

## USE OF MILITARY FORCE IN SYRIA BY TURKEY, NATO, AND THE UNITED STATES

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### 1. INTRODUCTION

During an ongoing insurgency in Syria, Turkey has already used military force against Syrian military targets inside Syria. Was this use of force by Turkey permissible under international law? If NATO engages in similar military force or more extensive armed force as a regional organization, will NATO's conduct be permissible under international law? U.S. military have been deployed to Jordan. If the United States engages in the use of force in Syria under certain future scenarios, will such conduct be permissible under international law? These and related questions are explored in the following essay.

### 2. USE OF MILITARY FORCE IN SYRIA IN 2012

#### 2.1. *Self-Defense Actions by Turkey*

On October 3, 2012, the Turkish town of Akcakale suffered artillery fire from armed forces of Syria. The Syrian fire killed five civilians and injured nine other persons. Turkey responded by firing on military targets in Syria, claiming self-defense against an "atrocious attack."<sup>1</sup> Turkey had contacted NATO, the Arab League, the Secretary-General of the United Nations, and the President of the U.N. Security Council, among others, prior to responding with military force.<sup>2</sup>

Was the use of armed force by Syrian military personnel an armed attack that triggered the right of Turkey to use responsive force in self-defense under Article 51 of the United Nations

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<sup>1</sup> See, e.g., Tim Arango & Anne Barnard, *Turkey Strikes Back After Syrian Shelling Kills 5 Civilians*, N.Y. TIMES, Oct. 3, 2012, [http://www.nytimes.com/2012/10/04/world/middleeast/syria.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/10/04/world/middleeast/syria.html?pagewanted=all&_r=0).

<sup>2</sup> See, e.g., *id.*

Charter? From my perspective, if Syria's use of force was intentional, such a shelling constituted an armed attack that triggered a right to use proportionate responsive force. Some claim that an attack must be of a certain gravity in order to constitute an armed attack,<sup>3</sup> and some claim that a border incident does not constitute an armed attack.<sup>4</sup> In contrast, I agree with the U.S. position that had been noted by Legal Adviser Harold Koh in September, 2012 during a speech on International Law in Cyberspace:

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<sup>3</sup> See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 191 (June 27) (preferring a need "to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms"); *Oil Platforms Case* (Iran v. U.S.), 2003 I.C.J. 161, ¶ 51 (Nov. 6) (quoting *Nicaragua*, *supra*, ¶ 72); *cf. id.* ¶ 72 ("the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defense'"); JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 143, 161 (2004); Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359, 370 & nn.69, 71 (2009) (noting that a gravity threshold articulated in 1986 "remained controversial") (citing G. Dahm, *Das Verbot der Gewaltanwendung nach Art. 2(4) der UNOCharta [The Prohibition on the Use of Force under Article 2(4) of the U.N. Charter]*, 10 JAHRBUCH FÜR INTERNATIONALES RECHT 48, 54-56 (1961-1962); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 230-31 (4th ed. 2005); Norman Menachem Feder, Note, *Reading the U.N. Charter Connotatively: Toward a New Definition of Armed Attack*, 19 N.Y.U. J. INT'L L. & POL. 395, 414-418 (1987); TARCISIO GAZZINI, THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 133 (2005); and Randalzhofer, *Art. 2(4) MN 36*, in *DIE CHARTA DER VEREINTEN NATIONEN: KOMMENTAR [THE CHARTER OF THE UNITED NATIONS: A COMMENTARY]* (Bruno Simma et al. eds., 1991)). See also, *id.* at 379-81 (noting new practice of states). I agree with Dinstein, Kunz, Taft, and others who recognize the need to abandon an unrealistic gravity limitation. See DINSTEIN, *supra*, at 195; J.L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947); William H. Taft, IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 300 (2004).

<sup>4</sup> See, e.g., Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 251 & n.36 (2010). In the *Nicaragua* case, the I.C.J. used the phrase "mere frontier incident" as something in contrast to "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State" that, "because of its scale and effects, would have been classified as an armed attack." *Nicaragua*, *supra* note 3, ¶ 195. There was no guidance concerning such a supposed distinction. See also DINSTEIN, *supra* note 3, at 195 (arguing that "it would be fallacious to dismiss automatically from consideration as an armed attack every frontier incident," such as when a soldier fires a single bullet across a border or a small military unit is attacked; and "'even a small border incident'" can constitute an armed attack) (quoting J.L. Kunz, *supra* note 4); *id.* at 202 (cumulative "pin-prick" attacks can be viewed as a process of armed attack); *id.* at 230-31 ("[T]here is no cause to remove small-scale armed attacks from the spectrum of armed attacks.").

the United States has for a long time taken the position that the inherent right of self-defense potentially applies against *any* illegal use of force. In our view, there is no threshold for a use of deadly force to qualify as an “armed attack”. . . . But that is not to say that any illegal force triggers the right to use any and all force in response—such responses must still be . . . *proportionate*.<sup>5</sup>

William H. Taft, IV, a former Legal Adviser, had noted earlier that “[t]he gravity of an attack may affect the proper scope of the defensive use of force . . . but it is not relevant to determining whether there is a right of self-defense.”<sup>6</sup>

In any event, cross-border artillery fire by Turkey has persisted in response to continued Syrian artillery and mortar shelling.<sup>7</sup> Such state-to-state uses of armed force have reached a sufficient gravity, do not constitute merely a border incident, and Turkey has a right to use proportionate responsive force as measures of self-defense. Additionally, the continued exchange between the Syrian and Turkish militaries has resulted in a limited international armed conflict to which the laws of war apply.<sup>8</sup> For this reason, layered

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<sup>5</sup> Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, Remarks at USCYBERCOM Inter-Agency Legal Conference: International Law in Cyberspace, (Sept. 18, 2012) (transcript on file) *available at* <http://www.state.gov/s/l/releases/remarks/197924.htm> (last visited, Nov. 27, 2012).

<sup>6</sup> Taft, *supra* note 3.

<sup>7</sup> See, e.g., Anne Barnard, *Rebels Clash with Syrian Security Forces Near Lebanon*, N.Y. TIMES, Oct. 7, 2012, <http://www.nytimes.com/2012/10/08/world/middleeast/rebels-clash-with-syrian-security-forces-near-lebanon.html> (describing how the death of Turkish citizens due to a Syrian mortar shell led the Turkish government to establish a retaliation policy).

<sup>8</sup> It is the fact of war or armed conflict that triggers application of the laws of war, whether or not the parties have declared war or recognized that it exists. See, e.g., U.S. DEP’T OF ARMY, FM 27-10, THE LAW OF LAND WARFARE 7, ¶ 8(a)-(b) *available at* <http://www.afsc.army.mil/gc/files/fm27-10.pdf> (“(a) *Types of Hostilities*. . . . Instances of armed conflict without declaration of war may include . . . the exercise of armed force pursuant to a recommendation, decision, or call by the United Nations, in the exercise of the inherent right of individual or collective self-defense against armed attack, or in the performance of enforcement measures through a regional arrangement, or otherwise, in conformity with appropriate provisions of the United Nations Charter. (b) The customary law of war applies to all cases of declared war or any other armed conflict which may arise between the United States and other nations, even if the state of war is not recognized by one of them.”); COMMENTARY IV, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 20 (Jean S. Pictet ed., 1958) (“There is no need for a formal declaration of war, or recognition of the existence of a state of war. . . . The occurrence of *de facto* hostilities is sufficient.”); The Prize Cases, 67 U.S. (2 Black) 635, 666-67 (1863) (holding that war can “exist *de facto* . . .

laws regarding self-defense and the laws of war apply to permit and restrain the use of Turkey's responsive armed force.

Would Syria have had a right to use force in self-defense against military personnel from the Free Syrian Army located in Turkey who were directly participating in armed attacks against Syria and in the armed conflict in Syria? Yes, if Syria had used selective force against members of the Free Syrian Army and had not attacked Turkish towns and Turkish military personnel. States have a right to use proportionate measures of self-defense against non-state actors who engage in armed attacks from another state with or without the consent of the state from which the non-state actor armed attacks emanate<sup>9</sup> and whether or not such a state is unwilling or unable to control its territory.<sup>10</sup>

### 2.2. Collective Self-Defense by NATO

On October 3rd, 2012, after the first Turkish response, the North Atlantic Council convened in an emergency meeting and condemned the Syrian attack as among "aggressive acts against an ally" and "flagrant violations of international law,"<sup>11</sup> but the Council did not publicly declare an intent to participate in a responsive use of force. Later, on October 9th and after Syrian and Turkish military units exchanged artillery and mortar barrages for the sixth straight day, NATO Secretary General Rasmussen announced that NATO was not anxious to get directly involved but will "protect and defend" Turkey under the North Atlantic Treaty "if necessary."<sup>12</sup>

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As a civil war is never publicly proclaimed, *eo nomine* . . . , its actual existence is a fact . . ."). Among layered laws, human rights law also applies in times of armed conflict and when measures of self-defense are employed during times of relative peace. See, e.g., Paust, *supra* note 4, at 263-69.

<sup>9</sup> See, Paust, *supra* note 4, at 238-58 (reviewing the *Caroline* precedent and historical practice by the United States).

<sup>10</sup> See, e.g., *id.* at 249-258 (discussing the example of U.S. drone strikes against al Qaeda in Afghanistan and Pakistan); Jordan J. Paust, *Permissible Self-Defense Targeting and the Death of bin Laden*, 39 DENV. J. INT'L L. & POL'Y 569, 580-81 (2011) (using the killing of Osama bin Laden in Abbottabad, Pakistan to demonstrate that the willingness or ability of a state to control its territory does not limit the lawfulness of another state's use of self-defense on that territory).

<sup>11</sup> Arango & Barnard, *supra* note 1.

<sup>12</sup> See, Anne Barnard & Christine Hauser, *Group Tied to Al Qaeda Claims Attack on Compound Near Damascus*, N.Y. TIMES, Oct. 10, 2012, at A8.

Why is the North Atlantic Treaty relevant to NATO's involvement? Article 5 of the Treaty provides agreement in advance among the members of NATO:

[A]n 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-defense recognized 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.<sup>13</sup>

In view of Article 5, it is evident that individual members of NATO can participate in collective self-defense at the request of a member-state<sup>14</sup> that is under a process of armed attack and, moreover, that NATO could participate in collective self-defense.

### 2.3. *Regional Action by NATO*

A broader regional power concerning attacks that threaten regional peace and security also exists under the United Nations Charter for regional organizations such as NATO, the Organization of American States ("O.A.S."), the African Union ("A.U.", formerly Organization of African Unity or "O.A.U."), and the League of Arab States.<sup>15</sup> For example, Article 52 of the U.N. Charter recognizes the permissibility of actions taken by regional arrangements for "the maintenance of international peace and

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<sup>13</sup> North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

<sup>14</sup> In a sense, the North Atlantic Treaty provides consent in advance for collective self-defense. *Cf. Nicaragua, supra* note 3, ¶ 195 ("[I]t is . . . clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defense on the basis of its own assessment of the situation.").

<sup>15</sup> *See also* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 828 (Bruno Simma ed., 2d ed. 2002) [hereinafter CHARTER COMMENTARY] (noting the O.A.S., O.A.U., and League of Arab States are among well-recognized regional arrangements or agencies dealing with matters relating to the maintenance of international peace and security within the meaning of Article 52. A prior distinction "between collective self-defence, seen as directed against an external aggressor, and collective security, viewed as measures taken against a member State of an organization, is no longer valid. Such a distinction is found neither in Article 51 nor in Chapter VIII," which contains Articles 52–53).

security as are appropriate for regional action, provided that such . . . activities are consistent with the Purposes and Principles of the United Nations.”<sup>16</sup> Article 52 adds that “[n]othing in the . . . Charter precludes” regional arrangements for such “regional action.”<sup>17</sup> Article 54 underscores the competence of regional organizations to engage in “activities undertaken . . . for the maintenance of international peace and security,” but requires that “[t]he Security Council shall at all times be kept fully informed.”<sup>18</sup>

### 2.3.1. *Prior Regional Action by the O.A.S.*

During the Cuban missile crisis in 1962, the Soviet Union attempted to deliver nuclear weapons to Cuba, but the United States moved to interdict their transfer by deploying U.S. naval vessels to stop and search Soviet ships heading for Cuba. The United States carefully avoided the term “blockade,” use of which would signal an act of war.<sup>19</sup> On October 23, 1962, the O.A.S. General Assembly passed a resolution authorizing member states to participate in the interdiction.<sup>20</sup> The United States held that the U.N. Charter envisioned this use of naval vessels as “collective measures” permitted under Article 52. The then-Legal Adviser of the State Department noted that “[t]he President in his speech did not invoke Article 51 or the right of self-defense. And the O.A.S. acted not under Article 3 [of the Rio Treaty], covering cases of armed attack, but under Article 6, covering threats to the peace other than armed attack.”<sup>21</sup>

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<sup>16</sup> U.N. Charter art. 52(1). Purposes of the Charter include the need to serve peace, security, self-determination of peoples, and human rights. *See, e.g., id.* pmbl., arts. 1, 55, 56. Such purposes also limit the authority of the Security Council. *See, e.g., id.* arts. 24(2), 25.

<sup>17</sup> *Id.* art. 52(1).

<sup>18</sup> *Id.* art. 54.

<sup>19</sup> *See, e.g.,* ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* (1974) (detailing the U.S. government’s cautious analysis of international law during its internal discussions about how to characterize the country’s actions toward Cuba); MARY ELLEN O’CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE* 397 (2d ed. 2009).

<sup>20</sup> *See* Resolution of the Council of the Organization of American States, Meeting as the Provisional Organ of Consultation, Oct. 23, 1962, *available at* 47 U.S. DEP’T OF STATE BULL. 723 (1962) (calling for the “immediate dismantling and withdrawal from Cuba of all missiles and other weapons with any offensive capability.”).

<sup>21</sup> Abram Chayes, *The Legal Case for U.S. Action in Cuba*, 47 DEP’T STATE BULL. 763, 764 (1962). *See also* CHAYES, *supra* note 19, at 554 (asserting that no claim of Article 51 self-defense was made); CHARTER COMMENTARY, *supra* note 15, at 845

### 2.3.2. *Prior Regional Action by NATO in Kosovo.*

NATO is a regional arrangement designed partly for the maintenance of international peace and security. Although too many seem not to realize it, NATO's actions in Kosovo in 1999 exemplify regional peace and security actions permitted by Article 52 of the U.N. Charter, especially since they promoted peace, security, self-determination, and human rights in the area.<sup>22</sup> Such regional competence is partly enhanced by Charter-based duties of every state to take joint and separate action for the universal respect for and observance of human rights.<sup>23</sup>

Article 53 of the U.N. Charter does not limit "regional action" permitted in Article 52 (and, as noted, Article 52 states that nothing in the Charter precludes regional arrangements for such action). But Article 53 does prohibit regional organizations from engaging in "enforcement action" that is actually "under the authority" of the Security Council "without the authorization of the Security Council."<sup>24</sup> In some instances, the Security Council has made decisions to authorize use of regional organizations as part of enforcement action that the Security Council has authorized and might control,<sup>25</sup> and there might be a growing use of regional organizations in this manner in the future.

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(arguing that O.A.S. authorized members could take "all, including military, measures" to interdict the transfer of Soviet nuclear weapons); O'CONNELL, *supra* note 19, at 397-405; Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515, 523-24 (1963) (defending the interdiction as regional action permissible under Article 52); *The Cuban Missile Crisis, 1962*, in 4 MARJORIE M. WHITEMAN, U.S. DEP'T OF STATE, DIGEST OF INT'L L. 523 (1965).

<sup>22</sup> Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 545-47 (2002). *But see* Shinya Murase, *The Relationship Between the UN Charter and General International Law Regarding Non-Use of Force: The Case of NATO's Air Campaign in the Kosovo Crisis of 1999*, in 2 LIBER AMICORUM JUDGE SHIGERU ODA 1543, 1544-45, 1551-52 (Nisuke Ando et al. eds., 2002); *infra* note 28 and accompanying text. NATO's website identifies "collective defense, crisis management and cooperative security" as being among its "core" strategic purposes in a "transformed security environment." *See Strategic Concepts*, NORTH ATLANTIC TREATY ORGANIZATION, [http://www.nato.int/cps/en/natolive/topics\\_56626.htm?selectedLocale=en](http://www.nato.int/cps/en/natolive/topics_56626.htm?selectedLocale=en) (last updated May 30, 2012).

<sup>23</sup> *See, e.g.*, U.N. Charter arts. 55(c), 56.

<sup>24</sup> *Id.* art. 53, para. 1.

<sup>25</sup> *See, e.g.*, S.C. Res. 1244, ¶¶ 5, 7, U.N. Doc. S/RES/1244 (June 10, 1999), U.N. Doc. S/RES/1244 (June 10, 1999) (authorizing "Member States and relevant international organizations" to use force in Kosovo); CHARTER COMMENTARY, *supra* note 15, at 827, 848, 859-62.

Nonetheless, permissible regional organization actions are not always “enforcement action” “under the authority of” the Security Council. For example, when the Security Council is veto-deadlocked with respect to its ability to make “decisions” to authorize “enforcement action,” permissible regional military actions under Article 52 are neither “enforcement action” nor “under the authority of” the Security Council, at least until the Council can act and actually decide on measures under Chapter VII of the Charter. When the Council is veto-deadlocked, it is unable to decide on measures “to give effect to its decisions”<sup>26</sup> or to decide on “action required to carry out” its decisions,<sup>27</sup> and it is unable to decide to “utilize” a regional arrangement “for enforcement action under its authority” within the meaning of Article 53. In view of the above, it is evident that NATO’s actions in Kosovo were permissible under Article 52 and were not impermissible under Article 53 of the Charter.<sup>28</sup>

By majority vote, the Security Council should also be able to provide “authorization” for regional action even though, or especially because, such action is not “enforcement action” “under the authority of” the Council. This impliedly occurred in March, 1999 when the Security Council voted to defeat a draft resolution

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<sup>26</sup> See U.N. Charter arts. 41–42. When the Security Council is veto-deadlocked, despite a statement in a prior resolution that it decides to “remain seized” of a matter, realities such as those in Kosovo and now in Syria demonstrate that it is seized of nothing in a controlling sense, and that, for tens of thousands of victims of ongoing violence, its claim can function as cruel nonsense. Certainly the fact that the Security Council prefers to remain seized in its attention does not preclude other entities from exercising their competencies under the Charter, such as those of the International Court of Justice, the U.N. Secretary-General, the U.N. General Assembly, and regional organizations.

<sup>27</sup> *Id.* art. 48.

<sup>28</sup> See Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1772–75 (2000) (contending that intervention was, indeed, legal); cf. DINSTEIN, *supra* note 3, at 310–14 (missing the point that Article 52 provides for “regional action” when the Security Council is unable to act and to authorize “enforcement action” as such). See also CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 161–62 (3d ed. 2008) (explaining that the Cuban missile crisis was authorized as “regional peacekeeping under Chapter VIII of the UN Charter”). But see *id.* at 49–50 (claiming that NATO authorization regarding Kosovo without Security Council authorization was supposedly of “doubtful” validity); CHARTER COMMENTARY, *supra* note 15, at 868–69. For further analysis, compare editorial comments of Professors Henkin, Wedgwood, Chinkin, Falk, Franck, Reisman in Christine Chinkin et al., *Editorial Comments: NATO’s Kosovo Intervention*, 93 AM. J. INT’L L. 824 (1999), with Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 VAND. J. TRANSNAT’L L. 1231 (1999) (revised from 93 AM. J. INT’L L. 834 (1999)).

attempting to restrain NATO's authority in Kosovo.<sup>29</sup> Later, in June, 1999, the Security Council authorized "States and relevant international organizations" to establish a security presence in Kosovo,<sup>30</sup> and part of the Security Council's authorization had recognized that "the international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control."<sup>31</sup> By doing so, the Security Council impliedly ratified NATO's prior conduct and its presence in Kosovo. Over time, such implied and ratifying authorizations can supplement new patterns of normative expectations and "subsequent practice" and, therefore, provide either a new or clarified meaning concerning provisions of the U.N. Charter noted herein.<sup>32</sup>

Additionally, the fact that NATO is the only regional organization that has three permanent members of the U.N. Security Council among its twenty-eight members and that decisions of the North Atlantic Council (where each member has a vote) must be unanimous might supplement NATO's perceived authority in the international community. NATO's increased

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<sup>29</sup> See Belarus, India, and Russian Federation: Draft Resolution, U.N. Doc. S/1999/328 (Mar. 26, 1999) (vote: 12-3 (Namibia, People's Republic of China, Russia)); Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828, 830-31 (1999). But see Monica Hakimi, *To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization*, 40 VAND. J. TRANSNAT'L L. 643, 676 (2007) (missing the legal relevance of regional action under Article 52 of the Charter and noting that "the scale of . . . defeat [of the draft resolution] was politically significant, for it meant that the international community was overwhelmingly unwilling to condemn NATO for taking an enforcement action outside the parameters of the U.N. Charter"); Murase, *supra* note 22, at 1544-45 (*cf. id.* at 1551-52); Sreenivasa Rao Pemmaraju, *International Organizations and Use of Force*, in 2 LIBER AMICORUM JUDGE SHIGERU ODA, *supra* note 22, at 1599-1600, 1602.

<sup>30</sup> See S.C. Res. 1244, *supra* note 25, ¶ 5 ("Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences . . ."); *id.* ¶ 7 ("Authorizes Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2").

<sup>31</sup> See *id.*, Annex 2, ¶ 4. See also CHARTER COMMENTARY, *supra* note 15, at 868.

<sup>32</sup> See, e.g., Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331 (concerning the fact that new patterns of practice and *opinio juris* can change the meaning of treaty provisions). See also Hakimi, *supra* note 29, at 676 n.190 (noting that the Slovenian representative at the U.N. in March 1999 had referred to "the practice of the Security Council, which has several times, including on recent occasions, chosen to remain silent at a time of military action by a regional organization aimed at the removal of a regional threat to peace and security").

membership and involvement in matters affecting regional peace and security are part of a new reality that should be considered with respect to the various objects and purposes of the U.N. Charter and interpretation of its provisions.<sup>33</sup>

### 3. DEPLOYMENT OF U.S. TROOPS IN JORDAN

#### 3.1. *Future Elimination of Chemical and Biological Weapons in Syria*

On October 10, 2012, it was reported that the United States has a task force of more than 150 military personnel in Jordan to help with the flood of Syrian refugees, to “prepare for the possibility that Syria will lose control of its chemical [and biological] weapons,” and to prepare to aid Jordan in avoiding cross-border clashes with Syrian military forces.<sup>34</sup>

If U.S. military forces destroy chemical and biological weapons stashed in Syria in order to assure that they do not fall into the hands of al Qaeda or other nefarious groups, would the U.S. use of military force be permissible under the United Nations Charter? Would it constitute what most consider to be an unlawful

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<sup>33</sup> See, e.g., Vienna Convention on the Law of Treaties, *supra* note 32, art. 31(1) (concerning the fact that serving the objects and purposes of a treaty are relevant to the meaning of treaty provisions). See also *supra* note 16 (regarding purposes of the U.N. Charter). NATO is aware of a new reality connected to a transformed security environment. See *supra* note 22.

<sup>34</sup> See, e.g., Michael R. Gordon & Elisabeth Bumiller, *U.S. Military Is Sent to Jordan to Help With Crisis in Syria*, N.Y. TIMES, Oct. 9, 2012, <http://www.nytimes.com/2012/10/10/world/middleeast/us-military-sent-to-jordan-on-syria-crisis.html>; *Spec Ops Troops Set Up Near Syrian Border to Help Jordan*, AIR FORCE TIMES, Oct. 22, 2012, at 13 (“about 150 troops, mainly Army Special Forces, have deployed” in Jordan, “lawlessness in Syria has fueled concerns that . . . [chemical and biological] weapons could fall into the hands of Islamic militants,” and it is “unclear what role al-Qaida-linked militants may be playing in the Free Syrian Army”). See also *Syrian Rebels Overrun Missile Base*, L.A. TIMES, Oct. 13, 2012, at 9 (“Syria is believed to have one of the world’s largest chemical weapons programs . . . . Western powers . . . worry that Islamist extremists are playing an increasing role in the conflict” and there is fear that chemical and biological weapons could fall into their hands); Craig Whitlock, *U.S. Steps Up Support of Turkey Amid Syrian Conflict*, WASH. POST, Oct. 19, 2012, [http://www.washingtonpost.com/world/national-security/2012/10/19/98b4f104-1a1e-11e2-b235-9cd54b35db6f\\_story.html](http://www.washingtonpost.com/world/national-security/2012/10/19/98b4f104-1a1e-11e2-b235-9cd54b35db6f_story.html) (military officials from the United States and Turkey “have met to make contingency plans to impose no-fly zones over Syrian territory or seize Syria’s stockpiles of chemical and biological weapons” and “cross-border shelling has continued,” adding that “[t]he Obama administration . . . [is] monitoring the whereabouts of Syria’s stockpiles of” chemical and biological weapons).

“preemptive”<sup>35</sup> use of armed force? Could it constitute a lawful measure of collective self-defense at the request of Jordan and/or Turkey?

Turkey is under a process of armed attacks by Syrian military units and could request assistance from the United States, but would al Qaeda fighters who are aiding the Free Syrian Army and obtain possession of the weapons be likely to use them against Turkey? If Jordan is under a similar process of armed attacks by Syrian military units, could Jordan request assistance to destroy chemical and biological weapons in Syria once they are in control of al Qaeda fighters or their affiliates? It is likely that Jordan would merely have a claim similar to that of Turkey. Yet, given the fact that a limited armed conflict exists between Turkey and Syria, the law of war paradigm is applicable in addition to the self-defense or collective self-defense paradigm, and layered laws apply.

Under the laws of war, Turkey presently has authority to destroy lawful military targets such as chemical and biological weapons located in Syria and under control of the Assad regime.<sup>36</sup> If an armed conflict exists between Syria and Jordan, Jordan will also have such a competence under the laws of war. If Turkey or Jordan request assistance from the United States or NATO to destroy military targets in Syria during an armed conflict, the United States or NATO could participate but would become participants in an armed conflict with Syria or the remnants of the Assad regime. For the United States or NATO, the war could be very short, involving merely selective use of force to destroy chemical and biological weapons and any defensive force needed to support such a mission.

If, in the future, Syrian chemical or biological weapons are actually controlled by members of al Qaeda, in view of the fact that al Qaeda engages in continued armed attacks on U.S. military

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<sup>35</sup> See, e.g., Paust, *supra* note 22, at 533-38 (noting a difference between mere “preemptive” use of force, which is widely known to be unlawful, and “anticipatory” use of force in self or collective self-defense when an armed attack is imminent).

<sup>36</sup> See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 52(2) 1125 U.N.T.S. 3 (8 June 1977) (“Attacks shall be limited strictly to military objectives . . . . [M]ilitary objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”).

personnel and other U.S. nationals, the United States could claim the right to target members of al Qaeda in Syria who directly participate in such a process of armed attacks as well as the weapons that they control as a measure of self-defense under Article 51 of the U.N. Charter.<sup>37</sup> In such a circumstance, the United States could also request the aid of Jordan, Turkey, and NATO with respect to lawful measures of collective self-defense. The self-defense paradigm pertains whether or not targetings are also permissible under the laws of war in an actual theatre of war, such as exists in Afghanistan and parts of Pakistan. In my opinion, under international law the United States cannot be at war or in an armed conflict with al Qaeda as such.<sup>38</sup> Therefore, the law of war paradigm does not aid the United States in its efforts to target members of al Qaeda and their weapons in Syria absent an armed conflict between the United States and Syria in which members of al Qaeda participate in fighting against armed forces of the United States.

In any event, it would be more clearly legally appropriate for NATO to authorize the destruction of chemical and biological weapons in Syria as an Article 52 regional action that is needed to end a manifest threat to regional peace and security that can arise once such dangerous weapons are likely to fall into the hands of unsavory non-state actors. With such an authorization, either a U.S. or NATO force could destroy the weapons. Under the U.S. Constitution, it would be far more lawful for the President to use military force in self-defense or collective self-defense under Article 51 of the U.N. Charter or to participate in NATO- or Security Council-authorized uses of force,<sup>39</sup> as opposed to merely entering the limited war between Turkey and Syria without a treaty-based competence or authorization.

One can understand that a terroristic release of certain biologic agents could cause the deaths of millions in a region and might

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<sup>37</sup> See, e.g., Paust, *supra* note 4, at 260-64, 270-72 (concerning the propriety of U.S. measures of self-defense against members of al Qaeda located in a foreign country and who directly participate in armed attacks, and who are, therefore, targetable as direct participants in armed attacks (DPAA)); Paust, *Permissible Self-Defense Targeting*, *supra* note 10, at 571-72, 575-76.

<sup>38</sup> See, e.g., Paust, *supra* note 4, at 260 & n.53; Jordan J. Paust, *Propriety of Self-Defense Targetings of Members of al Qaeda and Applicable Principles of Distinction and Proportionality*, 18 ILSA J. INT'L & COMP. L. 565, 566-72 (2012), available at <http://ssrn.com/abstract=2165278>.

<sup>39</sup> See Jordan J. Paust, *Constitutionality of U.S. Participation in the United Nations-Authorized War in Libya*, 26 EMORY INT'L L. REV. 43, 47-55, 66-67 (2012).

threaten all of humankind if, for example, there are inadequate or no known means of preventing their spread and deadly consequences. Waiting for a veto-deadlocked Security Council to authorize enforcement action in such a circumstance would not be rational or policy-serving, especially when a regional organization could take action that has become necessary in order to avert a regional or global biologic catastrophe. When a regional organization engages in regional action to assure the destruction of biologic agents, effort should be made to incinerate the agents with heat so intense that their escape into the environment is not possible. During times of relative peace, because such deadly agents might exist in several countries, preventative efforts should be made to destroy biologic agents with the cooperation of the states possessing them. Where the agents have not been destroyed, effort should be made to identify their location so that during times of local armed conflict, for example, regional organizations might be able to destroy them before they are used by terrorist groups.

### 3.2. *Future U.S. Support of a Legitimate Government of the Syrian People*

The future is uncertain, but if the armed conflict in Syria continues, with the outside recognition of a governmental entity as the legitimate representative of the Syrian people, how might such a development condition the legitimacy of outside use of military force in Syria?

During the conflict in Libya in 2011, there was a change in the international legal status of the Libyan rebel-insurgents to belligerents, and “they consented to and welcomed” the use of armed force by the United States and NATO to protect civilians and civilian populated areas.<sup>40</sup>

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<sup>40</sup> Jordan J. Paust, *International Law, Dignity, Democracy, and the Arab Spring*, 46 CORNELL INT’L L.J. (forthcoming 2013) [hereinafter Paust, *The Arab Spring*] (manuscript on file with author), available at <http://ssrn.com/abstract=1991432>. See also Paust, *supra* note 39, at 44–45 (describing Operation Odyssey Dawn, conducted in Libya in 2011); Harold Hongju Koh, Legal Advisor U.S. Department of State, Statement Regarding Use of Force in Libya (Mar. 26, 2011), available at <http://www.state.gov/s/1/releases/remarks/159201.htm> (“U.S. forces have targeted the Qaddafi regime’s air defense systems, command and control structures, and other capabilities of Qaddafi’s armed forces used to attack civilians and civilian populated areas.”). The U.N. Security Council had expressly authorized “Member States . . . to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in” Libya. See S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011). Cf. Paust, *The Arab Spring*, *supra* (“Over a period of months, it had become reasonably necessary to provide

In July 2011, the National Transitional Council of Libya (“NTC”) gained recognition as the legitimate representative of the Libyan people,<sup>41</sup> and its consent provided additional independent legitimacy for use of force to support regime change, to provide self-determination assistance to the Libyan people, and to participate in collective self-defense<sup>42</sup> against continuous armed

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support for regime change in Libya in order to effectively protect civilians who were under a series of murderous armed attacks and serious threats of imminent future attacks by the Qaddafi regime.”). The General in command of NATO’s air operation in Libya has noted that selective use of force by NATO involved continual protection of civilians and civilian populated areas from armed attacks by pro-Qaddafi forces (PGF) but that anti-Qaddafi forces (AGF) were not attacked because “[w]e saw when the [AGF] entered towns, they liberated the town and the people. They did not indiscriminately attack civilians and in fact, kept the civilians away from any of the fighting between the AGF and PGF.” See E-mail from Lieutenant General Ralph J. Jodice II, Lieutenant General, U.S. Air Force, to author (Apr. 20, 2012, 09:50 CST) (on file with author).

<sup>41</sup> See, e.g., *Fourth Meeting of the Libya Contact Group Chair’s Statement, July 15, 2011, Istanbul*, REPUBLIC OF TURKEY, MINISTRY OF FOREIGN AFFAIRS, ¶ 4 (July 15, 2011), available at [http://www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair\\_s-statement\\_-15-july-2011\\_-istanbul.en.mfa](http://www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair_s-statement_-15-july-2011_-istanbul.en.mfa) (concerning recognition in July 2011 by thirty-two countries (including the United States) that the NTC became “the legitimate governing authority in Libya”). See also *Contemporary Practice of the United States Relating to International Law*, 105 AM. J. INT’L L. 775, 779–80 (John R. Crook ed., 2011) (describing U.S. Department of State officials’ remarks on Secretary of State Hillary Clinton’s recognition of the NTC during a meeting of foreign ministers in Istanbul in mid-July 2011); William Wan & William Booth, *United States Recognizes Libyan Rebels as Legitimate Government*, WASH. POST, Jul. 15, 2011, [http://www.washingtonpost.com/world/middle-east/western-arab-leaders-meet-in-turkey-on-libyas-future/2011/07/15/gIQAZLbjFI\\_story.html](http://www.washingtonpost.com/world/middle-east/western-arab-leaders-meet-in-turkey-on-libyas-future/2011/07/15/gIQAZLbjFI_story.html) (noting the “full diplomatic recognition” given to the Libyan rebels); Stefan Talmon, *Recognition of the Libyan National Transitional Council*, ASIL INSIGHTS, June 16, 2011, at 1, available at <http://www.asil.org/pdfs/insights/insight110616.pdf> (exploring the meaning and scope of the recognition). With respect to recognition of the NTC and Security Council encouragement of the NTC (or “the Libyan authorities”) to implement its plans, for example, to “protect Libya’s population,” restore governmental services, prevent violations of human rights, and ensure an inclusive political process involving free elections, see, for example, S.C. Res. 2009, ¶¶ 5, 7, U.N. Doc. S/RES/2009 (Sept. 16, 2011).

<sup>42</sup> See Jordan J. Paust & Albert P. Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANSNAT’L L. 1, 11–12 n.39 (1978) (“Contextual reality and the serving of all goal values require a new reading of article 51 of the Charter” where a given people are denied self-determination by an oppressive elite using military force, “especially in the light of massive violations of human rights of their people[] Outside states cannot precipitate violence, but where an armed attack has occurred against a people seeking self-determination it is not improper to assist those being attacked.”). Recognition of the right of self-defense and collective self-defense of a people entitled to self-determination who are under armed attack is all the more appropriate given the fact that such peoples are among recognized non-state actors with formal

attacks by remnants of the Qaddafi regime. Prior to the authorization of use of military force in Libya by the Security Council, the League of Arab States had also supported creation of a no-fly zone in Libya.<sup>43</sup> It is theoretically possible that the Security Council or the League of Arab States will respond similarly with respect to the need to protect civilians and civilian populated areas in Syria, but there have been no such authorizations. What if in the future they do not occur?

One possible scenario could involve the outside recognition of a governmental entity as the legitimate representative of the Syrian people<sup>44</sup> and that entity's consent to or request for outside military

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participatory roles in the international legal process and that international law and international relations have never been merely state-to-state. With respect to documentation of these facts, see, for example, Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT'L L. 977, 978-81, 1000 (2011) (listing examples of nations, tribes, indigenous peoples, and "belligerents" that have formally participated in international legal processes). International relations also recognizably exist once a status of belligerency is obtained and, at such a moment at least, all of the customary laws of war are applicable. *Id.* at 981 (citing, for example, the Confederate States of America during the U.S. Civil War).

<sup>43</sup> See, e.g., S.C. Res. 1973, *supra* note 40, pmbl. ("Taking note also of the decision of the Council of the League of Arab States of 12 March 2011 to call for the imposition of a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure . . . ."); Steven Erlanger, *Sarkozy Puts France at Vanguard of West's War Effort*, N.Y. TIMES, Mar. 20, 2011, <http://www.nytimes.com/2011/03/21/world/europe/21france.html> (citing Arab League criticism of mission-creep of forces implementing the no-fly zone); Julian Borger, *The Libyan Crisis: Obama's Dilemma Over a No-Fly Zone*, JULIAN BORGER'S GLOBAL SECURITY BLOG, THE GUARDIAN (Mar. 12, 2011, 8:02 PM), <http://www.guardian.co.uk/world/julian-borger-global-security-blog/2011/mar/13/libya-nato> (noting the Arab League's vote in favor a no-fly zone bringing "military intervention closer to reality."); *White House Welcomes Arab League Libya No-Fly Zone Call*, RADIO FREE EUR. RADIO LIBERTY (Mar. 12, 2011, 3:44 PM), [http://www.rferl.org/content/arab\\_league\\_libya/2336021.html](http://www.rferl.org/content/arab_league_libya/2336021.html) (reporting a White House statement in support of the Arab League call for a no-fly zone).

<sup>44</sup> Turkey, France, Saudi Arabia, Bahrain, the United Arab Emirates, Oman, Qatar, Kuwait, the United Kingdom, the United States, and other states have already recognized the Syrian coalition as the legitimate leader of the Syrian people. See, e.g., Sebnem Arsu & Tim Arango, *Turks Grant Recognition to Coalition of Syrians*, N.Y. TIMES, Nov. 15, 2012, <http://www.nytimes.com/2012/11/16/world/middleeast/turkey-recognizes-new-syrian-rebel-group-as-legitimate-leader-of-syria.html>; Steven Erlanger & Rick Gladstone, *France Grants Its Recognition to Syria Rebels*, N.Y. TIMES, Nov. 13, 2012, <http://www.nytimes.com/2012/11/14/world/middleeast/syria-war-developments.html?pagewanted=all>; Neil MacFarquhar & Hania Mourrada, *Citing a 'Credible Alternative' to Assad, Britain Recognizes Syrian Rebel Group*, N.Y. TIMES, Nov. 20, 2012, <http://www.nytimes.com/2012/11/21/world/middleeast/britain-is-latest->

support for self-determination assistance<sup>45</sup> and/or collective self-defense against continual armed attacks on Syrian people by the Assad government.<sup>46</sup> A legitimate Syrian governmental entity could request assistance from Turkey, Jordan, the United States, the League of Arab States, and/or NATO. For the people of Syria, such a scenario is long overdue.

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power-to-recognize-syrian-opposition-coalition.html?\_r=0; Mark Landler et al., *U.S. Will Grant Recognition to Syrian Rebels, Obama Says*, N.Y. TIMES, Dec. 11, 2012, [http://www.nytimes.com/2012/12/12/world/middleeast/united-states-involvement-in-syria.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/12/12/world/middleeast/united-states-involvement-in-syria.html?pagewanted=all&_r=0).

<sup>45</sup> See, e.g., Paust, *supra* note 22, at 547–48 (describing the permissibility of self-determination assistance under the U.N. Charter); Paust, *The Arab Spring, supra* note 40, at 31–38 (discussing self-determination assistance and its legal support in the context of regime change in Libya during 2011).

<sup>46</sup> See *supra* note 41 (listing various countries' recognition of the NTC as the legitimate government of Libya in 2011).