Self-Preservation

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A. Introduction

1 In → *international law* there exists no single clear meaning of the term "self-preservation": it has been employed in the practice of → *States* and by scholars for a variety of purposes. In rather general terms, self-preservation refers to a unilateral action by a State in response to a compelling need to preserve the State in one form or another. In many cases self-preservation has been employed as a legal justification for an action that would otherwise have been unlawful. Traditionally, the term referred to actions aimed at "the protection of the State, its honour, and its possessions and the lives and property of its citizens" (United States Navy Regulations, 1948, Art. 0614). It should be noted that, although self-preservation is often associated with military action, an act of self-preservation need not necessarily constitute a use of military force.

2 Prior to the inception of the → *United Nations [UN]*, self-preservation was viewed by the majority of scholars as a right of States and, in many instances, as a sovereign duty (Alverez, p.118). However, it is unlikely that the concept constitutes a right of States today, at least in its entirety. In the UN era, invocation of a general notion of self-preservation has diminished greatly, and, as such, it is questionable whether the concept has much normative basis in contemporary international law. Having said this, it is notable that the term has begun to creep back into the vocabulary of international legal scholarship in recent years. Moreover, elements of the concept of self-preservation clearly continue to fall within accepted international legal parameters, most notably the right of → *self-defence*. Self-preservation is generally now seen as a historical concept that has in many respects been superseded by the UN system; any action taken to protect the State must today be compatible with the → *United Nations Charter*.

B. Concept

3 In its narrowest form, the term "self-preservation" has been used as a synonym for the concept of necessity (→ *necessity, state of*). In this incarnation, self-preservation constitutes a unilateral action taken in response to a situation of "grave and imminent peril" affecting the "essential interests" of the responding State. This allows for States to preclude the wrongfulness of obligations owed to other States in extreme circumstances. Historically, this potentially allowed for the use of military force against States that were not themselves necessarily in breach of international law, to secure the interests of the invoking State.

4 More commonly, self-preservation has been employed in a broader sense: this is an interpretation that includes the concept of necessity, but is not limited to it. Therefore, self-preservation is perhaps best understood as an 'umbrella' term. It should be seen as a label that encompasses a range of concepts that all possess a good deal more specificity under contemporary international law than self-preservation does itself. Traditionally, then, self-preservation has encompassed the following legal concepts: self-defence, → *countermeasures* (either in the form of → *reprisals* or → *self-help*) and necessity.

5 The third incarnation of self-preservation is not a legal one, as such, but is rather something that "lies in the realm of ideology" (Bowett, p.10). Given that international law is a non-hierarchical system without a centralised legislator and is comparatively lacking in core enforcement mechanisms, a theoretical natural law right (→ *natural law and justice*) of unilateral self-preservation can be seen as a key underlying basis for many of the norms that have developed within that system. This has its roots in concepts such as the equality of States (→ *States, sovereign equality*), the inviolability of territorial integrity, and the political independence of States (→ *territorial integrity and political independence*), all of which being aspects of → *sovereignty*. The imperative to protect the welfare of the State entity can be seen as providing a base of legitimacy for acts that may otherwise be undesirable, and as a key motivating factor in the formation of international law.

6 Historically, all acts of self-preservation could potentially be seen as being lawful. Post-1945, however, not all actions that could be considered as acts of self-preservation may be seen as lawful actions. Nonetheless, self-preservation remains an important concept today to the extent that it underpins many of the existing rules of international law, most notably in the context of the use of military force and other non-forcible mechanisms for the → *peaceful settlement of international disputes* (see, eg, *Legality of the Threat or Use of Nuclear Weapons*, para. 96 → *Nuclear Weapons Advisory Opinions*). It is in this more nebulous capacity that self-preservation may be described as a "general principle of law recognised by civilised nations" as contemplated by Art. 38.1(c) of the Statute of the → *International Court of Justice [ICJ]* (Cheng, p.31).

C. Measures of Self-Preservation After 1945

7 The normative regime imposed by the UN Charter provides legal definition to measures that may broadly be seen as acts of self-preservation, as well as clearly restricting the exercise of any 'right' of self-preservation. Certain types of action that were traditionally considered as falling within the concept became patently unlawful. Art. 2(4) of the Charter prohibited the use of military force (→ *use of force, prohibition of*), with the only unilateral exception to this being forcible action taken in self-defence. As such, any other measure of self-preservation involving the use of military force during peacetime is unlawful. Having said this, certain non-forcible actions that can be seen as falling under the traditional notion of self-preservation may still be lawful under contemporary international law.

8 Given that some actions that were traditionally considered as acts of self-preservation are today clearly unlawful, whilst others have a legal basis that is much more defined than was the case pre-1945, the definitional value of the term self-preservation is today somewhat dubious: a fact that led Ian Brownlie to term the

concept "vague and obsolete" (Brownlie, p.255). It is certainly clear that there is no longer a limitless legal right to self-preservation, if indeed there ever was such a thing.
9 As the various possible manifestations of self-preservation are examined in separate entries, they will not be discussed in detail here; however, to clarify the position of self-preservation today, it is useful to broadly identify the concepts that have traditionally fallen within its scope. All of the measures below consist of decentralised measures aimed at preserving the security of the State in question or enforcing an obligation owed to that State. When any of the measures outlined may be viewed as being lawful, they must be both a measure of last resort and be proportional to their aim.

1. Self-Defence

10 Perhaps the most important measure of self-preservation under contemporary international law is the right of self-defence, which is indisputably lawful under Art. 51 of the UN Charter and in customary international law. Self-defence involves the use of military force in response to a prior → *armed attack*, where the response taken is both necessary and proportional. Measures of self-defence must therefore be taken as a last resort, and must be proportional to the need to respond with force to the attack suffered.
11 It should be noted that the ICJ has indicated that even the most catastrophic uses of force – the use of nuclear weapons – may fall under the rubric of self-defence in extreme instances "in which the very survival of the State would be at stake." (*Legality of the Threat or Use of Nuclear Weapons*, para. 105). The Court was not clear on this point, but it would seem that a nuclear attack could potentially be seen as necessary in instances where a State faced total destruction, and that such a use of nuclear armaments may be considered proportional to a threat of that kind. This may be read as an implicit acceptance by the ICJ that force may be employed in self-defence in response to a *threat*, rather than an actual use, of force (see → *self-defence, anticipatory* and → *self-defence, pre-emptive*). Having said this, there remains a good deal of controversy surrounding the lawfulness of such manifestations of the right of self-defence. In any event, it is clear that self-defence does maintain a forcible provision for self-preservation even in the most extreme circumstances; however, it places particular legal limits on this.

2. Self-Help

12 Actions of self-help, like self-defence, are premised upon the prior actions of another State that detrimentally affects the responding State. Following the adoption of the UN Charter, self-help involving the use of force is unlawful (see, eg, *Corfu Channel* (*United Kingdom v Albania*), p.35, → *Corfu Channel case*). However, non-forcible measures of self-help (non-forcible countermeasures) that constitute a *prima face* breach the principle of non-intervention (→ *intervention, prohibition of*) may nonetheless be lawful (see, eg, International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, Arts. 49-54, → *state responsibility*; → *International Law Commission [ILC]*).

3. Necessity

13 As noted above, "necessity" refers to a unilateral action in response to a situation affecting the "essential interests" of the responding State. The exact scope of the doctrine of necessity today is unclear, but it may be said that it no longer legally justifies the use of military force. In certain circumstances, a state of necessity may justify non-forcible measures that would otherwise be unlawful (ILC Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, Art. 25). As such, it has much in common with the concept of self-help. The distinction between the two is essentially the requirement that necessity may only be invoked in instances of "grave and imminent peril". As with self-help and self-defence, an action of necessity must be proportional to the "peril" justifying it. Moreover, such actions must not serious impair the interests of other States.

4. Armed Reprisals

14 An armed reprisal is an unlawful use of force during peacetime. Like self-defence, an action of armed reprisal is taken in response to a prior breach of international law. For the majority of writers, such actions today are unlawful because they constitute a use of force that fails to meet the modern legal criteria for self-defence, either because they are taken in response to a non-forcible delict (no armed attack), or because they fail to meet the criteria of necessity and proportionality (see Green). Armed reprisals tend to be conducted with punitive intent. Traditionally, the notion of self-preservation was seen as legalising such actions, but most scholars now take the view that this can no longer be said to be the case. Having said this, a small number of writers have taken the view that armed reprisals may still be lawful under customary international law (see Salpeter and Waller).

D. Recent Revival?

15 In the early twenty-first century, the notion self-preservation has been given something of a dusting off. A notable minority of scholars have returned to the concept, most obviously in the context of State response to terrorism. The argument has been put forward that, in extreme situations of national emergency, the doctrinal restrictions of international law may be subordinate to a wider principle of self-preservation (see, eg, Gross and Ni Aolain, p.32-50). This revival of the notion of self-preservation is apparent, albeit often only implicitly, in much of the legal rhetoric of the "war on terror". This semi-revival of self-preservation as a distinct 'right' or legal justification is potentially dangerous, as it undermines existing legal rules by reference to what is in fact an amorphous concept; one that does not possess clear legal bounds.

16 It is submitted that the notion of self-preservation is today only of legal consequence to the extent that as a term it broadly links, or encompasses, certain contemporary rules of international law. It is not a concept that possesses legal character in or of itself. In other words, any act of "self-preservation" must not be of itself contrary to international law, or it must be rendered lawful by falling within accepted legal limits for the exercise of self-defence, self-help or necessity (with actions of armed reprisal being unlawful). Even in instances where a State faces absolute destruction, any forcible response must fall within the requirements of self-defence. The famous statement made during the Cuban Missile Crisis by the then

United States Secretary of State, Dean Acheson, that "the survival of States is not a matter of law" can no longer be said to be correct.

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