

RATIONALIZING THE RIGHT OF SOLDIER  
SELF-DEFENSE AND ITS LIMITS IN  
INTERNATIONAL LAW

KAR MUN CHAN\*

I. INTRODUCTION .....	1065
II. NICARAGUA'S EFFECT ON THE ARTICLE 51 "ARMED ATTACK" THRESHOLD REQUIREMENT.....	1066
A. <i>Circumventing Nicaragua</i> .....	1068
III. THE RELATIONSHIP BETWEEN SOLDIER SELF- DEFENSE AND ARTICLE 51 .....	1068
A. <i>Soldier Self-Defense as Derived from Article 51 Self-Defense</i> .....	1069
B. <i>Soldier self-defense as distinct from Article 51 self- defense</i> .....	1071
IV. THE EXTENT TO WHICH THE RIGHT OF SOLDIER SELF-DEFENSE CAN BE LIMITED BY A HIGHER AUTHORITY .....	1073
V. CONCLUSION .....	1075

I. INTRODUCTION

The notion that soldiers have a right to defend themselves has been a “long-standing assumption” shared by countries across the world.<sup>1</sup> Also referred to as “individual” or “unit” self-defense, this right features fairly consistently in states’ Rules of Engagement (ROE) and other military doctrines.<sup>2</sup> It is fre-

---

\* LL.M. Candidate, New York University School of Law. All views expressed, and all errors herein, are my own.

1. Erica Gaston, *Soldier Self-Defense Symposium: The View from the Ground – Emerging State Practice on Individual and Unit Self-Defense*, OPINIO JURIS (May 2, 2019), <http://opiniojuris.org/2019/05/02/soldier-self-defense-symposium-the-view-from-the-ground-emerging-state-practice-on-individual-and-unit-self-defense/>.

2. INT’L INST. OF HUMANITARIAN L., SANREMO HANDBOOK ON RULES OF ENGAGEMENT 3 (2009); N. ATL. TREATY ORG., MC 362/1 — NATO RULES OF ENGAGEMENT 4 (2003); The Judge Advoc. General’s Legal Ctr. and Sch., *Operational Law Handbook* 83 (2015); NORWEGIAN CHIEF OF DEFENCE, *MANUAL I KRIGENS FOLKERETT [MANUAL OF THE LAW OF ARMED CONFLICT]* 27 (2013); FRENCH MINISTRY OF DEFENCE, *DIRECTIVE INTERARMÉES SUR L’USAGE DE LA FORCE EN OPÉRATION MILITAIRE SE DÉROULANT À L’EXTÉRIEUR DU TERRITOIRE*

quently—and increasingly—being relied on by soldiers both in situations of modern conflict, such as in Afghanistan prior to the U.S. withdrawal, and occasionally, in opposition to superior orders.<sup>3</sup> It is, thus, all the more concerning that there is presently little consensus as to the source of the right or the extent to which it may be limited in the interests of operational necessity.<sup>4</sup>

This Comment will advance two key propositions: first, that the doctrinal basis of soldier self-defense lies in customary international law, and not state self-defense under Article 51 of the U.N. Charter; and second, that for this reason, *inter alia*, the right is one that can only be restricted to the extent that it is a proportionate means of achieving a legitimate operational aim.

## II. NICARAGUA'S EFFECT ON THE ARTICLE 51 "ARMED ATTACK" THRESHOLD REQUIREMENT

Within *jus ad bellum*, which governs the conditions under which states may resort to war or to the use of armed force in general, Article 51 of the U.N. Charter offers an exception to the Article 2(4) prohibition on the "threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>5</sup> Article 51 provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an *armed attack* occurs against a Member of the United Nations . . . ."<sup>6</sup>

---

NATIONAL [JOINT DIRECTIVE ON THE USE OF FORCE IN MILITARY OPERATIONS OUTSIDE NATIONAL TERRITORY] 34 (2006); AAP 1003, ROYAL AUSTRALIAN AIR FORCE, OPERATIONS LAW FOR RAAF COMMANDERS 45 (2nd ed. 2004); NEW ZEALAND DEFENCE FORCE, MANUAL OF ARMED FORCES LAW VOL. 4: LAW OF ARMED CONFLICT, 17-37 (2nd ed. 2008); UNITED KINGDOM MINISTRY OF DEFENCE, JOINT DOCTRINE PUBLICATION 3-46: LEGAL SUPPORT TO JOIN OPERATIONS 25-26 (3rd ed. 2018).

3. ERICA GASTON, GLOB. PUBL. POL'Y INST., WHEN LOOKS COULD KILL: EMERGING STATE PRACTICE ON SELF-DEFENSE AND HOSTILE INTENT 10 (2017).

4. Elvina Pothelet & Kevin Jon Heller, *Symposium on Soldier Self-Defense and International Law: Highlighting and Framing the Issue*, OPINIO JURIS (Apr. 29, 2019), <http://opiniojuris.org/2019/04/29/symposium-on-soldier-self-defense-and-international-law-highlighting-and-framing-the-issue%E2%BB%BF/>.

5. U.N. Charter art. 2, ¶ 4.

6. *Id.* art. 51 (emphasis added).

In *Military and Paramilitary Activities in and Against Nicaragua*, the International Court of Justice (ICJ) established a *de minimis* threshold for drawing a distinction between an “armed attack,” which would engage Article 51, and “less grave forms” of the use of force, which would not.<sup>7</sup> In suggesting that “a mere frontier incident” would lack the necessary “scale and effects” to qualify as an “armed attack,”<sup>8</sup> the ICJ made clear that this would be a high threshold, a requirement affirmed in the *Case Concerning Oil Platforms* and in an award of the Eritrea-Ethiopia Claims Commission.<sup>9</sup> The *Nicaragua* decision narrowed the forms of violence to which a state is legally permitted to respond using unilateral defensive force pursuant to Article 51, thus encouraging states to respond to low-level violence either without recourse to force at all or, at the very least, by going through the collective mechanism of the U.N. Security Council.<sup>10</sup>

At the same time, however, such a strict construction of Article 51 has significant implications for soldiers operating on the ground. Taken to its logical conclusion, *Nicaragua* stands for the proposition that in a situation involving force falling short of an armed attack, a state is prevented from authorizing its soldiers to act in the name of national self-defense, even when said force is being directed at them. This severely undermines the ability of individual soldiers to both protect themselves and carry out their mission,<sup>11</sup> especially when one considers the asymmetric nature of conflict and the reluctance of a significant part of the international community to acknowledge that non-state actors may themselves launch armed attacks.<sup>12</sup>

---

7. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 191, (June 27).

8. *Id.* at 195, 231.

9. *Case Concerning Oil Platforms* (Iran v. U.S.), Judgment, 2003 I.C.J. Rep, 161., ¶ 51 (Nov. 6); Partial Award, Jus Ad Bellum—Ethiopia’s Claims 1-8, 26 R.I.A.A. 457, 465 (Eri.-Eth. Claims Comm’n 2005).

10. Monica Hakimi & Jacob K. Cogan, *The Two Codes on the Use of Force*, 27(2) EUR. J. INT’L L. 257, 270 (2016).

11. GASTON, *supra* note 3, at 7.

12. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9), ¶ 139.

### A. *Circumventing Nicaragua*

It is thus unsurprising that international law scholars have scrambled to find ways to fill this lacuna. Rather than accept the constraints introduced by *Nicaragua* to soldiers' exercise of self-defense, scholars have presented the following interpretations of the decision: that a series of small-scale attacks may fall within the definition of armed attack;<sup>13</sup> that *Nicaragua* was not meant to apply outside the context of collective self-defense and third-state intervention in a conflict;<sup>14</sup> and that the ICJ's distinction between more and less grave uses of force does not reflect positive law.<sup>15</sup>

A possible solution can be found in the recently articulated notion that under international law, individual soldiers have a *prima facie* right to defend *themselves* when attacked—a right that exists even where the *Nicaragua* definition of an armed attack is not satisfied.

### III. THE RELATIONSHIP BETWEEN SOLDIER SELF-DEFENSE AND ARTICLE 51

While the existence of a doctrine of soldier self-defense appears to be widely accepted,<sup>16</sup> the international community remains divided on the relationship between soldier and national self-defense under Article 51. There are two competing views. First, that soldier self-defense is derived from Article 51

---

13. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 202 (5th ed. 2011).

14. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 145-146 (4th ed. 2018); Abdulqawi A. Yusuf, *The Notion of "Armed Attack" in the Nicaragua Judgment and Its Influence on Subsequent Case Law*, 25 (2) LEIDEN J. INT'L L. 461 (2012); Christopher Greenwood, *The International Court of Justice and the Use of Force, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS* 373, 381 (Vaughan Lowe & Malgosia Fitzmaurice eds. 1996).

15. Chris O'Meara, *The Relationship Between National, Unit and Personal Self-Defence in International Law: Bridging the Disconnect*, 4(2) J. ON THE USE OF FORCE & INT'L L. 273, 290-91 (2017); Greenwood, *supra* note 11, at 381; Hakimi & Cogan, *supra* note 7, at 271.

16. Pothelet & Heller, *supra* note 4; Charles P. Trumbull IV, *The Basis of Unit Self-Defense and Implications for the Use of Force*, 23 DUKE J. COMPAR. & INT'L L. 121, 121 (2012); O'Meara, *supra* note 11; Erica Gaston, *Do the Strikes on al Shabaab Stretch the AUMF or the Unit Self-Defense Doctrine?*, LAWFARE (Mar. 8, 2016, 10:00 AM), <https://www.lawfareblog.com/do-strikes-al-shabaab-stretch-aumf-or-unit-self-defense-doctrine>.

self-defense.<sup>17</sup> Second, that soldier self-defense is a separate doctrine.<sup>18</sup>

A. *Soldier Self-Defense as Derived from Article 51 Self-Defense*

Under the Article 51-based conception, soldier self-defense is derived from the established *jus ad bellum* right of national self-defense contained in Article 51 of the U.N. Charter,<sup>19</sup> albeit exercised by individual soldiers and military units rather than states.<sup>20</sup> This appears to be the position of the United States, which, in its written pleadings before the ICJ in *Aerial Incident of 3 July 1988*, asserted that the inherent right of self-defense recognized in Article 51 of the Charter “includes the right of individual military units to defend themselves from attack.”<sup>21</sup>

One argument made in favor of this stance—the attribution argument—is that the rules of attribution under the international law paradigm of state responsibility are such that when soldiers, as members of their national armed forces, exercise their right of individual self-defense, the state is *de facto* defending itself because the conduct of organs of the state, including the armed forces, is attributable to the state, even if *ultra vires*.<sup>22</sup> Nonetheless, even if a soldier’s use of force contrary to Article 2(4) of the U.N. Charter may be attributed to his or her state such that the state is held responsible, the same attributability cannot simply be transposed into the context of

---

17. DINSTEIN, *supra* note 10, at 243; O’Meara, *supra* note 12, at 285; TERRY GILL & DIETER FLECK (eds.), *THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS* 483 (2nd ed. 2015).

18. Trumbull, *supra* note 13, at 139; Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 128 (1998).

19. DINSTEIN, *supra* note 10, at 243.

20. Randall Bagwell, *Soldier Self-Defense Symposium: Individual Self-Defense in Armed Conflict: A US Perspective*, OPINIO JURIS (Apr. 30, 2019), <https://opiniojuris.org/2019/04/30/soldier-self-defense-symposium-individual-self-defense-in-armed-conflict-a-us-perspective%E2%80%A2%BF/>.

21. Preliminary Objections submitted by the United States of America, *Aerial Incident of 3 July 1988 (Iran v. U.S.)*, 2000 2 I.C.J. Pleadings 3, at 203 (Mar. 4, 1991).

22. Draft Articles on Responsibility of States for Internationally Wrongful Acts, in *Report of the International Law Commission on the Work of Its Fifty-third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001), art. 4. See generally O’Meara, *supra* note 12, at 292 and DINSTEIN, *supra* note 10, at 262.

an exercise of self-defense. In international law, the question of attribution relates only to the breach of an international obligation, and not to defenses against wrongfulness.<sup>23</sup> As such, the conclusion that the attribution argument attempts to reach, which is that a state is defending itself when its soldier is exercising his or her right of individual self-defense, plainly does not flow from the premise that the state is considered to have breached its international obligation when its soldier does so.

Another argument cited by proponents of accommodating soldier self-defense within the Article 51 framework—the policy argument—is that to do so would ensure that the exercise of soldier self-defense is regulated by the same conditions attached to the broader doctrine of self-defense under international law.<sup>24</sup> However, that the doctrine of soldier self-defense should be governed by the same principles of proportionality, necessity, and immediacy as national self-defense has hardly been contested in all its iterations, including as a standalone right.<sup>25</sup> In fact, a disentanglement of the two forms of self-defense would facilitate the further narrowing—relative to national self-defense—of the nature and scope of action that may be taken in the course of soldier self-defense, in alignment with the lower threshold for such action to be triggered. This is to be juxtaposed against attempts in recent years by major global powers to continually stretch the conditions for national self-defense in international law.<sup>26</sup> For instance, Charles P. Trumbull IV, in his seminal article on the basis of unit self-defense, theorizes that the “immediacy” requirement is likely

---

23. See Draft Articles, *supra* note 22, at art. 2

24. O’Meara, *supra* note 12, at 292. See also GILL & FLECK, *supra* note 14, at 482 (arguing that, in contrast, the legal requirements for personal self-defense as an independent doctrine are otherwise not easily reconcilable with the nature and activities of a military unit).

25. See Trumbull, *supra* note 13, at 131 and Stephens, *supra* note 15, at 131.

26. See Brian Egan, Legal Advisor, U.S. Dep’t of State, International Law, Legal Diplomacy, and the Counter-ISIL Campaign, Speech at the 110th Annual Meeting of the American Society of International Law (Apr. 1, 2016) (articulating a broad conception of anticipatory self-defense and the “unwilling or unable” test as a standard for necessity for the United States) and GEOFFREY S. CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 25 (2D ED. 2018) (ASSERTING A GROWING ACCEPTANCE OF PREVENTIVE SELF-DEFENSE).

to be of a much higher standard for individual soldiers than for states.<sup>27</sup> In that sense, an insistence that soldier self-defense falls under national self-defense would in effect undermine the policy rationale of the *Nicaragua* decision, which was to prevent the abuse of self-defense by states and avoid an erosion of the U.N. Charter's prohibition on the use of force.<sup>28</sup>

Moreover, such a view is unable to account for the fact that U.N. peacekeepers have an "inherent right of self-defense" even though the United Nations is evidently not a state,<sup>29</sup> or that Article 51 requires that states immediately report an exercise of their right of national self-defense to the Security Council—a right that under this view would implausibly be triggered with every shot fired in an act of soldier self-defense.<sup>30</sup> Finally, the most fundamental problem with this perspective is that it fails to reconcile the *Nicaragua* interpretation of Article 51 and the fact that under the soldier self-defense doctrine, military personnel may respond in self-defense to uses of force directed towards them—even if these fall *below* the armed attack threshold. O'Meara ascribes this to the ICJ in *Nicaragua* having created a "disconnect between the two levels of self-defense."<sup>31</sup> However, doubts as to the correctness of the ICJ decision aside, this supposedly troubling disconnect easily vanishes once one recognizes that soldier self-defense exists independently from national self-defense.

#### B. *Soldier self-defense as distinct from Article 51 self-defense*

The stance that soldier self-defense should be regarded as *separate* from national self-defense seems to find support in the military manuals and directives of New Zealand and France respectively, both of which distinguish explicitly between self-de-

---

27. Trumbull, *supra* note 13, at 131.

28. Gaston, *supra* note 13.

29. U.N. DEP'T OF PEACEKEEPING OPERATIONS/DEP'T OF FIELD SUPPORT, GUIDELINES ON THE USE OF FORCE BY MILITARY COMPONENTS IN UNITED NATIONS PEACEKEEPING OPERATIONS 8, 23 (2017); Trumbull, *supra* note 13, at 129-130.

30. Aurel Sari, *Self-Defense Symposium: Personal Self-Defense in International Law—A Norm in Search of its Normative Foundations?*, OPINIO JURIS (May 3, 2019), <http://opiniojuris.org/2019/05/03/soldier-self-defense-symposium-personal-self-defense-in-international-law-a-norm-in-search-of-its-normative-foundations/>.

31. O'Meara, *supra* note 12, at 292.

fense for the individual soldier and self-defense as exercised by states.<sup>32</sup> Article 31(1)(c) of the Rome Statute appears to draw a similar line: the Article makes individual self-defense available as a ground for excluding individual criminal responsibility in international law, while clarifying that the “fact that the person was involved in a defensive operation conducted by forces”—in other words, engaged in national self-defense—will not have the same effect.<sup>33</sup> Under this view, soldier self-defense would effectively be released from the shackles of the *Nicaragua de minimis* threshold, existing not because of Article 51, but as a matter of customary international law.<sup>34</sup>

Admittedly, it is not entirely certain whether a *sui generis* right of soldier self-defense can be said to exist outside of the Charter architecture, given the broadness of Article 2(4)’s prohibition on the use of force. Only two settled exceptions have been carved out of it thus far—actions taken within the Security Council collective security system and actions under Article 51 self-defense. That said, it is unlikely that even those who believe that soldier self-defense is a subset of national self-defense would dispute that the doctrine, itself, is one that carries the status of customary law.<sup>35</sup>

---

32. FRENCH JOINT DIRECTIVE, *supra* note 2, at 34; NEW ZEALAND MANUAL OF ARMED FORCES LAW, *supra* note 2.

33. Rome Statute of the International Criminal Court, art. 31, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90. *See generally* Trumbull, *supra* note 13, at 128 and CAMILLA G. COOPER, NATO RULES OF ENGAGEMENT 277 (2019).

34. Trumbull, *supra* note 13, at 140; Stephens, *supra* note 15, at 128.

35. *See* DINSTEIN, *supra* note 10, at 262 (asserting that the legality of unit self-defense is “determined by Article 51 as well as by customary international law”); O’Meara, *supra* note 12, at 305-6 (regarding the law as clearer if “unit self-defence is indeed governed by customary international law along the same lines of national self-defence”); Hans Hosang, *Soldier Self-Defense Symposium: Netherlands Views on Self-Defence for Military Personnel*, OPINIO JURIS (Apr. 29, 2019), <http://opiniojuris.org/2019/04/29/soldier-self-defense-symposium-netherlands-views-on-self-defence-for-military-personnel%E2%BB%BF/> (arguing that “there is general consensus that discrete military units. . . have the inherent right under customary international law to defend themselves”).



#### IV. THE EXTENT TO WHICH THE RIGHT OF SOLDIER SELF-DEFENSE CAN BE LIMITED BY A HIGHER AUTHORITY

Understandings of the relationship between soldier self-defense and Article 51 necessarily influence views about the extent to which the right of soldier self-defense may be limited by a higher authority.

For the United States, which appears to regard national self-defense under Article 51 as the basis of soldier self-defense, it follows that the state is allowed considerable latitude in limiting its soldiers' exercise of individual self-defense—which, after all, is but a manifestation of state self-defense.<sup>36</sup> This position thus offers little protection against attempts made by states and their officers to undermine soldiers' ability to defend themselves.

Conversely, for countries that espouse the stronger view that soldier self-defense is an inherent right possessed by military personnel that is entirely divorced from Article 51, there is a more convincing case to be made that the right exists and can be exercised irrespective of any limitations that the individual's state purports to impose upon it. Norway, for instance, perceives the right of individual self-defense as one that “cannot be restricted”.<sup>37</sup> Australia, too, has characterized the concept of unit self-defense as a “non-derogable right.”<sup>38</sup> Under this view, states may even be *obliged* not to interfere with their soldiers' right of individual self-defense.

Such an interpretation finds support in contemporary international human rights law, which imposes a positive duty on states to protect the lives of their military personnel by allowing them to respond to armed threats. In its *Wall* Advisory Opinion, the ICJ found that Israel had “the right, and indeed

---

36. See OPERATIONAL LAW HANDBOOK, *supra* note 2, at 83 (establishing that military members may exercise individual self-defense, *unless they are otherwise directed by a unit commander*) and Christopher M. Ford, *Personal Self-Defense and the Standing Rules of Engagement*, in COMPLEX BATTLESPACES: THE LAW OF ARMED CONFLICT AND THE DYNAMICS OF MODERN WARFARE 122 (2019) (stating that under the assumption that “soldiers are acting as singular personifications of the State, the State could limit their exercise of self-defense”).

37. NORWEGIAN MANUAL OF THE LAW OF WAR, *supra* note 2, at 27.

38. Dale Stephens, *Human Rights and Armed Conflict—The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 4 YALE HUM. RTS. & DEV. L.J. 1, 22 (2001).

the duty, to respond in order to protect the life of its citizens".<sup>39</sup> In *Smith v. The Ministry of Defence*, the U.K. Supreme Court found that a state's obligation to protect the right to life of its citizens extends to the lives of military personnel.<sup>40</sup> Similarly, in its *Nuclear Weapons* Advisory Opinion, the ICJ affirmed that Article 6 of the International Covenant on Civil and Political Rights (ICCPR) on the right to life does not cease in times of war or hostilities.<sup>41</sup> This dictum has been read as suggesting that the self-defense right of soldiers is likewise non-derogable.<sup>42</sup>

Despite the appeal of this interpretation from a human rights perspective, it is submitted that a balance must still be struck between preserving soldiers' right of self-defense on the one hand and the legitimate concern of operational necessity on the other.<sup>43</sup> After all, even the right to life is not absolute, seeing as it admits the exception of non-arbitrary deprivations of life.<sup>44</sup> Furthermore, to contend that the right of soldier self-defense cannot in any way be subject to command-imposed restrictions is to neglect the inherent nature of military service, where "demands of discipline and duty" prevail and "subordination to civil and command authority is a defining characteristic".<sup>45</sup> This is especially so where the "ordered application of military force" in the field is critical to the attainment of military and broader national security objectives.<sup>46</sup>

Fortunately, it is possible to construe the right of soldier self-defense as independent from Article 51, while at the same time recognizing that it is far from absolute. In other words, the view that soldier self-defense is distinct from national self-

---

39. Legal Consequences of the Construction of a Wall, *supra* note 12, at ¶ 141.

40. *Smith and others (FC) v. The Ministry of Defence* [2013] UKSC 41.

41. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8), ¶ 25.

42. Stephens, *supra* note 35, at 23.

43. Gary Pattison, *Soldier Self-Defence: the Theoretical and Legal Bases for Command-Imposed Restrictions*, 59(1) Mil. L. & L. War Rev. 23 (2021); Gary P. Corn, *Should the Best Offense Ever Be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force Rules in the Standing Rules of Engagement*, 49(1) VAND. J. TRANSNAT'L L. 1 (2016).

44. U.N. Hum. Rts. Comm., General Comment no. 36, Article 6 (Right to Life), ¶ 10 CCPR/C/GC/36 (Sept. 3, 2019).

45. Corn, *supra* note 40, at 23.

46. Pattison, *supra* note 40, at 35.

defense leaves open the possibility that the state may nonetheless restrict this right by imposing certain conditions on its exercise, such as the proverbial “don’t shoot until you see the white of their eyes” order at the Battle of Bunker Hill, issued by Captain William Prescott to maximize the effect of his firepower against a much larger and more well-equipped enemy.<sup>47</sup> More recent examples include U.S. orders to its soldiers not to return fire despite being routinely fired upon in the 1914 Battle of Naco between two Mexican factions, so as to maintain the United States’ strict position of neutrality,<sup>48</sup> as well as the “hold fire” order issued by a Pakistani force commander who feared an escalation of the conflict amidst the U.N. Operation in Somalia.<sup>49</sup> These examples illustrate that there may be a genuine operational need for soldiers to refrain from acting in self-defense in certain circumstances.

The question, then, lies in the extent to which command-imposed restraints are acceptable. The test for state interference should be one of strict proportionality between the infringement on the soldier’s self-defense right as well as the associated rights to life and physical integrity, and the advancement of the legitimate interests of the operation in a given scenario. Hence, any limitations on the right of soldier self-defense must be carefully weighed against legitimate operational aims and found both absolutely *necessary* and *reasonable* to achieve these goals. Such a test draws inspiration from both the structure of the proportionality principle within the European human rights regime as well as the substantive criteria for non-arbitrariness in respect of Article 6 of the ICCPR.<sup>50</sup>

## V. CONCLUSION

In sum, command-imposed restraints of soldiers’ exercise of their right of individual or unit self-defense should be legally permissible insofar as they are strictly proportionate. Only in regarding soldier self-defense as a *sui generis* customary

---

47. JOHN BARTLETT, FAMILIAR QUOTATIONS 446 (Emily M. Beck ed., 14th ed. 1968).

48. CORN ET AL., *supra* note 23, at 89.

49. Pattison, *supra* note 40, at 30-31.

50. See General Comment no. 36, *supra* note 41, at ¶ 12 (explaining that arbitrariness includes “elements of reasonableness, necessity, and proportionality”).

right distinct from Article 51—as opposed to one subsumed under national self-defense—can the doctrine accommodate such operationally necessary restrictions and, more crucially, surmount the *Nicaragua de minimis* threshold requirement for a use of force amounting to an armed attack.