A Theory of Legitimate Defense

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Abstract and Keywords
This chapter focuses on Article 51 of the UN Charter concerning self-defense and examines the concept of legitimate defense. It discusses the concept legitimate defense as an extensive interpretation of self-defense in the Charter. In addition, it looks into the distinction of understanding and interpretation of various nations of self-defense and the problems that it carries. The chapter also investigates on whether nations have the inherent or natural right to defend not only themselves but other states that are subject or aggression. It cites Operation Desert Storm by the Bush administration as an example.

Keywords: UN Charter Article 51, self-defense, legitimate defense, Bush administration, Operation Desert Storm, George H.W. Bush

1. Self-Defense and Defense of Others
Although all common law jurisdictions refer to the concept of selfdefense, the term, at least in this form, is not universally used. Indeed, most other countries on the Continent replicate the German pattern of speaking about “necessary defense”
instead of speaking of self-defense. The French term, which is reproduced in all other Romance languages, is simple and direct: *légitime défense*, or legitimate defense.¹

The differences between the English concept of self-defense and the French concept of *légitime défense* are deep and far-reaching. In domestic legal systems, self-defense is supplemented by a whole range of parallel concepts. To use the terms and code sections of the U.S. Model Penal Code, self-defense (§ 3.04) is supplemented by the defense of other persons (§ 3.05) and defense of property (§ 3.06). All three of these forms of defense would be covered by the French concept of *légitime défense*. The three Model Penal Code sections employ a total of 1,881 words to micromanage the range of issues that are covered by the typical European codes’ provisions on legitimate defense in a single sentence.

For example, the German Penal Code Article 32 holds that a “defensive use of force is legitimate when necessary to avert an imminent unlawful attack to oneself or others.” The attack on oneself or others includes (p.64) all interests of the person: bodily security, property, and even intangible interests such as privacy. How is it possible that this single sentence adequately covers the same territory of defensive force as the 1,881 words of the Model Penal Code? The answer is simple: it is not meant to. Criminal codes in the Continental tradition are not recipes for solving all possible problems. Rather, they state general principles and leave the rest to be worked out by the case law and the scholarly literature.

The distinction between self-defense and *légitime défense* also exists in international law, although here the confusion is even greater. The French-language version of the United Nations Charter, which is just as authoritative as the English version, uses the phrase *droit naturel de légitime défense* to refer to what is termed in the English version “the inherent right of self-defense.” The “inherent right” becomes a “natural right” in French; even more intriguingly, “self-defense” becomes the more generalized concept of *légitime défense*. Parallel translations are found in Spanish and Russian.²

It is difficult to know, therefore, which term, self-defense or *légitime défense*, we should use from this point on. Both terms carry official weight in international law; both are used in official versions of the UN Charter. But Article 51 also uses
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another term that muddies the waters. Alongside individual self-defense, the Charter mentions “collective self-defense,” which advert to one nation assisting another in warding off an aggressor. For example, in 1991 the United States engaged in collective self-defense by going to the rescue of Kuwait against Iraq. There is, then, a potential for overlapping references to the right of states to rescue each other from aggression. This form of defensive force could be treated as collective self-defense, or it could be implied by the defense of others included in légitime défense and even in some statutory definitions of self-defense. However, as it is described under Article 51, the right of states to come to each other’s aid is freighted, in international law, with concerns about covert aggression, or coming to the aid of another and then remaining as the occupier of the defending country.

These fears complicate the question of principle. Should states have the inherent or natural right to defend not only themselves but other states that are subject to aggression? If Kuwait is subject to attack, do all states have a right to send troops to defend it? If Vietnam is subject to attack from the North, may Americans send troops even without the consent of the South Vietnamese government? Americans assumed that they needed to be invited by the sovereign government in Saigon. But this interpretation is not self-evident. If we follow the French charter text and instead assume a right of légitime défense, there is little doubt that saving other states from aggression falls within the natural right recognized by the (French version of the) Charter.

The enormous difference between these two concepts of defensive force—self-defense and legitimate defense—shapes the assumptions of international law. Because most scholars follow the English rather than the French text, they have tended to assume that this “inherent right” is limited to the protection of one’s own borders. Insofar as our choice of language determines policy, we should perhaps be more conscious of our choices.

We will not yet take a stand at this point as to whether an inherent right of individual or collective self-defense under Article 51 should include the automatic right to come to the defense of other states subject to aggression; this question of law and policy requires further discussion. It can only tantalize us at this juncture, for it illustrates a major theme of
comparative law that lies at the foundation of our inquiry: that we should seek to refine international law by drawing on the lessons of other national legal systems, including their domestic law of self-defense. However, we must first come to grips with our two opposing traditions of legislation: the Continental conception of the Right and the truncated notion that dominates English-speaking common law jurisdictions.

Is language destiny? Does our choice of English or French or German determine whether the inherent, natural right protected under Article 51 of the Charter includes the automatic right to protect other states? No, language is not destiny, but sensitivity to comparative law should make us aware of the way our choice of language limits our horizons. Just because we speak English and this book is written in English, and the English text of Article 51 speaks of “self-defense” instead of légitime défense, we should not assume that the Charter approves only of the force exercised in the name of protecting a country’s own borders. For the time being we will bracket this intriguing question of the diversity of language and conceptual frameworks in international law as we focus on a deeper understanding of légitime défense and the use of force among nations.
2. The UN Charter and Légitime Défense
What is the proper analogy for thinking about Article 51 and its promise that member states have the right to use military force when they are attacked? One might, for example, analyze this right in the same way (p.66) one might interpret a right found codified in a regular business contract. Think of a contract that imposes responsibilities for each party but also contains a provision enumerating the rights of each party in the event of a breach by the other. One might read Article 51 in this way. Signatories to the UN Charter have agreed to forgo the use of force by virtue of their signing the “contract,” and if a signatory fails to live up to its obligations, member states who are attacked are relieved of their contractual obligations and can engage in self-help measures. Under this view, the proper analogy for reading Article 51 is not criminal law at all, but private law.

This view is enticing but fails to capture the intuitive appeal of viewing Article 51 through the lens of criminal law. The reference to self-defense in Article 51 is a justification for otherwise illegal violence for the simple reason that self-defense has always been a defense in international law for using military force, long before the UN Charter was signed. As will become clear later in this chapter, the major treatise writers of international law long ago recognized the intuitive appeal of self-defense and self-preservation, terms that originated in criminal law but can be used whenever defensive force is applied against aggression, whether individual or collective. So if criminal law is the appropriate lens through which to interpret Article 51, how specifically do we critique the rather concise provision recognizing the inherent right of self-defense?

Although the English-language version of the UN Charter refers to collective self-defense, the equally authoritative French-language version uses the phrase “droit naturel de légitime défense” to refer to what is termed in the English version “the inherent right of self-defense.” The first thing one notices about this language is that the right is inherent. Many things could be meant by the phrase “inherent right,” although the French language is clearer: the right is natural. This means that the right is not created by the UN Charter but is preexisting and is simply recognized by the Charter. Because it is an inherent right, it should not be limited to member states of the United Nations. In fact, it is unclear whether it must be
restricted to states; it might apply to all nations or peoples, in the broadest sense, regardless of whether they are in control of their own state or not. This is an important aspect of légitime défense and is explored in greater depth in chapter 6.

But we must set aside this question and deal with the more central issue of how to understand the term légitime défense. Should states have the inherent or natural right to defend not only themselves but also other states that are subject to aggression? If Kuwait is subject to attack, do all states have a right to send troops to defend it? If we follow the French (p. 67) charter text and assume a right of légitime défense, there is little doubt that saving other states from aggression falls within the natural right recognized by the French version of the Charter.

The scholarly literature on the use of force in international law is generally insensitive to the nuances of the French-language provision of légitime défense. The major treatises on the use of force rarely mention the phrase légitime défense or legitimate defense at all, and when they do, there is no discussion of its unique differences with the Anglo-American notion of self-defense. Consequently, legal interpretations of Article 51 of the UN Charter have remained remarkably static, oscillating between strikingly similar positions that debate minutiae such as when the use of force must be reported to the Security Council and when regional treaties such as NATO can be used to maintain collective peace and security. But the core doctrine of the use of force has remained largely unexamined in the fifty years since it was created in the aftermath of World War II. If the differences between self-defense and légitime défense were properly understood by international lawyers, a serious discussion could begin about the rights and responsibilities of each nation to respond to armed aggression whenever and wherever it occurs.

For example, much of the scholarship has been preoccupied with understanding the notion of collective self-defense. Article 51 posits an inherent right not just to individual self-defense, but also to collective self-defense, a term that has generated much confusion. Though one might think that collective self-defense would encompass our notion of defense of others, a deeper investigation reveals that the concepts are quite distinct. The prevailing view over the past fifty years has been that collective self-defense refers to regional treaties of
mutual defense, where several states pledge that an attack against one is an attack against them all, thus resulting in an armed response. These arrangements were once plentiful and even overlapping, although the advent of the cold war led to the rise of NATO and the Warsaw Pact as the only two such arrangements that really mattered. And since the collapse of the Soviet Union, and with it the Warsaw Pact, NATO has grown so large as to encompass half the globe. Consequently, one hears very little about collective security arrangements anymore. Indeed, it was somewhat striking that 9/11 was the first time that NATO declared that one of its members had been attacked, triggering a legal duty of the organization to respond in defense.

Collective self-defense is not the same as defense of others. For example, there is a tendency to reduce all cases of collective self-defense to regular self-defense, assuming that there is always some kind of self-interest involved, such as a regional security interest. Consider the following passage from Dinstein:

Believing as they do that, in the long run, all of them are anyhow destined to become victims of aggression, each may opt to join the fray as soon as one of the others is subjected to an armed attack. In truth, it is the selfish interest of the State expecting to be next in line for an armed attack that compels it not to be indifferent to what is happening across its borders. It may be said that an armed attack is like an infectious disease of the body politic of the family of nations. Every state has a demonstrable self-interest in the maintenance of international peace, for once the disease starts to spread there is no telling if and where it will stop.

Although this is usually true, it is perhaps not universally true. The argument appeals to the rationale behind these regional security arrangements. They are regional in nature because nations in one geographic area usually face a common military threat. Consequently, an armed attack against a confederate is usually a threat to one’s own security, because the attack is evidence of a hostile purpose and may be a prelude to a larger campaign against other countries in the region. Furthermore, the attack against one territory may result in territorial expansion that can be parlayed into greater regional military dominance, in turn resulting in a greater threat to neighboring countries. Therefore, responding to an attack against one
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regional neighbor is really just an elaborate game of self-defense, because the other members of a security alliance are inclined to protect their regional interests; this is the real reason for their intervention.

This may be true in cases of regional treaty arrangements, but it is somewhat outdated and fails to take into account the modern phenomenon of humanitarian intervention. Many nations feel compelled to intervene (or should feel compelled) when an armed attack occurs, and not just because their regional security interest is implicated. Remember the rhetoric of the first President Bush before Operation Desert Storm. He called the invasion of Kuwait an act of aggression that could not stand. It was not an attack against U.S. interests; it was an attack against a sovereign nation, and Bush argued that a full-blown invasion of a sovereign nation was simply intolerable in this day and age. Of course, the U.S. military action was authorized by a Security Council vote under its Chapter VII powers. However, the Bush administration would most likely have sent troops even if the Security Council had failed to act. And the Bush administration’s stated reason was a normative argument that Saddam Hussein’s actions were wrong and Kuwait had to be defended. Although commentators and skeptics made much about the U.S. interest for cheap oil—and stability in the Middle East—this was never a part of Bush’s early rhetoric about the rationale for the war.

The existing legal literature on collective self-defense fails to deal with the most central issues raised by the concept of defensive action. The literature overemphasizes an odd collection of legal issues: regional treaty arrangements for mutual assistance, concerns about aggression and unlawful occupation, and the duty under Article 51 to report actions of self-defense to the Security Council. International lawyers worry that regional treaty arrangements will be used as a legal strategy to defend military aggression. Small cases of provocation or border incidents will be manufactured to provide the legal justification for a military attack that was already planned well in advance. This concern is probably a holdover from the First World War, when Archduke Ferdinand was assassinated and a set of overlapping alliances quickly spiraled into a world conflict. The more modern version of this phenomenon is the Gulf of Tonkin incident, where the United States used a naval attack in the Gulf of Tonkin as a legal basis
Evidence collected in the meantime has suggested that this supposed attack was in actuality a deft pretext for war. These cases of questionable defense might also lead to unlawful occupations, where a stated concern for the continued security of the state is used as a pretext for the continued occupation of foreign soil, long after the alleged justification for the attack has passed. These concerns were paramount during the cold war, when the Soviet Union intervened, with military force, to create the Eastern Bloc. Although ostensibly these interventions were motivated by a desire for collective self-defense, the Soviet presence in reality became an unlawful and sustained occupation that continued until the collapse of Communism.

All of these issues sidetrack the needed discussion of humanitarian intervention, which we take up in greater detail in chapter 6. When states engage in a humanitarian intervention, they are hardly acting in collective self-defense. The relevant questions are not regional treaty arrangements and a legalistic duty to report the use of military force to the Security Council. Rather, the pertinent issue is whether the humanitarian crisis is legally sufficient to justify a violation of another state’s territorial integrity on the basis of defense of others. This would be central to our discussions if we switched from talking about collective self-defense and started talking about légitime défense.

Analyses about collective self-defense also place too much emphasis on whether the target state believes that it is being attacked. The International Court of Justice concluded in the Nicaragua case that for a defending country to exercise the right of collective self-defense to aid an attacked country, the latter must conclude and announce that it has been attacked. In other words, the defending state cannot rely on its own judgment about whether an attack has occurred and whether a military response is required. More significantly, the attacked state must formally request the assistance, according to the ICJ, or else the exercise of collective self-defense is illegal. This is a startling claim. In many cases, there is no time to wait for a thorough analysis and formal request from the attacked state. Also, the government of the attacked state may be seized by sympathizers or collaborators of the attacking state, who would refuse to issue such a formal request. One can easily imagine this happening in cases of ethnic conflict.
where an attack is initiated and at the same time the
government of the attacked state is taken over by members of
an internal ethnic group aligned with the attacking state. In
such a case there would be a real problem of determining
whether those who have seized control are a legitimate
government or not. If the government is not legitimate, are all
other states barred from exercising collective self-defense
because a formal invitation is lacking? But the real question to
ask is whether the need for a formal invitation in cases of
collective self-defense is appropriate, and whether switching to
légitime défense would vitiate this requirement. Indeed, the
dissenting judges in the Nicaragua case noted that the
invitation requirement was impractical.  

Dinstein’s analysis of the Nicaragua case assumes that the ICJ
went wrong, but for the opposite reason. According to
Dinstein, when one state intervenes to defend its neighbor, it
does so to protect its own interests and is therefore acting in
some form of self-defense. This could be one reason to
consider relaxing the formal assistance requirement because
we would not want to handcuff the responding state’s right to
use military force to protect its own interests. Although the
conclusion here might be correct, the reasoning is not. In
some situations, the reason to relax the requirement of a
formal request for assistance is that the responding state is
engaging in defense of others, not some contorted version of
self-defense. Just as anyone on the street has the right to come
to the defense of a victim of a violent attack and need not wait
for a formal request, so too any member of the world
community should have the right to engage in defense
of others when a violent attack has occurred. The continental
notion of légitime défense recognizes this fact because it
encompasses defense of others.

Consider the case of Austria. The Nazis walked into Austria
in 1938, behind the threat of invasion but without any actual
resistance. Had the Austrians resisted, they clearly would
have been invaded and slaughtered. It is therefore incorrect to call
the Anschluss a case of voluntary political union between two
countries. While everyone agrees that other countries had the
right to intervene against the Nazi territorial drive, there are
different rationales that one might appeal to. Dinstein would
appeal to self-defense proper, arguing that neighboring states
had a right to intervene to protect their own regional interests
because they certainly knew that they were next on Hitler’s
proponents of collective self-defense are inclined to ask questions about the existence of formal treaties of mutual assistance and whether military intervention is required under them. But both avenues totally miss the point. Every country had the right to intervene on Austria’s behalf, whether they asked for help or not, under a theory of defense of others. This is clear under our notion of légitime défense. If the Austrian government was seized by Nazi sympathizers who retroactively approved the Anschluss, would this change matters? It should not, because territorial expansion by military force, or by imminent threat of military force, is intolerable in international law. And all nations have the right to come to the defense of others in such circumstances.

A more contemporary example will help explain the point. After Saddam Hussein brazenly invaded Kuwait in 1990, the first Bush administration declared that Hussein’s illegal aggression could not be allowed to stand. What was the basis for the intervention? Is it best described as a case of collective self-defense or a case of defense of others? Although clearly Bush argued that Hussein was dangerous, and clearly the United States had strategic interests all over the Middle East and the Arab world, it is nonetheless clear that it was Kuwait’s defense that we were coming to. Hussein had engaged in all sorts of threatening military behavior for decades, including a long war with Iran that the United States supported, but it was not until Hussein started invading sovereign nations that the first Bush administration decided to act. We acted on behalf of Kuwait and defended its right to exist. Although elements of both collective self-defense and defense of others are present in this example, it more closely hews to the core idea of defense of others. And any account of international self-defense that excludes defense of others in favor of collective (p.72) self-defense misses the point. Intuitively, the concept of defense of others and légitime défense more accurately tracks what actually happened.
3. The History of the UN Charter

The negotiating history of the UN Charter complicates our analysis of the meaning of self-defense and légitime défense. One might think that the delegates deliberately chose the words “individual and collective self-defense” and rejected “defense of others.” If they had really meant to enshrine légitime défense as the appropriate standard, they would have chosen a corresponding English phrase that included defense of others. But this argument does not display a subtle understanding of the negotiating process and the genesis of the Charter. First, the initial negotiations focused on creating an English-language document that every nation could agree on. However, the fact remains that the French-language version was adopted at the same time as the English version and carries equal legal weight. It is neither derivative nor secondary. Rather, it appears most likely that insufficient attention was placed on the translation process. Indeed, a historical analysis of the negotiations indicates that the wording of Article 51 was some of the most contentious in the whole process and remained a sticking point until compromises could be brokered. A nuanced reading of this history indicates that the exact contours of the right to self-defense depend on whether you look to the French- or English-language version of the Charter.

It was clear during the negotiations that the UN was to be the clearinghouse for all decisions about the use of military force and that the Security Council was the appropriate organ to make these determinations. Indeed, anything less would have threatened the UN’s status as a strong international institution capable of responding to threats to international peace and security. However, concentrating so much legal power in one organ—with limited representation of the world’s nations—caused much controversy. In particular, Latin American countries were concerned that the Charter could be used as a legal justification for invalidating their regional treaty arrangements for mutual security. Under these agreements, an attack against one country would trigger a duty to assist by the remaining countries. In the wake of World War II, Nazi and Japanese aggression, and the failure of the League of Nations, these treaties for mutual security were obviously important for the world’s minor powers, and most were reluctant to sign on to any international legal order that would have invalidated them—at least until they could be certain that the
global institution that would replace them, the United Nations, would be successful in adequately protecting their security and preventing another world war.

There was also great concern that the veto power held by the Major Powers on the Security Council would prevent the Security Council from authorizing military action, either when one of the Powers was itself responsible for the aggression or when it was in some other way aligned with a minor nation that committed the aggression. A single holdout among the Great Powers could then handcuff the Security Council from acting. In light of this fact, the regional security treaties were seen as an important legal fallback that could be used to justify military action in the wake of Security Council inaction. If the Security Council did not authorize the use of force to respond to an illegal aggression, at least an organization of like-minded nations with a common regional security interest could step in to fill the void.

The Latin American nations were therefore inclined to support an amendment that carved out an explicit exemption for these regional security arrangements. In other words, use of force by these regional organizations would also constitute a legal use of force under international law and would not be subject to the requirement that use of force be authorized by the Security Council. The United States was understandably concerned that this amendment would create an exception so large as to weaken the international institution at the hands of regional interests. If regional organizations could authorize the use of force, nations would have a greater incentive to sign mutual defense pacts and less incentive to participate meaningfully in an international institution for peace and security. Indeed, this was precisely the kind of alliance that proved disastrous in the lead-up to the First World War and would “convert the world into armed camps.”

The French delegation responded to this concern with a very particular suggestion. Instead of exempting regional defense treaties, the UN Charter should explicitly state that all members had the right to act in the interests of “peace, right, and justice” in the event of Security Council inaction. The precedent for this proposal was Article 15 of the Covenant of the League of Nations, which stated that “the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and
In many ways, this was a startling proposal and represented a totally different worldview of the relationship between the UN and its member states. Under the French proposal, each state would be responsible for making individual determinations of when intervention was required by the principles of what was just and right—obviously a very broad standard—and could not be handcuffed in its determinations by a failure to act at the international level. In some sense this proposal merely codified the de facto status quo, because when individual states believe that intervention is necessary and the Security Council fails to act, they intervene anyway. The French proposal would simply have provided a legal basis to justify these actions instead of always labeling them illegal under international law. Each member state would bear some ultimate responsibility for deciding when justice demanded the use of force.

The United States was so wary of providing explicit exemptions for the regional treaty arrangements that initially it supported the spirit of the French proposal. This was a better solution than turning the globe into regional “armed camps.” But nations that relied heavily on mutual defense pacts, particularly the Latin American states, were interested in a more explicit endorsement of their security pacts rather than the loose language of the French proposal.

Several compromise amendments were considered that ultimately paved the way for the final UN Charter. First, the language on the right of self-defense was changed so that it would be characterized as “inherent.” Second, it was the British delegation that suggested the compromise that would solve the problem of the regional treaties and would eventually find its way into the Charter. The amendment called for recognition that individual states had the “right to self-defense against armed attack, either individual or collective.” When this right was recognized, member states had to report their actions immediately to the Security Council. Although certainly not as broad as the French view that member states could intervene on the basis of justice and right, the compromise was nonetheless broader than it would have been had it recognized only individual self-defense. The reference to collective self-defense was meant to legitimize the regional defense treaties and the kind of collective action they might engage in. However, to further mollify the Latin American delegations, the Charter also included an explicit
reference in Article 52 to these regional arrangements, which were deemed legitimate as long as they were “consistent with the Purposes and Principles of the United Nations.” Furthermore, these arrangements were to be encouraged so as to promote the peaceful resolution of local disputes.

Although these negotiations had taken place in multiple languages, the focus of the work had been to produce an English-language Charter that all could agree on. It is therefore pretty clear that the delegations did not fully turn their attention to the problems that would be created by translations. As it happens, when legal concepts have exact analogues in another language, the process of translation is uncomplicated. But when a particular legal concept is not represented in another language, translation can be as much of a legal negotiation as a linguistic one. For example, after the Meiji Restoration, the Japanese legal system began to have significant interactions with the rest of the world and required translations of European legal codes. The Japanese, however, did not have a word that directly corresponded to the Western notion of rights, a highly individualistic notion foreign to the Japanese legal system. Scholars responded to this lacuna by simply adopting a new word for the concept of rights: *kenri*. The word first appeared in the Chinese translation of Wheaton’s famous nineteenth-century treatise on international law, which was published in China in 1864 and Japan in 1865. The term then migrated from the Chinese language to the Japanese. The concept continues to be used in contemporary Japanese legal culture today, although debate remains about its comparative significance.

However, this example is relatively easy to deal with because a new word could simply be created. A blank slate was available on which a new distinction could be created from scratch. It is far more dangerous and confusing when two languages have apparently corresponding legal terms, but their content is subtly different. This appears to be what happened when it came time to translate the draft UN Charter. The Dutch delegation suggested that there be only one official version of the Charter so that there would be one definitive text to appeal to when there were disputes of interpretation. Although this was correct in principle, the issue of which language would be chosen for the authoritative version was obviously insurmountable. The Soviets would never have accepted an English-only Charter, and neither would many
other countries. Although there was no mechanism to deal with disputes of interpretation between the different translations, this difficulty could not be avoided.

All agreed that translations were necessary for each of the official languages of the United Nations, corresponding to the Great Powers on the Security Council. A translating committee was created to take charge of the effort, to be overseen by representatives from multiple delegations to ensure the technical accuracy of the translations. However, this process was clearly not scrutinized to the same degree as the original negotiations. When the French-language version of the charter was created, the inherent right to self-defense became “le droit naturel de légitime défense,” apparently without a widespread discussion about the distinctions between the Anglo-American notion and the Continental one. In this case, the fact that there was a corresponding yet distinct concept in another language proved confusing. If the French language had no word for self-defense—just as the Japanese had no word for rights—a new word could simply have been invented. But, as it was, a similar concept already existed that could be used off the shelf, even though pertinent differences remained.

The French had good reason to support the translation of self-defense into their more familiar notion of légitime défense. The Continental notion of légitime défense, encompassing as it did the notions of defense of others and defense of property, was much closer to their original proposal allowing military interventions in support of what was just and right. Indeed, one might even say that the French proposal survived, albeit covertly, in the French-language concept of légitime défense. The concept supports a much broader range of permissible interventions, not just limited to individual self-defense or mutual defense arrangements. Any nation has the right to intervene when nations fall victim to illegal aggression.

It is not surprising that these contradictions were not worked out in advance. Ambiguities are often left in place, as opposed to explicitly resolved, because otherwise no agreement could be reached. The uncertainty functions as a kind of delay in agreement that allows the process to move forward. Take, for example, the question of who would be empowered to interpret the UN Charter. Under U.S. law, the Supreme Court has ultimate authority to interpret the Constitution and adjudicate disputes between the two other branches of
government. Anticipating that similar disputes would arise over the UN Charter, some members favored an amendment that would grant the International Court of Justice the authority to issue binding interpretations, and others favored giving this responsibility to the Security Council.\textsuperscript{30} When no agreement could be reached, the issue was left unresolved. The result was that a known ambiguity was left in place because each party could interpret that ambiguity in the manner it felt appropriate. No matter that these interpretations are mutually exclusive. As it stands, the issue of who has the ultimate authority to interpret the Charter remains unresolved.\textsuperscript{31} Similarly, it was rational for parties not to resolve every last issue of self-defense, one of the most contentious subjects during the Charter negotiations. Instead of resolving the differences between self-defense and légitime défense, instead of defining every exact situation in which the use of force could be used, the members left open the outer reaches of the concept so that some minimal agreement could allow the process to move forward.\textsuperscript{32} It is for this reason that the ambiguities about self-defense in international law remain unresolved and in need of deep analysis.

This history of the UN Charter has been largely lost. Few legal scholars are aware of the genesis of Article 51’s provisions on the inherent right of self-defense, and consequently, the standard analyses of the provision usually make no reference to its historical origins in the French proposal. Furthermore, the standard texts are equally ignorant of the differences between the English version and the French translation. Whether this stems from historical or linguistic ignorance is unknown.

For example, Thomas M. Franck presents a history of the negotiations in his \textit{Recourse to Force} but emphasizes that the New Zealand delegation proposed an amendment that imposed a duty on all members to “collectively resist” all acts of aggression against any member state.\textsuperscript{33} This proposal was rejected, although it did garner a surprising amount of support (a majority in fact), as Franck correctly notes.\textsuperscript{34} But the amendment was rejected mostly because it created a legal duty to intervene, not because it allowed foreign intervention outside of one’s borders. The issue was therefore not whether defense of others was appropriate, but whether the creation of a duty to intervene was appropriate. As discussed in chapter 2, this legal issue also arises in domestic law. In the United
States, there is no general duty to intervene on someone’s behalf unless you have a special relationship with the victim that creates this duty (such as being a lifeguard or bodyguard). Most Continental jurisdictions, on the other hand, have imposed by statute a general duty to intervene. At the international level the issue is also controversial. States were reluctant to agree to the New Zealand proposal because they did not want to be compelled against their will to exercise force against another state, which would in effect transform any local or regional war into a world war overnight. Indeed, much of the UN legal order is built around the voluntary use of force. Even when collective force is used for missions authorized by the Security Council, no state is forced to send troops against its will. Military contributions are made on a voluntary basis, and those who wish to abstain—whether for moral, diplomatic, or practical reasons—may do so.

Franck does take note of the French proposal to allow intervention on the basis of what is right and just, but he takes the rejection of this proposal, combined with the rejection of the New Zealand proposal, as evidence that the Charter’s provisions on self-defense are severely limited. This is the standard view. A broad view of self-defense, encompassing defense of others, was defeated when the French and New Zealand proposals were rejected. Regional security arrangements, as a form of enlarged individual self-defense, were approved through the addition of the phrase collective self-defense. No mention is made of the Charter’s translation and the term légitime défense. There is no analysis of how the essence of the French proposal, and a wider notion of defense of others, has survived in the French-language version of the Charter, as well as the other translations (such as the Spanish and the German) that follow the French pattern.

The consequence of this omission is certain: the standard legal texts take for granted the primacy of self-defense and totally ignore a more plausible analysis of the provision that remains more faithful to the French-language version of the Charter and the other European translations that rely on corresponding concepts. It is this analysis that we hope to capture in this book.

4. The Novelty of Légitime Défense
The current literature on the use of force in international law is strangely insensitive to the distinction between self-defense and légitime défense. Although some scholars are clearly aware of the distinction, particularly those writing in the 1940s and 1950s, when the UN Charter negotiations were still in the recent past, none has realized the import of the distinction or how it might influence their analysis of the use of force. Indeed, even French scholars of international law fail to realize the significance of the distinction, although of course they are aware of the vagaries of translation. Some French authors use the term le droit d’auto-protection, literally meaning the right of self-protection, as a way of talking about the Anglo-American notion of self-defense without invoking the much broader notion of légitime défense.

For example, Jean Delivanis correctly notes that the phrase légitime défense spans both criminal and international law and that the concept operates differently in each sphere. But he emphasizes that légitime défense has traditionally operated in a much broader fashion in international law than in criminal law, which is precisely the opposite of our analysis. He says this because he emphasizes the lack of police enforcement power in international law. Self-defense operates in criminal law as a right to defend yourself only until the police arrive on the scene. In international law, the police power is much weaker, and there are few instances when an international police force will come to a nation’s rescue. Therefore, it is true that the sphere of self-defense is somewhat larger in international law. Nations have a greater need to resort to self-help measures than a random person walking down the street. The response time of the Security Council pales in comparison to the local police department.

But Delivanis writes some very confusing things about légitime défense, which is evidence of the general lack of scholarly seriousness about these concepts, even among French scholars. For example, Delivanis concludes that collective self-defense did not exist as a right in international law prior to the creation of the UN Charter. In other words, according to Delivanis, it would be wrong to suggest that the right of collective self-defense already existed in customary international law and was simply codified and explicitly recognized when the UN Charter was adopted.
His argument stems from a general confusion among these writers about collective self-defense and defense of others. They are inclined to view the two as nearly identical, so that defending others is really just a case of regional or collective self-defense among a group of nations that have signed a security pact. But this leads to all sorts of conceptual mistakes. It leads to the inevitable conclusion that collective self-defense can be exercised only when a state has some kind of formalized treaty or obligation to a neighboring state. So, if West Germany is attacked by the Soviet Union during the cold war, the United States can come to the defense of West Germany, but only because the United States has signed a treaty of mutual assistance that requires one to come to the aid of another if attacked by the Soviet Union. Otherwise, the United States has to sit this one out.

So far, so good. It is probably correct that a regional arrangement is required for collective security to be legal under Article 51 of the UN Charter. Indeed, as we noted earlier, the whole point of codifying a right of collective self-defense in the Charter was to protect the existing regional treaty arrangements that the Latin Americans wanted to preserve. But where this analysis goes wrong is in concluding that defense of others is really just the same thing as collective self-defense. Therefore, a formal treaty of collective security, creating a legal obligation to assist, is required before the use of force will be considered legal for defense of others too. This is totally wrong, both as a conceptual matter and as a legal matter. Collective self-defense and defense of others are not the same concept at all. The former applies when nations form collective security pacts—this much is true. But defense of others is the notion, more common in domestic criminal law, whereby any law-abiding citizen has the right to intervene to save someone from an unlawful attack before the police arrive. No formal arrangement need exist. Indeed, the whole point of defense of others is that strangers who happen upon the scene can do something about it, even if their only connection to the victim is that they both belong to the great community of humanity.

For these scholars of international law, the confusion on this point stems from an outdated view of defense of others in U.S. law. Delivanis argues that the right of defense of others in U.S. domestic law (la défense d’autrui) requires a special relationship with the victim. This was once true at common
law, and it was once the view in the United States, but the consensus among criminal lawyers has since evolved, and, we argue, it should so evolve in international law as well. What is even more striking is that the “close relationship” requirement in criminal law never existed in French law at all. 39 It was a species of British and U.S. common law that Continental lawyers in Germany and France rightly avoided. But here we have international lawyers, even French ones, appealing to the U.S. and British rule to influence their analysis of international law.

Delivanis cites Section 76 of The Restatement (First) of Torts, the standard explanation of U.S. tort law published in 1934, but this rule of tort law was quickly abandoned in the Second Restatement because everyone recognized that the old rule was based on an outdated and offensive view of a master’s dominion over his wife, family, household, and slaves. According to the Second Restatement, the “restriction of the privilege to intervene on behalf of third persons to those who are members of the actor’s family or household was founded upon conditions long since past.” 40 The law has long since recognized the right and privilege to defend strangers from attack, and so “every man has the right of defending any man by reasonable force against unlawful force.” 41 The case law supporting this change goes back to the early twentieth century; courts have long since recognized that one can defend any stranger who himself has a legitimate right to use self-defense against an unlawful attack.

The rules in criminal law have also evolved. It was once true at common law that a defender could use deadly force in defense of others only when the victim was a family member or an employee. D. W. Bowett, whose Self-Defence in International Law offers some of the most sophisticated arguments about the historical tradition of legitimate defense, relies heavily on this analysis of criminal law. 42 He notes correctly that the right of defense of others in English Common Law was limited to cases where there was a special relationship between the victim and the defender. 43 Bowett concludes that “the right is limited to those cases where there (p.81) exists some sort of proximate interest; the right extends to the defence of one’s family, one’s servants, and to those persons whom one is under a recognized duty to protect.” 44
Although this was once true, our views about defense of others in criminal law have evolved significantly in the common law world. The traditional view that defense of others required a close family relationship represented an uncomfortable interim moment when scholars were confused about whether defense of others was a justification or an excuse. As discussed in chapter 2, a justification means that the defendant’s conduct was justified and there was no wrongdoing at all. An excuse means that the defendant’s conduct was not justified but there is some reason that we should not punish him. If the defendant has an excuse, the conduct was still wrongful, but the defendant is not individually culpable for his actions. Defense of others was treated as an excuse because the theory was that you could not stand by and watch while your loved ones were being attacked; you had to do something about it and should not be punished for it when you did. In this sense, defense of others was treated like necessity or duress, where the defendant argued that he should escape punishment because for some extraordinary reason he had to do it. Part of this confusion stems from the fact that the distinction between justification and excuse was largely unknown to common law lawyers, who preferred instead to talk simply about “defenses,” a broader category encompassing both justification and excuses without differentiating between them. It was the Continental lawyers, particularly the German criminal lawyers, who understood best the distinction between justification and excuse, between wrongful acts and a defendant’s culpability.

And so the close family relationship requirement has now been dropped, even in the United States, for cases of defense of others. It is clear in the Model Penal Code and in all penal statutes that are based on it that defense of others is a justification, just like self-defense. Therefore, there is no reason to treat it like an excuse. We no longer think of the defender as someone who should be excused because he could not sit by and watch while his wife was being attacked. (This is the kind of analysis we reserve for the case where the husband commits a crime on an innocent third party because someone threatens to torture his wife.)\textsuperscript{45} Lethal force is justified to protect victims against unlawful attacks, and the victim does not have to be a relative. Now you always have the right to intervene on behalf of others in the event of an unlawful attack; you do not need to be a bodyguard or a family member.
You just have to be there, and of course your use of deadly force has to be justified. If a woman is being raped in a dark alley, any bystander can use force to repel the attack; you don’t have to be the woman’s husband.

In general, there has been a historical evolution away from excuses and toward justifications in international law. Many of the major commentators writing in the early twentieth century preferred to analyze the use of force as a case of necessity that could be excused if the life of the nation was threatened. John Westlake, in his pivotal treatise, rarely mentions self-defense. He prefers to talk of the inherent right of self-preservation, which is what excuses the use of military force against another state. He even cites Dudley v. Stephens, the famous British case of 1884, where two shipwrecked sailors who ate their cabin boy claimed that their actions were excused by necessity. The judges in the case rejected the defense, and Westlake cites the opinion as evidence that one cannot appeal to self-preservation to extinguish the rights of innocent third parties, whether cabin boys or nation-states. The case is the classic example of murder excused by a claim of necessity, and the great scholars of international law of the day thought of it as the paradigm for thinking about resorting to murder among nations. Going to war could be excused on the basis of self-preservation. The famous Caroline case of 1848 describes international self-defense in like terms. British forces destroyed an American ship at Niagara that was smuggling arms across the border into Canada. The ensuing diplomatic incident led U.S. officials to argue that self-defense required a case of necessity, “instant, overwhelming, leaving no choice of means, and no moment for deliberation,” a standard that the Americans argued was not satisfied in this case. The idea that one could not do otherwise is the language of self-preservation and excuse. But there has been a gradual shift away from excuses in international law. No one talks about excusing nations anymore. We talk about justifications for going to war, because the idea is that if a nation is attacked and goes to war to defend itself, then it has done nothing wrong and does not need an excuse. Its actions are justified.

But some confusion about the distinction between justification and excuses in international law remains. Strangely, the major treatise writers on international law, even some of the French ones, have not fully adapted to thinking of defense of others as
a justification. They are still used to thinking of excuses, and this causes them to analyze defense of others as an excuse. They assume that the close family relationship requirement of the common law applied in French and German law as well. Delivanis quotes the French Penal Code provision that allows the “legitimate defense of oneself or others,” which says nothing about there needing to be a close relationship between the victim and the defender. Indeed, Article 122–5 of the French Penal Code says, “A person is not criminally liable if, confronted with an unjustified attack upon himself or upon another, he performs at that moment an action compelled by the necessity of self-defence or the defence of another person, except where the means of defence used are not proportionate to the seriousness of the offence.” There is no mention of special or family relationships; anyone can exercise this right. In the original French, the code refers to this as légitime défense d’elle-même ou d’autrui, meaning literally the “legitimate defense of oneself or others.” The close family relationship requirement never existed in French law.

Bowett’s influential argument therefore confuses collective self-defense with defense of others. None of this would be so problematic except that this analysis of criminal law is used as an analogy to better understand self-defense in international law. But because the original reading of criminal law is outdated and represents a conceptual confusion between justification and excuses, the analogy to international law suffers from the same defects, where they flourish into a poor reading of the UN Charter and the use of force in international relations. Defense of others must be regarded as part of a general right of légitime défense, as a reading of the French Penal Code makes clear; and it is not limited to cases of special relationships. It is not an international excuse.

This confusion becomes dangerous when it is imported into international law. Collective self-defense is indeed a restrictive notion, but equating it with defense of others only confuses things. Bowett concludes:
The “collective” right will exist where the state invoking the right can show some interest of its own which is violated by the attack launched upon another state. We must similarly presuppose a “proximate relationship,” though not necessarily in terms of geographical contiguity, which makes a direct violation of the rights of one state an indirect, but nevertheless real, violation of the rights of another state which comes to the former’s aid by virtue of the latter’s right of collective self-defence.  

This just collapses collective self-defense and defense of others into individual self-defense.

Because all of this is based on outdated or incorrect views of French and U.S. criminal law, we cannot equate collective self-defense and defense of others. We must return to the fundamental understanding of légitime défense as a unified concept that allows for defensive force to be used against unlawful attacks—against oneself, another, or property. This is the beauty of the French Penal Code provisions on defensive force, and it is a pity that the conceptual elegance of these terms has been lost on the major commentators on international law. So when the French, Spanish, and German versions of the UN Charter refer to légitime défense and its cognates in Spanish and German, we must understand it within the European tradition as the unified concept that it is. We cannot simply twist it around and make it fit into the Anglophone notion of collective self-defense. This betrays the true meaning of both.

One of the few treatise writers to get this right is Ian Brownlie, who correctly interprets defense of others as a broad right indeed. He concludes that there is “a customary right or, more precisely, a power, to aid third states which have become the object of an unlawful use of force. It is immaterial whether this right is called a sanction, collective defence, or collective self-defence, although none of the terms is really adequate.” Indeed, the correct term is légitime défense. Brownlie offers an extensive history of the right of self-defense in customary international law before World War II and the UN Charter. He correctly notes that many commentators on customary international law referred to it as a “right of legitimate defense,” showing that the term has a long history in international law. “Legitimate defense,” he writes, “involved action to prevent or redress violation of legal
rights.” It would therefore be correct to say that we aim, with this book, to recapture this seasoned vocabulary and return it to current usage in international affairs.

A deep understanding of the role of the criminal law concept of légitime défense in international law is unknown, not only in the United States, but in Europe as well. This is rather strange, because one would think that the French-language version of the Charter would dictate that the broader notion of légitime défense be applied in the international arena by French lawyers. This is not necessarily the case. Perhaps the field of international law is dominated by English-centric attitudes. In any case, the broad application of légitime défense in the international arena is so novel that even French-speaking countries do not make full use of the concept within their own midst. We aim to rectify that oversight with a coherent account of the doctrine of legitimate defense and its application in international law.

However, we must reclaim this terminology not simply by importing all of its conceptual baggage. We must reclaim the term légitime défense by also associating it with all of the best advances in our thinking about (p.85) criminal law. The relationship between self-defense, defense of others, and defense of property is more properly understood now as justifications all unified by a common structure. The most basic question is whether the use of force is legitimate, as the French would say, or necessary, as the Germans would say. How do we figure out what is legitimate force and what is necessary? In the great tradition of criminal law, we must analyze cases and determine the constraints that apply to this use of force. Figuring out these constraints—where they come from and how they apply—is the task of our next chapter. Our analogy between international and criminal law will again form the basis for our work.

Notes:

(2.) See, e.g., Carta de las Naciones Unidas, Art. 51 (translating self-defense as “legitima defensa, individual o collectiva”). The Russian version reveals some particularities. The term parallel to “inherent right” is neot’emlemoe prava or “inalienable right.” The term for self-defense is samooborona, which is in fact a literal translation of “self-defense” rather than the term used in the Russian Penal Code, which is equivalent to the French concept.

(3.) See Rome Statute Art. 31(1)(c).

(4.) See Definition of Aggression Resolution, pmbl. G.A. Res. 3314 (1974) (reaffirming that “the territory of a State shall not be violated by being the object, even temporarily, of military occupation”).

(5.) The point of referring to self-defense as an inherent right is that if the Security Council fails to act, states may still claim the right to act under Article 51. See Thomas M. Franck, Recourse to Force: State Action against Threats and Armed Attacks 48 (New York: Cambridge University Press, 2002). On the possible interpretation of Article 51 to include the automatic right to defend other states under attack, see D. W. Bowett, Self-Defenses in International Law, at 201 (New York: Praeger, 1958) (quoting French sources relying on the term légitime défense). Bowett recognizes the analogy to the domestic law of self-defense and in the end, on the basis of common law sources, rejects a universal right to defend others, even in the domestic law of self-defense. Id. at 202–3.


(7.) This idea was suggested by Annemieke van Verseveld.

(8.) Indeed, overlapping alliances are often cited by historians as a contributing cause of World War I.
(9.) Article 5 of the treaty was invoked by the North Atlantic Council on September 12, 2001, the day after the attacks, and was reaffirmed on October 2, 2001, after an official investigation that determined that the attacks were conducted by Al Qaeda under the direction of Osama bin Laden. See North Atlantic Treaty, Art. 5 (April 4, 1949) (“The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.”).

(10.) Dinstein, *War, Aggression and Self-Defence*, at 225.

(11.) *Id.*


(16.) See Dinstein, *War, Aggression and Self-Defence*, at 238.


(18.) See *id.* at 698 (noting that U.S. officials were “concerned lest the new provision place too much emphasis on regionalism at the expense of the world organization”).
(19.) See id. at 696.

(20.) Id. at 690.


(23.) Id. at 698.

(24.) Id. at 699.


(27.) See id. at 16.

(28.) Feldman, id., argues against the prevailing wisdom that Japanese legal culture places a premium on community and eschews claims based on individual rights.


(30.) Belgium argued that ultimate competence to interpret the Charter should rest with the General Assembly but that the ICJ could issue advisory opinions. Britain argued that each organ of the UN could provide its own interpretation of matters within its operational competence. See Russell, A History of the United Nations Charter, at 925–27.

(31.) The ICJ and the Security Council sometimes offer conflicting and mutually exclusive interpretations of the Charter. The court concluded in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory that Article 51 did not apply in cases of military threats from nonstate actors. However, the Security Council has taken a different view and recognized the applicability of Article 51 in cases of terrorism. For an in-depth discussion, see Kathleen Renee Cronin-Furman, note, The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship, 106 Colum. L. Rev. 435 (2005). See


(33.) See Franck, *Recourse to Force*, at 46.

(34.) See id. at 47 (noting that the proposal received more than 50 percent of the votes but that amendments required 66 percent support to pass).


(36.) Id. at 148.


(38.) See Delivanis, *Légitime Défense*, at 149 (“Cependant, il est nécessaire qu’il existe une relation relativement proche, tout au moins dans certains droits, entre les personnes qui se défendant en commun”).


(40.) Restatement (Second) of Torts, Section 76.

(41.) See John Salmond, *Torts* 375 (London, Sweet & Maxwell, 11th ed. 1953), quoted in Restatement (Second) of Torts, Section 76.

(42.) See Leward v. Basely (1694) and *Tickel v. Read* (1772), cited in Bowett, *Self-Defenses in International Law*, at 201 n.3.

(43.) Indeed, Bowett seems to be the original source of this analysis, which is then repeated by Delivanis without further scrutiny or independent research.
(44.) Bowett, *Self-Defenses in International Law*, at 201–2. Bowett also cites Roman law for this proposition, including Sohm’s *Institutes of Roman Law*. However, the fact that a proximate relationship was required in Roman law was based in the extreme inequities of Roman society. Masters could protect slaves because they were property, and men could protect their family because they had dominion over them. But the law has long since abandoned these master-slave dialectics. This point is also made by the late Josef Kunz, who concludes that “the right to defend others in municipal law is often restricted to persons having a special family relation with the person defended.” *See* Josef Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 Am. J. Int’l L. 872, 875 (1947). However, Kunz correctly notes that légitime défense includes defense of others and cites the French scholar Descamps for this proposition, as well as the similar distinction in German law between *Nothilfe* (defense of others) and the more general *Notwehr* (necessary defense). *Id.* Also, instead of recognizing an independent notion of defense of others under the umbrella of légitime défense, Kunz recognizes that collective self-defense could be a broad notion that might eventually allow the use of force for “any and all states members.” *Id.* at 874.

(45.) Indeed, German law to this day still limits the excuse of necessity to those who stand in a close relationship with the defendant. *See* StGB Art. 35.

(46.) John Westlake, *Chapters on the Principles of International Law* 115 (Cambridge: Cambridge University Press, 1894) *le droit international de conservation* *Traité de Droit International*

(47.) *See* Henry Wheaton, *Elements of International Law* 90 (Boston: Little, Brown, 1866) *le droit de conservation* *See* Éléments du Droit International *See* Introduction to the Study of International Law

(48.) *See* Westlake, *Chapters on the Principles of International Law*, at 111. But Westlake does defend a more limited right of self-preservation when a state “must take its defence into its own hands.” *Id.* at 115.

(49.) Ellery C. Stowell, *Intervention in International Law* 392–405 (Washington, D.C.: John Byrne, 1921)*Id*
(50.) The case is discussed and quoted in Rodin, War and Self-Defense, at 111.


(52.) Bowett, Self-Defenses in International Law, at 202.


(55.) See id. at 231, citing Verdross, 30 Hague Recueil (1929); Séfériadès, 34 Hague Recueil (1930); Cavaglierie, Nuovi Studi sull’ Intervento (1928); Baty, The Canons of International Law (1930).