Preemptive Self-Defense: Inherently Inconsistent or Technologically Essential?

September 11, 2001. It is a day that is permanently embedded in the hearts and minds of countless people across our nation. It is a day, just as December 7, 1941, that will "live in infamy." But it is also a day that marked a shift in the world's perspective regarding the right to self-defense – a shift in the world's view of war, and its laws.

When one imagines war as it existed prior to the 21st Century, it traditionally evokes images of large masses of men engaged in intense, physical combat – a method of conflict that ordinarily left no doubt as to who emerged the victor at the consummation of the struggle. This was the case well into the 1900s. Even World War II, which was a catalyst for countless technological developments, was a war largely based on direct, physical confrontation. It was this aspect of the nature of war that strongly, yet silently, influenced the birth and childhood of international law in the first half of the 20th Century. A paramount illustration is the Charter of the United Nations. Entered into force on October 24, 1945, the Charter is the foundational treaty of the U.N., and has been ratified by nearly all of the world's countries.

Article 51 of the Charter reaffirmed the long-standing customary principle that sovereign states possess the inherent right of individual or collective self-defense when confronted with an armed attack. In more affirmative terms, the interminable fact that there *are* exceptions to the general prohibition against unwarranted use of force was codified at the international level by the provisions of Article 51. In a general way, the preeminent exception is very simple – use of force is permissible in a defensive response to an armed attack.

There necessarily arises a question demanding analysis – what constitutes an armed attack? As previously eluded to, the answer to this question is invariably linked to the nature of war as it existed at a given time in history. In the years immediately following the adoption of the U.N. Charter, additional treaties, including the Geneva Convention IV and Additional Protocols I and II to the Geneva Conventions, have elaborated on precisely what constitutes an attack of the intensity or duration that warrants a defensive use of force. But all have done so almost exclusively, and perhaps unavoidably, within their immediate historical context. For the international community to define "armed attack," it was not necessary to peer into the future in anticipation of then-unknown methods of warfare.

On the contrary, even in the middle of the 20th Century, the nature of warfare had not changed in a way that could have been described as unforeseeable one hundred years earlier. Granted, there were technological advancements. But, the component that lay at the heart of warfare had not changed. Men still fought, *en masse*, with locational, physical exertion. For that reason, the factors that have, for the last half-century, defined armed conflict, were in no way anticipatorily holistic – they were not intended to account for the truly unforeseeable elimination of the human element from the battlefield.

For example, one requirement, under Additional Protocol II, is that armed conflict be between organized armed groups "under responsible command."[1] Furthermore, such armed groups must also "exercise control over a part of [the defending state's] territory" in a manner that "enable[s] them to carry out sustained and concerted military operations." These factors have served an indispensable purpose when examining battlefields, the men on them, and the movements they make. They have served the purpose of quantifying and qualifying the power of a threat, especially where such power was determined, as it has been for so long, by numbers: number of men, number of machines, number of acres occupied, number of miles from our gates. As stated, criterion or this sort were still widely applicable during conflicts as recent as World War II.

However, the passage of time is rendering such factors utterly useless in many situations. Consider the following scenario: insurgents, possessing no governmental or organizational affiliation, are encamped in a valley. The encampment, consisting of both above-ground structures and subterranean passages, is barely visible with the human eye. Three months prior, the insurgents were instrumental in a devastating terrorist act on the soil of another continent. Now, a missile, sixty-four inches in length and seven inches in diameter, emerges from the sky and strikes the ground, creating a blast radius large enough to demolish structures and draw all air from within the tunnels. The direct origin of the missile is an aircraft; an aircraft deployed by a sovereign state in another continent; an aircraft devoid of any human being; an aircraft whose controllers are hundreds of miles away.

The customary factors used in determining whether a situation constitutes armed conflict are nearly useless in such a scenario. Who is to determine whether such an encampment is under responsible command? Perhaps more pertinent, who is *able* to make such a determination. The determination of whether the insurgents exercise control over a part of the other state's territory is irrelevant, as the insurgents have never left the borders of the country in which they were born. An analysis of whether the insurgents are capable of carrying out sustained and concerted military operations may be equally as meaningless, as it is often nearly impossible to ascertain whether these particular insurgents have *ever* engaged in military operations.

It is precisely this type of scenario that has led to the international community's apprehensive response concerning the legitimacy of so-called preemptive self-defense. The rising implementation of unmanned aerial vehicles in response to armed groups that are not readily identifiable is an imminent, serious challenge for the legal community. While many point to the Six-Day War as the first large-scale example of the use of preemptive self-defense, what is often overlooked is the fact that preemptive uses of force have always been an integral *component* of war. During a war, each party attempts to predetermine the other's strategy, and, if possible, strike first. The issue comes to a head when one follows the "tennis ball" of attacks and responses back to initiation and is forced to ask the question, who used force first? And even if that question can be answered, the question of whether a "preemptive" response is proportional to the attack remains on the table – demanding an entire new tier of analysis.

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[1] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Jun. 8, 1977, 1125 U.N.T.S. 609, at art. 1.

Regardless of one's opinion on the legitimacy of preemptive self-defense, it is certain that the ability for law-makers and military officials to analyze and draw conclusions on the appropriateness of force has become exponentially more difficult. Never before has an enemy possessed the ability to strike with such power, and yet remain so elusive. Never before has a nation possessed the ability to strike back in such a non-human manner, and yet produce results that are so humanly devastating. Perhaps it is the fear that preemptive wars will become an artificial justification for wars of aggression. Or perhaps it is merely resentment toward an already disliked elected official or administration. Whatever the cause of the great apprehension toward the use of preemptive force, the international legal community has no small amount of work ahead of it as it attempts to keep pace with a rapidly changing world.