

CUSTOMARY CONSTRAINTS ON THE USE OF FORCE: ARTICLE 51 WITH AN AMERICAN ACCENT

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ABSTRACT

This Article, prepared for a symposium on ‘The Future of Restrictivist Theories on the Use of Force’, examines the current trajectory of restrictivist scholarship in the United States. In contrast to their counterparts in continental Europe, American restrictivists tend to devote less energy to defending narrow constructions of the UN Charter. Instead, they generally focus on legal constraints outside the Charter’s text, including customary norms and general principles of law such as necessity, proportionality, deliberative rationality, and robust evidentiary burdens. The Article considers how these features of the American restrictivist tradition reflect distinctive characteristics of American legal culture, and it explores the tradition’s influence on debates over anticipatory self-defense and the use of force against non-state actors abroad. The Article concludes by examining how the American restrictivist tradition is beginning to shape the United States’ approach to the use of force in response to cyber attacks.

1. INTRODUCTION

Contemporary debates over the legitimate scope of self-defence under international law have taken markedly different turns in continental Europe and the United States. Continental European scholars who advocate a ‘restrictive’ approach to self-defence generally assert that Article 51 of the UN Charter permits states to use force only after another state has launched an “armed attack” of sufficient magnitude to satisfy the event threshold required for responsive military action.¹ Scholars who operate within this tradition emphasize the Charter’s objective “to strengthen universal peace” by limiting the circumstances in which states may use force

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¹ UN Charter Art. 51.

unilaterally to resolve their disputes. In effect, the requirement of an “armed attack” advances this objective by allowing states to use force without the consent of the UN Security Council only if an act of aggression by another state has left them with no plausible means short of military action to safeguard their “territorial integrity or political independence.”² This vision of the Charter as a comprehensive code for the use of force dominates restrictivist scholarship in the civil law world. In the discussion that follows, we refer to this venerable tradition as ‘conventional restrictivism.’ Although conventional restrictivism is by no means the only approach to the use of force endorsed by continental European scholars—particularly following the 9/11 terrorist attacks³—it continues to shape European debates over the use of force.⁴

Conventional restrictivism has gained relatively few converts, however, among scholars of international law in the United States.⁵ When American legal scholars debate the use of force, ‘hawks’ and ‘doves’ alike tend to accept that Article 51 permits states to use force in some settings that would be categorically excluded under conventional restrictivism, including in response to imminent attacks from other states.⁶ Rather than seek to constrain the use of force by interpreting the language of Article 51 narrowly, as do their restrictivist counterparts in continental Europe, American legal scholars who seek to constrain the use of force tend to focus

² UN Charter Arts. 1(1) & 2(4).

³ See, e.g., C. Kreß, ‘Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts’, (2010) 15 *J. Conflict & Sec. L.* 245, at 248; C.J. Tams, ‘The Use of Force Against Terrorists,’ (2009) 20 *EJIL* 359; T. Ruys & S. Verhoeven, ‘Attacks by Private Actors and the Right of Self-Defence,’ (2005) 10 *J. Conflict & Sec. L.* 289.

⁴ See, e.g., J. Kammerhofer, ‘The Resilience of the Restrictivist Rules of Self-Defence’, in *The Oxford Handbook on the Use of Force in International Law* (2014) , 627 at 633; J. Mrázek, ‘The Use of Force and Expanded Conceptions of Self-defence’, (2011) 29 *Chinese (Taiwan) Y.B. Int’l L. & Aff.* 135; T. Gazzini, ‘A Response to Amos Guiora: Pre-Emptive Self-Defence Against Non-State Actors?’, (2008) 13 *J. Conflict & Sec. L.* 25, 26 (“Dealing with self-defence . . . essentially means interpreting and applying Article 51 . . .”).

⁵ See Kammerhofer, *supra* note 4, at 633 (reporting the results of an informal survey in which only one of fifteen authors “identifiable as ‘US scholars’ . . . comes even close to [conventional restrictivism]”).

⁶ See, e.g., M.E. O’Connell, ‘Lawful Self-Defense to Terrorism’, (2002) 63 *U. Pitt. L. Rev.* 889, 894-95.

on legal principles derived from sources outside Article 51. These principles include substantive requirements of necessity, proportionality, and cost-benefit reasonableness. American ‘restrictivists’ also emphasize procedural requirements for self-defence such as public deliberation, transparency, and robust burdens of proof. Although these substantive and procedural principles do not appear explicitly in the Charter’s text, American restrictivists argue that these principles represent binding norms of customary international law (some incorporated into *jus ad bellum* from *jus in bello*), general principles of law accepted by the international community of states, and basic principles of legality that are constitutive of international legal order. As customary norms, these principles are context-sensitive and subject to shifting application over time, allowing the international community gradually to update and refine the law’s application in response to new threats to international peace and security, much as common-law courts continuously update and refine legal norms through adjudication.⁷ In short, the distinctive strain of restrictivist scholarship that has risen to prominence in the United States, which we will call ‘customary restrictivism,’ seeks to constrain self-defence by encircling this sovereign power within a web of flexible principles that are reminiscent of common law constitutionalism and global administrative law.

In this Article, we delineate the salient features of customary restrictivism as it has emerged in American legal scholarship, explaining how the tradition represents an important alternative or complement to conventional restrictivism. We begin in Part I by identifying the key features of conventional restrictivism, and we offer some tentative theories to explain why

⁷ See O. Corten, ‘The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate’, (2005) *16 Eur. J. Int’l L.* 803 (discussing the relative flexibility of the customary prohibition against the use of force under the “expansive” and “restrictive” approaches); M. Byers & S. Chesterman, ‘Changing the Rules about Rules? Unilateral Intervention and the Future of International Law’, in R. Holzgrefe & J.L. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (2003) 177, 180 (observing that “[t]he relationship between [treaties and custom] is similar to the relationship between domestic statutes and the common law.”).

the American legal academy has proven to be inhospitable soil for conventional restrictivism. Next, we make the case that American legal scholars have developed a distinctive restrictivist tradition that focuses on establishing various rule-of-law principles, regulatory values, and deliberation-reinforcing procedural requirements as customary *jus ad bellum*. We argue that this brand of restrictivism, which is consistent with the common-law tradition's cautious but accommodating approach to legal change, is consistent with the Charter's overarching purposes. To illustrate how customary restrictivism has played out in American legal scholarship, Parts II and III highlight two areas where customary restrictivism departs from conventional restrictivism: anticipatory self-defence and the use of force in counter-terrorism operations against non-state actors abroad. In Part IV, we identify a third area where customary restrictivism has made inroads into continental legal theory and will likely prove increasingly influential in future debates: self-defence against cyber-attacks. The Article concludes by identifying some of the possible costs and benefits of shifting the focus of *jus ad bellum* analysis away from the text of Article 51 toward general regulatory values and rule-of-law principles.

2. CONVENTIONAL RESTRICTIVISM AND CUSTOMARY RESTRICTIVISM

Conventional restrictivists assert that the text of Article 51 constrains a state's authority to use force in several discrete ways. First, in the words of Jörg Kammerhofer, "self-defence is only allowed if and as long as an 'armed attack' occurs and only to end it."⁸ Under Article 51, in other words, a state may use force solely to repel an attack that is already in progress. Using

⁸ See J. Kammerhofer, 'The Resilience of the Restrictivist Rules of Self-Defence', in *The Oxford Handbook on the Use of Force in International Law* (2014), 627 at 629 (characterizing these constraints as the "Nicaragua consensus").

force to prevent future attacks—even *imminent* attacks—is categorically prohibited.⁹ Second, “not every use of force amounts to an armed attack.”¹⁰ Before self-defence can be justified under Article 51, an attack from abroad must be particularly grave in its “scale and effects.”¹¹ Minor border skirmishes or similar episodes of isolated violence ordinarily will not qualify as armed attacks under this formulation. Third, “armed attacks can only be committed by a state; actions by non-state entities have to be attributed to a state to count as armed attacks.”¹² In each of these respects, conventional restrictivism aspires to sharply limit both the types of incidents that will trigger the right of self-defence and the types of actions a state may take when exercising this right.

Supporters of conventional restrictivism acknowledge that these limits on the use of force could prevent states from protecting their people from danger in a variety of settings.¹³ While states could repel serious acts of aggression by other states, they would be helpless to prevent

⁹ See *id.* at 629; M. Bothe, ‘Terrorism and the Legality of Pre-emptive Force’, (2003) 14 *Eur. J. Int’l L.* 227, 229-30; I. Brownlie, *International Law and the Use of Force by States* (1963) 366 (“It is considered that the terms ‘attack’, ‘use’, and ‘resort to’ imply an act or the beginning of a series of acts.”); H. Neuhold, ‘Legal Crisis Management: Lawfulness and Legitimacy of the Use of Force’, in U. Fastenrath et al. eds., *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011) 284-85 n.21 (arguing that the ordinary meaning and object and purpose of Article 51 dictate that “the adversary must actually have started offensive military action” before self-defence is permissible).

¹⁰ Kammerhofer, *supra* note 8, at 629.

¹¹ *Nicaragua*, 1986 ICJ Rep. ¶ 195; see also O. Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2010), 403; D. Kretzmer, ‘The Inherent Right to Self-Defense and Proportionality in Jus ad Bellum’, (2013) 24 *Eur. J. Int’l L.* 235, 242-44; G. Nolte & A. Randelzhofer, ‘Article 51’, in B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (3d ed. 2012), 1397 at 1409.

¹² *Id.*; see also Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 131 (July 9), ¶ 139 (suggesting that “Article 51 has no relevance” if a state “does not claim that the attacks against it are imputable to a foreign State”); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116 (Dec. 19), ¶¶ 146-47 (“find[ing] that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present” because there was “no satisfactory proof of the involvement of [the government of the DRC] in attacks by non-state actors) [hereinafter *Armed Activities*]; Corten, *supra* note 11, at 160-197; Bothe, *supra* note 9, at 233; Nolte & A. Randelzhofer, *supra* note 11, at 1417.

¹³ See, e.g., J. Kammerhofer, ‘Uncertainties of the Law on Self-Defence in the United Nations Charter’, (2004) 35 *Neth. Y.B. Int’l L.* 143, 201-02.

both sporadic small-scale attacks by other states and 9/11-style attacks by non-state actors abroad without the assistance of another state or authorization from the UN Security Council. Conventional restrictivists argue, however, that guaranteeing effective protection for individual human beings is not the primary purpose of Article 51. In their view, the ‘inherent right of self-defence’ is a limited prerogative to ward off major militarized attacks that are already in progress; it is not a general license to protect a state’s people from any and all threats originating abroad.¹⁴ According to conventional restrictivists, these limits on the use of force promote the overarching purposes of the Charter by preventing low-grade violence, threats of future attacks, and even grave acts of aggression from sparking the type of large-scale international conflict that would entail massive casualties and embroil the broader international community in a sustained regional or global conflict.

Conventional restrictivism’s approach to Article 51 is not free from difficulty. Advocates of a more expansive approach to the use of force have observed that Article 51 characterizes self-defence as an “inherent right” that the Charter “shall” not “impair.”¹⁵ The natural reading of this language, they suggest, is that Article 51 preserves a right of self-defence that predates the birth of the United Nations and survives in customary international law alongside the Charter.¹⁶ In response to this more expansive reading of Article 51, conventional restrictivists contend that the Charter narrowly codifies the customary law of self-defence circa 1945 by authorizing the exercise of this right without Security Council authorization in contravention of Article 2(4) only in situations where an “armed attack” has already “occur[red].”¹⁷ On this reading, states may not

¹⁴ *Id.*

¹⁵ UN Charter art. 51.

¹⁶ See, e.g., D. Bowett, *Self-defence in International Law* (1958), 184-88.

¹⁷ UN Charter art. 51; see also T.L.H. McCormack, ‘Anticipatory Self-Defense in the Legislative History of the United Nations Charter’, (1991) 25 *Isr. L. Rev.* 1, 2 (outlining and critiquing this argument); I.

use force in self-defence unless an attack from abroad has already begun, and only if the attack is of sufficient gravity to constitute the type of major military action that consumed the international community's attention in the wake of World War II. Even under this formulation, however, it remains unclear precisely how grave an attack must be to qualify as an "armed attack."¹⁸ As the ICJ has recognized, the term "armed attack" is not self-interpreting, and "treaty law" does not furnish a clear answer to this question.¹⁹ Moreover, reasonable jurists may disagree as to whether Article 51's express approval of self-defence in response to an "armed attack" should be understood to exclude by implication a further customary right to use force to repel less grave forms of violence.²⁰ Ultimately, the case for limiting the use of force to grave attacks that have already transpired is hardly water-tight.

Explaining why only violence attributable to a state may qualify as an 'armed attack' poses an even trickier challenge for conventional restrictivism. Nothing in the text of Article 51 expressly precludes the use of force to repel attacks from non-state actors such as private militias or transnational terrorist networks. Instead, conventional restrictivists typically argue that using force in self-defence against non-state actors abroad without the consent of the territorial state is inconsistent with the purposes of the UN Charter. Stressing that cross-border military action without the territorial state's consent has consequences for the legal relationship between the two states, conventional restrictivists insist that such measures require special justification based on

Brownlie, *International Law and the Use of Force by States* (1963), 273; H. Kelsen, *The Law of the United Nations* (1950), 156, 159, 269, 792, 914.

¹⁸ *Nicaragua*, *supra* note 11, ¶¶ 51, 64, 191.

¹⁹ *Id.* ¶ 176.

²⁰ Some scholars in the United States have argued, for example, that a use of force in self-defense is not actually "against" the "political independence" or "territorial "integrity" of a state. *See, e.g.,* W.C. Bradford, "The Duty To Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War', (2004) 79 *Notre Dame L. Rev.* 1365, 1376-78; *cf.* M. Reisman & M.S. McDougal, 'Humanitarian Intervention to Protect the Ibos', in R.B. Lillich (ed.), *Humanitarian Intervention and the United Nations* (1973), 167 at 177. *But see Armed Activities*, *supra* note 12, ¶ 148 ("Article 51 of the Charter may justify a use of force in self-defence only within the confines there laid down.").

the attribution of responsibility to the territorial state.²¹ Moreover, allowing military intervention without either the territorial state's consent or state responsibility for a prior attack would undermine international peace and security by increasing the likelihood of armed conflict between the two states. The state where dangerous non-state actors reside might view foreign intervention within its borders (rightly or wrongly) as an "armed attack" justifying a military response, entangling the two states in a conflict that would threaten international peace and security. To avoid these problems, conventional restrictivists argue, the term "armed attack" in Article 51 must be construed narrowly to cover only military actions that are attributable to *states*, not non-state actors alone.²² Given that Article 51 does not speak directly to the problem of non-state actors, however, conventional restrictivists have been forced to stake their claim on contestable assumptions about the purpose of the Charter's collective security regime—assumptions that have only ambiguous support in the Charter's text.

Enthusiasm for conventional restrictivism has been tepid, at best, in the United States. The U.S. government consistently has rejected each of the central pillars of conventional restrictivism, insisting that states may use force in self-defence against imminent attacks, that attacks need not pass a threshold of exceptional gravity to constitute "armed attacks," and that attacks need not be attributable to other states to trigger the "inherent right of individual and collective self-defence" under Article 51 and customary international law.²³ For the most part,

²¹ See Gazzini, *supra* note 4, at 27; H.H. Hofmeister, 'When Is It Right To Attack So-Called "Host States"?' (2007) 11 *Singapore Y.B. Int'l L.* 1, at 4.

²² See Nolte & A. Randelzhofer, *supra* note 11, at 1417 ("[T]he preferable view still seems to be that attacks by organized armed groups need to be attributed to a State in order to enable the affected State to exercise its right of self-defence, albeit under special primary rules of attribution.").

²³ See, e.g., US National Security Strategy 22 (2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf; Memorandum of Assistant Attorney General Jay S. Bybee, Office of Legal Counsel, Authority of the President Under Domestic and International Law To Use Military Force Against Iraq, Sept. 23, 2002, at 23-33 [hereinafter Bybee Memorandum].

American legal scholars have also rejected the central tenets of conventional restrictivism.²⁴ Accordingly, few international lawyers in the United States today endorse the kinds of limits on the use of force that continental scholars would recognize as ‘restrictive.’

Given conventional restrictivism’s poor reception in the United States, some international lawyers outside the United States may surmise that American legal scholarship lacks a meaningful ‘restrictivist’ tradition. Indeed, some may be tempted to conclude that American scholarship serves merely as an exercise in apologetics for the United States’ controversial assertions of self-defence in such diverse settings as Nicaragua (1981-86), Libya (1986), Afghanistan and Sudan (1998), Iraq (2003), and Pakistan (2011). The reality is far more complex.

Several distinct features of the American legal tradition have conspired to inhibit conventional restrictivism from making inroads into U.S. scholarship. One significant factor has been a widespread skepticism among some American legal scholars—informed by the political realist tradition that pervades traditional international relations theory—about the Charter’s power to constrain state action in practice.²⁵ Leading publicists such as Thomas Franck and Michael Glennon have argued that the Charter occupies a “peripheral” position in international disputes over the use of force, with “the concept of self-defense remain[ing] a convenient shield for self-serving and aggressive conduct.”²⁶ Rather than defend the authority of Article 51 in the

²⁴ See, e.g., S.D. Murphy, ‘Terrorism and the Concept of “Armed Attack” in Article 51 of the UN Charter’, (2002) 43 *Harvard Int’l L.J.* 41, 50-51; W.M. Reisman, ‘International Legal Responses to Terrorism’, (1999) 22 *Hous. J. Int’l L.* 3.

²⁵ See, e.g., H.J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (5th ed. 1978); E.H. Carr, *The Twenty-Years Crisis: 1919-1939* (1939).

²⁶ T.M. Franck, ‘Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States’, 64 *AJIL* 809, 811, 835 (1970); see also M.J. Glennon, ‘The Fog of Law: Self-defense, Inherence, and Incoherence in Article 51 of the United Nations Charter’, (2002) 25 *Harv. J. L. & Pub. Pol’y* 539, 540 (suggesting that “international ‘rules’ concerning use of force are no longer regarded as obligatory by states”); O. Schachter, ‘The Right of States to Use Armed Force’, (1984) 82 *Mich. L. Rev.* 1620, 1620,

face of conflicting state practice, scholars such as Franck and Glennon characterize this tension as evidence that Article 51's limits have fallen into desuetude or have been constructively amended by new customary norms.²⁷ The influence of American legal realism can be discerned, moreover, in the oft-repeated sentiment that the ambiguous and incomplete language of Article 51 gives states free rein to define the legitimate scope of self-defence for themselves.²⁸ While conventional restrictivists might bristle at this suggestion, the idea that textual gaps and ambiguities operate as *de facto* delegations of lawmaking power to public authorities is a familiar theme in American jurisprudence²⁹ and scholarship.³⁰ Indeed, U.S. legal scholars tend to prize the comparatively flexibility and responsiveness of administrative regulation and common-law adjudication relative to the perceived rigidity of a code-based legal regime.³¹ Given these ingrained features of American legal culture, it should come as no surprise that legal scholars in the United States are generally less sympathetic to arguments that Article 51 furnishes a comprehensive legal regime for self-defence.

Resistance to conventional restrictivism among American scholars also reflects a different perspective about the function and purpose of the Charter's collective security regime.

1635 (observing "that the obligations of the Charter are widely seen as mere rhetoric, at best idealistic aspirations, or worse as providing a pretext or 'cover' for aggression").

²⁷ Franck, *supra* note 26, at 809-10; Glennon, *supra* note 26, at 540-41; *cf.* T. Rheingold, 'State Weakness, Irregular Warfare, and the Right to Self-Defense Post 9/11', (2011) 105 AJIL 244.

²⁸ *See* Franck, *supra* note 26, at 816 ("How is the fact of an armed attack to be established? The Charter provides no answer . . ."); M.S. McDougal, 'The Soviet-Cuban Quarantine and Self-Defense', (1963) 57 AJIL 597, 600 (asserting that "nothing in the 'plain and natural meaning' of the words of the Charter requires an interpretation that Article 51 restricts the customary right of self-defense"); *cf.* N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010), 50 (observing that it is unsettled whether there is a minimum threshold of severity for an "armed attack" and what that threshold would be).

²⁹ *See, e.g.*, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984) (holding that courts must treat statutory gaps and ambiguities as delegations to the administrative agency that is entrusted to administer the statute).

³⁰ *See, e.g.*, Lisa Schultz Bressman, 'Reclaiming the Fiction of Congressional Delegation', (2011) 97 *Va. L. Rev.* 2009; M.H. Lemos, 'The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine', (2008) 81 *S. Cal. L. Rev.* 405.

³¹ *See generally* G. Calabresi, *A Common Law for the Age of Statutes* (1999).

While conventional restrictivists tend to envision the Charter's provisions as operating to secure peaceful relations between states,³² legal scholars in the United States are more likely to view self-defence as a mechanism for establishing a just world order that guarantees political self-determination and a reasonable degree of security for all peoples.³³ In a world where peaceful dispute resolution often proves ineffective, where the United Nations routinely fails to prevent humanitarian disasters, and where weapons of mass destruction and terrorist attacks by non-state actors pose grave threats to human security, most American legal scholars have been unwilling to accept a narrow reading of Article 51 that would privilege peace between states at the expense of justice and security for the individual victims of a cross-border attack.³⁴ While American legal scholars are not alone in viewing international law in instrumentalist terms as a tool for advancing human interests, they are more likely than their peers in continental Europe to construe ambiguities in the Charter's collective security regime as permitting states to use force unilaterally to promote human security.³⁵ Indeed, most American legal scholars view a state's prerogative to protect its own people from harm as both a sovereign *right* enshrined in international law, including Article 51,³⁶ and a sovereign *responsibility* derived from the state's basic social contract or fiduciary relationship with its people.³⁷ Given these recurring themes in

³² Cf. Immanuel Kant, 'Perpetual Peace: A Philosophical Sketch', in H. Reiss (ed.) & H.B. Nisbet (trans.), *Kant: Political Writings* (2d ed. 1991), 93 (1793).

³³ See M.J. Glennon, 'The New Interventionism: The Search for a Just International Law', (1999) 73 *Foreign Aff. 2*; cf. J. Rawls, *The Law of Peoples* (1999), 91.

³⁴ Schachter, *supra* note 26, at 1628 (internal quotation marks omitted).

³⁵ See, e.g., G.P. Fletcher & J.D. Ohlin, *Defending Humanity: When Force Is Justified and Why* (2008); Bradford, *supra* note 21; J.D. Ohlin, 'The Doctrine of Legitimate Defense', (2015) 91 *Int'l L. Stud.* 119.

³⁶ See, e.g., M. Halberstam, 'The Right to Self-Defense Once the Security Council Takes Action', (1996) 17 *Mich J. Int'l L.* 229, 238 (characterizing self-defence as "one of the most, if not the most, fundamental rights both of individuals and of states"); N. Rostow, 'Nicaragua: A Surreply to a Rejoinder', (1985) 11 *Yale J. Int'l L.* 474, 478 ("The inherent right of a state to engage in individual or collective self-defence is the fundamental attribute of sovereignty, and the UN Charter leaves this right unimpaired.")

³⁷ See E.J. Criddle & E. Fox-Decent, *International Law's Fiduciary Constitution* (Oxford Univ. Press, forthcoming 2016); S.P. Marks & N. Cooper, 'The Responsibility To Protect: Watershed or Old Wine in

American legal scholarship, it is unsurprising that leading journals in the United States regularly publish scholarship challenging the central tenets of conventional restrictivism. These features of American legal discourse that have prevented conventional restrictivism from gaining a firm foothold in American legal scholarship are unlikely to lose force in the near term. This does not mean, however, that American legal scholarship lacks a discernible ‘restrictivist’ tradition. Since the dawn of the Charter era, debates over the use of force in the United States have been every bit as vibrant and divisive as they are in Europe, with legal scholars staking out relatively expansive and restrictive positions on various questions regarding the permissible scope of self-defence. In contrast to their civil-law counterparts, however, the participants in these debates tend to place less emphasis on textual exegesis of Article 51. While American restrictivists echo their continental cousins in insisting that self-defence “must be interpreted narrowly” to prevent abuse,³⁸ they tend to look outside the Charter for the salient narrowing principles. This distinctive viewpoint has led to the emergence of the tradition we describe here as ‘customary restrictivism.’

One principle that features prominently in customary restrictivism, but does not appear explicitly in the text of Article 51, is the principle of proportionality. Proportionality analysis finds widespread application in municipal legal systems throughout the world, and the international community has accepted the proportionality principle as a norm of customary *jus ad bellum* that predated the Charter and retains its vitality in contemporary customary

New Bottles?’, (2010) 2 *Jindal Global L. Rev.* 86, 94 (“It is by fulfilling the social contract of protecting the rights of its members that the state acquires legitimacy.”); cf, 3 E. de Vattel, *The Law of Nations* (Fenwick, transl. 1916), 256 (“Self-defense against an unjust attack is not only a right which every Nation has, but it is a duty, and one of its most sacred duties.”).

³⁸ C.J. Fenwick, Editorial, ‘The Quarantine Against Cuba: Legal or Illegal?’, (1963) 57 *AJIL* 588, 592.

international law. Three conceptions of proportionality bear special consideration.³⁹ First, proportionality arguably requires, at a minimum, that the means a state employs in response to an attack be rationally related to the permissible ends of self-defence. Consequently, defining the permissible ends of self-defence narrowly is one strategy that customary restrictivism has employed to limit the use of force. If the permissible ends of self-defence are limited to repelling a discrete attack, for example, states will have far less room to maneuver than if self-defence permits a state to take further steps to eliminate a foreign aggressor's capacity to mount similar attacks in the future. Second, the principle of proportionality may be construed to mean that states must use the "least restrictive means" available to prevent the anticipated harm.⁴⁰ In other words, states may use force in self-defence only if less destructive measures such as diplomatic negotiation, retorsion, and countermeasures are manifestly inadequate to avert an attack. Third, proportionality may be understood to preclude states from using force if the costs of military action would exceed the benefits. The broader the frame of reference for cost-benefit analysis—for example, the more a state under attack takes into consideration not only the costs and benefits of force to themselves, but also to other states that may be affected by their actions—the more restrictive this analysis is likely to be in application. In each of these potential formulations, proportionality offers a legal basis for restricting the use of force without direct reference to Article 51.

Alongside the principle of proportionality, customary restrictivists argue that states may use force only in response to an 'actual' or 'imminent' attack. Over time, the U.S. government

³⁹ For a discussion of these aspects of proportionality in the context of European public law, see A.S. Sweet & J. Mathews, 'Proportionality, Judicial Review, and Global Constitutionalism', in G. Bongiovanni et al. (eds.), *Reasonableness and Law* (2009) 173, 174.

⁴⁰ See, e.g., Nicholas Rostow, 'Nicaragua and the Law of Self-Defense Revisited', (1987) 11 *Yale J. Int'l L.* 437, 453 ("To be lawful, a responsive use of force under article 51 must aim to cure the breach that gave rise to the exercise of the right of self-defense. It must be proportional, involving no more than the force reasonably required to cure the breach.").

has endorsed an increasingly capacious definition of ‘imminence,’ treating credible threats of future attacks as ‘imminent’ even if the nature and timing of the anticipated attacks are uncertain and, in significant respects, hypothetical. One manifestation of this expansion of imminence in practice is the U.S. government’s oft-repeated emphasis on ‘necessity’ as a synonym or substitute for ‘imminence.’⁴¹ Customary restrictivists, on the other hand, contend that the imminence criterion requires a far narrower definition in harmony with the term’s ordinary meaning.⁴² Under the restrictivist reading of imminence, states may use force only if a specifically identifiable attack is in motion or about to commence.

Customary restrictivists also contend that international law imposes evidentiary constraints on states’ use of force. When states engage in anticipatory self-defence, for example, they must take into account the quality of the evidence states use to support the conclusion that an attack is imminent. The quality of evidence is also important in deciding whether the use of force in self-defence would meet the principle of proportionality. Just how solid the evidence must be to support the use of force depends upon context, including the time and resources available to the responding state, and the nature and severity of the anticipated threat.⁴³ Some scholars and policymakers in the United States have suggested, however, that the applicable standard places a much heavier evidentiary burden on states: establishing imminence and proportionality by “clear and compelling” evidence.⁴⁴

⁴¹ See, e.g., Bybee Memorandum, *supra* note 23.

⁴² See, e.g., N.S. Erakat, ‘New Imminence in the Time of Obama: The Impact of Targeted Killing on the Law of Self-Defense,’ (2014) 56 *Ariz. L. Rev.* 195, 202 (“Imminence indicates that an attack has not yet taken place but is already in motion or is otherwise inevitable.”).

⁴³ See, e.g., J.C. Daskal, ‘The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone,’ (2013) 161 *U. Pa. L. Rev.* 1165; M. Waxman, ‘The Use of Force Against States that Might Have Weapons of Mass Destruction,’ (2009) 31 *Mich. J. Int’l L.* 1.

⁴⁴ See, e.g., M.N. Schmitt, ‘U.S. Security Strategies: A Legal Assessment,’ (2004) 27 *Harv. J.L. & Pub. Pol’y* 737, 756-57 (discussing and endorsing the U.S. government’s assertion of this standard when responding in Afghanistan to the 9/11 terrorist attacks).

Finally, customary restrictivism asserts that international law places additional process-based safeguards on the use of force. For example, recent publications in U.S. journals have focused attention on questions of transparency, institutional checks and balances, and deliberative process—particularly in counter-terrorism operations where the nature and imminence of the threat posed by particular non-state actors abroad is not always clear to the public.⁴⁵ In American debates over the use of force, restrictivist scholars tend to characterize these factors as bedrock requirements of procedural due process that are anchored in both domestic and international law.

Conventional restrictivists have been known to criticize American legal scholarship for failing to take the UN Charter’s text seriously as a constraint on self-defence.⁴⁶ This characterization is not entirely without force. By and large, even the most restrictivist scholars in the United States find it difficult to accept the idea that the Charter alone establishes a comprehensive regulatory regime for the use of force. For American legal scholars, the Charter serves as a starting point for *jus ad bellum* analysis, but other sources are primarily responsible for supplying the robust framework of legal principles that regulate the use of force, including customary international law, general principles of law accepted by states, and basic principles of legality that are constitutive of international legal order.⁴⁷ The fact that American legal scholars have been more willing than their continental counterparts to draw on these sources to construct a restrictivist approach to the use of force should come as no surprise. This approach to *jus ad*

⁴⁵ See, e.g., P. Alston, ‘The CIA and Targeted Killing Beyond Borders’, (2011) 2 *Harv. Nat’l Sec. J.* 283.

⁴⁶ See, e.g., Corten, *supra* note 7, at 813.

⁴⁷ Viewed from this perspective, the principles that govern contemporary *jus ad bellum* have affinities with global administrative law, which plausibly constitutes “a revived version of *jus gentium*” based on “norms emerging among a wide variety of diverse actors and in very diverse settings, rather than depending on a *ius inter gentes* built upon agreements between states.” B. Kingsbury, N. Krisch & R.B. Stewart, ‘The Emergence of Global Administrative Law, The Emergence of Global Administrative Law’, (2005) 68 *L. & Contemp. Probs.* 15, 29.

bellum analysis resonates with the common law tradition, where legal principles pioneered and championed by courts such as proportionality, robust evidentiary burdens, and deliberative decision-making procedures have long been considered constitutive of the rule of law.⁴⁸ To common law lawyers, customary principles such as these are responsive to “the central aspiration of the rule of law—the subjection of public power to controls that ensure it is exercised in the interests of those affected by it.”⁴⁹ Much like common law courts have developed general principles in the domestic arena to constrain executive power, customary restrictivists in the United States have relied on general principles of common law constitutionalism and regulatory prudence—framed as norms of customary international law—to limit a state’s sovereign prerogative to use of force.

In the sections that follow, we examine how legal scholars in the United States have applied principles of international law outside the Charter to restrict the use of force in several distinct contexts. To be clear, we do not make the case here that American legal scholars have drawn directly upon common-law jurisprudence as inspiration for customary *jus ad bellum*. Nor do we claim that European scholars have neglected customary *jus ad bellum* as a source of legal constraints on the use of force.⁵⁰ We do argue, however, that the general *methodology* of restrictivist legal scholarship in the United States—with its relative neglect of Article 51 in favor of broad regulatory principles, evidentiary burdens, and procedural constraints—resonates with a common-law tradition that aspires to provide the law with stability and continuity, while also

⁴⁸ See D. Dyzenhaus, ‘The Rule of (Administrative) Law in International Law’, (2005) 68 *L. & Contemp. Probs.* 127, 131 (“[T]he history of the common law of judicial review is a history of judges imposing controls on public officials that are not prescribed by any statute.”).

⁴⁹ *Id.* at 129.

⁵⁰ For a comparison of expansionist and restrictivist approaches to customary *jus ad bellum*, see Corten, *supra* note 7.

ensuring that the law remains responsive to shifting societal needs over time.⁵¹ This approach to customary *jus ad bellum* features prominently in American scholarship covering a host of issues, from anticipatory self-defense to counter-terrorist operations against non-state actors to cyber-attacks. As these examples demonstrate, the American legal academy's focus on customary *jus ad bellum* to the relative neglect of the Charter's text reflects a distinctive 'common law' sensibility that marks a clear departure from the more formalist spirit of conventional restrictivism.

3. ANTICIPATORY SELF-DEFENCE

In stark contrast to conventional restrictivism, American legal scholars generally accept the idea that states may use force in some settings to protect their people against future attacks, not merely to ward off an attack that has already begun. Rather than reject anticipatory self-defence outright, restrictivist scholars in the United States have defined the sovereign right of anticipatory self-defence narrowly by applying a substantively and procedurally demanding conception of customary *jus ad bellum*.

U.S. Secretary of State Daniel Webster delivered the classic nineteenth-century statement on anticipatory self-defence during the *Caroline* affair of 1837.⁵² Concerned that an American ship was smuggling weapons across the Niagara River to Canadian rebels, British authorities entered American waters without the consent of the U.S. government to neutralize the threat. Although Webster contested the legality of this British response, he accepted in principle that international law would permit cross-border military action in contexts where there was "a

⁵¹ See generally Calabresi, *supra* note 31, at 1-5, 163-66 (discussing these features of the American tradition and encouraging judges to use "common law"-style adjudication to update obsolete statutes).

⁵² Letter from Webster to Fox, Apr. 24, 1841, 29 B.F.S.P. at 1137-38.

necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”⁵³ This “*Caroline* doctrine,” as it came to be known, was widely accepted in the United States as an authoritative statement of customary international law. Although the *Caroline* doctrine endorsed anticipatory self-defence as a general proposition, it limited this right by holding that the “necessity” for military action must be “overwhelming”—suggesting that solid evidence must support the existence a particularly grave threat. Moreover, by underscoring that self-defence would be permissible only in response to an “instant” threat, the *Caroline* doctrine introduced an imminence requirement; threats that were merely speculative or would take time to materialize would not support the use of force under this standard. At the same time, the idea that self-defence must “leav[e] no choice of means, and no moment for deliberation,” appeared to suggest that anticipatory self-defence would be permissible only if a state were compelled to take defensive measures reflexively under the kind of time pressure that would preclude an attempt to head off the threat through diplomacy, economic sanctions, or other non-forcible methods.

Following the adoption of the UN Charter, conventional restrictivists contended that Article 51 superseded the *Caroline* doctrine by providing a comprehensive international regime for the use of force.⁵⁴ Nonetheless, most American legal scholars continued to assert that anticipatory self-defence was legally permissible in response to imminent threats,⁵⁵ and references to the *Caroline* criteria continued to surface in broader debates at the international

⁵³ *Id.*

⁵⁴ See, e.g., J. Kammerhofer, ‘The Armed Activities Case and Non-State Actors in Self-Defence Law’, (2007) 20 *Leiden J. Int’l L.* 89, 99 (expressing skepticism that the *Caroline* doctrine, “a statement on the law on the use of force made in 1842[,] is still correct despite the developments over the last 165 years”).

⁵⁵ See, e.g., Schachter, *supra* note 26, at 1635; McDougal, *supra* note 28, at 599.

level.⁵⁶ For example, when the United States fired cruise missiles at several al Qaeda terrorist training camps in Sudan and Afghanistan following terrorist attacks against U.S. embassies in Tanzania and Kenya, restrictivist scholars in the United States criticized the action, arguing that further al Qaeda attacks were not imminent under the *Caroline* standard.⁵⁷ In contrast, the idea that anticipatory self-defence against an attack like the embassy bombings might be illegal *per se* under the UN Charter received scant attention in American scholarship.

Clarifying the international law of anticipatory self-defence assumed greater urgency following the devastating terrorist attacks of September 11, 2001. In its September 2002 National Security Strategy, the Bush Administration declared that it would use force to prevent biological, chemical, or nuclear weapons from falling into the hands of terrorist organizations.⁵⁸ The following year, the Bush Administration put this strategy into practice by intervening militarily in Iraq for the avowed purpose of, *inter alia*, preventing the Iraqi regime from delivering weapons of mass destruction (WMDs) into the hands of international terrorist organizations such as the al Qaeda network.

Although the 2003 Iraq War has been a source of great controversy among international lawyers in the United States, few American scholars have criticized the action on the grounds that anticipatory self-defence is never permissible under international law. Capturing the general consensus in the United States, Miriam Sapiroa suggests that in a world of proliferating WMDs

⁵⁶ See Schachter, *supra* note 26, at 1635 (observing that during “debates in the Security Council on [the legality of Israel’s 1981 strike against the Iraqi Osirak nuclear reactor], several delegates referred to the Caroline Case formulation of the right of anticipatory defense as an accepted statement of customary law”). In response to the ICJ’s *Nicaragua* judgment, U.S. State Department Legal Adviser Abraham Sofaer stated unequivocally: “The United States rejects the notion that the U.N. Charter supersedes customary international law on the right of self defense.” A. Sofaer, ‘Terrorism, the Law, and the National Defense’, (1989) 126 *Military L. Rev.* 89, 95.

⁵⁷ See, e.g., J.J. Paust, ‘Use of Force Against Terrorists in Afghanistan, Iraq, and Beyond’, (2002) 35 *Cornell Int’l L.J.* 533, 535-36.

⁵⁸ See Security Strategy of the United States of America, September 2002, *available at* <http://www.state.gov/documents/organization/63562.pdf>.

“it is more likely to be foolish, if not suicidal, for a state that believed its fundamental security interests were at risk to wait until the first attack.”⁵⁹ While American legal scholars have acknowledged “that the Charter’s language should [not] be stretched beyond its intended principles and purposes,”⁶⁰ they have been equally loathe to construe the UN Charter’s provisions as “a suicide pact” that would categorically prohibit self-defence in settings where grave threats such as WMD attacks could be anticipated and neutralized in advance.⁶¹

As an alternative to conventional restrictivism’s narrow reading of Article 51, customary restrictivists in the United States have emphasized principles of proportionality, imminence, burdens of proof, and obligations of transparent, deliberative process. In the months leading up to the invasion of Iraq, the Legal Adviser to the U.S. State Department, William Taft IV, endorsed this tradition in a memorandum to the American Society of International Law and the Council on Foreign Relations.⁶² He acknowledged that anticipatory self-defence would be permissible only if “proportional” and “justified only out of necessity. The concept of necessity includes both a credible, imminent threat and the exhaustion of peaceful remedies.”⁶³ Assistant Attorney General Jay Bybee also endorsed customary constraints such as imminence and proportionality but defined these principles expansively to permit action against threats that were not necessarily temporally proximate, but involved a threat of sufficiently high probability and

⁵⁹ M. Sapiroa, ‘Iraq: The Shifting Sands of Preemptive Self-Defense’, (2003) 98 AJIL 599, 602.

⁶⁰ *Id.*

⁶¹ See Secretary of State George Shultz, ‘Low-Intensity Warfare: The Challenge of Ambiguity’, 86 Dep’t St. Bull., Mar. 1986, at 17 (“The UN Charter is not a suicide pact.”).

⁶² W.H. Taft IV, Legal Adviser, Department of State, The Legal Basis for Preemption, Nov. 18, 2002, available at <http://www.cfr.org/publication.php?id=5250>.

⁶³ *Id.*; see also A. Sofaer, ‘On the Necessity of Preemption’, (2003) 14 EJIL 209, 220 (distilling a series of factors that would determine whether the use of force is legitimate under Article 51 of the Charter, including “(1) the nature and magnitude of the threat involved; (2) the likelihood that the threat will be realized unless pre-emptive action is taken; (3) the availability and exhaustion of alternatives to using force; and (4) whether using pre-emptive force is consistent with the terms and purposes of the UN Charter and other applicable international agreements”).

gravity to render military action “necessary.”⁶⁴ Restrictivist scholars in the United States would later criticize the Iraq War on the grounds that the imminence and proportionality requirements had not been satisfied because the United States lacked firm evidence that Iraq had concealed stocks of chemical or biological weapons for future use. Nor did the United States produce any credible evidence that Iraq had designs to put WMDs in the hands of international terrorists for a future attack against the United States.⁶⁵ American scholars stressed that this evidence fell well short of the “clear and compelling” evidence standard that the United States had relied upon as the applicable criterion for self-defence.⁶⁶ Some restrictivists argued further that the Bush Administration mischaracterized customary *jus ad bellum*; the imminence requirement could not be satisfied, they contended, without a temporally proximate threat.⁶⁷

In sum, restrictivist responses to the Iraq War in the United States have tended to focus on customary constraints such as imminence, proportionality, and burdens of proof, rather than critiques anchored directly to the Charter’s text. To pass muster under this approach, a state that invokes the ‘inherent right of self-defence’ bears the burden to show that its decision-making process is substantively and procedurally reasonable in light of factors such as the relative gravity of the threat, the availability of alternative tools to prevent an attack, and the likelihood that military action will undermine international peace and security. Rather than impose a bright-line rule against anticipatory self-defence, the U.S. tradition of customary restrictivism constrains

⁶⁴ Bybee Memorandum, *supra* note 23, at 26-27.

⁶⁵ See Senate Select Committee on Intelligence, Report on the U.S. Intelligence Community’s Prewar Intelligence Assessments on Iraq (July 7, 2004).

⁶⁶ See M.N. Schmitt, ‘U.S. Security Strategies: A Legal Assessment’, (2004) 27 *Harv J. L. & Pub. Pol’y* 737, 756-57 (suggesting that absence of objections to this standard in the U.N. Security Council and among NATO members testifies to the international legal authority of the “clear and compelling” evidence standard).

⁶⁷ See, e.g., Erakat, *supra* note 40, at 203-04, 243-47; T.M. Franck, ‘What Happens Now? The United Nations After Iraq’, (2003) 97 *AJIL* 607, 610, 619.

state action by requiring national authorities to show that the use of force was a strictly necessary and objectively reasonable response to a grave threat to human security.

4. THE USE OF FORCE IN COUNTERTERRORISM OPERATIONS AGAINST NON-STATE ACTORS ABROAD

Since shortly after the 9/11 attacks, the United States has maintained that it is at war with al Qaeda and associated groups. While the magnitude of the 9/11 attacks crystallized the American commitment to using military force against these non-state enemies, scholarly analysis of the use of force in self-defence against non-state terrorists evolved in the years before 2001. Customary restrictivist approaches were integral to finding legal authority for the military operations that followed 9/11, and these approaches have become more nuanced as the United States' experience with fighting non-state terrorist groups has grown.⁶⁸

4.1 *Evolving Self-Defence*

Long before the 9/11 attacks, the U.S. government and American legal scholars rejected the idea that attacks must be attributable to a foreign state to qualify for self-defence under Article 51. As Professor Michael Schmitt explained, the international reaction to States claiming self-defence in forceful responses to terrorism “evolved steadily” before the 9/11 attacks, “an evolution that reflects a clear shift in the normative expectations regarding exercise of the right.”⁶⁹ On April 5, 1986, terrorists bombed a discotheque in Berlin. One American soldier and a Turkish woman were killed and nearly 200 others were injured. Fortuitous intelligence intercepts quickly substantiated the Libyan People's Bureau as responsible for the attack. Within

⁶⁸ For a summary, see D. Bethlehem, ‘Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors’, (2012) 106 AJIL 769.

⁶⁹ M.N. Schmitt, ‘Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework’, (2008) 56 *Naval L. Rev.* 1, 7.

days the United States responded with air strikes targeting terrorist and Libyan government facilities, including a residence of Libyan leader Muammar el-Qaddafi. Although the international reactions to the military response were mostly critical, President Reagan announced that the United States acted lawfully: “Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight – a mission fully consistent with Article 51 of the UN Charter.”⁷⁰

On August 7, 1998, truck bombs exploded at the U.S. embassies in Kenya and Tanzania, killing nearly 300 people, including 12 Americans. Two weeks later, on August 20, the United States launched 79 Tomahawk cruise missiles against terrorist training camps in Afghanistan and a Sudanese pharmaceutical plant that the United States alleged to be a chemical weapons facility. President Bill Clinton explained that he ordered the attacks because “we have convincing evidence that [Islamic terrorist groups, including that of Osama bin Laden] . . . played the key role in the Embassy bombings . . . and compelling information that they were planning additional terrorist attacks against our citizens. . . .” The President wrote to Congress a day after the attacks reporting that

[t]he United States acted in exercise of our inherent right of self-defense consistent with Article 51 of the United Nations Charter. These strikes were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities. These strikes were intended to prevent and deter additional attacks by a clearly identified terrorist threat.⁷¹

⁷⁰ President Ronald Reagan, Address to the Nation (Apr. 14, 1986), in Dep’t State Bull. June 1986, 1-2.

⁷¹ Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 34 Weekly Comp. Pres. Doc. 1650 (Aug. 21, 1998).

The President did not assert that the Embassy bombings constituted an “armed attack.” Nor did he claim that the bombings were sponsored by any sovereign state. Instead, he justified the use of force in response to the bombings by embellishing traditional conceptions of self-defence with the values of necessity, proportionality, and deterrence, in part borrowed from the *jus in bello* and reflective of American conceptions of substantive reasonableness. American scholars largely supported the international legality of the strikes based on the same regulatory values. Ruth Wedgwood concluded that “nothing in the . . . Charter or state practice . . . restricts the identity of aggressors against whom states may respond,” and that “the use of military force must be tested by responsible decision-makers against a host of prudential considerations.”⁷² Former State Department Legal Advisor Abraham Sofaer argued that “self-defense allows a proportionate response to every use of force, not just ‘armed attacks.’”⁷³ Professor Wedgwood agreed that “the use of force was warranted to preempt terrorist action by bin Laden’s network,” and the missile strikes were thus not a reprisal.⁷⁴ Because al Qaeda had by then engaged in a “limited war” with the United States, “the rules of engagement are carefully moderated,” but this military response should be placed “within the international legal paradigm of war, rather than unbroken peace, with a right of ongoing military action against an adversary’s paramilitary operations and network.”⁷⁵ For Professor Wedgwood, the requirement of an ongoing threat of

⁷² R. Wedgwood, ‘Responding to Terrorism: The Strikes Against bin Laden’, (1999) 24 *Yale J. Int’l L.* 559, 563, 564.

⁷³ A.D. Sofaer, ‘Sixth Annual Waldemar A. Solf Lecture in International Terrorism: The Strikes Against bin Laden’, (1989) 126 *Mil. L. Rev.* 89, 92. Unsurprisingly, before 9/11 some leading U.S. scholars were not persuaded that non-state terrorists could engage in an “armed attack.” See, e.g., L. Henkin, *International Law: Politics and Values* (1995) 126 (“It is difficult to make an ‘armed attack’ out of a limited, isolated terrorist attack or even a few sporadic ones.”).

⁷⁴ Wedgwood, *supra* note 72, at 565.

⁷⁵ *Id.* at 576.

continuing terrorist attacks serves as an evidentiary standard to protect against uses of armed force based on pretext or mistaken factual determinations.⁷⁶

Three years later, after hijackers flew commercial airliners into the World Trade Center towers and the Pentagon, the United States wrote to the Security Council that it was initiating military action against al Qaeda training camps and Taliban military bases in Afghanistan in the exercise of its Article 51 right of self-defence to prevent and deter further attacks.⁷⁷ In December 2001, the Security Council approved the use of force against al Qaeda and the Taliban in Afghanistan when it authorized the creation of an International Security Assistance Force (ISAF) to disarm Taliban insurgents.⁷⁸ The operational and legal battleground would quickly shift beyond Afghanistan to the border regions of Pakistan, and eventually to Yemen and other locations. As American legal scholars grappled with the shifting battlefield that these cross-border operations represented, they developed nuanced criteria for evaluating compliance with international *jus ad bellum*.

If some legal scholars in the United States had questioned whether non-state terrorists could engage in an “armed attack” before 9/11,⁷⁹ the tide of scholarly opinion turned decisively in favor of the more expansive approach to non-state actors after 9/11. U.S. scholars concluded with virtual unanimity that the international community had come to “accept or at least tolerate

⁷⁶ See, e.g., J. Lobel, ‘The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan’, (1999) 24 *Yale J. Int’l L.* 537, 547 (“unilateral attacks based on secret information gained largely by inference” are unlawful).

⁷⁷ Letter from the Permanent Representative of the United States of America to the President of the Security Council (Oct. 7, 2001), 40 *I.L.M.* 1281 (2001).

⁷⁸ S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001); see also A. Roberts, ‘Afghanistan and International Security’, in M.N. Schmitt (ed.), *The War in Afghanistan: A Legal Analysis* (2009), 4 at 15 (concluding that the Security Council had earlier “accepted that a right of self-defense could apply to a State when it was attacked by a non-state entity”).

⁷⁹ See, e.g., L. Henkin, *International Law: Politics and Values* (1995) 126 (“It is difficult to make an ‘armed attack’ out of a limited, isolated terrorist attack or even a few sporadic ones.”).

acts of self-defense against a non-state actor.”⁸⁰ Rather than focus on the source of the threat to national security, U.S. scholars emphasized customary norms such as necessity and proportionality. For example, Professor Sean Murphy argued that U.S. responses to cross-border raids by Taliban insurgents in Pakistan should be evaluated based on the intrusiveness and gravity of the threats. Applying these criteria, he concluded that the 9/11 attacks and cross-border raids against U.S. forces in Afghanistan should be understood to satisfy the *jus ad bellum* requirements for an “armed attack.”⁸¹ Notably restrictivist scholars such as Mary Ellen O’Connell also endorsed the idea that a forceful response to Al Qaeda was justified based on the scale and gravity of the 9/11 attacks.⁸² Thus, drawing on customary principles that trace back to the *Caroline* incident, American legal scholars across the expansivist-restrictivist spectrum construed Article 51 to permit the use of force in self-defence, irrespective of the source of an attack, whenever a state’s sovereign responsibility to protect its people was manifestly “overwhelming” based on the scale and gravity of the threat to national security.⁸³

In addition to informing U.S. scholars’ understanding of the “armed attack” requirement, customary norms shaped restrictivist responses to U.S. military actions after 9/11 in a variety of other respects. Relying in part on the International Court of Justice’s (ICJ) *Advisory Opinion on Nuclear Weapons*, Murphy asserted that the necessity and proportionality of military action should take account of the availability and exhaustion of non-forceful alternatives and should be

⁸⁰ S.D. Murphy, ‘The International Legality of US Cross-Border Operations from Afghanistan to Pakistan’, in *The War in Afghanistan: A Legal Analysis*, *supra* note 78, at 109.

⁸¹ *Id.*

⁸² See, e.g., O’Connell, *supra* note 6, at 890-93. But see M.E. O’Connell, ‘Unlawful Killings with Combat Drones: A Case Study of Pakistan’, in S. Bronitt et al. (eds.), *Shooting To Kill: The Law Governing Lethal Force in Context* (2012) (“An armed response to a terrorist attack will almost never meet [the parameters of lawful self-defense.]”).

⁸³ Letter from Webster to Fox, *supra* note 52.

limited to measures that are reasonably necessary to counter an attack and protect U.S. forces.⁸⁴ More restrictivist scholars argued that a lawful use of force must also be geographically or spatially confined. O’Connell emphasized, for example, that “in addition to exchange, intensity, and duration, armed conflicts have a spatial dimension. . . . [That] there is an armed conflict in [Afghanistan does not mean] that Afghanis and Americans are at war with each other all over the planet.”⁸⁵ Jordan Paust echoed that “any conflict between the United States and al Qaeda as such cannot amount to war or trigger the application of the laws of war” across the globe; instead, the use of force in self-defence should be limited to areas where the United States was engaged in discrete conflicts or acted as an occupying power.⁸⁶ In these and other respects, U.S. restrictivist scholarship in the wake of the 9/11 terrorist attacks focused almost exclusively on elaborating and applying customary constraints on the use of force, treating these restrictions as either implicit requirements of Article 51 or side-constraints on the “inherent right” of self-defence.

4.2 Targeting and Drone Strikes

American debates over the legality of using force against non-state actors abroad shifted focus in significant respects as targeted killing became an increasingly central pillar of the United States’ counterterrorism strategy. The United States employed drones early in its campaign against al Qaeda and the Taliban in Afghanistan. It was not until November, 2002, however, that lethal force was used, when a Predator drone fired a Hellfire missile that struck and killed all five passengers traveling by car in a remote part of the desert in Yemen. The suspects included Qaed Saliim Sinan al-Harethi, wanted for his role in the 2000 suicide bombing

⁸⁴ Murphy, *supra* note 80, at 109; *see also* Sofaer, *supra* note 63, at 220.

⁸⁵ M.E. O’Connell, ‘Combatants and the Combat Zone’, (2009) 43 *U. Rich. L. Rev.* 845, 858.

⁸⁶ J.J. Paust, ‘Post 9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, The Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions’, (2007) 79 *Notre Dame L. Rev.* 1335, 1342; *see also* G. Rona, ‘Interesting Times for International Law: Challenges from the “War on Terror”’, (2003) 27 *Fletcher F. World Aff.* 55, 62.

of the USS Cole, which had killed 17 U.S. sailors. The other four, including one American, were allegedly accomplices of al-Harethi. Applying human rights law, the U.S. Special Rapporteur to the Commission on Human Rights claimed that the 2002 U.S. “attack in Yemen constitutes a clear case of extrajudicial killing.”⁸⁷ The use of drones for targeted killing operations began to accelerate after 2006 intelligence findings by President Bush, and peaked after President Obama revised the findings in 2009 and 2010 to authorize the targeting of top terrorist targets, including Osama bin Laden.

Predators and other drones have been used hundreds of times to fire at targets in Afghanistan, Pakistan, Yemen, Iraq, Somalia, and elsewhere. Other targeted killings, most notably of bin Laden, have been carried out by other means outside the “hot” Afghanistan battlefield. In 2010, State Department Legal Adviser Harold Hongju Koh gave an important speech laying out the Obama administration’s approach to international law.⁸⁸ Koh confirmed that, in addition to the present armed conflict between the United States, al Qaeda, and the Taliban and associated forces, the U.S. also “may use force consistent with its inherent right to self-defense under international law.”⁸⁹ Koh maintained that the United States may use “lethal force, to defend itself, including by targeting such persons as high-level al Qaeda leaders who are planning attacks.”⁹⁰ Acknowledging the difficulties of fighting a non-state enemy that does not respect sovereign borders and hides among the civilian population, Koh indicated that in each case, targeting decisions would be based upon subjective factors, “including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and

⁸⁷ U.N. Econ. & Soc. Council, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions, Submitted to Comm’n on Human Rights*, U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003).

⁸⁸ H.H. Koh, Legal Advisor, U.S. Department of State, Speech to the Annual Meeting of the American Society of International Law, *The Obama Administration and International Law* (Mar. 25, 2010).

⁸⁹ *Id.*

⁹⁰ *Id.*

ability of those states to suppress the threat the target poses.”⁹¹ Such factors along with the principles of distinction and proportionality are “implemented rigorously throughout the planning and execution of lethal operations.”⁹²

Responding to Koh’s speech, some international lawyers in the United States expressed “profound concern [that a] program that contemplates the killing of specific terrorists—including U.S. citizens—located far away from zones of actual armed conflict . . . violates international law.”⁹³ O’Connell continued to assert that international law would not permit a state to use force outside the bounds of an armed conflict, even where there is state consent. She insisted that just because “the United States is engaged in an armed conflict against al Qaeda in Afghanistan does not mean that [it] can rely on the law of armed conflict to engage suspected associates of al Qaeda in other countries.”⁹⁴ Similarly, UN Special Rapporteur Philip Alston concluded that the United States’ “broad and novel theory that there is a ‘law of 9/11’ that enables it to legally use force . . . [in] self-defense” anywhere in the world “threatens to destroy the prohibition on the use of armed force contained in the U.N Charter, which is essential to the rule of law.”⁹⁵ Other scholars and human rights groups likewise embraced what Professor Kenneth Anderson has called a “legal geography of war.”⁹⁶

In response, some American scholars and government officials have asserted that self-defence as exercised by the United States after 9/11 outside the armed conflicts in Afghanistan

⁹¹ *Id.*

⁹² *Id.*

⁹³ Letter from A.D. Romero, Executive Director of the American Civil Liberties Union, to Barack Obama, President of the United States, Apr. 28, 2010, at 1, available at <http://www.aclu.org/files/assets/2010-4-28-ACLUlettertoPresidentObama.pdf>.

⁹⁴ Declaration of Prof. M.E. O’Connell, ¶ 14; *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

⁹⁵ P. Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, A/HRC?14/24/Add.6 (May 28, 2010).

⁹⁶ K. Anderson, Hoover Inst., *Targeted Killing and Drone Warfare* (2011) 2-3 (noting that drones disturb the long-accepted “implied geography of war” based on “where hostilities took place.”)

and Iraq serves as an alternate justification for certain projections of force, and embeds customary law constraints of necessity and proportionality onto Article 51 self-defence.⁹⁷ As modified by subsequent administration statements, U.S. policy continues to suggest that it can lawfully inflict lethal force against anyone that is “part of” al Qaeda or associated forces without explicit geographic limits when the territorial state refuses consent or there is insufficient time to obtain consent.⁹⁸ Professor Jennifer Daskal argues that

lethal targeting outside a zone of active hostilities should be limited, not categorically prohibited. It should be focused on those threats that are clearly tied to the zone of active hostilities and other significant and ongoing threats that cannot adequately be addressed by other means. Moreover, a heightened quantum of information and other procedural requirements should apply, given the possibility and current practice of *ex ante* deliberation and review.⁹⁹

Professor Daskal reasons further that the United States should be precluded from invoking self-defence outside traditional battlefields unless it has established that the proposed target “pose[s]

⁹⁷ J.O. Brennan, Ass’t to the President for Homeland Sec. and Counterterrorism, Remarks at the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President’s Counterterrorism Strategy (Apr. 30, 2012) [hereinafter Brennan Remarks]; E.H. Holder, Jr., Att’y Gen., U.S. Dept of Justice, Remarks at Northwestern University School of Law (Mar. 5, 2012); J.C. Johnson, Gen. Counsel, U.S. Dep’t of Defense, Speech at the Oxford Union: The Conflict Against al Qaeda and its Affiliates: How Will it End? (Nov. 30, 2012) [hereinafter Johnson Speech]; C.A. Bradley & J.L. Goldsmith, ‘Congressional Authorization and the War on Terrorism’, (2005) 118 *Harv. L. Rev.* 2047, 2117-23 (international law does not limit the geographic scope of the battlefield); M.W. Lewis, ‘Drones and the Boundaries of the Battlefield’, (2012) 47 *Tex. Int’l L.J.* 293, 312-13 (limiting strikes to armed conflict zones would create sanctuaries for terrorists); J.J. Paust, ‘Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan’, (2010) 19 *J. Transnat’l L. & Pol’y* 237, 280 (suggesting that in lawful self-defense, targeted killings of non-state actors engaged in armed attacks can be permissible no matter where such attacks occur); J.D. Ohlin, ‘The Duty to Capture’, (2013) 97 *Minn. L. Rev.* 1268 (no strict geographic limits in applying IHL).

⁹⁸ See Brennan Remarks, *supra* note 97; Holder Remarks, *supra* note 97; Johnson Speech, *supra* note 97; Letter from Samantha J. Power, US Representative to the United Nations to Ban Ki Moon, Secretary-General of the United Nations, Sept. 23, 2014 [hereinafter Power Letter].

⁹⁹ Daskal, *supra* note 43, at 1209.

an actual, significant, and imminent threat that cannot be addressed by other means;” and lethal targeting is the least harmful means for addressing this threat.¹⁰⁰ Under this multi-factor approach to self-defence, the legality of drone attacks against suspected terrorists abroad would depend not only on whether the proposed targets have launched an “armed attack” under Article 51, but also whether the United States could satisfy principles of necessity, proportionality, deliberative procedures, and a robust burden of proof.

Over time, the Obama Administration has disclosed important details about the legal justifications and procedures that govern its targeted killing program, enabling scholars to scrutinize the program more closely for compliance with *jus ad bellum*.¹⁰¹ Beginning with Koh’s 2010 speech, *jus ad bellum* and *jus in bello* justifications for the United States’ targeted killing program have been offered in tandem.¹⁰² Yet the self-defence standards that have been articulated by government officials and academics continue to be at least as contested as any from the laws of armed conflict. At this writing, debates over the legality of military action against the Islamic State in Iraq and Syria (ISIS) have the United States seeking to import ISIS into its ongoing global armed conflict with al Qaeda—a conflict that is not limited to any particular location. Relying on administration policy articulated by National Security Adviser John Brennan in 2011, military action against ISIS in Iraq or Syria could occur without undertaking a separate self-defence analysis if the host state consents to the use of force (Iraq) or is unwilling or unable to suppress the threat posed by ISIS (Syria).¹⁰³ Moreover, treating ISIS

¹⁰⁰ *Id.* at 1209, 1230-31.

¹⁰¹ See Brennan Remarks, *supra* note 97; Holder Remarks, *supra* note 97; Johnson Speech, *supra* note 97.

¹⁰² Stephen W. Preston, Gen. Counsel, CIA, Remarks at Harvard Law School (Apr. 10, 2012) (arguing that to justify the use of force “we need look no further than the inherent right of national self-defense, which is recognized by customary international law”).

¹⁰³ A. Deeks, ‘Narrowing Down the U.S. International Legal Theory for ISIS Strikes in Syria’, Lawfare blog, Sept. 12, 2014, *available at* <http://www.lawfareblog.com/2014/09/narrowing-down-the-u-s-international-legal-theory-for-isis-strikes-in-syria/>. For background, see A. Deeks, “Unwilling or

conceptually as part of or equivalent to al Qaeda arguably would allow the United States to consolidate attacks by the two groups to establish a threat of sufficient intensity to meet the “scale and gravity” requirements for self-defence under the American reading of Article 51. Still, legal scholars in the United States continue to debate various aspects of the Obama Administration’s case for military action, including whether a sufficiently robust link has been established between ISIS and al Qaeda and whether ISIS poses an actual, significant, and imminent threat to the United States.

Taking a step back from the specifics of these debates, what stands out are the common themes that link restrictivist approaches to the use of force in the United States, and how sharply these themes depart from conventional restrictivism. Restrictivists in the United States rarely focus their attention on the kind of formal textual exegesis that defines conventional restrictivism. For American legal scholars trained in a common-law tradition that seeks to preserve the law’s flexibility to meet evolving societal demands, customary restrictivism has great intuitive appeal. As Michael Schmitt puts it, “law must be construed in the context in which it is to be applied if it is to remain relevant; and in the twenty-first century security environment, insistence on a passé restrictive application of international legal principles . . . would quickly impel States at risk to ignore them.”¹⁰⁴ Consistent with this vision, customary restrictivists in the United States have articulated a purposive, realist vision of *jus ad bellum* that makes allowance for states’ legitimate sovereign interests in defending their people from dangerous non-state actors. This increased tolerance for uses of force against non-state actors has been accompanied,

Unable”: Toward a Normative Framework for Extraterritorial Self-Defense’, (2012) 52 *Va J. Int’l L.* 483. Indeed, in her September 23, 2014 letter to the Secretary General, Ambassador Samantha Power noted that Article 51 self-defense is lawful where “the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that [it is unwilling or unable]. Accordingly, the United States has initiated necessary and proportionate military actions in Syria.” Power Letter, *supra* note 101.

¹⁰⁴ M. Schmitt, ‘Preemptive Strategies in International Law’, (2003) 24 *Mich. J. Int’l L.* 513, 546.

however, by a sustained commitment to nontextual constraints such as necessity, proportionality, and burdens of proof that are designed to limit and legitimate forceful responses through careful evaluation of context and facts. For customary restrictivists in the United States, these limits on the use of force combine clear-eyed realism about the law's limited capacity to constrain state behavior, on the one hand, with a firm commitment to the principles and values of common-law constitutionalism and the rule of law, on the other.

5. SELF-DEFENCE AGAINST CYBER ATTACKS

Our final example points toward common ground rather than cleavages between European and American approaches to a quintessentially modern security problem: cyber-attacks. A form of customary restrictivism has emerged in both the United States and Europe in the evolving legal posture for defending against cyber-attacks. Spurred by cyber intrusions directed at Estonia in 2007 and Georgia in 2008, recent years have witnessed a major research initiative sponsored by NATO, a related series of important conferences, and independent scholarship on both sides of the Atlantic addressing the international legal regime for self-defence against cyber attacks. These efforts suggest that there is considerable harmony among international lawyers on the need for a hybrid form of customary restrictivism that would adapt responses to cyber intrusions to both the Charter and principles of customary international law.

Developing a consensus-based understanding of the international law of cyber conflict has been complicated by unique attributes of the cyber domain. Prompt attribution of an attack, and even threat identification, can be very difficult. As a result, setting the critical normative starting point—the line between offense and defense—is elusive. May a state implement countermeasures in advance of a cyber-intrusion? If attribution cannot be reliably determined,

must responses be delayed accordingly? Most notably for our purposes, it is unclear when a cyber intrusion constitutes an “armed attack” that would trigger a right of self-defence under the Charter.

The traditional and dominant view is that the prohibition on the use of force and right of self-defence apply to armed violence, and only to interventions that produce physical damage. Under the traditional standard, most cyber-attacks will not violate Article 2(4), and thus do not enable Article 51 self-defence. During the Cold War, some States argued that “use of force” should be determined not so much by the type of *instrument* employed, but rather by the *effects* of the intrusion, by whatever means.¹⁰⁵ Although the U.S. government has resisted efforts to broaden the interpretation of “force” in conventional conflicts, it appears to have embraced an effects-based determination of the use of force norm in the cyber domain.¹⁰⁶ The 2011 White House Cyberspace Strategy states that “the United States will respond to hostile acts in cyberspace as we would to any other threat. . . . [C]ertain hostile acts conducted through cyberspace could compel [forcible] actions under the commitments we have with our military treaty partners.”¹⁰⁷

Meanwhile, between 2009 and 2013 a remarkably constituted international group of legal experts convened in Tallinn, Estonia under the auspices of the NATO Cooperative Cyber Defense Center of Excellence for the purpose of producing a manual on the law governing cyber warfare. The experts included scholars and practitioners from around the world, including many

¹⁰⁵ M.C. Waxman, ‘Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)’, (2011) 36 *Yale J. Int’l L.* 421, 428-30.

¹⁰⁶ *Id.* at 431, 436-7; The White House, *International Strategy for Cyberspace: Prosperity, Security, and Openness in a Networked World* (2011), 14; O.A. Hathaway et al., ‘The Law of Cyber-Attack’, (2012) 100 *Cal. L. Rev.* 817, 848; W. Banks, ‘The Role of Counterterrorism Law in Shaping ad Bellum Norms for Cyber War’, (2012) 89 *Int’l L. Studs.* 157, 169-70.

¹⁰⁷ White House Strategy, *supra* note 106, at 14.

from Europe and the United States. The resulting *Tallinn Manual on the International Law Applicable to Cyber Warfare* sought to apply existing legal norms to cyber warfare.¹⁰⁸

Remarkably, the *Tallinn Manual* and its commentary revealed a rough convergence of views among European and American legal experts on a variety of issues regarding the applicability, scope, and criteria for invoking self-defence in the cyber realm. The experts agreed that “whether a cyber-operation constitutes an armed attack depends on its scale and effects,” and a majority of the group concluded that an armed attack does not necessarily involve the employment of “weapons.” If the effects of a cyber-operation are analogous to those resulting from a kinetic attack, the instrument used to cause the effects is not critically important.¹⁰⁹ The group also agreed that accumulated effects from aggregated small cyber incidents may constitute an armed attack as a composite.¹¹⁰ At the same time, the experts concluded that the law remained unclear on the “precise point at which the extent of death, injury, damage, destruction, or suffering caused by a cyber-operation fails to qualify as an armed attack.”¹¹¹ Perhaps most interesting for present purposes, experts from both sides of the Atlantic concurred that self-defence in response to cyber attacks is subject to the same customary constraints that apply in the kinetic realm, including necessity, proportionality, imminence, and immediacy.¹¹²

The experts who gathered at Tallinn did not reach a consensus on all issues regarding the application of self-defence to cyber attacks. Like legal scholars and practitioners generally, the experts were divided over how *jus ad bellum* would apply to cyber intrusions that have extensive negative impacts but cause no injury, death, or physical destruction. In this unsettled area, some

¹⁰⁸ M.N. Schmitt (gen. ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (2013).

¹⁰⁹ *Id.* Rule 13(3), (4).

¹¹⁰ *Id.* Rule 13(8).

¹¹¹ *Id.* Rule 13(7).

¹¹² *Id.* Rule 13(21).

international lawyers took the view that physical harm to persons or property must exist for there to be an armed attack. Others focused on the scale of harm to a state's national interests, asserting that any cyber attack that wreaked massive harm on a state—for example, by crashing its national stock exchange and thereby derailing its economy—would justify a forcible response under Article 51.¹¹³ Additionally, the group remained divided over whether a State may undertake self-defence in the face of armed attacks by non-state actors.¹¹⁴

Parallel with the Tallinn project, American scholars have lined up in support of characterizing especially destructive cyber-attacks as armed attacks that give rise to Article 51 self-defence. Some American scholars, like Professors Michael Schmitt, Eric Talbot Jensen, and Sean Watts, support an impact analysis that would permit a forcible response if the cyber intrusion causes harm to the victim state equivalent to a kinetic attack.¹¹⁵ Others, like Gary Sharp, argue that a cyber-attack qualifies as an armed attack whenever the intrusion penetrates any critical national infrastructure system, regardless of whether it has yet caused any physical destruction or casualties.¹¹⁶ Thus, instead of the traditional and relatively clearer formulation of “armed attack,” many American scholars now support a more subjective effects-based criterion for determining whether a cyber intrusion triggers self-defence.

Some legal scholars in the United States have used the emerging effects-based formulation of Article 51 to advocate for restrictive approaches to self-defence in the cyber

¹¹³ *Id.* Rule 13(9).

¹¹⁴ *Id.* Rule 13(17). A majority accepted self-defense in the cyber realm against non-state actors. *Id.*

¹¹⁵ See, e.g., W.A. Owens et al. (eds.), National Research Council, *Technology, Policy, Law and Ethics Regarding U.S. Acquisition and Use of Cyberattack Capabilities* (2009), 33-34 [hereinafter NRC report]; E.T. Jensen, ‘Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense’, (2002) 38 *Stan. J. Int’l L.* 207, 223-29; M.N. Schmitt, ‘Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework’, (1999) 37 *Colum. J. Transnat’l L.* 885, 930-34; S. Watts, ‘Low-Intensity Computer Network Attacks and Self-Defense’, in R.A. Pedrozo & D.P. Wollschlaeger (eds.), *International Law and the Changing Character of War* (2011).

¹¹⁶ W.G. Sharp, *Cyberspace and the Use of Force* (1999), 129-30.

context. These scholars tend to focus on the scope and gravity of the harm caused by the cyber event and the magnitude and immediacy of the threat posed by the attacks; accordingly, they support extending the principles of necessity and proportionality to responses to the cyber arena.¹¹⁷ In a representative article, Daniel Silver has argued that a cyber-attack justifies self-defence “only if the severity of . . . [the] foreseeable consequences resembles the consequences that are associated with armed coercion.”¹¹⁸ The malleability of the foreseeability concept enables an evolving understanding of permissible responses to cyber-attacks, but it also sets a hard outer limit for the use of force. Common law restrictivist scholars have applied necessity and proportionality to cyber-attacks in much the same way.¹¹⁹ Under this application of customary principles of self-defence, military action is permissible in response to cyber attacks only if such action is strictly necessary and narrowly tailored to prevent grave and imminent harm. Thus, American scholars have envisioned the effects-based approach to self-defence under Article 51 not only as a basis for expanding the right to use force in response to cyber attacks, but also as a significant constraint on the United States’ recourse to force.

Both the expansionist and restrictivist features of the effects-based position appear to have gained the support of the U.S. government. As then-head of U.S. Cyber Command General Keith Alexander stated in congressional testimony in 2010, “[i]f the President determines a cyber-event does meet the threshold of a use of force/armed attack, he may determine that the activity is of such scope, duration, or intensity that it warrants exercising our right to self-

¹¹⁷ NRC Report, *supra* note 115, at 253-54; D.B. Silver, ‘Computer Network Attack as a Use of Force Under Article 2(4) of the United Nations Charter’, in M.N. Schmitt & B.T. O’Donnell (eds.), *Computer Network Attack and International Law* (2002), 89.

¹¹⁸ Silver, *supra* note 117, at 90-91.

¹¹⁹ See Waxman, *supra* note 128, at 112; Jensen, *supra* note 115, at 230; M.R. Shulman, ‘Discrimination in the Laws of Information Warfare’, (1999) 37 *Colum. J. Transnat’l L.* 939, 955-56.

defense.”¹²⁰ While serving as Legal Adviser to the State Department in 2012, Koh elaborated the official U.S. position when he stated that “cyber activities that proximately result in death, injury, or significant destruction would likely be viewed as a use of force.”¹²¹ Further details about the U.S. government’s position emerged the following year in the first wave of leaks from former NSA contractor Edward Snowden, when *The Guardian* published the undated Presidential Policy Directive/PPD-20, U.S. Cyber Operations Policy. The directive addresses “Defensive Cyber Effects Operations (DCEO)” for “defending or protecting against imminent threats or ongoing attacks or malicious cyber activity against U.S. national interests.”¹²² The directive reserves “the right to act in accordance with the United States’ inherent right of self-defence as recognized in international law,” including through the conduct of DCEO, in contexts where “network defense or law enforcement measures are insufficient or cannot be put in place in time to mitigate a threat[,] . . . or if [senior officials determine that DCEO] provides an advantageous degree of effectiveness, timeliness, or efficiency compared to other measures commensurate with the risks.”¹²³ Following the emerging customary restrictivist approach to cyber attacks, however, the directive also emphasizes that “[t]he United States Government shall conduct DCEO with the least intrusive methods feasible to mitigate a threat.”¹²⁴ In important respects, therefore, U.S. policy on cyber security appears to embrace central tenets of customary restrictivism, permitting

¹²⁰ Advance Questions for Lieutenant General Keith Alexander, USA, Nominee for Commander, United States Cyber Command: Before the S. Armed Services Comm., 111th Cong. 11 (2010).

¹²¹ H.H. Koh, Remarks at the U.S. Cyber Command Inter-Agency Legal Conference: International Law in Cyberspace (Sept. 18, 2012). Koh offered several examples of the types of cyber attacks that would trigger self-defense rights: cyber events that trigger a nuclear plant meltdown; intrusions that open a dam above a populated area causing destruction, or operations disabling air traffic control causing airplane crashes. *Id.*

¹²² Published by *The Guardian* on June 7, 2013, at <http://www.guardian.com.uk/world/interactive/2013/jun07/obama-cyber-directive-full-text>.

¹²³ *Id.*

¹²⁴ *Id.*

the use of force only if such action is strictly necessary to ward off or prevent an imminent attack, and only if forcible measures represent the least harmful means for preventing grave injury.

In a further sign of convergence between the European and American positions on cyber defense, NATO states collectively endorsed the effects test at a recent summit in South Wales. The resulting declaration of September 5, 2014, proclaims that a cyber-attack on any NATO member could trigger a collective response from all of its allies under Article 5 of the North Atlantic Treaty.¹²⁵ According to the declaration, “cyber attacks can reach a threshold that threatens national and Euro-Atlantic prosperity, security, and stability. Their impact could be as harmful to modern societies as a conventional attack.”¹²⁶ By accepting the effects-test, NATO member states also implicitly accepted the idea that the effects-based “threshold” would also serve as a limitation on the use of force in response to cyber attacks. Less clear on the face of the declaration is whether NATO members also accept the full panoply of customary principles that have been the focus of attention in American legal scholarship. Although the South Wales declaration “recognises that international law, including international humanitarian law and the UN Charter, applies to cyberspace,”¹²⁷ it does not specify any particular customary norms that would constrain member states’ recourse to force. Nonetheless, the fact that NATO member states were able to reach a consensus on the effects test as a justification for collective military action at least suggests the possibility for a similar consensus on a customary-restrictivist approach to self-defence against cyber attacks.

¹²⁵ Wales Summit Declaration, Issued by the Heads of State and Government Participating in the North Atlantic Summit in Wales, Sep. 5, 2014, ¶ 72, at http://www.nato.int/cps/en/natohq/official_texts_112964.htm.

¹²⁶ *Id.*

¹²⁷ *Id.*

Whatever the transatlantic convergence on cyber-attacks and self-defence, the U.S. government and American scholars employ a form of customary restrictivism in extending concepts of necessity, distinction, and proportionality to modulate the response to an attack, whether kinetic or non-kinetic.¹²⁸ This focus on context-sensitive customary principles rather than formal interpretation of the Charter reflects deeper trends in the United States’s common-law culture, as shaped by the confluence of legal realism and common-law constitutionalism. Rather than interpret the Charter’s international regime for the use of force as a static code, American legal scholars tend to approach Article 51 as a device for facilitating global coordination in the continuing development of customary *jus ad bellum*. Although concepts such as “armed attack” offer a starting point for analysis, American legal scholars generally accept that the international regime for the use of force is a product of the international community’s dynamic consensus, and must be allowed to adapt to meet the international community’s shifting needs—including the need to address the new threats posed by cyber attacks. What remains constant for American legal scholars are those customary constraints that represent basic safeguards against the abuse of state power: general legal principles such as necessity, proportionality, imminence, reasoned deliberation, and robust burdens of proof. That U.S. policymakers and legal scholars have embraced these principles in the cyber context so rapidly and with such broad agreement reveals just how deeply customary restrictivism has become engrained in U.S. legal culture.

6. CONCLUSION

¹²⁸ Koh, *supra* note 121, at 5; M.N. Schmitt, ‘Cyber Operations in International Law: The Use of Force, Collective Security, Self-Defense, and Armed Conflicts’, in Herb Lin (ed.), *Proceedings of a Workshop on Deterring Cyberattacks* (2009), 151 at 167; Waxman, *supra* note 128, at 112.

Conventional restrictivists conceive of the UN Charter’s collective security regime as a seamless code for the use of force. The language of Article 51, on this view, precisely defines the circumstances in which states may invoke a right of self-defence. Legal scholars in the United States, however, have been more receptive to the idea that Article 51 serves to preserve a customary right of self-defence that continues to evolve over time, adapting to new challenges and threats, through the steady accretion of state practice and *opinio juris*. For customary restrictivists in the United States, it is the principles of customary *jus ad bellum*—not the formal terms of Article 51—that provide international law’s primary constraints on the use of force. Dynamic customary requirements of necessity, proportionality, public deliberation, and robust burdens of proof define the metes and bounds of a state’s “inherent right of self-defence” under Article 51.

Of course, whether the *jus ad bellum* principles endorsed as custom by American restrictivists actually satisfy the traditional criteria for customary international law remains a matter of vigorous debate. We have not attempted to resolve the debate in this Article. Nor have we taken a position here on whether the traditional criteria set forth in the Statute of the International Court of Justice¹²⁹ accurately capture how states, international courts, and other global actors identify customary norms in practice.¹³⁰ Rather, this Article’s modest contribution has been to highlight how American restrictivist scholars have focused on customary *jus ad bellum* as their preferred vehicle for subjecting the use of force to the rule of law. These efforts have reinforced traditional principles of proportionality, imminence, and necessity, but they have also generated new norms such as the emerging requirement that states must make their case for

¹²⁹ Statute of the International Court of Justice, art. 38.

¹³⁰ See C.A. Bradley, A State Preferences Account of Customary International Law Adjudication, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2508298 (casting doubt on the traditional formula and suggesting a new approach expressly modeled on common law adjudication).

military action to the international community based on “clear and convincing evidence.” While U.S. scholars are not unique in stressing the importance of customary norms governing the use of force, their commitment to refine existing customary norms and develop new norms as an alternative to adopting limiting interpretations of the Charter reflects a characteristically American strategy for balancing legal continuity and change.

For decades, American legal scholars have argued that aspects of conventional restrictivism are politically unsustainable. When a state faces a genuinely imminent and existential threat to its national security, the thinking goes, national authorities will not hesitate to use force in self-defence—even if the threatened attack has not yet “begun” or cannot be attributed to a state. Many U.S. scholars have suggested that state practice following 9/11 supports this thesis. Confronted with such arguments, conventional restrictivists typically object that violations of the Charter—no matter how frequent or widespread—do not undermine the authority of the Charter’s requirements.¹³¹ Yet the less credence states accord to conventional restrictivism, the more weight customary *jus ad bellum* will be asked to bear as a constraint on states’ recourse to force. As this Article has shown, the U.S. government has endorsed core features of customary restrictivism, even as it has adamantly rejected conventional restrictivism. While the United States may be somewhat exceptional in this regard, it is hardly unique; other states with legal systems shaped by the common law tradition such as Australia, Israel, and the United Kingdom have followed a similar course. At the time of this writing, it seems possible that the gravitational pull of this growing body of state practice and *opinio juris* will eventually bend continental European approaches to self-defence into the same orbit. Indeed, as we have seen, recent developments in the law of counterterrorism and cyber security suggest that this

¹³¹ See, e.g., Kammerhofer, *supra* note 4, at 641 (arguing that even if customary international law offers a wider birth to self-defence than the Charter, this “does not help in justifying a prima facie breach of Article 2(4)”).

process may already be underway. Conventional restrictivists in Europe would do well, therefore, to engage directly with American legal scholarship on the use of force, if only to have a voice in the progressive development of customary *jus ad bellum*.