

NOTES

NONCONSENSUAL U.S. MILITARY ACTION AGAINST THE COLOMBIAN DRUG LORDS UNDER THE U.N. CHARTER

Under current foreign policy, the United States will not deploy military troops to eradicate cocaine crops and processing facilities in the territory of a drug-producing nation absent a request from that nation's government.¹ Colombia, which produces eighty percent of the world's cocaine,² has not requested that the United States take such action.³ As a result, current policy prevents the United States from undertaking potentially effective military action to strike at what is considered the heart of the cocaine trade.

The United States therefore has three options with respect to military involvement. The United States may (1) elect not to deploy troops to Colombia, (2) pressure Colombia to request such military action, or (3) alter foreign policy and deploy troops into Colombia without Colombia's consent. Choosing from among these options requires an analysis of complex domestic and foreign policy issues beyond the scope of this Note. It is clear, however, that the legality under international law of executing each option should carry some weight in the calculus of national policy.⁴

This Note specifically addresses the legality of the third option under the United Nations Charter's provisions governing the use of force. Part I summarizes the scope of the drug problem and current attempts to control it, outlining the likelihood of nonconsensual military action under existing political conditions. Part II discusses international law governing world nations' use of force and identifies prevalent views regarding its limits and application. Part III applies these views of interna-

1. N.Y. Times, Sept. 11, 1989, at A1, col. 4; Boston Globe, Sept. 6, 1989, at 1; Reggie Walton, Associate Director for Drug Policy, Statement on *Nightline* (ABC television broadcast, Sept. 5, 1989) ("Until we receive a request from the Colombian government to intervene, we don't deem it appropriate to do so by sending in troops.").

2. Bagley, *Colombia and the War on Drugs*, 67 FOREIGN AFF. 70 (Fall 1988).

3. Colombia's President Barco clearly has opposed the operations of an American strike force in Colombia. N.Y. Times, Sept. 11, 1989, at A1, col. 4; N.Y. Times, Sept. 9, 1989, at A1, col. 1.

4. For a brief discussion of the controversy surrounding enforcement of international law, see *infra* notes 169-72 and accompanying text.

tional law to possible use of military action by the United States to stop the growth and manufacture of illicit drugs in Colombia without that government's consent. Part IV discusses the significance of such action's legality under international law in formulating a national policy on the Colombian drug problem.

I. THE INTERNATIONAL DRUG CRISIS

Drug use exacts a substantial and rising cost from American society,⁵ leaving little question of America's incentive to cut off the drug trade. Not including drug-related crime, reported deaths from drugs rose from 2,825 in 1981 to 4,138 in 1986.⁶ In 1986, 120,000 emergency room admissions⁷ and ten to fifteen percent of all highway fatalities were drug related.⁸ Most experts see a strong link between drug use and teenage suicide.⁹ Twenty percent of convicted murderers admit they were using drugs prior to committing homicide.¹⁰ Drug abuse caused approximately 100 billion dollars in economic damage to American society in 1986.¹¹ This estimate does not attempt to measure the pain and suffering

5. Eisenbach, *Why America is Losing the Drug War*, HERITAGE FOUNDATION REP., No. 656 (June 9, 1988). The United States is the world's largest consumer of illicit drugs, with an estimated one in ten Americans using illegal drugs at least monthly. NATIONAL INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH AND HUMAN SERV., NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES 1985, at 10 (1987).

6. NATIONAL INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH AND HUMAN SERV., ANNUAL REPORT: DATA FROM THE DRUG ABUSE WARNING NETWORK, SERIES 1, No. 1, at 43 (1981) [hereinafter NIDA 1981 REPORT]; *id.*, SERIES 1, No. 6, at 81 (1986) [hereinafter NIDA 1986 REPORT], cited in Eisenach, *supra* note 5, at n.21.

7. NIDA 1981 REPORT, *supra* note 6, at 22; NIDA 1986 REPORT, *supra* note 6, at 26. The NIDA reports also indicate that, while the overall number of drug-related emergency room admissions remained fairly constant between 1981 and 1986, the number of cocaine-related emergency room admissions rose by more than 500%. *Id.*

8. NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., THE INCIDENCE OF DRIVING UNDER THE INFLUENCE OF DRUGS: AN UPDATE OF THE STATE OF KNOWLEDGE VI (1985), cited in Eisenach, *supra* note 5, at n.22.

9. See, e.g., Holden, *Youth Suicide: New Research Focuses on a Growing Social Problem*, SCIENCE, August 22, 1986, at 839, 839-41.

10. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS AND DRUGS 4 (1983), cited in Eisenach, *supra* note 5, at n.27.

11. Eisenach, *supra* note 5, at n.28. The annual economic damage resulting from drug abuse was \$60 billion in 1983. Consumption cost alone amounted to \$11 billion in 1988. *Id.* Furthermore, part of this economic cost stemmed directly from the use of drugs in the workplace. Studies have shown that drug users are three times as likely to be involved in on-the-job accidents, are absent from work twice as often, and on the average incur three times the amount of medicine costs as nonusers. *Id.*

associated with tragedies such as drug-related deaths.¹²

The drug problem also affects producer states,¹³ particularly Colombia, where internal violence attributable to the drug trade abounds.¹⁴ Armed guerrillas funded by drug lords control entire territorial blocks.¹⁵ Corruption is so widespread that the Colombian judicial system has virtually ceased to function.¹⁶ The Colombian government, intimidated by

12. *Id.*

13. In international law, a nation is referred to as a "state." Major producer states include: Afghanistan, the Bahamas, Bolivia, Colombia, Iran, Mexico, Panama, Paraguay, Peru, Syria, and Turkey. Moore, *New Strategy for a War on Drugs?* 20 NAT'L J., Mar. 12, 1988, at 678.

Producer-state government policies regarding the drug problem vary. While some states ineffectively attempt to resist the drug trade, others either acquiesce to it or actively support it. For example, a Bolivian statesman declared, "[w]e want them to know that at least one foreign country . . . has itself been invaded and exploited by international drug traffickers and producers and we intend to work to stop it" Statement of Dr. Guillermo Bedregal, Foreign Minister of Bolivia, to the National Press Club, Washington, D.C. Federal Information Systems Corp., Federal News Service, Oct. 3, 1988. And according to a U.S., representative, "[y]ou get lip service support from the [Colombian] government on narcotics matters but nothing else." HOUSE FOREIGN AFFAIRS COMM., 93D CONG., 1ST SESS., THE WORLD NARCOTICS PROBLEM: THE LATIN AMERICAN PERSPECTIVE 24 (Comm. Print 1973). The Medellin drug traffickers have attempted to gain greater political power. One Medellin leader, Pablo Escobar, sought to create a political following by handing out cash and building low-income housing and sports stadiums. Escobar was elected an alternate congressman in 1982. There are persistent rumors that congressional and even presidential campaigns receive substantial backing from the drug lords. Bagley, *supra* note 2, at 77. General Manuel Noriega of Panama was widely suspected of affirmatively aiding and profiting from the Panamanian drug trade.

14. Colombia is one of the most violent countries in the world. The estimated murder rate is higher than it was during the peak years of La Violencia—the Colombian civil war of 1948-58 in which 200,000 people were killed. Bagley, *supra* note 2, at 71. Colombia's drug bosses have been responsible for the assassination of one minister of justice, one attorney general, more than 50 judges, at least a dozen journalists, and more than 400 police and military personnel. *Id.* Many believe that the Medellin cartel paid guerrillas \$1 million to occupy the capital's Palace of Justice in 1985, an incident ending in the deaths of all the Supreme Court justices and approximately 80 persons, as well as the complete destruction of the Palace. *Id.* at 83. Furthermore, in 1986 the drug lords kidnapped the Conservative Party's presidential candidate. In the wake of his abduction, former President Misael Pastrana Borrero declared that "this country is in flames Last year I said we were on the verge of the abyss. Today, I think we are in the abyss." *Id.* at 73 (citing Oppenheimer, *Rising Violence Rips Colombia*, Miami Herald, June 12, 1988, at A1, col. 1).

15. The limited presence or total absence of government institutions in large areas of the national territory hampers efforts to combat crime. Bagley, *supra* note 2, at 72. According to Mexican officials, the drug traffickers control the Pacific state of Sinaloa. Gardner, *Conspiracy to Corrupt*, FIN. TIMES LTD., Feb. 14, 1987, at 1. For the purposes of international law, however, this territorial control by the drug lords is probably insufficient to make a potential invasion of Colombia by the United States not a "use of force" under Article 2(4). See *infra* notes 125-27 and accompanying text.

16. "Consider the options. A judge can accept a bullet through the head or a \$50,000 bribe." Debusmann, *Anti-Drug Campaigns in Latin America Fail to Curb Production*, REUTER LIBRARY

violence¹⁷ and corrupted by money, is effectively paralyzed from complying with extradition treaties and other international drug control obligations.¹⁸

The international community has responded to the drug problem.¹⁹ One hundred and fifty-five states, including Colombia, have ratified the Single Convention on Narcotic Drugs (Single Convention) since its adoption by the United Nations in 1961.²⁰ The Single Convention requires participating nations to restrict municipal cultivation, manufacture, and distribution of drugs to licensees.²¹ It also requires nations annually to disclose to the International Narcotic Control Board the amount of drugs produced, consumed, seized, or stockpiled.²² Further, the single convention requests discretionary cooperation among participating nations to eradicate illicit drug trafficking, and recommends penal sanctions against offenders.²³

The United States is attempting to reduce drug demand at the municipi-

REP., Mar. 3, 1988, at 1. Such a choice explains why cocaine traffickers rarely go to court these days.

17. Violence and threats of violence also have been directed against U.S. nationals. For example, in February 1985 the drug lords' enforcement troops (the Narcos) murdered U.S. Drug Enforcement Agency officer Enrique Camarena. Gardner, *supra* note 15, at 1. Cartel kingpin Carlos Lehder gave an interview on national television during which he appealed to discontented military officers and Marxist revolutionaries to join him in the "cocaine bonanza . . . the arm of the struggle against . . . the Achilles' heel of American imperialism." Bagley, *supra* note 2, at 86. After his arrest in 1988, Lehder threatened to kill five Americans for every Colombian extradited to the United States. *Id.*

18. In 1985, the drug lords hired guerrillas to storm Colombia's Palace of Justice. In August 1986, an intimidated Colombian Supreme Court declared the extradition treaty with the United States unconstitutional. In December 1986, President Barco signed the treaty, bringing it back into effect. In June 1987, the Colombian Supreme Court, intimidated by the cartel's threats, again ruled that the extradition treaty was unconstitutional despite Barco's signature. Bagley, *supra* note 2, at 85-87.

19. For a history of international drug control, see generally S. CHATTERJEE, *LEGAL ASPECTS OF INTERNATIONAL DRUG CONTROL* (1971); Note, *International Narcotics Control: A Proposal to Eradicate an International Menace*, 14 CAL. W. INT'L L.J. 530 (1984) [hereinafter Note, *International Narcotics Control*]; Note, *Trends in Extraterritorial Narcotics Control: Slamming the Stable Door After the Horse Has Bolted*, 16 INT'L L. & POL. 353 (1984).

20. Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298 discussed in Note, *International Narcotics Control*, *supra* note 19, at 544-45.

21. Single Convention, *supra* note 20, arts. 23, 25, 26, 28, 31.

22. *Id.*, art. 19.

23. *Id.*, arts. 35, 36. The 1972 Protocol Amending the Single Convention on Narcotic Drugs provides for the cooperative extradition of individuals who commit serious crimes. It also provides for the education, treatment, rehabilitation, and social reintegration of drug abusers. *Id.* Amendment of the Single Convention on Narcotic Drugs, Mar. 25-Aug. 8, 1975, 26 U.S.T. 1439, 1451-52, T.I.A.S. No. 8118.

pal level by educating potential drug users, prohibiting the use and sale of illicit drugs, and rehabilitating addicts.²⁴ The government seeks to reduce the drug supply as well by prohibiting municipal production and interdicting drugs at the nation's borders.²⁵ Additionally, the United States has entered into treaties prohibiting money laundering and other drug-related crimes²⁶ and providing for the extradition and prosecution of drug traffickers.²⁷ The most radical initiative yet launched by the U.S. government is Operation Snowcap.²⁸ This operation was undertaken pursuant to a 1983 treaty between Bolivia and the United States.²⁹ Under the treaty, the Bolivian government allowed the U.S. military to enter Bolivian territory and aid the Bolivian police force in its drug enforcement operations.³⁰

24. Eisenach, *supra* note 6, at 37-38. See U.S. DEP'T OF EDUC., WHAT WORKS: SCHOOLS WITHOUT DRUGS (1987). The Reagan administration adopted a "zero tolerance" approach in the federal workplace. Eisenach, *supra* note 6. Presumably, the Bush administration will continue this policy. For a discussion of the general ineffectiveness of rehabilitation programs, see GREATER WASHINGTON RESEARCH CENTER, DRUG USE AND DRUG PROGRAMS IN THE WASHINGTON METROPOLITAN AREA: AN ASSESSMENT, Feb. 1988 (Executive Summary).

25. See *Sealing the Borders: The Effects of Increased Military Participation in Drug Interdiction*, REUTERS (1988).

26. For example, the United States has entered Mutual Legal Assistance Tactics (MLATs) with several countries, including Switzerland, Turkey, the Netherlands, and Italy. See Note, *Preventing Billions from Being Washed Offshore: A Growing Approach to Stopping International Drug Trafficking*, 14 SYRACUSE J. INT'L L. AND COM. 65, 79-80 (1987) [hereinafter Note, *Preventing Billions*].

27. See generally Note, *Extradition Treaty Improvements to Combat Drug Trafficking*, 15 GA. J. INT'L & COMP. L. 285 (1985).

28. This operation was legalized in the United States by a 1981 amendment to the Posse Comitatus Act, 10 U.S.C. §§ 371-378 (1982). See Note, *A Proposal for Direct Use of the United States Military in Drug Enforcement Operations Abroad*, 23 TEX. INT'L L.J. 291 (1988) [hereinafter Note, *A Proposal*]. The amendment allows the Pentagon to offer support to the civilian agencies charged with drug interdiction. Morrison, *The Pentagon's Drug Wars*, 18 NAT'L J. Sept. 6, 1986, at 2104-09.

29. The treaty provided for a three-prong strategy. First, the U.S. military would maintain strikes at the laboratories to keep the price of the coca leaf low and reduce incentives to cultivate it. Second, the government would offer farmers financial incentives to destroy the coca crop. And third, Bolivia would pass a law making the cultivation, possession, and sale of coca leaves illegal, except for traditional purposes. Statement of Dr. Guillermo Bedregal, Foreign Minister of Bolivia, to the National Press Club, Washington, D.C., Federal Information Systems Corp., Federal News Service, Oct. 3, 1988.

30. The first phase of Operation Snowcap, Operation Blast Furnace, involved a C-5A transport plane, six Army Black Hawk helicopters armed with .30-caliber machine guns, and 160 U.S. troops armed with M-16 machine guns in a crop eradication and laboratory destruction effort over a period of six months. The operation occurred in the Beni Region near Santa Cruz, Bolivia. See DeMott, *Striking at the Source*, TIME, July 28, 1986, at 12; Shannon, *Guns, Drugs and Politics*, NEWSWEEK, July 28, 1986, at 26. See *infra* note 31. For a discussion of the legality of Operation Blast Furnace under municipal law, see Note, *Operation Blast Furnace: The United States Involvement in Bolivia to Put Heat on Drug Traffickers*, 2 J. INT'L DISPUTE RESOLUTION 175 (1987). Operation Blast Fur-

Notwithstanding the wide array of weapons in the drug-war arsenal, the United States is losing the battle against drugs.³¹ Due to the escalating severity of the drug problem and the perceived ineffectiveness of current control measures, political pressure is mounting to take new and unprecedented control measures.³² American officials have discussed sending troops into Colombia.³³ Obtaining the Colombian government's consent to such an action, however, seems unlikely³⁴ and may in fact be counterproductive.³⁵ Sending troops into Colombia to eradicate cocaine

nace serves as the model for this Note's hypothetical military action. See *infra* notes 40-42, 112-27 and accompanying text.

31. Each year, the United States' expenditure to battle drugs escalates. In fiscal year 1988, the federal government spent nearly \$2.5 billion on drug-law enforcement, up sharply from \$806 million in fiscal year 1981. Eisenach, *supra* note 6, at 35-36. Yet drug production has increased continually. Opium production has tripled since 1984 and heroin production has increased 10 times during the same period. See Note, *Preventing Billions*, *supra* note 26, at 65 n.2 (citing *U.N. Report Links Drugs, Arms, Traffic, and Terrorism*, N.Y. Times, Jan. 13, 1987, at B7, col. 4).

Even extreme military measures, such as Operation Snowcap, may prove ineffective. Charles Krause observed that "like so many other battles in the war on drugs, Operation Blast Furnace was largely a failure." *The MacNeil/Lehrer News Hour* (PBS television broadcast, March 1, 1988) (transcript no. 3242). See also Newsday, Jan. 1, 1989, at 1, col. 1; Christian Science Monitor, July 1, 1987, at 1, col. 3. But see N. Y. Times, July 2, 1989, at 1, col. 3 (Operation Blast Furnace successful in stopping traffickers during the operation). Most commentators attribute the futility of the task to the huge profits generated by the drug trade. The Medellin Cartel alone is reputed to earn from \$2 billion to \$4 billion a year. Approximately \$2.5 to \$3 billion a year in profits are repatriated to Colombia, where drugs now rank above coffee (which earns \$2 to \$2.5 billion) as the country's leading export. Bagley, *supra* note 2, at 70. Peru and Bolivia reap greater revenue from the cocaine trade than all other exports combined. Gardner, *supra* note 15, at 1.

32. Clarence Edgar Melvin, the leader of Operation Blast Furnace, see *supra* notes 28-30, stated that "the only thing that will work is force. I see it as a war. It's a threat to our national security at the same level as a military threat from another nation or a group of nations." *How to Lose the Coke War*, ATLANTIC MONTHLY, May 1987, at 22. Melvin's proposed solution is blunt: "Internationalize a strike force. Arrest the major traffickers. Put them in jails where they would stay . . . destroy their means of production, the millions of dollars' worth of chemicals that they have around their laboratories and factories. I would burn their houses down, is what I would do." *Id.* According to Melvin, it would take only a few weeks to cripple the cocaine trade in Bolivia using modern intelligence. *Id.*

33. See *infra* note 36.

34. Applying political pressure on the Colombian government would probably not produce desired results. The Colombian government views such coercion as a threat to its national sovereignty. In addition, governmental corruption and criminal coercion prevent the Colombian government from requesting U.S. aid. Virtually all factions on Bolivia's political spectrum condemned Operation Blast Furnace. Bagley, *supra* note 2, at 90. Furthermore, most other Latin American countries, including Colombia and Mexico, rejected such action as a viable solution. *Id.*

35. From the perspective of military logistics, experience proves that obtaining the consent of a drug-producing nation before deploying troops removes the element of surprise and renders the action ineffective. Once Operation Blast Furnace was publicly disclosed, "the crucial element of surprise was lost." Shannon, *supra* note 30, at 26. Another author observed that "the splash of

crops and processing facilities without the Colombian government's consent therefore remains a viable option.³⁶ Indeed, there is evidence that U.S. policymakers view nonconsensual military action as a possible alternative.³⁷

For purposes of analyzing the legality of U.S. military action in Colombia to thwart the drug war, this Note assumes that the hypothetical action³⁸ would be similar to Operation Blast Furnace, the first phase of the U.S.-Bolivian Operation Snowcap.³⁹ Operation Blast Furnace in-

unwanted publicity removed the surprise, ensuring that most of the big drug traffickers would be out of the country before the forces arrived." Demott, *supra* note 30, at 12. The drug lords knew about the operation because "[they] tend to be better armed and better organized than any government agency, with . . . computer-tracking of shipments, high-speed communications and early-warning systems." Debusmann, *supra* note 16, at 49.

36. Currently, there is minimal support for undertaking nonconsensual action. Given the volatility, unpredictability, and political importance of the drug war, however, such action must always be considered a viable option.

37. On April 8, 1986, then President Reagan declared drug trafficking a "national security risk" and authorized the use of military force against it. See Demott, *supra* note 35, at 12-13. Furthermore, President Bush issued a classified National Security Decision Directive (NSDD) authorizing the use of U.S. combat forces to accompany Colombian forces on narcotics patrols. Wash. Post, Sept. 10, 1989, at A1, col. 6. The Colombian government, however, has not consented to such an action.

Although drug czar William Bennett publicly has altered his position since 1988, at that time he advocated the use of unilateral military force abroad to prevent the growth and manufacture of illegal drugs targeted at this country. He stated that "[i]t is to be hoped we can do this in collaboration with foreign governments, but if need be we must consider doing this by ourselves." L.A. Times, *Unilateral Force Against Drugs Overseas Urged*, Mar. 3, 1988, at 3, col. 3. He further stated that, "[w]e are a great and sovereign people and we must protect our children." *U.S. Military Force Proposed Against Drug Trafficking*, REUTER LIBR. REP., Mar. 3, 1988. Congress created the job of "drug czar" in October 1988. The drug czar is responsible for devising a national drug-control strategy and for coordinating the efforts of government agencies that battle drug supply and demand. Editorial, *Bennett the Menace*, L.A. Times, Jan. 13, 1989, at 6, col. 1.

Many military officials believe that such an operation would provide an ideal training exercise for the military. "To operate far displaced from normal supply distribution points over topography they are not familiar with . . . what greater training for low-intensity conflict?" Morrison, *supra* note 28, at 2107.

38. Creating a hypothetical situation is both necessary and productive for analyzing the legality of any action. Because the U.S. government has not attempted a unilateral response to the Colombian drug importation problem, one must assume the situation. To avoid analysis until such a situation arises, however, would be to shut the barn door after the horse has left. The facts posed by Operation Blast Furnace have been selected because that operation represents the only documented use of the U.S. military in such a drug enforcement operation: combat troops and Black Hawk helicopters are apparently the Pentagon's logistical choice for small-scale interventions in Central America. See *Heavy Flak in the Drug War*, U.S. NEWS & WORLD REP., Dec. 18, 1989, at 16 (combat troops and Black Hawk helicopters proposed in anticipation of raid on drug lord Pablo Escobar).

39. See *supra* note 30 and accompanying text.

volved a C-5A transport plane, six Army Black Hawk helicopters armed with .30-caliber machine guns, and 160 U.S. troops armed with M-16 machine guns in a crop eradication and laboratory destruction effort over a period of six months. In the hypothetical, however, the action would be performed without the consent of the Colombian government.

II. INTERNATIONAL LAW ON THE USE OF FORCE

International law on the use of force governs the legality of the United States' hypothetical military action.⁴⁰ The United Nations Charter regulates the use of force in international relations. At the heart of the Charter, Article 2(4) provides that "[a]ll Members shall refrain in their international relations from 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."⁴¹ Article 51 represents the only express exception to Article 2(4) available for individual states.⁴² It assures that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations"⁴³

40. Article 38 of the International Court of Justice identifies the following sources of international law (in descending order of precedence): (a) international conventions (or "treaties") establishing rules expressly recognized by the contesting states; (b) international customary law; (c) the general principles of law recognized by civilized nations; and (d) the writings of the most highly qualified publicists of the various nations. Statute of the International Court of Justice, art. 38.

International law differs significantly from American municipal law. First, municipal law generally governs individuals, while international law regulates states. L. HENKIN, *INTERNATIONAL LAW* 10-11 (2d ed. 1987) (citing H. KELSEN, *PURE THEORY OF LAW* 215-17 (Knight trans. 1967)). Second, municipal law binds all citizens, with or without their explicit consent. To the contrary, international law requires the consent of affected states. *Id.* at 36 (citing O. SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE*, 178 *Rec. des Cours* 60-61 (1982)). Third, international law has no statutes applicable to all states. A treaty binds only those states that have specifically ratified it. *Id.* at 69-88. Fourth, customary law is determined by the conduct of states over long periods of time. State practice thus creates customary law. Additionally, the practice of international organizations, such as the U.N. General Assembly, may create customary law. Once customary law is created, it becomes binding on all states. *Id.* at 37-69. *See infra* notes 77-101 and accompanying text. Finally, in municipal law, scholarly writings are either normative or descriptive. However, the works of highly regarded publicists serve as a source of international law, albeit a subsidiary source. The opinions of these scholars thus represent substantive evidence of international law. L. HENKIN, *supra*, at 111-13.

41. U.N. CHARTER art. 2, para. 4.

42. Article 51 is one of two Charter exceptions to Article 2(4)'s general prohibition of the use of force. Article 51 excepts individual state defensive action. The other exception, embodied in Articles 39 through 45, permits collective force under the auspices of the United Nations. U.N. CHARTER arts. 39-45.

43. U.N. CHARTER art. 51.

This Part will first identify the type of conduct prohibited by Article 2(4). It will then explore the circumstances under which a state may act in self-defense under Article 51. Scholars have construed Article 51 in two ways. Because the legality of any defensive action under international law depends upon which interpretation the international legal community adopts, this section will analyze the different views.⁴⁴

A. *The Article 2(4) Prohibition on the Use of Force*

1. "Use of Force"

Article 2(4) prohibits only the "use of force."⁴⁵ Not every exercise of power by a state within the territorial domain of another state constitutes a use of force.⁴⁶ The determination of when an action rises to the level of force requires an analysis of both the type and magnitude of the action.

Regarding the type of action, two principles emerge. First, Article 2(4) indisputably prohibits the sending of armed troops into another state.⁴⁷ Second, an action need not meet resistance to constitute a use of force. For example, Professor Brownlie agreed with the International Court of Justice that a British navy mine-sweeping operation in Albanian territorial waters constituted a use of force, even though Albania was powerless to prevent the act and offered no resistance.⁴⁸ Thus, a military

44. These two views are referred to as permissive and restrictive. *See infra* notes 67-101 and accompanying text.

45. *See supra* note 41 and accompanying text. Although one aim of the Charter was to ban "the scourge of war," *see infra* note 67 and accompanying text, Article 2(4)'s language is not so restrictive. Use of the term "use of force," as opposed to "war," may represent an attempt to avoid circumvention of the Charter by nations calling their actions "incidents" or "conflicts." *See* Röling, *The Ban on the Use of Force and the U.N. Charter*, *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 3, 4 (A. Cassese ed. 1986) (giving the example of Japan's characterizing its war in Manchuria as an "incident").

46. Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 *TEX. INT'L L.J.* 1, 25 (1988).

47. "There can be little doubt that 'use of force' is commonly understood to imply a military attack, an 'armed attack,' by the organized military, naval or air forces of a state . . ." I. BROWN-LIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 361 (1963). While some scholars have defined the term "use of force" under Article 2(4) to include mere economic coercion or exercise of power without the use of arms, *see* H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* (Tucker 2d ed. 1966) (unarmed force) and Zourek, *La définition de l'agression et le droit international. Développements récents de la question*, 92 *HAGUE RECUEIL* 834 (1957) (economic force), Professor Brownlie finds both economic and unarmed force beyond the intended scope of Article 2(4). *See* I. BROWN-LIE, *supra*, at 362.

48. Commenting on the Corfu Channel Case, Memorial of the United Kingdom (U.K. v. Alb.), 1949 I.C.J. 4, Professor Brownlie stated that "such actions are a form of dictatorial intervention and would seem to involve a use of force." I. BROWN-LIE, *supra* note 47, at 363. In the Corfu Channel

action, whether or not it meets resistance, probably falls within the ambit of Article 2(4)'s prohibition.

It is more difficult, however, to determine the magnitude of action necessary to rise to the level of force. The Charter sheds no light on this question. Theorists have labeled some small-scale interventions a "use of force." For example, most scholars consider the Israeli rescue operation in Entebbe⁴⁹ a use of force. Although thirteen people were killed, this action involved only three planeloads of commandos,⁵⁰ took only 90 minutes to complete,⁵¹ and occurred on a single airstrip.⁵² On the other hand, theorists do not consider a single sniper attack or small explosion killing one civilian a use of force.⁵³ Apparently, the magnitude of an action necessary to constitute force depends on a number of variables, including the number of troops involved, the number of people killed, and the type and size of machinery and equipment used to effectuate the action.

2. "Against the Territorial Integrity . . . of Any State"

Article 2(4) prohibits the use of force "against the territorial integrity . . . of any State."⁵⁴ This language similarly raises interpretive problems. There are presently three interpretive camps. Under one view, Article 2(4) prohibits any use of force. Scholars adopting this view maintain that the phrase "against the territorial integrity" merely emphasizes the prohibition on the use of force, and does not restrict the substantive meaning of Article 2(4).⁵⁵ Both the second and third camps interpret Article 2(4)

Case, Albania challenged the British navy's mine-sweeping operation in Albanian territorial waters. Notwithstanding Albania's inability to resist the action, the International Court of Justice held that Britain had violated Albania's sovereignty. *But see* Findlay, *supra* note 46, at 25. ("if United States agents . . . do not encounter armed forces or authorities of the territorial state, self-help may be a permissible means of responding to past wrongs and preventing future . . . attacks").

49. On June 27, 1976, four PLO members hijacked an Air France Airbus to Entebbe, Uganda, where six more hijackers boarded. The hijackers demanded the release of 53 prisoners from Israel and other countries. The crew believed the hijackers received assistance from Ugandan armed forces, although President Amin denied the allegation. On July 3, three planeloads of Israeli commandos made a surprise landing at the airstrip, killed all the hijackers, and freed the hostages. Three hostages were killed during the raid. Sheehan, *The Entebbe Raid: The Principle of Self-Help in International Law as Justification for State Use of Armed Force*, 1 FLETCHER F. 135, 146-47 (1977).

50. *Id.*

51. *Id.* at 146 n.47.

52. *Id.* at 147.

53. Findlay, *supra* note 46, at 32.

54. *See supra* note 43 and accompanying text.

55. I. BROWNLIE, *supra* note 47, at 267 (language intended "to give more specific guarantees to

as prohibiting only force employed *against the territorial integrity* of another state.⁵⁶

Members of the second and third camps, however, disagree with respect to when an action threatens the "territorial integrity" of a state. Under the second view, any use of force on the territory of a nonconsenting state violates that state's territorial integrity.⁵⁷ Scholars rejecting this broad reading, however, assert that force taking place within a state whose government lacks some degree of control over its territory does not violate that state's territorial integrity.⁵⁸ Most publicists adhering to this third interpretation require that the government lack control over its entire territory.⁵⁹ Some commentators stretch the argument even fur-

small states"); Röling, *supra* note 45, at 4. According to Röling, this language in Article 2(4) is simply a codification of Article 10 of the Covenant of the League of Nations. *Id.*

56. Paust, *Entebbe and Self-Help: The Israeli Response to Terrorism*, 1 FLETCHER F. 86, 89-90 (1977). Paust asserts that Article 2(4) proscribes three types of coercion:

- (1) that employed against the territorial integrity of a state,
- (2) that employed against the political independence of a state, or
- (3) that employed in any other manner inconsistent with the purposes of the Charter.

Id. at 90.

This argument was first advanced during oral argument in the Corfu Channel case. *See* Gordon, *Article 2(4) in Historical Context*, 10 YALE J. INT'L L. 271, 275 (1985) (force is permissible as long as it is not directed against the integrity of the invoked state's territorial boundaries or its independence) (citing Memorial of the United Kingdom (U.K. v. Alb.), 1948 I.C.J. Pleadings (3 Corfu Channel) 295-96 (Public Sitting of Nov. 11-12, 1948) (statement of Sir Eric Beckett)). *See also* J. STONE, *AGGRESSION AND WORLD ORDER* 43, 95 (1958) (syntactically, Article 2(4) does not constitute an absolute prohibition of force, which would have been the result had the Article ended with the words "threat or use of force").

57. *See* M. SORENSEN, *MANUAL OF PUBLIC INTERNATIONAL LAW* 253, 254 (1968), *cited in* Findlay, *supra* note 46, at 16.

58. *See infra* notes 59-61.

59. One publicist observed that "one can construct an interpretation of 2(4) that justifies the use of armed force against groups that are operating in a vacuum of governmental authority." Gordon, *supra* note 56, at 277. Statehood requires a national legal order, which ceases to be valid as soon as it loses effectiveness. H. KELSEN, *supra* note 47, at 383, *quoted in* W. HOLDER, *THE INTERNATIONAL LEGAL SYSTEM* 162 (1972). For example, in *Ker v. Illinois*, 119 U.S. 436 (1886), a U.S. agent traveled to Peru to take custody of a suspected criminal. The agent failed to comply with a then-existing U.S.-Peruvian extradition treaty by failing to produce extradition papers. He failed to do so because Peru was occupied by Chilean forces. Two commentators have argued that the Chilean occupation of Peru deprived the Peruvian government of standing to complain about the United States' violation of Peru's territorial integrity. *See* M. BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* § 3-2 (1983); Cardozo, *When Extradition Fails, Is Abduction the Solution?*, 55 AM. J. INT'L L. 127, 133 (1953), *cited in* Findlay, *supra* note 46, at 17. Likewise, the United States' action in Germany following World War II did not violate Germany's territorial integrity because the German government lacked actual control over its territory. *See* *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); M. BASSIOUNI, *supra*, § 3-3; Cardozo, *supra*, at 33.

ther, requiring that the state lack control over only most of its territory.⁶⁰ Little support exists for this latter view.⁶¹

B. The Article 51 Self-Defense Exception to Article 2(4)

The self-defense provision contained in Article 51 may justify a military action otherwise violative of Article 2(4).⁶² Article 51 effectively allows a member of the United Nations to defend itself against an armed attack militarily without violating Article 2(4). It provides that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council [acts]”⁶³

Two interpretations of Article 51 have evolved—the restrictive view and the permissive view.⁶⁴ Under the restrictive view, defensive action is

60. See Findlay, *supra* note 46, at 16-17. Findlay used Lebanon as an example for this argument. The government of Lebanon actually controls only a tiny portion of the nation's territory. Most of the country is either occupied by Syrian or Israeli troops or controlled by various militia. Therefore, Findlay argues, Lebanon currently has no control over persons or property within its jurisdiction. *Id.* at 17. Conventional notions of sovereignty and territorial integrity are thus nonsensical when applied to Lebanon and cannot serve as the predicate for duties under international law. *Id.* Another commentator has adopted a similar approach to suggest that the United States could use military personnel in Colombia to combat drug trafficking without the Colombian government's consent. See Note, *A Proposal for Direct Use of the United States Military in Drug Enforcement Operations Abroad*, 23 TEX. INT'L L.J. 291, 306-07 (1988) (“Colombia, where the drug trade is careening out of the government's control, no longer can lay claim to sovereign control over [its] borders The United States could not violate a sovereignty that Colombia no longer possesses”).

Professor Paust has carried this argument even further, suggesting that action in the territory of a nonconsenting state may not violate that state's territorial integrity, even if the state retains effective control over its entire territory. See Paust, *supra* note 56, at 90 (Entebbe raid, although on territory of another state, did not threaten that state's territorial integrity). This Note does not address Paust's novel view.

61. The minority view seems incorrect. Even if a government lacks control over most of its territory, the state may retain territorial integrity. For example, the United States maintained territorial integrity during the civil war, although the government lacked control over half its territory. See 2 L. OPPENHEIM, INTERNATIONAL LAW 653-54 (H. Lauterpacht 7th ed. 1952) (all states that do not declare the contrary have a duty to remain neutral with respect to a civil war in another state). Likewise, all states have a duty of neutrality toward a state under seige by a belligerent liberation movement, even if the movement occupies major blocks of territory. *Id.* This principle illustrates that rights based on territorial integrity and sovereignty apply with equal force to states that lack control over their territory. *Id.*

62. See *supra* notes 45-61 and accompanying text.

63. U.N. CHARTER art. 51. The Security Council “acts” under Chapter VII, which authorizes the council to utilize collective force to “restore international peace and security.” U.N. CHARTER art. 39.

64. The Charter's provisions on the use of force must be reasonably construed. Accordingly,

justified only in response to an armed attack.⁶⁵ Under the permissive view, defensive action is justified whenever it would be justified under customary international law.⁶⁶ An understanding of the Article 51 exception, therefore, requires an analysis of the concept of “armed attack” and the circumstances under which customary law justifies a defensive response. Finally, must a state be implicated in the attack before defensive action on its territory is justified? And if so, what level of conduct is required to implicate a state in the attack?

1. *The Restrictive View*

Theorists advocating the restrictive view of Article 51 emphasize the Charter’s primary purpose—to abolish war.⁶⁷ They stress that any use of force could escalate into war, and therefore seek to limit the circumstances under which a state legally may resort to force in self-defense.⁶⁸ Although customary law existing prior to the Charter’s adoption generally permitted defensive acts,⁶⁹ restrictive advocates maintain that Article 51 replaced this broad customary privilege. Rather, the Charter embodies a single narrow exception: a state may take defensive measures only in response to an “armed attack.”⁷⁰

The U.N. Charter, however, does not define “armed attack.” The meaning of this phrase “remains as indeterminate legally as it was when

this Note identifies two accepted constructions—the restrictive and the permissive. For an example of the restrictive view, see I. BROWNLIE, *supra* note 47. For an example of the permissive view, see J. STONE, *CONFLICT THROUGH CONSENSUS* (1977) and J. STONE, *AGGRESSION AND WORLD ORDER* (1958).

65. See *infra* notes 67-74 and accompanying text.

66. See *infra* notes 75-101 and accompanying text.

67. “WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war . . .” U.N. CHARTER preamble. See Röling, *supra* note 55, at 3-4 (underlying purpose of Article 2(4) to outlaw scourge of war).

68. Röling, *supra* note 45, at 6.

69. For a discussion of the approach under customary law, see *supra* note 40.

70. Restrictivists refuse to accept the permissive argument that the words “inherent right . . . of self-defense” were intended to incorporate the customary right of self-defense. They argue that such a conclusion undermines the Charter’s goal of limiting possible justifications for resort to force by subjecting the Charter to a wide and illusive range of interpretation. Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 133-34 (1986). Thus, for the restrictivists, the framework of the Charter is clear: a state may use force to repel an armed attack, but may not use force against coercion short of an armed attack. Because the Security Council retains authority to defend against unarmed coercion under Chapter VII, see *supra* note 63, the restrictive interpretation may require a state to suffer an infringement of its rights until the Security Council acts. Restrictive scholars justify this cost by stressing the overriding concern for the prevention of war and its escalation. See Röling, *supra* note 45, at 6.

the Charter was drawn up, and can be freely construed case by case by its authorized interpreters."⁷¹ Early interpreters equated the phrase with an "ongoing military attack."⁷² However, both logic and precedent support relaxing the requirement that the attack be "ongoing," especially in the situation of anticipatory self-defense.⁷³ Notwithstanding the varying interpretations of "armed attack," most commentators agree that the phrase encompasses at least a "military" attack.⁷⁴

71. One commentator stated:

the infrequency of precedents . . . and the fact . . . that condemnations of States' reactions are dictated by a multitude of motives, among which a critical analysis of the debates and resolutions cannot permit the inclusion of what in the last resort is the only decisive one, make it impossible to find a definition of armed attack under the terms of Article 51 either in UN practice or in that of its members.

Combacau, *The Exception of Self-Defense in U.N. Practice*, THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 9, 23 (A. Cassese ed. 1986).

72. 2 L. OPPENHEIM, *supra* note 61, at 156; Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 876 (1947).

73. There is much support for interpreting Article 51 to allow "anticipatory" self-defense, whereby a state acts in self-defense before it is under actual armed attack. Proponents of anticipatory self-defense argue that, due to the existence of modern weapons of mass destruction and extremely short warning times, Article 51 could not reasonably exclude the right to defend against an anticipated attack. As one scholar argued, "[a] state could not be expected to wait like a 'sitting duck.'" Weber, *Cuban Quarantine*, 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 136, 138 (1982). See also Note, *Reading the U.N. Charter Connotatively: Toward a New Definition of Armed Attack*, 19 INT'L L. & POL. 395 (1987) [hereinafter Note, *Reading the U.N. Charter*]; Note, *Tensions Between International Law and Strategic Security: Implications of Israel's Preemptive Raid on Iraq's Nuclear Reactor*, 24 VA. J. INT'L L. 459 (1984); Comment, *The Sun Sets on Tamuz I: The Israeli Raid on Iraq's Nuclear Reactor*, 13 CAL. WEST. INT'L L.J. 86 (1983).

74. Irrespective of the current lack of support for extending "armed attack" to nonmilitary events, the idea has logical appeal and may become more prevalent. Some publicists have acknowledged that a nonmilitary attack may be even more dangerous than a military attack. For example, Nanda states:

Revolutionary changes in science and technology with their impact on armaments, the so-called "wars of national liberation," and highly sophisticated and refined mechanisms of carrying on subversive activities might, after all, prove as dangerous to the "political independence" and "territorial integrity" of a nation state as an open armed attack.

Nanda, *The United States Action in the 1965 Dominican Crisis: Impact on World Order—Part II*, 44 DENVER L.J. 225, 225-43 (1967), quoted in B. WESTON, INTERNATIONAL LAW AND WORLD ORDER 313 (1980).

Even those mandating a strict approach would concede that dumping cyanide into a river flowing across the border would constitute an armed attack. This reasoning leads to interesting, logical results. For example, would restrictivists also concede that secretly shipping great quantities of cyanide-laced food across the borders constitutes an armed attack? If so, would they concede that sending drugs, which cause thousands of deaths and billions in property damage, is an armed attack?

Many government officials have accepted the notion that such acts rise to the level of armed attacks. For example, U.S. Customs Commissioner William Von Raab suggested that President Bush should treat the drug problem like President Reagan treated the Libyan chemical weapons plant. "[The Libyan plant] was unlikely to distribute any of its chemicals [beyond Libya's bor-

2. *The Permissive View*

Proponents of the permissive view emphasize that the Charter compels states to fulfill their obligations under international law.⁷⁵ Expanding the scope of the self-defense exception available for individual states under Article 51 would further this goal.⁷⁶ Accordingly, the permissive view maintains that Article 51 fully incorporates the customary law of self-defense and thus permits actions the restrictive view would exclude.⁷⁷ Incorporation of the customary privilege finds support in Article 51's reference to the "inherent right" of self-defense.⁷⁸

a. *Forcible Self-Help*

Because the permissive interpretation of Article 51 relies on the customary law of self-defense, it is necessary to determine the bounds of this customary privilege. Under customary law, a state clearly may respond with force to a legal wrong amounting to an armed attack.⁷⁹ It is unclear, however, whether customary law justifies "forcible self-help"⁸⁰ as a legitimate response to a nonmilitary action, such as the production and

ders], he said, 'yet today, in our own hemisphere, hundreds of poison chemical plants operate with impunity, churning out deadly chemicals for direct export to the United States.'" *War on Drugs Urged Abroad*, *NEWSDAY*, Feb. 8, 1989, at 4.

75. "WE THE PEOPLES OF THE UNITED NATIONS DETERMINED . . . to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained" U.N. CHARTER preamble.

76. See Röling, *supra* note 45, at 4.

77. Treaties often codify existing customary international law. Note, *Reading the U.N. Charter*, *supra* note 73, at 397 n.6 (citing M. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 146 (1985)). See *supra* note 40.

78. See *supra* note 63 and accompanying text. Because the framework of the restrictive view lacks an essential protective component, states have refused and will most likely continue to refuse to adopt it. Under the restrictive view, a law-abiding state could not rectify violations of its rights unless met with an armed attack. See *supra* note 70 and accompanying text. This result does not comport with the Charter's strong and repeated emphasis on the requirements of justice and respect for the obligations of international law. See *supra* note 75. Moreover, states subject to an unarmed attack cannot rely on help from a politically polarized Security Council. The restrictive view thus renders the Charter ineffective in protecting state rights. J. STONE, *CONFLICT THROUGH CONSENSUS* (1977).

79. See Schachter, *supra* note 70, at 120. In this regard, the permissive view does not diverge from the restrictive view of Article 51. See *supra* note 71-74 and accompanying text. For a further discussion of customary law as a source of international law, see *supra* note 40 and *infra* notes 82-94 and accompanying text.

80. Both self-defense and self-help are potential justifications for acts that would otherwise be illegal under the Charter, and both are reactions to a prior violation of international law. For ease of terminology, "self-defense" will refer to actions in response to military attacks, and "forcible self-help" will refer to actions in response to other legal wrongs.

shipment of illicit drugs.⁸¹

The privilege of forcible self-help existed prior to the Charter's adoption.⁸² According to permissivists, this privilege survived the adoption of the Charter and remains an integral part of the Charter. Customary law, however, can be superseded by customary norms that subsequently evolve.⁸³ For a pattern of behavior to achieve the status of a customary norm, the states must repeat their behavior continually out of a sense of legal obligation.⁸⁴ Thus, if states have regularly refrained from forcible self-help since the adoption of the Charter, a new customary norm prohibiting such defensive action will have emerged, defeating the rationale behind the permissive view.⁸⁵

Common practice, however, suggests that states do not regularly refrain from forcible self-help. Since 1945, states have resorted to numerous acts of extraterritorial forcible self-help.⁸⁶ The Entebbe raid,⁸⁷ the

81. Because the United States prohibits the exportation of illicit drugs to its borders, such activity constitutes a legal wrong against the United States. *See supra* note 25 and accompanying text. The production of illegal substances clearly violates the Single Convention as well. *See supra* notes 19-23 and accompanying text. Exporting illicit drugs, however, does not rise to the level of an armed attack. *See supra* note 74 and accompanying text. Military response to such action would thus represent forcible self-help rather than self-defense. *See supra* note 80.

82. "Customary international law had permitted states to engage in certain forms of extraterritorial self-help." Paust, *supra* note 56, at 87.

83. To the extent that Article 51 represents a codification of customary law, it assumes the characteristics of customary law, including the susceptibility to change by a new code of state behavior. J. BRIERLY, *THE LAWS OF NATIONS* 57-62 (6th ed. 1963), *cited in* Note, *Reading the U.N. Charter*, *supra* note 73, at 397 n.6. *See supra* note 40.

84. Monaco, *Sources of International Law*, 3 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 424, 427 (1982). *See supra* notes 40, 74-76 and accompanying text.

85. Many commentators have examined post-Charter examples of states resorting to forcible self-help to determine whether these examples may establish a norm of customary law. *See e.g.*, Bryde, *Self-Help*, 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 215, 217 (1981) (although "States have since 1945 resorted to numerous acts of self-help involving the use of force . . . it cannot be considered the nucleus for the development of new customary [law]"). These commentators, however, assume that the privilege of forcible self-help did not exist before the Charter's adoption. This Note, however, maintains that a customary privilege of forcible self-help did exist. *See, e.g.*, *infra* note 97 (discussing the *Caroline* Incident). Because under the permissive view the Charter incorporated existing customary law, this Note focuses on whether post-Charter practice *disestablished* a customary privilege, rather than whether it *established* a customary privilege.

86. It is difficult to recognize the emergence of a norm of refraining from self-help because of the difficulty in identifying a state's failure to act. It is much easier to identify instances in which states *have* resorted to forcible self-help. Thus, if states have resorted to self-help in a substantial number of cases, states are not regularly refraining from such conduct, and no new norm has emerged.

Some examples of defensive action since the Charter's adoption were in response to military attacks. While a response to a military attack ordinarily would constitute self-defense, these particular

Cuban Missile Crisis,⁸⁸ the United States' intervention into Cambodia,⁸⁹ the Corfu Channel Case,⁹⁰ the aborted U.S. raid into Iran,⁹¹ and South Africa's attack of national liberation movements in neighboring territories⁹² all evidence the continuation of the customary privilege. Moreover, states do not recognize a legal obligation to refrain from forcible self-help. For example, the United States has formulated a policy that would allow states to use force to protect "vital interests."⁹³ The United States could define as "vital interests" its foreign investments and resource supplies. The inclusion of such interests displays the lack of normative restraint inherent in the U.S. self-defense policy.⁹⁴ Therefore, state practice since the Charter's adoption suggests that no new norm prohibiting self-help has emerged. Under the permissive view, it seems that the privilege to resort to forcible self-help remains a right inherent in Article 51.

responses are characterized as self-help. *See supra* note 80. The defending state in each instance was not attacked by the state in which the defensive action took place, but by political groups in that state. Thus, the defensive action represents self-defense against the attacking groups and self-help against the state.

87. *See supra* notes 49-53 and accompanying text.

88. *See Weber, supra* note 73, at 136.

89. Paust, *supra* note 56, at 91. The United States attacked enemy forces inside neutral Cambodia when it became clear that Cambodia could not carry out its international responsibilities as a neutral state. Cambodia's neutrality was essential to assure that enemy forces not use Cambodian territory to attack U.S. and Allied troops in South Vietnam. Paust suggests that customary law authorized such forms of self-defense inside neutral territory. *Id.*

90. *See supra* note 48 and accompanying text.

91. Schacter, *supra* note 70, at 139.

92. Higginbotham, *International Law, the Use of Force in Self-Defense, and the Southern African Conflict*, 25 COLUM. J. TRANSNAT'L L. 529, 530-33 (1987).

93. Former Defense Secretary Caspar Weinberger set forth six factors that govern foreign use of combat force by the U.S. government:

- (1) Force should be used only for vital interests;
- (2) If used, then it should be dedicated to winning;
- (3) Winning should be clearly defined in relation to political and military objectives;
- (4) The military capabilities required to win should be provided, and adjusted during the course of combat as necessary;
- (5) The whole undertaking should not be attempted without "some reasonable reassurance" of broad backing by the American people and Congress;
- (6) The commitment to force should be a last resort.

Falk, *The Decline of Normative Restraint in International Relations*, 10 YALE J. INT'L L. 263, 266 (1985) (citing N.Y. Times, Nov. 29, 1984, at A1, col. 3 (speech before National Press Club, Nov. 28, 1984)).

94. *See id.* As one scholar noted, "[t]he theory that a State is entitled to defend all vital interests with military means is too dangerous. . . . It is the State itself which in the case of Art. 51 is called upon to interpret its interests and to evaluate the pertinent facts." RÖling, *supra* note 45, at 7.

b. Restraints on Forcible Self-Help

Three amorphous restraints limit a state's ability to resort to forcible self-help. The first restraint emerges from U.N. General Assembly practice. While the U.N. General Assembly has neither confirmed nor rejected the forcible self-help interpretation,⁹⁵ that body has been far less likely to denounce uses of force when taken for reasons consistent with the purposes of the U.N. Charter.⁹⁶ Thus, if the privilege exists at all, the Charter's purposes may limit a state's right to resort to forcible self-help.

The customary law of forcible self-help places two additional restraints on states seeking to invoke the privilege.⁹⁷ First, a state may invoke the privilege only when "necessary."⁹⁸ For an action to meet the necessity requirement, the state must have as its motive the protection of an essen-

95. The practice of the U.N. General Assembly is considered a subsidiary source of evidence establishing customary law. *See supra* note 40. Thus, the Assembly's actions may assist in determining the permissibility of forcible self-help under customary law. The General Assembly never has supported, and often has denounced, resort to forcible self-help. *See Combacau, supra* note 71, at 17. While one might interpret these denunciations to signal a rejection of the notion of forcible self-help, they can be explained on two grounds. First, the states' actions exceeded the restraints on forcible self-help. *Id.* at 26. These restraints are described *infra* notes 97-101 and accompanying text. Second, the defensive actions contravened the purposes of the U.N. Charter. *Id.* The General Assembly has been less willing to denounce forcible self-help when the conduct did not exceed self-help restraints and when the reasons for using force were compelling and consistent with the Charter's purposes. For example, the Security Council debated the Entebbe raid for four days. The Council issued no resolutions or declarations and has not discussed the matter since. Sheehan, *The Entebbe Raid: The Principle of Self-Help in International Law as Justification for State Use of Armed Force*, 1 FLETCHER F. 135, 146-47 (1977). General Assembly practice therefore leaves open the possibility that a state may resort to forcible self-help, provided the state's objective is indisputably compatible with the Charter and the state's action does not exceed the customary restraints on self-help.

96. *See Combacau, supra* note 71, at 17; *supra* note 95.

97. These traditional restraints on invocation of the privilege of forcible self-help were first formulated in 1837 in the *Caroline* Incident. 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 409 (1906). In the *Caroline* Incident, a group of Canadian insurgents attempted to overthrow British rule in Canada. The insurgents received arms, supplies, and recruits from a ship, the *Caroline*, docked in U.S. territory. The United States had unsuccessfully attempted to prohibit the insurgents' activity. Consequently, a British force crossed into U.S. territory and destroyed the vessel, killing two U.S. nationals in the process. Britain argued that its destruction of the *Caroline* was justified under international law. United States Secretary of State Daniel Webster asserted that the right to self-help is not absolute, but is limited by certain restraints. In the ensuing debate, the nations agreed with Webster's formulation of the law, but disagreed over its application to the case. *Id.* at 536. For an interesting discussion of the *Caroline* Incident, see Higginbotham, *supra* note 92, at 535-36.

98. In response to the *Caroline* Incident, discussed *supra* note 97, Webster argued that self-help should be confined to instances in which "necessity . . . is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." J. MOORE, *supra* note 97, at 409. On the pre-Charter doctrine of necessity, see generally B. RODICK, THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW (1928).

tial interest⁹⁹ and must exhaust all less forcible means of protecting that interest.¹⁰⁰ Second, once the privilege is invoked, the defensive response must be “proportional” to the offensive action.¹⁰¹ In other words, a state may take only defensive measures necessary to remedy the wrong.

3. *Attribution of Responsibility*

Both the restrictive and permissive interpretations of Article 51 focus on what type of offensive conduct justifies resort to use of force as a defense.¹⁰² It remains unclear, however, whether responsibility for the offensive acts—which could very well be carried out by individuals—must be attributed to a state before defensive action can be taken on the territory of that state.¹⁰³ Two views have developed: the traditional view and the emerging view. The practice of the United Nations General Assembly does not resolve this split in authority.¹⁰⁴

99. According to the International Law Commission, examples of essential state interests include: 1) the state's existence; 2) the maintenance of conditions in which essential services can function; and 3) domestic peace. INT'L L. COMM'N, ARTICLES ON STATE RESPONSIBILITY, I.L.C. Rep. 71 (1980).

100. *See id.* art. 33 (“The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is precluded *if the State had no other means of safeguarding* an essential State interest . . .”) (emphasis added).

101. As originally articulated by Webster, this restraint demanded that self-help be “limited by that necessity, and kept clearly within it.” 2 J. MOORE, *supra* note 97, at 409. Bryde stated that “the principle of proportionality had already been well established under general international customary law and has to be regarded as implicit in the very notion of self-defense.” Bryde, *supra* note 85, at 213.

102. *See supra* notes 64-101 and accompanying text.

103. For example, suppose individuals within state *A* perform acts against state *B* sufficient to justify a defensive response under Article 51. Must state *B* await a formal attribution of responsibility to state *A* before responding defensively on the territory of state *A*?

104. One line of cases before the General Assembly involved this issue. In each case, a state responded to armed attacks on its territory by a neighboring state, not carried out by the latter's army, but by members of a liberation movement based in that country. The victim states, Israel, Portugal, and South Africa, carried out retaliatory actions in the territory of neighboring states. *See* Combacau, *supra* note 71, at 26; Higginbotham, *supra* note 92, at 529. The United Nations has repeatedly condemned these actions. Combacau, *supra* note 71, at 26. Yet these condemnations do not necessarily endorse the traditional dualist view. They were instead prompted by the excessiveness of the countermeasures, and their delay in execution. Such factors qualified the actions as illegal reprisals. *Id.* at 26-27. Moreover, the initial attack in each case came from a liberation movement legitimated by the General Assembly. *Id.* *See* L. HENKIN, *supra* note 40, at 286 (referring to two General Assembly Resolutions granting access to international forums to liberation movements recognized by the Organization of African Unity). This factor established a separate ground for invalidating the defensive actions. When the initial individual aggression is considered illegitimate under the Charter, the United Nations has neither condemned nor approved defensive action. For example, the United Nations did not rule on the Entebbe raid, although the issue was directly before

Adherents to the traditional view steadfastly maintain that a state may not take defensive action on the territory of another state unless acts sufficient to warrant self-defense can be attributed to that state.¹⁰⁵ The traditional view rests on the dualist doctrine, which maintains that international law regulates states, not individuals.¹⁰⁶ Because an individual cannot violate international law, a state may not justifiably react to individual conduct that is not attributed to another state. According to the International Law Commission, the attribution of responsibility to a state follows common-law agency principles.¹⁰⁷ Thus, defensive action is justified under Article 51 when: (1) the individual aggressors are agents of a state,¹⁰⁸ (2) a state assists the individual aggressors,¹⁰⁹ or (3) a state's failure to prevent the attack constitutes a breach of an international duty.¹¹⁰

Proponents of the emerging view assert that, in some circumstances, a state may take self-defensive measures against individuals on the territory of another state, even absent attribution of responsibility for aggressive acts to that state.¹¹¹ The emerging view focuses on the legal wrong committed, rather than the aggressor. Rejecting the dualist notion, a growing number of scholars note that both individual and state coercion threaten the victim state's security.¹¹² Under this view, therefore, Article

it. See *supra* notes 49-53 and accompanying text. Lacking more conclusive precedent, it is thus unclear whether a defensive action carried out in another state against individuals whose initial actions were considered illegitimate under the Charter would be illegal under Article 2(4). Combauc, *supra* note 71, at 24.

105. L. HENKIN, *supra* note 40, at 141.

106. *Id.* See *supra* note 40.

107. The International Law Commission appears to follow common-law agency principles. See I.L.C. Rep. 171-74 (1976). The Commission mandates that "[t]he conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law." INT'L L. COMM'N, ARTICLES ON ATTRIBUTION OF RESPONSIBILITY, art. 11 (1976).

108. "The conduct of an organ of a State, (or) of a territorial governmental entity . . . shall be considered as an act of the State . . . even if . . . the organ exceeded its competence according to internal law or contravened instructions concerning its activity." INT'L L. COMM'N, ARTICLES ON ATTRIBUTION OF RESPONSIBILITY, art. 10.

109. The comments to the International Law Commission Report indicate that a state remains wholly responsible both for the failure to prevent the action when a duty under international law is imposed, and for acts of government organs affirmatively aiding an individual's conduct. I.L.C. Rep. Comments (1975).

110. *Id.*

111. D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 56 (1958).

112. Professor Bowett suggests "[the traditional] position . . . ignores the very real potentialities for endangering a state's security which individuals possess . . ." *Id.* He thus proposes that international law impose duties on individuals similar to those imposed on states. *Id.*

51 protects a state's use of force in defense against individual aggressors.¹¹³

III. USE OF FORCE DOCTRINE APPLIED TO THE HYPOTHETICAL ACTION

A. *The Article 2(4) Prohibition on the Use of Force*

I. "Use of Force"

This Part will analyze the legality of nonconsensual military action by the United States against the Colombian drug lords. Specifically, this section will consider whether the hypothetical action¹¹⁴ constitutes a prima facie violation of Article 2(4).¹¹⁵

The hypothetical action would constitute a "use of force," falling within the scope of the Article 2(4) prohibition.¹¹⁶ It necessarily would involve armed troops seeking to destroy property. The action would require the equivalent of one C-5A transport plane, six Army Black Hawk helicopters armed with .30-caliber machine guns, and 160 U.S. troops armed with M-16 machine guns.¹¹⁷ It would take place over a territory approximately the size of the Beni region near Santa Cruz, Bolivia, and would last a number of weeks.¹¹⁸ Such action would exceed the magnitude of the Entebbe raid in territorial scope and duration, and would involve a similar number of troops.¹¹⁹ Therefore, the proposed military action meets the type and magnitude requirements necessary to fall within Article 2(4)'s proscription.¹²⁰ That the Colombian government

113. Professor Bowett has written that

[although] the state on whose territory these preparations or activities occur is not in breach of any duty, and therefore, no action in self-defense can be directed against it by the state threatened . . . the threatened state is [not] powerless to do anything to protect itself [I]t may take action in self-defense but such action must be directed solely at the individuals . . . responsible for the . . . violation of its rights.

Id. Although such defensive action may occur on another state's territory, the action cannot be directed against the state. In this respect, both the traditional and the emerging views condemn forcible self-help against a nonresponsible state.

114. *See supra* note 38 and accompanying text.

115. *See supra* notes 45-61 and accompanying text.

116. *See supra* notes 45-53 and accompanying text.

117. This hypothetical action is the equivalent of the force used in Operation Blast Furnace, a consensual military drug operation. *See supra* note 39 and accompanying text.

118. *Id.*

119. *Id.*

120. *See supra* notes 45-53 and accompanying text. This Note, in hypothesizing an action equivalent to a known military antidrug effort (*see supra* note 117), refrains from speculating on the

may be powerless to offer resistance¹²¹ does not defeat the action's status as a use of force.¹²²

2. "Against the Territorial Integrity . . . of Any State"

Under all three accepted interpretations of the language "against the territorial integrity . . . of any State," the hypothetical military action would violate Article 2(4). Under the first view, Article 2(4) prohibits any use of force.¹²³ Because the U.S. action constitutes a use of force, Article 2(4) prohibits it. The other constructions of Article 2(4) describe it as proscribing only force violative of a state's territorial integrity.¹²⁴ Under the second view, any action on the territory of a nonconsenting state violates that state's territorial integrity.¹²⁵ This encompasses the hypothetical action, which necessarily would take place on Colombian territory. Under the third view, a state's territorial integrity might be violated only if the state loses control over substantially all of its territory.¹²⁶ Even under this restrictive reading of Article 2(4), the action against Colombian drug lords would contravene the Charter. Although guerrillas funded by drug lords and hostile to the Colombian government control blocks of territory in Colombia,¹²⁷ evidence does not suggest this situation is pervasive.¹²⁸

legality of a smaller attack. However, as the size of the action decreases in an effort to avoid characterization as a "use of force," the effectiveness of such an effort might become suspect.

121. Most drug-producing states presumably possess insufficient military strength to oppose an unanticipated military incursion by the United States. *See supra* note 13.

122. *See supra* note 48 and accompanying text.

123. *See supra* note 55 and accompanying text.

124. *See supra* note 56 and accompanying text.

125. *See supra* note 57 and accompanying text.

126. *See supra* notes 58-60 and accompanying text. This interpretation of Article 2(4) has not been widely accepted. *See supra* note 61 and accompanying text.

127. *See supra* note 15.

128. *Id.* Most Colombian traffickers have no political goals beyond protecting their own profits. While the situation described *supra* notes 14-18 represents a chaotic environment in Colombia, it does not appear to represent the loss of control requisite to satisfy this alternative territorial integrity view. This is not to say that the drug lords of Colombia, for example, are incapable of usurping and fractionalizing Colombian territory to such an extent that the Colombian government effectively will lack control over *nearly all* of its territory. If such a situation occurs, a nonconsensual military action might not violate Article 2(4) under the last two interpretations of the "territorial integrity" requirement. *But see* Note, *A Proposal*, *supra* note 28, at 306 (suggesting that, because "the drug trade is careening out of the government's control, [such that the Colombian people] no longer can lay claim to sovereign control over their own borders . . .," U.S. military action would not contravene international law).

B. *The Article 51 Self-Defense Exception*

Notwithstanding a prima facie violation of Article 2(4), nonconsensual action to combat the Colombian drug problem may be justifiable under Article 51. The United States could argue that illicit drugs flowing across its borders necessitate a defensive response. The success of this argument hinges on whether one applies the restrictive or permissive view of Article 51, as well as the choice of criteria for attribution of responsibility.

1. *The Restrictive View*

Under the restrictive view of Article 51, the only justification for use of force in self-defense is a military attack.¹²⁹ Although Colombian drugs cause severe damage in the United States, their shipment plainly does not constitute a military attack.¹³⁰ Therefore, the United States cannot justify a defensive response under the restrictive view of Article 51.

2. *The Permissive View*

The legality of the hypothetical military action under the permissive view presents several difficulties. First, it is unclear whether the privilege of forcible self-help exists at all under customary law.¹³¹ Second, if the privilege does exist, states may invoke the privilege only under circumstances indisputably compatible with the purposes of the Charter.¹³² The General Assembly recognized the severe economic and social problems associated with drug abuse and drug trafficking when it convened at the Single Convention.¹³³ The express purposes of the Charter include solving "problems of an economic, social, cultural, or humanitarian character"¹³⁴ Thus, combatting the spread of illicit drugs furthers the Charter's aims.

Third, assuming the customary privilege exists, the defensive action must meet the privilege's substantive restraints: necessity and propor-

129. *See supra* notes 67-74 and accompanying text.

130. Violent acts attributable to the drug trade occur against U.S. nationals both abroad and within U.S. borders. However, the instances of violence abroad are very limited. *See supra* notes 17-18. Moreover, the causal link between internal violence and the drug trade is difficult to establish.

131. *See supra* notes 80-85 and accompanying text.

132. For a discussion of this limitation on the doctrine of forcible self-help, see *supra* notes 95-96 and accompanying text.

133. *See supra* notes 19-23 and accompanying text.

134. U.N. CHARTER art. 1, para. 3.

tionality.¹³⁵ Necessity requires that the aggressive act threaten an essential state interest, and that the state exhaust all other means of protecting that interest.¹³⁶ The drug crisis threatens the health and safety of U.S. citizens and the economic stability of the United States—both essential state interests.¹³⁷ Before invoking the privilege, however, the U.S. government must have exhausted all less forcible means of protecting its interests.¹³⁸ The United States has put forth a substantial effort to stop the flow of drugs across its borders.¹³⁹ This effort has been ineffective, and even the decision to dump more resources into the battle most likely would prove futile.¹⁴⁰ While this effort might satisfy the exhaustion requirement, one could argue to the contrary that, as one of the richest and most powerful nations, the United States possesses the resources to increase the effectiveness of its current control measures, particularly at the demand level.¹⁴¹

To meet the proportionality requirement, the hypothetical action must remain within the bounds necessary to prevent the flow of drugs across U.S. borders.¹⁴² The United States must identify clearly the crops and laboratories producing drugs to be exported to the United States before destroying them.¹⁴³ Troops must remain in Colombia a minimal amount of time, and must be instructed not to fire weapons unless fired upon. Also, the United States must articulate to the international community that its sole objective is the destruction of illegal drugs bound for its shores.¹⁴⁴

3. *Attribution of Responsibility*

Under the emerging view of attribution of responsibility, the United States would not be barred from taking defensive action against individ-

135. *See supra* notes 97-101 and accompanying text.

136. *See supra* notes 98-100 and accompanying text.

137. *See supra* notes 5-12 and accompanying text.

138. *See supra* note 99.

139. *See supra* notes 24-30 and accompanying text.

140. *See supra* notes 31-32 and accompanying text.

141. Bagley, *supra* note 2, at 71. The producer states have argued that the United States can reduce its demand for illicit drugs. Whether increasing U.S. efforts at demand reduction will end the drug crisis is a key factual issue subject to debate. *See supra* note 24 and accompanying text.

142. *See supra* note 101 and accompanying text.

143. The United States must establish that the drugs are bound for its borders in order to justify its action solely on defensive grounds. Destroying drugs bound for another state probably would exceed the force necessary to remedy the wrong committed against the United States.

144. *See supra* notes 97-101 and accompanying text.

ual drug lords in Colombia by the absence of attribution of responsibility to the Colombian government.¹⁴⁵ Under the traditional view, however, acts sufficient to warrant self-defense must be attributable to Colombia before U.S. action is justified.¹⁴⁶ There is little public knowledge regarding the Colombian government's involvement in the drug trade. The following paragraphs therefore describe a spectrum of possible courses of conduct, which may or may not warrant the attribution of responsibility for the drug traffickers' acts to the Colombian government:

- (1) The Colombian government actively and effectively prohibits the transfer of illicit drugs to the United States;
- (2) The Colombian government actively but ineffectively prohibits the transfer of illicit drugs to the United States, or acquiesces to such transfer;¹⁴⁷
- (3) Some Colombian government officials support the transfer of illicit drugs to U.S. destinations in contravention of government policy or in the face of government acquiescence; or¹⁴⁸
- (4) Colombian government policy covertly or openly supports the transfer of illicit drugs to the United States.¹⁴⁹

In the first situation, Colombia has fulfilled its duty to prevent the transfer of illicit drugs.¹⁵⁰ The Colombian government has not violated international law and the United States may not take defensive action against it under the traditional view. In the second scenario, the drug producers constitute "persons not acting on behalf of the State" under

145. See *supra* notes 111-13 and accompanying text.

146. See *supra* notes 105-10 and accompanying text. The drug-producing states argue that consumption, rather than production, of drugs is responsible for the drug crisis. See *supra* notes 24, 141 and accompanying text. This argument, however, is not convincing under international law. The shipment into the United States of illicit drugs by the producing state or its nationals constitutes the international delict. U.S. consumers are not involved in the drug production or shipment, and thus cannot be the cause of the breach of international law. The involvement of consumers is relevant, however, with regard to the necessity of the proposed action. See *supra* note 143 and accompanying text.

147. This is arguably the present situation in Bolivia. See *supra* notes 29-30 and accompanying text.

148. This is probably the most accurate description of the actual situation in Colombia. See *supra* notes 13-18 and accompanying text. See also Morrison, *supra* note 28, at 2109 ("the President of Columbia had to withdraw an entire army group from the field because of its increasing complicity with drug traffickers").

149. This is arguably the present situation in both Colombia and Panama. See *supra* notes 13-18 and accompanying text.

150. The Single Convention imposes this duty on all ratifying states, including Colombia. See *supra* notes 19-23 and accompanying text.

the International Law Commission's attribution principles.¹⁵¹ Colombia, therefore, is not responsible for the affirmative acts of producers. Although Colombia would be responsible for failing to prevent the production of illicit drugs,¹⁵² this breach of international duty probably does not rise to the level justifying defensive response.¹⁵³

However, Colombia has breached its affirmative duty to thwart drug production in the third situation.¹⁵⁴ Moreover, the state may be directly responsible for the affirmative acts of drug producers if the officials supporting the drug activity constitute an "organ of a State."¹⁵⁵ Even subordinate agents, such as policemen, may constitute "organs" of states under international law.¹⁵⁶ In the fourth situation, Colombia has affirmatively aided the drug producers and is thus responsible for their acts.¹⁵⁷ The drug traffickers' acts therefore would be attributable to the Colombian government.

IV. CONCLUSION

The analysis in Part III indicates that the hypothetical military action in response to the Colombian drug traffickers almost certainly would violate international law as formulated by the U.N. Charter.¹⁵⁸ The proposed military action would constitute a prima facie violation of Article 2(4) under all but the most radical interpretations of that provision.¹⁵⁹ Under the restrictive view of the Article 51 exception, the action would not be justifiable as self-defense.¹⁶⁰ Even under the permissive view, the action is unlikely to be justifiable.¹⁶¹ While a reasonable case can be made for the existence of the legal privilege to resort to forcible self-help,¹⁶² the proposed military action would probably exceed the substantive restraints on the privilege's invocation.¹⁶³ Further, it is unclear

151. See *supra* notes 105-10 and accompanying text.

152. See *supra* notes 19-23, 150 and accompanying text.

153. See *supra* notes 62-112 and accompanying text.

154. See *supra* notes 19-23 and accompanying text.

155. See *supra* note 108 and accompanying text.

156. See Zemanek, *Responsibility of States: General Principles*, in 10 *ENCYCLOPEDIA OF POLITICAL INTERNATIONAL LAW* 366 (R. Bernhardt ed. 1987).

157. See *supra* note 109 and accompanying text.

158. See *supra* notes 31-53, 113-57 and accompanying text.

159. See *supra* notes 45-61, 114-22 and accompanying text.

160. See *supra* notes 67-74, 129-30 and accompanying text.

161. See *supra* notes 75-101, 131-44 and accompanying text.

162. See *supra* notes 82-94 and accompanying text.

163. See *supra* notes 95-101, 135-44 and accompanying text.

whether one must attribute responsibility to the Colombian government for the aggressive acts of the drug traffickers.¹⁶⁴ Under the traditional attribution-of-responsibility doctrine, no defensive action is justified absent such attribution.¹⁶⁵ Under the emerging view, however, attribution is not an obstacle.¹⁶⁶

U.S. defensive action may depend upon whether the United States supports the permissive or restrictive view of Article 51. In the context of nonconsensual military action against the drug lords, analysis of the policy concerns underlying the two views suggests that the United States should support the permissive view. While the restrictivists seek the prevention of full-scale war,¹⁶⁷ the permissivists seek to ensure that states comply with their obligations under international law.¹⁶⁸ Because the entire international community is likely to view any action directed at eradicating the drug problem with considerable sympathy,¹⁶⁹ there appears minimal risk that the action will escalate into full-scale war. Correspondingly, the need to adopt the restrictive view diminishes. The United States therefore should support the the permissive view of Article 51.

Nevertheless, the proposed military action likely will be deemed illegal under international law. How much of an effect should that illegality have on the policy question of whether the United States should pursue the proposed military action? International lawyers recognize that, because no sovereign power imposes formal sanctions for violations of international law,¹⁷⁰ attention to law is not the paramount or even dominant motivation for national behavior.¹⁷¹ Yet international law does place a substantial limitation on a nation's freedom to act.¹⁷² The

164. See *supra* notes 102-13 and accompanying text.

165. See *supra* notes 105-10, 146-57 and accompanying text.

166. See *supra* notes 111-13, 145 and accompanying text.

167. See *supra* note 67 and accompanying text.

168. See *supra* note 75 and accompanying text.

169. Bryde stated that "[i]n some cases the reasons for using force were so compelling that the actions have met with considerable sympathy from large parts of the international community." See Bryde, *supra* note 85, at 217.

170. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 133 (1954), quoted in L. HENKIN, *supra* note 40, at 1. The United Nations does authorize collective action to enforce the Charter provisions. However, this mechanism is considered ineffective. See Cassese, *Return to Westphalia? Considerations on the Gradual Erosion of the Charter System*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 505 (A. Cassese ed. 1986); Combacau, *supra* note 71, at 30 (failure of collective mechanism causes states to endure legal wrongs).

171. See L. HENKIN, *HOW NATIONS BEHAVE* 320-21 (2d ed. 1979).

172. *Id.* See *infra* note 40.

violator of international law will be considered a violator by other states, providing a measure of horizontal enforcement.¹⁷³ Additionally, the United States has a substantial interest in maintaining the integrity of the international legal system¹⁷⁴—an integrity jeopardized by every violation.¹⁷⁵ Thus, consequential repercussions from any nonconsensual military action should weigh against a U.S. Administration decision to take such action in waging its war on drugs.

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173. L. HENKIN, *HOW NATIONS BEHAVE* 320-21 (2d ed. 1979).

174. See *supra* note 40 and accompanying text. See also 1 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 12 (1940), cited in W. BISHOP, *INTERNATIONAL LAW* 9 (3d ed. 1971) (The "effectiveness [of international law] increases as the nations of the world find it not only to their benefit but also to the benefit of the community of nations to conduct their relations according to . . . generally accepted standards . . .").

175. No nation will build policy on law deemed ineffective. It would be unrealistic and dangerous to base government policy on laws not observed by other nations. L. HENKIN, *HOW NATIONS BEHAVE* 320-21 (2d ed. 1979).