United States of America to the U.N., Letter dated Oct. 7, 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001) (“In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following armed attacks that were carried out against the United States on 11 September, 2001.”).

attack justifying the use of force in self-defense.²³⁸ The United States' actions also enjoyed broad international support, and, although the initial phases of military operations in Afghanistan were conducted solely by U.S. forces, they were soon joined by a coalition of forces from eighteen nations to support the new Afghan government in its fight against the Taliban and al Qaeda.²³⁹

As a matter of domestic law, the U.S. Department of Justice's Office of Legal Counsel opined that the President had authority to act without congressional approval in response to the September 11, 2001, attacks and against "foreign States suspected of harboring or supporting" the terrorists who carried out the attacks.²⁴⁰ Ultimately, the question of unilateral action was moot as Congress quickly passed a joint resolution authorizing the President

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.²⁴¹

The resolution also stated that it constituted specific statutory authority to introduce U.S. armed forces into hostilities pursuant to the War Powers Resolution.²⁴²

The international and domestic legal justification for the U.S. response to the September 11, 2001, terrorist attacks was fairly straightforward. When the United States sought to expand its response beyond the Taliban and al Qaeda in Afghanistan, however, the legal issues became more complicated and controversial.

²³⁸ *Id.*

²³⁹ 2 UNITED STATES ARMY, *supra* note 56, at 474.

²⁴⁰ Memorandum Op. for the Deputy Counsel to the President, The President's Constitutional Auth. to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sep. 25, 2001), <http://www.justice.gov/olc/warpowers925.htm>.

²⁴¹ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

²⁴² *Id.*

2. Operation Iraqi Freedom

Iraq had been a thorn in the side of the international community since soon after the end of the 1991 Persian Gulf conflict.²⁴³ Iraq accepted certain conditions in exchange for a coalition cease-fire, including “destruction, removal, or rendering harmless” of all chemical and biological weapons.²⁴⁴ In the decade after the cease-fire, Iraq consistently evaded and ignored its agreed-upon responsibilities,²⁴⁵ and, by 2002, the U.S. intelligence community believed that Iraq was reconstituting its weapons of mass destruction program.²⁴⁶

The initial U.S. response was diplomatic, working through the UN and the International Atomic Energy Agency to convince Iraq to abandon its weapons of mass destruction development programs.²⁴⁷ Iraq refused to comply with inspection requirements, leading the United States to consider military options.²⁴⁸ The United States expended considerable effort to secure a new Security Council resolution specifically authorizing the use of force, but, when it became clear that the proposed resolution would fail, the United States abandoned the effort.²⁴⁹

Operation Iraqi Freedom began on March 20, 2003, with a missile strike on a bunker believed to contain Iraqi leader Saddam Hussein, his two sons, and other regime leaders.²⁵⁰ The initial strike was immediately followed by an air and ground assault by U.S. and coalition forces.²⁵¹ By April 9, 2003, U.S. troops were in Baghdad and organized resistance was crumbling.²⁵² Fighting would continue for nearly seven years as

²⁴³ Memorandum Op. for the Counsel to the President, Auth. of the President Under Domestic and Int’l Law to Use Military Force Against Iraq, 26 Op. O.L.C. 143, 145–50 (2002), <http://www.justice.gov/olc/opiniondocs/milit-force-iraq.pdf>; 2 UNITED STATES ARMY, *supra* note 56, at 480.

²⁴⁴ U.N. S.C. Res. 687 ¶ 8, U.N. Doc. S/RES/687 (Apr. 3, 1991).

²⁴⁵ Memorandum Opinion, *supra* note 243, at 147–50; 2 UNITED STATES ARMY, *supra* note 56, at 480.

²⁴⁶ Memorandum Opinion, *supra* note 243, at 195–96.

²⁴⁷ John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT’L L. 563, 566 (2003).

²⁴⁸ *Id.*; 2 UNITED STATES ARMY, *supra* note 56, at 481.

²⁴⁹ Geoffrey Corn & Dennis Gyllensporre, *International Legality, the Use of Military Force, and Burdens of Persuasion: Self-Defense, the Initiation of Hostilities, and the Impact of the Choice Between Two Evils on the Perception of International Legitimacy*, 30 PACE L. REV. 484, 508–14 (2010).

²⁵⁰ 2 UNITED STATES ARMY, *supra* note 56, at 483.

²⁵¹ *Id.*

²⁵² *Id.* at 490.

Operation Iraqi Freedom transformed from a conventional war to a counterinsurgency.²⁵³

The international law justification for *Operation Iraqi Freedom* was based, in part, on UN Security Council Resolution 678, which was adopted in 1990 to authorize the 1991 Persian Gulf War.²⁵⁴ Resolution 678 authorized member states “to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.”²⁵⁵ Two such “subsequent relevant resolutions” required Iraq to comply with the 1991 cease-fire terms, which included permanently dismantling its weapons of mass destruction program²⁵⁶ and to cease repression of Iraq’s civilian population.²⁵⁷ The United States determined that Iraq was in material breach of both resolutions and concluded that Resolution 678’s authorization to “use all necessary means” was still in effect even though the UN Security Council did not specifically authorize any new military intervention to enforce its previous resolutions.²⁵⁸

The United States also enjoyed broad international support for *Operation Iraqi Freedom* although there was significant international disagreement about the legality and probity of the operation.²⁵⁹ Three other nations contributed troops to the initial invasion²⁶⁰ and another thirty-four nations participated in later operations in Iraq.²⁶¹

Even in the absence of specific UN authority or international approval, the United States considered *Operation Iraqi Freedom* to be legal as an act of anticipatory self-defense, permitted under Article 51 of the UN Charter.²⁶² The United States determined that Iraq’s history of developing and using weapons of mass destruction along with its relationship with terrorist organizations made the threat imminent.²⁶³ The Office of Legal Counsel observed

²⁵³ *Id.* at 490–508.

²⁵⁴ Memorandum Opinion, *supra* note 243, at 163–66, 177.

²⁵⁵ S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

²⁵⁶ S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991).

²⁵⁷ S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991).

²⁵⁸ Memorandum Opinion, *supra* note 243, at 177.

²⁵⁹ Yoo, *supra* note 247, at 563.

²⁶⁰ UNITED STATES ARMY, ALLIED PARTICIPATION IN OPERATION IRAQI FREEDOM 6 (Steven A. Carney 2011).

²⁶¹ *Id.* at 1.

²⁶² Memorandum Opinion, *supra* note 243, at 194–98.

²⁶³ *Id.* at 195–97.

that even if the probability that Iraq itself would attack the United States with [Weapons of Mass Destruction], or would transfer such weapons to terrorists for their use against the United States, were relatively low, the exceptionally high degree of harm that would result, combined with a limited window of opportunity and the likelihood that if we do not use force, the threat will increase, could lead the President to conclude that military action is necessary to defend the United States.²⁶⁴

As a matter of domestic law, on October 11, 2002, Congress adopted the Authorization for Use of Military Force Against Iraq Resolution of 2002, which authorized the President “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.”²⁶⁵ The resolution also stated that it constituted specific statutory authority to introduce U.S. armed forces into hostilities pursuant to the War Powers Resolution.²⁶⁶

3. Operation Odyssey Dawn

In early 2011, the Libyan regime of Colonel Muammar Qadhafi faced an increasingly active opposition.²⁶⁷ The regime responded with brutal suppression, including deliberate targeting of civilian protesters.²⁶⁸ In March 2011, Qadhafi’s forces were preparing to assault the city of Benghazi, an opposition stronghold, and Qadhafi pledged that they would show “no mercy and no pity.”²⁶⁹

The UN Security Council authorized the use of force “to protect civilians and civilian populated areas under threat of attack in the Libyan

²⁶⁴ *Id.* at 197.

²⁶⁵ Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

²⁶⁶ *Id.*

²⁶⁷ Memorandum Opinion for the Attorney General, Authority to Use Military Force in Libya 1 (Apr. 1, 2011), <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.²⁷⁰ In other words, NATO forces, including U.S. armed forces, were authorized only to protect civilians using air and naval forces but could not introduce ground forces into Libya.

Operation Odyssey Dawn was the U.S. contribution to a NATO-led mission with forces from seventeen nations.²⁷¹ Although the U.S. armed forces were in the lead for the first phase of the operation, they quickly turned command and control over to NATO, increasing the international legitimacy of the operation.²⁷²

As a matter of international law, the United States justified its military operations in Libya on Security Council Resolution 1973.²⁷³ The participation of coalition forces added additional legitimacy to the United States' involvement in the operation.²⁷⁴

Domestically, the Department of Justice's Office of Legal Counsel determined that the President had unilateral authority to order U.S. armed forces to participate in *Operation Odyssey Dawn* without prior congressional authorization.²⁷⁵ They also opined that U.S. participation did not rise to the level of hostilities that would invoke the War Powers Resolution.²⁷⁶ President Obama declared that preventing Qadhafi's forces from massacring civilians in Benghazi was in the United States' national interest, because such a massacre would create a refugee crisis in Egypt and Tunisia, countries that were in the midst of a "fragile" transition to democratic governance.²⁷⁷

²⁷⁰ U.N. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Feb. 26, 2011).

²⁷¹ JEREMIAH GERTLER, CONG. RESEARCH SERV., R41725, OPERATION ODYSSEY DAWN (LIBYA): BACKGROUND AND ISSUES FOR CONGRESS 7, 13–14 (2011).

²⁷² *Id.* at 14–16.

²⁷³ Memorandum Opinion, *supra* note 267, at 6.

²⁷⁴ GERTLER, *supra* note 271, at 16–20.

²⁷⁵ Memorandum Opinion, *supra* note 267, at 14.

²⁷⁶ *Id.* at 8.

²⁷⁷ President Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>.

4. Syria

Small demonstrations against the Bashar al Assad regime in Syria began in early 2011.²⁷⁸ By March of that year, these demonstrations developed into a popular uprising and the violence continued to escalate into 2012.²⁷⁹ By August 2012, more than 20,000 Syrians had been killed, more than 155,000 sought refuge in neighboring countries, and up to one million were internally displaced.²⁸⁰

On August 20, 2012, President Obama declared that Assad's use of chemical weapons might prompt the United States to use military force in Syria.²⁸¹ Just over one year later, on August 21, 2013, the Assad regime reportedly used chemical weapons in an attack on a Damascus suburb. Faced with evidence that Syria had crossed its "red line," the U.S. government considered whether the use of force was warranted or justifiable.

Press reports indicated that the Obama administration would prefer to have the support of the UN Security Council,²⁸² but expected Russia to veto any resolution authorizing the use of force.²⁸³ In a televised address on August 31, 2013, President Obama said that he was "comfortable going forward without the approval of a United Nations Security Council

²⁷⁸ JEREMY M. SHARP & CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV. R33487, ARMED CONFLICT IN SYRIA: U.S. AND INTERNATIONAL RESPONSE 1–2 (2012).

²⁷⁹ *Id.* at 2–3.

²⁸⁰ *Id.* at 3.

²⁸¹ President Barack Obama, Remarks by the President to the White House Press Corps (Aug. 20, 2012), <http://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps> ("We have been very clear to the Assad regime, . . . that a red line for us is we start seeing a whole bunch of chemical weapons moving around or being utilized. That would change my calculus. That would change my equation.").

²⁸² Adam Entous & Sam Dagher, *U.S. Talks Tough on Syria, Ramps Up Attack Planning*, WALL ST. J., Aug. 26, 2013, <http://online.wsj.com/news/articles/SB10001424127887323407104579034633663263254> ("If he decides to act militarily, Mr. Obama would prefer to do so with U.N. Security Council backing, but officials said he could decide to work instead with international partners such as the North Atlantic Treaty Organization or the Arab League. 'We'll consult with the U.N. They're an important avenue. But they're not the only avenue,' a senior administration official said.").

²⁸³ *Id.* ("In the past, U.N. Security Council resolutions seeking to punish Mr. Assad have been blocked by Russia, which was critical of the NATO-led mission in Libya in 2011. Administration lawyers have, however, developed legal approaches that Mr. Obama could opt to use to justify a military intervention without U.N. backing.").

that, so far, has been completely paralyzed and unwilling to hold Assad accountable.”²⁸⁴

In his August 31, 2013, speech, President Obama justified military action against Syria based on U.S. national security interests, including support for “the global prohibition on the use of chemical weapons,” protection of U.S. “friends and . . . partners along Syria’s borders,” and prevention of “escalating use of chemical weapons, or their proliferation to terrorist groups.”²⁸⁵ Based on the threat posed to U.S. national security interests, President Obama “decided that the United States should take military action against Syrian regime targets.”²⁸⁶ Having determined that the use of force was warranted, President Obama sought to legitimize U.S. military action by seeking congressional approval.²⁸⁷

President Obama asserted that he had the authority to order a military strike against Syria without congressional approval, but that congressional approval would make the nation stronger and make its actions more effective.²⁸⁸ According to White House Counsel Kathryn Ruemmler, the purpose behind seeking congressional approval was to enhance the legitimacy of a potential strike.²⁸⁹

While Congress debated the issue, diplomatic efforts to resolve the crisis continued. In early September 2013, Russia agreed to pressure Syria to give up its chemical weapons and Syria agreed to give up its

²⁸⁴ President Barack Obama, Statement by the President on Syria (Aug. 31, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* (“But having made my decision as Commander-in-Chief based on what I am convinced is our national security interests, I’m also mindful that I’m the President of the world’s oldest constitutional democracy. . . . And that’s why I’ve made a second decision: I will seek authorization for the use of force from the American people’s representatives in Congress.”).

²⁸⁸ *Id.* (“[W]hile I believe I have the authority to carry out this military action without specific congressional authorization, I know that the country will be stronger if we take this course, and our actions will be even more effective.”).

²⁸⁹ Charlie Savage, *Obama Tests the Limits of Power in Syrian Conflict*, N.Y. TIMES, Sept. 8, 2013, <http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria> (“The president believed that it was important to enhance the legitimacy of any action that would be taken by the executive, to seek Congressional approval of that action and have it be seen, again as a matter of legitimacy both domestically and internationally, that there was a unified American response to the horrendous violation of the international norm against chemical weapons use.”).

stockpile of chemical weapons.²⁹⁰ President Obama credited the threat of using force for pushing the Syrian regime's concessions, and he asked Congress to postpone a vote to authorize the use of force while the parties pursued a diplomatic resolution.²⁹¹

Even though the United States ultimately decided not to use force in the Syrian conflict, the public debate over the justification for the use of force, leading to President Obama's determination that the use of force was justified, demonstrated the importance of legitimacy in U.S. use of force decisions. The United States would have welcomed a UN Security Council resolution, but recognizing that obtaining one was unlikely, it declared that a resolution was unnecessary.²⁹² The President determined that Syria's use of chemical weapons jeopardized important U.S. national security interests, and that was sufficient for him to determine that the use of force was justified.²⁹³ However, to increase the legitimacy of any military strike, he sought approval from Congress.²⁹⁴

IV. Framework for Use of Force Decisions

As the discussion in Part III above shows, the UN Charter's use of force framework does not present a practical legal barrier to the use of force by the United States. The United States professes fealty to the concepts of international and domestic law regulating the resort to force, but in practice the decision to use force in international relations is more a matter of legitimacy than law. Many factors must be considered in evaluating the legitimacy of a decision to use armed force in international relations. These decisions are extremely fact specific, making some legal and legitimacy factors more prevalent in some cases and not in others.

²⁹⁰ President Barack Obama, Remarks by the President in Address to the Nation on Syria (Sept. 10, 2013), <http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>.

²⁹¹ *Id.*

²⁹² *See supra* text accompanying notes 282–84.

²⁹³ *See supra* text accompanying notes 285–87.

²⁹⁴ *See supra* text accompanying notes 288–89.

Rather than a bright line that, when crossed, signals that a use of force is justified, the decision is best viewed as a spectrum of legitimacy, similar to Justice Jackson's formulation of executive power in *Youngstown Sheet & Tube v. Sawyer*.²⁹⁵ In 1952 the United States was engaged in the Korean War and several of its major steel producers were engaged in a labor dispute with their unions.²⁹⁶ The unions were preparing to strike, which would halt steel output and threaten industries vital to the war effort.²⁹⁷ To prevent this, President Truman issued an executive order directing the seizure of various steel plants and facilities, which then would be operated by the federal government.²⁹⁸

Several companies subject to the executive order, including Youngstown Sheet & Tube Company, sued, seeking declaratory and injunctive relief.²⁹⁹ The Supreme Court held that the President did not have the authority, on his own, to seize private property.³⁰⁰ In a concurring opinion, Justice Jackson describes the limits of the President's power vis-à-vis Congress as a spectrum. When the President acts with congressional authorization, his authority is at its maximum. When he acts contrary to the express or implied will of Congress, his authority is at its lowest ebb. In between these extremes is a "zone of twilight."³⁰¹

Similarly, there is a spectrum of legitimacy with regard to use of force decisions. When a President has the backing of the UN Security Council, a strong multinational coalition, congressional support, and a clear national interest, the legitimacy of the decision to use force is at its maximum. Lacking all of these, the President may still have the authority to order the use of force, but the legitimacy of the decision would be at its lowest ebb. Often, the President is at neither extreme, but has some combination of legitimacy factors in his favor. These legitimacy factors include both international and domestic considerations.

²⁹⁵ 343 U.S. 579 (1952).

²⁹⁶ *Id.* at 582.

²⁹⁷ *Id.* at 582–83.

²⁹⁸ *Id.* at 583.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 587–88.

³⁰¹ *Id.* at 635–38.

A. International Considerations

The United States of America was born with a “decent respect to the opinions of mankind,”³⁰² and it still seeks to act with international support for its actions even when it claims the authority to act unilaterally. Although successive administrations since 1945 have acted in ways that suggest international law is not binding on the decision to use armed force, they have almost universally sought to legitimize their actions as supported by international law.

1. United Nations Security Council Resolution

As discussed above, the UN is not a realistic impediment to the United States’ use of force. For example, the United States used or threatened armed force without Security Council approval and without a claim of self-defense in the Cuban Missile Crisis, Grenada, Kosovo, and Syria. Nonetheless, the UN can add incomparable legitimacy to an operation when the Security Council authorizes the use of force.³⁰³ For this reason, the United States has expended considerable effort to secure Security Council authorization for its military operations whenever possible even when it contends that no such authorization is required.³⁰⁴

Nevertheless, when the United States determines that it does not have time to secure a resolution, it has not felt constrained by the requirement. For example, when Cambodian forces seized the crew of the *S.S. Mayaguez*, the Ford administration was concerned that if the crew reached the Cambodian mainland, freeing them would become exceedingly more difficult.³⁰⁵ As a result, although the United States did seek the UN General Secretary’s assistance in reaching a diplomatic solution, it did not wait long before launching the rescue operation.³⁰⁶

³⁰² THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

³⁰³ Glennon, *supra* note 18, at 501; David C. Hendrickson & Robert W. Tucker, *The Sources of American Legitimacy*, FOREIGN AFF., Nov./Dec. 2004, at 18, 26 (“Neither George H.W. Bush nor Bill Clinton allowed the Security Council to constrain U.S. policy in all instances, but they were keenly aware of the importance of respecting the international body.”); Kagan, *supra* note 10, at 82 (“[A] Security Council authorization is never essential. It is a means to the end of gaining allied support, but not an end in itself.”).

³⁰⁴ See *supra* text accompanying notes 249 (discussing the Bush Administration’s efforts to secure a Security Council resolution authorizing military force against Iraq).

³⁰⁵ Behuniak, *supra* note 102, at 53–54.

³⁰⁶ See *supra* text accompanying notes 110–11.

The United States made no effort to secure a Security Council resolution, choosing instead to rely on a claim of self-defense.

Similarly, if it appears that the United States will be unsuccessful in obtaining a Security Council resolution, it may choose to not seek one. For example, in the Cuban Missile Crisis, *Operation Urgent Fury*, Kosovo, and Syria the United States' aims were contrary to the policy of another permanent member of the Security Council.³⁰⁷ Trying and failing may have a greater negative effect on the legitimacy of an operation than not trying at all. On several occasions other nations have sought Security Council resolutions condemning U.S. actions, but none have been successful due to the United States' veto authority.³⁰⁸

2. *International Cooperation*

Whether or not the United States is able to convince the UN Security Council to adopt a resolution authorizing the use of force, the United States has developed a preference for coalition warfare.³⁰⁹ In every instance examined in Part III except two, the *Mayaguez* recovery and *Operation Just Cause*, the United States acted with multinational partners. Arguably, the United States could have acted unilaterally in several cases, but chose to work with other nations.³¹⁰ In addition to

³⁰⁷ See *supra* text accompanying notes 71–73 (Cuban Missile Crisis), 129–32 (*Operation Urgent Fury*), 222 (Kosovo), 282–84 (Syria).

³⁰⁸ U.N. S.C. Rep. of the Security Council, June 16 1983–June 15 1984, 26–27, U.N. Doc. A/39/2; GAOR, 39th Sess., Supp. No. 2 (1985); U.N. S.C. Rep. of the Security Council, June 16, 1989–June 15, 1990, U.N. Doc. A/45/2; GAOR, 45th Sess., Supp. No. 2 (1993).

³⁰⁹ See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 41 (2010); THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 48 (2006); THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 3, 11 (2010).

³¹⁰ Kagan, *supra* note 10, at 84–85.

[I]t is an open question whether the United States can 'go it alone' in a material sense. Militarily, it can and does go it virtually alone, even when the Europeans are fully on board, as in Kosovo and in the Persian Gulf War. Economically, it can go it alone too if it must, as with the reconstruction of places such as Iraq. (Five decades ago, after all, it rebuilt Europe and Japan with its own funds.) It is more doubtful, however, whether the American people will continue to support both military actions and the burdens of postwar occupations in the face of constant charges of illegitimacy by the United States' closest democratic allies.

increasing the size and capabilities of a force, operating as part of a coalition adds international legitimacy to an operation.³¹¹

Coalition operations have their disadvantages as well. At the tactical level, units from different nations may have difficulty coordinating operations. For example, in Afghanistan, most troop-contributing nations have imposed “national caveats” on their forces, limiting the types of operations they can conduct.³¹² More seriously for the initial decision to use force, however, is the complexity of synchronizing strategic and operational goals and rules of engagement.³¹³ Nevertheless, the United States has developed an intentional practice over the course of many administrations of engaging in coalition operations whenever practicable.³¹⁴

3. *United States Understanding of Customary International Law Relating to Jus ad Bellum*

The wording of Article 51 of the UN Charter has generated much debate about the legitimate extent of self-defense authorized by the Charter. On the one hand, some argue that the text limits self-defense to instances of “armed attack,” requiring a nation to absorb an actual attack by armed force before invoking the right of self-defense.³¹⁵ On the other hand, some point to the Charter’s recognition of an inherent right of self-defense and argue that the Charter is merely declaring that states have the same right of self-defense under the charter as they had before it became effective.³¹⁶ The U.S. position is much closer to the latter point of view

Id.

³¹¹ James A. Helis, *Multilateralism and Unilateralism*, in 2 U.S. ARMY WAR COLLEGE GUIDE TO NATIONAL SECURITY ISSUES: NATIONAL SECURITY POLICY AND STRATEGY 169, 171 (J. Boone Bartholomees, Jr., ed., 5th ed. 2012) (“[M]easuring allies’ worth only in terms of their military capabilities ignores the importance of their political and diplomatic contributions.”); Wayne A. Silkett, *Alliance and Coalition Warfare*, PARAMETERS, Summer 1993, at 74, 75 (noting that “few factors contribute to public legitimacy like a coalition effort.”).

³¹² HELLE C. DALE, THE HERITAGE FOUND., NATO IN AFGHANISTAN: A TEST CASE FOR FUTURE MISSIONS 4–5 (2006), <http://www.heritage.org/research/reports/2006/12/nato-in-afghanistan-a-test-case-for-future-missions>.

³¹³ Silkett, *supra* note 311, at 79–80.

³¹⁴ See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 41 (2010); THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 48 (2006); THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 3, 11 (2010).

³¹⁵ See BROWNLIE, *supra* note 36, at 275–78.

³¹⁶ See Yoo, *supra* note 247, at 739–40.

and includes an extensively broad understanding of the right of self-defense.³¹⁷

The United States has also justified the use of force by its obligation to protect its citizens abroad.³¹⁸ The UN Charter does not sanction the use of force for protection of nationals abroad unless it meets the requirements of self-defense under Article 51 and many scholars contend that, by itself, it does not.³¹⁹ The U.S. position has been inconsistent on this matter, invoking Article 51 to protect U.S. citizens in the *Mayaguez* rescue,³²⁰ but rejecting it as a justification for *Operation Urgent Fury*.³²¹ In *Urgent Fury*, the United States claimed that protection of U.S. citizens was an independent justification for the use of force when the host nation could not or would not protect them.³²² Nevertheless, whether the United States characterizes forcible protection of its nationals abroad as self-defense or as a separate justification for the use of force, it operates contrary to the requirements of the UN Charter.

Humanitarian intervention is an evolving justification for the use of force. International law positivists deny that humanitarian intervention can justify the use of force absent a supporting Security Council resolution.³²³ Others say that sometimes the actual or potential tragedy is so great that intervening without Security Council authorization is “illegal but legitimate.”³²⁴ The United States has participated in many humanitarian operations, although most have been authorized by the UN Security Council.³²⁵ The United States intervened in Kosovo to stop the

³¹⁷ See *supra* text accompanying notes 110–11 (*Mayaguez* rescue), 142 (*Operation Just Cause*), 237–38 (*Operation Enduring Freedom*), 262–64 (*Operation Iraqi Freedom*).

³¹⁸ See *supra* text accompanying notes 110–11 (*Mayaguez* rescue), 126 (*Operation Urgent Fury*).

³¹⁹ See Thomas C. Wingfield, *Forcible Protection of Nationals Abroad*, 104 DICK. L. REV. 439, 461–62 (2000); Randelzhofer, *supra* note 36, at 798; BROWNLIE, *supra* note 36, at 301.

³²⁰ Behuniak, *supra* note 102, at 119.

³²¹ MOORE, *supra* note 119, at 128.

³²² *Id.*

³²³ See, e.g., GEOFFREY S. CORN, VICTOR HANSEN, RICHARD B. JACKSON, CHRIS JENKS, ERIC TALBOT JENSEN & JAMES A. SCHOETTLER, JR., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 27 (2012); Roberts, *supra* note 222, at 185–86 (noting that humanitarian intervention was considered as justifiable use of force during the drafting of the UN Charter, but was not included in the text).

³²⁴ William C. Bradford, “*The Duty to Defend Them*”: *A Natural Law Justification for the Bush Doctrine of Preventive War*, 79 NOTRE DAME L. REV. 1365, 1464 n.402 (2004).

³²⁵ See *supra* text accompanying notes 172–74 (Somalia), 207–08 (Bosnia), 270, 273 (*Operation Odyssey Dawn*).

brutal suppression of Kosovar Albanians without UN sanction, suggesting that the United States is willing, in at least some circumstances, to justify the use of force for humanitarian purposes.³²⁶

B. Domestic Considerations

While the law of *jus ad bellum* is generally concerned with international law, the decision to use armed force involves many domestic considerations as well. National security policy formulation responsibility is divided between the executive and legislative branches, but the dividing line is not well-defined and there is frequent tension between the political branches over the proper scope of their authority. The Constitution vests the President with the executive power, which includes primary responsibility for foreign affairs, and makes him Commander in Chief of the armed forces.³²⁷ The Congress has the power to declare war, establish an army and a navy, and make rules to govern and regulate the armed forces.³²⁸ When the President makes the decision to use force in international affairs³²⁹ he must consider the extent of his authority and the potential for infringement on congressional authority.

1. National Interest

Historically, the President has asserted a constitutional authority to commit U.S. armed forces abroad to protect important national interests (short of war) without prior congressional approval.³³⁰ Important U.S. national interests that have been consistent over time include protection of U.S. territory, people, and institutions; promotion of U.S. economic

³²⁶ See *supra* text accompanying notes 221–22.

³²⁷ U.S. CONST. art. II, §§ 1, 2; THE HERITAGE GUIDE TO THE CONSTITUTION 179–80 (Edwin Meese III et al. eds., 2005).

³²⁸ U.S. CONST. art. I, § 8.

³²⁹ Although the war powers are shared by the executive and legislative branches, the decision to use armed force is the President's. Congress has never declared war or authorized the use of military force without a presidential request.

³³⁰ See, e.g., Memorandum Opinion, *supra* note 267, at 6; Memorandum Opinion, *supra* note 240, at 8 (“Our office has taken the position in recent Administrations, including those of Presidents Clinton, Bush, Reagan, Carter, and Nixon, that the President may unilaterally deploy military force in order to protect the national security and interests of the United States.”); Proposed Deployment of United States Armed Forces Into Bosnia, *supra* note 209, at 4–5.

well-being; promotion of democratic values; and global stability.³³¹ For example, the United States justified the *Mayaguez* rescue and *Operation Urgent Fury* as furthering the vital national interest of protecting the United States and its citizens.³³²

The United States has also invoked support for the United Nations as a national interest justifying the use of force. President Truman committed U.S. troops to the defense of South Korea because he determined that protecting the UN's effectiveness was an important national interest.³³³ Presidents have also asserted support for the UN as a national interest in justifying deploying troops to Somalia, Haiti, Bosnia, and Iraq in 2003.³³⁴ The United States has asserted prevention of civilian massacres³³⁵ and prevention of the use and proliferation of chemical weapons as national interests justifying the use of force.³³⁶

National interests can also develop as a crisis evolves. For example, the 1994 National Security Strategy Report declared that the war in the former Yugoslavia did "not pose an immediate threat to our security or warrant unilateral U.S. involvement."³³⁷ Later that year, President Clinton declared that the security of Central Europe, including the former Yugoslavia, was vital to U.S. national interests.³³⁸

Furthermore, Presidents have asserted authority to use force to protect "important" national interests, suggesting that there are other national interests that are not important enough to justify the use of force.³³⁹ Scholars have proposed several different models for the

³³¹ Alan G. Stolberg, *Crafting National Interests in the 21st Century*, in 2 U.S. ARMY WAR COLLEGE GUIDE TO NATIONAL SECURITY ISSUES: NATIONAL SECURITY POLICY AND STRATEGY 13, 15–16 (J. Boone Bartholomees, Jr., ed., 5th ed. 2012)

³³² See *supra* text accompanying notes 110–11 (*Mayaguez*), 126 (*Operation Urgent Fury*)

³³³ *Authority of the President to Repel the Attack in Korea*, *supra* note 51, at 176.

³³⁴ See *supra* text accompanying notes 175–78 (Somalia), 200 (Haiti), 209 (Bosnia), 265 (*Operation Iraqi Freedom*).

³³⁵ See *supra* text accompanying note 277.

³³⁶ See *supra* text accompanying notes 285–86.

³³⁷ THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY OF ENGAGEMENT AND ENLARGEMENT 21 (1994).

³³⁸ William Jefferson Clinton, *Implementing the Bosnian Peace Agreement: Let Us Lead*, <http://www.presidency.ucsb.edu/ws/index.php?pid=50808&st=&st1=>

³³⁹ SAM C. SARKESIAN, JOHN ALLEN WILLIAMS & STEPHEN J. CIBALA, *US NATIONAL SECURITY: POLICYMAKERS, PROCESSES & POLITICS* 7 (4th ed. 2008). Presidents have also used the adjectives "paramount" and "vital" to describe those interests that justified the use of force. 23 DEP'T ST. BULL., *supra* note 51, at 176–77 (justifying the use of force in

gradation of national interests, but they all boil down to two categories: those a nation will go to war over and those over which it will not.³⁴⁰

Just as national interests can develop as a crisis evolves, they can also diminish, such as when the nation declares certain interests to be vital, but then fails to enforce those declarations. This can occur in two instances. First, the nation can declare certain interests to be vital in some circumstances but not in others.³⁴¹ Second, because the term “national interest” invokes strong reactions from the public and policy makers and because “national interests” receive resources, there is an incentive to label issues as national interests that do not fit the definition or to raise legitimate national interests to the “important” or “vital” level for arbitrary or political reasons.³⁴² In either case, failure to act in defense of stated interests may cause potential adversaries to mistakenly assume that the United States will not act in similar circumstances, which could lead to conflict.

2. Congressional Concurrence

Although the executive branch has consistently argued that it possesses broad power to unilaterally order the use of armed force, it has also recognized that congressional concurrence adds legitimacy to the decision. The most forceful form of congressional concurrence is a declaration of war, a tool that has only been used eleven times in the history of the United States and not since 1942.³⁴³

More recently, Congress has signaled its consent through legislation authorizing the use of military force short of a formal declaration of

Korea to protect the “paramount” interest of supporting the UN); THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 5 (1998) (“We will do what we must to defend these [vital] interests, including—when necessary—using our military might unilaterally and decisively.”).

³⁴⁰ MICHAEL G. ROSKIN, NATIONAL INTEREST: FROM ABSTRACTION TO STRATEGY 9 (1994), <http://www.strategicstudiesinstitute.army.mil/pdf/files/pub356.pdf>.

³⁴¹ P. H. Liotta, *To Die For: National Interest and Strategic Uncertainties*, PARAMETERS, Summer 2000, at 46, 51. For example, in Kosovo and Somalia, the United States asserted prevention of genocide as one of the national interests used to justify intervention. James F. Miskel, *National Interests: Grand Purposes or Catchphrases?*, 55 NAV. WAR. COLL. REV. 96, 100–01 (2002). However, when genocide occurred in Rwanda, the United States was not willing to back up its interest with force. *Id.* at 101.

³⁴² JAMES E. BAKER, IN THE COMMON DEFENSE 15 (2007).

³⁴³ ELSEA & GRIMMETT, *supra* note 164, at 4.

war.³⁴⁴ The legislative and executive branches view authorizations for the use of military force (AUMF) differently. Congress considers an AUMF a prerequisite to the use of armed force abroad, except in limited circumstances when specific authorization may be granted after the fact but is nonetheless required.³⁴⁵ The executive views AUMFs as a measure of legitimacy, showing that both political branches are united in a course of action.³⁴⁶ When requesting AUMFs, Presidents refer to them as measures of congressional support, not authorization. When President George H.W. Bush requested congressional support for *Operation Desert Storm*, he made it clear in his request that he did not consider legislative authorization necessary.³⁴⁷

Finally, Congress can take affirmative action in opposition to the use of U.S. armed forces as well. Through its spending power, Congress can refuse to provide funding for operations of which is disapproves.³⁴⁸ In the 1980s, for example, Congress enacted a series of “Boland Amendments” that restricted U.S. operations against the Sandinista government in Nicaragua and U.S. support for anti-Sandinista rebels.³⁴⁹

Congress is reluctant to enact restrictive legislation once U.S. armed forces are engaged in combat. A notable exception was congressional action to end U.S. involvement in Vietnam. Through a series of bills in the early 1970s, Congress imposed increasing restrictions on U.S. operations in South East Asia,³⁵⁰ ultimately cutting off all funding to

³⁴⁴ *Id.* at 8–19.

³⁴⁵ Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243 § 3(c), 116 Stat. 1498 (2002); Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(b), 115 Stat. 224 (2001); Authorization of the Use of U.S. Armed Forces Pursuant to U.N. Security Council Resolution 678 with Respect to Iraq, Pub. L. No. 102-1 § 2(c), 105 Stat. 3 (1990).

³⁴⁶ See ELSEA & GRIMMETT, *supra* note 164, at 12–13.

³⁴⁷ *Id.*

³⁴⁸ Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 835–36 (1994); BAKER, *supra* note 342, at 102.

³⁴⁹ Raven-Hansen & Banks, *supra* note 348, at 857–61.

³⁵⁰ The 1970 Department of Defense Appropriations Act provided, in part, that “none of the funds appropriated by this Act shall be used to finance the introduction of American ground combat troops into Laos or Thailand.” Pub. L. No. 91-171, § 643, 83 Stat. 469, 487 (1969) (An amendment to the Special Foreign Assistance Act of 1971 provided that “none of the funds authorized or appropriated pursuant to this or any other Act may be used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisers to or for Cambodian military forces in Cambodia.”). Pub. L. No. 91-652, § 7(a), 84 Stat. 1942, 1943 (1971).

“finance directly or indirectly combat activities by United States military force in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.”³⁵¹

For better or worse, Congress has proven more unified in supporting presidential decisions to use force than in opposition. As Justice Jackson once observed, “We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”³⁵²

3. War Powers Resolution

As discussed in Part III.A.4 above, the War Powers Resolution does not resolve the debate over the scope of legislative and executive authority in the use of armed force, but it has inserted an additional consideration in the executive decision to use force. This is evident in the consistent statements that presidential action is taken “consistent with” the War Powers Resolution, if not in accordance with it.³⁵³ The legislative branch is justifiably protective of its authority in national security matters and the Congress, or individual members, may challenge an executive decision perceived to be taken without congressional input or consent.³⁵⁴

United States Presidents have consistently regarded the War Powers Resolution as unconstitutional and have sidestepped its requirements, and Congress has failed to take decisive legislative action asserting its authority in this area. Neither side seems willing to engage in a showdown over the Resolution, and the Supreme Court has refused to decide the conflict between the other two branches of government.³⁵⁵ As a result, the War Powers Resolution serves more as a source of legitimacy than law. Presidents like to have congressional support for

³⁵¹ Joint Resolution Making Continuing Appropriations for the Fiscal Year 1974, Pub. L. No. 93-52, § 108, 87 Stat. 130, 134 (1973).

³⁵² *Youngstown Sheet & Tube Co. et al. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

³⁵³ GRIMMETT, *supra* note 98, at 14.

³⁵⁴ *See, e.g., Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990); *Conyers v. Reagan*, 578 F. Supp. 323 (D.D.C. 1984). Although individual members of Congress have not been successful in War Powers litigation against the executive branch, cases like these can raise legitimacy issues for a President seeking to justify a use of force decision.

³⁵⁵ *Id.*

their actions and so will act consistent with the War Powers Resolution and will ask Congress for legislation supporting the use of force even while claiming that doing so is not necessary. Congress, for its part, is not satisfied with legislation supporting a use of force decision, and adopts resolutions authorizing the use of force pursuant to the War Powers Resolution.

V. Conclusion

The UN Charter's use of force framework does not present a practical legal obstacle for the United States to use force in its international relations, but there are factors that add to or detract from the legitimacy of such a decision. The United States has shown that it will use armed force in situations in which the UN Security Council has not authorized it, indicating that the United States does not feel bound by the Charter's requirements. However, the United States has sought Security Council authorization when it thinks it can achieve it because a Security Council Resolution adds international legitimacy to a military operation. Similarly, the United States often has the capability to conduct unilateral military operations, but nevertheless prefers to operate as part of a coalition of nations. The added legitimacy of having international partners outweighs some of the difficulties inherent in coalition operations.³⁵⁶

Instead of a bright line demarking the legal limit of the United States' use of force in international relations, there is a spectrum of authority that can be compared to Justice Jackson's formulation of executive power in domestic law. When the United States acts in accordance with a UN Security Council Resolution authorizing the use of force, and acts with coalition partners, and when the executive and legislative branches are in agreement as to the course of action, its legitimacy is "at its maximum."³⁵⁷ When the executive acts unilaterally, without support of the UN Security Council, other nations, or the Congress, it may have legal authority to do so, but its legitimacy is "at its lowest ebb."³⁵⁸

³⁵⁶ Helis, *supra* note 311, at 171.

³⁵⁷ *Youngstown*, 343 U.S. at 635.

³⁵⁸ *Id.* at 636.