

**Necessity within the Legal Framework of Self-Defence
against Terrorism**

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Abstract

This thesis focuses on the criteria established for the use of force in self-defence in international law. The prohibition on the use of force in Article 2(4) of the United Nations Charter is subject to exemption by way of approval from the Security Council, or by invoking the right to self-defence. The use of force in self-defence is promulgated in Article 51 of the United Nations Charter, but is understood to be restricted by the principles of necessity and proportionality. Since the attacks in the United States on 11th September 2001, the law on self-defence has focused on the emergence of non-state actors within the framework of *jus ad bellum*. In view of this, and the contemporary context, this thesis seeks to reappraise the meaning of necessity in light of terrorism. In particular, the study asks whether the meaning of necessity is affected if self-defence is applied against a non-state actor, and if so, how. It also explores the establishment of the two conditions of self-defence, necessity and proportionality, based on the *Caroline* incident, and examines how the *Caroline* doctrine has been interpreted in the formulation of rules incorporated in *jus ad bellum*. The understanding of necessity in self-defence is also re-evaluated by asking the role of necessity in self-defence framework. It is argued that necessity has two important roles in self-defence law. First, it is argued that necessity acts as a requirement to self-defence, specifically by seeking whether an armed attack has taken place, and if so, whether there is an alternative option to the use of non-forcible measures. Second, necessity acts as a limitation to self-defence, establishing that any defensive measures must be employed solely to achieve the legitimate aim of self-defence, which is to halt and repel an armed attack. However, it is difficult to assess necessity as a limitation on the use of force in self-defence when force is directed against terrorist groups.

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List of Abbreviations

AJIL	American Journal of International Law
ASEAN	Association of Southeast Asian Nations
BYIL	British Yearbook of International Law
CUP	Cambridge University Press
EJIL	European Journal of International Law
EU	European Union
GA	General Assembly
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
JCSL	Journal of Conflict and Security Law
LJIL	Leiden Journal of International Law
NILR	Netherlands International Law Review
OAS	Organization of American States
OUP	Oxford University Press
PCIJ	Permanent Court of International Justice
SC	the Security Council
UN	United Nations
UNTS	United Nations Treaty Series
UKMIL	United Kingdom Materials on International Law

Table of Cases

- Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) ICJ Rep 1986 p. 14
- Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda) ICJ Rep. 2005
- Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America) ICJ Rep 2003 p. 161
- Corfu Channel Case (United Kingdom vs. Albania) ICJ Rep 1949 p. 4
- North Sea Continental Shelf, ICJ Rep 1969
- Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons ICJ Rep 1996 226 96
- People V Alexander McLeod 25 Wendell 483 (1841)
- Portugal v. Germany (The Naulilaa Case), Special Arbitral Tribunal, Annual Digest of Public International Law Cases 526
- People V Alexander McLeod 25 Wendell 483 (1841)
- Continental Shelf Case (Libya v. Malta) ICJ Rep 1985
- Lotus Case PCIJ (1927) at 28
- North Sea Continental Shelf Cases (1969)
- Colombian-Peruvian Asylum Case, ICJ Rep 1950
- Fisheries Case, (United Kingdom vs. Norway) ICJ Rep 1951
- S.S Wimbledon (United Kingdom v Japan) 1923 PCIJ (Ser. A) No. 1 (17 August 1923)

Chapter I: Introduction

Article 2(4) of the United Nations Charter prohibits states from using force to negotiate international relations.¹ This prohibition is also present in customary international law. One of the main exceptions to this general rule in both cases is the acknowledgment of the right to self-defence, as mentioned in Article 51 of the United Nations Charter.² Customary international law requires invoking states to comply with two conditions when exercising self-defence; these conditions are necessity and proportionality.

The primary focus of this thesis is the concept of necessity in self-defence. It aims to appraise the entire concept of necessity comprehensively as a component of the legal framework of self-defence and in particular, to establish its role in the context of self-defence against terrorism.

In legal literature, discussion surrounding the right to self-defence is a contentious topic. The debate has gathered momentum following the attacks that took place on 11th September 2001 (hereafter '9/11') in the United States (US), with some scholars opining that the right to self-defence is applicable against a non-state actor.³ Whilst there is an abundance of legal writing discussing this area, few writers dedicate their work to the condition of necessity and proportionality.⁴ Even fewer commentators discuss the

¹ Article 2(4) United Nations Charter (1945) 1 UNTS XVI

² Article 51 United Nations Charter (1945) 1 UNTS XVI

³ For e.g. Christoph Müller, 'The Right of Self-Defense in the Global Fight against Terrorism' (2006) 81 *International Law Studies* 351-366, 354; Nicholas Rostow, 'Before and After: The Changed UN Response to Terrorism Since September 11th' (2002) 35 *Cornell International Law Journal* 475

⁴ Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004); Christine Gray, *International Law and the Use of Force* (3rd ed, OUP 2008) 119; Abraham Sofaer, 'On the Necessity of Pre-Emption' (2003) 14 *EJIL* 209-226; Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense' (2013) 107 *AJIL* 563-570; Christian J Tams and James G Devaney, 'Applying Necessity and Proportionality to Anti-Terrorist Self-Defence' (2012) 45 *Israel Law Review* 91-106

concept of necessity in isolation.⁵ This is perhaps due to the fact that necessity may be construed as a simple concept in *jus ad bellum* which does not require in-depth analysis. However, this thesis believes that there is more to the principle of necessity which can be developed academically.

In view that there are few commentaries that discuss on the concept of necessity extensively, through this research, it is hoped that it contributes to the expansion of the scholarship in *jus ad bellum*. This thesis presents a different way of viewing necessity in relation to self-defence against state actors and non-state actors. It also opens the discussion on the content that constitutes the meaning of necessity in self-defence. Furthermore, necessity is examined by looking various elements within self-defence that directly affects our understanding of necessity. Among others, necessity is explored in relation to the aim of self-defence, the effects of anticipatory and pre-emptive self-defence on the meaning of necessity and the effects of self-defence against non-state actors on the concept of necessity.

It is also observed that necessity has a significant importance in self-defence framework. This research approach necessity by enquiring the purpose or *raison d'être* of its existence in the law of self-defence. It is argued that necessity has a dual role. The first role of necessity is as requirement for a state to launch self-defence. This assessment requires a state to establish a threat or armed attack that compels it to act by using force. Further, necessity also demands the victim state to use force only as a matter of last resort. The second role of necessity is it acts as a limitation for states to use force in self-defence measure. In doing so, necessity as a limitation links to the legitimate aim of self-defence. States that exercise force beyond the aim of self-defence is regarded as unnecessary use of force and no longer said to be acting in self-defence. Thus, it is contended that the component of necessity consists of the two roles.

⁵ Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 AJIL 769-777

Furthering the study of necessity, this research uses three examples where self-defence were invoked against non-state actors. In each state practice, both roles of necessity (as a requirement to self-defence and limitation to use force) are applied. As a result, this research discovers that determining whether or not the use of force was necessary in order to achieve the legitimate aim of self-defence is challenging. This is primarily due to the nature of terrorist groups that are often secretive, evasive and hard to distinguish between innocent civilians and terrorists. In addition, to prove necessity as a limitation to use force relies upon facts on the ground. It is hard to verify, in a terrorist-controlled area, whether a defensive measure was exercised limited to meeting the aim of self-defence.

Another contribution of this thesis to the scholarship of *jus ad bellum* is the analysis of the doctrines that are derived from the *Caroline* incident. *Caroline* doctrine refers to any legal rules that have links to the *Caroline* incident of 1837. There are four main *Caroline* doctrines. First, the *Caroline* affair created limitations on the use of force in self-defence, restricting it to necessity and proportionality. Second, the incident established that self-defence can be exercised against non-states actors. Third, states are permitted to exercise self-defence in anticipatory fashion. Finally, the *Caroline* affair established the claim of pre-emptive self-defence. This thesis analyses how each doctrine came into existence in *jus ad bellum*, and then explain its relevance to the *Caroline* case. It is observed that there is no proper determinative process to translate the *Caroline* incident (as a fact) into legal rules. As such, the *Caroline* affair is open to misinterpretation or over-interpretation. It is argued that that pre-emptive self-defence that claims to have origin from the *Caroline* incident is a misinterpretation of the *Caroline* affair.

This thesis acknowledges that fulfilling the condition of necessity does not necessarily warrant the use of force legal. There are additional conditions that a state must abide by when exercising the right to self-defence such as the requirement of proportionality. This thesis is not arguing for a conception of necessity that functions outside the framework of self-defence permitting

states an excuse to perform their international legal obligations and ultimately justify the use of force. Rather, this research is built upon the premise that self-defence is applicable against non-state actors by taking the view of the majority of scholar post-9/11 although it is noted that the ICJ has not pronounced a solid jurisprudence on this matter.

Following this introductory chapter, Chapter 2 offers a descriptive outline of the general legal framework of self-defence. It thereby acts as a foundation for all the arguments used in this thesis. It begins by analysing the prohibition on the use of force in the UN Charter and customary international law. Following that, Article 51 of the UN Charter is examined along with the customary right to self-defence. Among other aspects, the Chapter will examine the chief components of self-defence, such as the requirement of an 'armed attack', the meaning of 'inherent right' and the relationship between Article 51 and the Security Council. Lastly, Chapter 2 will look into the conditions of self-defence, as established by the principles of necessity and proportionality.

The origins of the principles of necessity and proportionality in the law of self-defence are studied in Chapter 3. Article 51 is silent on the conditions for the use of force in self-defence, which can only be found in customary international law. The majority of scholars argue that necessity and proportionality originate from a classical incident involving the destruction of the *Caroline* vessel in 1837 by British forces at Niagara Falls. Scholars have derived the meaning of both necessity and proportionality from the subsequent series of letters between the British and American governments. Chapter 3 questions the relevance of the *Caroline* incident as a basis for the right to self-defence, since the United Nations Charter in Article 51 has guaranteed each state the right to self-defence. Some scholars use the *Caroline* incident to expand the perimeters of the right to self-defence to describe anticipatory self-defence, the right to pre-emptive self-defence and self-defence against non-state actors. Thus, this Chapter will examine whether the rules emanating from the *Caroline* incident offer a correct interpretation of the incident. Furthermore, it will ask if these are the correct

interpretations of the Caroline incident, and what methods scholars used to derive these legal rules. The study will also examine the approach taken by the International Court of Justice (ICJ) in cases where the right to self-defence has been invoked.

Chapter 4 then discusses on the content of the principle of necessity within the law of self-defence. This includes among others an interpretation of necessity, understanding of necessity as a test for the right to self-defence, and the relationship between necessity and proportionality. Fundamental to this thesis is a re-evaluation of the concept of necessity in the framework of self-defence. This is achieved by examining the role of necessity in self-defence. This thesis asks if necessity acts as a requirement to self-defence, or if it merely serves as a limitation on the use of force or both. Further to the assessment of necessity, this Chapter investigates its application to the use of force in self-defence against a non-state actor.

Chapter 5 extends the discussion about necessity as a concept in *jus ad bellum*. Arguably, there are several factors influencing the principle of necessity in self-defence. *Inter alia*, necessity is affected if force is used in anticipatory or pre-emptive self-defence, and necessity is also affected by the aim when using force. The principal question raised in this Chapter concerns whether our understanding of necessity is affected if self-defence is directed against a non-state actor. It asks how, in such cases, a state can determine if it has fulfilled the requirement of necessity, and whether there is a distinction between necessity when situations involve inter-states and states versus non-state actors. It further explains that a state may claim to fulfil the principle of necessity when self-defence is employed against terrorist group by arguing the 'unable or unwilling' theory espoused by Ashley Deeks. However, this theory is subject to criticism and this may arguably undermine the credibility of any use of force in self-defence.

Discussions about the application of the concept of necessity outlined in Chapters 4 and 5 are applied to state practice in Chapter 6. This Chapter examines the aspects of necessity as applied in three cases involving the

use of force in self-defence against terrorist groups. The examples are the use of force in self-defence against Al-Qaeda in Afghanistan (2001), Hezbollah in Lebanon (2006) and Islamic State in Syria (2014). The focus of this Chapter is on understanding the dynamics of necessity in the use of force against non-state actors, and analysing the concept of necessity in each situation.

The thesis then concludes with Chapter 7 where it will be argued that there is no fixed approach determining the meaning of necessity. A state can determine necessity from various perspectives, as subject to various conditions. For example, necessity can be influenced by the entity of the aggressor (a state or a terrorist group) and be judged on whether force is employed in traditional self-defence or in anticipatory self-defence. It can also be noted that necessity has a dual role in the framework of self-defence. First, it acts as a requirement for any state initiating self-defence, and second it serves as a limitation on the use of force.

Chapter 2: The Legal Framework of Self-Defence

1. Introduction

The legal framework concerning self-defence begins by stating a prohibition on the use of force. It is appropriate to start any discussion on self-defence by acknowledging that force is generally considered as unlawful in international law. After this acknowledgement, the discussion then focuses on the law pertaining to self-defence, by examining its sources and contents. This Chapter provides a descriptive outline of the framework for self-defence, and as such, it will serve as a basis for the arguments made throughout this thesis. It is vital to outline the basic tenets of self-defence before discussing the core of the thesis, which is the principle of necessity.

Discussion will begin with the prohibition on the use of force specified in Article 2(4) of the United Nations Charter 1945. Following that, the discussion will move on to examine the law on self-defence in conventional law, as stated on Article 51 of the United Nations Charter and in customary international law. This will include examination of elements of self-defence, such as the requirement of an 'armed attack', the phrase 'inherent right to self-defence', and the relationship between the right to self-defence and the UN Security Council. Another aspect that will be analysed is the discussion surrounding the lawfulness of anticipatory self-defence, and the applicability of self-defence targeting non-state actors. Finally, this chapter will end by detailing the principles of necessity and proportionality under the law of self-defence, as required by customary international law. A core focus of this thesis is the study of the concept of necessity in the context of self-defence.

In sum, the purpose of this chapter is to serve as a foundation to the thesis, offering an exploration of its key arguments within the legal framework of self-defence. It will commence with a prohibition on the use of force, discussing the scope on the right to self-defence and concluding by discussing the principles of necessity and proportionality.

2. Prohibition on the Use of Force

The main point of reference on the prohibition on the use of force in the UN Charter is in Article 2(4) which states:

“All 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.”¹

Prior to the establishment of the United Nations in 1945, during the inter-War period (1919-1944), there were several efforts to prohibit states to use force (or the outlawry of war).² Such attempts were made for instance through the League of Nations and the Kellogg–Briand Pact, which prohibited signatory parties to use force against another territory.³ With the inception of Article 2(4) of the United Nations Charter, it explicitly states that the prohibition on the use of force under international law. This provision is often described as the ‘cornerstone’ of the modern international system because it restrains states from resorting to force.⁴

¹ Article 2(4) of the United Nations Charter (1945) 1 UNTS XVI

² Wilhelm Grew, *The Epochs of International Law* (Walter de Gruyter, 2000) 619 – 624

³ Article 10 of the Covenant of League of Nations (28 April 1919)

⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* ICJ Rep. 2005 p 201 para 148 (‘The prohibition against the use of force is a cornerstone of the United Nations Charter’); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* ICJ Rep 1986 p. 14 in a separate Opinion of President Singh, p. 153 (‘the very cornerstone of the human effort to promote peace in a world torn in strife’); *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* ICJ Rep 2003 p. 61, in a dissenting opinion of Judge Elaraby, at 291 (‘The principle of the prohibition of the use of force in international relations...is no doubt, the most important principle in contemporary international law to govern inter-State conduct; it is indeed the cornerstone of the Charter’); in a separate opinion of Judge Simma at 328.

The prohibition on the use of force can be approached in two ways. Firstly, the prohibition could be drawn from Article 2(4) of the United Nations Charter, as set out above. Secondly, customary international law also demands prohibition on the use of force. This can be derived from state practice and *opinio juris*, which confirms the prohibition on the use of force proceeds from customs.

a. Article 2(4) of the United Nations Charter

Much of the discussion associated with this Article emerged in response to interpretations of the scope of the prohibition. In particular, whether the provision should be read strictly according to the words contained in Article 2(4) or afforded some flexibility in special circumstances, to allow states to exercise force without violating the provision. However, a central interpretation made in the Article defines the term 'force' as referring to military or armed force⁵ and it can also mean 'political and economic force'.⁶

Scholars raised the issue on the meaning of Article 2(4) by examining the *travaux preparatoires* to determine the intention of the states during the drafting period. For instance, Randelzhofer and Brownlie, argue that the meaning of 'force' in the provision refers specifically only to the use of military force.⁷ This is because, they argued, that during the drafting of the provision, Brazil attempted to propose the definition of force to include economic coercion but the San Francisco Conference rejected the idea.⁸ However, Stone questions the clarity of the *travaux preparatoires* that can be

⁵ Yoram Dinstein, *War Aggression and Self-Defence* (5th ed., CUP 2012) 88; Randelzhofer, 'Article 2(4)' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Vol.1, 2nd edn, OUP 2002) 117; Derek W Bowett, *Self-Defence in International Law* (Manchester University Press 1958) 148

⁶ Randelzhofer (n 5) 118.

⁷ Randelzhofer, 'Article 2(4)' in Bruno Simma and others (eds.), *The Charter of the United Nations: A Commentary* (Vol. I, 3rd ed, OUP 2012) 209; Ian Brownlie, *International Law and the Use of Force by States* (OUP 1963) 267-8

⁸ *Ibid*

construed conclusively that force is restricted to military force only.⁹ He further his argument by stating that it is an extreme view of the provision that any use of transboundary force necessarily equates to violation of Article 2(4).¹⁰

Aside from the meaning of force in Article 2(4), it may be raised here whether there is a link between the provision with the meaning of aggression. The Definition of Aggression can be derived from GA Resolution 3314 (XXIX) Article 1 which states:

“Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations’.¹¹

The language used in defining the meaning of aggression is similar to Article 2(4) of the UN Charter. However, upon examination, the meaning of aggression bears no relevance to Article 2(4). This is because the preamble of the GA Resolution states that the definition of ‘aggression’ is intended for Article 39 of the United Nations Charter with respect to the powers of the Security Council in determining the definition of aggression.¹² Therefore, there is no link that can be made between the meaning of aggression as stated in the GA Resolution with Article 2(4) prohibition on the use of force.

Historically, the relevance of this Article has been scrutinised, specifically in connection with the effectiveness of Article 2(4) as a measure preventing

⁹ Julius Stone, *Aggression and World Order* (Stevens and Sons 1958) 95-98

¹⁰ Ibid

¹¹ Article 1 of Definition of Aggression, UN General Assembly 3314 (XXIX) 14 December 1974 UN Doc A/Res/29/3314

¹² Ibid. The Preamble of the GA Resolution states ‘Recalling that the Security Council, in accordance with Article 39 of the Charter of the United Nations, shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security’

states from using force contrary to the UN Charter. Arguably, if the Article has been effective in preventing states from exercising force, then it is not possible to explain the series of conflicts that have occurred since the establishment of the United Nations. Critics question whether the Charter scheme as a whole is able to withstand the pressure of maintaining international peace and security, in line with the aims of the Charter.¹³ Franck opines that, although the provision imposes strict obligations, it contains various ambiguities, with potential to result in its 'deadly erosion'.¹⁴ He posits his argument, stating that Article 51 (on the right to self-defence) permits states to excuse themselves from the prohibition based on self-defence, without a proper fact finding system in place to identify who is the aggressor and who is the innocent.¹⁵ This leads Article 2(4) to be undermined, with states choosing 'to attack first and lie about it afterwards'.¹⁶ This could be said one of the weaknesses of the provision.¹⁷

Despite the flaws contained in Article 2(4), states generally agree on the basic tenets that each state is sovereign and territorial integrity and political independence must be respected. O'Connell claims that since the inception of Article 2(4) in 1945, the world has not witnessed a state succeeded in conquering another member state of the UN and extinguishing its existence.¹⁸ Even during the invasion of Kuwait by Iraq in 1990, after several attempts of negotiations failed, military force was used to liberate Kuwait.¹⁹ This shows that member states reinforce the Charter's norms of against the use of force in international relations.

¹³ Article 1(1) of the United Nations Charter (1945) 1 UNTS XVI

¹⁴ Thomas Franck, 'Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States' (1970) 64 AJIL 809-837, 809

¹⁵ *ibid* 811

¹⁶ *ibid* 810-812

¹⁷ See opposing discussion L. Henkin, 'The Reports of the Death of Article 2(4) and Greatly Exaggerated' (1971) 65 AJIL 544

¹⁸ Mary O'Connell, 'The Prohibition of the Use of Force' in Nigel White and Christian Henderson (eds.), *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 117

¹⁹ See UN SC Res. 678 (1990) November 1999

A significant development on the issue of the prohibition on the use of force was in 2005. By 2005, the world has witnessed two major armed conflicts namely in Afghanistan (2001) and in Iraq (2003). In a UN Document, *World Summit Outcomes*, member states reaffirmed the rules, which states:

“78. We reiterate the importance of promoting and strengthening the multilateral process and of addressing international challenges and problems by strictly abiding by the Charter and the principles of international law, and further stress our commitment to multilateralism.”

“79. We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.”²⁰

Another ambiguity in Article 2(4), as explained by Franck could be extended by examining the phrase ‘against the territorial integrity or political independence of any State’. Some commentators support a strict approach, demonstrating that this Article permits state A to enter state B, without contravening Article 2(4), the intention being not to jeopardise the political or territorial integrity of state B.²¹ Others view the use of force within another territory as not amounting to a violation of the said Article unless the victim state is deprived of its territory permanently.²² However, these arguments do not garner majority support from academics. The UN Charter was founded to prevent the ‘scourge of war’, as it was conceived in the wake of the First and

²⁰ 2005 World Summit Outcome document, UN Doc. A/RES/60/1, 24 October 2005

²¹ Derek Bowett, *Self-Defence in International Law* (Manchester University Press 1958) 150-151

²² See D’Amato, *International Law: Process and Prospect* (Transnational Publisher 1987) 58-59

Second World Wars.²³ Furthermore, another stated purpose of the Charter is ‘...to maintain international peace and security...to take effective collective measures for the prevention and removal of threats to the peace’.²⁴ If Article 2(4) is unable to restrain the use of force, except in situations permitted under the Charter regime, this would undermine the entire UN system, determining the prohibition on the use of force.²⁵ Even if these arguments were directed toward the vagueness of the term ‘territorial integrity or political independence of any State’, the following phrase: acting ‘in any other manner inconsistent with the Purposes of the United Nations’ is considered to be ‘a residual “catch-all” provision’, limiting the scope of the use of force.²⁶ As such, various perspectives can be seen here with regard to the evaluation of Article 2(4). On the one hand, it is argued that the vagueness of Article 2(4) undermines the purpose of the provision by preventing states from using force. On the other hand, it is also argued that the prohibition is clear, as no use of force is permitted in any circumstances except those permitted in the Charter. Furthermore, the argument above also indicates that analysis of the provision divides the interpretation of the prohibition according to two interpretations: a broader and a strict approach.

The division on the strict and broad interpretations of Article 2(4) can be seen in state practice. In 1976, a plane was hijacked by an armed terrorist group, which subsequently landed in Entebbe International Airport in Uganda.²⁷ It was clear during the incident that the terrorists were targeting Israeli nationals. During the course of negotiations, and in an effort to release the captors, Israeli forces landed at the airport without awaiting the permission of the Ugandan government, and employed force in order to rescue the victims.²⁸ In doing so, airport buildings were targeted and several Ugandan aircrafts destroyed. The Organisation of African Unity (OAU)

²³ Preamble of the United Nations Charter 1945 1 UNTS XVI

²⁴ Article 1(1) of the United Nations Charter 1945 1 UNTS XVI

²⁵ Hilaire McCoubrey and Nigel White, *International Law and Armed Conflict* (Dartmouth 1992) 25

²⁶ Yoram Dinstein, *War Aggression and Self-Defence* (4th ed, CUP 2005) 90

²⁷ See UN Doc. S/PV.1939 (1976)

²⁸ Murray Colin Alder, *The Inherent Right of Self-Defence* (Springer 2013) 138-139

strongly condemned the actions of Israeli forces, describing them as an act of aggression and a breach of Ugandan sovereignty.²⁹ Similar sentiments were echoed by other states such as Benin, China, Cuba, Romania, Algeria, Tanzania and USSR among others. Qatar, on behalf of the Arab States, claimed that Israel had committed a flagrant violation of Uganda's territory and committed an act of aggression.³⁰ Israel defended its actions, claiming it had acted on humanitarian grounds to rescue its nationals. It was supported by the US, who claimed that in such circumstances Israel had the right, derived from the right to self-defence as recognised under international law, to breach Ugandan territory temporarily.³¹

In another incident, in 1983, the Security Council convened to discuss US intervention in Grenada.³² Following the murder of the Grenadian Prime Minister and other cabinet members, the US intervened, ostensibly to restore peace and security, while at the same time assisting evacuation efforts. Several countries supported the US intervention in Grenada, including Barbados, Chile and Jamaica; however, forty-three countries opposed the invasion claiming it was a violation of the UN Charter. The opposing countries requested the states involved to refrain from the use of threat and force when conducting international relations. Singapore did not condemn the military operation in Grenada because they recognised that neglecting the country would undermine the moral and legal principles of the Charter.³³ France stated that the justifications forwarded by the US did not

²⁹ Repertoire of the Practice of the UN Security Council- Regional Arrangements (Chapter XII) – List of Communications from Regional Organisations – (1975-1980) - Consideration of the Provisions of other Article of the Charter Part II: Consideration of the Provisions of Article 2 411 (http://www.un.org/en/sc/repertoire/75-80/75-80_12.pdf#page=17)

³⁰ 'Complaint of Aggression by Israel against Uganda' (1976) UN Yearbook 315-320, 318

³¹ Ibid 319.

³² See for factual events L Doswald-Beck, 'The Legality of the United States Intervention in Grenada' 31 (1984) NILR 355-377, 356-359; See also 'The Situation in Grenada' UN Doc. GA A/RES/38/7 (2 November 1983). See the discussion in Francis A. Boyle and others, 'International Lawlessness in Grenada' 78 (1984) AJIL 172-175

³³ 'Grenada Situation' (1983) UN Yearbook 213

conform to international law, furthermore, that such intervention could only be permitted when authorised by the Security Council.³⁴

The different interpretations of the scope of Article 2(4) can be exemplified in the two events outlined above. In both cases, the aggressor states provided a broad interpretation of the prohibition allowing the use of force without contravening Article 2(4), arguing that they acted to achieve hostage rescue and restore peace. Both states, the US and Israel, contended that their use of force were legal and within the framework of the UN Charter. However, other states argued their interpretations of Article 2(4) were wrong, as shown when France objected to the US invasion of Grenada. Similarly, other states upheld the integrity of the UN Charter, insisting that force could only be resorted to if the Security Council gives permission. From the examples cited above, it shows that Article 2(4) can be interpreted broadly and strictly by states and claim that using force in another state's territory does not necessarily violate Article 2(4).

In the *Corfu Channel* case,³⁵ the first case put before the ICJ, the United Kingdom initiated 'Operation Retail' within the territorial seas of Albania after two British navy ships were hit by sea mines in the Corfu Channel straits. The government of the United Kingdom justified its operation in the context of Article 2(4), stating:

“...but our action on the 12th/13th November threatened neither the territorial integrity nor the political independence of Albania. Albania suffered thereby neither territorial loss nor any part of its political independence.”³⁶

The statement implied that, although the UK had employed force within the territory of Albania, it did not intend to threaten Albania's territorial integrity or

³⁴ *ibid*

³⁵ *Corfu Channel Case (United Kingdom vs. Albania)* ICJ Rep 1949 p. 4

³⁶ ICJ Pleadings in *Corfu Channel Case (United Kingdom v. Albania)* Vol, III 1949 p. 296

its political independence. This defence, however, was rejected by the Court, whereby it emphasised that respect for territorial sovereignty as an essential foundation of international relations.³⁷ The Court also stressed that although there are 'defects in international organisation', such as the ambiguities contained in certain provisions of international documents, powerful states must not pervert the administration of international justice.³⁸

Article 2(4) of the Charter imposes strict obligations on member states to observe the prohibition on the use of force. The prohibition does not excuse substantial violations of human rights or humanitarian crises within other states.³⁹ However, the Charter only permits recourse to force in exercising the right to self-defence, or by the collective endorsement of the Security Council.⁴⁰ Beyond these exceptions, use of force is a derogation of the attacked state's territorial integrity and political independence.⁴¹ In the case of *Military and Paramilitary Activities In and against Nicaragua* (hereafter '*Nicaragua*'), the Court considered the issue of forcible humanitarian intervention invoked by the US. The Court held that the use of force is not an appropriate mechanism for upholding humanitarian values.⁴² This reflects the strict interpretation followed by the ICJ with regard to the scope of Article 2(4). The case also demonstrates that the use of force may only be

³⁷ *Corfu Channel Case (United Kingdom vs. Albania)* ICJ Rep 1949 p. 35

³⁸ *Ibid.*

³⁹ Thomas Franck, *Recourse to Force* (CUP 2002) 137

⁴⁰ Articles 42 and 51 of the United Nations Charter 1945 1 UNTS XVI

⁴¹ Oscar Schachter, 'The Rights of States to Use Armed Force' (1984) 82 *Michigan Law Review* 1620-1646, 1632

⁴² The Court states: 'In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regards to the steps actually taken, the protection of human rights, a strictly humanitarian intervention objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping the *contras*. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence. See *Military and Paramilitary Activities In and against Nicaragua (Nicaragua v. United States of America)* ICJ Reports 1986 p. 268

permissible if the Charter provides such course of action such as Article 51 or by permission from the UN Security Council. Observers argued that the ICJ's decision not to uphold the humanitarian justification made by the US indicated not a total rejection by the Court on the concept of humanitarian intervention, rather the actions taken by the US did not conform to humanitarian objectives.⁴³

The wider impact of the Court's decision to reject humanitarian values as a basis for the use of force indicates that the Court provides no flexibility in Article 2(4), emphasising that no use of force is permissible, except for the exceptions stated in the Charter. In addition, the judgment also reveals that the Court followed a broad interpretation of the scope of the prohibition. However, the ICJ's position on humanitarian intervention in *Nicaragua* was an approach taken in 1986 and it is unclear whether the Court maintains this view today.⁴⁴ In few instances, states invoked humanitarian intervention as a basis for the use of force. Gray observes that, since the Kosovo crisis in 1999, states have been more prepared to rely openly on the legal doctrine of humanitarian intervention.⁴⁵

In 1997, the Yugoslavian government, which controlled Kosovo, faced domestic opposition from the Kosovo Liberation Army (KLA), which rejected central government control. On 5 March 1998, government forces allegedly killed fifty-people, including women and children, in Drenica. By September 1998, it was reported that 230,000 people had been displaced by the conflict.⁴⁶ The friction between the two sides worsened, and on 31 March 1998, the Security Council condemned the use of excessive force by the Serbian police against peaceful demonstrators in Kosovo and stated the Security Council's opposition to terrorist activities in Kosovo.⁴⁷ On 24 March 1999, NATO launched military air strikes against the Yugoslavian

⁴³ Christine Gray, *International Law and the Use of Force* (3rd ed, OUP 2008) 35

⁴⁴ See Security Council 3989th meeting on 26 March 1999 (S/PV.3989)

⁴⁵ Gray (n 43) 33-36

⁴⁶ S/RES/1199 of 23 September 1998

⁴⁷ S/RES/1160 of 31 March 1998

government, to end the humanitarian atrocities committed against the civilians.⁴⁸

The use of force for humanitarian reasons is a controversial position to take under the Charter, because the does not explicitly permit such recourse. However, the Kosovo crisis illustrated arguments both in support and against the use of humanitarian grounds as a reason for force as a violation of the prohibition under Article 2(4). During the Kosovo crisis, the Security Council had not approved the use of force, and the right to self-defence was not raised. During the crisis, some NATO members argued that, despite there being no Security Council resolution allowing military operations against Yugoslavia, the humanitarian catastrophe was so immense that force was necessary to stop further killings. The US Ambassador said:

“We and our allies have begun military action only with the greatest reluctance. But we believe that such action is necessary to respond to Belgrade’s brutal persecution of Kosovar Albanians, violations of international law, excessive and indiscriminate use of force, refusal to negotiate to resolve the issue peacefully and recent military build-up in Kosovo – all of which foreshadow a human catastrophe of immense portions.”⁴⁹

The UK Secretary of State for Defence made a similar comment, stating: “in international law, in exceptional circumstances and to avoid humanitarian catastrophe, military action can be taken and it is on that legal basis that military action was taken”.⁵⁰ Essentially, the line of argument employed by the supporters of NATO military action was that the exceptional humanitarian crisis warranted the use of force by the international community, although it was implicitly acknowledged that there was no

⁴⁸ Statement by Dr Javier Solana, Secretary-General of NATO on 23 March 1999 <http://www.nato.int/DOCU/pr/1999/p99-040e.htm>

⁴⁹ S.C.O.R (LIV) 3988th Meeting, 24 March 1999 at 4. (It can also be argued that the justification made by the US is not strictly a legal justification based on humanitarian intervention).

⁵⁰ UKMIL, 70 BYIL, 1999 p. 586

endorsement of this by the Security Council. The argument follows that if the Security Council is deadlocked and no proposed outcome could resolve the issue, the international community must act, albeit with force. The Netherlands representative, exemplified this line of narrative, saying:

“The Secretary-General is right when he observes... that the Council should be involved in any decision to resort to the use of force. If, however, due to one or two permanent members’ rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur.”⁵¹

Although other Member States did not share the view advanced by NATO, they considered that principles, such as respect for territorial integrity and international law, as prescribed in the UN Charter must be upheld, irrespective of any international crisis. A Russian diplomat said during deliberations by the Security Council, ‘attempts to justify the NATO strikes with arguments about preventing a humanitarian catastrophe in Kosovo are completely untenable. Not only are these attempts in no way based on the Charter or other generally recognized rules of international law...’⁵² Similarly, China expressed the view that other member states should not interfere with the internal affairs of Yugoslavia, emphasising that China opposed any intervention in whatever form and on whatever pretext.⁵³ Other member states, such as India⁵⁴ and Namibia⁵⁵ opposed NATO’s decision to undertake military operations. Russia attempted to table a draft resolution in the Council, proposing that NATO’s ‘unilateral use of force constitutes a flagrant violation of the United Nations Charter’; this was rejected by a large margin in support of the motion: 12 against and 3.⁵⁶

⁵¹ S.C.O.R (LIV), 3988th Meeting, 24 March 1999 at 8

⁵² Security Council 3988th meeting on 24 March 1999 (S/PV.3988) at 2

⁵³ S.C.O.R. (LIV), 3988th Meeting, 24th March 1999 at 12

⁵⁴ *ibid* 16.

⁵⁵ *ibid* 10.

⁵⁶ Security Council 3989th meeting on 26 March 1999 (S/PV.3989) at 6. Three countries were in support of the motion; China, Namibia and

The discussion in the Security Council regarding the Kosovo crisis illustrates the difficulty encountered when applying humanitarian intervention; as an exception to prohibition on the use of force. From a wider perspective, humanitarian military operations offer an opportunity to examine the scope of Article 2(4), as seen through state practice. On the one hand, supporters of NATO strikes seemed to suggest that prohibitions on the use of force should be relaxed to permit the use of force on a humanitarian basis. This affects the interpretation of Article 2(4), as humanitarian intervention is not covered by the two exceptions to the use force stated under the Charter. Meanwhile, the other camp advocated a strict interpretation of Article 2(4) because there was no Security Council resolution nor was the operation invoked under the right to self-defence. Thus, in their view, the absence of these two legal avenues rendered NATO's strikes a violation of the prohibition.

As evidenced above, there appears to be a gradual transition, among some, from the strict understanding of Article 2(4), toward a loose interpretation concerning the use of force, permitting states to intervene on humanitarian grounds. As one commentator observes:

“If the use of force by NATO in Kosovo is seen as a precedent for a reinterpretation of Article 2(4) absolute prohibition on the discretionary use of force by states, the substitution of a more ‘reasonable’ principle, one that accommodates the use of force by any government to stop what it believes to be an extreme violation of fundamental human rights in another state, could launch the international system down the slippery slope into an abyss of anarchy.”⁵⁷

This concern is widely shared by other legal commentators, who claim that any new interpretation of Article 2(4) should be avoided, so that the

Russia. The 12 opposing states were Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, Slovenia, United Kingdom and United States of America.

⁵⁷ Franck (n 43) 171-172.

unilateral use of force by states remains illegal in all cases.⁵⁸ It is argued that Article 2(4) should remain interpreted broadly and the Kosovo intervention cannot be used as precedent in state practice. The German Foreign Minister, in a statement in the General Assembly in 1999, commented that:

“[The intervention in Kosovo] must not set a precedent for weakening the United Nations Security Council’s monopoly on authorizing the use of legal international force. Nor must it become a licence to use external force under the pretext of humanitarian assistance. This would open the door to the arbitrary use of power and anarchy and throw the world back to the nineteenth century”.⁵⁹

Similarly, the French Foreign Minister stated that ‘we French, we have declared it was an exception, this Kosovo matter, and not a precedent’.⁶⁰ The pronouncement made by the Ministers show that other state members were not keen to relax the interpretation of Article 2(4).

In a further example of discussions regarding the possibility of humanitarian intervention, the UN Security Council convened in February 2011 to discuss civil unrest in Libya, raising concerns that the government was systematically violating human rights.⁶¹ In a following meeting, the Council passed a Resolution permitting states to ‘use all necessary measures’ to protect civilians.⁶² This language tacitly authorised the use of force in Libya

⁵⁸ Dinstein (n 5) 93-94.; Randelzhofer (n 7) 130-132.; See Gray (n 43) 34

⁵⁹ UN Doc. A/54/PV.8 (22 September 1999) 12

⁶⁰ UN Doc. A/54/PV.14 (25 September 1999) 17

⁶¹ SC Res 1970 (2011) S/RES/1970 (2011) 26 February 2011

⁶² Para 4 states:

Authorized Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to *take all necessary measures*, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and *requests* the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization

by members of the United Nations,⁶³ although the Resolution explicitly prohibited 'foreign occupation force of any form on any part of Libyan territory'.⁶⁴ The Resolution did not clarify permissible limits for forcible measures.⁶⁵ In ensuing discussions, opinions diverged regarding the level at which forcible measures amounted to violations of the UN Charter, exceeding the force needed to resolve the humanitarian crisis. Five Member States abstained from voting Resolution on 1973 (2011) on various grounds.⁶⁶ Brazil was not convinced militarisation of the conflict would settle the humanitarian problems, and feared it would 'lead to exacerbating tension'.⁶⁷ Expressing similar opposition, China argued that the Security Council should act in accordance with the Charter and international legal norms, and respect Libya's sovereignty and territorial integrity.⁶⁸ The Resolution was eventually adopted: ten states voted in favour, no state opposed, and five states abstained. This Resolution reflects the willingness of states to adapt Chapter VII of the Charter to apply force on the basis of humanitarian crisis.⁶⁹ Although humanitarian intervention in this instance was approved via the Security Council, it should not be understood as a reflection of greater flexibility under Article 2(4). In fact, conversely, it reiterates that, even when faced with a humanitarian catastrophe, appropriate mechanisms must be followed in accordance with the Charter

conferred by this paragraph which shall be immediately reported to the Security Council (emphasis added) S/RES/1973 (2011)

⁶³ Ben Smith and Arabella Thorpe, 'The Interpretation of Security Council 1973 on Libya' (House of Commons Library, International Affairs and Defence Section, (SN/IA/5916) 6 April 2011) 2

⁶⁴ S/RES/1973 (2011) 17 March 2011

⁶⁵ See Pierre Thielbörger, 'The Status and Future of International Law after the Libya Intervention' (2012) 4 Goettingen Journal of International Law 11-48, 19-21; Paul Williams and Colleen Popken, 'Security Council Resolution 1973 on Libya: A Moment of Legal and Moral Clarity' (2011) 44 Case Western Reserve Journal of International Law 225-250, 236; M Schmitt, 'Wings over Libya: The No Fly Zone in Legal Perspective' (2011) 36 Yale Journal of International Law Online 45-58, 47

⁶⁶ Countries abstained from voting the Resolutions are Brazil, China, Germany, India and Russia.

⁶⁷ S/PV.6498 (2011) UN Security Council 6498th Meeting on 17 March 2011 pg. 6

⁶⁸ *ibid* 10.

⁶⁹ Although the discussion did not reach consensus but neither states in the Security Council vetoed to use force in Libya.

especially with regard to the use force. Therefore, this case strengthens the view that Article 2(4) should be interpreted strictly.

In summary, the scope of the prohibition on the use of force has been read both strictly / narrowly and broadly. Some nations consistently argue that Article 2(4) should be read strictly, with force only allowed in accordance with the limits stated in the Charter. Those preferring a broad interpretation on the prohibition, seek avenues that permit states to exercise force outside the realm of the Charter; for example, humanitarian intervention as above. Nevertheless, Article 2(4) remains a relevant instrument governing international relations, with states (even during a crisis) preferring to comply with the prohibition as far as possible, however it is interpreted.

b. The Prohibition on the Use of Force in Customary International Law

Similar to the prohibition on the use of force outlined in the UN Charter, a similar prohibition is present in customary international law. This signifies that aside from the UN Charter the prohibition exists in other legal sources.

The customary prohibition was first confirmed in the case of *Nicaragua*.⁷⁰ On this occasion, the US was involved in supporting the *contras* to overthrow the Nicaraguan government. It was contested whether the Court had the jurisdiction to assess both parties on the basis of Article 2(4), and so the US excluded itself from the Court's jurisdiction to try the case under Article 2(4).⁷¹ The case was eventually determined according to customary international law, specifically whether the US had violated the customary prohibition on the use of force, and not in reference to the prohibition prescribed in the UN Charter.

⁷⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ Reports 1986 p.14

⁷¹ Reservation on the Court's jurisdiction pursuant to Article 36(2) of the ICJ Statute (1945) 51 Stat. 1031

The Court passed a judgment, which considered both the Charter and customary law. The Court explained the existence of the prohibition in both sources of the law:

“The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter...The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention.⁷²...A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law...”⁷³

From this judgment, it follows that customary law on the prohibitive obligation regarding using force without lawful justification, applies to all states, irrespective of whether they are signatories to the UN Charter or other multilateral treaties imposing a similar responsibility. Notably in the case of *Nicaragua*, the Court relied on the General Assembly’s ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States’,⁷⁴ to deduce the *opinio juris* and form the conclusion that the prohibition comprises part of customary international

⁷² Nicaragua (n 70) para. 188 p. 99.

⁷³ *ibid* para. 190 p. 100.

⁷⁴ GA Res. 2625 (XXV) ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States’ (24 October 1970)

law.⁷⁵ The Court, however, minimally described the scope of this customary law prohibition, not elaborating on how it conforms to the 'general practice' of state.⁷⁶ Noting that customary law is based upon 'general practice accepted as law'⁷⁷ the Court did not explain how this aligns with the requirements set out in the *Continental Shelf* to form customary law; the requirements of state practice and *opinio juris*.⁷⁸

In *Nicaragua*, Judge Jennings' Dissenting Opinion acknowledged a restriction on the use force in previous state practice (prior to the drafting of the UN Charter), but questioned the difference between the Charter's Article 2(4) and the customary prohibitive obligation.⁷⁹ Drawing from the judgment, it can be said the Court gave vague answers on the question of whether the Charter is identical to customary international law on the use of force. First, the Court suggest that the rules content in customary international law and Charter are distinct. The Court explained that 'on a number of points, the areas governed by the two sources of law do not exactly overlap, and the substance rules in which they are framed are not identical in content'.⁸⁰

Second, the Court also expressed that although the rules in Charter law and customary international law do overlap in all aspects, customary international law continue to exist alongside with treaty law. In this passage, the Court gave the example of the conditions of necessity and proportionality

⁷⁵ Preamble of the Declaration reiterates the wording in Article 2(4) of the Charter except it omitted the word 'Every State' and replaces it with 'all Members'. The Preamble provides 'Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed at the political independence or territorial integrity of any State'.

⁷⁶ Rendelzhofer (n 7) 133-134.; Dinstein (n 5) 92-93.

⁷⁷ Article 38(1)(b) of the Statute of the International Court of Justice (1945) 51 Stat. 1031

⁷⁸ *North Sea Continental Shelf*, ICJ Rep 1969 para 77 p.3

⁷⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ Rep 1986 Dissenting Opinion of Judge Jennings at p 530

⁸⁰ *Nicaragua* (n 70) 94 para 175

in self-defence that are absent in Article 51 but continue to exist in customary international law.⁸¹

Finally, the Court stated that even if the norms in Charter law and customary international law are not identical, customary international law has developed under the influence of the Charter – ‘to such an extent that a number of rules contained in the Charter have acquired a status independent of it’.⁸²

Furthermore, he criticised the Court’s method of interpreting *opinio juris* by directing to an international document, General Assembly Resolution (1970), whilst at the same time denouncing the jurisdiction of Article 2(4) (the Charter).⁸³ Judge Jennings contemplated this inconsistency in deducing customary law, arguing that had the General Assembly’s Resolution been rejected, the outcome of the judgment would have been different.⁸⁴

Another point that may be raised is the method of the ICJ in reviewing the similarities and differences of the prohibition in Article 2(4) and customary international law. The ICJ tends to deduce the content of the prohibition in customary law as identical to Article 2(4) and viewed the matter under general international law.⁸⁵ The Court could have gone further by explaining in detail the different content of the prohibition under Article 2(4) and in customary international law. Nonetheless, one common theme espoused by the Court is that the prohibition on the use of force exists under customary law as well as in Article 2(4) of the UN Charter.

Conclusion

⁸¹ Nicaragua (n 70) 94 para 176

⁸² Ibid 96-97 para 181

⁸³ Dissenting Opinion of Judge Jennings in Nicaragua (n 79) 532-533.

⁸⁴ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*) ICJ Rep 1986 Dissenting Opinion of Judge Jennings at p 533

⁸⁵ Nicaragua (n 70) para 190

The prohibition on the use of force is an essential element determining the circumstances of *jus ad bellum*, which underpins the integrity of international law, serving to maintain international peace and security. The prohibition on the use of force originates from two main sources of law: namely through the UN Charter and customary international law.

Article 2(4) of the UN Charter prohibits member states from using force, unless where permitted under the UN mechanism. There is a division in terms of interpreting this provision in the form of broad and narrow readings. A strict interpretation of Article 2(4) advocates the non-use of force in international relations, only accepting forcible measures under the right to self-defence and under the authorisation of the UN Security Council. While the broad interpretation calls for the use of force in exceptional circumstances, even without the permission of the Security Council and without invoking the right to self-defence, this is deemed as not violating Article 2(4). The confirmed that the prohibition on the use of force is also contained in customary international law.

The prohibition on the use of force, however, has several acknowledged exceptions. One of these exceptions is the right to self-defence. The following section will consider this right in relation to the UN Charter and customary law, and its effects on the entire framework of self-defence.

3. The Law on Self-Defence

Primarily, Article 51 of the UN Charter prescribes the law on self-defence in international law as an exception to the prohibition on the use of force. Article 51 of the UN Charter provides:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-

defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”⁸⁶

The collective security system of the United Nations offers Article 51 as key to understanding the procedures for exercising the right to self-defence. Member states must exercise this right in accordance with the requirements prescribed in Article 51.⁸⁷ The provision is clarified by several key phrases comprising key elements of self-defence, which will be examined below.

a. Elements of Self-Defence

The wording of Article 51 imposes the requirement of an ‘armed attack’ as a condition that states must meet before exercising the right to self-defence. It is for the victim state to prove that it has suffered from an ‘armed attack’ in order to trigger the right to self-defence.⁸⁸ The prevailing view of legal commentators on the meaning of an ‘armed attack’ is that it refers to the use of physical force in another state.⁸⁹

i. ‘Armed Attack’ and Self-Defence against Non-State Actors

The issue on the use of force in self-defence against non-state actors is one of the most contentious subjects in international law and it is an ongoing

⁸⁶ Article 51 of United Nations 1945 (1945) 1 UNTS XVI

⁸⁷ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons ICJ Rep 1996 p 263 para 96

⁸⁸ Case Concerning Oil Platforms (Islamic Republic of Iran v. United States) ICJ Rep 2003 p 189 para 57.

⁸⁹ Albrecht Randelzhofer, ‘Article 51’ in Bruno Simma (eds), *The Charter of the United Nations: A Commentary* (Vol. II, 3rd ed, OUP 2012) 1407-1408; Tom Ruys, *‘Armed Attack’ and Article 51 of the UN Charter* (CUP 2010) 55-56; Olivier Corten, *The Law against War* (Hart Publishing 2012); Dinstein (n 5) 196-197; Elizabeth Williamhurst, ‘Principles of International Law on the Use of Force by States in Self-Defence’ (Chatham House, October 2005) 5

discussion amongst commentators and practitioners. Article 51, which outlines the right to self-defence in the UN Charter, is silent on the permissibility of self-defence against non-state actors. While in state practice, there are diverging examples that can be construed in support and against the right to self-defence against non-state actors. To further add the complexity in this area, the jurisprudence from the ICJ is unclear in this regard. The Court till today has never explicitly mentioned the lawfulness of a state taking defensive measure against a non-state entity that is independent from any state involvement. As such, scholars too are divided on the issue of self-defence against non-state actors. However, it is argued that despite the ambiguity of such right in the ICJ's jurisprudence, there is a growing tendency in state practice to accept the right to self-defence against non-state actors and this is supported by several highly respected legal authors. No doubt as this is a highly contentious area of international law, there are still strong opposition to the right to use self-defence against non-state entity in practice and also in writings.

This part will outline the discussions that surround the issue of self-defence against non-state actors. This part underpins the basis of this thesis that states have the right to use self-defence against non-state actors, where the principle of necessity will be considered in that context – ‘necessity within the legal framework of self-defence against terrorism’. Therefore, the following discussion focuses on the arguments of self-defence against non-state entities in state practice and academic discussions.

The terms ‘armed attack’ and ‘aggression’ (French: ‘aggression armée’) are present in Articles 1(1), 39, 51 and 53 of the UN Charter, but are not defined. The same terms can also be found in Article 5 of the North Atlantic Treaty (NATO Treaty), which prescribes that an armed attack against one or more of the signatory Parties to the treaty in Europe or North America shall be considered an attack against them all.⁹⁰ The drafting history of Article 51 (*travaux préparatoires* of the UN Charter) indicates that the drafters of the

⁹⁰ North Atlantic Treaty 1949 (4 April 1949), 34 (1949) UNTS 243

provision were deeply divided on what would comprise the scope of an 'armed attack', and only agreed to include the term 'armed attack' in Article 51 to safeguard the right to self-defence in the Charter.⁹¹ In 1974, the General Assembly passed Resolution 3314 (XXIX), the 'Definition of Aggression',⁹² providing a non-exhaustive list of acts constituting 'aggression' under Article 3 of the Resolution.

Confusion should be clarified between the meaning of aggression and armed attack. The definition of aggression contained in the GA Resolution 3314 has no correlation with the meaning of 'armed attack' stipulated in Article 51. This is because the definition of aggression in the Resolution refers to Article 39 of the UN Charter and the preamble of the Resolution makes this point clear.⁹³ Furthermore, Ruys argues that according to *travaux préparatoires* of the Definition of Aggression, parties to the discussion consciously avoided the reference of aggression to the right of self-defence.⁹⁴ This is evident in Article 6 of the Definition of Aggression, where it states that:

“Nothing in this Definition shall be construed in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.”⁹⁵

Therefore, it can be said that there is little relevance of the meaning of aggression with Article 51 on the right to self-defence.

The question of what amounts to an 'armed attack' for the purpose of self-defence under Article 51 was considered first in the aforementioned case of

⁹¹ Ruys (n 89) 128-136; Corten (n 89) 414-416; Randelzohfer and Nolte (n 89) 1407

⁹² GA Res 3314(1974) 'Definition of Aggression' UN Doc. A/RES/29/3314, 14 December 1974

⁹³ See the argument above regarding the meaning of aggression and Article 2(4) of the UN Charter.

⁹⁴ Ruys (n 89) 130-131

⁹⁵ Article 6 of Definition of Aggression GA Res 3314(1974) 'Definition of Aggression' UN Doc. A/RES/29/3314, 14 December 1974

Nicaragua.⁹⁶ Nicaragua claimed that the US had breached its sovereignty by laying mines in Nicaraguan internal and territorial waters, damaging its merchant ships and foreign freight, and damaging its ports and naval bases. It further contended that the US was indirectly using force against Nicaragua by extending its support and assistance to Nicaraguan guerrillas (the Contras) who had tried to topple the Sandista government (the sitting government). In its defence, the US argued that it was exercising the right to collective self-defence, in response to the alleged armed attack against El Salvador by Nicaragua. The Court ruled in favour of Nicaragua, finding that the US had used force against Nicaragua. When issuing the judgement, the Court explained that not every situation could be categorised as an armed attack:

“...the Court does not believe that that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.”⁹⁷

The Court further explained the meaning of an armed attack, stating, “There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks.”⁹⁸ Elaborating the components of an armed attack in relation to types of attack and the role of irregular forces, the Court referred to Article 3(g) of the General Assembly Resolution 3314 (XXIX) on the Definition of Aggression.⁹⁹ The Court stated:

“In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed

⁹⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America)* ICJ Rep. 1986 p. 14

⁹⁷ *ibid* p. 104 para. 195

⁹⁸ *ibid*

⁹⁹ General Assembly Resolution 3314 (XXIX) 14 December 1974

forces across an international border, but also the “sending by or on behalf of a State of armed band, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” (inter alia) an actual armed attack conducted by regular forces, “or its substantial involvement therein”...The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.”¹⁰⁰

The passage above reflects that the Court attempted to categorise ‘scale and effect’ to determine what constitute as an armed attack. The Court gave the example that ‘a mere further incident’ does not equate an armed attack. In another case, the Court gave another example to explain the meaning of an armed attack where it states ‘localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for the purpose of the Charter’.¹⁰¹ The Court seems to follow the jurisprudence of ‘scale and effects’ in its judgment of an armed attack.

Some judges were critical the Court’s position on this matter. Judge Higgins, for instance in *Nicaragua*, claimed that the Court’s approach in defining an armed attack as ‘operationally unworkable’. She goes on to comment:

“When a state has to decide whether it can repel incessant low-level irregular activity, does it really have to decide whether that activity is equivalent of an armed attack by a foreign army – and, anyway, is not any use of force by a foreign army entitled to be met by sufficient force to require it to withdraw? Or is it that now in doubt also? Is the question of level of violence by regular forces not really an issue of

¹⁰⁰ *Nicaragua* (n 70)

¹⁰¹ Eritrea Ethiopia Claims Commission, Partial Award, *Jus ad Bellum*, (19 December 2005) 433

proportionality, rather than a question of determining what is an 'armed attack'.¹⁰²

Some commentators were equally unhappy with the Court's approach on this matter. For example, Dinstein disagrees that small scale incident cannot amount to an armed attack and any armed attack above, which he describes as *de minimis* threshold (however that is defined), warrant a response in self-defence.¹⁰³ However, Gray sympathises with the Court's view as it reflects state practice where it represents the legal position of the UN Security Council.¹⁰⁴

In another part of *Nicaragua* judgment, the Court distinguished 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'.¹⁰⁵ The Court expounded the latter forms of the use of force by referring to Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in (GA Resolution 2625 (XXV)). The Court endorsed the distinction between the two forms of the use of force in *Oil Platforms* in determining whether there was an armed attack by Iran against the US.¹⁰⁶ In spite of the Court's attitude in explaining the gravity of an attack that constitute an armed attack for the purpose of Article 51, the Court however, did not dismissed the possibility of a single attack might be sufficient to trigger the inherent right to self-defence.¹⁰⁷ Therefore, the Court sees the possibility that a single armed attack, may according to scale and effects, constitute as an armed attack for the purpose of Article 51.

The Court also stressed that not all acts committed by armed bands constitute an 'armed attack'. In defining the meaning of 'armed attack', it

¹⁰² Dissenting Judgment of Judge Higgins in *Nicaragua* 251

¹⁰³ Dinstein (n 5) 211

¹⁰⁴ Gray (n 43) 132, See also Lindsay Moir, *Reappraising Resort to Force* (Hart Publishing 2010) 24

¹⁰⁵ *Nicaragua* (n 70) p 101 para 191

¹⁰⁶ *Oil Platforms* (n 88) para 51

¹⁰⁷ *Ibid* p 195 para 72

must be noted that the Court in *Nicaragua* was judging the case in relation to customary international law, and not the law as specified in the UN Charter; hence, the Court was not discussing the issue of an armed attack.¹⁰⁸ Therefore, there was no direct suggestion that the meaning of armed attack as discussed in *Nicaragua* was intended to define that propagated in Article 51. Furthermore, the Court was not tasked with defining the actual meaning of an 'armed attack', but only with envisaging the hypothetical need to take defensive action.¹⁰⁹ In addition, the Court in *Nicaragua* was reluctant to express its views on the meaning of an 'armed attack' because neither party disputed the existence of an armed attack.¹¹⁰ Thus, the Court only referred to an armed attack by stating, 'there appears now to be general agreement on the nature of acts which can be treated as constituting armed attacks'.¹¹¹ This created some ambiguities with regard to the nature and meaning of an armed attack under Article 51.

The judgment above also alludes to the issue of the role of non-state actors in the legal framework of self-defence. In particular, the issue of threshold and attribution. The underlying question here is whether the acts committed by a non-state actor is attributable to the host state. This is often known as the question of attribution. If so, to what degree of state's involvement which can be deemed as attributable to the acts of the non-state actor? This is commonly referred to as the threshold question.

The Court suggested that an armed attack executed by a non-state actor must have a degree of state involvement which the Court termed as 'sending on behalf of a state...'. The Court also made it clear here that the threshold outlined for a state to be held responsible for the conduct of a non-state

¹⁰⁸ *Nicaragua* (n 70) p 103 para 194.

¹⁰⁹ Raphaël Van Steenberghe, 'Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?' (2010) 23 LJIL 183-208, 198

¹¹⁰ *Nicaragua* (n 85) 103 para. 194.

¹¹¹ *ibid* p 103 para. 195.

actor is 'substantial involvement'. Unfortunately, the Court did not elaborate the meaning of 'substantial involvement'.

Some members of the bench in the *Nicaragua* case had varying opinions with regards to the degree of state involvement. For example, Judge Singh opined that even a regular and substantial arms supplies would not amount to an armed attack – a narrow approach.¹¹² While Judge Schwebel criticised the Court for taking a restrictive approach which may deny the victim state to take rightful respond to self-defence. He further suggested that the concept of 'substantial involvement' should also be taken as to include financial and logistical support.¹¹³ Another criticism raised by another judge in the case, Judge Jennings, raised the concern that it is 'dangerous to define unnecessarily strictly the conditions for lawful self-defence' as this would restrict states to launch defensive measures.¹¹⁴

The case of *Nicaragua* reflects that Court was willing to accept the notion of self-defence against a non-state actor with the condition of meeting the attribution and threshold as mentioned above. Some judges, whilst agree on a common view that an armed attack may be attributed to a non-state actor, however differ on the degree of threshold. Nonetheless, *Nicaragua* outlines that in certain circumstances an armed attack can be attributed to a non-state actor.

In the Advisory Opinion of *Wall* case, the issue of non-state actors and the right to self-defence was raised again.¹¹⁵ In this instance, the Court seems to divert from its opinion in *Nicaragua*. In the *Wall* case, the Court was tasked to consider the construction of wall as a measure of defence against terrorist

¹¹² Separate Opinion of President Nagendra Singh (1986) ICJ Rep 151

¹¹³ Dissenting Opinion of Judge Schwebel (1986) ICJ Rep 259

¹¹⁴ Dissenting Opinion of Judge Jennings in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ Rep 1986 p. 543-544. See also Natalino Ronzitti, 'The Expanding Law of Self-Defence' 11 JCSL (2006) 343-359, 351

¹¹⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, p. 136 (The full facts of this case can be found in Chapter 3 6(c)).

attacks against Israel. The Court was also asked to determine Security Council Resolutions 1368 and 1373 (2001) in relation to the right of self-defence against non-state actors.

The Court found that the Security Council Resolutions was not applicable in the present case as the attacks originated within and not outside the territory of Israel. Therefore, Israel 'could not in any event invoke those resolutions' to substantiate the claim of self-defence against non-state actors.¹¹⁶ More importantly, the Court stated that Article 51 permits the inherent right to self-defence in cases of 'armed attack by one state against another state'.¹¹⁷ Such pronouncement is a diversion from the jurisprudence mentioned in *Nicaragua* where an armed attack may be attributed to a non-state actor in certain conditions. As a result, it seems that the Court in *Wall* case approves self-defence between states against states only.

The main judgment in *Wall* Advisory Opinion was criticised by Judge Higgins where she states:

"There is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a state. That qualification is rather a result of the Court so determining in [*Nicaragua*]."¹¹⁸

Similar positions were taken by other judges in the *Wall* Advisory Opinion such as Judges Buergenthal¹¹⁹ and Kooijmans¹²⁰ where they disagree that self-defence is not exclusive in inter-states conflicts.

Whilst in another case, the case of *Armed Activities on the Territory of the Congo* (hereafter '*Armed Activities*'), the Court seems unwilling to mention

¹¹⁶ *ibid* p 194 para 139

¹¹⁷ *Ibid*

¹¹⁸ Separate Opinion of Judge Higgins in *Wall* Advisory Opinion para. 33

¹¹⁹ Declaration of Judge Buergenthal in *Wall* Advisory Opinion para 6

¹²⁰ Separate Opinion of Judge Kooijmans in *Wall* Advisor Opinion para 35

on the question of attribution and threshold.¹²¹ Here, the Court enquired into the contention that Uganda exercised its lawful right to self-defence against Congo, despite no specific allegation having been made against Uganda for such armed attack. The Court expressly specifies its position by stating:

“...there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC... The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.”¹²²

The Court further adds:

“Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right to self-defence against large-scale attacks by irregular forces.”¹²³

The Court was reluctant to outline the circumstances in which it is permissible for states to respond to large-scale attacks by non-state entities. Indeed, this reluctance by the Court was not popular among commentators, especially considering the case was decided after the 9/11 attacks.¹²⁴ However, this case may be taken that the Court had not dismissed the possibility that self-defence is applicable to non-state actors in certain circumstances. Judge Kooijmans, in his Separate Opinion in this case

¹²¹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* 2005 ICJ Rep. 168

¹²² *ibid* p.222-223 para. 146-147.

¹²³ *ibid* 168 at para. 147.

¹²⁴ Lindsay Moir (n 104) 136-137. See also Separate Opinion of Judge Kooijmans in *Armed Activities on the Territory of the Congo (DRC v Uganda)*, ICJ Rep. 2005 at para 25 and Separate Opinion of Judge Simma in *Armed Activities on the Territory of the Congo (DRC v Uganda)*, ICJ Rep. (2005) at para. 8

criticised that armed attacks are not necessarily attributable state involvement and it is unreasonable to deny an attacked state the right to self-defence merely because there is no attacker state.¹²⁵ But the Court in this occasion saw no reason to explain the matter further. Thus, jurisprudence for self-defence against a non-state actor is still subject to discussion.¹²⁶

Hence, in all three cases cited above, *Nicaragua*, *Wall* and *Armed Activities*, indicate that the Court created a mix jurisprudence on the issue of self-defence against non-state actors. In *Nicaragua*, the Court appears to accept armed attack may be committed by a non-state actor although there must be a degree of state involvement (threshold). In contrast, *Wall* case explicitly mentioned that self-defence applies in inter-states situation which is contrary to judgment in *Nicaragua*. Finally, in *Armed Activities*, the Court shied away from mentioning the conundrum of self-defence against non-state actors in international law. Therefore, to date, the Court has not yet created a solid jurisprudence on the issue of self-defence against non-state actors. As such, in terms of jurisprudential aspects from the ICJ, the permissibility of self-defence against non-state actors is open to debate.

From one angle, it could be said that the Court was fairly consistent in its approach in answering the permissibility of self-defence against a non-state actor. In *Nicaragua*, the Court qualified its judgment by stating there must be an element of state involvement and even in *Wall* case, the Court has not dismiss the possibility of self-defence between a state a non-state actor. However, upon examination, the Court could be said it has not establish a firm position on the question of attribution and threshold.¹²⁷ In particular,

¹²⁵ Separate Opinion of Judge Koojijmans in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* ICJ Rep. 2005 p. 314 para. 30

¹²⁶ Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 33

¹²⁷ James Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing, 2009) 47-48

post-9/11 where states at times invoke Article 51 in response to armed attacks committed by non-state actors.

Scholars offer variety of opinions in approaching the questions of attribution and threshold raised earlier. For example, Kimberly Trapp advocates that if the host state is unable to suppress terrorist activities within its borders and affecting another state, it is suffice that there is an 'acquiescence' in terrorism by the host state (not necessarily active support by the host state to the non-state actor) for the host state be attributed to the conduct of the non-state actor.¹²⁸ For Tom Ruys and Sten Verhoeven, they argue that the question of attribution can be resolved by re-interpreting the concept of 'substantial involvement' by applying a broader 'aiding and abetting' test.¹²⁹ In doing so, it is a useful indicator for cases involving 'indirect military aggression' for a state to be attributed to non-states conduct.¹³⁰ They further argue that, the 'substantial involvement' concept takes into account the intention of the host state and the host state is not responsible if it is unaware the support given is used to commit attacks abroad.¹³¹

In legal literature, there are three jurisprudence on state responsibility for actions of non-state actors. First, in *Nicaragua*, the ICJ introduced the 'effective control test', which determines culpability based on a state participating in financing, organising, training and supplying the non-state armed group.¹³² This makes the state appear imputable over the conduct of the non-state actor in another state. The effective control test seems to have gained some support. The International Law Commission (ILC) adopted the notion of an effective control test in its Draft Articles on State

¹²⁸ Kimberly Trapp, 'Back to Basics: Necessity, Proportionality and the Right to Self-Defence against Non-State Terrorist Actors' 56 ICLQ (2007) 141-156, 151-152, 155

¹²⁹ Tom Ruys and Sten Verhoven 'Attacks by Private Actors and the Right to Self-defence' (2005) 10 JCSL 289-320, 315-316

¹³⁰ *ibid*

¹³¹ *ibid*

¹³² *Nicaragua* (n 70) p 64-65 para 114

Responsibility.¹³³ Later the ICJ, in a separate case, considered the Draft Articles as customary international law.¹³⁴ Therefore, by precedent and conventional law, the main method of assessment is the effective control test.

Second, also developed in *Nicaragua*, is 'dependence test' or 'agency test'. Recalling the facts of *Nicaragua*, the Court asked the following question:

"whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government".¹³⁵

In this case, the Court found that there was insufficient evidence to suggest the contras had 'complete dependence on the US aid'.¹³⁶ This test requires a high degree of proof to attribute a state with a non-state actor where the dependency must be 'complete'. Furthermore, this test requires a state to be in actual exercise of control in 'all fields' of a non-state actor's activity. In effect, this test equates a group of individuals with an organ of a state that relies on a relationship of dependence and control.

Finally, another means of examining a state control over a non-state actor involves using the 'overall control test'. This test was propounded in the appeal decision of *Prosecutor v Dusko Tadic* in the International Criminal Tribunal for the Former Yugoslavia (ICTY).¹³⁷ The Tribunal considered

¹³³ James Crawford, *The International Law Commission's Articles on States Responsibility: Introduction, Text and Commentaries* (CUP 2002) 47

¹³⁴ Gabčíkovo-Nagymaros Project (Hungary/Slovakia) ICJ Rep 1997 p 38 para 47

¹³⁵ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) ICJ Rep 1986 para 109

¹³⁶ *Ibid* para 110

¹³⁷ *Prosecutor v. Dusko Tadic* Judgment in the Appeals Chamber of International Criminal Tribunal for the former Yugoslavia (ICTY) IT-94-1-A (15 July 1999)

whether Yugoslavia should be held responsible for the acts committed by Serb forces and consequently determined if the conflict was an international armed conflict.¹³⁸ The Appeal Chamber viewed that different level of control test applied to different types of non-state actors, and in this case with an armed non-state entity. The Appeal Chamber describes the overall control test as:

“In order to attribute the acts of a military or paramilitary group to a state, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the state be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the state should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.”¹³⁹

The overall control test could be described as a less stringent test than the effective control test. In the former, the test does not require the state to direct a specific order to violate international law in another territory, and it suffices that the state has general control over the armed organisation. In the latter test, a higher burden of proof is required to link the state and the armed group, and it must be shown that a specific direction is being given to the group to undertake unlawful international conduct. While the dependence test requires a complete control of the non-state actor in all fields. This test demands a higher threshold of proof in comparison to the other two tests. Hence, there are differences between the three tests.

In all the three cases articulated above, it must be noted the distinction between them. The dependence and effective control tests were formulated in *Nicaragua* where the Court (ICJ) analysed the case in light of *jus ad bellum*. While the overall test was developed in *Tadic* case where the Court

¹³⁸ *ibid* pp 34-35 paras 83-87

¹³⁹ *ibid* p 56 para 131

(ICTY) was determining the characterisation an armed conflict and not legal responsibility of the Former Republic of Yugoslavia.

The discussion regarding the three tests was reignited in the case of *Genocide in Bosnia*.¹⁴⁰ After establishing the Bosnian Serb Armed Forces had committed an act of genocide at Srebrenica, the Court was tasked with examining whether the conduct of the Bosnian Serbs could be attributed to the Federal Republic of Yugoslavia (FRY). In its judgment, the Court considered both the tests promulgated in the *Nicaragua* and *Tadic* cases. The Court relied on the effective control test to determine the state's responsibility, rather than the overall control or dependence tests. The ICJ, in effect, endorsed effective control as the correct method of ascertaining the legal responsibility of a state for actions of non-state actors.

In the decision *Genocide in Bosnia*, the Court criticised the judgment of *Tadic* in ICTY on two grounds. First, that the ICTY Appeal Chamber was deciding a case that fell under the jurisdiction of international criminal law (to a certain extent international humanitarian law), which is distinct from the law before the ICJ, as denoted by state responsibility, and therefore the Court disregarded the ruling of the ICTY.¹⁴¹ Second, if the overall test concept was to be accepted as the benchmark for the attribution of state to non-state actors' conduct, the test had overly broadened the notion of state

¹⁴⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)* ICJ Rep. 2007, p. 43

¹⁴¹ '...the Court observes that the ICTY was not called upon in the *Tadic* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only... As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction...'
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro) ICJ Rep. 2007, p. 43, p. 209 para. 403

responsibility, in particular, Article 8 of the Articles on State Responsibility.¹⁴² Thus, the Court found the overall control test inapplicable in the instance of *Genocide in Bosnia*.

However, endorsement of the effective control test by the ICJ has been criticised. In *Tadic*, the ICTY Appeal Chamber introduced the overall control test because the Tribunal saw the *Nicaragua* tests as unsuited to the facts before the tribunal. The Tribunal, thus, merely proposed an alternative method of attribution of state to non-state actor, not dismissing the merits of the effective control test. The Tribunal explained this:

“The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.”¹⁴³

The Tribunal then distinguished what constituted an internationally wrongful act performed between ‘private individuals’ and ‘organised and hierarchically structured groups’. It ruled with the latter type of non-state actor, which fits better with the overall control test. In fact, the Tribunal did not reject the notion in *Nicaragua* outright, but only argued for a flexible approach to the issue of culpability and maintained that an effective control test suits different scenarios.¹⁴⁴ Furthermore, the high-threshold test could easily enable an armed group or private individuals to escape legal responsibilities, due to the secretive nature of such organisations, as proving a direct effective relationship (instruction, direction or control) is very difficult.

¹⁴² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)* ICJ Rep. 2007, p. 43, p. 210 para. 406

¹⁴³ *Tadic* (n 137) p 48 para 117

¹⁴⁴ Antonio Cassese, ‘The Nicaragua and Tadic Tests Revisited in Light of the ICJ on Genocide in Bosnia’ (2007) 18 EJIL 649-668, 657

Despite the divergence of jurisprudence on state's attributability towards non-state actors, the ILC, conscious of differing views, attempted to close the gap.¹⁴⁵ In its commentary, it acknowledges the views presented by the ICTY, yet firmly states the concept introduced in *Nicaragua*. Thus, matters relating to the unlawful use of force in another state by an armed group or private individuals are still tested according to the effective control method.¹⁴⁶

The 'dependence', 'overall control' and 'effective control' tests will have an impact on how states respond to an armed organisation. This will be shown in state practice, which demonstrates that the application of necessity differs between state and non-state actors. Therefore, the tests discussed earlier are vital to distinguish the application of necessity between different entities in self-defence.

ii. 'Inherent Right'

The language employed in Article 51 refers to the 'inherent right' to self-defence, or as termed in French, the '*droit naturel*'. The meaning of 'inherent right' in Article 51 is subject to continuous debate among legal commentators.

The prevailing view purports that the term inherent refers to the right to self-defence as afforded to members and non-members of the United Nations.¹⁴⁷ Other commentators have resisted the notion that Article 51 defines a right that existed before 1945 and which continues to exist under the Charter. Yoram Dinstein believes that if the right to self-defence originates from a 'natural right' (*droit naturel*), or from a 'natural law' it has no place in an era

¹⁴⁵ 'Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text of article 8, the three terms "instructions", "direction" and "control" are disjunctive; it is sufficient to establish any one of them.' Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries 2001 p.48

¹⁴⁶ Dinstein (n 5) p. 224

¹⁴⁷ Randelzohfer and Nolte (n 89) 1403, Ruys (n 89) 515

dominated by positive law.¹⁴⁸ In supporting the supremacy of the Charter, he criticises the notion of a 'natural right' thus: 'It may be conceived as an anachronistic residue from an era in which international law was dominated by ecclesiastical doctrines. At the present time, there is not much faith in transcendental truth professed to be derived from nature'.¹⁴⁹

Another way viewing the meaning of 'inherent right' is it acts as a gateway for customary international law to continue to exist alongside with Article 51. By relying on the term 'inherent right' the Charter also implies that the pre-existing rights of states prior to 1945 in relation to self-defence endure, irrespective of any impediment imposed on them by any subsequent treaty.¹⁵⁰ This contradicts the right to self-defence as portrayed in Article 51. Assuming the right to self-defence implies no prior requirement in the form of a breach of international law; this is in stark contrast with Article 51, which establishes the need for an 'armed attack' as a trigger before exercising the right to self-defence. Thus, this complicates the right to self-defence; whether the term 'inherent right' of self-defence must abide by the restrictions levied in Article 51, such as meeting the requirement of 'armed attack' and reporting to the Security Council, or if 'inherent right' denotes the permissibility of exercising self-defence without restraint.

More importantly is to what extent does customary international law affect Article 51. If 'inherent right' means acknowledging previous legal rights, this may undermine the whole purpose of the UN Charter. As rightly commented by Randelzhofer 'the content and scope of a customary right of self-defence are unclear and could extend far into the spheres of self-help in such way that its continuing existence would, to a considerable extent, reintroduce the unilateral use of force by states, the far-reaching abolition of which is intended by the UN Charter'.¹⁵¹

¹⁴⁸ Dinstein (n 5) 191.

¹⁴⁹ *ibid.*

¹⁵⁰ Gray (n 43) 117-118.

¹⁵¹ Albrecht Randelzhofer, 'Article 51' in Bruno Simma (eds), *The Charter of the United Nations: A Commentary* (Vol. II, 3rd edn, OUP 2012) 1404

In view of the above, the distinction between Article 51 and customary law as a source for the 'inherent right' to self-defence is unmistakable. On the one hand, to support the pre-1945 right to self-defence fully without the interference of the UN Charter defies the role of the Charter as a multilateral agreement subscribed to by states to administer their international affairs. On the other hand, purely seeking the right to self-defence through the lens of Article 51 fails to account relies on customary international law such as the principles of necessity and proportionality.

Although Article 51 is largely silent concerning limitations on the use of force in the realm of self-defence it is well established and widely recognised that the requirements of necessity and proportionality derive from customary international law, which is not mentioned in Article 51.¹⁵² It is argued that the only logical approach to rationalising these differences of opinion is to have a view that Article 51 and customary law work in tandem. The ICJ supports this method:

“That Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right to self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law...It cannot therefore be held that Article 51 is a provision which ‘subsumes and supervenes’ customary international law. It rather demonstrates that in the field in question...customary international law continues to exist alongside treaty law. The areas

¹⁵² Moir (n 104) 11

governed by the two sources thus do not overlap exactly, and the rules do not have the same content.”¹⁵³

In summary, the meaning of inherent self-defence may espoused the notion that the right to self-defence is permissible according to Article 51, in particular, the requirement that must be an armed attack. While another interpretation of inherent right may open the door for other customary right to exist alongside with Article 51. This may unnecessarily allow states to justify unilateral force on the basis of outdated legal justification.

iii. Self-Defence and the Security Council

Under the UN Charter, the Security Council has a mandate to exercise collective action in any circumstances that require the Council’s intervention, including the use of force. The powers subscribed to by the Security Council stem from the following provisions¹⁵⁴:

- a. Article 24 – awarding the Security Council primary responsibility for the maintenance of international peace and security, and to act on behalf of member states.
- b. Article 39 – ‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decided what measure shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security’.
- c. Article 42 – the Security Council may take the necessary measures to maintain or restore international peace and security, which includes the use of force.
- d. Article 51 - member states exercising self-defence are required to immediately report to the Security Council, and by reporting to the Security Council ‘...shall not in any way affect the authority and

¹⁵³ Nicaragua (n 70) p 94 para 176

¹⁵⁴ The United Nations Charter 1945 1 UNTS XVI

responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security’.

The above provisions express the wide-ranging powers of the Security Council, and the degree of flexibility it can exercise when determining necessary measures in any given situation.

The Security Council is composed of fifteen member states, of which five members are permanent,¹⁵⁵ and the remainder are non-permanent and elected for a period of two years.¹⁵⁶ The primary responsibility of the Council is to maintain international peace and security,¹⁵⁷ with special duties conferred under Chapters VI, VII, VIII and XII.¹⁵⁸ Chapter VII links recourse to the Security Council with the right to self-defence as specifically mentioned in Article 51.

The Security Council may respond to measures in two ways: first, the Council may decide to impose non-forcible measures to maintain or restore peace and security.¹⁵⁹ This can be in the form of economic sanctions¹⁶⁰, severance of diplomatic relations, goods or commodities embargo, travel restrictions on individuals, and any other non-forcible measure that the Security Council deems appropriate. Secondly, the use of force may be approved, if in the Security Council’s view the implementation in Article 41 is inadequate.¹⁶¹ The use of force may be exercised according to various methods; for instance through air, sea or land forces. Following Article 42 of the Charter, the use of force is an option for the Security Council to consider if necessary to maintain peace and security.

¹⁵⁵ The five member states are China, Russia (formerly Soviet Union), the United Kingdom, France and United States of America.

¹⁵⁶ Article 23 of the United Nations Charter 1945 1 UNTS XVI

¹⁵⁷ Article 24(1) of the United Nations Charter 1945 1 UNTS XVI

¹⁵⁸ Article 24(2) of the United Nations Charter 1945 1 UNTS XVI

¹⁵⁹ Article 41 of the United Nations Charter 1945 1 UNTS XVI

¹⁶⁰ Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) 217-219

¹⁶¹ Article 42 of the United Nations Charter 1945 1 UNTS XVI

The relationship between the use of force and the Security Council is subject to debate. One view is that the UN Security Council may decide when to exercise force even for the purpose of self-defence. Yoram Dinstein seems to follow this line of argument, explaining that the Security Council may employ defensive force by invoking the collective security force under a degree of latitude conferred by the Charter to the Council, namely under Chapter VII.¹⁶² In comparison the parameters of Article 51, which permits member states to act only in self-defence subject to the fulfilment of the armed attack requirement, the Security Council may determine that any type of breach of the peace or aggression, not necessarily amounting to an armed attack, warrants the use of force.¹⁶³ This effectively gives the Security Council a wide remit to pursue collective security, and to make its own determination about when to use force. In some instances, the Security Council has endorsed the use of force against member states. For example, in Security Council Resolution 83 during the Korean War, the Council stated willingness to act, 'Having determined that the *armed attack* upon the Republic of Korea by forces from North Korea constitutes a breach of the peace'.¹⁶⁴ Later, during the invasion of Kuwait in 1990, the Security Council passed a resolution to use all necessary measures against Iraq to reinstate Kuwait's sovereignty and territorial integrity.¹⁶⁵

Although the Security Council receives a strong mandate to use force, this questions the relationship between the Security Council and the right to self-defence. Article 51 allows an exception to the rule on the prohibition on the use of force in cases of self-defence, stating this right may be exercised individually and or collectively: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence'.¹⁶⁶ It does, therefore, elevate the right to self-defence contained within the Charter. The right to self-defence is a prerogative of the attacked state, enabling it to

¹⁶² Dinstein (n 5) 308-309.

¹⁶³ *ibid* 308-309.

¹⁶⁴ S/RES/83 (1950) 27 June 1950 (emphasis added)

¹⁶⁵ S/RES/0678 (1990) 29 November 1990

¹⁶⁶ Article 51 of the United Nations Charter (1945) 1 UNTS XVI

determine whether its interests are jeopardised by external threat or attack. As such, the appropriate body to determine whether there is any existence of an armed attack is the victim state and not another political entity or organisation. This is not to deny that the Security Council has the right to determine 'threat to peace', and may decide to take necessary actions to undertake its responsibility to maintain peace.¹⁶⁷ However, allowing the Security Council to impinge on the exclusivity of victim states to determine their exposure to an armed attack may seem to overstretch the Security Council's powers.

The right to self-defence accords any state the privilege to exercise force without prior approval from the United Nations. It is a subjective test, by which the invoking state must determine what constitutes an 'armed attack'. The function of the Security Council is to maintain international peace and security; it might consider a particular situation a threat to peace, a breach of the peace, and an act of aggression in accordance with Chapter VII. In view of the right to self-defence and the function of the Security Council, it is important to ask if it is possible for the Security Council to determine whether a situation warrants self-defence.

Recent state practice seems to suggest that the Security Council is competent to judge when a state may exercise its right to self-defence. Security Council Resolutions 1368 (2001) and 1373 (2001) expressed this notion following the 9/11 attacks in US. In Resolution 1368 (2001), the Council states that it recognises 'the inherent right of individual or collective self-defence in accordance with the Charter' and 'Expresses its readiness to take all necessary steps in response to the terrorist attacks of 11 September 2001'.¹⁶⁸ Similarly in Resolution 1373 (2001), the Council reiterates the right

¹⁶⁷ Christian Tams, 'The Use of Force against Terrorist' (2009) 20 EJIL 359-397, 376

¹⁶⁸ Security Council Resolution 1368 (2001) 12 September 2001 (S/RES/1368/(2001))

of member states to self-defence, asking for cooperation in the prevention of terrorism.¹⁶⁹

The two Resolutions highlight that the right to self-defence was available to the US to exercise if it chooses to do so. If these Resolutions are established as a precedent to the future determination of self-defence, this then raises a question over who decides when the right of self-defence occurs: Is it the attacked state, the Security Council or both? Reflecting on the language of Article 51, the onus is on the victim state, who defines when an 'armed attack' occurs; the provision does not determine whether the Security Council should play this role. If it is accepted that the Security Council can determine when self-defence should be exercised, the victim state loses the liberty to decide when to launch self-defence. As such, it is not within the scope of the Security Council to dictate when to act in self-defence.

The Resolutions in 2001 were not the first instances of the Security Council raised the issue of the right to self-defence. In 1949, Israel and several Arab States namely Egypt¹⁷⁰, Jordan¹⁷¹, Syria¹⁷² and Lebanon¹⁷³ agreed to suspend hostilities and pledged to avoid any further act of hostilities.¹⁷⁴ In 1951, Egypt imposed restrictions on Israeli goods passing through the Suez Canal and claimed that it was exercising its right to self-defence, and that the armistice could not end the state of belligerence.¹⁷⁵ In response, Israel requested that the Security Council pass a Resolution to reinforce its previous Resolution affirming the terms of the Armistice Agreement of 1949. Egypt argued that despite a Security Council Resolution restating the

¹⁶⁹ Security Council Resolution 1373 (2001) 28 September 2001 (S/RES/1373/(2001))

¹⁷⁰ United Nations Treaty Series No. 654 (1949) at 252-284 24 February 1949

¹⁷¹ United Nations Document S/1302/Rev.1 3 April 1949

¹⁷² United Nations Document S/1353/Rev.1

¹⁷³ United Nations Document S/1296/Rev.1 8 April 1949

¹⁷⁴ See Security Council Resolution 73 (1949) 11 August 1949 S/Res/73 (1949)

¹⁷⁵ See Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963) 213-216

Armistice, it could not interfere in the right of Egypt to act in self-defence. The representative of Egypt is reported as saying:

“The Charter was based on the principle of respect for the sovereignty of Member States and could not restrict their inherent rights. The right to self-defence, therefore, might not be overridden in favour of the Security Council except in so far as the States concerned were so well protected by the resources available to the Security Council that the abandonment of their right of self-defence would not harm them.”¹⁷⁶

The above example reflects the strained relationship between the Security Council's remit and the right to self-defence of each member state. The Security Council rejected the argument forwarded by Egypt, confirming that Security Council Resolutions must be respected.

Article 51 imposes a reporting duty to the Security Council in the event that a state invokes the right to self-defence. The ICJ in *Nicaragua* held that ‘the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence’.¹⁷⁷ Gray argues that the act reporting to the Security Council is not merely a procedural matter but it indicates the state is acting in good faith.¹⁷⁸ However, failure to report does not necessarily diminish the claim of self-defence in Article 51. Nonetheless, in *Nicaragua*, the Court seems to take into account in its judgment regarding the duty to report to the Security Council.

In Article 51, it states that ‘until the Security Council has taken measures necessary to maintain international peace and security’. This is often referred to as the ‘until clause’ of the provision. The clause raises several questions worthy of brief discussion. Issues that may be raised are, among

¹⁷⁶ *Article 25*, Repertory (1945-1954) Vol. II Para 44 at 48

¹⁷⁷ *Nicaragua* (n 70) para 200

¹⁷⁸ Gray (n 43) 122

others, what acts constitute as 'measures necessary' and who decides when the self-defence has ended?

It is perhaps difficult to outline each response that would be regarded as 'necessary measure'. Different situation demands different type of response. However, Article 51 does give an indication as to what is the aim of any measure taken by the Security Council – 'such action as it deems necessary in order to maintain or restore international peace and security.' It is not surprising that the phrase 'international peace and security' is used as this the main task of the SC provided under Chapter VII of the UN Charter. An example of this can be seen during the invasion of Kuwait by Iraq in 1990. The SC passed a resolution authorising UN members (states that were co-operating with the Government of Kuwait) 'to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area'.¹⁷⁹

Additional enquiry can be made as to when does the right to self-defence ceased to exist in light of intervention from the SC. Some have argued that once the SC has taken measure, irrespective of the effectiveness of the measure in maintaining in international peace and security, the right to self-defence cease to exist.¹⁸⁰ However, Ruys disagree that mere inclusion of a matter would end the right to self-defence. He argues that this may lead to 'the absurd result that an aggressor would bring its own unlawful actions to the attention of the Council and consequently be shielded from a counter-attack in self-defence'.¹⁸¹

It is argued that the right to self-defence deemed cease to exist is subject to the effectiveness of measures taken by the SC and this the view taken by

¹⁷⁹ SC Resolution 678 (1990)

¹⁸⁰ Abram Chayes, 'The Use of Force in Persian Gulf' in Lori Damrosch and David Scheffer (eds.), *Law and Force in the New International Order* (Westview Press 1991) 3-12 and 55-58

¹⁸¹ Ruys (n 89) 76

most authors.¹⁸² It is a common sense approach to suggest that not all measures taken by the SC necessarily able to 'maintain international peace and security'. There is a possibility that aggression may continue to take place in spite of any SC Resolutions pronouncement.

Referring back to the two Security Council resolutions of 2001, the Security Council reminded member states of their right to exercise the right to self-defence individually or collectively. Specifically Resolution 1368 (2001), the Security Council merely 'recognises' that the affected member state (the US) has the right to self-defence. This does not mean that the Security Council endorses action by the US relative to this right. Reviewing the document as a whole, it is apparent that the Resolution did not expressly state when the US should launch any act of self-defence, nor did it require that the US employ force in self-defence. The substantive text of the Resolution heavily condemned the attacks against the US, mentioning the right to self-defence in the preamble only. The right of the US to forcible self-defence was implied as it is accorded to all states. A similar argument could be applied in Resolution 1373 (2001) however with additional complexity. The Resolution proposed that member states 'take the necessary steps to prevent the commission of terrorist acts'.¹⁸³ Again, the content of the Resolution nowhere explicitly proposes a need to use force in self-defence, simply only 'Reaffirming' the right in the preamble. Thus, it could be argued that the two Resolutions only act as a reminder to US that the right to self-defence is available if necessary.

b. Anticipatory Self-Defence

¹⁸² See Tom Ruys, 'Armed Attacks' and Article 51 of the UN Charter (CUP 2010) 76 at fn. 117 See also Dino Kritsiotis, 'A Study of the Scope and Operation of the Rights of Individual and Collective Self-Defence under International Law' in Nigel White and Christian Henderson (eds.), *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 220-221

¹⁸³ 2(b) of the Security Council Resolution 1373 (2001) 28 September 2001 (S/RES/1373/(2001))

The concept of anticipatory self-defence in *jus ad bellum* refers to the use of force prior to an actual armed attack as stated in Article 51. The legal issue of anticipatory self-defence asks the question whether it is lawful to use force before an armed attack materialises. Indeed, the concept of anticipatory self-defence invites diverging opinions as will be explored below.

At this juncture, it is important to briefly highlight the distinction between 'anticipatory' and 'pre-emptive' self-defence. This thesis views that anticipatory self-defence refers to the use of force where an armed attack is imminent. Whilst pre-emptive self-defence means the use of defensive force where the attack is perceived as remote and yet to happen. The two terminologies will further be discussed in Chapter 3.a.i.

Partly, the disagreement on the lawfulness of anticipatory self-defence originates from interpretation of Article 51. Cases decided by the ICJ were silent with regards to the permissibility of anticipatory self-defence. Furthermore, some state practice, although inconsistent, may seem to suggest that there is a body of opinion that regards anticipatory self-defence as acceptable in international law. However, it is doubtful whether selective state practice could be used as a generalisation of the whole self-defence regime.

The origin of anticipatory self-defence is often linked to the *Caroline* incident that occurred in 1837.¹⁸⁴ In that incident, the British government employed force against rebels in America despite there being no prior attacks against its territory (British Canada), claiming that it acted in self-defence.¹⁸⁵ Correspondence ensued between the British and American governments regarding the incident. In one letter, the British defended their actions stating:

¹⁸⁴ Further discussion on the *Caroline* incident in Chapter 4.

¹⁸⁵ See R.Y Jennings, 'The *Caroline* and *McLeod* Case' (1938) 32 AJIL 82-99

“It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation. It will be for it to show, also that the local authorities in Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clear within it.”¹⁸⁶

The text above calls for the use of force in self-defence on anticipatory basis, when attack is imminent. Many authors acknowledge that the *Caroline* case allows states under customary international law to exercise anticipatory self-defence.¹⁸⁷

The *Caroline* incident appears to suggest that anticipatory self-defence has a basis in customary international law. If this notion were to be accepted, this may seem in conflict with Article 51 of the UN Charter. The provision requires a state to fulfil the requirement of if ‘an armed attack occurs’ to initiate defensive measure. However, if it is argued that customary anticipatory self-defence is compatible to current international law, Article 51 perhaps could be interpreted to encapsulate customary self-defence. In a wider perspective, the underlying arguments of the existence of anticipatory self-defence raise an important theme; self-defence in Article 51 versus anticipatory self-defence in customary international law.

The status to anticipatory self-defence in customary international law may be derived from the above mentioned incident and confirm its place in customs. Brownlie asserts that there can be little doubt that the right to anticipatory

¹⁸⁶ *British and Foreign State Papers 1840-1841* (Vol. XXIX, James Ridgway and Sons, 1857) 1137-1138

¹⁸⁷ Franck (n 39) 97; Moir (n 104) 12; Anthony Arend and Beck, *International Law and the Use of Force* (Routledge 1993) 72; Ian Brownlie, *International Law and the Use of Force* (OUP 1963) 189

self-defence can be found in customary international law.¹⁸⁸ Such right may also be drawn from the Article 51. Bowett argues that Article 51 should be read to include anticipatory self-defence because the Charter does not call for a restrictive interpretation of the provision and *travaux preparatoires* that safeguard the right to self-defence.¹⁸⁹ He further argues that no state can be expected to wait for its territory to be attacked while its capabilities to retaliate are destroyed by an aggressor.¹⁹⁰ As such, the interpretation of Article 51 does not explicitly condemn anticipatory self-defence and exercising such right may be seen as a pragmatic act.

Meanwhile, the ICJ has not been forthright in expressing its views with regards to the lawfulness of anticipatory self-defence. However, Judge Schwebel in his Dissenting Opinion in the case of *Nicaragua* stated that Article 51 should not be interpreted 'if, and only if, an armed attack occurs', implying that other interpretations should be permitted by states seeking to initiate the right to self-defence under Article 51.¹⁹¹ In this statement, Judge Schwebel may be alluding to his acceptance of the right to anticipatory self-defence but the Court did not in its merit judgment, state whether it supported or rejected anticipatory self-defence, expressing no opinion.¹⁹²

There are several examples that could be used to exemplify anticipatory self-defence in state practice. For instance, in the case of the Israeli-Arab War 1967, anticipatory self-defence was central to discussions among the international community. On 18th May 1967, the Egyptian government requested the United Nations withdraw the UN Emergency Force (UNEF) from Sinai; this was a peace keeping mission, which had served as a buffer

¹⁸⁸ Brownlie (n 156) 257

¹⁸⁹ Derek Bowett, *Self-Defence in International Law* (Manchester University Press 1958) 188-189.

¹⁹⁰ *ibid* 191-192.

¹⁹¹ Dissenting Opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) ICJ Rep 1986 para. 173 p. 347

¹⁹² *Nicaragua* (n 70) para. 194 p. 103

zone between Israel and Egypt.¹⁹³ In June of the same year, Israeli forces launched an attack against the United Arab Republic (UAR), defending its action to the Security Council by stating that the Egyptian government had provocatively massed 80000 men and 900 tanks, which were ready to mobilise against Israel's southern frontier.¹⁹⁴ The Security Council did not pass any resolution condemning Israel for acting in anticipatory self-defence, but at that time, no Member States were willing to embrace the principle.¹⁹⁵ Silence from the Security Council in this case did not amount to endorsement of the right to anticipatory self-defence, but did reflect understanding that it was necessary for states facing an imminent threat to defend their territory.¹⁹⁶

In another incident, Israel launched an attack near Baghdad on 7th June 1981, citing anticipatory self-defence. Israel claimed that the nuclear reactor 'Osirak' was being modified for military use, and that this act constituted a nuclear threat against Israel.¹⁹⁷ Israel added that it could not stand by idly when faced with nuclear weapons, and that pre-emptive self-defence was in accordance with the inherent right to self-defence under Article 51.¹⁹⁸

The international community's reaction in general was to condemn Israel. In the Security Council discussion following the Osirak attack, a Syrian delegate emphasised that Article 51 could only be invoked if an armed attack occurs against a member state of the United Nations, and that the use of a pre-emptive strike was based on 'a concept that has been refuted time and again in the Definition of Aggression'.¹⁹⁹ Similarly, Sierra Leone criticised Israel for taking action on the grounds of self-defence when no

¹⁹³ Report of the Secretary-General on the withdrawal of the United Nations Emergency Force (A/6730 & Add.1-3) 26 June 1967

¹⁹⁴ UN Doc S/OV 1348:71

¹⁹⁵ Anthony Arend and Beck, *International Law and the Use of Force* (Routledge 1993) 77

¹⁹⁶ Franck (n 39) 105.

¹⁹⁷ 2280th Meeting, 12 June 1981, UN Doc S/PV 2280 at para 59

¹⁹⁸ *ibid.*

¹⁹⁹ Statement of Mr El-Fattel, UN Doc No S/OFF Rec. 2284, 16 June 1981:6

armed attack had occurred, nor was there any imminent recourse to force.²⁰⁰ The United Kingdom added to the discussion by considering the stance of international law:

“It has been argued that the Israeli attack was an act of self-defence. But it was not a response to an armed attack on Israel by Iraq... The Israel intervention amounted to a use of force which cannot find a place in international law or in the Charter which violated the sovereignty of Iraq.”²⁰¹

Consequently, the Security Council unanimously adopted Resolution 487 (1981) on 19th June 1981, finding Israel in ‘clear violation of the Charter of the UN and the norms of international conduct’.²⁰²

The above state practice shows instances where anticipatory self-defence was invoked by states. These were inter alia claimed by some to reflect the acceptance by member states that the right to anticipatory self-defence exist in international law. However, it must also be noted that some states were unwilling to accept fully the notion of anticipatory self-defence.

This thesis, however, views that the right to anticipatory self-defence is lawful in *jus ad bellum* irrespective of whether it originates from Article 51 or customary international law. Notwithstanding the link between the right to anticipatory self-defence and the *Caroline* incident, which is often cited as a prime evidence of such right in customs, a policy-based (although not entirely legal) argument could also be supplemented to substantiate the claim of anticipatory self-defence.

For instance, Franck views Article 51 as a provision that could be interpreted in support of anticipatory self-defence.²⁰³ He argued that Article 51 cannot

²⁰⁰ Statement of Mr Koroma, UN Doc No S/PV 2283

²⁰¹ Statement of Sir Anthony Parsons, UN Doc No. S/PV 2282:42

²⁰² SC Res. 487 (1981) S/RES/487 (1981) 19 June 1981

²⁰³ Franck (n 39) 98.

be interpreted to 'compel the *reductio ad absurdum* that states invariably must await first, perhaps decisive, military strike before using force to protect themselves'.²⁰⁴ Previously, as early as 1963, another commentator, Rosalyn Higgins, has asserted that states may resort to force in response to imminent future threats in response to illegal acts, emphasising that self-defence must be taken proportionality in nature and degree.²⁰⁵ Meanwhile, Christine Gray observed that states rarely invoke anticipatory self-defence as a basis for their measures because they know that it is not the strongest foundation upon which to defend their actions, as they are unlikely to garner wide support from the international community.²⁰⁶

Furthermore, the permissibility of anticipatory self-defence has not been explicitly condemned the ICJ. This is mainly due to the silence of the ICJ on the matter when it had the opportunity to decide cases raising the question of self-defence. The Court never made any pronouncement concerning whether to accept or dismiss anticipatory self-defence. This may also affect the limitations of self-defence, in particular concerning whether or not principles of necessity and proportionality are applicable to cases of anticipatory self-defence. For example, in *Nicaragua*, the Court emphasised that a state must be subjected to an armed attack prior to exercising the right to self-defence.²⁰⁷ Similarly, in discussing the *Legality of the Threat or Use of Nuclear Weapons* (hereafter '*Nuclear Weapons*') the Court reiterated that the right to self-defence, whether exercised individually or collectively, hinges upon the existence of an armed attack.²⁰⁸ In a case in 2005, the Court remained firm in its approach to Article 51 explaining that:

"Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the

²⁰⁴ *ibid.*

²⁰⁵ Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (OUP 1963) 201

²⁰⁶ Gray (n 43) 161-162.

²⁰⁷ *Nicaragua* (n 70) p. 104 para 195.

²⁰⁸ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* ICJ Rep 1999 p 244 para 38.

use of force by a state to protect perceived security interests beyond these parameters. Other means are available to a concerned state, including, in particular, recourse to the Security Council.”²⁰⁹

All of the cases mentioned reflect a pattern of unwillingness on the part of the ICJ to explicitly mention the legality of anticipatory self-defence apart from stating what is stated in Article 51. Thus, by way of Court’s jurisprudence, at present, there has been no precedent from the ICJ explicitly confirming or denying the legality of anticipatory self-defence.

Recent state practice directs to the growing support of anticipatory self-defence although it is only few limited occasions. For example, in 2002, the United States adopted the narrative of pre-emptive self-defence in National Security Strategy which states:

“The United States has long maintained the options of pre-emptive actions to counter a sufficient threat to our national security...to forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively...Yet in an age where the enemies of civilisation openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while danger gathers.”²¹⁰

While in the United Kingdom a debate in the House of Lords in April 2004 discussed the concept of pre-emption in self-defence and the Attorney General, Lord Goldsmith, was asked whether the UK government accepted the legitimacy of pre-emptive self-defence. Lord Goldsmith said:

“The Government’s position is supported by the records of the international conference at which the UN Charter was drawn up and by state practice since 1945. It is therefore the Government’s view

²⁰⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* ICJ Rep (2005) p.223 para 148.

²¹⁰ *The National Security Strategy 2002* (The White House, 2002) 15

that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote.”²¹¹

The two countries took a different positions with regards to anticipatory and pre-emptive self-defence. Indeed, it is questionable whether the two remarks from two influential states define the acceptance of anticipatory or pre-emptive self-defence. Nonetheless, this reflects that some state are willing to express their intention to invoke self-defence beyond the traditional meaning of self-defence.

In conclusion, it is argued that the right to anticipatory self-defence exists in the law on the use of force. This may originates from customary international law, primarily by citing the *Caroline* incident, the interpretation of Article 51 which does not outright prevent the possibility of anticipatory self-defence and the silence of the ICJ. Some state practice show some tendency to accept anticipatory self-defence as part of *jus ad bellum* although this is highly debatable. Furthermore, policy arguments to allow the use of anticipatory self-defence in the self-defence legal regime supports the basic tenets of the purpose of self-defence for a state to defend itself provided that the defensive force is taken with caution.²¹²

c. Policy Justification for the Use of Force in Self-Defence against Non-State Actors

There are arguments used in favour of the right to self-defence against non-state actors based on policy or pragmatic basis and not entirely based on legal reasoning. Proponents for this type of argument often portray the incompetency of international legal system to protect states which resulted in the affected states' interests.

²¹¹ Parliament Debate, House of Lords, 21 April 2004 at Column 370 (http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm#40421-07_head0)

²¹² Ian Brownlie, *International Law and the Use of Force by States* (OUP, 1963) 258-259

The scenario could be portrayed in the following situation. *Arguendo*, assuming that the right to self-defence against a non-state actor cannot be substantiated from Article 51 and in customary international law. Or in other words, states can only use defensive measures in inter-states situation, such narrative puts the aggrieved state in a difficult situation. If a state is attacked by a terrorist group emanating from abroad, according to the above understanding of Article 51 and customary international law, the victim state is helpless and can only act with the approval from the Security Council to authorise collective security measure.

If a state cannot defend itself from a terrorist attack emanating from abroad because Article 51 does not allow any action to be taken against the aggressor (a non-state entity), it may be argued that this may run contrary to the purpose of the UN Charter. Article 1 of the UN Charter states that the purpose of the UN is 'to maintain international peace and security and to that end: to take effective collective measures for the prevention and removal of threats to the peace'.²¹³ Following the spirit of the above-mentioned provision, it seems that the victim state may take a degree of response, however it may be defined, in order to maintain its security. As such, this leads some commentators to justify the argument in support of self-defence against non-state actors on the basis of pragmatism or policy-based consideration.

For instance, Amos Guiora states that the existing international law (Article 51 of the UN Charter, the *Caroline* incident, Security Council Resolutions 1368 and 1373 (2001)) does not outline clear guidance on the permissibility to exercise self-defence against non-state actors. She further argues that, if 'sufficient' intelligence is available, it is ultimately a fundamental duty of a state to protect its citizens, then the state may be deemed lawful to use force in self-defence against a state or a non-state actor with strict restraints

²¹³ Article 1(1) of the United Nations Charter 1949

attached to the use of force.²¹⁴ This type of argument points to the practicality of a state to undertake its fundamental duty to protect its territory whether international law allows the use of self-defence against a non-state actor or otherwise seems subordinate to the argument of pragmatism.

Another example is in a situation where a terrorist group is in possession of a weapon of mass destruction (WMD) and threatens to use it against another state. In such a situation, some would argue that it is right for the aggrieved state to launch self-defence even if it is directed towards a non-state actor.²¹⁵ This is because, in their view, the effects of WMD are so damaging that the risk of allowing it to materialise may ruin the whole country's institutions. This kind of reasoning to justify the use of self-defence against a non-state actor is not based on legal arguments but on policy considerations. It may be argued that these arguments may not be founded on legal grounds but they might resolve the threats faced by the aggrieved state. However, allowing states to justify the use of defensive force against non-state actors not based on international law invites abuse by states and may threaten the stability of international peace and security.

A case in point to illustrate the argument of practicality in the use of force against a non-state actor is in the US National Security Strategy 2002. President Bush issued the document in the aftermath of the 9/11 terrorist attacks. In it, it states that:

“Yet, in an age where enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.”²¹⁶

²¹⁴ Amos Guiora, 'Anticipatory Self-Defence and International Law – Re-Evaluation' 13 JCSL (2008) 3-24, 16-23

²¹⁵ Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 San Diego Law Journal 7-37, 16; See David B. Rivkin Jr. and Lee A. Casey, 'Using Force Lawfully in the 21st Century' (2006) 81 International Law Studies 319-336

²¹⁶ National Security Strategy 2002 p. 15

In the document, the US substantiates its stance on the use of force by suggesting that it is a view supported by 'legal scholars and international jurist' which is debatable among legal scholars. Nevertheless, the text above reflects that the US was willing to exercise force against any entity if the threats warrants the US to exercise force. Such arguments cannot be said to be totally based on legal considerations.

In conclusion, the arguments shown above that justifies the use of self-defence against a non-state actor is a pragmatic and policy considerations. These arguments must be distinguished from legal arguments. In a strict legal discussion, the right to self-defence against a non-state actor must be substantiated by legal texts, customs and established practice. The conflation between legal and policy considerations may sway the focus of the arguments outside the context of international law. Furthermore, allowing states to justify the use of force outside international legal framework such as the UN Charter and customs may result in abuses by states.

d. State Practice in Self-Defence against Non-State Actors

The incident that happened on 11 September 2001 in the US and the SC Resolutions ensued marked as a focal point in considering the right to self-defence against non-state actors.²¹⁷ On that day, the US witnessed horrific scenes on its territory. Four commercial aeroplanes were hijacked by terrorists; two planes targeted the Twin Towers of the World Trade Centre in New York causing its total destruction. Another plane crashed into America's Defence Department building, the Pentagon, and another failed to reach its intended target in Washington DC. It is reported that the total deaths from these attacks amounted to more than 2,900 people.²¹⁸ In response to the attacks, the Security Council convened the next day passing a resolution condemning the attack.²¹⁹ In it, the Security Council labelled the attack a

²¹⁷ Dominic McGoldrick, *From '9-11' to the 'Iraq War 2003'* (Hart Publishing, 2004) 22

²¹⁸ 9/11 Commission Report, (August 2004) pg. 552 at footnote 188

²¹⁹ Security Council Resolution 1368 (2001) 12 September 2001 (S/RES/1368/(2001))

'terrorist attack...an act of international terrorism' and a threat to international peace and security.²²⁰ The preamble of this resolution recognises the inherent right to self-defence, and the body of the resolution referred to a response to the terrorist attack. Less than three weeks after the attacks a similar notion was expressed in Security Council Resolution 1373 (2001). Its preamble reaffirmed the previous resolution condemning the terrorist attacks,²²¹ and again it stressed the right of the individual and collective to self-defence. The two resolutions seems to imply, although inconclusively, that the affected state (the US) may regard the attacks on 9/11 was an armed attack and may take lawful self-defence against the perpetrators. However, this does not necessarily mean the two resolution was a general endorsement by the Security Council that a state may recourse to self-defence against a non-state actor.

The Organisation of American States also condemned the attacks in the US calling for its inherent right to self-defence under the UN Charter and Inter-American Treaty of Reciprocal Assistance (Rio Treaty).²²² Similarly, the North Atlantic Treaty Organisation (NATO) invoked Article 5 of its treaty for the first time, which states 'an armed attack against one or more of them in Europe or North America shall be considered an attack against them all... such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.'²²³

Following the attacks, the US launched a military campaign in Afghanistan (Operation *Enduring Freedom*), targeting Al-Qaeda and the *de facto* government at the time, the Taliban. The decision to act against the Taliban was a result of their non-cooperation in handing over those responsible for

²²⁰ *ibid.*

²²¹ Security Council Resolution 1373 (2001) 28 September 2001 (S/RES/1373/(2001))

²²² 24th Meeting of Consultation of Ministers of Foreign Affairs, 21 September 2001, (OEA/Ser.F/II.24)(RC.24/RES.1/01)
<http://www.oas.org/OASpage/crisis/RC.24e.htm>

²²³ Article 5 of the North Atlantic Treaty 1949, 34 (1949) UNTS 243

the 9/11 attacks.²²⁴ President Bush explained to American citizens the intention of the military operation:

“...the United States military has begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. These carefully targeted actions are designed to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime.”²²⁵

On the same day, John Negroponte, US Permanent Representative at the United Nations reported to the Security Council that US has acted in self-defence:

“...the attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation... In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States.”²²⁶

The American government explained that it exercised the right to self-defence against Al-Qaeda, and also against the Taliban for its non-cooperation in eradicating Al-Qaeda from its territory. By extension, the same consequence could also be directed toward any government harbouring a terrorist group.²²⁷ Therefore, in one interpretation, the effects of

²²⁴ Gray (n 43) 203-207.; Gilles Dorronsoro, ‘The Security Council and the Afghan Conflict’ in Vaughan Lowe and others (eds), *The United Nations Security Council and War* (OUP 2008) 452-465, 459-461

²²⁵ President George Bush Speech, 7 October 2001 <http://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011007-8.html>

²²⁶ Letter from Ambassador John Negroponte to the UN Security Council, S/2001/946 7 October 2001

²²⁷ Sean Murphy, ‘Contemporary Practice of the United States relating to International Law’ (2002) 96 AJIL 237

the 9/11 attacks and decisions following the Security Council Resolutions may give the notion that states in certain circumstance may act forcibly in self-defence against non-state actors.

After the invasion of Afghanistan in 2001, there were other several instances where states invoked the right to self-defence and claimed the attacks were perpetrated by non-state actors. *Inter alia*, the Israeli war in Lebanon in 2006, the Turkish operation in Northern Iraq against Kurdistan Workers' Party (PKK) in 2008, Columbia's use of force against FARC in Ecuador (2008)²²⁸ and the recent conflict in Iraq/Syria against Islamic State (IS).²²⁹ The question remains, whether these state practice signify an acceptance by states that there is a general right to self-defence against a non-state actor in international law.

Based on state practice and the inconsistency of the ICJ in the jurisprudence with regards to this matter, and in addition to silence of Article 51 on the entity of the author of an armed attack, it is submitted that states are afforded the right to self-defence against a non-state actor. The example of the 9/11 attacks, where the gravity of the attacks executed by Al-Qaeda, a non-state actor, could be said to reach the threshold of an armed attack as required in Article 51.²³⁰ This therefore allows the victim state to initiate defensive measure even against a non-state actor.²³¹ However, this is not to suggest that the 9/11 attacks is a watershed moment in *jus ad bellum* where the whole law on the use of force changes overnight.²³² In fact, it reinforces

²²⁸ Tatiana Waisberg, 'Colombia's Use of Force in Ecuador Against a Terrorist Organization: International Law and the Use of Force Against Non-State Actors' ASIL Insights (22 Aug 2008)

²²⁹ State Practice on Lebanon (2006) and Islamic State (2014) will be discussed in Chapter 6.

²³⁰ Niaz Shah, 'Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law's Response to Terrorism' (2007) 12 JCSL 95-126, 104-105

²³¹ Raphaël van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?' (2011) 23 LJIL 183-208, 191-194

²³² Noëlle Quénivet, 'The World after September 11: Has It Really Changed?' (2005) 16 EJIL 561-577, 575-577

Article 51 that the role of the host state is taken into consideration in considering the use of force against non-state actors.

Indeed, the notion of armed attack exerted by non-state actors (self-defence against terrorist groups) is not new, and was discussed prior to the 9/11 attacks. The practice of self-defence against terrorist groups has most commonly been invoked by the US and Israel.²³³ As early as 1956, Israel invoked the right to self-defence under Article 51 when it captured part of the Sinai Peninsula, justifying its measures as being directed by the desire to prevent the *Fedayeen* terrorist group from infiltrating Israeli territory.²³⁴ The justification of self-defence was also invoked on 6 June 1982 when Israel occupied parts of Lebanon, explaining to the Security Council that the Palestinian Liberation Organisation (PLO) around the world had targeted Israeli citizens.²³⁵ Mr Blum, a representative of Israel in the Security Council at the time, reminded the Council:

“[W]hen Israel, after years of unparalleled restraint, finally resorts to the exercise of its right of self-defence, the fundamental and inalienable right of any State, which is also recognized by the Charter of the United Nations as the inherent right of Member States of the Organization.”²³⁶

In another incident, on 7 August 1988 the US embassies in Kenya and Tanzania were attacked by international terrorist organisations.²³⁷ The US responded by attacking a pharmaceutical factory in Sudan believed to have

²³³ Moir (n 104) 26.; Gray (n 43) 195.

²³⁴ See *Security Council Official Records*, 748th Meeting, 29 October 1956 at 11 para. 71; Security Council Resolution 1125(XI) of 2 February 1957. See also Franck (n 39) 55-56

²³⁵ Security Council Official Records, 2375th Meeting, (S/PV.2375) 6 June 1982, at 3-4, para. 24-35

²³⁶ *ibid* 4, para. 36.

²³⁷ See: Resolution 1189 (1998) S/RES/1189 (1998) 13 August 1998

been used by the terrorists; invoking the right to self-defence.²³⁸ In 1993, Iran justified attacks against Kurdish groups based within Iraqi territory as an act of self-defence. Iran explained to the UN Secretary General:

“During the past few weeks, bands of armed and organized terrorist mercenaries have engaged in trans-border military attacks against and sabotage in Iranian border. These bands, whose headquarters and military bases are located in Iraq... In response to these armed attacks from inside Iraq and in accordance with Article 51 of the Charter of the United Nations... the Islamic Republic Air Force carried out a brief, necessary and proportionate operation against the military basis of the terrorist group.”²³⁹

All the incidents referred demonstrate that even before 9/11, states justified defensive measures against terrorist groups. The 9/11 incident is a significant course of event that lead to the approval of two controversial Security Council Resolutions in response to terrorist attacks. However, this thesis does not advocate that 9/11 is a turning point that allows the use of self-defence against non-state actors in international law. Rather 9/11 is an indicator amongst other indicators that some states are willing to accept self-defence against non-state actors is permissible. Christian Tams argues that SC Resolutions 1368 and 1373 (2001) was a continuation of momentum by states in the past that the use of force is lawful against non-state actors.²⁴⁰

The two Security Council Resolutions presented an opportunity to examine whether the law on self-defence has formally acknowledged that state has the right to exercise self-defence against a non-state actor. In one aspect,

²³⁸ Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/1998/780 (20 August 1998)

²³⁹ Letter from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General, 26 May 1993 S/25843

²⁴⁰ Christian Tams, ‘The Use of Force Against Terrorists’ 20 EJIL (2009) 359-397, 375 -378

the resolutions can easily be discerned as a testament from states that the US has the right to self-defence against the perpetrator of the 9/11 attacks, Al-Qaeda, a non-state entity. In fact, in both of the resolutions, it reiterates that the US has the right to self-defence.

However, it is doubtful that the two Security Council Resolutions change the law on the use of force. This is because the Resolutions had not explicitly state in general terms that a state may invoke Article 51 against a non-state entity. Furthermore, SC Resolutions 1368 and 1373 (2001) cannot of itself give rise to a new custom in international law as the practice and *opinio juris* represent only fifteen states (including the P-5).²⁴¹ Tom Ruys argues that the Security Council Resolutions may indicate a certain views held by limited number of states but it certainly cannot form an instant custom.²⁴² As such, although the two Resolutions are significant in determining jus ad bellum, the documents do not change entirely the scope on the law of self-defence.

Nevertheless, contemporary scholars are largely willing to accept that self-defence against non-state actors is permissible with the conditions that the principles of necessity and proportionality are met.²⁴³ In light of Security Council Resolutions 1368 (2001) and 1373 (2001), it has been argued that there is a support for acknowledging non-state agents carry out armed attacks, thus qualifying terrorist attacks as 'armed attacks' against which force may be used in self-defence.²⁴⁴ Thus, it is no longer an exceptional claim to rely on self-defence for the purpose of responding to terrorist and other non-state attacks.²⁴⁵

²⁴¹ Ruys (n 89) 49

²⁴² *ibid*

²⁴³ Dinstein (n 5) 227-228.; Moir (n 104) 26; Malcolm Shaw, *International Law* (6th edn, CUP 2008) 1136; Nataliano Ronzitti, 'The Expanding Law of Self-Defence' (2006) 11 JCSL 343-359, 348-349; Shah (n 230) 104; Tom Ruys and Sten Verhoven 'Attacks by Private Actors and the Right to Self-defence' (2005) 10 JCSL 289-320, 297-298; Randelzohfer and Nolte (n 89) 1418.

²⁴⁴ Shah (n 230) 104.

²⁴⁵ Franck (n 39) 64.

The question that follows is not whether self-defence is applicable against a non-state actor but rather what the relationship is between the non-state actor and the host state that warrants the victim state to launch self-defence. Again, this relates to the question of attribution as discussed above.

The assessment that self-defence against a non-state actor is no longer centred on defensive measures enacted against terrorist groups has shifted the argument toward self-defence, and the issue of necessity and proportionality.²⁴⁶ This is the core of discussion in this thesis, which examines the concept of necessity in relation to self-defence against terrorism.

In conclusion, the ICJ has presented an incoherent jurisprudence on the legality on the use of self-defence against a non-state actors. In particular, the ambiguities on the questions of attribution and threshold. Furthermore, whilst the 9/11 incident and the Security Council Resolutions 1368 and 1373 (2001) are significant consideration in *jus ad bellum*, it cannot be said conclusively that 9/11 change the law on self-defence against a non-state actor. In contrast, state practice seems to suggest that in some instances, although inconsistent, states in limited circumstances are willing to embrace the notion of self-defence against non-state actors. This includes incidents prior to 9/11 and post-9/11. As such, this thesis maintains that a state may recourse to self-defence against non-state actors subject to meeting the restrictions imposed in exercising self-defence. The legality of any use of force in self-defence, regardless if it is directed against a state or a non-state actor, should focus on the parameters of self-defence; whether the acting state meets the principles of necessity and proportionality.

4. Necessity and Proportionality in the Law of Self-Defence

²⁴⁶ Christian Tams, 'The Use of Force Against Terrorist' (2009) 20 EJIL 359-397, 381

The governing principles of necessity and proportionality in Article 51 and customary international law are clear from Court judgments. It requires the invoking state to comply with both principles when exercising the right to self-defence.²⁴⁷ However, the two principles are not present in Article 51 of the Charter; indeed, it specifies no restriction in the use of force in self-defence.²⁴⁸ It is argued in this thesis (in the following Chapter), the origin of the doctrines of necessity and proportionality is a historical one that can be traced back to a famous incident involving the destruction of the vessel *Caroline* in 1837.²⁴⁹ Following the incident, the exchange of correspondence between the British and American governments eventually laid the foundation for these two principles. For example, the ICJ in *Nicaragua* stated that 'self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law'.²⁵⁰ In the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court reiterated this position, stating 'the submission of the exercise of the right to self-defence to the conditions of necessity and proportionality is a rule of customary international law... This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.'²⁵¹ Thus, the two requirements can be understood to originate in customs and applicable for Article 51 of the UN Charter.

The meaning of 'necessity' in this context is the implication that the only response possible is to exert force.²⁵² At the heart of any defensive measures, avenues of non-forcible measures must be sought prior to any use of force, and force should only be utilised as a matter of last resort for

²⁴⁷ Ian Brownlie (n 212) 279

²⁴⁸ Article 51 of the United Nations Charter 1949 1 UNTS XVI

²⁴⁹ British and Foreign State Papers 1840-1841 (Vol. XXIX, James Ridgway and Sons 1857) 1137-1138

²⁵⁰ *Nicaragua* (n 70) p. 94 para. 176.

²⁵¹ *Nuclear Weapons* (n 87) para. 41 p. 245.

²⁵² Gray (n 43) 150; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 152-153; Myra Williamson, *Terrorism, War and International Law* (Ashgate 2009) 115

self-defence.²⁵³ The lawfulness of self-defence in necessity, and when conducted in proportionality, is thereby established, but should not be understood to entail defensive measures of a retaliatory, deterrent or punitive character.²⁵⁴ Therefore, the objective of self-defence must be to support a country's security, and should not extend beyond that.²⁵⁵

The principle of proportionality is hard to classify, as it involves application of the law relative to the facts.²⁵⁶ The measurement of proportionality is subject to competing opinions. Some assert that proportionate self-defence can be measured in relation to the events preceding it, in particular an armed attack. Meanwhile, others suggest that proportionality in self-defence is measured in relation to the threat being faced and the means necessary to end the attack.²⁵⁷ Furthermore, when combined with the principle of necessity, there is a question about who should decide the scope of 'enough' (proportionate force).²⁵⁸ However, despite unclear messages regarding the constraints on proportionality, Professor Ago asserts that proportionality must be applied with some degree of flexibility:

“It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the "defensive" action, and not the forms, substance and strength of the action itself.”²⁵⁹

²⁵³ See Elizabeth Wilmhurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 ICLQ 963-972, 967

²⁵⁴ Corten (n 89) 485; Nuclear Weapons (n 87) p.583 para. 5.

²⁵⁵ Armed Activities (n 121) p 223 para 148.

²⁵⁶ Gray (n 43) 150.

²⁵⁷ Lubell (n 126) 64.

²⁵⁸ Shah (n 230) 123-125.

²⁵⁹ Roberto Ago, 'Addendum to Eight Report of State Responsibility' in Yearbook of the International Law Commission 1980 (Vol. II, Part One) at 69 (A/CN.4/SER.A/1980/Add.I (Part 1))

Thus, Professor Ago's report argues that proportionality cannot be evaluated based on the scale of armed attack or retaliation commensurate to the aggression, but should focus on the aim of self-defence.²⁶⁰

In this thesis, it argues for a different way of observing necessity as a principle in the framework of self-defence. Necessity is not seen as an abstract principle that is only applicable before the use of force. Rather, this study looks into the role of necessity in the whole framework of self-defence. As such, it is argued that necessity's role is not merely as a requirement to trigger the right to self-defence but necessity is seen as an ongoing basis throughout the use of force. It is submitted that necessity consists of two parts, first, necessity as a requirement and second, necessity as a limitation to self-defence.

Necessity as a requirement primarily consists of the requirement that there is an armed attack exists. This point has been discussed above which includes among others the discussion of gravity of an armed attack for the purpose of Article 51 and the author of the armed attack (a state or a non-state actor). In addition, part of necessity as a requirement is to acknowledge that the armed attack is purposely directed towards the victim state and it was not a mistake.²⁶¹

The latter aspect of necessity (as a requirement) limits the use of force in order to achieve the aim of self-defence. It is argued that the legitimate aim of self-defence is to repel or halt an armed attack from succeeding.²⁶² It can be said that a state responding to an armed attack and exercise defensive force beyond the legitimate aim of self-defence could be described as unnecessary use of force. Therefore, the second aspect of necessity focuses the use of force in achieving the aim of self-defence

²⁶⁰ Gardam (n 252) 161; Kinga Tibori Szabó, *Anticipatory Action in Self-Defence* (Springer 2011) 257

²⁶¹ Oil Platforms (n 88) 191-192

²⁶² The aim of self-defence in the context of necessity will further be discussed in Chapter 4 2(d)

In pursuing this hypothesis, it is admitted that it may raise several criticisms. First, the latter aspect of necessity (necessity as a limitation to self-defence) may be seen to resemble with the principle of proportionality. Second, if the defensive use of force is scrutinise in great detail, it is a possibility that it may encroach into the realm of *jus in bello* (as oppose to strictly in *jus ad bellum*).

This study acknowledges that confusion may occur between the concept of necessity as a limitation to self-defence and proportionality. This is because proportionality, as mentioned above, relates to the size, duration and target of the use of force.²⁶³ While necessity (as a limitation to self-defence) also focuses on the force employed by the state. Both concepts oversee the use of force. Another similarity is both necessity as a limitation and proportionality observe the use of force on the whole. For example, necessity as a limitation observes the whole use of force and similarly, proportionality too must assess the whole scale of the operation.²⁶⁴

However, it is submitted that there is a crucial difference between necessity as a limitation and proportionality. Necessity as a limitation focuses on the use of force meeting the legitimate aim of self-defence while proportionality examines the intensity of the use of force. Such distinction is maintain in order to separate between necessity and proportionality.

The principles of necessity and proportionality are not easily discernible from one and other. That is, 'if a use of force is not necessary, it cannot be proportionate and, if it is not proportionate, it is difficult to see how it can be necessary'.²⁶⁵ According to this line of argument, proportionality and necessity operate in tandem under the law of self-defence.²⁶⁶ The

²⁶³ Gray (n 43) 150

²⁶⁴ Oil Platforms (n 88) p 198 para 77

²⁶⁵ Gray (n 43) 150

²⁶⁶ Kimberley Trapp, 'Back to Basics: Necessity, Proportionality and the Right to Self-Defence Against Non-State Terrorist Actors' (2007) 56 ICLQ 141-156, 146

relationship of these two principles will underpin this thesis although focus will be largely directed toward the study of necessity.

Despite the inter-relationship between necessity and proportionality, there are distinction between the two. For instance, he ICJ often treats necessity and proportionality as differently. In *Nicaragua*, the Court observed that the US was not acting in a response in line with necessity when it supplied arms to the opposition (contras) in Nicaragua months after Nicaragua assisted the opposition in El Salvador, once a major offensive against the government of El Salvador had been completely repulsed.²⁶⁷ The Court also found that measures taken by the US that included laying mines in the Nicaraguan waters, and attacking ports and oil installations were disproportionate acts of self-defence.²⁶⁸

A similar approach, dividing necessity from proportionality, can be observed in *Oil Platforms*. The Court found that the attack on *Sea Isle City* and the mining of the *USS Samuel B. Roberts* did not justify a US response in self-defence in the form of targeting Iranian platforms on the basis of it was unnecessary use of force.²⁶⁹ Once the Court examined the question of necessity only then it proceeded to assess the question of proportionality. The Court stated that had the attack of 19 October 1987 been portrayed as a response to an armed attack against *Sea Isle City* committed by Iran it would have been regarded as proportionate.²⁷⁰ These cases demonstrate that it is possible to dissect necessity from proportionality under the law of self-defence although facts are unique to a particular scenario.

In conclusion, in any use of force in self-defence, a state must abide to the two important principles of self-defence – necessity and proportionality. The history of the two principles can be traced back to the *Caroline* incident in 1837 and subsequently the two principles are still in use until today. This

²⁶⁷ *Nicaragua* (n 70) p 122 para 237

²⁶⁸ *ibid* p122 para 237

²⁶⁹ *Oil Platforms* (n 88) p 198 para 76

²⁷⁰ *ibid* p 198 para 77

thesis argues that necessity can be viewed into two roles. First, necessity acts as a requirement to self-defence and second, necessity acts as a limitation to use force in meeting the legitimate aim of self-defence. The latter aspect of necessity could be said to resemble with the concept of necessity. However, it is maintained that necessity focuses on the aim of self-defence while proportionality examines the intensity of the use of force.

5. Conclusion

This Chapter outlined the basis of law in *jus ad bellum*, which will be referred in this thesis. The framework on the law of self-defence has a dual foundation. First, the law on the prohibition on the use of force is of paramount relevance. It acts as an overarching principle requiring states to refrain from the use of force in international relations. Article 2(4) of the United Nations Charter and customary law highlight this. Second, the right to self-defence provides an exemption to the general rules prohibiting the use of force. This is acknowledged in Article 51 of the United Nations Charter, as well as in customary international law.

Article 51 consists of several elements such as the terms 'armed attack' and 'inherent right'. This Chapter has found that the meaning of an 'armed attack' is subject to wide debate. It has been argued that it can include a physical armed attack that must reach a certain level of intensity to qualify as an armed attack under the meaning of Article 51. The Chapter also discussed whether the phrase 'inherent right' can refer to the customary law on self-defence, and the extent to which self-defence is established according to Article 51 rendering customary law irrelevant.

The Chapter also established that the law on the use of force in self-defence is moderated by two limiting principles: necessity and proportionality. Although not established in Article 51, however, the two principles have been present in customary since the *Caroline* incident in 1837. The legality of any self-defence hinges upon fulfilment of this requirement. Both principles are arguably applicable to state versus state, and state versus

non-state actors, as Article 51 provides the right to self-defence without elaborating on the identity of the aggressor. Under the jurisprudence of the ICJ, however, self-defence against non-state actors is only approved if there is state involvement in the armed attack. Some state practice can be construed as accepting the narrative of self-defence against non-state actors. One of the indicators is the Security Council Resolutions 1368 (2001) and 1373 (2001) calling for self-defence against terrorism although it cannot be said conclusively the Resolutions endorse self-defence against non-state actors. Nonetheless, there is a growing body of state practice acknowledging the right to self-defence against non-state actors is lawful subject to meeting the requirements of necessity and proportionality. As such, it is important to understand the establishment of necessity and proportionality in *jus ad bellum*, and the following Chapter will examine this further.

Chapter 3: The *Caroline* Doctrine: Necessity, Proportionality and Immediacy in the Law of Self-Defence

1. Introduction

As explained in Chapter 2, Article 51 of the United Nations Charter and customary international law recognise the right to self-defence. This Chapter will examine the right to self-defence, as understood in customary international law, concentrating on the features of necessity, proportionality, and imminence. Under customary international law, the right to self-defence is associated repeatedly with the *Caroline* incident, which happened in 1837 and involved the British government and Canadian rebels. Therefore, to understand the background and scope of this right in customary law, this Chapter will first present the historical facts of the *Caroline* incident.

The historical evidence cementing the scope of self-defence is in the form of correspondence between the two governments. It is argued that, because of this correspondence, the principles of necessity, proportionality and imminence in *jus ad bellum* were established. The Chapter will also examine the transformation of the principles from mere evidence of state practice as accepted in the nineteenth century, to the level of universality in contemporary international law. This will be examined by observing the development of *jus ad bellum* up until the creation of the United Nations Charter.

It is argued herein, that the *Caroline* incident helps us to understand the state of *jus ad bellum* today. However, in 1837, there was no comprehensive international legal regime that regulates states. A question is raised, therefore, what is the relevance of the *Caroline* incident in contemporary international law. Furthermore, whether the incident is a legal significance or merely a political disputes between states. A this incident only involved two countries, could it be said to represent state practice and *opinio juris* of all states? To answer this question, we will examine evidence to determine the relevance of the incident in the law on the use of force today.

Another aspect that will be examined is the doctrine established as a result of the *Caroline* incident. Doctrine refers to the concept of law that was applied to following incidents and legal rules based on the *Caroline* incident. The doctrines linked to the *Caroline* incident are: (i) that the right to self-defence is limited to necessity and proportionality, (ii) self-defence against non-state actors, (iii) anticipatory self-defence, and (iv) pre-emptive self-defence. This Chapter will also highlight difficulties that manifest when interpreting customary international law, and how these affect the interpretation of the *Caroline* doctrine.

2. Historical details of the *Caroline* affair

This section presents a detailed analysis of the facts and background to the *Caroline* incident. An understanding of the facts of the *Caroline* incident is crucial when analysing doctrines, which revolve around the understanding of the parties involved, the socio-economic situation that led to the sinking of the *Caroline* vessel, and the political ramifications between the parties. Thus, it is vital to highlight and understand what happened on the night concerned.

Throughout the 1830s, the Canadians grew increasingly resentful of British rule, accruing both political and social grievances.¹ In Lower Canada, farmers were dissatisfied with the feudal agricultural system, as predominantly, either the Catholic Church or the absentee landowners (many of whom were living in the United Kingdom) owned the land they worked. The tenants were expected to work the land and pay taxes, but were denied hunting and fishing rights, and were not permitted to use it for personal economic gain. Similarly, in Upper Canada, descendants of

¹ Kenneth Stevens, *Border Diplomacy: The Caroline and McLeod Affairs in Anglo-American Canadian Relations 1837-1842* (The University of Alabama Press 1989) 12-17. For more details of the revolution see also James Callahan, *American Foreign Policy in Canadian Relations* (The MacMillan Company 1937) 164-165; Colin Read, *The Rising in Western Upper Canada: The Ducombe Revolt and After* (University of Toronto Press 1943) 115-116

American Revolutionaries (Family Compact') and the Anglican Church, which also controlled the provincial government and economic institutions, primarily owned land. The Church of England owned two million acres, and each Family Compact inherited ten to fifty thousand acres. This deprived the normal citizens of Lower and Upper Canada of their rights to advance economically through farming.

In contrast, their neighbours in America prospered as the agricultural revolution gathered momentum and industries were established. Although several political initiatives were pursued to address social problems in Canada, the poor progress failed to meet the demands of the Canadians. Consequently, anti-British sentiment grew, and in one incident in Lower Canada rebels protested on the streets, wearing the French tri-colour and singing *La Marseillaise*. The grievances and resentment of the people ultimately translated into political movements, and several rebellions unsuccessful broke out in 1837 in both Upper and Lower Canada.

The rebellion against British rule created sympathy amongst the Canadian's American neighbours, who supported them with supplies and logistics. This included a privately owned vessel, the *Caroline*, from a US citizen for the use of the rebels. At that time, several hundred revolutionaries controlled Navy Island (the Canadian side of the Niagara River), and used it as a base for the inward supply of arms from the US.² The rebels proclaimed the establishment of a provisional government from British-Canada, with a distinctive flag. The role of the *Caroline* was to transport supplies, new recruits, sightseers and visitors to Navy Island. The British government was aware of the activities of the ship, and on 28 December Colonel McNab, the commander of Canadian forces in Chippewa, ordered Commander Andrew Drew of the Royal Navy to destroy the *Caroline*, because it posed a great

² Oppenheim, *International Law: A Treatise* (8th edn, Longmans 1955) 301-302; John Moore, *A Digest of International Law* (Vol. II, Washington Government Printing Office 1906) 409-414

threat.³ On the night of 29 December 1837, Commander Drew and fifty men and seven boats trawled the river searching for the *Caroline*, which at the time was docked at Fort Schlosser in New York (American territory). That night the vessel also sheltered more than twenty passengers who had been unable to find accommodation.⁴ The British forces boarded the *Caroline*, attacking it with muskets and cutlasses. One of the attackers took coals from the steamer's furnace and started a fire, which eventually spread. The raiders towed the *Caroline* into the river, where the current dragged it into the Niagara Falls. During the incident two Americans were killed; Armos Durfee, and a cabin boy (Johnson 'Little Billy') were shot as they attempted to leave the steamer.

President Van Buren learned of the attack on 4 January 1838 and immediately ordered Generals to observe the Niagara frontiers. He also instructed the governors of New York and Vermont to assist the military at the border. At the diplomatic level, the Secretary of State John Foyth wrote to the British minister in Washington, Henry Fox, and complained about the incident and the deaths of two Americans. He stated that the destruction of the *Caroline* and the assassination of American citizens had 'produced 'the most painful emotions of surprise and regret', and that the incident would be made the 'subject of a demand and redress'. On 6 February 1838, Mr Fox replied that the destruction of the *Caroline* was executed under the instructions of Colonel McNab, and he further explained the piratical status of the *Caroline*.⁵ Further, Mr Fox stated that at the time of the incident the US was patently unable to enforce its borders, which had created an opening for rebels to enter America posing a threat to Britain. The British claimed the raiding of the vessel was an act of self-defence. The disagreement between the two countries concerning the destruction of the

³ Albert Corey, *The Crisis of 1830-1842 in Canadian-American Relations* (New Haven, Yale University Press 1941) 36-37

⁴ Corey (n 2); Kenneth Stevens, *Border Diplomacy: The Caroline and McLeod Affairs in Anglo-American Canadian Relations 1837-1842* (The University of Alabama Press 1989) 12-17

⁵ H. Ex Doc. 302, 25th Cong. 2nd Session; Public Record Office, F. O 5. 322

Caroline was then put aside for several years until the matter was raised again.

In 1840, the US government investigated the *Caroline* incident once again, arresting Mr McLeod on the allegation that he had murdered Amos Durfee.⁶ The British government demanded that the US release the detainee. On 12 March 1841, Mr Fox wrote to Mr Webster, the new Secretary of State, justifying Mr McLeod's actions by stating that he was 'performing an act of public duty for which they cannot be made personally and individually answerable to the laws and tribunals of any foreign country'.⁷ However, the US disregarded the plea and tried McLeod. Mr Webster responded again, justifying the seizure of the *Caroline* as an act of self-defence. The following passage below, often referred to as the Webster text, now forms the basis for customary law of self-defence:

"Under these circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's Government to show upon what state facts, and what rules of national law, the destruction of the *Caroline* are to be defended. It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the *Caroline* was impracticable, or would have been unavailing ; it must be shown that day-light could not be waited for;

⁶ See Marcus Tullius Cicero Gould, *The Trial of Alexander McLeod for the Murder of Amos Durfee* (Vol. II, Gould's Stenographic Reporter 1941); William Riddell, 'International Murder Trial' (1919) 10 *Journal of Criminal Law and Criminology* 176 - 183

⁷ *British and Foreign State Papers 1840-1841* (Vol. XXIX, James Ridgway and Sons 1857) 1127

that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in here the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this, the Government of The United States cannot believe to have existed.”⁸

The *Caroline* affair did not end with the exchange of diplomatic notes. The politics of the event intensified when the President sent a message to Congress describing the event as a possible violation of the sovereignty and jurisdiction of the US.⁹ On 28 July 1842, Lord Ashburton wrote to Mr Webster, admitting that the US had the right to uphold its territorial integrity and that the seizure of the *Caroline* was, therefore, a violation of its sovereignty. The British also apologised over the incident and expressed regret. However, the British government further insisted that all nations have the right to self-defence, and that a nation’s actions may be excused in the event of ‘necessity’. The letter stated:

“...it is admitted by all writers, by all jurists, by the occasional practice of all nations, not expecting your own, that a strong overpowering necessity may arise when this great principle may and must be suspended. It must be so, for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity. Self-defence is

⁸ *British and Foreign State Papers 1840-1841* (Vol. XXIX, James Ridgway and Sons 1857) 1337-1138

⁹ *British and Foreign State Papers 1841-1842* (Vol. XXX, James Ridgway and Sons 1858) 194-195

the first law of our nature, and it must be recognized by every code which professes to regulate the condition and relations of man.”¹⁰

On this point, the British government disagreed with the description of necessity presented by the US in previous correspondence. Necessity as explained by Mr Webster thus, ‘a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation’,¹¹ was deemed unrealistic because the interpretation was considered too restrictively imposed and inapplicable to the current case. The description of necessity was subject to further disagreement between the US and the British, although both countries were able to mediate the political dispute. In response, Mr Webster on 6 August 1842 accepted the apology, but continued to disagree on the definition of necessity.

Meanwhile, in the trial of Mr McLeod, the US government pursued the case in the Supreme Court, despite the British government’s plea to discharge the defendant based on *nolle prosequi* (no prosecution) and its application for habeas corpus. The case, *The People vs. McLeod*¹², went to trial, but resulted in discharge of the defendant due to insufficient evidence. As a result, the diplomatic disagreements regarding the arrest of Mr McLeod gradually declined, although the justification for the sinking of the *Caroline* remained disputed.

3. The Relevance of the *Caroline* affair in Contemporary International Law

The *Caroline* affair took place in the nineteenth century and yet it still influences *jus ad bellum* today. This section will seek to examine how the *Caroline* affair transformed into a legal doctrine that endures till today, despite a series of international legal developments in the intervening period. This will involve comparing previous practice and other defensive measures

¹⁰ *ibid.* 196

¹¹ British and Foreign State Papers 1840-1841 (n 7)

¹² *People V Alexander McLeod* 25 Wendell 483 (1841)

such as 'self-preservation', 'reprisal' with 'self-defence' as we understand it today.

The effect of the *Caroline* case is not immediately apparent in international law. The event itself was by its nature a political one, and it involved three principal parties, namely the British and American governments, and the Canadian rebels. Furthermore, if the *Caroline* incident is taken as an example of legal authority, customary law changes and develops over time. The development of customary law is influenced by state practice and by the judgments from international tribunals. However, Jennings observed that the importance of the affair proceeds from the fact that the disputes shifted from a political excuse to a legal doctrine.¹³ In the eyes of international law, the commentary on the event shaped the law of self-defence in a manner that has been sustained until the present day. Arguably, the correspondence between the two countries and the facts surrounding the affair are important to understand in any evaluation of the law of self-defence.

Many commentators have quoted the *Caroline* case as a source of law in self-defence and used the incident to justify several doctrines in *jus ad bellum*.¹⁴ In particular, it is claimed that the *Caroline* event established four main legal narratives of self-defence; (1) limitations on the use of force in self-defence; (2) recognition of the right to self-defence against non-state actors; (3) approval of the use of force in anticipatory self-defence; and finally (4) approval of the use of force in pre-emptive self-defence. All four claims will be assessed in relation to the *Caroline* case as this study seeks to understand what would be the correct interpretation of law. The first three claims have broad support in legal jurisprudence, however it is argued that pre-emptive self-defence falls outside the interpretation of the *Caroline* case.

¹³ R.Y. Jennings, 'The Caroline and McLeod Cases' (1938) 32 AJIL 82-99, 85

¹⁴ e.g. Tom Ruys, 'Armed Attack' and Article 51 of the UN Charter (CUP 2010) 255; Hilaire McCoubrey and Nigel White, *International Law and Armed Conflict* (Dartmouth 1992) 87

a. Sustainability of the *Caroline* Doctrine within International Law

Disagreement between two nations in the nineteenth century was not unique, as states commonly disagreed on a range of issues. However, what is exceptional is that the effects of the *Caroline* incident still resonate in contemporary international law. Therefore, it is important to understand in what context the *Caroline* case illustrates in *jus ad bellum*, and how the incident contributes to our understanding of the concept of self-defence.

i. From Multiple Justifications for the Use of Force to the Concept of Self-Defence

One of the biggest contributions of the *Caroline* incident is that it clarifies the concept of self-defence in international law. Although Article 51 of the United Nations Charter defines contemporary understanding of self-defence, arguably the elements of Article 51 do not necessarily reflect the concept of self-defence as understood in the nineteenth century (at the time of the *Caroline* incident). In 1837 self-defence was not a prominent subject in international law, and was usually considered under the heading 'self-preservation'.¹⁵ Furthermore, within the legal literature, there were other justifications for using force that were not only limited to self-defence.

The term 'self-preservation' is evident in the correspondence between the two governments following the *Caroline* incident. In the correspondence, both parties used the term 'self-defence' and 'self-preservation' throughout their exchanges without elaborating on the meaning of each terminology. For instance, the letter written by Mr Fox dated 6 February 1838 explained, 'The piratical character of the steamboat '*Caroline*' and the necessity of *self-defence* and *self-preservation* under which Her Majesty's subject acted in destroying that vessel would seem to be sufficiently established'.¹⁶ In another exchange dated 24 April 1841, Daniel Webster wrote, 'it is admitted

¹⁵ Stephen Neff, *War and the Law of Nations* (CUP 2005)

¹⁶ H. Ex Doc. 302, 25th Cong. 2nd Session; Public Record Office, F. O 5. 322 (emphasis added)

that a just right of *self-defence* attaches always to nations as well as to individuals, and is equally necessary for the *preservation* of both'.¹⁷ These letters suggest that at the time of the *Caroline* incident there was already a body of international law requiring states to justify the use of force. However, the letters did not distinguish between the two concepts, a fact that creates confusion for modern lawyers.¹⁸

Indeed, in the nineteenth century, legal literature on the use of force by states referred to both self-defence and self-preservation. Self-preservation was understood to be a fundamental right, enabling a sovereign state to violate another state's territory in certain circumstances.¹⁹ The concept of self-preservation could also be seen as encompassing other legal justifications for the use of force, such as self-defence, reprisal, self-help and necessity, which were all regarded as lawful prior to 1945.²⁰ Wheaton explains that the right to self-preservation derives from the right to self-defence.²¹ As early as the eighteenth century, Emrich de Vattel in *Le droit des gens* (The Law of Nations) wrote that the right to self-preservation is so paramount that the 'duties of states are subordinated to the right of self-preservation'.²² Legal literature at the time was influenced by various legal terminologies, which were employed to describe the lawful use of force against states, although distinctions and similarities were not then fully appreciated.

¹⁷ British and Foreign State Papers 1840-1841 (n 7) 1129

¹⁸ R.Y. Jennings, 'The Caroline and McLeod Cases' (1938) 32 AJIL 82-99, 92

¹⁹ Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Vol. 1, Longman 1992) 416; W E Hall, *Treatise on International Law* (Clarendon Press 1909) 264

²⁰ James Green, 'Self-Preservation' in *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law (online) March, 2009) 2

²¹ Henry Wheaton, *Elements of International Law* (Stevenson and Sons 1836) 81

²² Emrich de Vattel, *The Law of Nations or the Principles of Natural Law* (Carnegie Institution of Washington 1916) 14

The significance of the *Caroline* incident in contemporary international law was that it marked the recognition of self-defence as the only legitimate justification for the use of force. Other justifications such as self-preservation and reprisal that were lawful during the time of the *Caroline* incident are now deemed unlawful under current international law. However, since 1945, the only lawful unilateral use of force recognised in international law is self-defence as enshrined in Article 51 of the UN Charter. This right to self-defence can be linked historically to *Caroline* incident and in part the incident inform our understanding on the concept of self-defence today. However, it could also be said that our understanding of self-defence evolved through state practice including Article 51 and through the jurisprudence of the ICJ. Yet, the *Caroline* incident is significant in historical terms as a point of reference for customary self-defence.

In addition to the concept of self-preservation, there is also discussion over the concept of reprisal. The definition of reprisal must be stated with caution, because the meaning and lawfulness of reprisal changes over time. The meaning of reprisal in the nineteenth and twentieth centuries required an actual infringement of territorial sovereignty by the offending nation, which the victim could regard as a measure of war.²³ An example of reprisal contemporaneous with the *Caroline* incident was the 'Opium war' between Britain and China in 1839-1840. The dispute began when British nationals were mistreated in China for unlawfully importing opium, which the British government objected to, not because of restrictions on opium but in relation to the custody of the British nationals.²⁴ Consequently, the British government issued a Council Order authorising reprisal against China 'with a view of obtaining...satisfaction and reparation'.²⁵

²³ Evelyn S. Colbert, *Retaliation in International Law* (King's Crown Press 1948) 94

²⁴ Neff (n 15) 230

²⁵ *ibid.*

Another famous example of reprisal is the *Naulilaa* dispute between Portugal and Germany.²⁶ In October 1914, a German provincial governor and twenty soldiers were tasked with negotiating matters of common interest with the Portuguese at Naulilaa Fort, located at the border of Portuguese colonial territory in Angola. Because of a misunderstanding, Portuguese officials killed the Governor and two other German soldiers. Germany responded by attacking several Portuguese posts including the Fort. Portugal then claimed compensation, and an arbitration tribunal adjudicated the matter. Germany justified its actions based on a legitimate reprisal, but the tribunal rejected this claim. The Arbitration, did however explain that reprisal is a lawful justification if several conditions are met. The judgment of the Arbitration reflects the state of international law at the time; showing reprisal was considered a lawful justification for the use of force. Today reprisal is no longer regarded as a legitimate excuse for the use of force.

In the twentieth century, international law gradually developed to restrict use of force between states. In 1920, the Covenant of League of Nations, signed by the major powers at the time, such as the US, Great Britain (British Empire), China and France, agreed under Article 10 of the treaty 'to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League'.²⁷ Furthermore, member states of the League were obliged to settle dispute through non-forcible means such as submitting disputed matters to arbitration or judicial process.²⁸ Another development in the twentieth century was the Kellogg-Briand Pact of 1928, which explicitly denounced war as an instrument for national policy.²⁹ This effectively prohibited signatory parties (which numbered fifty-four states by 1929) from engaging in war to settle international disputes. In 1945, following the inception of the

²⁶ For facts of the incident see Portugal v. Germany (The Naulilaa Case), Special Arbitral Tribunal, Annual Digest of Public International Law Cases 526; Hans Kelsen, *Principles of International Law* (The Lawbook Exchange Ltd, 1952) 24-25

²⁷ Article 10 of the Covenant of League of Nations, 28 April 1919

²⁸ Article 12 of the Covenant of League of Nations, 28 April 1919

²⁹ Article 1 of the Kellogg-Briand Pact 1928 94 LNTS 57

United Nations Charter, the use of force to attack the territorial integrity and political independence of any state was made illegal.³⁰ However, the Charter allows for the use of force on the grounds of self-defence.³¹ Thus, the development of *jus ad bellum* was gradually restricted from various legal grounds for the use of force in the nineteenth century to only self-defence in the twentieth century, such that today the only lawful means to exercise unilateral force under the Charter mechanism is in self-defence.

The *Caroline* incident contributed to shaping the law on the use of force by only recognising self-defence and self-preservation as legal bases for violating American sovereignty and not mentioning other justifications such as reprisal. Developments in international law in the twentieth century further narrowed the scope for the use of force to only self-defence. The right to self-defence is now stated expressly in Article 51 of the UN Charter. Furthermore, the *Caroline* incident provides the platform that requires states to comply with the conditions of necessity and proportionality in the event of self-defence. These two conditions are absent in Article 51 but can be linked historically to the *Caroline* affair. Therefore, not only the right to self-defence that can be traced to the *Caroline* incident but also the limitations in the use of defensive measures. Again, it has to be borne in mind that the concept of self-defence developed since the nineteenth century but the *Caroline* incident still preserves the status as a point of reference for customary self-defence.

ii. Travaux Préparatoires and the *Caroline* Affair

It is beneficial to consider whether the drafters of Article 51 referred to the right to self-defence as stated in the *Caroline* incident by examining the travaux préparatoires of the United Nations Charter. By determining this, we can establish if there is a direct connection between Article 51 and the *Caroline* incident.

³⁰ Article 2(4) of the United Nations Charter 1945 1 UNTS XVI

³¹ Article 51 of the United Nations Charter 1945 1 UNTS XVI

Article 51 of the United Nations Charter is the point of reference for the right to self-defence for all member states. It was argued earlier that the *Caroline* case shapes contemporary understanding of self-defence; however, Article 51 does not explain the link between contemporary self-defence and self-defence as established in the *Caroline* incident. It may be opined that the scope of self-defence in the nineteenth century bore little relevance to the meaning of self-defence post-1945, especially during the drafting of Article 51. Furthermore, that the *Caroline* incident has no relevance to Article 51, because the contexts of the two in terms of the state of international law are so different. Despite these differences, it is argued that the *Caroline* affair still shapes the law of self-defence, or at least influences how international law sees self-defence.³²

The drafting history of the United Nations Charter shows no relationship between the right of self-defence and the *Caroline* incident. Discussions on the construction of Article 51 focused on two main issues.³³ First, issues of collective regional self-defence, such as within Latin American countries and the Arab states. Second, on the position of Article 51 within the Charter; this was mainly a technical editing issue, rather than one containing substantive elements of self-defence. Thus, it appears the drafters were not concerned with *Caroline* self-defence in the 1945 treaty, leading some commentators to surmise that the *Caroline* incident has no meaning within Article 51.³⁴ Article 51 is thereby judged to be independent of any influence prior to 1945, and to be the only reference source for invoking the right to self-defence in international law.

³² James Green, 'Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense' (2006) 14 *Cardozo J. Int'l & Comp. L.* 429-480, 446-473. The author argues that it is unhelpful for scholars to disregard the importance of the Caroline incident as it is useful to aid our understanding in the law of self-defence. See T.D Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy' (2006) 11 *JCSL* 361-369, 366-369

³³ Refer to Chapter 2 3.a. of this thesis.

³⁴ Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2012) 197

There are factors that might be construed to undermine the status and relevance of the *Caroline* incident in contemporary international law. The exchanges following the *Caroline* incident were simply a diplomatic exercise by both countries to resolve a dispute without going to war, and therefore the documents cannot be regarded as a source of legal rules.³⁵ In addition, there is nothing in the documents (correspondence) implying the issues raised were intended to govern the rules on the use of force in the future.³⁶ If the exchanges were not intended as a basis for the establishment of legal rules, it is unclear how the *Caroline* case became so immersed in contemporary international law as to be regarded as an important reference. As Kearley asks, 'why have modern scholars extracted Webster's statement from its context and made it into a rule of general prohibition, even though that general application distort history and can lead to the development of questionable legal rules?'³⁷ Another criticism of the *Caroline* affair as a reference for self-defence relates to justifications for the use of force in the nineteenth century. As explained above, the use of force could be justified on various legal grounds at that time. Ocelli argues that the *Caroline* incident was not representative of customary international law in the nineteenth century, and that the exchange of letters only reflects the American political views.³⁸ Therefore, based on the assumption that the documents were diplomatic letters and not a legal construction of doctrine, and the argument that the explanations made by both parties diverge from the practice at the time, it can be said that the *Caroline* affair cannot be regarded as a suitable reference for self-defence.

However, the argument above fails to reflect the significance of the *Caroline* incident in contemporary international law. Several cases before the ICJ have concluded that necessity and proportionality are to be imposed as

³⁵ Maria Ocelli, 'Sinking' the *Caroline*: Why the *Caroline* Doctrine's Restrictions on Self-Defense Should Not Be Regarded as Customary International Law' (2003) 4 San Diego International Law Journal 467-490, 476

³⁶ *ibid.*

³⁷ Timothy Kearley, 'Raising the *Caroline*' (1999) 17 Wisconsin International Law Journal 325-346, 330-331

³⁸ Ocelli (n 35) 480

limitations on self-defence, something not mentioned in Article 51.³⁹ The ICJ states both limitations refer to customary international law, which the majority view of scholars regard as a reference to the *Caroline* incident. It is wrong to suggest that necessity and proportionality are derived from Article 51, and it is also wrong to argue that the two limitations were created by the Court itself. The Court drew the notions of necessity and proportionality from customary international law, and this indirectly refers to the origin of the two limitations, the *Caroline* incident.

As explored above, there is no direct relationship found between Article 51 and the *Caroline* incident with regard to the understanding of self-defence. This is evidenced through the travaux préparatoires for Article 51. However, the absence of necessity and proportionality in Article 51 indicates that our understanding of contemporary self-defence must refer to other sources of law, specifically to customary international law. It is argued here that the literature of necessity and proportionality in the context of self-defence refer to the *Caroline* incident. This also shows the significance of the *Caroline* affair as a point of reference in customary self-defence.

4. Legal Narratives on the *Caroline* Doctrine

The destruction of the *Caroline* by British forces was an incident referred to by many commentators as reflecting the right to self-defence in customary international law and other legal narratives in *jus ad bellum*. The creation of legal rules as a consequence of the incident is termed the *Caroline* doctrine - legal rules for self-defence that are associated directly with the *Caroline* affair.

Four main doctrines result from the incident. First, the *Caroline* affair created limitations on the use of force in self-defence, restricting it to necessity and proportionality. Second, the incident established that self-defence can be

³⁹ See below Section 6 of this Chapter 'The Principles of Necessity, Proportionality and Immediacy in Jurisprudence of the International Court of Justice'.

exercised against non-states actors. Third, states are permitted to exercise self-defence in anticipatory fashion. Finally, the *Caroline* affair established the doctrine of pre-emptive self-defence. This section will attempt to analyse how each doctrine came into existence in *jus ad bellum*, and then explain its relevance to the *Caroline* case. These four doctrines also reflect the complexities of interpreting a historical incident like the sinking of the *Caroline* vessel when establishing it as a reference for contemporary self-defence. The interpretation of historical events is open to misinterpretation, because there is no clear mechanism to interpret customary international law for an event like the *Caroline* incident.

In spite of these doctrines originated from the *Caroline* incident, it must be noted that there were developments in *jus ad bellum* since the nineteenth century. Legal rules, although it can be traced back in history, do not freeze in time and it is subject to changes in state practice and customary international law. Nonetheless, these narratives that are associated with the *Caroline* affairs signify that the incident can be used as a reference for its origin in customary international law.

a. The Doctrine of Limitations on the Use of Force in Self-Defence

The most important interpretation of the *Caroline* incident concerns the recognition of the right to self-defence within customary international law. Notwithstanding the existence of the right to self-defence under the United Nations Charter, the sinking of the *Caroline* vessel is regarded as a primary example of the right to self-defence in customary law. Furthermore, the *Caroline* incident created limitations on self-defence, restricting it to the principles of necessity and proportionality. This is deduced from correspondence between the American and British governments regarding the incident.

In the exchanges, both countries affirmed that states have the right to self-defence. This is clearly expressed in the letter, 'Self-defence is the first law

of our nature, and it must be recognized by every code which professes to regulate the condition and relations of man'.⁴⁰ This statement shows that both states acknowledge the right to self-defence is accorded to all states. At present, the right to self-defence is not an issue in international law because Article 51 of the United Nations Charter upholds this right to all member states. In the nineteenth century, when the international legal system was not as well established or comprehensive as it is today, the *Caroline* affair offered a significant contribution by recognising the right to self-defence as a part of customary international law.

Although the right to self-defence is recognised under customary international law, force cannot be employed indiscriminately. Another vital contribution and interpretation of the *Caroline* incident is that it outlines the conditions imposed on the right to self-defence by establishing two principles: necessity and proportionality. Both principles were extracted from Webster's texts and simplified below:

"It will be for Her Majesty's Government to show upon what state facts, and what rules of national law, the destruction of the *Caroline* are to be defended. It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation."⁴¹

Whilst the meaning of proportionality was derived from the following sentence to describe the extent to which force could be exercised in self-defence. It states:

"It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or

⁴⁰ *British and Foreign State Papers 1841-1842* (Vol. XXX, James Ridgway and Sons 1858) 196

⁴¹ *British and Foreign State Papers 1840-1841* (Vol. XXIX, James Ridgway and Sons 1857) 1337-1138

excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”⁴²

Aside from the limitations of necessity and proportionality, a further restriction often associated with the Webster text was the concept of imminence. Although the exact word ‘imminence’ does not appear in the document, its meaning can be surmised. It mainly refers to timing in association with the exercise of self-defence. Thus, based on the Webster text, the limitations of necessity, proportionality and imminence were established.

b. The *Caroline* Incident and the Right to Self-Defence against Non-State Actors

Another interpretation of the *Caroline* incident is the doctrine that self-defence may be exercised against both states and non-state actors. Similar to the above, whereby it is argued that the *Caroline* doctrine acknowledges the principles of necessity and proportionality, it is also argued here that the *Caroline* incident supports the doctrine of self-defence against non-state actors.

Several commentators share the view that the *Caroline* incident is the source of customary international law for the right to self-defence against a non-state actor.⁴³ For instance, Franck assesses that in today’s context, threats and attacks are not only confined to states or governments, can also proceed from a non-state entity.⁴⁴ The law on self-defence against non-state actors can be linked to the *Caroline* incident because it outlined the limitations of self-defence in relation to the Canadian rebels, a non-state

⁴² *British and Foreign State Papers 1840-1841* (Vol. XXIX, James Ridgway and Sons 1857) 1337-1138

⁴³ E.g. Lubell (n 48) 35; Daniel Bethlehem, ‘Self-Defense Against An Imminent or Actual Armed Attack by Nonstate Actors’ (2012) 106 *AJIL* 769-777, 773. See also Helen Duffy, *The ‘War on Terror’ and the Framework of International Law* (CUP 2005) 153

⁴⁴ Thomas Franck, *Recourse to Force* (CUP 2002) 67

group, and not a government.⁴⁵ This in effect suggests that self-defence against non-state actors is lawful. From a slightly different perspective, it could be argued that if all the customary law requirements for self-defence are met (the requirement imposed as above; necessity and proportionality) then self-defence operations are permissible irrespective of the entity of the aggressor, whether a state or a terrorist group.⁴⁶ Maogoto recalls that this was the legal narrative espoused by President Clinton's administration when the US launched counter-measure operations against terrorist groups in Afghanistan and Sudan in 1998.⁴⁷

Two main observations can be extracted from the *Caroline* incident to form the doctrine of self-defence against non-state actors. First, if the conditions of self-defence (necessity and proportionality) are met by the invoking state, the defensive measure is arguably regarded as legal regardless of the entity involved. Thus, legality hinges upon the fulfilment of requirements and not the identity of the aggressor. Second, the correspondence addressed the issue of the use of force by British forces against a rebel, a non-state actor, harboured on American territory. Both countries acknowledged that each state has the right to protect itself, even if the aggressor is a non-state actor, the victim state is still afforded the right to self-defence. Therefore, this substantiates the argument that the *Caroline* doctrine and the Webster text were addressing the issue of state against non-state actor. Hence, customary law for self-defence against non-states actors arguably has strong connections with the *Caroline* incident.

Indeed, the *Caroline* incident may allude to the recognition that states have the right to self-defence against non-state actors historically. Nevertheless, it cannot be said that customary international law freeze in time and devoid of further development. As in the case of the *Caroline* incident, admittedly, at present, the right to self-defence against non-state actors may not entirely rely on the incident as a source of law. In addition, as explained earlier in

⁴⁵ *ibid* 67.

⁴⁶ Jackson Nyamnuya Maogoto, *Battling Terrorism* (Ashgate 2005) 114

⁴⁷ *ibid*.

this thesis, there are several state practice that may be construed to support the right to self-defence against non-state actors. Furthermore, it may be argued that Article 51 and jurisprudence of the ICJ are still open to interpretation thus allowing state to recourse self-defence against non-state actors. Be that as it may, it is maintain that the significance of the *Caroline* incident in legal literature serves as a point of reference for the right to self-defence against non-state actors and the right may evolve through time such as the inception of Article 51 of the UN Charter and with state practice.

Upon examination, there is a difference between the doctrine of self-defence against non-state actors and a doctrine that recognises the conditions of necessity and proportionality in the *Caroline* incident. The latter mainly refers to the correspondence between the British and American governments concerning the incident, whilst the former doctrine primarily concerns the entities involved in the incident, i.e. the British forces attacked Canadian rebels. Put differently, the doctrine of self-defence against a non-state actor relates to the circumstantial and anecdotal facts surrounding the *Caroline* incident whereby a government sank a rebel ship. In this case, the doctrine of necessity and proportionality in self-defence was not extracted from the historical facts associated with the *Caroline* incident but with the exchange of letters, specifically, the Webster text. Therefore, one doctrine links to the facts and one to the letters, although both originated from the same incident.

c. The Right to Anticipatory Self-Defence in the Context of the *Caroline* Incident

Some interpretation of the *Caroline* incident is the establishment of the right to anticipatory self-defence. Anticipatory self-defence differs from traditional meaning of self-defence as it allows self-defence to be taken even where the aggressor has not yet physically attacked the victim state but with the condition that the attack is regarded as imminent.⁴⁸

⁴⁸ See Elizabeth Wilmhurst, 'Principles of International Law on the Use of Force by States in Self-Defence (Chatham House, October 2005) pg. 8

Scholars argue that the right to anticipatory self-defence in customary law can partly be attributed to the *Caroline* incident.⁴⁹ This is derived when the British forces raided the Canadian rebel's outpost leading to the sinking of the *Caroline*, although the group had not attacked them. Later, the British government justified the act to the American government as an act of self-defence. By this, it is said that the sinking of the *Caroline* supports the doctrine of anticipatory self-defence.

However, scholars have not fully embraced the contention that the doctrine of anticipatory self-defence originated from the *Caroline* incident.⁵⁰ Some agree that the general right of anticipatory self-defence has merit without any affiliation to the *Caroline* incident. Dinstein argues that nothing connects the right to anticipatory self-defence with the *Caroline* affair, and that it is a misrepresentation to suggest that the *Caroline* correspondence advocates anticipatory self-defence.⁵¹ He justifies this by claiming its raison d'être was to determine whether the British could exercise self-defence in America without going to war with the US government, and not the legality on the use of force.⁵² Therefore, he argues the notion of anticipatory self-defence cannot be attached to the *Caroline* affair.⁵³ Assuming that anticipatory self-defence has links with the *Caroline* affair, the incident can only shed light on the general right to anticipatory self-defence in international law, as this

⁴⁹ Lindsay Moir, *Reappraising the Resort to Force* (Hart Publishing 2010) 12-13; Franck (n 54) 97-98; Lubell (n 48) 31; Malcolm Shaw, *International Law* (6th edn, CUP 2008) 1140; Amos Guiora, 'Anticipatory Self-Defence and International Law – A Re-Evaluation' (2008) 13 JCSL 3-24, 11; Lous-Philippe Rouillard, 'The Caroline Case: Anticipatory Self-Defence in Contemporary International Law' 1 (2004) Miskolc Journal of International Law 104-120, 118; Dino Kritsiotis, 'A Study of the Scope and Operation of the Rights of Individual and Collective Self-Defence under International Law' in Nigel White and Christian Henderson, *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 188-191

⁵⁰ See: Albrecht Randelzhofer and Georg Nolte, *The Charter of the United Nations: A Commentary* (Vol. II, 3rd edn, OUP 2012) 1421-1424

⁵¹ Dinstein (n 34) 197

⁵² *ibid.*

⁵³ *ibid.*

would 'be excessive in light of the very restrictive interpretation that can in fact be given to the *Caroline* incident'.⁵⁴

Article 51 of the United Nations Charter states that 'armed attack' is a precondition to exercise the right to self-defence: 'if an armed attack occurs...'. This makes it difficult to justify anticipatory self-defence within the context of Article 51 without referring to other sources of law. Customary international law offers an avenue for rationalising the right to anticipatory self-defence within the remit of Article 51. As suggested by Bowett:

"It is a fallacy of the first order to assume... that the right has no other content than the one determined by Article 51. Such a view produces a restricted interpretation of the right not warranted by the Charter. Not least of the restrictions involved in this view is the construction of Article 51, which limits the right of individual or collective self-defence to cases where an 'armed attack', occurs. This is a restriction certainly unrecognised by general international law, which has always recognised an 'anticipatory' self-defence."⁵⁵

In contemporary international law, there are growing support for the right to anticipatory self-defence in strict circumstances. Notwithstanding the arguments whether or not the right is established under Article 51 of the United Nations Charter, it is widely accepted by states that exercising self-defence in an anticipatory fashion is permissible. For example, in a *High-level Panel on Threats, Challenges and Change Report* in 2004 by the United Nations, the Secretary-General stated that 'Long-established customary international law makes it clear that states can take military action as long as the threatened attack is imminent, no other means would deflect it, and the action is proportionate'.⁵⁶ This narrative was reiterated by the

⁵⁴ Hilaire McCoubey and Nigel White, *International Law and Armed Conflict* (Ashgate 1992) 92

⁵⁵ Derek Bowett, *Self-Defence in International Law* (Manchester University Press 1958)

⁵⁶ UN Doc A/59/565 (2004), 2 December 2004, at para. 188

Secretary-General in 2005 in *In Larger Freedom*, which pointed out that 'Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened'.⁵⁷ The weight of these two reports drafted by the head of the United Nations does indicate that there are some proponents that are willing to support anticipatory self-defence, provided limitations are observed.

Despite the recognition of anticipatory self-defence by the UN Secretary-General, it is not universally accepted by all member states of the United Nations. For instance, members of the Non-Aligned Movement (NAM) reject the notion of anticipatory self-defence and maintained that self-defence must be adhered according to Article 51 of the UN Charter.⁵⁸ Gray argues that the rejection from NAM members totalling a number 118 member states show that states are still divided on the status of anticipatory self-defence in international law.⁵⁹

In the *Caroline* incident, the analysis of anticipatory self-defence is primarily directed toward the conduct of British forces against the Canadian rebels within US territory, and not the correspondence between the two countries. Therefore, a theme emerges in regard to the interpretation of the whole *Caroline* affair; that is, a doctrine can be extracted based on both anecdotes of the incident and through the letters written by the two governments (the Webster text). The doctrine of anticipatory self-defence derives from the former. At present, the notion of anticipatory self-defence is still open for debate although there are some states who are embracing this narratives irrespective whether it is associated with the *Caroline* incident or otherwise.

⁵⁷ UN Doc/A/59/2005, 21 March 2005, at para 124

⁵⁸ NAM Comments on the High-Level Panel Report, 28 February 2005, UN Doc A/59/PV.85, 14-15

⁵⁹ Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 165

d. The *Caroline* and the Claim of 'Pre-Emptive Self-Defence'

Another doctrine believed to have links with the *Caroline* affair, and perhaps the most contentious of all, is pre-emptive self-defence⁶⁰. Pre-emptive self-defence is 'where a party uses force to quell any possibility of future attack by another state, even where there is no reason to believe that an attack is planned and where no prior attack has occurred'.⁶¹ In contrast, anticipatory self-defence as referred above, directs the use of self-defence when an attack is perceived as incoming or imminent.

The relationship between the *Caroline* incident and pre-emptive self-defence is unclear, although authors often cite the two together without elaborating further. One possible justification for a connection between the two involves interpreting the conduct of British forces during the incident. The argument for pre-emption in the *Caroline* affair stresses that British forces raided the vessel in advance of any attack by the rebels, and that the British forces had no knowledge of any specific imminent attack. Not only did the British proceed to raid the *Caroline* vessel without such evidence, they also killed two Americans. Based on this narrative, it is possible to argue the case offers an example of pre-emptive self-defence upheld in customary law.

Another possible connection between the *Caroline* incident and pre-emptive self-defence is mentioned in the Webster text. The text reads, 'instant,

⁶⁰ David B. Rivkin Jr. and Lee A. Casey, 'Using Force Lawfully in the 21st Century' (2006) 81 *International Law Studies* 319-336, 320 (The author refers the term 'anticipatory self-defence' for the use of defensive measures without imminent armed attack i.e. Pre-emptive self-defence); Yaniv Roznai, 'Let the Caroline Sink! Assessing the Legality of a Possible Israeli Attack on Iranian Nuclear Facilities and Why the Traditional Self-Defense Formula is Incompatible with the Nuclear Age' (2010) 18 *California Journal of International Law* 18-34, 31. The author attempts to argue for relaxing the imminent requirement hence permitting pre-emptive self-defence. This has basis in the *Caroline* incident. In contrast see. Amy Eckert, 'Doctrine or Doctrinaire – The First Strike Doctrine and Preemptive Self-Defense Under International Law' (2004) 12 *Tul. J. Int'l & Comp. L.* 117-151, 145-149

⁶¹ May O'Connell, 'The Myth of Preemptive Self-Defence' *The American Society of International Law Task Force on Terrorism* (August 2002) fn. 10 at pg. 2

overwhelming and leaving no choice of means and no moment of deliberation'. This phrase makes no mention of armed attack as an essential condition. If the requirements of 'instant, overwhelming, no other means to resolve the matter' are met, then pre-emptive self-defence can be employed. Furthermore, customary international law is not static and can be modified to accommodate new contexts, probably giving some allowance to absorb the idea of pre-emptive self-defence into customary international law.⁶²

Scholars often cite pre-emptive self-defence with the *Caroline* incident without elaborating further.⁶³ For example, Bothe explains that the Webster formula can be expanded as far as acknowledging pre-emptive self-defence, but admits that 'this is as far as pre-emptive self-defence possibly goes' under the current international law.⁶⁴ However, he fails to explain how it could be interpreted in such a way. This issue arose when President Bush initiated the debate on pre-emptive self-defence in the National Security Strategy (2002) claiming the US has the right to use force in undertaking pre-emptive self-defence against its enemies.⁶⁵ The then legal adviser to the State Department, William Taft, argued that pre-emptive self-defence is indeed embedded within the *Caroline* doctrine, forming customary international law without explaining how the two relate to one another, he states:

"The doctrine of pre-emption to prevent a catastrophe resulting from an attack by weapons of destruction is, however, a natural extension of – and fully consistent with – the traditional right of individual and

⁶² Federic L Kirgis, 'Pre-emption Action to Forestall Terrorism' American Society of International Law Insights (June, 2002)

⁶³ Donald Rothwell, 'Anticipatory Self-defence in the Age of International Terrorism' (2005) 24 University of Queensland Law Journal 337-435, 346-347; Bin Cheng, 'Pre-emptive or Similar Type of Self-defence in the Territory of Foreign States' (2013) 12 Chinese Journal of International Law 1-8, 6

⁶⁴ Michael Bothe, 'Terrorism and the Legality of Pre-emptive Force' (2003) 14 EJIL 227-240, 231

⁶⁵ US National Security Strategy 2002 at p 15

collective self-defence to ensure that the right of self-defence attaches early enough to be meaningful and effective.”⁶⁶

It is argued that pre-emptive self-defence has no basis by referring to the *Caroline* incident based on two grounds. First, the *Caroline* affair cannot be said with certainty to reflect the intention and acts of the British forces were one of pre-emptive self-defence. It might be the case that it was merely anticipatory but not pre-emptive self-defence (absent of the condition of imminence). As pre-emptive self-defence is a contentious claim in *jus ad bellum*, any recognition of such right requires a clarity in the *Caroline* incident to reflect that it was indeed a pre-emptive self-defence that happened in the incident. As this is unclear reading from the historical accounts of the *Caroline* event, the incident could not be concluded to support pre-emptive self-defence in international law.

Second, state practice has shown that states are reluctant to endorse pre-emptive self-defence. Despite the ‘Bush Doctrine’ advanced by the US post-9/11, many states still reject the position of pre-emptive self-defence. As such, even if one argues that pre-emptive self-defence is part of the *Caroline* doctrine, it is argued that pre-emptive self-defence does not continue to evolve in today’s *jus ad bellum* due to lack of support from states.⁶⁷ Therefore, the claim that the pre-emptive self-defence finds support in the *Caroline* affair is a misunderstanding of the incident.

In summary, the claim of pre-emptive self-defence is argued by some to have originated from the *Caroline* incident. How the incident became subsumed into a doctrine in support of pre-emptive self-defence is vague. As a result, the incident cannot be said to support pre-emptive self-defence in customary international law. Partly, this is due to lack of clarity in the account

⁶⁶ William Taft, ‘Pre-emptive Action in Self-Defence’ (2004) 98 American Society of International Law Proceedings 331-333, 333

⁶⁷ Christine Gray, *International Law and the Use of Force* (3rd ed, OUP 2008) 214-216

of the *Caroline* incident and state practice is largely unwilling to endorse the notion of pre-emptive self-defence.

5. The Identification of Doctrines from the *Caroline* Incident

The above analysis demonstrates that the *Caroline* incident has been interpreted into a series of legal doctrines in customary international law. Therefore, it is important here to understand the process of interpretation as a means to create legal rules. Before analysing the interpretative process of the *Caroline* incident, it is beneficial to understand first the creation and existence of customary international law. Following that, this section will attempt an attempt to justify the interpretation of customary international law in the context of *Caroline* doctrine and to try to uncover an explanation for the creation of the *Caroline* doctrine. Simultaneously, this section will also identify the problems of interpreting the *Caroline* incident.

a. Customary International Law

The authority for customary international law can be found in Article 38(1)(b) of the Statute of the International Court of Justice, where it provides ‘international custom, as evidence of a general practice accepted as law’.⁶⁸ This provision acknowledges the existence of customary law and other primary sources of international law, such as treaties and general principles of international law.

b. Content and Creation of Customary International Law

There are two main elements in the creation of customary international law: state practice and *opinio juris*. These elements are recognised based on the judgment in the case *North Sea Continental Shelf* from 1969, where the Court states:

⁶⁸ Statute of the International Court of Justice, 18 April 1946

“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”⁶⁹

The two elements have since been re-stated in other cases, such as in *Continental Shelf Case (Libya v. Malta)* where the Court pointed out that customary international law must be ‘looked for primarily in the actual practice and *opinio juris* of States’.⁷⁰ This was mentioned again in *Nicaragua*.⁷¹ Therefore, the content of customary international law must involve two elements.

One of the problems in customary international law is defining *opinio juris* and state practice. Several writers raised the issue of what amounts to ‘state practice’. There appears to be no consensus amongst authors.⁷² D’Amato states: ‘a claim is not an act... claims themselves, although they may articulate a legal norm, cannot constitute the material component of custom’.⁷³ He believes that statements alone cannot form the basis for state practice, as this requires the actions of the state. Meanwhile Akehurst

⁶⁹ North Sea Continental Shelf, ICJ Rep (1969) p 44 para 77

⁷⁰ Continental Shelf Case (Libya v. Malta) (1985) ICJ Rep p 29 para 27

⁷¹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) ICJ Rep 1986 p 97 para 183

⁷² Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 2003) 133-136; Anthony D’Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) 52; Jörg Kammerhofer, ‘Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems’ (2004) 15 EJIL 523-553; Michael Akehurst, ‘Custom as a Source of International Law’ (1974-1975) 47 BYIL 1-53. See also Noora Arajärvi, *The Changing Nature of Customary International Law* (Routledge 2014) 18-23

⁷³ Anthony D’Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) 88

believes that statements can form a component of state practice and that the absence of action does not imply state practice does not exist, thereby contradicting D'Amato.⁷⁴ Furthermore, he argues that it is 'artificial to distinguish between what a state does and what it says'.⁷⁵ The arguments posed by scholars in the debate over 'act versus claim' reflect unsettled interpretations of state practice.

Another problem in customary international law is the complexity involved in creating a new customary international law or, as Michael Byers puts it, 'the chronological paradox'.⁷⁶ Customary international law presupposes there was already a practice in existence prior to the creation of a law, i.e. a custom that is believed to be a law.⁷⁷ The implication is that restricts state actors from creating new customary laws unless based on previously established practice; this would then not be regarded as a new customary international law. As a consequence, it is unlikely that a state will suddenly regard a practice as custom in international law without evidence of its existence.

As discussed previously, the *Caroline* incident is regarded as the source of law of self-defence in customary international law. The development of a custom into a legal rule requires both state practice and *opinio juris*. The extent to which these applied to make the *Caroline* incident custom is somewhat undeveloped. It is often assumed that the *Caroline* incident is a source of law without a need for further investigation. Similarly, the principles of necessity, proportionality and imminence are regarded as the benchmarks for the legality of self-defence without understanding how they were created.

⁷⁴ Michael Akehurst, 'Custom as a Source of International Law' 47 (1974-1975) BYIL 1-53, 2. The author states that state practice not merely physical acts of state but also claims, declarations in abstract such as GA Resolution, national laws, national judgments and omissions.

⁷⁵ *ibid* 3.

⁷⁶ Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 2003) 130-133

⁷⁷ See *Lotus Case* PCIJ (1927) at 28; *North Sea Continental Shelf Cases* (1969) p 38 para 77

Arguably, there is a gap in knowledge in terms of our understanding of the *Caroline* incident, which eventually transformed into legal rules. This gap in knowledge is rooted in the complicated interpretation of customary international law and the uniqueness of the *Caroline* doctrine. As will be shown below, the interpretation of customs requires numerous processes before they become law. Further adding to this complexity is the act of balancing various norms to create interpretation of customary law. Failure to justify the interpretation of the *Caroline* doctrine in legal literature leaves a huge gap in our knowledge, affecting the creation of customary self-defence based on the *Caroline* incident.

The uniqueness of the *Caroline* doctrine is that it is relied on a single incident involving just two governments and one rebel group to form a custom. Typically, customary interpretations generally refer to several practices in place when forming a coherent customary law. Scholars and practitioners must therefore act cautiously when interpreting the *Caroline* incident, because their conclusions essentially permit states to exercise force against other states. Therefore, an error in interpreting this source of law, may result in a grave violation of international law. Therefore, due to the uniqueness of the *Caroline* case, the interpretative process must be executed carefully.

c. Determination of Customary International Law

It is important to understand the determination of customary law, as this may provide insight into how the *Caroline* incident could be regarded as a source of self-defence in customary international law.

There are generally two main academic debates that apply when approaching customary international law. First, traditional custom, which primarily focuses on state practice (interaction and acquiescence of states) and treats *opinio juris* as secondary to identifying the difference between

legal and non-legal obligations.⁷⁸ Second, modern custom primarily refers to a general statement of rules, which concentrate on *opinio juris* rather than state practice.⁷⁹ The modern approach could be described as a deductive process because it infers custom from general statements, and thus tends to create custom more quickly comparative to tradition. Traditional custom is an inductive process that relies on observing state practice to create legal rules; therefore, it requires time to develop.

In recognising the two approaches in customary international law, it can be observed that there is tension between traditional and modern approaches to customary international law. Each approach tends to lean toward a different outlook. Traditional approaches seek to create legal rules by looking into the past and observing previous state practice. This facilitates the effectiveness of the legal rules once they have been implemented because it is generally acceptable as practice. The modern approach prioritises the aspiration of general statements to achieve the intended results from legal rules, thereby creating a forward looking approach. Koskenniemi characterises these two tensions as the competing tendencies of apology (the past practice – facilitative/descriptive) and Utopia (aspiring goals of the legal rules - normative). He recognises the competing views as follows:

“A law which would lack from State behaviour, will or interest would amount to a non-normative apology, a mere sociological description. A law which would base itself on principles which are unrelated to State behaviour, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way.”⁸⁰

⁷⁸ Anthea Elizabeth Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 AJIL 757-791; 758

⁷⁹ *ibid.*

⁸⁰ Martti Koskenniemi, *From Apology to Utopia* (CUP 2005) 17

Therefore, any interpretation of custom requires understanding of how to blend traditional and modern approaches to customary law, and how to recognise the tension between descriptive accuracy and normative appeal.

The ideal interpretation for customary international law is to balance the need for a facilitative process, which takes into account previous state practice, and simultaneously advances aspirations related to the law concerned. Kirgis argues that a balance between the two could be achieved by using a sliding scale. This scale would allow the creation of legal rules, by compensating one element with another. Kirgis explains:

“On the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris*, so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an *opinio juris* is required. At the other end of the scale, a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing [of state practice].”⁸¹

Based on the sliding scale, it is possible to create legal rules that are based on state practice, and which similarly apply to the creation of legal rules based on *opinio juris* only. However, the two extremes of the scale require an additional pre-requisite for balance. The problem arises at the middle of the scale, which requires the balance of *opinio juris* and state practice. Kirgis tackles this question by stating that it depends on the importance of the activity in question, and the reasonableness of the rule involved when seeking to strike a balance.

The criticism of sliding scales is that permitting *opinio juris* or state practice to solely form legal rules ignores the problem. The effect can be that *opinio juris* tends to satisfy the facilitative norm but at the cost of the goal of

⁸¹ Frederic Kirgis, ‘Custom on a Sliding Scale’ (1987) 81 AJIL 146-151, 149

attaining a legal rule. Similarly, for state practice, a sliding scale fulfils the need for a normative requirement but can disregard the effectiveness of the legal rule creating a utopian style standard. In any creation of a customary rule, the two elements of *opinio juris* and state practice must be fully satisfied.

Alternatively, traditional and modern approaches to customary international law could be amalgamated by applying a 'fit and substance' method and this is based on the works of Dworkin, who argues that interpretations of customary law must reach the threshold of 'fit'.⁸² Fit is an analytical process that makes practice eligible for interpretation. In doing so, the practice must accurately describe the custom.⁸³ There are three possible outcomes of this process. First, if there is no potential interpretation then custom cannot be presumed. Second, if there is only one possible interpretation then that becomes the custom. Third, if the practice qualifies for more than one interpretation, according to Dworkin, substance is then applied to the interpretations to determine the best interpretation. Substance includes consideration of moral and political views. Thus, the application of fit and substance is directed backwards, taking into account previous practices that help to facilitate the custom, and simultaneously try to achieve the aspirations or goals of the custom that denotes the most suitable interpretation.

The theory of fit and substance, as argued by John Tasioulas, enables the creation of custom by carefully selecting the best possible outcome from different practices. Roberts, however, argues that once an interpretation is determined then it must be further subjected to a 'reflective equilibrium' test,

⁸² John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16 *Oxford Journal of Legal Studies* 85-128, 113

⁸³ *ibid* 113-115. See also Brigit Schlütter, *Developments in Customary International Law* (Martinus Nijhoff Publishers 2010) 55-57

as created by Rawls.⁸⁴ This is a process in which the interpretation must be balanced between two spectrums of practice, in which the interpretation is facilitative and principles consist of morals. By doing so, the interpretation will take into account reality in practice (*lex lata*), and simultaneously seek to achieve the intended outcome (*lex ferenda*). Roberts further argues that the interpretation must be tested continuously with reflective equilibrium. This is because she believes customs are fluid and change over time, and therefore interpretation must adapt to these changes.⁸⁵ Therefore, interpretation requires continuous re-assessment of state practice and *opinio juris* to determine whether it is applicable in a new climate, in need of modification, or if a new custom is created. As a result, this process combines traditional and modern approaches to customary international law.

In summary, interpretations of customary law are based on two requirements, state practice and *opinio juris*, and any interpretation must consider both elements when forming custom. However, scholars are divided in their approach to the interpretation of customary international law, as it is generally divided into two methods, a traditional approach and a modern approach. How the *Caroline* incident is interpreted in customary international law and whether the approaches discussed fit the interpretation of the *Caroline* incident as customary authority in self-defence is analysed below.

d. The *Caroline* Incident in Customary International Law

The identification of customary international law is a complex process and authors have favoured many different approaches when interpreting it. Legal rules pertaining to the *Caroline* incident is a result of the translation of the incident into legal doctrines. If the *Caroline* incident is considered acceptable in mainstream views as an authority on customary self-defence, it must be possible to interpret the incident to form legal rules. Many contemporary

⁸⁴ Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757-791; 779

⁸⁵ *ibid* 784-788.

scholars regard the *Caroline* incident as the embodiment of self-defence requirements in customary international law. However, here the issue is not whether the *Caroline* incident is an authority for self-defence, but how the incident transforms into customary legal rules.

This analysis assumes that the *Caroline* doctrine is a well-established custom in international law, based on the cases put before the ICJ, where necessity and proportionality are regarded as having origin from customary international law on self-defence.⁸⁶ In addition, the majority of scholars regard the *Caroline* incident as the basis for the right to self-defence. Based on these positions, we argue that the *Caroline* incident forms the foundation for the right to self-defence in customary international law.

All the cases put before the ICJ that considered the right to self-defence agree that necessity and proportionality are derived from customary international law. However, the Court has failed to explain the source of the customary international law on self-defence.⁸⁷ Recalling the Statute of the International Court of Justice, customary international law is defined as 'evidence of a general practice accepted as law'.⁸⁸

An ironic aspect of the judgments made by the ICJ in relation to customary self-defence is that the Court never explicitly confirmed nor denied that the *Caroline* incident is the source of the principles of necessity and proportionality. However, the mainstream view in legal literature accepts that customary law on self-defence links to the *Caroline* incident, which created the conditions of necessity and proportionality. One explanation for the Court never having endorsed the *Caroline* incident is the complexities that might arise in its interpretation. As self-defence itself is a highly contentious area in international law, the Court has perhaps sought to avoid further complications affecting the debate. If the Court were to recognise the

⁸⁶ Refer to Chapter 2 Section 4 of this thesis. – Necessity and Proportionality in the Law of Self-Defence.

⁸⁷ Maurice Mandelson, 'The Subjective Element in Customary International Law' (1995) 66 BYIL177, 206-207

⁸⁸ Statute of the International Court of Justice, 18 April 1946

Caroline incident as the source of customary international law this would open the floodgate to multiple legal rights associated with the *Caroline* incident. For instance, the *Caroline* incident may be interpreted to mean that the Court accepts the notions of anticipatory or pre-emptive self-defence, which it has preferred to remain silent on thus far. The Court can insulate itself from misreading of the *Caroline* incident by remaining silent, while still maintaining that self-defence can be found in customary international law.

Another explanation could be that the Court has considered Article 51 in all the cases that relates to the question of *jus ad bellum* and concluded that necessity and proportionality is understood to be part of the provision. Therefore, the Court may see that there is no relevance in pronouncing the *Caroline* incident in its judgment. Alternatively, the Court has determined the effects of endorsing the *Caroline* incident would create more harm than good, and so have purposely avoided detailing the source of law. The criticism that the Court never fully justifies sources of international law (explaining the 'evidence of a general practice accepted as law') was countered by the President of the International Court of Justice, who stated that:

“[A]uthors are correct in drawing attention to the prevalent use of general statements of rules in the Court’s modern practice, although they take the point too far by insisting on theorizing this development. In fact, the Court has never abandoned its view, firmly rooted in the wording of the Statute, that customary international law is ‘general practice accepted as law’ — that is, in the words of a recent case, that ‘the existence of a rule of customary international law requires that there be a ‘settled practice’ together with *opinio juris*’. However, in practice, the Court has never found it necessary to undertake such an inquiry for every rule claimed to be customary in a particular case and instead has made use of the best and most expedient evidence available to determine whether a customary rule of this sort exists. Sometimes this entails a direct review of the material elements of custom on their own, while more often it will be sufficient to look to the

considered views expressed by States and bodies like the International Law Commission as to whether a rule of customary law exists and what its content is, or at least to use rules that are clearly formulated in a written expression as a focal point to frame and guide an inquiry into the material elements of custom.”⁸⁹

Recognising the *Caroline* incident as the source of law for customary self-defence in international law places the Court in a difficult position, as the incident may be misinterpreted. Moreover, the Court is not compelled to explain the source for every customary law, because it is sufficient for it to acknowledge such customary laws exist in international law.

e. Identifying and Interpreting the *Caroline* Incident in Customary International Law

Recognition of the *Caroline* doctrine infers that it is possible to identify the *Caroline* incident as a legal rule. To transform an incident to a customary rule shows there must be an interpretive justification citing the *Caroline* incident as the customary source for self-defence. This section seeks to explore the possible interpretive process of the *Caroline* incident, leading to the creation of the *Caroline* doctrines.

According to *North Sea Continental Shelf* and *Continental Shelf* cases, any creation of customary law must involve state practice and *opinio juris*.⁹⁰ To determine what state practice and *opinio juris* in the *Caroline* incident is challenging. This is because the creation of a custom usually results from multiple practices. In this case, the creation of a customary rule only relies on a single incident, which may not reflect an accurate description of state practice at the time. Another difficulty of identifying customary law in the context of the *Caroline* incident is it involves only two states (Great Britain and the United States). To generalise unilateral interaction only between two

⁸⁹ Peter Tomka, ‘Custom and the International Court of Justice’ (2013) 12 *The Law and Practice of International Courts and Tribunals* 195-216

⁹⁰ *North Sea Continental Shelf*, ICJ Rep (1969) p 44 para 77

states (Britain and America) and apply the rule to all states may appear to be an oversimplification of a single incident.

Nonetheless, there are two ways to extract state practice and *opinio juris* in the *Caroline* incident. First, the state practice can be derived from facts or circumstances pertaining to the incident. The facts and circumstances regarding the incident show that the British forces exercised force against the Canadian rebels on American territory. Furthermore, the British forces sank the *Caroline* vessel in response to threats made by non-state actors and British forces killed two Americans having entered America without gaining permission. Second, *Opinio juris* can be derived from the correspondence (written records) between the American and British governments regarding the sinking of the vessel. This document reflects the attitude of both countries, regarding what they believed to be the law at the time which is the right to self-defence. This indicates that the *opinio juris* of both countries is the right to self-defence. By dissecting *opinio juris* and state practice from the *Caroline* incident, it is possible to apply the traditional and modern approaches in the creation of customary law as discussed above.

Traditional custom in the context of the *Caroline* incident aims to focus on state practice. This involves observing the practice of British forces against the rebels. British forces raided the *Caroline* vessel on American territory without the permission of the American government, killing two Americans. The British government claimed this was an act of self-defence. Thus, the primary focus was on observing acts committed by British forces (state practice).

By following traditional approaches to custom it could be interpreted that the overall theme is the establishment of the right to self-defence. This could be extended to encompass the right to self-defence against non-state actors and the right to self-defence against an entity prior to an attack from an aggressor. The extension to the right to self-defence could be established because traditional approaches to custom focus on state practice (facts and

circumstances of the incident) and not *opinio juris* (correspondence). Thus, the practice of British forces created the right to self-defence and other rights related to self-defence.

In the correspondence, both states agreed that the right to self-defence exist but America disagreed with the manner in which the British employed force in this instance. In regard to modern approaches where the primary focus is on general statements (the correspondence) only the general right to self-defence could be agreed by both countries. Therefore, other rights related to self-defence such as self-defence against a non-state actor, or the right to anticipatory self-defence could not be established by modern approaches. Therefore, by taking a modern approach, the right to self-defence is regarded as the only custom possible to be interpreted and no other rights were recognised.

Comparing traditional and modern approaches in the context of the *Caroline* incident, the traditional approach created self-defence and other rights, such as self-defence against non-state actors, and exercising self-defence before an attack. For all these rights to be regarded as legal rules, subsequent practices must uphold that these rights as law or believed to be law. While modern approaches establish the general right to self-defence only.

Alternatively, assuming that the requirements of *opinio juris* and state practice are not required to create customary law in the *Caroline* case (due to the uniqueness of the *Caroline* incident or for any other reason) scholars then have just two sets of raw sources to interpret. First, scholars may analyse the historical facts and circumstances of the *Caroline* incident to create law or second, they may interpret custom based on the correspondence between the two countries.

Arguably there is an inherent flaw in the first type of analysis because this method of interpretation relies heavily on circumstantial evidence surrounding the incident. In other words, the doctrine is interpreted based on

the facts and circumstances of the case. As the incident occurred nearly two centuries ago and for contemporary scholars to use the incident to deduce legal rules, it is questionable whether the historical records are accurate especially in determining the circumstances during the incident. In contrast, if legal rules were derived from a written document which is reliable and published in reputable journals, it gives more credibility on the source of the legal rules.

It can be argued that the second type of analysis offers an expansive interpretation of the *Caroline* doctrine. The principles of necessity and proportionality were extracted through literal interpretation of the Webster text as explained above. Once the principles had been determined, the connotation of each principle evolved to accommodate new contexts. This caused each principle to undergo expansive interpretation so that it could encapsulate new rights, such as anticipatory self-defence and pre-emptive self-defence. Because of these processes the meaning of the *Caroline* doctrine is flexible yet retains its origin from the Caroline incident from the Webster text.

If it is correct to interpret from the facts surrounding the *Caroline* incident, it might then be possible to create unnecessary legal rules. This is because it only requires certain elements beneficial to *jus ad bellum* to be present in the Caroline incident to create legal doctrine. For instance, the doctrine of self-defence against non-state actors relates to the belligerents involved: the British government vis-à-vis Canadian rebels, a non-state entity. Therefore, the doctrine can be simplified into the right to self-defence against non-state actors. Similarly, the modus operandi executed by the British forces leads to the conclusion that the *Caroline* incident could be said to support anticipatory self-defence. For the sake of argument (perhaps a somewhat exaggerated example), it would be correct to suggest that the incident implies self-defence could only be exercised if the alleged aggressor is on a ship, and so self-defence is unlawful if the aggressor is inside a motor vehicle? Of course, no one would agree that self-defence could be executed only if a terrorist group was on a ship. However, this example reflects the

inexhaustible outcomes that might result from interpreting the circumstances of the *Caroline* incident.

As touched on in the preceding paragraph, the danger of interpreting classical events as a basis for legal rules is open to abuse. States may advance their arguments for the use of force, as long as they relate to the *Caroline* incident or at least, as long as the *Caroline* incident has some resemblance with its arguments. This will lead to an interpretation based on national interest rather than on objective legal rules that ought not to be state orientated.⁹¹ This may also explain why there are different opinions regarding anticipatory and pre-emptive self-defence based on the *Caroline* incident. For example, some commentators confirm that anticipatory self-defence reflects the *Caroline* case, simultaneously arguing that pre-emptive self-defence is not supported by the incident. Meanwhile other authors would argue that pre-emptive self-defence is indeed the correct outcome to be assumed from the *Caroline* incident. The core of this disagreement relates to disagreements about how to interpret the *Caroline* incident. Therefore, various outcomes could be concluded when interpreting the circumstances and facts associated with the *Caroline* incident.

The difficulty when constructing legal rules from an historical event stems from the unclear interpretive mechanisms of the *Caroline* case in *jus ad bellum*. These lead to the various doctrines that they are purportedly to uphold. For instance, as suggested above, at least four doctrines are associated with the *Caroline* affair. Therefore, states and jurists cannot be criticised for advancing their own views based on the *Caroline* case whatever they are. Had there been clear instruction on how to interpret incident like the *Caroline* case misinterpretation could be prevented.

In fact, there are several examples of guidance on methods for interpreting sources of international law. The 1969 Vienna Convention on the Law of Treaties outlines procedures for interpreting treaties and international

⁹¹ Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2006) 286-287

documents.⁹² However, the method suggested is inapplicable in the *Caroline* case, because it primarily deals with customary law. Regarding customs, the ICJ has provided several guidelines to determine what constitutes customary law. For example, the Court in the *Asylum* case stated that customary rule must be 'in accordance with a constant and uniform usage practised by the States in question'.⁹³ The Court also proffered further guidance, for instance that there must be some degree of uniformity amongst state practices before a custom can come into existence,⁹⁴ and that there is no time limit on the existence of state practice as custom, although it must be used extensively and be virtually uniform for the affected state.⁹⁵ These judgments may assist in determining the features of customary law; however, they do not shed any light on the interpretation of classical incidents like the *Caroline* case.

It can be concluded that the absence of a legal framework from which to construe legal rules regarding an incident that happened in nineteenth century leads to different opinions claiming to support various legal rules. This may be open to abuses by states arguing for their own national interests, while claiming objectivity. It could also be subject to misinterpretation or over-interpretation leading to endorsement of the wrong outcome. However, whether outcomes relating to the *Caroline* incident are erroneous, states and authors cannot be held responsible for misinterpretation because no legal framework is in place offering guidance to assist interpretation. Although the above analysis regarding the identification and interpretation of the *Caroline* case involves viewing the incident in the past, it is noted that customary international law changes and develops through state practice. It is wrong to suggest that the narratives espoused in *Caroline* doctrine should be seen in isolation and ignore the changes in international law. However, it is significant that the *Caroline* incident is a

⁹²Article 31 and 32 of the Vienna Convention on the Law of Treaty 1969 (UN Doc A/CONF.39/27)

⁹³Colombian-Peruvian Asylum Case, ICJ Rep 1950, pp. 276–7

⁹⁴Fisheries Case, (*United Kingdom vs. Norway*) ICJ Rep 1951, p. 116 at 131 and 138

⁹⁵North Sea Continental Shelf, ICJ Rep 1969, p.43 para. 74

point of reference in legal literature to determine the right to self-defence in customary international law.

6. The Principles of Necessity, Proportionality and Immediacy in Jurisprudence of the International Court of Justice

The establishment of the principles of necessity and proportionality have already been discussed in the context of the *Caroline* incident. These principles are also evident in the judgments made by the ICJ in cases concerning *jus ad bellum*. Cases decided by the ICJ on the legality of any defensive measures have evaluated fulfilment of the principles of necessity and proportionality. This reflects the importance of these principles to any state executing self-defence. This section will only highlight issues of necessity and proportionality in each case and analyse the Court's approach and in observing the two principles.

a. Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*)⁹⁶

The first case to consider when examining the importance of the principles of necessity and proportionality is the case of *Nicaragua*. Nicaragua accused the US of violating Article 2(4) of the UN Charter by using unlawful force and violating Nicaragua's sovereignty. In addition, it alleged that the US had breached its obligations in the Treaty of Friendship, Commerce and Navigation of 1956 signed by both countries. In response, the US justified its actions, stating that it had acted on the basis of collective self-defence by assisting El-Salvador. The Court found the US had been involved in the unlawful use of force against Nicaragua, and had violated its sovereignty.

This was the first case on the use of force brought before the ICJ, and it led the Court to make several important remarks on the scope of self-defence.

⁹⁶ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*) ICJ Rep (1986) p 14

First, the Court was challenged over its jurisdiction to adjudicate the law of self-defence. The US argued that the Court had no jurisdiction to oversee the right to self-defence in this case. The Court determined that, whilst acknowledging the content of the 1956 Treaty, it has the power to decide the scope of self-defence under customary international law. Thus, the Court could decide the legality of the claim of collective self-defence made by the US.

Secondly, the Court explained the scope of the law on self-defence. Article 51 of the UN Charter contains the right to self-defence; however, the same right can also be found in customary international law. In fact, the Court argued the term 'inherent right to self-defence' indicates that Article 51 itself refers to customary international law.⁹⁷ Thus, the source of law for self-defence can be derived from both the Charter and customary international law. In respect to the principles of necessity and proportionality, the Court stated that 'self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law'.⁹⁸ Therefore, the Court affirmed the existence of these two principles under customary law of self-defence. It thereby established a precedent in the jurisprudence of *jus ad bellum* that states must comply with the two principles when exercising the right to self-defence, even when self-defence is invoked under Article 51.

Another observation that can be made based on the judgment from *Nicaragua* is the terms of the assessment of necessity and proportionality. In *Nicaragua*, the Court examined the principles of necessity and proportionality according to action taken by the US' against Nicaragua. The Court categorised necessity according to the time taken to materialise the support given by the US to the Contras in El Salvador. The measures taken by the US only began to materialise months after a major offensive against the Government of El Salvador, and at the time the assistance was offered,

⁹⁷ *ibid* p 94 para 176

⁹⁸ *Ibid*.

the opposition's action against El Salvador had reduced.⁹⁹ On that basis, the Court found no necessity for the US to use force against Nicaragua, because it was capable of eliminating the main danger from El Salvador without involving Nicaragua. Thus, the Court established that the requirement of necessity did not exist to justify the measures taken by the US against Nicaragua on the basis of collective self-defence.

The requirement of proportionality was discussed in reference to the extent of the destruction enacted against Nicaragua. The Court considered the mining of ports, and attacks on oil installations in Nicaragua by the US, from September 1983 until April 1984 as not proportionate.¹⁰⁰ The Court judged there was lack of clarity regarding the extent of the aid provided by Nicaragua to the opposition in El Salvador. It could be observed here that the Court linked the destruction committed by the US with the extent of the aid; the Court states:

“Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid.”¹⁰¹

The comparison between the size of the aid and the proportionate destruction of Nicaragua's assets may be confusing. This is because it is hard to quantify the size of aid (assuming it is in monetary terms or even to quantify supplies such as weapons and logistical support), and this makes determining the proportionality of any response difficult to evaluate. Furthermore, even if all the evidence were presented to the Court, the question of 'proportionate to what?' could not be answered based on the wrong doing of another party, although it could be realised based on the aim of self-defence. The end result of any defensive measures is not to question whether the force used by the aggrieved state in self-defence is

⁹⁹ *ibid* p 122 para 237

¹⁰⁰ See *ibid* p 48 para 81

¹⁰¹ *ibid* p 122 para 237

proportionate to the armed attack, but rather whether the state in question has achieved the aim of self-defence. The question of the aim of self-defence will be argued in the next Chapter.

In summary, in *Nicaragua*, the Court firmly established that it was feasible to decide on the matter of self-defence under customary international law, despite reservations about excluding Article 51 from any bilateral or multilateral agreements. The Court also concluded that the principles of necessity and proportionality are pivotal to the legality of self-defence, and failure to comply with these may render the actions of the invoking state unlawful. Specifically on the issue of necessity, the Court believes that the effects of any measures taken in self-defence should be the countering of any attack or threat, and that a threat must exist to justify the execution of self-defence. Concerning proportionality, the Court balanced the effects of the defensive measures against the alleged wrong doing; claiming the proportionality of the riposte must match the wrong doing. This judgment firmly establishes that the lawfulness of self-defence requires fulfilment of the conditions of necessity and proportionality.

b. Oil Platforms (Islamic Republic of Iran v. United States of America)¹⁰²

The law of self-defence and the requirements of necessity and proportionality were further discussed in relation to *Oil Platforms*. The Court found insufficient evidence to suggest that the 'armed attack' against the US had been executed by Iran, and therefore judged the self-defence measures taken by the US as unlawful. The judgment in this case indicates the importance of the requirements of necessity and proportionality in the lawfulness of any self-defensive actions.

There were two main points raised in this case. The first incident concerned the attack against the *Sea Isle City*, a Kuwaiti tanker flying the US flag, by a

¹⁰² *Oil Platforms (Islamic Republic of Iran v. United States of America)* ICJ Rep (2003) p 161

missile in October 1987 within Kuwaiti waters. The US alleged that Iran had launched a silkworm missile against the Sea Isle City from the Fao area and that Iran had captured three Iraqi missile sites in 1986.¹⁰³ In the attack, the vessel was damaged and six crew members were injured. In response, the US invoked the right to self-defence under Article 51, using force against the Reshdat and Resalat oil complexes, within the territory of Iran. Iran contested that it had not launched the missile against Sea Isle City and claimed that it was fired by Iraq, although Iran admitted that it had captured the Fao area in 1986 the military sites were badly damaged during the Iran-Iraq War.¹⁰⁴

The second incident mentioned in this case was an attack against the *USS Samuel Roberts*. On 14 April 1988, a mine struck the USS Samuel Roberts within international waters, and the US accused Iran of the attack. The US claimed there was evidence to link the mine with Iran because its serial number matched those of other Iranian mines.¹⁰⁵ In response to the attack against its vessel, the US invoked the right to self-defence under Article 51¹⁰⁶ and attacked the Salman and Nasr complexes, oil platforms, on 18 April 1988. Iran rejected the claim that it was responsible for the mine attacks; although it admitted it had laid mines during the Iraq-Iran war it claimed the US also laid mines during the war. It was further contended by Iran that the attacks against its territory contravened the Treaty of Amity, Economic Relations and Consular Rights 1955, signed by both countries.

In its judgment, the Court analysed the question of necessity and proportionality in self-defence by referring to jurisprudence in the *Nicaragua* case. The argument made by the US on necessity was that force could only be used as a matter of last resort. This was exemplified when the US argued that the force it had enacted against the Reshadat and Resalat Complexes

¹⁰³ *ibid* p 187 para 52-53

¹⁰⁴ *ibid* p 188 para 54-55

¹⁰⁵ *ibid* p 195 para 71

¹⁰⁶ Letter from the United States Permanent Representative in 18 April 1988 (S/19791)

was made after several factors had been considered, and after non-forcible measures were taken. The US claimed that Iran had repeatedly attacked neutral ships and naval vessels, which seriously impeded their security duties, and resulted in its nationals suffering financial losses.¹⁰⁷ The US stated that 'it was clear that diplomatic measures were not viable means of deferring Iran from its attacks: "Accordingly, armed action in self-defense was the only option left to the US to prevent additional Iranian attacks"¹⁰⁸. The argument set forth by the US reflected the condition of necessity; it argued self-defence measures were being executed in the absence of other alternatives.

Another aspect of necessity raised by the Court was the military targets. The Court enquired as to why the targets had been chosen by the US, in particular why it deemed it necessary to use force against them. The US claimed there was military presence and activity on the Reshadat oil platforms, and at the Salman and Nasr Complexes. However, it failed to present credible evidence to the Court of this, and rather proceeded to attack the targets based on self-defence.¹⁰⁹ The Court emphasised that there must be strong evidence that the targets contributed to the armed attack in order to make a case for necessity in using force against them. The Court explains:

"In the case both of the attack on the Sea Isle City and the mining of the USS *Samuel B. Roberts*, the Court is not satisfied that the attacks on the platforms were necessary to respond to these incidents. In this connection, the Court notes that there is no evidence that the United States complained to Iran of the military activities of the platforms, in the same way as it complained repeatedly of minelaying and attacks on neutral shipping, which does not suggest that the targeting of the platforms was seen as a necessary act."¹¹⁰

¹⁰⁷ Oil Platforms (n 101) p 185-186 para 49

¹⁰⁸ *ibid* p 185-186 para 49

¹⁰⁹ *ibid* p 198 para 76

¹¹⁰ *ibid* p 198 para 76

Thus, in order for lawful self-defence, the invoking state must show that the targets were the origin of the armed attack, thereby proving it was necessary to use force against them.¹¹¹ Failure to do so may result in a judgment of illegality regarding the act of self-defence because the requirement for necessity would not be met.

In terms of the target, in *Nuclear Weapons Advisory Opinion*, the Court stated that self-defence must 'also meet the requirements of the law applicable in armed conflicts which compromise in particular the principles and rules of humanitarian law'.¹¹² The Advisory Opinion from the Court seems to suggest that there must be an element of *jus in bello* in determining *jus ad bellum* and this was criticised by some commentators.¹¹³ Moir, however, suggested that it might be the case that the Court was referring to the requirement of necessity rather than creating additional requirement for a lawful self-defence.¹¹⁴

Another point raised in the judgment of *Oil Platforms* is the meaning of necessity itself. The Court highlights that:

“[T]he requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any “measure of discretion”.¹¹⁵

This text amplifies the meaning of necessity by attaching to it the ‘purpose’ of self-defence. However, the Court went no further in explaining what it intended by this passage. The question that arises here relates to the purpose of self-defence and lack of clarity in terms of the meaning of the

¹¹¹ Ruys (n 14) 106

¹¹² Nuclear Weapons Advisory Opinion ICJ Rep. 1996 p 226 para 51

¹¹³ James Green, ‘Self-Defence: A State of Mind for State?’ (2005) 55 Netherlands International Law Review 380-381

¹¹⁴ Lindsay Moir, *Reappraising the Resort to Force* (Hart Publishing 2010) 125

¹¹⁵ Oil Platforms (n 101) p 196 para 73

phrase 'measure of discretion'. Nonetheless, it was a step forward that the Court had identified necessity as something that must be assessed in relation to the aims of any use of force in self-defence.

The Court also considered the principle of proportionality, although briefly. The Court explained that the proportionality test must be judged according to overall measures taken by the invoking state, or in the words of the Court, 'it cannot close its eyes to the scale of the whole of the operation'.¹¹⁶ Hereby, the Court noted that it must take into account the destruction of Iranian vessels and aircraft by the US. The Court found the US use of force in self-defence in this case could not be justly regarded as proportionate.

An interesting point made by the Court related to the interaction between the requirements of necessity and proportionality. The Court first considered all the arguments for the principle of necessity and found the US did not meet the requirement. When the Court then considered the issue of proportionality, the Court commented, 'as to the requirement of proportionality, the attack of 19 October 1987 might, had the Court found that it was necessary to the Sea Isle City incident as an armed attack committed by Iran, have been considered proportionate'.¹¹⁷ This signifies that the two requirements are to be considered separately, and that the first requirement that must be met by the invoking state is necessity and not proportionality. This demonstrates the significance of necessity in the self-defence framework. However, the Court did not expand on what happens if proportionality is met and how then necessity is determined.

In summary, *Oil Platforms* shows that the jurisprudence of the Court, as it describes the lawfulness of self-defence relates to the fulfilment of the requirements of both necessity and proportionality. Necessity in this case was determined by asking whether the use of force was necessary upon the intended target and enquired regarding the chosen target. There was also mention of whether the targets contributed to the armed attack. This case

¹¹⁶ *ibid* p 198 para 77

¹¹⁷ *ibid* p 198 para 77

also highlights that the principle of proportionality must be understood as an overall measure of the self-defence and as such cannot be judged in isolation.

c. Legal Consequences of the Construction of a Wall Case in the Occupied Palestinian Territory (Advisory Opinion)¹¹⁸

On 8 December 2003, the United Nations General Assembly adopted a Resolution that sought the opinion of the Court on the construction of wall in the Palestinian territory.¹¹⁹ The Court assessed several issues related to the implications of the construction of the wall in international law, the status of Israel as an occupying power, the right of the Palestinian people to self-determination, and the right to self-defence. In respect to the claim of self-defence the specific question posed to the ICJ was:

“What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”¹²⁰

When justifying the construction of the Wall, Israel, among other claims, invoked the right to self-defence. Israel stated that the construction of the wall was an act of self-defence consistent with the right as enshrined in Article 51 of the United Nations Charter.¹²¹ Israel further argued that it relied on Security Council Resolutions 1368 (2001) and 1373 (2001) that reflect

¹¹⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) ICJ Rep (2004) p 136

¹¹⁹ General Assembly Resolution A/RES/ES-10/14 (12 December 2003)

¹²⁰ *ibid.*

¹²¹ A/ES-10/PV.21 p. 6

the right to self-defence against terrorists, and that Israel was the victim of continuous terrorist attacks.¹²²

Palestine counter argued that the construction of the Wall by Israel did not meet the criteria for self-defence.¹²³ Palestine states that Israel failed to satisfy three main points. First, Palestine denied that the violence in the Occupied Territory qualified for the meaning of an 'armed attack' as required in Article 51.¹²⁴ Secondly, Palestine argued that Israel could not justify the construction of the Wall because self-defence could only be exercised if there is an imminent or actual armed attack.¹²⁵ Finally, that the construction of the Wall did not meet the requirement of proportionality. The act of constructing a Wall, as Palestine argued, was a disproportionate response to terrorist attacks.¹²⁶

The Court held that it is not applicable to apply Article 51 in this case.¹²⁷ The Court based its judgment on two main factors: First, that the armed attack in question was not imputable to a foreign state, maintaining that Article 51 recognises the right to self-defence in the case of 'armed attack by one state against another state'.¹²⁸ Secondly, the Court deemed the threats with which Israel was concerned had originated from within its own territory.¹²⁹ Therefore, as Article 51 refers to an armed attack by a foreign entity, the invocation of self-defence was not relevant. Thus, the Court found that under the criteria of self-defence (based on the first requirement stated in Article 51 'if an armed attack occurs') this case did not meet the standard envisaged in the Charter.

¹²² See Israel Written Statement to the Proceedings (30 January 2004) p. 17 para. 2.25. See also Letter from Israel Ambassador to United Nations Secretary General dated 26 January 2004

¹²³ Written Statement by Palestine to the Proceedings (30 January 2004) p 232 para 530

¹²⁴ Ibid p 233 para 531

¹²⁵ Ibid p 233 para 532

¹²⁶ Ibid p 233 para 533

¹²⁷ Legal Consequences of the Construction of a Wall (n 117) p 194 para 139

¹²⁸ Ibid

¹²⁹ Ibid

A further observation that can be made relative to this case is the reading of Article 51. The Court stated that the armed attack was not imputable to a foreign state. This implies that the Court could only accept action if an armed attack was committed by a state. That is, Article 51 is only applicable in state versus state disputes.

The view taken by the Court in this case is a diversion from the jurisprudence of *Nicaragua* case. Recalling the judgment of the Court in *Nicaragua*, the Court was willing to accept that in limited circumstances, a state may recourse to self-defence against non-state actors if the conditions of attribution and threshold are met. However, in *Wall* case, the Court expressly state that self-defence is between states. This position is criticised by Judge Higgins where she commented that 'nothing in the text of Article 51... stipulates that self-defence is available only when an armed attack is made by a State. That qualification is rather a result of the Court so determining in [the *Nicaragua* case]'.¹³⁰

Indeed, it is questionable whether the facts of this case should be viewed in light of *jus ad bellum* or it should be determined in other aspects of international law.¹³¹ This is because Israel had control over the Occupied Territory of Palestine and the attacks originated within the Occupied Territory. The Court rightly decided that this case is not within the realm of the law of self-defence. Furthermore, the Court saw no relevance of SC Resolution 1368 and 1373 (2001) and cannot judged this matter to be a *jus ad bellum* issue.

In summary, this case reiterates the importance that states in exercising self-defence, requires that there must be an armed attack and any response must meet the requirements of necessity and proportionality. It is highly doubtful that *Wall* case contributes any significant discussion on the issue of

¹³⁰ Separate Opinion of Judge Higgins in Legal Consequences of the Construction of a Wall at para 33

¹³¹ *ibid* at para 34

jus ad bellum. In fact, it creates more confusion. This is by making a statement that Article 51 is applicable between states. This position is in contrast to the jurisprudence espoused in *Nicaragua*. The Court also highlighted that the facts of this case is not a question of international but rather it should be dealt with Israel's domestic law.

d. Case Concerning Armed Activities in the Territory of the Congo¹³²

The Democratic Republic of Congo (DRC) initiated this case against Uganda in June 1999. The DRC submitted several claims against Uganda, *inter alia*, Uganda had violated the territorial integrity and political independence of the DRC contrary to Article 2(4) of the United Nations Charter and Article 3 of the Charter of the Organisation of African Unity.¹³³ The DRC contended that the Ugandan army had invaded seven provinces in the DRC since August 1998. It was also alleged that the Ugandan army had committed massacres, rape, abductions, murders systematic looting and human rights violations in DRC territory.¹³⁴ In response, Uganda denied any a violation of the DRC's territory and any crimes committed against its neighbour.

The issue of territorial violation by Uganda originated from an agreement between the two countries. Prior to 1998, President Laurent Kabila had allowed Ugandan forces to enter Eastern DRC for security purposes. However, consent was withdrawn in July 1998 in an agreement made by the host government governing foreign troops in the Congo.¹³⁵ Uganda contested that its consent was primarily directed toward foreign troops and not specifically to Ugandan troops. Uganda further argued that, even if its consent had been withdrawn, Uganda has the right to self-defence after September 1998.

¹³² Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) ICJ Rep (2005) p 168

¹³³ Application Instituting Proceeding, Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) 23 June 1999 p 13-15

¹³⁴ *ibid* p. 7-9

¹³⁵ Armed Activities (n 131) para 99 p 211

The Court found Uganda had no claim to self-defence under Article 51 of the United Nations Charter. This is because Uganda did not claim there was an attack or an imminent attack against it. Uganda alleged that the DRC government had collaborated with Sudan by assisting an opposition military group in Uganda; the Allied Democratic Forces (ADF). Uganda corroborated its claim by presenting several examples of evidence, such as intelligence reports, eye witness accounts and the deployment of military weapons. However, the Court was not convinced that the evidence could be relied upon to show there was an agreement between DRC and Sudan in support of the opposition group in Uganda.¹³⁶ Due to weak evidence linking the attacks against Uganda with the DRC, the Court found no case for self-defence by Uganda. The Court further explained that even if there were an armed attack, Uganda's actions would fail to meet the criteria of necessity and proportionality. The Court ruled:

“[S]ince the preconditions for the exercise of self-defence do not exist in the circumstances of the present case, the Court has no need to enquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and in a manner that was proportionate. The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of trans border attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.”¹³⁷

The passage above is indicative of how the Court applies the requirements of necessity and proportionality. It first considers whether there is an armed attack. If the answer is affirmative the Court then decides if the principles of necessity and proportionality were applied. In this case, the Court exemplifies the siege of airports and towns to evaluate the two requirements

¹³⁶ *ibid* para 130 p 219

¹³⁷ *ibid* para 147 p 223

for self-defence. The Court notes the distance between the Uganda border and the sieged areas were ‘hundreds of kilometres’ apart. However, if the Uganda forces had taken towns several kilometres away from its border, then would that have constituted compliance with the two requirements for self-defence? The Court is silent on this point. Yet, this passage suggests that the distance between the border and the area attacked may sway judgment over the legality of force in self-defence in particular its relevance to the requirements of necessity and proportionality.

Another significance of this case, despite the Court’s dismissal on the applicability of self-defence, is it raises the question of attribution. The claim made by Uganda that DRC and Sudan were responsible for the attacks committed by ADF could not be substantiated. In reaching that position, the Court applied the test used in *Nicaragua*:

“The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3(g) of General Assembly resolution 3314 (XXIX) on the definition of aggression...”¹³⁸

Judge Kooijmans in his Separate Opinion commented on this by stating the Court does not only endorse the jurisprudence of *Nicaragua* but the Court also rejected Uganda’s claim that mere tolerance towards non-state actors could trigger the right to self-defence.¹³⁹

Meanwhile, it is true that the Court may and rightly so avoided from answering the contentious issue of self-defence in this case. However, if the Court wishes to clarify the matter on the law of self-defence against non-state actors in its jurisprudence, the Court had the opportunity to do so. However, it remained reticent. In fairness, the Court was focused on judging

¹³⁸ Ibid para 146

¹³⁹ Separate Opinion of Judge Kooijmans in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* ICJ Rep (2005) para 22

a case regarding the claim of Uganda's use of force in DRC – an inter-state matter and not ADF's action in Uganda.¹⁴⁰

In sum, the Court approached the issue of necessity and proportionality in each case based on the facts presented by the relevant parties. It can be observed that there is no fix method in determining what constitute as necessity and proportionality. However, this case shows that fulfilment of the principles of necessity and proportionality by the invoking state is decisive in the legality to use force in self-defence. Another significance of this case was that the Court used a test espoused in *Nicaragua* case to determine the attribution of a non-state actor with a state.

7. Conclusion

The *Caroline* incident has had a huge effect in shaping our understanding of the law on self-defence. It is the focal point of reference for the right to self-defence under customary law and from this source of authority several doctrines emerged in relation to the scope of self-defence. In particular, several legal rules were established, namely, that the right to self-defence should be limited to necessity and proportionality, that the right to self-defence against non-state actors exists, and that states have the right to anticipatory self-defence and the right to pre-emptive self-defence.

Caroline self-defence doctrines have contributed to the development of *jus ad bellum*. In the nineteenth century, there were several legal grounds allowing states to exercise force lawfully. However, after the creation of the United Nations Charter in 1945, the only legal basis upon which it is legal to exercise force is Article 51; i.e. on the grounds of self-defence. However, Article 51 is not the only source of law touching on the right to self-defence, and it is far from clear in terms of mentioning the scope of self-defence. For instance, the limitations on self-defence are not mentioned in Article 51, and customary international law is thereby required to establish this limitation.

¹⁴⁰ Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 134

Furthermore, cases from the ICJ confirm that self-defence must comply with necessity and proportionality, establishing that these are part of the customary requirement of self-defence. In customary law, this is a reference to the *Caroline* doctrine, which establishes the limitations of necessity and proportionality. Although self-defence post-1945 is governed by Article 51 self-defence, the applicability of customary self-defence remains significant.

Although the *Caroline* incident is argued to have a significant impact in *jus ad bellum*, yet there are several factors that may diminish its status as source of law in customs. For example, it can be questioned that the *Caroline* incident was not intended to have any legal implications and it was merely a political disagreement between two states. Furthermore, a dispute which only affected two countries could hardly be said as a general practice and *opinio juris* of states. In addition, the *Caroline's* impact in international law may not have any relevance in contemporary international law as customs do not freeze in time and state practice changes. Therefore, it could be seen here that the *Caroline* affair may not be so significant in international law today.

However, in legal literature, the *Caroline* incident still preserves its status as a focal point on many aspects of the law on self-defence in customs. There are many legal narratives or doctrines that emanate from the affair. The creation of the *Caroline* doctrines in customary international law reflects the possibility of translating such an incident into legal rules. There was an interpretive process involved in transforming the details of the incident into several doctrines. How an incident becomes a legal rule is unclear in legal literature. This thesis contributes to discussion in the literature of self-defence by attempting to justify the creation of the *Caroline* doctrines. This is by interpreting the incident through the requirement of *opinio juris* and state practice or by literal interpretation from the sources. However, it is observed that the difficulty of understanding the existence of *Caroline* doctrines originates from unclear method of interpreting classical event like the *Caroline* incident. This may result in abuses of interpretation and therefore open to speculation.

Despite the problems of interpretation, it is argued that the *Caroline* incident establishes doctrines of self-defence which are still recognised till today although it may change according to state practice and Article 51. The ICJ reiterates that any use of force in self-defence must fulfil the requirement of necessity and proportionality. This then becomes the jurisprudence of the Court and solidifies the prominence of the *Caroline* doctrine in contemporary international law. The meaning of each term, necessity and proportionality and their application remains unclear. Therefore, the following Chapter will examine the scope of necessity in the context of self-defence.

Chapter 4: Necessity within the Legal Framework of Self-Defence

1. Introduction

This Chapter will commence by evaluating the issues surrounding the meaning of necessity within the legal framework of self-defence. It will serve as a preliminary framework for the following Chapter which will assess further the principle of necessity.

Another originality of this thesis is by understanding the role of necessity in the framework of self-defence. In this Chapter, this study will argue that necessity has a dual role. First, it acts as a requirement to self-defence and second, necessity acts as a limitation to use force.

This Chapter is divided into six sections. In Section 2, the interpretation of necessity will be examined from multiple perspectives. Namely, viewing necessity as a matter of last resort, subjective and objective tests to determine necessity, interpreting necessity according to the Webster Formula (the *Caroline* incident) and finally, seeing necessity in relation to the aim of self-defence.

Section 3 will discuss the relationship between necessity and proportionality. It will start by explaining necessity in *jus ad bellum*. Due to the fact that self-defence is determined by both necessity and proportionality, it is imperative when analysing necessity to consider the principle of proportionality. Accordingly, section 3 will attempt to assess the implications of proportionality with necessity and the relationship between the two principles.

The main aim of this Chapter is to deconstruct the content of the principle of necessity, so that it can be elaborated on further in Chapter 5. Therefore, it will first explore necessity as a requirement for the use of force self-defence involving the exercise of force. In such cases, necessity is judged based on the existence of a threat or an armed attack and determines use of force as

a last resort. Secondly, it will also cover the limitations imposed on the defensive use of force; i.e. that the invoking state should only employ force if it is necessary. Therefore, both aspects are considered to comprise the content of necessity.

It is argued in this Chapter that necessity and proportionality can be considered separately however, it is acknowledged that there are overlapping areas between necessity and proportionality. This is inevitable as all aspects of self-defence are interrelated. In this thesis, the idea of necessity as a limitation to self-defence may seem to conflate with the principle of proportionality. Yet, it is maintained that the distinction between the two is that necessity as a limitation focuses on the aim of self-defence whilst proportionality focuses on the scale and intensity on the use of force in self-defence.

Section 5 will discuss the application of necessity in self-defence against state or non-state actors, serving as a prelude to the next Chapter. Finally, in Section 6, this Chapter will conclude that the meaning of necessity could be interpreted in multiple ways and the essential elements of necessity can be understood by examining the role of necessity within the framework of self-defence. This is by exploring the question whether necessity is a pre-condition of self-defence or limitation to self-defence or both.

2. Interpretation of Necessity

The meaning of necessity must first be understood within the legal framework of self-defence. This will indicate the scope of the principle of necessity and the application of necessity in a self-defence framework. From a wider perspective, the term necessity is used to denote various aspects of international law. In other branches of international law, necessity conveys diverse meanings, and the replication of necessity in the context of *jus ad bellum* may alter its meaning for the purpose of self-defence. Thus, the process of defining necessity herein must focus specifically on the perspective of the law of self-defence.

The process of defining necessity can be undertaken in respect of four main aspects. First, necessity can be viewed as a test prior to exercising force, and this test could be seen as either subjective or objective. Second, necessity can be seen to indicate that force is only to be used as a matter of last resort. Third, necessity can be defined according to the Webster text. Finally, necessity can be viewed in relation to the aims of self-defence. All four aspects inform how legal literature defines necessity in self-defence.

The simple meaning of necessity, according to Oxford Dictionary describes circumstances that inevitably demand a specific result. The etymology of necessity derives from the Latin word *necessitate* (nominative *necessitas*).¹ This definition may not denote necessity within the law of self-defence, but may indicate basic tenets that can be utilised to define necessity in general. In the context of the law of self-defence, necessity is regarded as the use of force by a victim state when no other methods for resolution are available.²

a. Necessity as a Matter of Last Resort

The meaning of necessity reflects a situation in which the use of force is unavoidable, and in which force is exercised for the purpose of self-defence. It is often reported that the use of force is necessary because there are no other means to redress the conflict. The difficulty in this respect is to evaluate when and how to determine there are no alternative means available to uphold the security of the attacked state, thereby necessitating the use of force in self-defence. Necessity should be regarded as a matter of last resort and non-forcible avenues should be preferred over the use of force.

¹ C. T Onions and others (eds), *The Oxford Dictionary of English Etymology* (OUP 1966)

² Judith Gardam, *Necessity, Proportionality and the Use of Force* (CUP 2004) 4-7; Elizabeth Williamhurst, 'Principles of International Law on the Use of Force by States in Self-Defence' (Chatham House, October 2005) 7 ; Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 150

The position that necessity is seen as a matter of last resort is an uncontroversial one within the legal literature, even amongst scholars.³ Cases before the ICJ reflect the view that necessity carries the meaning that an attacked state must first exhaust non-forcible means before exercising defensive force.⁴ Thus, the meaning of necessity refers to the final option available to an aggrieved state for the purpose of self-defence.

However, the notion that an attacked state must exhaust all non-forcible means is a misplaced notion of necessity. While necessity entails the belief that force is indeed a last resort, this should not be at the cost of the attacked state's interest. This is based on the assumption that the victim state may not have all options available for consideration. This perhaps might be because it is imperative to address the conflict immediately, or because diplomatic channels cannot resolve the pressing needs of the attacked state. Furthermore, the attacked state must consider the effectiveness of any non-forcible measures. It must ask itself whether for instance, negotiations with the opposing party would end the armed attack or threat. If the likelihood is that non-forcible measures would not end the attack or threat, the victim state has no option but to exercise force in self-defence. It is argued that such a situation meets the criterion of necessity.⁵ Therefore, although necessity is a last resort for an attacked state to consider it should not restrain itself from the use of force if such action jeopardises its own security.

³ E.g. Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2013) 232; Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (OUP 1963) 205

⁴ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States) ICJ Rep 1986 p 122 para 237; *Oil Platforms* (Islamic Republic of Iran v. United States of America) ICJ Rep 2003 p 198 para. 76; *Memorial of the DRC*, 206-207, para 5.28; *Armed Activities DRC v Uganda* ICJ Rep 2005 para 147

⁵ Gardam, (n 2) 152-153

Judge Robert Ago explained that the condition of 'necessity' requires that force must only be used if there is no alternative available to the attacked state. He further states:

“...had it (the attacked state) been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force. The point is self-evident and is generally recognized: hence it requires no further discussion.”⁶

Ago attempted to conclude discussions on necessity by acknowledging that the use of force must be seen as a final option available to an attacked state.

Another aspect of necessity can be interpreted in light of Article 51 of the UN Charter. The provision states that the attacked state may exercise the right to self-defence 'until the Security Council has taken measures *necessary* to maintain peace and security.'⁷ The effect of this provision limits the victim state to exercise its right to self-defence until the Security Council is in a position to intervene.⁸

The word necessity in Article 51 does not necessarily connote the same meaning as that intended by the customary international law of self-defence. This is because the use of the word necessity in the provision does not describe the rights of the attacked state. Rather it explains the action of the Security Council, outlining if any measure is necessary for the Council to

⁶ Robert Ago, Addendum – Eight report on State Responsibility on the internationally wrongful act of the state, source of international responsibility (part 1) (A/CN.4/318/Add.5-7) 1980, vol. II(1) p. 69

⁷ Article 51 of the United Nations Charter 1 UNTS XVI (emphasis added)

⁸ Some scholars describe that this part of Article 51 has little practical significance. See. Tom Ruys, '*Armed Attack*' and Article 51 of the UN Charter (CUP 2010) 74

take in order to maintain peace and security.⁹ This point is further amplified in the following sentence, in a provision which states:

“Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems *necessary* in order to maintain or restore international peace and security.”¹⁰

The provision above clarifies that the word *necessity* is not used to describe the context and the rights of the attacked state while waiting for the Security Council to intervene in a conflict. Thus, the word *necessity* in Article 51 should not be read as similar to the principle of *necessity* in customary international law.

Nonetheless, the word *necessity* in Article 51 does indicate a timeline establishing the necessity of the use of force in self-defence. The provision explains the Charter does not restrain states from exercising the inherent right to self-defence, but that the use of force should cease to exist once the Security Council has ‘taken measures to necessary to maintain peace and security’, however this is defined. This implies that once the Security Council intervenes to mediate the situation, the attacked state can no longer rely on the principle of *necessity*, because Article 51 prevents continuing action. Therefore, in this regard, the period in which it is permitted to attack in self-defence in the context of *necessity* is the moment from the initial armed attack, until the point the Security Council intervenes. Outside this timeline, the state cannot invoke the principle of *necessity* when exercising the right to self-defence.

⁹ Randelzhofer and Nolte in ‘Article 51’ in Bruno Simma and others (eds.) *The Charter of the United Nations: A Commentary* (Vol. II, 3rd edn, OUP 2012) 1428

¹⁰ UN Charter (n 7).

The meaning of 'until the Security Council has taken the measures necessary to maintain peace and security' in the context of necessity is unclear.¹¹ As argued previously, the word 'necessary' as contained in the provision, might indicate the period allocated to the attacked state in the exercise of self-defence. However, it is unclear if the measures advocated by the Security Council would achieve the intended outcome – 'maintain peace and security'. The Security Council has the privilege of determining the actions to be taken to achieve peace and security.¹² In terms of the definition of necessity in the context of SC powers, it should be noted, however, that not all measures are effective in mediating a conflict. Moreover, taking a measure does not necessarily result in an end to conflict between the parties. Furthermore, some measures are only intended to settle the situation temporarily, as the conflict may endure after the Security Council takes action.

b. Subjective or Objective Necessity

The meaning of necessity can be approached by viewing necessity as a test. Notwithstanding the question of what constitutes necessity, further analysis can be made on the 'how' question of necessity; i.e. how to assess necessity as a test. The outcome could be in the form of the objective assessment of necessity, or alternatively, could be a subjective test of necessity or both.

The first case in which the question of necessity was considered was in *Nicaragua*. The Court considered the term 'necessity' in several sources relevant to the case. Firstly, 'necessity' was cited in reference to the Treaty of Friendship, Commerce and Navigation of 1956, to which the US and

¹¹ See similar discussion on self-defence and the Security Council (the 'until clause' discussion) in Chapter 2 (3) iii – Self-Defence and the Security Council

¹² The Security Council may exercise its powers under Chapter VII of the United Nations Charter. Any measures may take in the form of non-forcible measures (Article 41) or forcible measures (Article 42).

Nicaragua were contracting parties.¹³ In paragraph 1 (d) of Article XXI it states:

“The present Treaty shall not preclude the application of measures: (d) *necessary* to fulfil the obligation of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.”¹⁴

Secondly, the Court considered the meaning of necessity in the context of self-defence. The US claimed it was acting in self-defence against Nicaragua, but the Court responded by stating:

“Taking into account the whole situation of the United States in relation to Central America, so far as the Court is informed of it (and even assuming that the justification of self-defence, which the Court has rejected on the legal level, had some validity on the political level), the Court considers that the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, cannot possibly be justified as “necessary” to protect the essential security interests of the United States.”¹⁵

The Court judged there was no case of ‘necessity’ for the US to recourse to force in self-defence and so that the US had failed to meet the standard of ‘necessity’ set out in the 1956 Treaty. The Court offered a poignant reminder of the scope of necessity, thus, ‘...whether a measure is necessary to protect the essential security interests of a party is not, purely a question for the subjective judgment of the party.’¹⁶ As such, based on this judgment, the Court claimed the assessment of necessity should be an objective test.

¹³ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*) ICJ Rep 1986 p 116 para 222

¹⁴ Emphasis added

¹⁵ *ibid* p 141 para 282

¹⁶ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*) ICJ Rep 1986 p 141 para 282

Judge Schewebel argues, in his dissenting judgment, that in the course of exercising force in self-defence the US in fact fulfilled the requirement of necessity as required in self-defence.¹⁷ He further explained that the requirement of necessity is broadly a subjective test, and not an objective one as suggested in the main judgment. Judge Schewebel based this position on the assumption that the victim state knows best what constitutes a necessity demanding the exercise of defensive force in a particular situation. He further questions the capacity of the Court to make a decision about 'necessity' on behalf of the victim state. He questions:

“Is the Court in a position to adjudge the necessity of continued United States recourse to measures of collective self-defence? I doubt that it is... Such a judgment, involving as it does an appraisal of the motives and good faith of Nicaragua and the United States, is exceedingly difficult for this Court now to make.”¹⁸

Therefore, based on the above discussion, the test for necessity should lie with the state suffering from the unlawful use of force. In the course of receiving threats or unlawful force, the state in question can consider various options to end the act of aggression; this would also include asking itself whether a forceful riposte is necessary. Under the United Nations Charter system, the use of force is illegal, contrary to Article 2(4). This makes the belligerents in any conflict conscious of the fact that the use of force can only be employed in self-defence. When arriving at the conclusion that force is necessary for defensive purposes, in practical terms, the victim state should make a determination that takes into account all possible considerations within a short period of time. For this reason, the Court is not ideally placed to judge what is necessary or unnecessary for self-defence, because the environment of conflict is tumultuous in comparison with the calm of the Courtroom. This further strengthens the proposition that necessity is a

¹⁷ Dissenting Judgment Judge Schewebel in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ Rep 1986 p 296 para 76

¹⁸ *ibid* p 293-294 para 69

decision to be made by the victim state and not a third, albeit independent, party.

In addition, the question of what constitutes necessity in a particular situation cannot be judged separately from other circumstances. The Dissenting Judgment of Judge Schwebel made this point clearly, by highlighting the possibility that factors might exist that are not apparent to the Court but are which taken seriously by the victim state. The example used by the learned judge was concerning available information disclosed to the Court in that proceeding. Countries do not always disclose their full intelligence knowledge to the public, and even were such data available to the Court, 'It would be difficult for the Court to establish the true motives, and the reasonableness, of the policy of a Party on a question such as this, even if it were present in Court'.¹⁹ In addition, while another state's intelligence agency might be directly or indirectly involved in a conflict, it is not necessarily privy to Court proceedings, and may not submit their knowledge of the case.²⁰ Therefore, the Court is unable to examine all aspects of the situation, which may prevent the Court from understanding the case fully. Due to this weakness, the Court is incapable of assessing what would be necessary for the victim state over a particular period of time, based on the knowledge made available to them. Therefore, according to this argument, the question of how the necessity test should be determined is better served by the victim state, and not another entity. Thus, the necessity examination is indeed a subjective test.

Despite demanding the necessity test be made as a subjective test by some judges, in cases post-*Nicaragua* the Court upheld the view that necessity is accepted as an objective assessment. In *Oil Platforms*²¹, the US attacked several oil installations within the territory of Iran citing grounds of self-defence. The issue of necessity in this case was judged in relation to the

¹⁹ *ibid* para 71 p 294

²⁰ *ibid* para 71 p 295

²¹ Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America) ICJ Rep 2003 p . 161

Treaty of Amity, Economic Relations and Consular Rights between the US and Iran from 1955. In it, Paragraph 1(d) of Article XX states:

“The present Treaty shall not preclude the application of measures... *necessary* to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or *necessary* to protect its essential security interests.”²²

In opining that the US invoked the right to self-defence, the Court decided that it had the jurisdiction to judge on matter on the use of force under international law although it restricted this to the consent of the parties and the scope of Article XX of the 1955 Treaty.²³ The Court also determined that necessity, as quoted in the 1955 Treaty could be read in conjunction with necessity for the purpose of self-defence.²⁴ The Court concluded that the interpretation of necessity in self-defence ‘must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion"’.²⁵ This judgment substantiates the jurisprudence that the necessity test for self-defence must be read objectively and not as a subjective test.

Based on the jurisprudence of the ICJ on the test of necessity, it is argued that it might be the case that the test for necessity requires both subjective and objective elements. This is because different sets of facts warrant different way of judging necessity for the purpose of self-defence. Taking the example as above, the facts in *Nicaragua* is different from *Oil Platforms*. As such, it requires different way of determining necessity. Therefore, it is argued that necessity may have both elements of subjective and objective tests depending on the issues in hand.

²² Emphasis added

²³ Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America) ICJ Rep 2003 p 182-183 para 42

²⁴ *ibid* p 183 para 43

²⁵ *ibid* p 196 para 73

c. Necessity and the Webster Formula

The principles of necessity and proportionality in the law of self-defence originate from the *Caroline* incident in 1837, as discussed in Chapter III of this thesis. Following the incident, Secretary Webster wrote that self-defence is limited to both necessity and proportionality. By referring back to the origin of necessity in the context of self-defence, it may become apparent how necessity should be interpreted in international law on the use of force. It is, however, argued that the meaning of necessity in the *Caroline* incident is influenced by the development of modern jurisprudence in international law. In particular, necessity in self-defence is interpreted according to Article 51 of the UN Charter, which recognises the principles of necessity and proportionality. As discussed above (in the Jurisprudence of the ICJ in Chapter 3 (6) and Chapter 4 (b) – Subject or Objective test for necessity) it shows that the meaning of necessity has developed and refined through the cases brought before the ICJ.

The *Caroline* incident resulted in exchanges of correspondence between the British and American governments. This correspondence disputed the parameters of necessity, and the following passage is regarded as embodying the definition of necessity. It states that, ‘...to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation.’²⁶ This is a strict reading of necessity, as underlined by the phrase, ‘no choice of means, and no moment of deliberation’, which implies that force should only be exercised only when there is no other alternative. It also indicates appropriate timing for the exercise of force. The meaning of ‘no moment of deliberation’ suggests that even negotiation between two conflicting parties is not feasible as force is necessary to defend a state’s interest. Therefore, interpreting necessity in light of the Webster text could be categorised as denoting strict view of necessity.

²⁶ *British and Foreign State Papers 1840-1841* (Vol. XXIX, James Ridgway and Sons 1857) 1337-1138

In *Caroline*, necessity could be subject to reassessment if seen through the United Nations Charter. At the time of the *Caroline* incident, the state of international law was dissimilar to that in contemporary international law. In fact, it is questionable whether at the time there was any international law. In the nineteenth century, there were no intergovernmental organisations governing the rights of each state, and there was no regulation on the use of force. The use of force could be exercised by any state, regardless of motivation. However, with the inception of the United Nations Charter, the use of force was strictly prohibited; it was rendered permissible in self-defence or with the approval of the Security Council. Therefore, necessity under the *Caroline* doctrine, and necessity in the current state of international law are different and cannot be treated equally.²⁷ An extreme view would suggest that the *Caroline* incident has no relevance at all in the modern international law because Article 51 and state practice have superseded the legal authority on the law of self-defence.²⁸

An additional difference between *Caroline* necessity and necessity in contemporary international law is that the aggrieved state is offered the option of mediating the conflict. According to the *Caroline* incident, the description for necessity makes no mention of other options being available to the victim state, such as a dialogue between the aggressor and the victim state. This strict definition of necessity may be challenged on the basis of practicality in the twenty-first century. It is arguably the case that in any conflict, the option of not resorting to force is always available. This is because diplomatic channels provide alternative avenues of dispute for belligerents to consider. Disputes could take the form of negotiation overseen by a third party, such as the United Nations, or a regional organisation (for instance the Arab League and Association of South East Asian Nations (ASEAN)). These organisations support competing parties to deescalate tension and to avoid the use of force if both parties to the conflict

²⁷ Gardam (n 2) 149-150

²⁸ See Maria Occelli, 'Docking the *Caroline*: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense' (2006) 14 *Cardozo Journal of International Law* 429-480

wish. Alternatively, competing states may choose a judicial process to settle disputes, such as the ICJ. Therefore, in contemporary international affairs, there is always the option to avoid the use of force. Thus, the strict interpretation of 'no moment of deliberation' cannot be deemed to reflect the meaning of necessity in the current context of international law.

While the meaning of *Caroline* necessity could be regarded as detached from modern law on self-defence, nonetheless, there are several examples in state practice that still define necessity based on the *Caroline* incident. During a meeting of the UN Security Council on the issue of Israel's raid on Iraq's Osirak nuclear plant, Israel claimed that it had acted in self-defence, and moreover, that it regarded the use of force as necessary. Other Security Council members unanimously disagreed, stating that there was a need to invoke the right to self-defence because there was no necessity to do so. Representatives of the United Kingdom commented 'It has been argued that the Israeli attack was an act of self-defence. But, it was not a response to an armed attack by Iraq. *There was no instant or overwhelming necessity for self-defence*'.²⁹ The language used by diplomats was similar to that used in correspondence by Secretary Webster from 1837, and ironically by the same country. The Ugandan representative was explicit in his definition of necessity based on the *Caroline* incident, remarking:

"The requirements of self-defence... have well been established since the famous North American case of *The Caroline* in 1837... The rule of necessity established in the case of *The Caroline* and stated by then American Secretary of State, Daniel Webster, is that self-defence is justified only when the necessity of that self-defence is 'instant, overwhelming, leaving no choice of means and no moment for deliberation.'³⁰

This illustrates that in some state practice, the meaning of necessity in self-defence still resonates, albeit partially, from the *Caroline* incident. It would be

²⁹ UN Doc. S/PV.2282 (8 June 1981) p 10 para 106 (emphasis added)

³⁰ *ibid* p 2 para. 14-15

inaccurate to dismiss the prominence of the *Caroline* incident when defining the contemporary meaning of necessity in self-defence.³¹ This also shows that the *Caroline* doctrine is still relevant in the context of international law albeit minimally. Therefore, using a historical perspective to define necessity is acceptable, with some limitations.

Alternatively, it may be the case that necessity for the purpose of self-defence simply means necessity as understood in plain English. This view may seem attractive as it is simple. Yet, one cannot disregard that the ICJ has made several pronouncement with regards to the scope of necessity in self-defence. Therefore, it is argued that in defining necessity, it is unavoidable to take into account the historical context of necessity (in the *Caroline* incident) as well as the jurisprudence of the ICJ with regards to this area of law (*jus ad bellum*)

In summary, it is feasible to interpret necessity based on the *Caroline* incident because it is the origin of the principle. The meaning of necessity in the Webster text context resulted in a restrictive use of the term necessity. However, it may be difficult to apply legally the meaning of necessity in the contemporary international context. This is because the existence of alternative options for an aggrieved state to recourse to non-forcible measures will always be available in the modern environment of diplomatic efficiency. In addition, the meaning of necessity has developed through the jurisprudence of the ICJ and state practice. As such, the full meaning of necessity cannot solely be relied from the *Caroline* incident. However, it would be imprecise to describe the concept necessity as having lost the meaning conveyed at its inception. Therefore, necessity can be interpreted in light of the *Caroline* incident, but with more emphasis on the UN Charter rather on the history of necessity.

³¹ James Green, 'Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense' (2006) 14 *Cardozo J. Int'l & Comp. L.* 429-480

d. Aim of Self-Defence in Relation to Necessity

Another way of analysing necessity is by examining the relationship between necessity and the aim of self-defence. The aim of self-defence is relevant to the entire framework of self-defence. It is therefore important first to understand the purpose of self-defence and then reflect the role of necessity in achieving it. This includes the assessment of necessity relative to fulfilling the aim of self-defence.

The use of force in self-defence must serve to achieve a legitimate goal, which is repelling an attack or preventing (halt and repel) an attack from succeeding.³² The victim state must act with the intention to fulfil a legitimate aim of self-defence. To exercise force beyond the legitimate aim of self-defence may be considered an unlawful use of force. In *Armed Activities*, the Court commented on the scope of self-defence and restrictions on the use of force:

“Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council.”³³

The Court emphasised that self-defence cannot extend beyond the legitimate aim of self-defence. Thus, the use of force beyond the lawful purpose of self-defence may amount to aggression or a reprisal.³⁴ The Court also stated that if force were required and the aim was no longer within the ‘parameters’ of self-defence, the state concerned might then seek the

³² Olivier Corten, *The Law Against War* (Hart Publishing 2012) 484; Bruno Simma (eds), *The Charter of the United Nations: A Commentary* (Vol. II, 3rd edn, OUP 2012) 1426

³³ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* ICJ Rep 2005 p 223 para 148

³⁴ Tom Ruys, *‘Armed Attack’ and Article 51 of the UN Charter* (CUP 2010) 95

approval of the Security Council to use force, not by invoking the right to self-defence. This shows strict application of the right to self-defence.

In a complex situation where a state has multiple aims in using force for self-defence, this positions the state concerned precariously between the legal and illegal use of force. In the framework on the use of force, whether as established in the United Nations Charter or in customary international law, self-defence is an exception to the prohibition on the use of force. Therefore, the use of force cannot be exercised lightly, and can only be utilised for the sole purpose of self-defence. However, repelling or preventing an armed attack could also take place concurrent with other aims, such as the protection of human rights or regime change.

Article 51 requires that the use of force in self-defence does not exceed what is permitted by need. This premise seems pertinent when assessing the purpose of self-defence in light of the prohibition on the use of force. Compliance from the invoking state with the notion of exercising self-defence according to the legitimate aim of self-defence indirectly upholds the framework of *jus ad bellum*, which determines that the only permissible use of force is for self-defence. If an additional purpose for self-defence (other than repelling or preventing an armed attack) were to be recognised as lawful, the framework of *jus ad bellum* would lose its integrity as a legal mechanism prohibiting from using force except in genuine cases of self-defence. Furthermore, any state that exercises self-defence to repel or prevent an armed attack will enhance the legitimacy of the use of force. Other parties would be unlikely to criticise the use of force were it apparent that it was necessary to prevent an armed attack only. Therefore, the benefits of following the aim of self-defence also give credibility to the state using force, and support the integrity of the self-defence framework.

Alternatively, it is also possible to argue that self-defence could be exercised with other purposes aside from the use of force. This is on the basis that in certain circumstances, to achieve a goal (legitimate aim of self-defence), it is

necessary to act in a way not regarded as self-defence.³⁵ For instance, if state A suffers a continuous attack from State B, then in order for State A to repel or prevent an armed attack, it must change the government of State B, and this can be categorised as a lawful act of self-defence. Olivier Corten argues that multiple aims in self-defence are deemed lawful with the requirement that the main or ultimate aim of the use of force is self-defence, and that this must be specified clearly.³⁶

In its main judgment on *Nicaragua*, the Court concluded that the US had acted unlawfully for failing to meet the requirement of necessity and proportionality in self-defence. The Court opined that there was no necessity for the US to take defensive measures against Nicaragua, because the measures took place several months after the major offensive from the armed opposition against the Government of El Salvador had been wholly repulsed.³⁷ However, in Judge Schwebel's Dissenting Opinion, he argued that there had been an armed attack against El Salvador and the US was lawful to exercise the right to collective self-defence against Nicaragua.³⁸ He also argues that the US fulfilled the requirement of necessity by the persistent failure of Nicaragua to cease armed subversion against El Salvador.³⁹ Judge Schwebel in respect to multiple aims associated with the use of force, and interpreting the meaning of necessity in self-defence argued that:

“Even if it be accepted, *arguendo*, that the current object of United States policy is to overthrow the Nicaraguan Government - and that is by no means established - that is not necessarily disproportionate to

³⁵ Bruno Simma (eds), *The Charter of the United Nations: A Commentary* (Vol. II, 3rd edn, OUP 2012) 1426-1427

³⁶ Olivier Corten, *The Law Against War* (Hart Publishing 2012) 485

³⁷ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*) ICJ Rep 1986 p 122 para 237

³⁸ Dissenting Opinion of Judge Schwebel in Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*) ICJ Rep 1986 p 271 para 12-13

³⁹ *ibid* p 269 para 9

the obvious object of Nicaragua in supporting the Salvadoran rebels who seek overthrow of the Government of El Salvador.”⁴⁰

Judge Schwebel hinted that the purpose of self-defence, *inter alia*, is to overthrow a government, and in doing so may repel or prevent an armed attack. This could be regarded as lawful self-defence, showing there are some who are willing to interpret multiple aims that deem self-defence lawful, although Judge Schwebel’s view is a Dissenting Opinion.

It can be concluded that there are two jurisprudences with regard to the aim of self-defence, and relationships established based on the principle of necessity. Firstly, it can be said acting in necessity if self-defence is exercised only to repel or prevent an armed attack. Secondly, necessity could also be seen as exercising force in self-defence alongside aims such as regime change.

In summary, the definition of necessity in *jus ad bellum* could be viewed from multiple angles. The majority of scholars agree that the use of force can only be used as a matter of last resort. Necessity connotes that force is inevitable. Another way of viewing necessity in self-defence is by applying the necessity test. This test determines whether the attacked state is in a situation where it is necessary to use force. However, the problem with the necessity test concerns whether it is seen as an objective or subjective test or both. The ICJ argues the necessity is an objective test. Another meaning of necessity is associated with the source of the law on self-defence in customary international law. This is in reference to the Webster text, which sets out the principles of necessity and proportionality. By referring necessity to the *Caroline* incident, a restrictive view of necessity is denoted, which may seem inapplicable in contemporary international law. Finally, it is argued that the meaning of necessity should be attached to the aim of self-defence. This restricts the use of force in self-defence as a tool to achieve the legitimate goal of self-defence and to prevent self-defence as a pretext for aggression.

⁴⁰ *ibid* p 270 para 9

3. The Relationship Between Necessity and Proportionality

Equally important in understanding the role of necessity in the framework of self-defence is the principle of proportionality. Proportionality plays an important role in determining whether an act of self-defence is legal or illegal although this is not the only consideration. It reflects the importance of both proportionality and necessity when assessing the legality of self-defence. Like the principle of necessity, proportionality can be interpreted in various ways.

This section seeks to clarify the meaning of proportionality in the context of *jus ad bellum*. Following that, it will focus on the similarities and distinctions between necessity and proportionality in *jus ad bellum*.

a. Definition of Proportionality in *Jus ad Bellum*

Crucial to this thesis is the meaning of proportionality in the context of *jus ad bellum*. Proportionality is generally the main restraint placed upon states when exercising force in self-defence.⁴¹ The meaning of proportionality has created a rift amongst commentators in terms of the scope of proportionality.⁴² In particular, disagreements arise when discussing how to measure proportionate force, and when determining on what basis force should be regarded as proportionate.

An obvious point of reference when interpreting proportionality involves measuring it in relation to a threat or an armed attack. The meaning of proportionality in this case relies on the premise that the proportionate use of force is only employed to neutralise the threat or an armed attack.⁴³ Commentators on the Chatham House discussion on self-defence upheld

⁴¹ Gardam (n 2) 8-10

⁴² Gray (n 2)150

⁴³ Albrecht Randelzhofer, *Article 51* in Bruno Simma (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Vol. II, OUP 2012) 1407-1408

this point, when they assessed that any 'force used must not be excessive in relation to the harm expected from the attack'.⁴⁴ However, some scholars reject the suggestion that the proportionate use of force must correspond with the initial armed attack, because it would deprive the victim state of an effective response to an armed attack.⁴⁵

However, it is argued that the opposite position is more practical in defining the meaning of proportionality. That is proportionality is linked with the aim of self-defence. According to this argument, proportionality takes into account, among others, the scale of the use of force in self-defence as well as the aim of self-defence. In other words, the riposte (proportionality) is not relative to the scale of an armed attack or threat. As discussed previously, the legitimate aim of self-defence is that necessity and proportionality must serve to fulfil the aim of self-defence. This argument negates the proposition that force used in self-defence must be commensurate with the threat or armed attack. This is because when defensive force is used to achieve the aim of self-defence, the force may not necessarily correspond to the threat of armed attack.

Several commentators confirm that the use of force must fulfil the requirement of proportionality and be able simultaneously to achieve the aims of the self-defence operation. Antonio Cassese argues that any force used must be judged both against legitimate ends and against the attack against which it is responding.⁴⁶ Meanwhile, David Kretzmer argues that the assessment of proportionality depends on various factors, such as whether the armed attack is ongoing, if attacks have ended, if they are against non-state actors and if the force exercised serves to achieve the aim of self-defence.⁴⁷ However, he concedes that the legitimate aim of self-defence is

⁴⁴ Elizabeth Williamhurst, 'Principles of International Law on the Use of Force by States in Self-Defence' (Chatham House, October 2005) at 10

⁴⁵ Tom Ruys, '*Armed Attack*' and Article 51 of the UN Charter (CUP 2010) 112

⁴⁶ Antonio Cassese, *International Law* (2nd edn, OUP 2005) 355

⁴⁷ David Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum' (2013) 24 EJIL 235-282, 269- 276

an unsettled area of *jus ad bellum*, which differs from the aim of self-defence and affects how proportionality is measured.⁴⁸ While Yoram Dinstein argues that 'it is perhaps best to consider the demand for proportionality in the province of self-defence as a standard of reasonableness in response to force by counter-force'.⁴⁹

Meanwhile, cases before the ICJ do not further the scope of studies of proportionality in *jus ad bellum*. In fact, they confuse analysis of proportionality in self-defence.⁵⁰ In *Oil Platforms*, the Court commented that two separate attacks were made by the US against Iran on 19 October 1987 and 18 April 1988 in response to alleged armed attacks by Iran. The Court stated:

“As to the requirement of proportionality, the attack of 19 October 1987 night, had the Court found that it was necessary in response to the Sea Isle City incident as an armed attack committed by Iran, have been considered proportionate. In the case of the attacks of 18 April 1988, however, they were conceived and executed as part of a more extensive operation entitled ‘Operation Praying Mantis’...The question of the lawfulness of other aspects of that operation is not before the Court, since it is solely the action against the Salman and Nasr complexes that is presented as a breach of the 1955 Treaty; but the Court cannot assess in isolation the proportionality of that action to the attack to which it was said to be a response; it cannot close its eyes to the scale of the whole operation, which involved, inter alia, the destruction of two Iranian frigates and a number of other naval vessels and aircraft. As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither ‘Operation Praying Mantis’ as a whole, nor even that part of it that destroyed the

⁴⁸ *ibid* 260-269

⁴⁹ Yoram Dinstein, *War Aggression and Self-Defence* (3rd edn, CUP 2001) 184

⁵⁰ James Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing 2009) 86

Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.”⁵¹

In the passage above, the Court asserted that the reading of proportionality must be weighed according to the entire self-defence operation. In a further example, the Court examined proportionality in reference to the type of weaponry used;⁵² although in other cases, such as *DRC v Uganda*, the Court focused on the modus operandi of self-defence taken by the victim state. The Court stated:

“the taking of airports and towns [by Ugandan forces] many hundreds of kilometres from Uganda’s border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.”⁵³

The Court seems to offer diverse opinions on the meaning of proportionality, and no coherent definition of proportionality can be extracted from its judgments.

In summary, it is a relatively uncontentious point to state that proportionality in *jus ad bellum* affects the legality of any self-defence action. However, any analysis of how proportionality is measured remains subject to discussion. One way of measuring proportionality is according to threat and attack. Alternatively, proportionality can be measured in relation to the aims of self-defence. The latter approach is more practical because it is hard to quantify the armed attack committed by the aggressor. Therefore, proportionality is measured among others the scale of the defensive force and whether the force employed achieved the aim of self-defence.

⁵¹ Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America) ICJ Rep 2003 para 77

⁵² Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons ICJ Rep 1996 p 245 para 42

⁵³ Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda) ICJ Rep. 2005 p 223 para 147

b. The Relationship between Necessity and Proportionality

Despite differences between necessity and proportionality in *jus ad bellum*; both principles are required to maintain the legality of use of force in self-defence. It is often argued that necessary use of force affects proportionality and vice-versa.⁵⁴ This section examines the close relationship between necessity and proportionality and seeks to determine how far the two principles interact with one another.

Necessity and proportionality are inextricably linked; indeed, as explained by one commentator 'if a use of force is not necessary, it cannot be proportionate and, if its proportionate it is difficult to see how it can be necessary'.⁵⁵ Similarly, Olivier Corten argues that necessity and proportionality are two intertwining concepts that serve the same purpose. He asks a rhetorical question: 'what is a disproportionate measure if not a measure that goes beyond that its purpose requires, that is, which is not necessary for the pursuit of that same purpose?'⁵⁶ This reflects the influence of necessity over proportionality and vice-versa.

In practice, the mutuality of necessity and proportionality was apparent during the Israel-Hezbollah conflict in Lebanon in 2006. Israel declared its actions against Hezbollah were an act of self-defence; it invoked Article 51 of the UN Charter after suffering an attack from Hezbollah originating from within Lebanon.⁵⁷ Several states criticised Israel for employing disproportionate force in self-defence.⁵⁸ Despite this condemnation, Israel defended its actions stating that proportionality was linked to necessity in its actions against Hezbollah. The Israel government stated:

⁵⁴ James Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing 2009) 89

⁵⁵ Gray (n 2) 150

⁵⁶ Olivier Corten, *The Law Against War* (Hart Publishing 2012) 488

⁵⁷ Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council (A/60/937–S/2006/515)

⁵⁸ Namely, Argentina, China, Qatar, Congo and Tanzania. See Security Council Meeting on 14 July 2006 (S/PV.5489)

“One important principle established by international law for the “reasonable military commander” seeking to make this difficult balance, is that the proportionality of a response to an attack is to be measured not in regard to the specific attack suffered by a state but in regard to what is necessary to remove the overall threat.”⁵⁹

The Israeli government pointed out that proportionality in self-defence must be seen in relation to necessity. Israel put forward the case that necessity and proportionality are indeed linked. A further example was during the 1990-1 Persian Gulf conflict, which also saw an interaction between the two principles. During the conflict, the UN Security Council passed a resolution calling for the withdrawal of Iraq’s military forces from Kuwaiti territory.⁶⁰ The British ambassador to the Security Council highlighted the principle of proportionality in terms of the necessity to undertake military action, when he stated:

“Some have suggested that military action being taken by the allies is in some way excessive or disproportionate and thus exceeds the ‘all necessary means’ authorized in resolution 678 (1990) to bring about the liberation of Kuwait. But the nature and scope of military action is dedicated not by some abstract set of criteria but by the military capacity of the aggressor, who has refused all attempts to remove him from Kuwait.”⁶¹

This example reflects the fact that proportionality was seen as part of the overall practice of self-defence that was necessary to liberate Kuwait from

⁵⁹ Israel Ministry of Foreign Affairs - ‘Responding to Hizbullah attacks from Lebanon: Issues of proportionality’ <http://www.mfa.gov.il/mfa/aboutisrael/state/law/pages/responding%20to%20hizbullah%20attacks%20from%20lebanon-%20issues%20of%20proportionality%20july%202006.aspx> (Dated 25 July 2006)

⁶⁰ UN SC Res. 661 (1990) 6 August 1990 and UN SC Res. 665 (1990) 25 August 1990

⁶¹ UN Doc. S/PV.2977, Part II, para. 72, (14 February 1991)

the invasion of Iraq. This again shows the connection between proportionality and necessity in the overall scheme of self-defence requirements.

c. Necessity in *Jus ad Bellum*

Another principle in the formula of self-defence is the notion of necessity. Necessity, similar to proportionality, requires the invoking state to exercise force in self-defence if necessary as performed in proportionate measure. Failure to comply with the requirement of necessity renders the invoking state's use of force *prima facie* illegal. In fact, the first point of reference following an armed attack or threat concerns whether necessity arises to compel the affected state to launch a riposte. As such, necessity is an important aspect in the law of self-defence, which this thesis tries to highlight. In the next Part, this thesis will outline the components of necessity in self-defence.

The issue of necessity will be explored broadly in this thesis as the basis of this work concentrates on the role of necessity in the framework of self-defence. Arguably, there is more to the simplistic perception of necessity in *jus ad bellum*, as necessity divides into two parts; first, necessity prior to exercising the use of force, and second, necessity when exercising the use of force. The details of this argument will be outlined below. Further to this argument, this thesis seeks to clarify the application of necessity in state versus state, and state against non-state actor settings. By doing so, the aspect of necessity in the two settings could be extracted for analysis.

Necessity covers any forceful action taken by an invoking state, and so must be by way of a last resort, asserting the right of the state to use force unilaterally.⁶² The use of force must be seen as the only response to counter

⁶² Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 6

threat of an armed attack after considering non-forcible options.⁶³ The meaning and scope of necessity were aptly described by Judge Ago in his report on State Responsibility, which describes necessity as follows:

“[A]ction taken in self-defence must be necessary is that the State attacked... must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. In other words, had it been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force.”⁶⁴

The principle of necessity in self-defence, as explained in Chapter III, originated from the *Caroline* incident of 1837. Although the requirements of necessity and proportionality are absent from the UN Charter regime, it is still widely regarded that both principles are an integral part of the *jus ad bellum* framework.

4. Components of Necessity in Self-Defence

a. Introduction

The discussion above has focused on various aspects of the interpretation of necessity in self-defence. In this Section, the discussion on necessity will be explored further by examining the components of necessity, and how a state determines necessity. This thesis considers necessity in two parts: first, before the use of force, when a state is deciding to exercise the right to self-defence, and, second, during the use of force. In the two periods, pre- and during the use of force, necessity is evaluated in relation to self-defence.

⁶³ Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2012) 231-232

⁶⁴ Robert Ago, Addendum Eight Report on State Responsibility to ILC (1980) YILC Vol. II (A/CN.4/318/Add.5-7) (Part 1) para. 120 p. 69

As mentioned earlier, the originality of this thesis is by examining the role of necessity in self-defence framework. This is by posing the question: 'what is the role of necessity in the law of self-defence?' In doing so, it gives several indications as to the role of necessity. It is argued that necessity has a dual role. First, necessity acts as a requirement to exercising the right to self-defence. Without the existence of necessity, self-defence cannot be invoked by a state, and therefore it would be illegal to exercise self-defence due to failure to meet this requirement. The second role of necessity is the limitation on force used in self-defence. This creates necessity as a restraining element when a state is taking defensive measures. It is acknowledged that the latter aspect of necessity is confusing as it may distort the difference between necessity and proportionality. To a certain degree, necessity as a limitation can be seen as a proportionality and not necessity. It is argued that this is where necessity and proportionality overlaps. However, the difference is necessity as a limitation to self-defence focuses solely on meeting the aim of self-defence while proportionality relates to the scale and intensity of the defensive force.

b. The First Role of Necessity – A Requirement

The first role of necessity in the framework of self-defence is to act as requirement. This means showing there is a serious threat to the state and that force is necessary to defend itself. A state that fails to meet this requirement does not meet the prerequisite of the right to self-defence.

i. Existence of a Threat or an Armed Attack

Prior to exercising the right to self-defence, the aggrieved state must establish the requirement of necessity as a response to a threat or an armed attack. The existence of either a threat or an armed attack indicates that the victim state must respond, although not necessarily with force.

Under Article 51 of the UN Charter, the requirement required as a prerequisite to the right to self-defence is proof of an armed attack.⁶⁵ Such proof demonstrates that circumstances exist that compel the state to exercise defensive force. However, not all threats or armed attacks are likely to result in exercising the right to self-defence. Only certain types of aggression merit self-defence by force. The invoking state must first determine that the attack threatens the survival or the vital interests of the victim state.⁶⁶ Thus, a response in self-defence must be based on what is necessary to protect the continued existence of the state.⁶⁷

A problem arises, in that defining a threat to the vital interest of a state demanding a response in self-defence requires a subjective judgment. As established above, the only party that can truly understand the nature of such a threat is the aggrieved state, and perceptions over what interests are vital for the existence of a state vary. Despite the difficulty of ascertaining threats and the vital interest of a state, an invoking state must prove a threat or armed attack warrants the state using force for defensive purposes.

ii. Force as 'A Last Resort'

Another aspect of necessity in terms of requirement is that force must be used only as a last resort. As discussed earlier, a state must exhaust non-forcible options in response to threats, although there is no obligation to consider all options. By adding force as a last resort to the meaning of necessity shows force will not be used indiscriminately, but only when there is no other feasible way to address the conflict.

Article 2(4) of the UN Charter prohibits states from using force in international affairs. Therefore, for a state to violate this prohibition they must

⁶⁵ Article 51 of the UN Charter (1945) 1 UNTS XVI. The provision used the phrase 'if an armed attack occurs...'

⁶⁶ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons ICJ Rep 1996 p 263 para 96

⁶⁷ James Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing 2009) 77

prove they are acting in self-defence. To do so, the state must show that it has taken steps to resolve the dispute amicably, but has found it necessary to exercise defensive measures. If the concept of 'the use force as a last resort' were not appended to necessity as a requirement, states would be more likely to invoke self-defence as a preferential tool to resolve disputes. Therefore, it is necessary to make force a last resort as part of the requirement of necessity.

An additional aspect that can be drawn from the meaning of necessity is immediacy. Immediacy shows there is a temporal aspect in place when a state launches a defensive attack. The principle of immediacy requires the state to consider the time lapse between an armed attack and any response by force.⁶⁸ It also signifies there must not be an undue time-lag between the armed attack and the exercise of the right to self-defence.⁶⁹ The notion of 'immediacy' or 'instancy' in the formula of necessity in self-defence indicates the need for states to react in a timely manner to the perceived threat or armed attack.⁷⁰ Therefore, immediacy incorporates the idea of time into the judgement of necessity.

Arguably, immediacy is an integral part of necessity. The role of immediacy in self-defence aims to provide a timeframe in which it is eligible for a state to use force relative to the moment of an armed attack. A long time lag between the moment an armed attack takes place and the use of force in self-defence diminishes the right of the invoking state to act in self-defence; as it enables the possibility of engagement in diplomatic negotiations.⁷¹

⁶⁸ Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (CUP 2010) 99

⁶⁹ Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2014) 233

⁷⁰ Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2006) 150

⁷¹ Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (CUP 2010) 102; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2006) 151 Both authors categorised immediacy under necessity. While other authors such as Yoram Dinstein define immediacy in a separate heading. See also Thomas Franck, *Recourse to Force* (CUP 2004) 98

Thus, in principle, time is of the essence when a state is considering whether it is necessary to take defensive measures. If a state does not comply with the principle of immediacy (acting in self-defence within a reasonable time) this may render all measures of self-defence unnecessary. Because of the nature of immediacy in self-defence, it is essential for it to be a component of necessity and not a separate entity in the self-defence framework.

The issue of time in relation necessity was treated as a requirement for self-defence in the aforementioned case of *Nicaragua*. In its judgment, the Court considered the time taken for the US to launch defensive measures against Nicaragua, and consequently dismissed the claim by the US; stating it had failed to fulfil the requirement of necessity in the December 1981 attack. The Court judged:

“...cannot be said to correspond to a ‘necessity’ justifying the United States action against Nicaragua on the basis of assistance given by Nicaragua to the armed opposition in El Salvador. First, these measures were only taken, and began to produce their effects, several months after major offensive of the armed opposition against the Government of El Salvador had been completely repulsed... and the actions of the opposition considerably reduced in consequence. Thus it was possible to eliminate the main danger to the Salvadorian government without the United States embarking on activities in and against Nicaragua. Accordingly, it cannot be held that these activities were undertaken in the light of necessity.”⁷²

The details of this judgment exemplify the role of necessity as a requirement. First, the Court questioned the timing and the immediacy of the situation, and judged the lapse in time between armed attack and the response unfavourably. Second, the Court considered necessity in light of alternative options to the use of force. The Court found that force was not the last resort available to the US, and claimed ‘it was possible to eliminate the main

⁷² *Nicaragua Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ Rep (1986) p 122 para 127

danger to the Salvadorian government without the US embarking on activities in and against Nicaragua'. This reflects the belief that the use of force in self-defence by the US was not a last resort.

In practice, several examples can be put forward to show how necessity acts as a requirement to self-defence, whether from the perspective of an existence of a threat or an armed attack, force as a last resort or immediacy, or any combination of the three. First, during a Security Council meeting on the issue of the Six Day War, Israel claimed that it had suffered attacks from Arab states and was under threat from a mass army congregating at the border of Egypt-Israel.⁷³ Israel stated that only when its security 'was becoming smaller' and its safety had been breached, only then had Israel decided to use force in self-defence.⁷⁴

Another example reflecting the role of necessity as a requirement for self-defence was during Israel's raid against Iraq's Osiraq nuclear reactor in 1981. This case study is often used as an example of pre-emptive self-defence. For this purpose, it will be shown that there is a scope for evaluating the principle of necessity. In this case study, Israel claimed that the nuclear reactor could be used as a military against Israel and that it was 'in its final stage of construction'.⁷⁵ Israel claimed that it had attempted to settle the nuclear threat through diplomatic channels, but unsuccessfully, and so it invoked the right to self-defence.^{76, 77} In the passage below, Israel justifies its action by explaining the element of necessity as a requirement to self-defence where the threat was endangering the existence of Israel:

"The decision taken by my Government in the exercise of its right of self-defence...We sought to act in a manner which would minimize

⁷³ UN Doc S/PV. pp.14-19 paras. 142-194 (Statement to the Security Council by Israel Foreign Minister Eban, 6 June 1967)

⁷⁴ UN Doc S/PV. p.15 para. 155 (Statement to the Security Council by Israel Foreign Minister Eban, 6 June 1967)

⁷⁵ UN Doc S/PV.2280 (12 June 1981) p. 8 para. 57

⁷⁶ UN Doc S/PV.2280 (12 June 1981) p. 8 para. 67 and p. 10 para. 94

⁷⁷ UN Doc S/PV.2280 (12 June 1981) p. 11 para. 97

the danger to all concerned, including a large segment of Iraq's population. We waited until the eleventh hour after the diplomatic clock had run out, hoping against hope that Iraq's nuclear arms project would be brought to a halt. Our Air Force was only called in when there was less than a month to go before Osirak might have become critical."⁷⁸

Despite Israel's attempt to highlight all the elements of necessity as a trigger for the right to self-defence, it received no support from the members of the Security Council. This resulted from disagreement among the Security Council members over whether Israel had fulfilled the requirement of necessity in launching actions in self-defence. Amongst the criticisms levelled against Israel were that it had failed to seek alternative solution to forcible measures. For instance, Japan stated that Israel could have pursued its nuclear concerns by approaching International Atomic Energy Agency (IAEA) for consideration, and therefore claimed that 'Israel's resorting directly to military measures is absolutely unjustifiable'.⁷⁹ However, the US representative at the Security Council, claimed Israel's action proceeded from the conviction that it had failed to exhaust peaceful means.⁸⁰ This signifies that it is a pre-requisite that a state seek an amicable solution before using force.

Another point raised in the discussion touched on the threat from the Osirak nuclear plant. The argument put forward by Israel when citing self-defence was that the nuclear reactor posed a threat to its security and so must be dealt with immediately. Members of the Security Council therefore dismissed the existence of the threat and the immediacy of the matter. For instance, France, which had assisted Iraq in building the nuclear reactor, established that the reactor was purely intended to meet civilian aims, and incapable for the production of atomic bombs.⁸¹ Furthermore, the Director General of IAEA

⁷⁸ UN Doc S/PV.2280 (12 June 1981) p. 11 para. 102

⁷⁹ UN Doc S/PV.2282 (8 June 1981) para. 95 p. 9

⁸⁰ (1981) UNYB 276

⁸¹ UN Doc S/PV.2282 para. 48 p. 5

confirmed that the Osirak nuclear reactor was safe for civilian use in accordance with the Non-Proliferation Treaty (NPT).⁸² United Kingdom also expressed the view that there was no instant or overwhelming necessity for self-defence, because the nuclear reactor was safeguarded by the NPT regime.⁸³ This shows there must be a serious threat in existence and an urgent need (immediacy) when reacting with force.⁸⁴

In summary, the right to self-defence can be invoked if the principle of necessity is fulfilled. Necessity in this respect is seen as a requirement to engage in self-defence, because of the existence of a threat or an armed attack, with force being the final option and immediacy being present. Failure to show the elements of necessity as a requirement to self-defence affects the legality of the use of force.

c. The Second Role of Necessity – Limitation on the Use of Force in Self-Defence

The second role of necessity in the law of self-defence is to limit force.⁸⁵ This requires the invoking state to restrict the use of force as deemed necessary to achieve the legitimate aim of self-defence. Excessive force is deemed unnecessary and may be considered illegal. Necessity as a limiting factor resembles the previously discussed principle of proportionality. Arguably, to assess necessity, proportionality must be considered. This is because some features of proportionality are applicable to discussions on necessity.⁸⁶

As argued above, a state that pleads for self-defence must demonstrate it is necessary to exercise force for defensive purposes. If a state exercises the

⁸² UN Doc S/PV.2282 para. 55 p. 5

⁸³ UN Doc S/PV.2282 para. 106 p. 10

⁸⁴ Indeed there are separate arguments to suggest this is an example for pre-emptive self-defence. See Natalino Ronzitti 'The Expanding Law of Self-Defence' (2006) 3 JCSL 343-359; Istvan Pogany, 'Nuclear Weapons and Self-Defence in International Law' (1986-87) 2 Connecticut Journal of International Law 97

⁸⁵ Gardam (n 2) 149; Gray (n 2) 149

⁸⁶ Gray *ibid* 150

right to self-defence, it would not do so without restriction. Restriction arguably covers two areas in *jus ad bellum* namely, necessity and proportionality. This thesis argues that, not only does necessity act as a pre-requisite to self-defence, but it also acts as a factor restraining self-defence.⁸⁷ The word necessity itself conveys the notion that force is necessary for self-defence. This is where necessity and proportionality overlap. Proportionality by nature restrains the use of force. The fact that necessity cannot be separated from proportionality suggests that necessity plays a role in limiting the use of force in self-defence. However, there are clear distinctions to be made between the two. Proportionality generally refers to the size, duration and target of the force used, whilst necessity as a limitation ensures the use of force is in relation the aim of self-defence.⁸⁸

The second role of necessity as a limitation in self-defence relates to assessments of whether the use of the force meets the aim of self-defence. If the use of force is retaliatory, deterrent or punitive in character, it is deemed unnecessary, as it does not serve the legitimate aims of self-defence.⁸⁹ Therefore, states must limit the use of force to defensive purposes.

In advancing the narrative of necessity as a limiting factor in self-defence, it is inevitable to acknowledge the conflation between necessity and proportionality. The criticism that may be raised here is that necessity (as a limitation) can simply be construed as proportionality. In addition, if it is disproportionate use of force, is it not that it is also failing to meet necessity as a limitation to self-defence? This thesis, however, maintains that there is a difference between proportionality and necessity (as a limitation).

The interaction between necessity (as a limitation) and proportionality can be explained in the following hypothetical example. If a state uses defensive

⁸⁷ Lindsay Moir, *Reappraising the Resort to Force* (Hart Publishing 2010) 11

⁸⁸ Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 150

⁸⁹ Randelzhofer and Nolte, 'Article 51' in *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) 1425

force excessively, the action of the state could be interpreted in two ways. First, if the force is used extensively but failed to meet the aim of self-defence, the state could be said using force disproportionately (failing to meet the condition of proportionality) and failed to meet the principle of necessity. Second, if a state uses force extensively but meet the aim of self-defence, the state could be regarded as meeting the principle of necessity (as a limitation) but fail to meet the principle of proportionality. The underlying objective here is in meeting the aim of self-defence for necessity (as a limitation) while proportionality focuses on the size and scale of the defensive force.

Some have questioned the role of necessity as a limiting factor in self-defence post the UN Charter. In the nineteenth century, the term necessity was a limiting factor for nations when they were exercising force in accordance with doctrine derived from the *Caroline* incident. However, the role of necessity in UN Charter regime is disputed. Article 51 of the UN Charter performs a controlling function on states, although allowing the exercise of self-defence. As described by one commentator:

“...necessity was a limiting factor at a time when there are no limits, and took the place of restraints on the resort to force. Nowadays, the situations in which states may resort to force are already limited, and this factor should be borne in mind in determining the requirements of necessity under the Charter system.”⁹⁰

Although it may be said that necessity may diminish in relevance in terms of the use of force in self-defence, states and the ICJ continue to cite necessity as a benchmark when examining legality in the use of force. Thus, necessity continues to have a role in the self-defence regime.

Theoretically, it is possible to decipher the meaning of necessity and partition it into two roles. In practice, however, the division of the two roles of

⁹⁰ Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 149

necessity are less clear. Several factors cause confusion in the two roles. In state practice, speeches by heads of states and diplomats are often not explicit in their meaning as regards necessity in self-defence. The idea of necessity may be referenced but it is not contextualised. It is open to interpretation whether necessity refers to the requirement to self-defence, which triggers the right, or if it is indicated as a limitation on the use of force making the confusion worse; in such cases necessity refers to international humanitarian law. Similarly, in legal literature, with few exceptions, commentators overlook the intricacies of the role of necessity in self-defence regimes. Thus, it may be that scholars understand the role of necessity but they are unclear about what aspect of necessity they are referring to. It is perhaps also the case that legal literature uses the term necessity as a requirement and a limitation interchangeably. It is important for the jurisprudence of *jus ad bellum* to understand the role of necessity, and to establish how the different elements of necessity affect the legal framework of self-defence.

d. Conclusion

The discussion of necessity as a principle in the self-defence framework can further be extended by analysing the components of necessity. This can be achieved by understanding the role of necessity in fulfilling the legitimate aim of self-defence. It is argued that necessity has two distinct yet related roles in self-defence. First, it is treated as a requirement that states seek to achieve prior to claiming they are acting in self-defence. The requirement consists of several elements; namely, there must be a threat, and the state should consider peaceful means of resolving the conflict demanding an immediate imperative to react with force. All these elements combine to establish necessity as a requirement for self-defence. The second role of necessity is as a limiting factor when the invoking state is exercising self-defensive measures. Necessity restricts the force employed by the invoking state to achieve the legitimate aim of self-defence. This prevents the state concerned from over-using permissible force. The second role of necessity bears similarities to the principle of proportionality. However, proportionality

determines the scale and duration of the defensive measures. By understanding the different roles of necessity in self-defence, it is possible to clarify the position of necessity in the self-defence framework. This may encourage practitioners and commentators to re-think the concept of necessity, and its use in the jurisprudence of *jus ad bellum*.

5. The Application of Necessity in Self-Defence against State and Non-State Actors

a. Introduction

The concept of necessity in the legal framework of self-defence can be further analysed by understanding the application of necessity as applied to state and non-state actors.

This section will attempt to demonstrate the differences in the application of necessity in self-defence according to the identity of the aggressor. Differences stem from the constructs of international law, which focus on state institutions. Contemporary laws on the use of force are being challenged by the growing threat from terrorist groups. Therefore, the general framework on self-defence requires further revision to adapt the different applications of necessity to states and non-state actors.

b. Terrorism in International Law

The effects of terrorism in international law have permeated various aspects of international affairs. They have affected international security, the sovereignty of states, international trade, international humanitarian law, international human rights and the law on the use of force. The adverse effects of terrorism are currently keenly felt in international law. International law has been compelled to address the growing threat of terrorism in the international arena. One of the aims of the UN Charter is 'to maintain

international peace and security'⁹¹; this requires states to take measures to ensure international relations are not affected by terrorist activities.

As the threat that terrorism will endanger international security and destabilise state institutions becomes more intense, states are choosing to undertake additional non-forcible initiatives to counter this threat by establishing an applicable international legal framework. A series of international conventions have been drafted to address the issue of terrorism. Among these are conventions directed towards specific activities in the realm of international affairs, covering civil aviation,⁹² maritime affairs,⁹³ hostage situations,⁹⁴ and financial checks.⁹⁵ All these international instrument function independently and do not comprise a holistic approach. As one commentator described, this is a 'piecemeal' approach to tackling terrorism.⁹⁶

The post 9/11 period saw a new set of international efforts to combat terrorism through international law. A more comprehensive legal framework was established to prevent the activities of terrorists. In SC Res. 1373 (2001) the Security Council called upon Member States to implement major international Conventions and protocols relating to terrorism and established a SC Counter-Terrorism Committee.⁹⁷ In 2004, A UN report entitled 'A More Secure World: Our Shared Responsibility' was published by the Secretary–

⁹¹ Article 1(1) of the United Nations Charter 1945

⁹² 1963 Convention on Offences and Certain other Acts Committed on Board Aircraft 1248 UNTS 451; 1970 Convention for the Suppression of Unlawful Seizure of Aircraft 860 UNTS 12325; 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 974 UNTS 14118

⁹³ 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation IMO Doc. SUA/CONF/15/Rev.1

⁹⁴ 1979 International Convention against Taking of Hostages 1316 UNTS 21931

⁹⁵ 1999 International Convention for the Suppression of the Financing of Terrorism UN Doc.A/Res/54/109(1999)

⁹⁶ Helen Duffy, *The 'War on Terror' and Framework of International Law* (CUP 2005) 24

⁹⁷ Security Council Resolution 1373 (2001) 28 September 2001 (S/RES/1373/(2001))

General's High Panel Report on Threats, Challenges and Change, and outlined a comprehensive strategy against terrorism to assist states in confronting terrorism.⁹⁸ It includes the prevention of terrorist activities such as upholding the rule of law, protecting human rights, reducing poverty, preventing state collapse, and overseeing the control of dangerous materials.⁹⁹ The efforts in combatting terrorism were further intensified by refinements to the UN counter terrorism strategy. In 2006, the Secretary-General released another report dissuading people from resorting to terrorism or supporting it, denying terrorists the means to carry out an attack and deterring states from supporting terrorism.¹⁰⁰ This comprehensive and holistic approach by the UN in combatting terrorism meant there was a marked difference in approaches after the 9/11 attack. By establishing a legal framework, it was possible to take measures collectively and effectively to meet the challenges of terrorism through non-forcible efforts.

The interpretation of the law on the use of force depends on the threats enacted by terrorist groups. Where the threat from terrorist groups is critical and capable of exerting similar destruction to those by state actors then states would seek to reconcile the existing law to challenge a non-state actor. Under the law, states and terrorist groups are two distinct entities, and cannot be treated equally. This difference affects *jus ad bellum* in several ways. First, the threat exerted by terrorist groups cannot be undermined simply because it is a non-governmental organisation. For instance, the number of death caused by the 9/11 attacks reflect the ability for Al-Qaeda to organise massive destruction with maximum casualties using an unconventional method of execution. The ongoing attacks by Al-Qaeda in other parts of the world, such as the bombing in London in 2004 and Madrid

⁹⁸*Report of the High-Level Panel on Threats, Challenges and Change - A More Secure World: Our Shared Responsibility* UN Doc. A/59/565 (2 December 2004) pp. 45- 47

⁹⁹ *Report of the High-Level Panel on Threats, Challenges and Change - A More Secure World: Our Shared Responsibility* UN Doc. A/59/565 (2 December 2004) pp. 45- 47

¹⁰⁰ Report of the UN Security Council, *Uniting Against Terrorism – Recommendations for a Global Counter-Terrorism Strategy* UN Doc.A/60/825 (27 April 2006)

in 2005, show the ability of terrorist groups to disrupt international peace and security. Thus, the law on the use of force is necessarily affected. The law has to be reformed to meet the challenges faced, whilst simultaneously still retaining the measures required to supervise inter-state conflicts.

Another difference between a state and a non-state actor in international law is the legal obligations imposed on states. This creates an imbalance in legal obligations.¹⁰¹ A state is expected to act according to international norms and principles in all their internal or external affairs. Such obligations have an effect on how states can behave when using force. For example, a state that invokes the right to self-defence has to comply with the rules of *jus ad bellum* and international humanitarian requirements, and failure to do so may deem its use of force as unlawful. Another scenario would be that a state would be expected to exercise force reasonably in accordance with the rules on State Responsibility to ensure that its conduct does not breach international obligations.¹⁰² For instance, states have the duty not to knowingly allow their territory to be used for acts contrary to the rights of other states.¹⁰³ This obligation assumes that every state has the responsibility to refrain from organising, encouraging, instigating or participating the organisation of irregular forces, armed bands or terrorist groups within its territory, and to prevent an incursion from its territory into the territory of another state.¹⁰⁴ These are among some of the responsibilities of a state in international law. Irrespective of whether a state is threatened or attacked by another state or a non-state actor, the onus of legal responsibility still lies with the state exercising the right to self-defence.

¹⁰¹ Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 24

¹⁰² Article 2 of Draft Articles on Responsibility of States for Internationally Wrongful Acts Supplement (Nov. 2001) No. 10 (A/56/10)

¹⁰³ Corfu Channel (United Kingdom v. Albania) ICJ Rep. (1949) p 22

¹⁰⁴ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations GA Res 2625 (XXV) 24 October 1970, Annex, Section 1

In contrast, terrorist groups are free from legal accountability in *jus ad bellum*.¹⁰⁵ They have no international obligations and may exercise force at any time without considering the implications in *jus ad bellum* or *jus in bello*. In the example of 11 September 2001, Al-Qaeda attacked the US by hijacking several civilian aircrafts and purposefully targeting public buildings and killing thousands of civilians. If Al-Qaeda were a state actor, it would have been judged to have been acting unlawfully under a series of international conventions, treaties and customary laws. However, Al-Qaeda disregards such legal responsibility and disrupts international security.

The existence of large organised terrorist groups on the international stage affects the landscape of the law on self-defence.¹⁰⁶ Notwithstanding the effects on the principles of necessity and proportionality by non-state actors, there is also concern over nation states' involvements with terrorist groups. This question is important when apportioning legal responsibility. It is necessary to ask, to what extent a state has control over a terrorist group, making it consequently responsible for the unlawful conduct of a non-state actor. For instance, if state A is in conflict with state B but is using a proxy or auxiliary (such as a terrorist group), state A is deemed to have instructed the terrorist group to breach the security of state B. In this situation, it is important to determine how the use of a non-state actor affects state A's accountability for the unlawful conduct of the terrorist group? One way to assess states' involvement with a non-state actor is by examining state control mechanisms.

Recalling the discussion in Chapter 2, in legal literature, there are three main approaches in determining legal responsibility of a state for actions of non-state actors. First, 'effective control test' is a method where it assess the

¹⁰⁵ Non-state actors can be held responsible under other international laws such as international criminal law, Article 7 (1) of the Rome Statute for crimes against humanity or international humanitarian law for instance under Common Article 3 of the Geneva Conventions and Additional Protocol II (applicable to member states and 'dissident armed forces or other organized groups...')

¹⁰⁶ Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 EJIL 993-110, 995-998

involvement of a state in participating in financing, organising, training and supplying the non-state armed group.¹⁰⁷ Second, 'dependence test' enquires whether the non-state actor is dependent on the state and controlled by the state.¹⁰⁸ Both of these tests were developed in *Nicaragua* (the ICJ). Finally, 'overall control test' requires a state to wield overall control over the non-state actor including coordinating and planning activities.¹⁰⁹ The latter test was pronounced in International Criminal Tribunal for the former Yugoslavia (ICTY) with regards to the characterisation of an armed conflict.

6. Conclusion

Necessity is an important principle in the law of self-defence as it affects legality when a state invokes the right to self-defence. The term necessity is broadly used in international law as a basis for exceptionalism in legal obligations. The focus in this Chapter is on scrutinising the meaning of necessity in the context of *jus ad bellum*. The scope of necessity can be viewed from several angles; namely defining necessity as a matter of last resort, subjectivity or objectivity in necessity, seeing necessity according to its origin (the *Caroline* incident) and defining necessity based on the aim of self-defence. All four aspects of necessity can result in a different interpretation and enhance the in-depth meaning of necessity in self-defence.

Aside from necessity, it is important to highlight the role of proportionality in the framework of self-defence as well as its relationship to the principle of necessity. It is argued that, necessity is closely linked with proportionality, as it governs similar aspects of the use of force. However, necessity could also be distinguished from proportionality.

¹⁰⁷ *Nicaragua* (n 4) p 64-65 para 114

¹⁰⁸ *Ibid* para 109

¹⁰⁹ *Prosecutor v Dusko Tadic Judgment in the Appeals Chamber of International Criminal Tribunal for the former Yugoslavia (ICTY) IT-94-1-A (15 July 1999) p 56 para 131*

It is further argued that there are two main components of necessity based on its role in *jus ad bellum*. First, the role of necessity as a component of the law of self-defence acts as a requirement and a necessity, and must be assessed before a state can exercise force in self-defence. The invoking state must show a necessity to use force. This could be in the form of the existence of a threat of armed attack, and the use of force as a last resort for the attacked state consider. The second role of necessity is as a limitation on the use of force when a state is exercising the right to self-defence. The second role of necessity is akin to the principle of proportionality, because certain facts are relevant when assessing both principles. It is argued in this Chapter that necessity as a limitation focuses on meeting the aim of self-defence while proportionality considers the scale and duration of the defensive force. Highlighting the dual roles of necessity amplifies the meaning of necessity in the framework of self-defence, assisting scholars in defining its role in self-defence.

The principle of necessity could be further analysed in terms of its application against state and non-state actors. It is proposed that necessity requires further adaptation to match a climate that is increasingly focused on terrorism. Three tests that were developed by the ICJ and ICTY to determine whether a non-state actor is acting on behalf of a state. The 'dependence test', 'overall control test' and 'effective control test' were used in the jurisprudence of international tribunals, although the latter test was regarded as the primary method of assessment. The choice of test used affects how a state respond in self-defence, and consequently the meaning of necessity relates to the entity of the aggressor.

The next Chapter shows how necessity is applied when a state invokes self-defence against non-state actors. It focusses on the roles of necessity as a requirement and a limitation of self-defence.

Chapter 5: Legal Standard of Necessity in the Framework of Self-Defence

1. Introduction

As evaluated in the previous chapter, the principle of necessity is an important aspect of the law of self-defence. A state that employs self-defence must adhere to the principle of necessity to any use of force. However, as discussed, necessity is an abstract notion that can be interpreted in multiple paradigms, and which is subject to several variables. In the legal literature concerning *jus ad bellum*, the meaning of necessity for self-defence remains undefined and multiple interpretations are valid. This Chapter proceeds based on the finding that there is no 'one-size-fits-all' concept of necessity that encompasses all situations. It aims to clarify the situation by unravelling the factors affecting the meaning of necessity in self-defence, and in so doing argues that the meaning of necessity is affected fundamentally by whether a state faces a state or a non-state actor (e.g. a terrorist organisation). To develop this argument this study examines several sources and case studies, and analyses the associated commentary.

The Chapter will approach necessity from two angles. Firstly, factors affecting the lawfulness of self-defence in the general framework of *jus ad bellum*, according to several norms set out in international law, e.g. the principle of sovereignty. All states are required to respect other states' sovereignty and as established in Article 2(4) of the UN Charter, to refrain from the use of force against another state. However, the prohibition in Article 2(4) does not apply when a state invites another state to use force within its territory; this is known as an 'invitation to intervene'. In such scenarios, raising the issue of self-defence is irrelevant, as self-defence is the unilateral use of force without permission of the host state.

In the Second part of this Chapter, the principle of necessity is examined by studying factors that affect the meaning of necessity. Arguably, there are three factors affecting how necessity is determined. First, it is judged

according to whether the defensive measure is taken in anticipatory or pre-emptive self-defence, which relies on the concept of imminence. Imminence is absent in pre-emptive self-defence, and so it is argued that the use of force in pre-emptive self-defence cannot be deemed to meet the condition of necessity. However, anticipatory self-defence is argued to fulfil the condition of necessity.

The second factor affecting the meaning of necessity is the aim of the action taken in self-defence. It is important to consider the aim of self-defence, as it determines how a state determines whether the use of force is necessary. A commonly accepted aim of self-defence is to halt or repel an armed attack, and this is described as a legitimate aim of self-defence. For instance, the necessity to use force in self-defence is judged according to whether it is necessary to halt and repel an armed attack. However, the concept of halting and repelling an armed attack is one that is challenged if the notion of anticipatory self-defence is accepted, as in this instance no armed attack has occurred. Similarly, the halt and repel school notion may be seen as irrelevant or pointless in the case of finished attacks, as there is no longer a need to halt or repel. Therefore, in the case of a completed attack the legitimate aim of self-defence is no longer applicable.

The third and final factor affecting the meaning of necessity concerns the aggressor entity. This Chapter argues that the aggressor entity, whether a state or a non-state actor, influences how necessity is seen by the invoking state. In fact, it is the main submission of this Chapter that the application of necessity in self-defence is heavily dependent on the entity of the aggressor. Therefore, this Chapter will explore the standard of necessity in the context of terrorism, by examining the theory of 'unwilling or unable', which provide the platform from which to assess whether it is necessary to use force against a non-state actor in another territory.

2. Factors Affecting Lawfulness of Self-Defence

The general law governing the use of force includes norms in international law. Fundamental amongst these norms is the principle of sovereignty, and the prohibition on the use of force against another state. In any use of force, including when exercising the right to self-defence, the invoking state must consider the implication of force upon sovereignty of the affected state, and the prohibition to use force.

The principle of sovereignty and the prohibition on the use of force may affect the lawfulness of any state claiming to exercise self-defence. These two factors are poignant considerations when determining the lawfulness of the use force in self-defence, including if it is directed toward a non-state actor. Observing that a state must consider these two factors, acting in self-defence against a non-state actor is a situation that requires the invoking state to balance the interests of its national security from terrorist attack emanating from over its border, and the use of force in another state.¹ This inevitably violates the sovereignty of the affected state contravening the prohibition on the use of force.

The following section explores the effect of foreign intervention on sovereignty, by way of consent. As explained above, this is commonly termed 'invitation to intervene'. When a state consents to a foreign entity's intervention in their internal affairs, this automatically overrides the principle of sovereignty and the prohibition on the use of force.² However, the issue of consent is complex, and sometimes makes it difficult to determine lawfulness in particular situations. This also affects the lawfulness of the use of force.

a. Sovereignty

¹ Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 36-37

² Gregory Fox, 'Intervention by Invitation' in Marc Weller (ed), *The Oxford Handbook on the Use of Force in International Law* (OUP 2015) 818-819; David Wippman, 'Military Intervention, Regional Organizations, and Host-State Consent' (1996) 7 *Duke J. Comp. & Int'l L.* 209, 209

The principle of sovereignty is an important concept in modern international legal discourse. The history of the modern principle of sovereignty can be traced to the Treaty of Westphalia³ in 1648, which recognised the emergence of the European nation state.⁴ This gave each state exclusive rights to exercise territorial jurisdiction and legal independence, free from any intervention by foreign powers in its domestic affairs.⁵ The concept of sovereignty has been developing and evolving ever since the establishment of the nation-state system, in the 16th and 17th centuries.

In contemporary international law, the concept of sovereignty is still pertinent as a principle for regulating interstate relations. For instance, Article 2(1) of the UN Charter states, “The Organisation (the UN) is based on the principle of the sovereign equality of all its members”.⁶ Prior to the establishment of the UN, the principle of sovereignty had already been enshrined as a concept of modern international law in the early 20th century. The case of *Wimbledon* in the Permanent Court of International Justice (PCIJ) illustrates this point.⁷ The Court remarked, “the right of entering into international engagements is an attribute of State sovereignty”.⁸ The Court, in this case interpreted the concept of sovereignty as confined to consent-based on legal rules. Nonetheless, the notion that a state is sovereign and capable of entering into a legal binding relationship under its own freewill was confirmed and acknowledged in the *Lotus* case in 1927.⁹ This reflects the importance

³ Treaty of Westphalia (24 October 1648) 1 Parry 271; 1 Parry 119

⁴ Samantha Besson, ‘Sovereignty’ in Max Planck Encyclopedia of Public International Law (Online)

⁵ Samantha Besson, ‘Sovereignty’ in Max Planck Encyclopedia of Public International Law (Online)

⁶ Article 2(1) of the United Nations Charter 1945 1 UNTS XVI

⁷ *S.S Wimbledon* (United Kingdom v Japan) 1923 PCIJ (Ser. A) No. 1 (17 August 1923) 25

⁸ *S.S Wimbledon* (United Kingdom v Japan) 1923 PCIJ (Ser. A) No. 1 (17 August 1923) 25

⁹ The Court states that:

‘The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.’

of the principle of sovereignty in contemporary international law. However, the traditional understanding of sovereignty in the early 19th century concerned state's exclusive power over their own territory was challenged by evolving issues in international law such as human rights, self-determination, economic and technological interdependence.¹⁰

Meanwhile, an aspect of sovereignty that remains a core principle is territorial sovereignty. This refers to the notion that a state has the fullest authority over the territory it governs.¹¹ It is *ad rem* to raise the issue of territorial sovereignty in any discussion on the use of force, as it affects the lawfulness of an action. Article 2(4) of the UN Charter expressly obliges member states to refrain from the use of force against the "territorial integrity or political independence of any state".¹² Therefore, the rule that a state is sovereign relates to its primacy in administering its territory free from foreign intervention.

By default, any use of force against a territory of another state is a violation of the affected state's sovereignty, and the prohibition in the Charter Article 2(4). This includes determining whether a state directs the use of force against a non-state actor. The challenge of today's *jus ad bellum* is to balance the principle of sovereignty, which each state must observe at all times, while addressing terrorist threats.¹³ However, the restrictions imposed by sovereignty and prohibitions against the use of force, as contained in Article 2(4) can be overcome if the host state consents to the intervention of a foreign entity, including the use of force within its territory.

S.S *Lotus* (France v. Turkey) 1927 PCIJ (Ser. A) No. 10 (7 September 1927)
18

¹⁰ David Held, 'The Changing Structure of International Law: Sovereignty Transformed?' in David Held and Anthony McGrew (eds), *The Global Transformations Reader* (2nd edn, Polity 2003) 162-175; Jens Bartelson. 'The Concept of Sovereignty Revisited' (2006) 17 EJIL 463-474; Helene Ruiz Fabri, 'Human Rights and State Sovereignty: Have the Boundaries been Significantly Redrawn?' in Philip Alston and Euan MacDonal (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 33-86

¹¹ Malcolm Shaw, *international Law* (5th edn, CUP 2008) 490

¹² Article 2(4) of the United Nations Charter 1945 1 UNTS XVI

¹³ Malcolm Shaw, *international Law* (5th edn, CUP 2008) 43-44

b. Exemption to the Rule of Sovereignty: Consent to Use Force

The use of force by one state in another state's territory on the basis of consent is generally accepted in international law.¹⁴ This is commonly termed 'invitation to intervene'. Consent may be given by one state to another state (or group of states) for various reasons, such as combatting international terrorism. Such consent effectively overrides the principle that a state is free from intervention by a foreign state, thus, the intervening state is not then acting contrary to Article 2(4) of the prohibition. Article 20 of the Draft Articles on State Responsibility states:

“Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.”¹⁵

In *Nicaragua*, the Court stated “it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition”.¹⁶ The Court confirmed the lawfulness of an invitation to intervene in *DRC v Uganda*. In this case, the Court reiterated that consent can be given by one state to another state upon the request of the government.¹⁷ In addition, the Court also

¹⁴ Gregory H. Fox, 'Intervention by Invitation' in Marc Weller (ed), *The Oxford Handbook on the Use of Force in International Law* (OUP 2015) 816-840

¹⁵ Article 20 of Draft Article Responsibility of States for Internationally Wrongful Acts 2001 UN Doc. A/RES/56/83 (28 January 2002)

¹⁶ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US) ICJ Rep. p. 14, p. 126 para. 246

¹⁷ Armed Activities on the Territory of the Congo (DRC v Uganda) ICJ Rep. 2005 p. 168, p. 196-199. para. 42-53

emphasised that consent can be withdrawn subsequently if the consenting state chooses to do so.¹⁸

Despite the lawfulness of invitations to intervene in international law, this area is not free from dispute. Indeed, scholars have questioned the legality of intervention by dividing the type of conflict faced by the inviting state. The reasons for intervention may vary according to whether the situation faced is a civil war,¹⁹ political opposition, or a struggle for self-determination;²⁰ thus, not all consent can be treated equally. Furthermore, adding to the complexity of this area is the basis of the invitation. A state may permit another state to intervene in its domestic affairs on the grounds of a treaty obligation, or based on previous practice.²¹ As such, consent may vary according to its legal foundation.

A complex aspect of the invitation to intervene concerns the question of who is an appropriate authority to issue consent. There is an abundance of state practice implied when a government gives consent, and often the context is questionable.²² The main suspicion when giving consent to another state to interfere in the domestic affairs of a host state, concerns whether the invitation is intended as a genuine consent or as a pretext for the unlawful use of force.²³

¹⁸ *Armed Activities on the Territory of the Congo (DRC v Uganda)* ICJ Rep. 2005 p. 168, p. 196-199. para. 42-53

¹⁹ Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 82-84

²⁰ Louise Doswald-Beck, 'The Legal Validity of Military Intervention of the Government' 56 (1985) BYIL 189-252, 200-207

²¹ Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 92-96

²² Among others France's intervention in Tunisia in 1980 to combat insurgents emanating from Libya, US support in Guatemala in 1954 through coup and involvement of Senegal in Guinea-Bissau in 1998 against army uprising (Keesings (1998) 42323). See also Christine Grey, *International Law and the Use of Force* (3rd edn, OUP 2008) 99-105 The author extensively analyse the complexity Lebanon's consent for Syrian troops in Lebanon and the role of other states which affects the Syria's legal position in Lebanon.

²³ Louise Doswald-Beck, 'The Legal Validity of Military Intervention of the Government' 56 (1985) BYIL 189-252, 211

A recent example of this, which illustrates the difficulty of establishing the appropriate body to give consent, is the Ukraine. At the end of 2013, an uprising occurred, mainly centred in Kiev in which many Ukrainians opposed the government's policies.²⁴ The uprising eventually led to the overthrow of President Yanukovich; Ukraine's Parliament voted to remove him and chose an interim leader.²⁵ President Yanukovich later fled the country, claiming he was still the democratically elected President of Ukraine and that the coup against him was illegal.

The uprising in Ukraine focused on Crimea, a peninsula in southern Ukraine. Ukraine claimed that Russia had committed an act of aggression by illegally entering its territory.²⁶ Russia explained to the Security Council that its actions had been carried out at the request of Ukraine's fugitive President, and that it had the right 'to use the armed forces of the Russian Federation to establish legitimacy, peace, law and order and stability in defence of the people of Ukraine.'²⁷ Subsequently, Russia deployed thousands of its forces to Crimea, annexing the territory after a referendum held on 16 March 2014.²⁸

The situation in Ukraine demonstrates the problem of determining the appropriate authority to give consent to a foreign state to intervene. In this example, the question concerned whether the consent given by President Yanukovich could be regarded as legitimate and lawful as he was the *de jure* President of Ukraine. Commentators were divided on this issue.²⁹

²⁴ <http://www.bbc.co.uk/news/world-middle-east-26248275> (accessed on 16 September 2014)

²⁵ <http://www.bbc.co.uk/news/world-europe-26304842> (accessed 3 September 2014)

²⁶ UN Doc. S/PV.7124 (1 March 2014) p.3

²⁷ UN Doc. S/PV.7125 (3 March 2014) p.4

²⁸ <http://www.bbc.co.uk/news/world-middle-east-26248275> (accessed on 16 September 2014)

²⁹ Gregory Fox, 'Ukraine Insta-Symposium: Intervention in the Ukraine by Invitation' <http://opiniojuris.org/2014/03/10/ukraine-insta-symposium-intervention-ukraine-invitation/> (accessed on 22 September 2014); Grigory Vaypan '(Un)Invited Guests: The Validity of Russia's Argument

Noting the complexity of the requirement of consent to intervene, there was a stark contrast indicated regarding the straightforward principle enunciated by the ICJ in the *Nicaragua* and *DRC v Uganda* cases, regarding allowing states to use force by invitation. Whether the consent given by the president is lawful or otherwise is subject to continuous debate; this shows that intervention by invitation involves more detailed consideration if it is to be considered the legal use of force.

The invitation to intervene should be judged on the validity of the consent. Consent may be given by a government to another state by way of an international or regional legal framework, or in accordance with mutual understanding. Oliver Corten argues that for consent to be considered valid it must possess four conditions. First, it must be anterior to the act. Second, should be given freely and uninvited. Thirdly, the consent must clearly be established, and fourthly, it must be relevant to the act in question.³⁰

However, in practice, not all consent is likely to conform to Corten's four conditions. The situation in Pakistan exemplifies this. After the 9/11 attacks, the US government embarked on its 'War on Terror' campaign, mainly focusing on Al-Qaeda and associated organisations.³¹ The terrorist group was believed to be based in Federally Administered Tribal Areas (FATA), north of Pakistan, at the border with Afghanistan. The US repeatedly

on Intervention by Invitation' (5 March 2014) Cambridge Journal of International and Comparative Law <http://cjiicl.org.uk/2014/03/05/uninvited-guests-validity-russias-argument-intervention-invitation/> (accessed on 23 September 2014); Zachary Vermeer, 'Intervention with the Consent of a Deposed (but Legitimate) Government? Playing the Sierra Leone Card (6 March 2014) Blog of the European Journal of International Law <http://www.ejiltalk.org/intervention-with-the-consent-of-a-deposed-but-legitimate-government-playing-the-sierra-leone-card/> (accessed 22 September 2014)

³⁰ Olivier Corten, *The Law Against War* (Hart Publishing 2012) 266-276

³¹ See President George Bush's speech at the Joint Session of the 107th Congress, 20 September 2001. http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf

launched counter-terrorist operations using drone planes targeting militants within the FATA region.³²

There are conflicting opinions regarding the validity of the consent based upon which the US drones operated in Pakistan.³³ Pakistan's government strenuously denied that it had explicitly consented to the US launching drone operations within its territory against the terrorists, circumventing the possibility of tacit consent by Pakistan.³⁴ Many Pakistanis saw the drone operations as a violation of their state sovereignty, and condemned the killing of innocent civilians unaffiliated to terrorist groups. However, sources suggest that Pakistan tacitly permitted the US to use its drones in the FATA region.³⁵ Such claims have some merit. The drone strikes in FATA may have assisted the Pakistani government to strengthen its security in the country, especially in the FATA region. This effectively represents the US and Pakistan governments working together to eradicate terrorism, although

³² Sikander Ahmed Shah, 'War on Terrorism: Self Defense, Operation Enduring Freedom, And the Legality of U.S Drone Attacks in Pakistan' (2010) 77 Washington University Global Studies Law Review 77-129, 113-115

³³ See Dawood I. Ahmed, 'Rethinking Anti-Drone Legal Strategies: Questioning Pakistani and Yemeni "Consent"' (2013) 8 Yale Journal of International Affairs 1-11

³⁴ 'No 'tacit consent' to US for Drone Strikes: Pakistan' http://articles.economictimes.indiatimes.com/2012-09-28/news/34148524_1_drone-strikes-drone-attacks-missile-strikes (28 September 2012); 'Pakistan is Not Co-Operating with US over Drones, Ministry Insists' (The Guardian, 28 September 2012) <http://www.theguardian.com/world/2012/sep/28/pakistan-military-drones-america>. See admission from 'two anonymous senior White House Officials' on Pakistan's tacit approval of the drone operation in Pakistan. This reported in 'U.S. Unease Over Drone Strikes' (Wall Street Journal, 26 September 2012) <http://www.wsj.com/articles/SB10000872396390444100404577641520858011452>

³⁵ Chris Wood, 'Drone Strikes in Pakistan' The Bureau of Investigative Journalism 28 September 2012 <http://www.thebureauinvestigates.com/2012/09/28/pakistan-categorically-rejects-claim-that-it-tacitly-allows-us-drone-strikes/>; See Former Pakistan's President, Pervez Musharraf, admitted there was a limited drone operations conducted by the US approved by the Pakistani government. <http://edition.cnn.com/2013/04/11/world/asia/pakistan-musharraf-drones/>

politically, admitting cooperation with the US was unpopular among the public.

After evaluating the competing views of consent given by Pakistan's government over the drone operations, it is argued that consent must be clearly established in order to substantiate the validity of any consent. In the case of Pakistan, if the US were not given consent to launch drone strikes in FATA, then they would have amounted to violation of Pakistan's sovereignty and thereby be unlawful.³⁶ Conversely, if consent was given, and the US exercised force within the remit of this consent, their actions would not contravene the prohibition on the use of force. The lack of an admission by Pakistan that consent existed leaves legal commentators with limited knowledge of the facts, impeding full analysis of the situation.

As mentioned previously, scholars are divided on the legality and the scope of consent in international law. They differ on the issue of whether consent stands as an independent basis for one state choosing to exercise force in another state, including consent to the use of force against a non-state actor³⁷. If consent is not sufficient to justify the use of force in another state, the alternative component of the lawful unilateral use of force is self-

³⁶ See statement by Ben Emmerson, UN Special Rapporteur on Counter-Terrorism and Human Rights, on the drone operations in FATA. He concluded that due to no consent by the Government of Pakistan, the operation is a violation of Pakistan's sovereignty and territorial integrity. (14 March 2013)
<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13146&LangID=E>

³⁷ Sean Murphy, 'The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan' (2009) 85 International Law Studies 109-139, 118 (Argues that once consent is given it sufficient as a legal basis for the US to use force in Pakistan). See contrast, Mary O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan 2004-2009' Notre Dame Law School, Legal Studies Research Paper No. 09-43 (find http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144) p. 16-17 (argues that consent to use force in the host state by an external states is not applicable in the absence of armed conflict hostilities)

defence.³⁸ It is therefore advantageous that the acting state (the state receiving the consent) to offer multiple justifications to use force in another state, preferably consent and the right to self-defence.³⁹ However, Ashley Deeks argues that the acting state must not blindly accept the invitation to act, as this conflicts with domestic law and the international human rights obligations of the host state.⁴⁰ She further asserted that the acting state has a 'duty to inquire' and seek due diligence regarding the nature of the consent.⁴¹ It follows that if consent does not preclude wrongfulness in using force in another state, the only provision the acting state could rely on is the right to self-defence. The right to self-defence still dominates discussions over the legality of the use of force, even in the context of consent. Part 3 below will discuss factors affecting the role of necessity in the law of self-defence.

³⁸ Marko Milanovic, 'More on Drones, Self-Defense, and the Alston Report on Targeted Killings'. Can be found at: <http://opiniojuris.org/2013/03/07/hilj-symposium-consent-to-the-use-of-force-jus-cogens-and-manifest-violations-of-domestic-law/> (published (5 June 2010) (The author argues that if consent is given it is irrelevant to discuss about self-defence.); Benedict R. Wiot, 'Drone Defense: The Inherent Right of Self-Defense and U.S Drone Strikes in Pakistan' 1-25. The author argues for the permissibility of drone strikes as a right to self-defence and further contests that some aspects of jus ad bellum do not provide realistic self-defence framework in combatting current terrorist threat. (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986509) (6 June 2011)

³⁹ Harold Koh, Legal Adviser, U.S. Dep't of State, Address at Annual Meeting of American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>; John B. Bellinger III, Legal Adviser, U.S. Dep't of State, Address at London School of Economics: Legal Issues in the War on Terrorism (Oct. 31, 2006)

⁴⁰ Ashley Deeks, 'Consent to the Use of Force and International Law Supremacy' (2013) 54 Harvard Journal of International Law 1-60, 33

⁴¹ Ashley Deeks, 'Consent to the Use of Force and International Law Supremacy' (2013) 54 Harvard Journal of International Law 1-60, 33; <http://www.ejiltalk.org/drones-and-targeted-killings-can-self-defense-preclude-their-wrongfulness/> (the author hinted that even a state that invokes the right to self-defence is not free from international human rights norms.) See opposing view on the 'duty to inquire' <http://opiniojuris.org/2013/03/07/hilj-symposium-consent-to-the-use-of-force-jus-cogens-and-manifest-violations-of-domestic-law/>

In summary, the rule that a state may invite another state to intervene in its domestic affairs is permissible under international law. A legitimate government of a state may invite another state to intervene within its territory. As shown above, invitations to intervene may be straight-forward exercises in which a host state permits another state to use force within its jurisdiction. However, the details of this consent may result in confusion about the authority in-charge of issuing the consent, such as in the case of Ukraine and Russia. The case of Pakistan illustrates that consent must be established and confirmed by the host state. If consent cannot be affirmed, then any use of force by a foreign entity in the host state is unlawful. However, scholars, such as Ashley Deeks, argue that not all types of invitation should be accepted, and that consent must conform to domestic laws and human rights obligations. If consent does not preclude wrongfulness, a state can only rely on the right to self-defence to justify its use of force in another state.

3. Factors Affecting the Principle of Necessity

As stated elsewhere in this thesis, the law of self-defence requires that a state should comply with the principles of necessity and proportionality, and failure to do so may be deemed unlawful.⁴² Specifically on the subject of necessity, a state must consider all relevant factors when considering what action is necessary in self-defence. Whilst this thesis argues that necessity is heavily influenced by the nature of the aggressor (depending on whether it is a state or non-state actor), other considerations also influence the meaning of necessity under the law of self-defence.

⁴² ICJ cases: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ Rep 1986 p 94 para 176; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Rep 1996 p 245 para 41; *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* ICJ Rep 2003 p 198 para 76; *Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda)* ICJ Rep 2005 p 223 para 147
Ian Brownlie, *International Law and the Use of Force by States* (OUP 1963) 279

Arguably, there are at least three considerations influencing the meaning of necessity in the course of self-defence. First, the claims of anticipatory or pre-emptive self-defence will have an effect on the meaning of necessity. Article 51 permits states to use force in self-defence in the event of an armed attack. To launch action in self-defence before the occurrence of an armed attack arguably falls outside the perimeter of Article 51. However, some authors have argued that anticipatory self-defence is lawful and permitted by the provision.⁴³ A more contentious view which is shared by few scholars suggests that pre-emptive self-defence is lawful in international law; at least permissible in limited circumstances.⁴⁴ Nonetheless, were both the claims regarding anticipatory and pre-emptive self-defence to be accepted in *jus ad bellum*, they might then prove relevant to the meaning of necessity.

The second factor that may affect the meaning of necessity involves understanding the aim of self-defence. In order to understand to what extent force is necessary, a benchmark must be established to prevent a state from employing the unnecessary use of force. This can be achieved by understanding the aims of actions in self-defence. States invoking self-defence and employing force that extends beyond the scope of self-defence may be regarded as an unnecessary use of force, and as such is deemed unlawful. As discussed in Chapter IV of this thesis, the majority view of

⁴³ Such as Derek Bowett, *Self-Defence in International Law* (OUP 1958) 185-186; Thomas Franck, *Recourse to Force* (CUP 2004) 97; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Vol. 1, Longman 1992) 421-422 ('Normally anticipatory self-defence is unlawful but not in all circumstances'); See Helen Duffy, *The 'War on Terror' and the Framework of International Law* (CUP 2005) 209-212

⁴⁴ Thomas Franck, *Recourse to Force* (CUP 2004) 97-108 (He argues that the centrality of any pre-emptive strikes relies on the probity of evidence which compels the victim state to react. He displays the permissibility of pre-emptive strikes on Israel's aerial strike of Osirak nuclear plant and deemed it as lawful); David Wippman, 'Do New Wars Call New Law?' in David Wippman and Michael Evangelista (eds), *The New Wars, New Laws? Applying Laws of War in 21st Century Conflicts* (Martinus Nijhoff 2005) 1-28; See the arguments calling for pre-emptive self-defence in light of the changing warfare against non-state actors Lindsay Moir, *Reappraising the Resort to Force* (Hart 2010) 75-81; David B. Rivkin Jr. and Lee A. Casey, 'Using Force Lawfully in the 21st Century' (2006) 81 *International Law Studies* 319-336

scholars regarding the legitimate aim of self-defence relates to repelling an armed attack. The concept of necessity in self-defence becomes problematic when states invoke self-defence but incorporate parallel aims.

Finally, the principle of proportionality also influences the meaning of necessity in self-defence. The principle of necessity aligns with the principle of proportionality when assessing the legality of self-defence. There is, therefore, inevitably a correlation between proportionality and necessity.⁴⁵

a. Necessity in Anticipatory and Pre-Emptive Self-Defence

The debate on anticipatory and pre-emptive self-defence here is a continuation of discussions raised in Chapter II.⁴⁶ Generally, arguments in support of, and against anticipatory and pre-emptive self-defence centre on the lawfulness of both claims in international law, and whether there is a sound basis for them in the UN Charter, or under customary international law. Specifically, the discussion focuses on the interpretation of Article 51, which requires the existence of 'an armed attack'.

i. Distinction between Anticipatory and Pre-Emptive Self-Defence

To reiterate and develop the discussion raised in Chapter II, it is important to elaborate on the debate on the permissibility of anticipatory self-defence as defined in Article 51. The debate started in 1958, when Bowett argued in favour of the inclusion of anticipatory self-defence in the provision. He argued that Article 51 cannot be interpreted restrictively, and that this can be substantiated by examining the *travaux preparatoire* of the UN Charter.⁴⁷ In

⁴⁵ James Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing 2009) 89; Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 150; Olivier Corten, *The Law Against War* (Hart Publishing 2012) 488

⁴⁶ Chapter II 3.b) Anticipatory Self-Defence of this thesis.

⁴⁷ Derek Bowett, *Self-Defence in International Law* (OUP 1958) 188-189

contrast, Brownlie, writing in 1963, argues that Article 51 prevents states from invoking anticipatory self-defence, regardless of how the provision is interpreted; he further suggested that arguments to the contrary (in support of anticipatory self-defence under Article 51) are either unconvincing or based on 'inconclusive pieces of evidence'.⁴⁸

The debate has been continued by more recent scholars, who have argued for and against the interpretation of anticipatory self-defence in Article 51. For example, *inter alia*, Mc Courbey and White, Dinstein,⁴⁹ Franck,⁵⁰ Higgins,⁵¹ and Ruys⁵² have all contributed to discussions on anticipatory self-defence. Discussions became more heated post the 9/11 attacks, when *jus ad bellum* focused on the application of self-defence against non-state actors.⁵³

The concept of pre-emptive self-defence is not a new terminology in *jus ad bellum*, but discussion of it was reignited post 9/11 when the United States published its National Security Strategy in 2002.⁵⁴ The term pre-emptive self-defence is often referred as the 'Bush Doctrine' as it relates to President

⁴⁸ Ian Brownlie, *International Law and the Use of Force By States* (OUP 1963) 276-278

⁴⁹ Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2012) 194-196

⁵⁰ Thomas Franck, *Recourse to Force* (CUP 2004) 98-99

⁵¹ Rosalyn Higgins, 'The Attitude of Western States Towards Legal Aspects of the Use of Force' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff 1986) 442

⁵² Tom Ruys, '*Armed Attack*' and Article 51 of the UN Charter (CUP 2010) 255-267

⁵³ James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 752; Noëlle Quénivet, 'The World after September 11: Has It Really Changed?' (2005) 16 EJIL 561-577; Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 EJIL 993-1001; Theresa Reinold, 'State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11' (2011) 105 AJIL 244-286; Michael Byers, 'Terrorism, The Use of Force and International Law After 11 September' (2002) 51 ICLQ 401-404

⁵⁴ The National Security Strategy of the United States of America (The White House, September 2002)

Bush authorising the use of force by expanding the traditional meaning of self-defence.⁵⁵

The meaning of anticipatory and pre-emptive self-defence in legal literature varies between scholars, and some authors use these terminologies interchangeably.⁵⁶ Other terms have also been used to describe similar notions, such as 'preventive' self-defence. Nevertheless, for the purpose of clarity, it is restated here that there are differences between each term, which are not universally used in all publications. The following meaning is used in this thesis. 'Anticipatory self-defence' denotes the use of force prior to an armed attack where the attack is deemed as 'imminent'.⁵⁷ Whilst 'pre-emptive self-defence' refers to the use of force without an armed attack, and where the attack is perceived as remote (not imminent).⁵⁸ Any use of force prior to an armed attack in general is defined as 'preventive self-defence'.⁵⁹ In spite of any claims to self-defence, whether anticipatory or pre-emptive, the two conditions of necessity and proportionality must be observed.⁶⁰

The distinction between anticipatory and pre-emptive self-defence concerns the notion of imminence. The proponents of anticipatory self-defence argue that in the absence of an actual attack, an imminent attack permits the defending state to recourse to force.⁶¹ However, the meaning of imminence is a broad concept within the principle of necessity, encompassing among

⁵⁵ Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 209-210

⁵⁶ Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 211-212

⁵⁷ James Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing 2008) 28

⁵⁸ Niaz Shah, 'Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law's Response to Terrorism' (2007) 12 JSCL 95-126, 110

⁵⁹ James Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing 2008) 28

⁶⁰ See Section 4 of Chapter 2 of this thesis

⁶¹ The UK-Attorney General position the legality of anticipatory self-defence in the House of Lords Debate 21 April 2004, Columns 369-370; In the UN Secretary-General Report on High Panel (2004) (A/59/565 - 2 December 2004) p. 54 Para.188; In Larger Freedom Report 2005 (A/59/2005, 21 March 2005) para. 124; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (CUP 2010) 255-257

others, the temporal dimension of an armed attack, the nature of the attack and the circumstance of irreversible emergency.⁶² These factors can all be construed within the definition of imminence for the purpose of self-defence.

However, arguably pre-emptive self-defence extends beyond what is expressly permitted in *jus ad bellum*.⁶³ The use of force in self-defence must conform to the requirement of Article 51 that there is an 'armed attack'. Even if the armed attack has not yet occurred, the affected state should only invoke the right to self-defence if an armed attack is imminent (anticipatory self-defence). The problem with allowing pre-emptive self-defence is that it could be used by a state to justify initiating actions in self-defence based on latent and obscure threats, consequently threatening the validity of the entire legal system and opening it up to abuse.⁶⁴ It is evident that allowing pre-emptive self-defence would undermine the aim of restraining a state from the use of force in the international legal system into perilous slope.⁶⁵ Therefore, pre-emptive self-defence is unlawful under the present *jus ad bellum* regime. Nonetheless, for the purpose of academic discussion, this section will include the claim of pre-emptive self-defence when analysing the principle of necessity.

In summary, according to the traditional meaning of self-defence in Article 51 of the UN Charter, and customary international law, a state might choose to exercise the right to self-defence if an armed attack occurs. Moreover, self-defence prior to the occurrence of an armed attack is permissible if the attack is imminent; this is referred to as anticipatory self-defence. However, pre-emptive self-defence describes the use of force prior to an armed attack

⁶² Elizabeth Wilmhurst (ed), 'Principles of International Law on the Use of Force by States in Self-Defence' (Chatham House, October 2005) 8-9

⁶³ Consider opposing arguments in support of pre-emptive self-defence. See e.g. Anthony Arend, 'International Law and the Preemptive Use of Military Force' (2003) 26 *The Washington Quarterly* 89-103; Michael Reisman and Andrea Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense' (2006) 100 *AJIL* 525-550

⁶⁴ Thomas Franck, 'What Happens Now? The United Nations after Iraq' (2003) 97 *AJIL* 607-620, 619

⁶⁵ Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 62

in cases where an armed attack is not imminent, and so falls outside the perimeter of Article 51 and customary international law. Allowing states to act on the basis of pre-emptive self-defence undermines the spirit of the UN Charter of non-aggression; however, it will be considered below in the discussion presented concerning the implication of anticipatory and pre-emptive for necessity.

ii. **The Effects of Anticipatory and Pre-Emptive Self-Defence in Necessity**

Despite continued debate on the lawfulness of anticipatory and pre-emptive self-defence, there are limited discussions directed toward the principles of necessity and proportionality, and how these principles are realised.⁶⁶ There are some scholars who agree that anticipatory self-defence is lawful, whether substantiated by Article 51 or under customary international law. However, it is important to also establish the status or position of necessity and proportionality in anticipatory and pre-emptive self-defence.⁶⁷ There is a gap in the academic literature regarding this link. Arguably, if anticipatory and pre-emptive self-defence are to be considered lawful, this then substantially shifts how necessity and proportionality are interpreted in the framework of self-defence. It suggests necessity and proportionality are not generic concepts aligned with all types of self-defence, but can be interpreted according to context.

⁶⁶ See Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004); Abraham Sofaer, 'On the Necessity of Pre-Emption' (2003) 14 EJIL 209-226; Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense' (2013) 107 AJIL 563-570; Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 AJIL 769-777; Christian J Tams and James G Devaney, 'Applying Necessity and Proportionality to Anti-Terrorist Self-Defence' (2012) 45 Israel Law Review 91-106

⁶⁷ Christian Henderson, 'The Use of Force and Islamic State' (2014) 1 Journal on the Use of Force and International Law 209-222, 219

The traditional meaning of self-defence in Article 51 requires the occurrence of an armed attack against a victim state, which might then use force against the attacking state. This means the invoking state invokes necessity based on the requirement that an armed attack has occurred. However, in anticipatory self-defence, the use of force takes place prior to the existence of an armed attack; thus, the victim state might find it difficult to invoke sufficient necessity. At the very least, the interpretation of necessity would not be similar to the reactive (traditional) meaning of self-defence. This is because the issue raised concerns how each state fulfils the requirement of necessity if no armed attack has occurred, in cases of anticipatory self-defence.

Arguably, if Article 51 attaches the meaning of necessity to the existence of an armed attack, then the claim of anticipatory self-defence might still fulfil the requirement of necessity because the armed attack is imminent, even if it has not yet occurred. Waldock argues that, even if a physical armed attack has not yet occurred, but the attack has been mounted, then it could be said to have begun.⁶⁸ Furthermore, it is reasonable to suggest that it would be contrary to the spirit of international law on self-defence if an armed attack were expected and certain to hit the victim state, and yet the law denies the right of the victim state to react.⁶⁹ Therefore, anticipatory self-defence is acknowledged as justified and meeting the criteria of necessity subject to an imminent armed attack. Nonetheless, the position of necessity in anticipatory self-defence reflects the understanding that necessity is not a generic principle, as it is subject to different factors, as in the case of anticipatory self-defence.

Accepting pre-emptive self-defence may undermine the principle of necessity in the law of self-defence. Notwithstanding the dispute over the lawfulness of pre-emptive self-defence, it is difficult to establish how

⁶⁸ Humphrey Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952) 81 *Recueil Des Cours* 451, 498

⁶⁹ Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (CUP 2010) 250

necessity could be proven if there is no imminent attack, and where the attack seems to be too remote to occur. Certainly, the absence of an imminent attack in cases of pre-emptive self-defence could be regarded as resulting in the unnecessary use of force, and consequently deemed illegal (as failure to meet the condition of necessity). If an armed attack is not imminent this then raises the question of whether the victim state has explored non-forcible options to counter the existing threat (as a last resort).

The position of necessity in pre-emptive self-defence against a non-state actor is even more obscure. It is difficult to see how a state can justify acting in necessity against a terrorist group that has not launched an armed attack on its territory. In such a scenario, the problems of whether it is necessary to use force in at all, and the violation of the principle of sovereignty is amplified. This context further reflects the conceptual difficulty associated with necessity in the application of pre-emptive self-defence. Meanwhile, it is understood that the type of self-defence then shapes the principle of necessity, whether reactive, anticipatory or pre-emptive self-defence. Thus, it could be said that there is no one-size-fits-all necessity for establishing types of self-defence.

iii. The Effects of Necessity in Anticipatory and Pre-Emptive Self-Defence against Terrorism

The above sub-section examined the difficulty of accommodating the principle of necessity when self-defence is invoked prior to the occurrence of an armed attack. This part extends that analysis by including non-state actors in the discussion contrasting the effects of self-defence with the principle of necessity.

The inclusion of non-state actors in the debate alters the dynamic of how one analyses the claims of anticipatory and pre-emptive self-defence. This is because the use of force is not directed towards a state entity (the host state). Rather the measure taken is targeted at a non-state actor (independent of any host state machinery) within the territory of the host

state. Recalling the discussion above, a state invoking self-defence against a terrorist group *prima facie* violates the sovereignty of the host state, and the prohibition on the use of force.

Claiming anticipatory self-defence against a non-state actor requires an armed attack to be imminent. Some scholars argue that the principle of necessity conforms to the general framework of self-defence, even if a state claims anticipatory self-defence. For instance, Jennings and Watts perceive no conceptual difficulty in examining necessity in the context of anticipatory self-defence, even against non-state actors. They offer the following example:

“When... a State is informed that a body of armed men is organized on neighbouring territory for the purpose of a raid into its territory, and then the danger can be removed through an appeal to the authorities of the neighbouring country or to an appropriate international organization, no case of necessity has arisen. But if such an appeal is fruitless or not possible, or if there is danger in delay, a case of necessity arises, and the threatened State is justified in invading the neighbouring country for the purpose of disarming the intending raiders.”⁷⁰

Here Jennings and Watts reflect the difficulty with determining necessity when acting against non-state actors. The case of necessity in anticipatory self-defence against a state is ‘simpler’ than determining necessity in anticipatory self-defence against a non-state actor. In the case of the latter, the victim state has to consider other international norms, such as the sovereignty of the host state (even though force is directed toward a non-state actor). Lubell describes this as an ‘additional stage’, which must be undertaken when determining necessity in a non-state actor situation.⁷¹ The

⁷⁰ Jennings and Watts (eds), *Oppenheim’s International Law* (Vol. 1, Longman 1992) 421-422

⁷¹ Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 46

role of non-state actors in the context of necessity is further discussed below.

Claims to enact pre-emptive self-defence, which is in itself controversial, is made more contentious when directed toward non-state actors. The majority of scholars are sceptical of the scope of pre-emptive self-defence and question whether pre-emptive self-defence against terrorism meets the requirements of necessity and proportionality. Gray, for instance, raises a poignant question in this regard, stating:

“[W]hether self-defence against terrorist attacks is permissible only when there has been an actual past attack or whether a purely pre-emptive action is lawful, and if so, how such a purely pre-emptive action could be necessary and proportionate. Moreover, would pre-emptive action be legal only against terrorism or also against other dangers?”⁷²

In this case the argument for force against a non-imminent threat may seem unconvincing. Rather the argument is undermined by whether the invoking state chooses to pursue non-forcible measures prior to employing force. For this reason, it is a challenge to accommodate necessity within the scope of pre-emptive self-defence.

Alternative Solutions: Maintain the Principle of Necessity and Proportionality Only and Discard Other Considerations

Scholars who have discussed the issues of necessity and proportionality have often focused on the individual content of the principles.⁷³ This provides an in-depth understanding of the meaning of necessity and proportionality as concepts in self-defence, widening the academic

⁷² Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 208

⁷³ Kimberley Trapp, 'Back to Basics: Necessity, Proportionality, And the Right of Self-Defence Against Non-State Terrorist Actors' 56 (2007) ICLQ 141-156, 145-155; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 19-27

discussion of *jus ad bellum*. However, states often invoke anticipatory or pre-emptive self-defence, whether targeted at states or non-states, and the concept of necessity and proportionality in such contexts remains ambiguous.⁷⁴ Therefore, there is additional scope for legal literature to discuss the position of necessity and proportionality in relation to anticipatory and pre-emptive self-defence. Admittedly, it is difficult to explain the concepts of necessity and proportionality in a fluid situation that is heavily reliant on the facts and circumstances associated with a particular incident.⁷⁵ This makes this area of law complex.

To analyse necessity in the context of each type of self-defence, and in accordance with the nature of the aggressor is a complicated exercise. It requires minute observations within each scenario, which depend on a multitude of factors. Alternatively, a radical solution may be considered to override the complexity of the law of self-defence. This would involve removing any consideration of the nature of the aggressor and the type of self-defence, but maintaining the principles of necessity and proportionality as benchmarks for lawfulness. In other words, whatever the claim to self-defence is, the fact that it is taken as an example against a terrorist group in pre-emptive fashion is immaterial. The act of self-defence is deemed lawful if it can be shown that the invoking state complies with the principles of necessity and proportionality. Therefore, the centrality of any self-defence measures are the fulfilment of the principles of necessity and proportionality.

The negation of other considerations, associated with the lawfulness of self-defence, aside from necessity and proportionality is admittedly contentious. Nevertheless, maintaining the legality of self-defence as seen through the prism of necessity and proportionality seems plausible. Article 51 of the UN Charter is silent on the permissibility of anticipatory or pre-emptive self-

⁷⁴ Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense' (2013) 107 AJIL 563-570, 564-568. See Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' 106 (2012) AJIL 769-777

⁷⁵ Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 21-22

defence, and relies on the requirement that self-defence be predicated on the existence of an armed attack. Concurrent to Article 51 is the authority from the *Caroline* incident, which establishes the guiding principles of necessity and proportionality.⁷⁶ Combining the two sources of law, self-defence demands as a minimum the existence of an armed attack, necessity and proportionality.⁷⁷

Cases considered by the ICJ show that the Court is relatively silent on the permissibility of anticipatory or pre-emptive self-defence. For example, in its *Advisory Opinion on the Legality of the Use of Nuclear Weapons in Armed Conflict*, the Court indirectly touched on the issue of anticipatory self-defence. The Court stated that it was unable to determine with unanimity whether the use of nuclear weapons would be lawful or unlawful in extreme circumstances of self-defence.⁷⁸ However, the Court maintained that any use of force in self-defence must apply the requirements of Article 51, which include reporting to the Security Council, and establishing the conditions of necessity and proportionality, 'whatever the means of force used in self-defence'.⁷⁹ The Court is silent on the legality of anticipatory self-defence, but firm on the statement that self-defence measures must comply with the conditions of necessity and proportionality.

In a more recent case, the Court was required to determine the issue of pre-emptive self-defence between the Democratic Republic of Congo (DRC) and Uganda. The Ugandan High Command issued a document 'Safe Haven' instructing action on self-defence without the need for an armed attack. These instructions could be regarded in legal terms as anticipatory self-

⁷⁶ See Chapter 3 of this thesis

⁷⁷ Article 51 also requires the invoking state to inform the Security Council for invoking the right to self-defence but failure to do so does not necessarily alter the legality of self-defence.

⁷⁸ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* ICJ Rep 1996 p 265 para 105(2)E. The judges were divided in their votes, seven in favour and seven oppose to the question of legality of nuclear weapons in extreme case of self-defence in which the very survival of the state is at stake.

⁷⁹ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* ICJ Rep 1996 p 245 para 44

defence or pre-emptive self-defence, as military operations were sometimes taken without an imminent attack.⁸⁰ The Court judged the objectives of the operation 'Safe Haven' as contrary to the concept of self-defence as understood in international law.⁸¹ The Court continued:

"The Court recalls that Uganda has insisted in this case that operation "Safe Haven" was not a use of force against an anticipated attack. As was the case also in the *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) case, "reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised" (I.C.J. Reports 1986, p. 103, para. 194). The Court there found that "[a]ccordingly [it] expresses no view on that issue". So it is in the present case."⁸²

The Court rightly judged there was no need to answer on the issue of anticipatory self-defence, because it was not raised by Uganda. However, had the Court been concerned with the claim of anticipatory or pre-emptive self-defence in international law, which may or may not affect the legality of self-defence, the Court would have had the opportunity to address the matter in this judgment. Meanwhile, the Court deviates from answering this thorny issue. However, the importance of necessity and proportionality are deemed contentious in all cases regarding self-defence put before the ICJ. It may be argued, therefore, that by following the jurisprudence of the ICJ, the legality of self-defence is dependent on states meeting the conditions of self-defence and not on how the defensive measures were taken.

⁸⁰ Michael Reisman and Adrea Armstrong, *The Past and Future Claim of Preemptive Self-Defense* (2006) 100 AJIL 525-550, 535

⁸¹ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* ICJ Rep 2005 p 126 para 119

⁸² *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* ICJ Rep 2005 p 222 para 143

Maintaining the conditions of self-defence, necessity and proportionality, and removing any consideration of preventive self-defence affects the lawfulness of a defensive measure; however, this may seem contradictory. The meaning of necessity can be construed as permitting anticipatory or pre-emptive self-defence. The *Caroline* incident established customary requirements that state choosing to invoke the right to self-defence must comply with necessity and proportionality. In the incident, the British government was arguably exercising self-defence although the revolutionaries had committed no armed attack against the British-Canadian government.⁸³ The *Caroline* incident establishes the definition of necessity in the circumstances of anticipatory self-defence⁸⁴ by defining necessity as 'instant overwhelming no choice of means and no moment of deliberation'. If this is accepted, then it is hard to disassociate the meaning of necessity from the concept of anticipatory self-defence, which enacted by the British during the *Caroline* incident. Therefore, there is a strong historical attachment between anticipatory self-defence and the meaning of necessity. Thus, necessity could be seen as an embodiment of anticipatory self-defence.

Sofaer argues that the principle of necessity permits the use of pre-emption in self-defence if all criteria are met. He outlines these criteria as follows, firstly, the nature and magnitude of the threat involved; secondly, the likelihood that a threat would materialise unless pre-emptive action is taken; thirdly, the availability of non-forcible measures, and lastly, whether the use of pre-emptive force is consistent with the terms and purposes established under the UN Charter and other international laws.⁸⁵ According to him, if all the four conditions are met, the use of pre-emption in self-defence is deemed as lawful under the principle of necessity. Therefore, even if legal discourse omits the question of how self-defence was employed, (whether reactive, anticipatory or pre-emptive), and maintains the two conditions of necessity and proportionality as a benchmark for the lawfulness of self-

⁸³ See Chapter 3 on the doctrines established through the *Caroline* incident.

⁸⁴ Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 56

⁸⁵ Abraham Sofaer, 'On the Necessity of Pre-emption' (2003) 14 EJIL 209-226, 220

defence, necessity itself allows the use of force in anticipatory or pre-emptive self-defence. This once again shows the possibility that the principle of necessity could be used as a basis upon which to justify anticipatory self-defence.

The above has shown that the jurisprudence of self-defence is problematic when seeking to interpret the concept of necessity. While necessity might restrict a state's use of force in self-defence against an aggressor, as states must only utilise force to what is necessary to respond to an armed attack,⁸⁶ at the same time it might serve as a justification to launch self-defence including anticipatory or pre-emptive self-defence. The next Chapter discusses state practice and reveals that necessity can serve both as a requirement and a limitation to self-defence.

b. Necessity and the Aim of Self-Defence⁸⁷

A further factor that can shape the meaning of necessity in *jus ad bellum* is the aim of self-defence. This requires a querying of the end goal a state seeks when invoking the right to self-defence. If a state were acting in self-defence, the use of force would be intended as a defensive measure and not for any other purpose. However, what constitutes an acceptable aim when employing the use of force in self-defence in international law must first be established.

The main purpose of applying rules on the use of self-defence is that they limit states from using more force than is necessary to achieve the intended outcome. The aim of self-defence then becomes the benchmark for any use of force in self-defence. A state that employs force to achieve the aim of self-defence could be said to be acting within the confines of the principle of necessity and proportionality. In contrast, a state that uses force that

⁸⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ Rep 1986 p 94 para 176

⁸⁷ This issue of aim of self-defence briefly has been discussed in Chapter 4 2d)

extends beyond the aim of self-defence could be condemned for unnecessary use of force, because it is no longer for self-defence and therefore unlawful. Viewing necessity in the context of the aim of self-defence may give an indication of the force necessary, using the aim as a point of reference. Therefore, it could be suggested that there is a connection between examining necessity as principle in *jus ad bellum* and the aim of self-defence.

If necessity is shaped by the aim of self-defence, it is then important to clarify whether this is then a benchmark from which to assess necessity. There is wide support in legal literature for the notion that the aim of self-defence is to repel and halt an armed attack.⁸⁸ Therefore, this thesis will consider repelling and halting an armed attack to be a legitimate aim of self-defence.

The legitimate aim of self-defence, as described above, is generally not a contentious issue as repelling and halting an armed attack is an accepted basis for self-defence. However, the legitimate aims of self-defence may be more difficult to apply in the complex situations that often occur affect military operations. Arguably, the legitimate aim of self-defence varies depending on each situation, and is based on several factors such as the nature and scale of the attack, and the entity of the aggressor.⁸⁹ The following section intends to extend this debate by examining necessity in

⁸⁸ For example Olivier Corten, *The Law Against War* (Hart Publishing 2012) 484; Bruno Simma (eds), *The Charter of the United Nations: A Commentary* (Vol. II, 3rd edn, OUP 2012) 1426; Jennings and Watts (eds), *Oppenheim's International Law* (Vol. 1, Longman 1992) 417-418; Natalia Ochoa-Ruiz and Esther Salamanca-Aguado, 'Exploring the Limits of International Law relating to the Use of Force in Self-defence' (2005) 16 EJIL 499-524, 515

⁸⁹ For instance, Kretzmer, in arguing in the context of proportionality and the aim of self-defence argues that the aim of self-defence is conditional upon several factors. David Kretzmer, 'The Inherent Right to Self-Defence and Proportionality *in Jus ad Bellum*' (2013) 24 EJIL 235-282, 240. See also Ian Brownlie, '*International Law and the Use of Force By States*' (OUP 1963) 281; Draft Articles on State Responsibility, Report of the International Law Commission, 32nd Session, [1980] II (2) ILC Ybk 1, 26, 53-54

relation to the aim of self-defence in two different contexts, as based on armed attack. First, complete armed attacks and second, ongoing armed attacks.

i. Completed Armed Attacks

In cases where an armed attack has ended before the victim state can riposte by force, the legitimate aim of self-defence, which is to halt and repel an armed attack, seems inapplicable. To use force where there is no longer an ongoing attack, if following the strict reading of the legitimate aims of self-defence, would no longer be regarded as a defensive measure. In fact, one of the major criticisms of Article 51 is that it relies on the occurrence of an armed attack as a trigger for the right to self-defence, although by the time the victim state is about to launch an act of self-defence, the aggression has ended. The only available forcible option for the victim state, therefore, is to pursue it through the Security Council mechanism. However, this leads to a question over the legitimacy of the victim state invoking the right to self-defence.

In *jus ad bellum* literature, the use of force on the basis of reprisal is unlawful, as force can only be invoked unilaterally under Article 51.⁹⁰ If a victim state suffering from a completed armed attack insists on exercising force such an act may amount to a reprisal.⁹¹ In relation to the legitimate aims of self-defence, a victim state may no longer be able to execute measures in self-defence to prevent or halt an armed attack when the aggression is complete; otherwise, the victim state would be judged guilty of reprisal. In this scenario, the victim state is in an uncomfortable legal position. Conversely, if the victim state does nothing to redress the armed attack

⁹⁰ Declaration on Friendly Relations; SC Res. 188 in 1965; SC Res 248 (1968) of 24 March 1968; Resolution on the Inadmissibility of Intervention; The International Court considered in the *Legality of the Threat or Use of Nuclear Weapons* that, 'armed reprisals . . . are considered to be unlawful . . . any right to [belligerent] reprisals would, like self-defence, be governed inter alia by the principle of proportionality', ICJ Reports, 1996, pp. 226, 246

⁹¹ Lindsay Moir, *Reappraising the Resort to Force* (Hart Publishing 2010) 56

committed against its territory or interests, its government may be judged incapable of maintaining national security and of securing its borders against foreign attacks. On the other hand, if it decides to use force in response to aggression this may be seen as a form of reprisal; more importantly, the use of force, even if invoked in self-defence, does nothing to repel or halt an armed attack that has already ended.

The problem stated above is the consequence of following the school of thought that demands self-defence be strictly only to 'repel and halt an armed attack'. Very few scholars challenge the belief that reprisal is in conformity with Article 51 on self-defence. Amongst them, Yoram Dinstein argues for a concept, which he terms 'defensive armed reprisal' as an aspect of the self-defence measure 'short of war' where the victim state may respond to an armed attack even when the aggression is complete.⁹² He concedes that the word 'reprisal' may cause uneasiness, but he maintains that defensive armed reprisal must still conform to all the conditions of self-defence (such as the occurrence of an armed attack as opposed to a breach of international law, and the observance of the principles of necessity and proportionality), therefore it is quintessentially a defensive measure.⁹³

Other authors appear to observe the legitimate aims of the self-defence ruling, and do not deviate from its meaning. For instance, Ronzitti maintains that it is not lawful self-defence if the attack has ended and the wrongdoer has restored the *status quo ante*; for example, the attacker has reverted to his territory.⁹⁴ Dinstein argues that this narrative is unrealistic, as it would

⁹² Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2012) 244-255

⁹³ Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2012) 244-255; See in contrast to Grey's argument. She argues that a state that fails to satisfy the conditions of necessity and proportionality of self-defence cannot be regarded as self-defence but reprisal. This is based her views on the action taken by the US against Iran and three dissenting judgments in Oil Platforms case. Christine Grey, *International Law and the Use of Force* (OUP 2008)122-123

⁹⁴ Natalino Ronzitti, 'The Expanding Law of Self-Defence' (2006) 11 JCSL 343-359, 355

mean that the victim state must accept an attack from an aggressor unless it responds on the spot, and this would encourage further attacks.⁹⁵

In addition, Dinstein claims it is practical to suggest that although every act of self-defence has an underlying defensive foundation, they should also have elements that are punitive and deterrent, in order to ensure the aggressor does not to repeat the attack in the future.⁹⁶ It is easy to conclude that Dinstein's views, are located at the borderline between legal and illegal use of force, and as such, very controversial. Reprisal that is cloaked with the notion of self-defence for revenge or as a lesson, whether for the future (future oriented goals) cannot be described as defensive.⁹⁷

Despite divergence in scholarly opinion on how to exercise force to halt and repel an armed attack, in practice it is difficult, if not impossible, to meet the legitimate aims of self-defence in a completed armed attack. In terms of necessity in self-defence, the same conclusion can also be drawn. It would be hard to argue that self-defence is necessary for such a motivation. This links necessity to the perspectives of requirement (to trigger the right to self-defence) and limitation (restricting force to what is necessary to achieve the aim of self-defence) when the armed attack has ended. Therefore, it can be concluded that self-defence to overcome completed attacks does not comply with the requirement of necessity if a state wishes to launch self-defence after completion of the armed attack.

In other situations, a victim state may consider such an attack to be one among many armed attacks. This is commonly known as the 'accumulation of events'⁹⁸ theory, whereby the armed attack is one of a series of armed

⁹⁵ Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2012) 252

⁹⁶ *ibid* 251

⁹⁷ Oscar Schachter, 'The Right of States to Use Armed Force' (1984) 82 *Michigan Law Review* 1620-1646, 1638; Christine Grey, *International Law and the Use of Force* (OUP 2008) 197-198

⁹⁸ Christine Grey, *International Law and the Use of Force* (OUP 2008) 155-156. In contrast see ND White, 'The United Nations and Counter-Terrorism: Multilateral and Executive Law-Making' in Ana María Salinas

attacks. By framing the initial armed attack as an ongoing attack, the victim state may then regard the aim when using force against the aggressor as halting or repelling an armed attack. The test of necessity in this situation concerns whether the use of force is necessary to achieve the legitimate aims of self-defence. The answer seems to be affirmative. However, this then only answers the requirement aspect of necessity and not the limitation characteristic. In other words, the question of what extent is force necessary for the victim state to act in self-defence in order to achieve the legitimate aim of self-defence is unanswered. This is contrast with the situation when force is necessary to counter the threat or armed attack, which is affirmative.

Commentators are divided on answers to the limitation aspects of self-defence, although the basis of self-defence is broadly accepted. Some argue that it is acceptable for the force employed to eliminate foreseeable future threats, and any measures to restore the security of the attacked state pre-armed attack.⁹⁹ An extreme view would suggest that the victim state might choose to exercise force until it is able to annihilate the aggressor, thus not creating any further threats or attack in the future. A modest position calls for a cautious use of force to reduce further threats deemed reasonable and foreseeable.¹⁰⁰ The many narratives offered by scholars concerning fulfilment of the aim of self-defence in situations where attacks are ongoing, reflect that the legitimate aim of self-defence fits well if there is an ongoing rather than a completed armed attack.

Arguably, whilst determining a legitimate aim for self-defence in the case of completed attack, focus should be on the question of whether it is necessary for victim states to act with force against their aggressors. If so, it is asked to what extent force is necessary to achieve the desired result. The end result

de Frias and others (eds), *Counter-Terrorism International Law and Practice* (OUP 2012) 60-61 (Nigel White also criticise the term 'war on terror' as it would give the impression that force is to be used until there is no more international terrorism).

⁹⁹ Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 157

¹⁰⁰ David Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus ad Bellum' (2013) 24 EJIL 235-282, 270

of self-defence is typically determined by the scale of the attack, the threat brought by the attack, and most importantly the identity of the attacker. A careful and reasonable outcome must be delivered by a defensive measure if it is intended for defensive purposes only (not aggression). Franck states, it would be *reductio ad absurdum* not to allow states recourse to self-defence once an armed attack has occurred, but it would be equally untenable for a state to utilise outright force without any restriction.¹⁰¹ Therefore, acts committed in self-defence 'must not exceed in manner or aim of necessity provoking them'.¹⁰² This requires the victim state to only use military force to eliminate the source of the attack, or to prevent an attack from occurring again, which must simultaneously comply with the principle of proportionality.¹⁰³ Thus, even following a completed armed attack, a victim state can still act in self-defence, but this would then be confined to the defensive use of force only.

ii. Anticipatory Self-Defence

In cases of anticipatory self-defence (as opposed to pre-emptive self-defence), the victim state relies on the notion that an armed attack is imminent.¹⁰⁴ This means that while an armed attack has not yet occurred, force will be used. The literal reading of Article 51 requires the existence of an armed attack on the injured state as a trigger for enactment of the right to self-defence. However, anticipatory self-defence presupposes the imminence of an armed attack as sufficient for a victim state to launch action in self-defence.

There has been increasing acceptance that the imminence of an armed attack entails the exercise of lawful self-defence. For example, the UN High

¹⁰¹ Thomas Franck, *Recourse to Force* (CUP 2008) 98

¹⁰² S Knauff, 'Proposed Guidelines for Measuring the Propriety of Armed States Responses to Terrorist Attacks' (1996) 19 *Hastings International and Comparative Law Review* 763-788, 774

¹⁰³ Niaz Shah, 'Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism' (2007) 12 *JCSL* 95-126, 110

¹⁰⁴ See for example Jennings and Watts (eds), *Oppenheim's International Law* (Vol. 1, Part. 1, Longman 1992) 421-422

Level Panel acknowledged that states cannot be expected to jeopardise their security when they know an armed attack is imminent requiring a military response.¹⁰⁵ It is evident that the use of force in anticipatory self-defence calls for immediate action to halt and repel any oncoming attack. With regard to the question of necessity, it is apparent that a state suffering from an imminent attack can lawfully consider it necessary to use force. However, this only answers part of the requirement of necessity, and does not resolve the limitation aspect. A question may be raised here as regards to anticipatory self-defence, regarding the extent to which force is necessary.

Noting that anticipatory self-defence hinges on beliefs about imminence, the injured state must only seek to address the imminence aspect of an armed attack, and no more than what is considered necessary to neutralise the imminent attack. For instance, if a rocket is launched from State A to State B, and the rocket is expected to hit State B, it is only necessary for State B to address the situation of the rocket by neutralising the rocket. It would be considered unnecessary if State B were to destroy other non-related military machinery in State A, because the existence of such machinery is not an imminent issue in anticipatory self-defence.

Arguably, it is also a matter of imminence if the use of force extends beyond an immediate threat to the prevention of further attacks. This includes removing the wider threat of reasonable future attacks by an 'imminent aggressor'.¹⁰⁶ There may be an unsubstantiated narrative, and a possibility that once an aggressor has attacked a state there is a potential it will do so again. This part should be looked at in perspective. Merely assuming there will be an attack is not the same as having specific information that an attack is incoming. To presume an attack will occur, although this is not proven, let alone considered imminent, arguably falls outside the general definition of necessity as it pertains to the use of force in self-defence. Furthermore, it

¹⁰⁵ Report of the High-Level Panel on Threats, Challenges and Change UN Doc. A/59/565 2 December 2004 (2004) Paras. 188-189

¹⁰⁶ David Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus ad Bellum' (2013) 24 EJIL 235-282, 272

would be difficult for a victim state to conform to the principle of proportionality in the case of an attack that is not imminent which is yet to materialise. Therefore, it can be concluded that the legitimate aim of self-defence in anticipatory self-defence must refer to imminent armed attack and must not employ force beyond that which is necessary in relation to the imminent threat.

4. Necessity in Self-Defence against Non-State Actors

The above discussion has attempted to define the meaning of necessity from various angles, fully exploring the factors affecting the meaning of necessity. This section extends this discussion further by examining the meaning of necessity in the context of self-defence against terrorism. As was argued earlier, the majority of scholars are inclined to accept the law of self-defence is applicable against non-state actors.¹⁰⁷ If this is an accepted legal position, several questions can be raised: What is the standard of necessity if a state exercises self-defence against a non-state actor? Can any threat posed by terrorists constitute sufficient necessity to launch action in self-defence? What criteria be met before as state can be said to be acting out of necessity in its exercise of self-defence? Thus, it is asserted here, that acceptance of self-defence against non-state actors demands the crafting of a standard to suit the meaning of necessity in relation to terrorism.

The acknowledgement that states may use lawfully force in self-defence against a non-state actor is not only a sound legal argument, but is also a pragmatic approach. The emergence of international terrorism has disrupted the traditional relationships state to state. States no longer have a monopoly over the use of force, and they are also no longer the sole custodians of international peace and security. As the landscape of international security

¹⁰⁷ See Chapter 3(c) of this thesis. See also others e.g. Christoph Müller, 'The Right of Self-Defense in the Global Fight against Terrorism' (2006) 81 *International Law Studies* 351-366, 354; Nicholas Rostow, 'Before and After: The Changed UN Response to Terrorism Since September 11th' (2002) 35 *Cornell International Law Journal* 475

changes, it is imperative that international law react to determine what practices constitute appropriate responses under the law in cases of international terrorism.

An example in which states had to react to threats and attacks by terrorist groups was the 9/11 attack in the US organised by Al-Qaeda. Following the attack, two prominent Security Council Resolutions were adopted to meet the threats posed by terrorist groups.¹⁰⁸ Although the two Resolutions do not endorse the right to self-defence against non-state actors, it does however indicate the willingness of states to employ self-defence against non-state actors.¹⁰⁹ A more contemporary example in which states have encountered a need to react to terrorism is the rise of Islamic State. This terrorist group is currently in control of large swathes of land in Iraq and Syria, wholly disregarding the political boundary between the two countries. Members of the UN agree that Islamic State represents a threat to international peace and security,¹¹⁰ and so it is incumbent upon international law to address this danger.

In relation to *jus ad bellum*, it is argued that the application of the law of self-defence is not the same when directed against a state and a non-state actor. As raised previously, in relation to factors affecting the lawfulness of self-defence, force taken in self-defence, as directed toward a terrorist group unavoidably violates the sovereignty of the host state unless consent is given. Arguably, threats from terrorist groups present a unique set of challenges that differ from those from state actors, and arguably they are even more perilous. It can be extremely challenging for a state to have advanced knowledge of an incoming terrorist attack, in particular when the

¹⁰⁸ SC Res. 1368 (2001)(S/RES/1368 (2001) 12 September 2001) and SC Res. 1373 (S/RES/1373 (2001) 28 September 2001)

¹⁰⁹ See discussion on Self-Defence against Non-State Actors in Chapter 2. See also Christoph Müller, 'The Right of Self-Defense in the Global Fight against Terrorism' (2006) 81 *International Law Studies* 351-366, 354

¹¹⁰ Security Council Resolution (S/Res/2170 (2014)) 15 August 2014

attacks are operated by small cells that are more or less impervious.¹¹¹ Furthermore, it is not an exaggeration to assume that terrorist groups acting in a sophisticated manner, and in the current climate, may in the future possess weapons of mass destruction such as biological or nuclear materials, further endangering international security.¹¹² Therefore, the law of self-defence must reflect the reality that terrorists are capable of causing instability within states.

When accepting that self-defence is applicable to non-state actors, it must also be agreed that the condition of necessity must also be addressed in the context of terrorism. It is submitted that the principle of necessity cannot be seen as a generic concept that is static and incapable of accommodating different types of threats. Certainly, there are differences between necessity in the context of states and non-states actors. Therefore, a distinction between necessity applied to different types of entities must be appreciated. Furthermore, when expanding necessity as concept to cover non-state actors, it is necessary to question the standard or benchmark whereby a state can regard it is necessary to act in self-defence.

Arguably, an alternative standard must be crafted to address the proximity between the host state and the non-state actor. By examining the proximity of the two parties, such a standard might define necessity as applicable if the host state is unable or unwilling to resolve a terrorist threat originating from within its borders. This situation is often referred to as 'unwilling or unable theory'. This school of thought presumes that a victim state has the right to self-defence if the host state is unable or unwilling to prevent terrorists operating within it from attacking or threatening another state. A contemporary example of the unwilling or unable theory is the Islamic State in Syria, which will be discussed in the next Chapter.

¹¹¹ Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 60

¹¹² Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 *San Diego Law Journal* 7-37, 16

The unwilling or unable theory specifically focuses on the ability of a host state to maintain its internal security. As such the onus is on the host state to stop extraterritorial use of force by any entity, rather than on the victim state's right to use force against an aggressor. The theory of unable or unwilling may be supported by international jurisprudence, based on cases where the legal duty rested on the host state. For example, in the *Corfu Channel* case, the Court enunciated that states have an obligation not to knowingly allow other non-governmental activists, including terrorist groups, to use their territory to endanger the safety of other states.¹¹³ The unable or unwilling theory may also be associated with the attribution of a state. For instance, a host state may be liable for the conduct that occurs within its borders, and which affects international relations, unless proven to be otherwise.¹¹⁴ Whatever the perspective taken by commentators, a common theme that can be derived concerns the ability of a host state to prevent any internationally wrongful conduct from spreading across a border affecting the security of another state. Therefore, on this basis, the unable or unwilling school of thought may have some resonance in international law.

Within the legal literature, Ashley Deeks famously articulated the unwilling or unable hypothesis in 2012, although she was not the first to use the phrase 'unwilling or unable'.¹¹⁵ She stresses that the unwilling or unable concept is not new to international law and that in fact the concept has historical lineage in the law of neutrality, as expounded by a prominent jurist in the eighteenth century, Emer de Vattel.¹¹⁶ She further contends that the unwilling or unable narrative was considered on several notable occasions in

¹¹³ *Corfu Channel (United Kingdom v. Albania)*, Merits, ICJ Reports (1949) 4, p. 22. See also *Friendly Relations* which states:

'Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.'

¹¹⁴ Article 2 of the Draft Articles on State Responsibility 2001

¹¹⁵ Ashley Deeks, "'Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 *Virginia Journal of International Law* 483-550

¹¹⁶ Ashley Deeks, "'Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 *Virginia Journal of International Law* 483-550, 499

international law, such as in the 1907 Hague Conventions and even in the famous *Caroline* incident in 1837.¹¹⁷

Ashley Deeks explains that the meaning of unwilling or unable as:

“The ‘unwilling or unable’ test requires the victim state to ascertain whether the territorial state is willing and able to address the threat posed by the nonstate group before using force in the territorial state’s territory without consent. If the territorial state is willing and able, the victim state may not use force in the territorial state, and the territorial state is expected to take the appropriate steps against the nonstate group. If the territorial state is unwilling or unable to take those steps, however, it is lawful for the victim state to use that level of force that is necessary (and proportional) to suppress the threat that the nonstate groups poses.”¹¹⁸

In her view, the unwilling or unable is a test in the framework of self-defence that is associated with terrorism. The test demands that the victim state make a judgment as to when it is necessary to use force. She further adds there are at least five factors which the victim state is required to consider:

“The victim state must (1) attempt to act with the consent of or in cooperation with the territorial state; (2) ask the territorial state to address the threat itself and provide adequate time for the latter to respond; (3) assess the territorial state’s control and capacity in the relevant region as accurately as possible; (4) reasonably assess the means by which the territorial state proposes to suppress the threat; and (5) evaluate its prior (positive and negative) interactions with the territorial state on related issues.”¹¹⁹

¹¹⁷ Ashley Deeks, ‘“Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense’ (2012) 52 Virginia Journal of International Law 483-550, 497-502

¹¹⁸ Ibid 487-488

¹¹⁹ Ibid 506

On the surface, the doctrine of unable or unwilling requires a review of the narratives articulated by Ashley Deeks to resolve the problem of necessity in self-defence against non-state actors. This test could be set out as a new standard against terrorism to determine necessity, providing a benchmark for the victim state to employ force.

As stated previously, the notion that a host state is at the receiving end of a defensive action from another state, due to the host state's inability to stop terrorism from occurring across-borders is not a new legal development. For example, Michael Schmitt argues that the victim state must seek to establish cooperation with the host state before launching any defensive action. However, 'if the sanctuary state either proves unable to act or chooses not to do so, the state under attack may, following a reasonable period for compliance (measured by the threat posed to the defender), non-consensually cross into the latter's territory for the sole purpose of conducting defensive operations'.¹²⁰ This is akin to the five points outlined by Ashley Deeks.

The theory of unwilling or unable arguably overlaps with other discussions on the subject of self-defence, as it focuses on the role of the host state. Arguably, there are two main areas in the general legal discourse in self-defence. First, the unwilling or unable doctrine substantiates the discussion of attribution, whereby the activities that take place within the border of the host state can be attributed to it, even if executed by a non-state organ. For example, Kimberly Trapp argues that if a state is unable or unwilling to take steps to counter-terrorism within its borders, this lack of action is enough for the victim state to show acquiescence between the host state and the non-state actor, thereby warranting the use of force against the non-state

¹²⁰ Michael N Schmitt, "Change direction' 2006: Israeli operations in Lebanon and the International Law of Self-Defense" (2008) 84 *International Law Studies* 266-301, 287

actors.¹²¹ This reflects the similarities between discussions about attribution and the theory of unable or unwilling.

Second, the test of unable or unwilling corresponds with the capability of the host state. As argued earlier, this test focuses on the host state's capability to counter threat, rather than the competence of the victim state to resist terrorist activities. Thus, the standard of whether a state is unable or willing is applied to the host state, rather than the inability or unwillingness of the victim state to take action against terrorism. This also implies whether the host state is competent to meet its international obligations to prevent terrorism from being undertaken abroad. Therefore, the doctrine of unwilling or unable relates to the compliance of the host state with its international obligations, and does not stand on its own as a premise in the interpretation of necessity in self-defence. The doctrine relates to other aspects of *jus ad bellum*, such as the discussion of 'attribution' and the capability of the host state. However, this doctrine is not free from criticism.

Ashley Deeks argues that the unwilling or unable doctrine is at present an established rule in international law. However, some commentators see this premise as somewhat doubtful. For example, Kevin Jon Heller is critical about endorsing the doctrine as part of customary international law, claiming it lacks the historical evidence that the test exists as part of state practice.¹²² In particular, Ashley Deeks claims that the unwilling or unable test stems from centuries old law: the law of neutrality. However, Kevin Jon Heller points out that neutrality law and the unwilling or unable doctrine are two separate laws, regulating different scenarios, whereby the law of neutrality regulates the behaviour of two legitimate belligerents in armed conflict and not that of states and non-states actors.¹²³ Therefore, Kevin Jon Heller

¹²¹ Kimberly Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors' (2007) 56 ICLQ 141-156, 150

¹²² <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/>

¹²³ <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/>

argues that the unwilling or unable test cannot be described as an established rule in international law.

Another aspect of the unwilling or unable doctrine that is a subject of contention is the lack of clarity. Based on this doctrine, if the host state is unable or unwilling to prevent terrorist armed attacks from advancing into another state, then it is considered necessary to use defensive force. Clear as this might appear, there are nonetheless some more complex questions that demand detailed answers: First, who determines that a state is unable or unwilling; and second, how does one judge that a state is unable or unwilling to take steps to counter terrorist activities within a host state?

The appropriate entity to judge whether a state is 'unwilling or unable' is the victim state. This is because it is the victim state that is directly affected by the incompetence of the host state's actions to counter terrorism.¹²⁴ It should therefore be asked if, in a different scenario, it would be appropriate for another state or international organisation to determine whether a state is unable or unwilling. Thus, this study asks: If the Security Council passes a Resolution confirming state X is unable or unwilling, or a third state acting in the spirit of collective self-defence finds that state X is unable or unwilling, does this mean the victim state may initiate self-defence?

A more complex problem associated with the doctrine concerns, which states fall within the category of unable or unwilling. By default, a state lacking a national security institution with a terrorist related concern within its borders could arguably be cited as unable or unwilling. The example used by Ashley Deeks regarding the unwilling or unable theory largely attributed it to countries that are ineffective at countering terrorism, e.g. Pakistan, Mali, Iraq, Syria, Lebanon and Congo.¹²⁵ These countries are known for their security inefficiencies. This then creates two types of states: a group of

¹²⁴ See Chapter 4 of this thesis on 'Subjective or Objective Necessity'

¹²⁵ Ashley Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense* (2012) 52 Virginia Journal of International Law 483-550, 549-550

states willing to apply the doctrine such as the US, United Kingdom, Australia, France, and the second tier of states mentioned earlier. The different treatment of states as a result of the application of the doctrine is likely to be less acceptable to those states that are considered poor and ineffective. This is one of the drawbacks of the unable or unwilling theory.

For this reason, some scholars have rejected the adoption of the unwilling or unable theory when evaluating the expansion of the role of necessity in self-defence. Dawood Ahmed argues that power inequality in the application of the unwilling or unable doctrine not only results in unfair treatment of weaker states, but also hinders legitimate exercise of self-defence.¹²⁶ For weaker states, such as the Yemen to exercise self-defence against powerful states such as the US, would be seen as contrary to the doctrine as the US is considered a competent entity to combat terrorism, although Yemen might have a genuine claim of self-defence. The perverse effects of the unwilling or unable doctrine undermine any legitimate claim it might have under customary international law on self-defence, largely because it could be used as a means to segregate states based on how effectively they are able to counter terrorism.

Indeed, articulation of the unwilling or unable doctrine offers new perspective in *jus ad bellum* literature. Specifically, the doctrine contributes to the debate about how a state might interpret the meaning of necessity as part of the condition to exercise the right to self-defence, where previously the meaning of necessity had not been developed as far as the principle of proportionality.¹²⁷ Therefore, the test of unwilling or unable could be deemed a step forward in furthering understanding of necessity in self-defence, although it is not universally accepted.

¹²⁶ Dawood Ahmed, 'Defending Weak States Against the 'Unwilling or Unable' Doctrine of Self-Defense', (2013) 9 Journal of International Law and International Relations 1-37, 24

¹²⁷ See Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors', (2012) 106 AJIL 1-8, 7; Christian Tams, 'The Use of Force against Terrorists' (2009) 20 EJIL 359-397, 385; Tom Ruys, 'Armed Attack' and Article 51 of the UN Charter (CUP 2010) 461

Another contribution of the unwilling or unable doctrine in legal scholarship is that it may subconsciously provide a new standard by which to assess the meaning of necessity. Indeed, Ashley Deeks suggested transforming unwilling or unable from a standard to a 'rule-like' norm.¹²⁸ Despite opposition, the international community is currently witnessing the unwilling or unable doctrine being applied in contemporary armed conflict, such as that against Islamic State.¹²⁹

It is important however to retain sight of the role that necessity plays in an armed conflict. It can be argued that there are three points to mention when assessing necessity in the legal framework of self-defence, each of which is judged at a different period of the conflict.

First, necessity is to be considered prior to the use of force. Thus, it is seen as a condition (or a requirement) before exercising the right to self-defence. The decision about whether the use of force in self-defence is necessary is usually dependent on the judgment of the affected or victim state. This is subjective, and necessity in relation to the pre-use of force might relate to the unwilling or unable doctrine. This creates a question as to whether the host state is ineffective to contain terrorist activity - a judgment undertaken by the victim state. Second, necessity is considered during the use of force. This usually takes the form of asking 'to what extent is force necessary to achieve the aim of self-defence'. Assessing the role of necessity during an armed conflict acts as a restraint on the use of force. This assessment is also determined subjectively by the victim state when launching defensive measures. Finally, necessity is determined objectively by other parties. It is usually examined by international organisations such as the organs of the

¹²⁸ Ashley Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense* (2012) 52 *Virginia Journal of International Law* 483-550, 514-515

¹²⁹ See the claim of self-defence against Islamic State in Syria with regards to unwilling or unable test <http://justsecurity.org/20118/clus-kreb-force-isil-syria/#more-20118> ; <http://justsecurity.org/14414/international-law-airstrikes-isis-syria/> ; <http://justsecurity.org/20118/clus-kreb-force-isil-syria/#more-20118>

United Nations, the ICRC, international courts and tribunals and writings by legal commentators. Therefore, the assessment of necessity could be seen as encompassing all aspects of an armed conflict – pre-, during and post-self-defence.

5. Conclusion

The principle of necessity in the legal framework of self-defence can be analysed by understanding its role in the wider spectrum of *jus ad bellum*. By invoking the right to self-defence, a state must take into account the sovereignty of the affected state and of the prohibition against the use of force. However, such restrictions can be overcome if the host state consents. The consent may include the use of force against a non-state actor within the territory of the host state. In a situation where the invitation to intervene is granted, it is irrelevant to justify force in self-defence, as the right to self-defence is only applicable when force is used in a foreign state without prior permission. However, the state that issues the permission to intervene must nonetheless comply with the conditions attached to lawful consent by host state.

The principle of necessity can be analysed by dissecting various factors affecting the principle. It is the main contention of this thesis that necessity cannot be seen as a universal concept in *jus ad bellum*, applicable to all types of self-defence. It follows that necessity must be determined according to the entity of the aggressor, whether it is a state or a non-state actor, as this will influence how the victim state interprets the meaning of necessity. Sofaer argues that the principle of necessity is affected by several factors, such as the magnitude of the threat or and attack, the likelihood that an attack will materialise and the non-forcible options available to the victim state. This Chapter contributes to the argument raised by Sofaer that there are other factors also influencing the meaning of necessity. First, necessity is influenced by whether self-defence is invoked in anticipatory or pre-emptive fashion. Preventive self-defence differs from traditional self-defence as the existence of an 'armed attack' is absent. In anticipatory self-defence,

it is lawful for a state to invoke self-defence in the case of an imminent armed attack. However, it becomes problematic if a state invokes pre-emptive self-defence (absent of imminent armed attack), as this would not be regarded as action according to necessity.

Second, the principle of necessity is affected by the aims associated with the use of force in self-defence. A legitimate aim for self-defence is halting or repelling an armed attack, as supported by the majority of scholars. Thus, the legitimate aim of self-defence becomes the benchmark for lawfulness in self-defence, and any use of force beyond this legitimate aim is therefore considered unnecessary and so unlawful. The difficulty assessing necessity in this regard arises when an armed attack is complete. The aim of repelling or halting an armed attack becomes redundant when there is no continued armed attack. The difficulty of maintaining this aim for self-defence will be illustrated in the next Chapter in relation to state practice. To continue to use force in self-defence after an armed attack, where an armed threat no longer exists may be seen as unnecessary. For anticipatory self-defence, a state might have a continuing basis upon which to use force in order to halt and or repel an imminent attack. Therefore, it would be regarded as an unnecessary use of force if the victim state were required to repel an incoming armed attack.

This thesis establishes that the entity of the aggressor, i.e. whether a state or a non-state actor, fundamentally defines the meaning of necessity. It is submitted that necessity in self-defence cannot be treated equally when a state is acting in self-defence against a state and when it is acting against a terrorist group. Therefore, a distinction must be made according to whether an armed attack is launched by a state or a non-state actor.

One way of judging whether a victim state has shown that it has met the requirement of necessity to use force in self-defence against a terrorist group is by analysing the proximity of the host state and the non-state actor. The 'unwilling or unable' doctrine provides a platform from which to determine whether a state is acting out of necessity when employing force in

self-defence. Simple as it might appear, the doctrine does not resolve the problem of necessity entirely. The 'unwilling or unable' test, if accepted in state practice, only addresses the issue of necessity as a pre-requisite for self-defence; it does not address the problem of applying necessity during the use of force. This is a significant point highlighting the problematic nature of the concept of necessity as it stands today.

The 'unwilling and unable' test also creates adverse effects, when weaker states are labelled as ineffective at containing terrorist threats, as this would mean weaker states can never invoke self-defence against terrorist attacks launched from powerful states. This undermines the entire purpose of Article 51, which requires the occurrence of an 'armed attack' to exercise self-defence, making no reference to the military effectiveness of a state. Nonetheless, the theory of 'unwilling or unable' contributes to the discussion about how a state can interpret the meaning of necessity.

Following the discussions presented in this Chapter, this study will conduct an analysis of necessity in state practice when self-defence is invoked against a non-state actor in the next chapter. In that analysis, necessity will be seen in reference to the two roles argued earlier, necessity as a requirement to self-defence and as limitation on the use of force in self-defence.

Chapter 6: Necessity in State Practice

1. Introduction

Chapters 4 and 5 of this thesis discuss the content and relevant considerations associated with the exercise of necessity in self-defence. Following on from Chapter 4, this chapter will now apply the discussion to the concept of necessity as practiced by states, with a specific focus on self-defence against terrorism. This includes applying the two roles of necessity, as a requirement and limitation in employing force in self-defence. Specifically, this chapter identifies the dynamics of necessity in self-defence in reference to non-state actors.

This chapter will analyse three case studies, to depict instances when self-defence was invoked against terrorist groups by a state. These three case studies share several common themes that benefit the analysis of necessity in self-defence against terrorism. The first common feature across the case studies is that all the states concerned explicitly invoked the right to self-defence. Therefore, the analysis specifically relates to the use of force on the grounds of self-defence, and excludes other justifications. The second feature that the self-defence invoked by the states concerned was directed toward a non-state actor. This allows exploration of the application of necessity in situations where self-defence is invoked by a state against a non-state actor. Finally, the three state practices referred to in this chapter all occurred following the 9/11 incident. It is important to comprehend the characteristics of the period when these incidents occurred in order to understand the context in which the international community received action in self-defence against a non-state actor. Many scholars have argued that the events on 9/11 changed the legal landscape on *jus ad bellum* in relation to terrorism, thereby informing subsequent developments.¹ As such, analysing state practices post-9/11 provides insight into how the concept of

¹ Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law* (CUP 2010) 294-295

necessity developed in an era when self-defence against terrorism was accepted widely.

The three case studies concern the following incidences of state practice: action in 2001 in Afghanistan; 2006 in Lebanon; and 2014 in Syria. In 2001, after the 9/11 attacks, the US invoked the right to use force in self-defence against Al-Qaeda and Taliban in Afghanistan. The US claimed that the 9/11 attack constituted an armed attack for the purpose of Article 51 of the UN Charter. The acts of aggression against the US were acknowledged as such by states and international bodies; including the Security Council and NATO. On 7 October 2001, the US officially launched a military operation in Afghanistan.

The second case study will analyse the use of force by Israel against Hezbollah, which occurred in Lebanon in 2006. Israel invoked the right to self-defence in response to rocket attacks; rockets were launched from within Lebanese territory and targeted military positions in Israel. The attack resulted in the deaths of three Israeli soldiers. Following the attack, Israel launched action in self-defence in Lebanon on 12 July 2006.

Finally, this chapter will examine self-defence in relation to armed attacks by Islamic State. At the time of writing, the international community continues to face threats and attacks from Islamic State, which is based in parts of Syria and Iraq. This study focuses on one airstrike operation against Islamic State, which took place on 23 September 2014 in Syria.

In this chapter, each incident will be analysed individually and comparatively, in order to explore further the concept of necessity. However, this chapter does not aim to assess the legality of each incident in totality. Rather, the focus is confined to the assessment of necessity in each state's practice. At the end of this chapter, there will be an overall assessment of necessity based on the combined analysis of the three states' practices.

Following on from the previous chapter, it is argued that discussions about necessity can generally be divided into two categories, based on the role of necessity - as a requirement to exercise self-defence and as a limitation to the use of force. The role of necessity as a requirement to self-defence can reasonably be established by understanding the circumstances faced by the victim state prior to its exercise of the use of force. This includes *inter alia* posing the question whether a non-forcible option the invoking state could consider before employing force exists. Another role for necessity is as a limiting factor in the use of force in self-defence. A state cannot employ force without restriction, even if force is considered permissible under international law by way of self-defence. Thus, it is necessary to consider whether the intensity of any force employed is necessary to achieve the legitimate aims of self-defence.

Arguably, it is difficult to determine how far the extent of any force employed against a non-state actor is necessary. This is due to the nature of terrorist groups: the fact that they are evasive and their physical presence and capability is unknown makes it difficult for the victim state to limit any defensive measures to what is necessary. Furthermore, the victim state is then subject to the possibility of another attack. The desire to avoid this risk can affect how states react to a terrorist threat, thereby determining the extent to which they decide force is necessary. In addition, it is argued that necessity cannot be seen as one-size-fits-all concept in the law of self-defence. Different sets of circumstances, in particular against a non-state actor, call for different types of necessity analysis. However, this does not mean that a state may use force without limits due to necessity; all states must comply with the rule of proportionality in *jus ad bellum* and with the requirements set out in *jus in bello*.

Here, the premise is that state practice will reflect the dynamics of necessity within a situation where self-defence is invoked against a terrorist group. To explore this, the discussion follows all aspects of necessity within a defensive measure. Admittedly, there are areas of overlap between necessity and proportionality. This is inevitable as the two principles are

inter-related in legal discourse. Nonetheless, state practice, as presented in this chapter will explore self-defence in light of the principle of necessity.

2. Al-Qaeda in Afghanistan (2001)

The first example in which the principle of necessity can be analysed post 9/11 is action taken against Al-Qaeda by the US. In 2001, following the 9/11 attacks, the US launched military strikes against Al-Qaeda, a terrorist organisation which was, at that time, based in Afghanistan. The US justified its use of force by invoking the right to self-defence under Article 51 of the United Nations Charter.²

The war in Afghanistan in 2001 contributed extensively to the literature on *jus ad bellum* as related to primary and secondary sources of international law. It is one of the major invocations of the right to self-defence in the twenty-first century. In particular, the incident contributed to academic discussions on the right to self-defence against a terrorist group, which was a contentious point before 9/11 and remains the subject of keen debate today. Some commentators have argued that 9/11 marked a turning point in the law of self-defence, as action taken in its aftermath confirmed that the right to self-defence can lawfully be invoked against non-state actors.³ As described by Dinstein, the incident of 9/11 'should have dispelled all lingering doubts concerning the application of Article 51 to non-State actors'.⁴ Therefore, it is appropriate to use this example to analyse the invocation of self-defence against terrorist groups, in accordance with the existing principle of necessity.

² Letter from Ambassador John Negroponte, Permanent Representative of the USA to the UN in New York, to the President of the Security Council, S/2001/946, 7 October 2001

³ Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2011) 227-229; Michael Byers, *War Law* (Grove Press 2005) 67; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 34

⁴ Dinstein *ibid* 227

At the time of writing, the military operation in Afghanistan by the US and NATO has officially ended (28 December 2014).⁵ Due to the long duration of the operation, it is necessary to recall some key features when approaching this case study. Firstly, as this analysis seeks to explore the principle of necessity in relation to terrorism, it will only focus on the role of non-state actors, and the discussion will be limited to the concept of necessity in self-defence. As far as possible, the study will exclude any state involvement against other states. Secondly, it is worth emphasising that the following analysis is predicated on the premise that the military operation in Afghanistan was taken on the basis on self-defence and not based on any other justifications that may confuse the legal analysis, such as humanitarian intervention. Therefore, this case study will be analysed only through the lens of the law on self-defence.

a. Factual Events

On 11 September 2001 (elsewhere referred to as 9/11), Al-Qaeda hijacked a number of civilian aircrafts and crashed them into key buildings at the heart of the US.⁶ The most notable attack was directed toward the World Trade Centre in New York City, which resulted in the collapse of the Twin Tower buildings. In total, the incident killed 2,977 people and caused injury to more than 6,000 individuals.⁷ The scale of the attacks shocked the international community.

This incident reflected the capability of a terrorist group to conduct large scale attacks using unconventional methods. This event then raised questions about international security. If the US, the state with the most advanced military capability in the world, was prone to attack from Al-Qaeda, it was then equally possible that other states may also be vulnerable to

⁵ 'Statement by the President on the End of the Combat Mission in Afghanistan' (The White House, 28 December 2014)
<https://www.whitehouse.gov/the-press-office/2014/12/28/statement-president-end-combat-mission-afghanistan> (accessed: 23 July 2015)

⁶ See 'Final Report of the National Commission on Terrorist Attacks Upon the United States' (2004)

⁷ 9/11 Commission Report , (August 2004) p 552 at footnote 188

similar terrorist attacks, whether from Al-Qaeda or other international terrorist organisations. This shifted the paradigm of international security concern from states against states, to states against non-state actors. From the perspective of international law, the question raised was whether it is lawful for a state to exercise self-defence against a non-state actor. Despite the significance of this incident in international law, this was not the first time since the United Nations Charter had come into effect that a terrorist group had successfully attacked a state. In fact, numerous incidents have occurred involving terrorist organisations and states.⁸ Nonetheless, the gravity of this single incident affecting thousands of people in the United States attracted the attention of the international community.

The day after the attack, the UN Security Council passed Resolution 1368 (2001), which condemned the attacks in the US.⁹ In this Resolution, the Security Council described the terrorist attacks as 'a threat to international peace and security'. The preamble to the Resolution recognises 'the inherent right of individual or collective self-defence in accordance with the Charter'.¹⁰ In another Security Council Resolution regarding the same incident, the Security Council reaffirmed the inherent right to self-defence, as prescribed in the UN Charter.¹¹ In two UN Security Council Resolutions, the right to self-defence was mentioned in relation to the 9/11 terrorist attacks. However, some commentators have argued that reiterating the right to self-defence in a Security Council resolution without specifying the details does not necessarily mean that the Security Council has now officially approved the use of force in this way.¹² It may be said that the resolutions merely stated the obvious fact that all states are afforded the right to self-defence

⁸ See Thomas Franck, *Recourse to Force* (CUP 2004) (Franck in Chapter 4 of his book outlines several instances where states invoked self-defence against state-sponsored terrorism.)

⁹ UN Doc. S/RES/1368 (2001) (12 September 2001)

¹⁰ *ibid*

¹¹ UN Doc. S/RES/1373 (2001) (28 September 2001)

¹² Amos Guiora, 'Anticipatory Self-Defence and International Law – A Re-Evaluation' (2008) 13 JCSL 3-24, 14-15; Ryan Williams, 'Dangerous Precedent: America's Illegal War in Afghanistan' (2011) 33 University of Pennsylvania Journal of International Law 563-613, 592-593

under the UN Charter and customary international law.¹³ Nonetheless, many have emphasised that the two Security Council resolutions indicate that an armed attack against the US had taken place.¹⁴

On 7 October 2001, the US launched *Operation Enduring Freedom* in Afghanistan, citing self-defence.¹⁵ The United Kingdom joined the US in Afghanistan by invoking Article 51 on the right to collective self-defence.¹⁶ Thus, the legal basis for the use of force in Afghanistan in 2001 was one of self-defence.

b. Analysis of Necessity

At the time of writing, *Operation Enduring Freedom*, which lasted for thirteen years, has ended. There is considerable difficulty proving necessity in self-defence in relation to a conflict of such long duration. Certainly is hard to argue that any defensive military campaign lasting for several years is necessary and proportionate.¹⁷ It is also difficult to justify the extent to which

¹³ Thomas Franck, 'Terrorism and the Right of Self-Defense' (2001) 95 AJIL 839-843; 843 (Thomas Franck states that 'As a matter of law, however, there is no requirement whatever that a state receive the blessing of the Security Council before responding to an armed attack')

¹⁴ Helen Duffy, *The 'War on Terror' and the Framework of International Law* (CUP 2005) 190; Michael Byers, 'Terrorism, the Use of Force and International Law after 11 September' (2002) 51 ICLQ 401-414, 401-402; See also Jutta Brunnée, 'The Security Council and Self-Defence: Which Way to Global Security?' in Niels Blokker and Nico Schrijver (eds), *The Security Council and the Use of Force* (Martinus Nijhoff 2005) 130-132 (It is argued that in certain circumstances it is beneficial that the issue on the use of force in self-defence albeit a unilateral action is debated in the Security Council as it may control the extension of the right to self-defence.)

¹⁵ Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council S/2001/946 (7 October 2001)

¹⁶ Letter from the Chargé d'affaires of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council S/2001/947 (7 October 2001)

¹⁷ Christine Gray, *International Law and the Use of Force* (3rd ed, OUP 2008) 203

the entire operation was deemed necessary and the proportionality of the extended use of force over a period of many years.

The analysis of *Operation Enduring Freedom*, as it targets non-state actors is confusing. When the US and the United Kingdom launched attacks in self-defence in Afghanistan, both countries implicated the conduct of Al-Qaeda as associated with the Taliban regime, the then *de facto* government of Afghanistan.¹⁸ This creates a distortion when evaluating the principle of necessity in self-defence solely in conjunction with a non-state actor. However, this study will limit itself to the analysis of self-defence against Al-Qaeda, as far as possible.

A further obstacle to the analysis of *Operation Enduring Freedom* was the length of time taken to complete the operation, in view of the fact that the claim to self-defence is a temporal right.¹⁹ Consequently, this analysis will focus solely on the period between 7 October 2001, when the first defensive attack was launched, and the formation of the new government in Afghanistan in December 2001.²⁰ The new government was established following the Bonn agreement; which came into effect on 22 December 2001, and was recognised by the UN Security Council.²¹ It is possible to argue that this effectively ends the timeline of the self-defence period.

Due to the significance of this state practice, the use of force in self-defence against Al-Qaeda in Afghanistan is a good case study and reflects contemporary state practice. This case study has contributed extensively to the debate on the use of self-defence against non-state actors. It would be

¹⁸ See Lindsay Moir, *Reappraising the Resort to Force* (Hart Publishing 2010) 43-46

¹⁹ See TD Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy' (2006) 11 JCSL 361-369

²⁰ 'Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions' UN Doc. S/2001/1154 (5 December 2001)

²¹ 'Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions' UN Doc. S/2001/1154 (5 December 2001)

an oversight of this research to disregard the importance of this state practice and the development of *jus ad bellum* post-Afghanistan 2001. On this basis, it is crucial that this case study is highlighted and confined to the discussion of the principle of necessity and the role of the non-state actor.

c. Necessity as a Requirement and Limitation to Self-Defence

The following part of this chapter will argue that, in the case study of Al-Qaeda in Afghanistan, the US invoked the right to self-defence and was thereby legally required to fulfil both elements of necessity and proportionality in its use of force. Necessity in self-defence requires the US to show that Al-Qaeda committed an armed attack or made a threat, which necessitated the use of force.

The history between the US and Al-Qaeda dates back to 1998. On 7 August 1998, a terrorist organisation led by Osama Bin Laden bombed two US embassies in Nairobi, Kenya and Dar-es-Salaam, Tanzania.²² In response, the US exercised the right to self-defence by bombing Osama Bin Laden's terrorist organisation in Sudan and Afghanistan.²³ In another incident in 2000, Al-Qaeda bombed the US Naval destroyer, USS *Cole*, while it was harbouring at the Yemeni port of Aden.²⁴ This resulted in the death of seventeen and the injury of thirty-nine American sailors.²⁵ Thus, the attacks committed by Al-Qaeda towards the US did not start in 2001.

²² See UN Doc. S/Res/1189 (1998) (13 August 1998)

²³ Letter Dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council S/1998/780 (20 August 1998)

²⁴ See Department of Defense USS Cole Commission Report (2001); Raphael Perl and Ronal ORourke, 'Terrorist Attack on USS Cole: Background and Issues for Congress' (CRS Report for Congress, 30 January 2001) <http://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/t/terrorist-attack-on-uss-cole-background-and-issues-for-congress.html>

²⁵ See Department of Defense USS Cole Commission Report (2001); Raphael Perl and Ronal ORourke, 'Terrorist Attack on USS Cole: Background and Issues for Congress' (CRS Report for Congress, 30 January 2001) <http://www.history.navy.mil/research/library/online->

When analysing the necessity of the military operation against Al-Qaeda, it is important to examine whether any other options were available that the US could have pursued after the 9/11 attacks, including the non-use of force. The US, however, judged that the use of force was necessary, and this was evident in a letter from the US Permanent Representative at the Security Council, which stated that the 9/11 attacks were an 'on going threat to the US and its nationals posed by the Al-Qaeda organisation with the assistance of the Taliban regime.'²⁶ It further claims that the use of force was necessary on the basis that:

“Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interest in the United States and abroad”.²⁷

In fact, before the US launched military operations in Afghanistan, it gave the Taliban government two weeks to destroy the terrorist elements that were operating within its borders.²⁸ This indicates that, before using force in self-defence, the US had attempted to exhaust non-forcible action by persuading the Taliban government. Since there was no fruitful outcome of their attempt to persuade the Taliban to assist the US in capturing those responsible for the 9/11 attacks, the US argued that it was then necessary for it to act in self-defence.²⁹

[reading-room/title-list-alphabetically/t/terrorist-attack-on-uss-cole-background-and-issues-for-congress.html](#)

²⁶ Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council S/2001/946 (7 October 2001)

²⁷ *ibid*

²⁸ President George W Bush Addresses to the Joint Session of the 107th Congress, Washington on 20th September 2001.

²⁹ See also Remarks by President George W Bush 'Address to the Nation on Operations in Afghanistan' on 7 October 2001. President Bush explained

A close analysis of the context of why it was necessary for the US to invoke the right to self-defence makes it clear that there is an element of state involvement, i.e. the Taliban's role, in shaping the meaning of necessity, even though the conflict was between the US and Al-Qaida. This also relates to the question of attribution - what was the relationship between Al-Qaida and Taliban? In *Nicaragua*, the ICJ introduced the 'effective control' test to determine state responsibility for the conduct of a non-state actor.³⁰ Also in *Nicaragua*, the Court propounded 'dependence test' which requires the non-state actor to have complete dependence on the state in all fields.³¹ While 'overall control' test in *Tadic* asked whether a particular armed conflict was an international or non-international in character. In the present case, there is no doubt there was a close relationship between the two parties but it is unknown whether Al-Qaeda is subordinate to Taliban or vice versa.

Also evident is the gravity of the armed attack against the US. To use the words of *Nicaragua*, 'the scale and effects would have been classified as an armed attack rather than a mere frontier'.³² Worthy of consideration in this respect is the Court's reference to the UN GA resolution on the Definition of Aggression, *inter alia* includes, 'the sending by or on behalf of a state of armed bands, irregulars or mercenaries which carry out acts of armed force against another state of such gravity as to amount to acts listed (in the Resolution)'.³³ However, such reference to determine the existence of an armed attack may find difficulty as there is no precise conformity exist

that the United States had given ample opportunity for the Taliban government to close down terrorist camps and hand the leader of Al-Qaeda but failed to meet such demands. See UN Doc. S/RES/1267 (1999) (15 October 1999) In 1999, the Security Council passed a Resolution requesting the Taliban to handover Osama Bin Laden and other terrorist associates with which the Taliban failed to comply.

³⁰ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*) ICJ Reports 1986 p 64-65 para 114

³¹ *Ibid* para 109

³² *Nicaragua* (n 30) p 103 para 195

³³ General Assembly Resolution 3314 (XXIX), *Definition of Aggression*, 14 December 1974 at Article 3(g).

between the notions of armed attack and aggression.³⁴ Nonetheless, the scale of the attacks by Al-Qaeda on 9/11 meets the meaning of an 'armed attack' for the purpose of Article 51 and this triggers the right to self-defence.

As explained above, the US claimed that the use of force was necessary because the Taliban government did not co-operate with the United States in countering Al-Qaida in Afghanistan. This premise gives rise to a hypothetical question, which may be put forward with respect to the meaning of necessity. If the Taliban regime had cooperated with the US to capture Al-Qaeda members and dismantle all terrorist training camps in its borders, would the use of force against Al-Qaeda in Afghanistan still have been regarded as necessary in the context of self-defence? The likelihood is that it would not have been regarded as necessary. Therefore, it is necessary to take into account the Taliban government's role in the conflict in order to understand the meaning of necessity in this case.

Alternatively, the US might have chosen a different course of legal action in response to the 9/11 attacks, i.e. by taking recourse to international criminal law. Taking this route would have indicated that the US still had other options and thus, the choice of self-defence as the only response was not necessary.

The use of criminal law to suppress terrorism has long been debated in international law. The history of terrorism in the context of international law has been exemplified by the 1937 League of Nations Convention on the Prevention and Punishment of Terrorism, which discussed the general meaning of terrorism, although it never entered into force.³⁵ Since then, international law has approached terrorism through thematic conventions, such as criminalising terrorism in bombings, airplane hijackings, and hostage-taking. The move to criminalise certain acts at the level of international law materialised with the adoption of the Rome Statute in

³⁴ Moir (n 18) 48

³⁵ League of Nations Convention on the Prevention and Punishment of Terrorism (16 November 1937)

1998.³⁶ This statute allows for the formation of judicial authority and prosecution, which has the power to indict individuals or groups suspected of committing serious crimes listed in the statute. However, the Rome Statute is limited to four types of crimes, which do not include terrorism.³⁷

Individual criminal acts may entail violation of international law for serious breaches of norms. Prior to the establishment of the International Criminal Court (ICC) in 2002, international law had already provided a limited platform to try individuals for allegations of mass atrocities, for example the International Criminal Tribunals for the former Yugoslavia (ICTY)³⁸ and Rwanda (ICTR)³⁹. As a result of the establishment of international tribunals and criminal courts, there has been a degree of success in prosecuting individuals who were responsible for crimes committed on a large scale. This enhances the credibility of international criminal law as an option, which states may consider in the event of mass crimes.

The advances in the area of international criminal law make it possible to argue that it would have been feasible for the US to prosecute the organisers of the 9/11 attacks under this legal regime, instead of invoking the right of self-defence. The fact that the US had recourse to this alternative legal option, rather than self-defence, raises the question of whether, based on the doctrine proceeding from the *Caroline* incident, the act of self-defence in Afghanistan was 'overwhelming, leaving no choice of means, and no moment of deliberation'. Although the investigation of the perpetrators of the 9/11 attacks and the establishment of judicial institutions under international

³⁶ UN Doc. A/CONF.183/9 (17 July 1998)

³⁷ The crimes are genocide, crimes against humanity, war crimes and crime of aggression. Some authors propose for the crime of terrorism to be included in the ICC's jurisdiction – see. Aviv Cohen, 'Prosecution Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism' (2012) 20 Michigan State International Law Review 219-257, 250-255

³⁸ UN Doc. S/RES/827 (1993) 25 May 1993

³⁹ UN Doc. S/RES/955 (1994) 8 November 1994

criminal law for their trial would have presented its own challenges, the idea itself is not new and unachievable.⁴⁰

Before the 9/11 attacks, the US was open to the idea of using criminal law for terrorism-related crimes. For example, after the attacks by Al-Qaeda at American embassies in 1998 and the *USS Cole* bombing in 2000, the US used criminal law methods to investigate, extradite and prosecute the persons responsible for the attacks.⁴¹ However, the US government appears to have had a change in attitude following the 9/11 attacks. On 20 September 2001, President George Bush used the term 'war on terror' for the first time to describe the action against the organisers of the 9/11 attacks.⁴²

The term 'war' against a terrorist group may seem to overstretch the paradigm of international security. Some commentators are sceptical of the phrase 'war on terror' and claim that the US uses that phrase as a rhetorical device designed to legitimate other policy goals, or in an attempt to loosen some legal constraints to the use of force.⁴³ Furthermore, it is questionable whether it is appropriate for a powerful country such as the US to declare a war on a non-state actor. This point was emphasised by Christopher Greenwood, a judge at the ICJ, who stated that:

⁴⁰ Helen Duffy (n 14) 75. See. Yves Beigbeder, *Judging War Criminals* (Palgrave 1999) 186-199. The author outlines the challenges faced during the establishment of the International Criminal Court. The feasibility of the creation of the ICC was partly due to the success and experience from the ICTY and ICTR. For challenges of setting up international tribunals see Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia* (OUP 2004) 41-59

⁴¹ Mary Ellen O'Connell, 'The Choice of Law Against Terrorism' (2010) 4 *Journal of National Security Law and Policy* 343-368, 347

⁴² Actual speech: Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.

⁴³ Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 1; Lindsay Moir, *Reappraising the Resort to Force* (Hart Publishing 2010) 1

“In the language of international law there is no basis for speaking of a war on [Al-Qaeda] or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals, and to treat it as anything else risks distorting the law while giving that group a status which to some implies a degree of legitimacy.”⁴⁴

By contrast, the argument in support of criminal law enforcement against Al-Qaeda’s members may not address the fundamental issue of deterring threats from that terrorist group. Wedgwood describes the fallacies of recourse to prosecution as:

“Courtroom victories did not shut down Al-Qaeda’s network of recruitment or its training camps. Nor did judicial verdicts quell Al-Qaeda’s appetite for violence. The guilty verdict in the East African embassy bombings case was delivered in a courtroom six blocks away from the World Trade Center, three months before the towers were toppled.”⁴⁵

The US seems to follow this school of thought, which believes that judicial machinery does not end the threat of terrorism. As explained by President Bush, the main goal of the ‘war on terror’ is to eradicate terrorism anywhere in the world.⁴⁶

With regard to the legal analysis of necessity for the purpose of self-defence, the fundamental question that must be addressed by the US was whether the use of force was a last resort. The US clearly had a choice of law between invoking the right to self-defence and attempting to prosecute the perpetrators using the international criminal law route. Despite having had

⁴⁴ Christopher Greenwood, ‘War, Terrorism and International Law’ (2004) 56 *Current Legal Problems* 505, 529

⁴⁵ Ruth Wedgwood, ‘Countering Catastrophic Terrorism: An American View’ in Andrea Bianchi (ed), *Enforcing International Law Norms Against Terrorism* (Hart Publishing 2004) 109

⁴⁶ Delivered on 20 September 2001

the option of pursuing criminal law, the US instead chose to invoke the right to self-defence over any other alternatives.⁴⁷

There are propositions to suggest that the US may have had recourse to force by acting under Chapter VII of the UN Charter. There were some indications that this was feasible at the time. Firstly, The Security Council Resolution which was passed immediately after the 9/11 attacks demonstrated the strong support of Member States for the use of existing powers prescribed by the UN Charter to the Security Council in order to bring those responsible for the attacks to justice.⁴⁸ Similarly, other intergovernmental organisations, such as the UN General Assembly⁴⁹, NATO⁵⁰, OAS⁵¹, EU⁵² and ASEAN⁵³, also lent their political support to the adoption of counter-terrorist measures by the US. If the use of force in Afghanistan had been authorised by the Security Council, the US may not have been tied to the principles attached to the right to self-defence, such as necessity and proportionality, although the US may still have had to fulfil its

⁴⁷ Stephen Neff, *War and the Law of Nations* (CUP 2005) 387-390

⁴⁸ UN Doc. S/Res/1368 (2001) (12 September 2001) 'Expresses its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.'

⁴⁹ UN Doc. A/RES/56/1 (2001) (18 September 2001)

⁵⁰ 'Statement by the Secretary General of NATO Lord Robertson' Press Release PR/CP (2001) 121, (11 September 2001). Available at <http://nato.int/docu/pr/2001/p01-121e.htm> ; 'Statement by the North Atlantic Council' Press Release PR/CP (2001) 122 (11 September 2001). Available at <http://nato.int/docu/pr/2001/p01-122e.htm>

⁵¹ 'OAS Secretary General Condemns Acts of Terrorism in United States' (E-002/01) 11 September 2001. Available at http://www.oas.org/charter/docs/comuni_eng/E_002.htm ; 'Statement From The OAS General Assembly' (E-005/1). Available at http://www.oas.org/charter/docs/comuni_eng/E_005.htm

⁵² 'Statement by President Prodi on the Attacks against the United States' (Brussels, 12 September 2001) IP/01/1265

⁵³ ASEAN Standing Committees Chairman's Letter To US Secretary of State Colin Powell On Terrorists Attack Bandar Seri Begawan, Brunei Darussalam, 13 September 2001. Available at <http://www.asean.org/communities/asean-political-security-community/item/asean-standing-committees-chairman-s-letter-to-us-secretary-of-state-colin-powell-on-terrorists-attack-bandar-seri-begawan-brunei-darussalam-13-september-2001>

obligation under *jus in bello*. Alternatively, the US may have considered using force based on humanitarian intervention, although this is a relatively difficult argument to make and is indeed a controversial justification.⁵⁴ Nevertheless, it was one of the options made available for consideration by the US.⁵⁵ In spite of this, the US opted for unilateral self-defence to exercise force against Al-Qaeda in Afghanistan.

The second aspect of necessity as a limitation to self-defence focuses on meeting the aim of self-defence. It is argued earlier that the legitimate aim of self-defence is to repel or halt an armed attack from succeeding. Recalling John Negroponte's statement to the Security Council, the US made it clear that their intention was 'to prevent and deter further attacks on the United States. These actions include measure against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan...'.⁵⁶ Similarly, the UK also explained its aim for invoking the right to self-defence as 'following the terrorist outrage of 11 September, to avert the continuing threat of attacks from the same source.'⁵⁷

It is difficult to assess with minute detail whether the coalition forces (including the US and the UK) met the legitimate aim of self-defence and

⁵⁴ See Carlo Focarelli, 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine' (2008) 13 JCSL 191-213 (The author lays out the doubts raised by UN member states regarding the 'emerging norm' of responsibility to protect). In contrast see S/Res/1973 (2011) (17 March 2011) on the use of force on the basis of humanitarian intervention in Libya in 2011.

⁵⁵ Michael Byers, 'Terrorism, The Use of Force and International Law after 11 September' (2002) 51 ICLQ 401-414, 404-405; See also Helen Duffy, *The 'War on Terror' and the Framework of International Law* (CUP 2005) 179-183; Olivier Corten, 'Human Rights and Collective Security: Is There an Emerging Right of Humanitarian Intervention?' in Philip Alston and Euan MacDonald, *Human Rights, Intervention and the Use of Force* (OUP 2008) 132-133

⁵⁶ Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the UN to the President of the UN Security Council, UN Doc S/2001/946 (7 October 2001)

⁵⁷ Letter dated 7 October 2001 from the Chargé d'affaires of the Permanent Mission of the United Kingdom to the UN to President of the UN Security Council, UN Doc S/2001/947 (7 October 2001)

conclude that the use of force was limited to the aim of self-defence. However, there is an indication that the US was able to achieve this. On 5 December 2001, following an agreement, a new government was formed in Afghanistan to establish government institutions including the creation of Afghanistan military force. In the agreement, the Interim Authority was given the role of internal security and the control of all 'mujahidin. Afghan armed forces and armed groups in the country'.⁵⁸ Although this agreement does not state conclusively that the coalition forces were able to meet the aim of self-defence, however, it does indicate that the US was able to remove the threat of Al-Qaida from being part of the government of Afghanistan. This can be interpreted to mean that the US was able to at least curb the threat of Al-Qaida based in Afghanistan.

In conclusion, the US invoked the right to self-defence by explaining to the Security Council that the 9/11 attacked was organised by Al-Qaeda. It also explained the reasons for initiating Operation *Enduring Freedom* on 7 October 2001. By explaining why the use of force was necessary, this shows that the US considered that it fulfilled the principle of necessity in self-defence. This also indicates that necessity is regarded as a requirement for invoking the right to self-defence. The military operation of the US concluded with an agreement that removed Al-Qaida as part of government institution. This can be seen as halting the threat exerted by Al-Qaeda in Afghanistan.

3. Israel v. Hezbollah (2006)

In 2006, Israel invoked the right to conduct a self-defence operation against Hezbollah, a terrorist group based in the territory of Lebanon. The incident culminated in the 2006 Lebanon war, which took place from 12 July until 14 August of that year. The conflict illustrates a situation in which self-defence

⁵⁸ Letter dated 5 December 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2001/1154 (5 December 2001) 6

was invoked against a non-state actor, raising key aspects associated with necessity in self-defence as present throughout the event.

This analysis will seek to examine whether a case of necessity existed for Israel's launch of defensive measures against Hezbollah in self-defence.⁵⁹ This will be followed by an examination of whether Israel fulfilled the second aspect of necessity, i.e. to limit the use of force to what is necessary to achieve the legitimate aim of self-defence. To that end, this analysis will be divided according to the first and second roles of necessity in the self-defence framework.

a. Factual Events

On 12 July 2006, Hezbollah fired several rockets from Lebanese territory across a UN peace keeping operation area (the 'Blue Line') and targeted the Israel Defence Force (IDF) position at the Israeli town of Zarit.⁶⁰ Hezbollah fighters pursued further attacks against several IDF positions, which resulted in the death of eight soldiers, the injury of several troops and the capture of two IDF personnel on that day.⁶¹ Israel responded by launching ground, air and sea attacks against Hezbollah positions. These attacks were conducted by bombing strategic locations, including roads and bridges in southern Lebanon.⁶² The hostilities between Hezbollah and Israel continued until August 2006, when the Security Council passed a resolution calling for a permanent ceasefire and respect for the UN peace-keeping mission.⁶³

⁵⁹ See on the question of attribution Christian Tams, 'The Use of Force against Terrorists' (2009) 20 EJIL 359-397, 379

⁶⁰ UN Doc. S/2006/560 (21 July 2006) See also Security Council Report Lebanon/Israel 20 July 2006 No. 5

⁶¹ For brief facts of the conflict see <http://www.globalsecurity.org/military/world/war/lebanon-change-of-direction.htm>

⁶² For brief facts of the conflict see <http://www.globalsecurity.org/military/world/war/lebanon-change-of-direction.htm>

⁶³ UN Doc. S/RES/1701 (11 August 2006) See also S/2007/392 (28 June 2007). See also Commission of Inquiry on Lebanon established by Human Rights Council A/HRC/3/2 (23 November 2006) para. 40 pg. 20. The Commission reported that 'On 12 July 2006, a new incident

Following the first attack on 12 July 2006, Israel wrote a letter, informing the Security Council that 'the terrorist infiltrated Israel and kidnapped two Israeli soldiers, taking into Lebanon'.⁶⁴ In that letter, Israel also attributed the responsibility of the attacks to Lebanon, as the attacks originated from there, and similar responsibilities were also attributed to other states.⁶⁵ For this reason, Israel argued that it reserved the right to self-defence in accordance with Article 51 of the UN Charter.⁶⁶ Meanwhile, five days after the first attack, Lebanon informed the Security Council that IDF had killed more than 100 civilians within four days and destroyed major infrastructures in Lebanon, including Beirut International Airport and other airports.⁶⁷ The Lebanese government rebutted the accusation that it had assisted Hezbollah in attacking Israel. In a letter to the Security Council, Lebanon stated that:

“The Lebanese Government announced from the first instance when the events broke, that it had no prior knowledge of what happened. Nor did it endorse the operation carried out by Hezbollah, which led to the abduction of two Israeli soldiers.”⁶⁸

However, this non-cooperation alleged by the Lebanese government between itself and Hezbollah was disputed by Israel, who claimed that Lebanon had advance knowledge about the planning of the attacks.

In this conflict, the main belligerency occurred between Hezbollah and Israel. Israel explicitly invoked the right to self-defence against the terrorist group. Such a situation is a clear example of a state exercising self-defence against a non-state actor. The issue of whether or not self-defence occurs is not in

between Hezbollah military wing and IDF... The situation began when Hezbollah fighters fired rockets at Israeli military positions and border villages while another Hezbollah unit crossed the Blue Line, killed eight Israeli soldiers and captured two.'

⁶⁴ UN Doc. A/60/937 – S/2006/515 (12 July 2006)

⁶⁵ UN Doc. A/60/937 – S/2006/515 (12 July 2006)

⁶⁶ UN Doc. A/60/937 – S/2006/515 (12 July 2006)

⁶⁷ UN Doc. A/60/941 – S/2006/529 (15 July 2006)

⁶⁸ UN Doc. A/60/941 – S/2006/529 (15 July 2006)

contention. On the contrary, the invocation of self-defence can easily be established. However, Israel implicated Lebanon and other states in the armed attacks launched by Hezbollah.⁶⁹ In Israel's view, the attacks were not solely committed by Hezbollah, but with the assistance of the Lebanese government. If the argument made by Israel is true, then self-defence is not only exercised against Hezbollah but also directed against Lebanon. In other words, Israel invoked self-defence against a state and a non-state actor.⁷⁰

In invoking Article 51 of the UN Charter, Israel was required to meet the conditions of necessity and proportionality. Specifically for the condition of necessity, it was incumbent upon Israel to demonstrate that it was necessary to employ force in self-defence.

b. Analysis of Necessity According to the Framework of Self-Defence

This part of the chapter focuses on the role of necessity in the conflict between Israel and Hezbollah. It examines whether Israel fulfilled the principle of necessity as required by the law of self-defence, and if so, how does Israel justify the use of force as necessary. In addition, there will also

⁶⁹ It is disputed whether Israel responded in self-defence against Hezbollah solely or whether it was directed against both Lebanon and Hezbollah. It may be that Hezbollah acted as auxiliaries of Lebanon and regarded as de facto organ of Lebanon. See Dinstein, (n 3) 219. See also Ruth Wedgwood, 'Responding to Terrorism: The Strikes Against bin Laden' (1999) 24 *Yale Journal of International Law* 559-576, 565 Assuming that Lebanon has assisted Hezbollah in the armed attack against Israel directly or indirectly, Lebanon cannot expect to insulate its territory against measures of self-defence if it had the capacity to shut down Hezbollah's operation within its border.

⁷⁰ It is suffice to show a link between the host state and the terrorist organisation within the territory to warrant the host state responsible for the attacks committed by the terrorist. Raphaël van Steenberghe, 'Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?' (2010) 23 *LJIL* 183-208, 200; See also Kimberly Trapp, 'Back to Basics: Necessity, Proportionality, and the Right to Self-Defence Against Non-State Actors' (2007) 56 *ICLQ* 141-156

be an analysis of whether the force taken by Israel was necessary to achieve the legitimate aim of self-defence.

This analysis is divided into two parts, which are based on the two roles of necessity. Firstly, it will explore the role of necessity as a requirement to self-defence. This will be done by determining the existence of an armed attack and questioning whether the use of force was a last resort to trigger the right to self-defence. Secondly, necessity will be examined as a limitation on the use of force during the conflict. This will be approached by assessing whether the use of force corresponds to the legitimate aim of self-defence. In this case, it is argued that Israel reasonably applied the principle of necessity to justify that the armed attacks against its territory warranted the use of force in self-defence and thus satisfied the requirement aspect of necessity. However, Israel failed to demonstrate that the force employed throughout the conflict was necessary to achieve the legitimate aim of self-defence.

i. First Part of Necessity (Requirement)

The starting point of analysis on necessity as a requirement to self-defence is to ask if the situation before the use of force required Israel to invoke Article 51. Israel claimed that the conflict started when Hezbollah launched a series of rocket attacks from Lebanon. The Lebanese government implicitly accepted that the rockets were launched from its territory but maintained that it had no prior knowledge of these attacks.⁷¹

According to Article 51, the right to self-defence can only be triggered if there is an 'armed attack'. The rockets targeted towards Israel's territory may be regarded as an armed attack against Israel.⁷² To illustrate this point, the

⁷¹ UN Doc. A/60/941 – S/2006/529 (15 July 2006)

⁷²Opposite argument see Giuliana Capaldo, 'Providing a Right of Self-Defense Against Large-Scale Attacks by Irregular Forces: The Israeli-Hezbollah Conflict' (2007) 48 *Harvard International Law Journal Online* 101-112, 105-106. The author argues that the attacks targeted at Israel on 12 July 2006 did not meet the 'armed attack' threshold as required in Article 51. See also Victor Kattan, 'The Use and Abuse of Self-Defence in International Law: The Israel –Hezbollah Conflict as a Case Study'

death of two Israeli soldiers and the kidnaping of several IDF soldiers by Hezbollah is a clear attack against Israel. On this basis, it is possible to establish the existence of an armed attack according to Article 51.⁷³ The issue here is not a question of an existence of an armed attack but rather who is the author of the armed attack. In order to answer this question, it alludes the discussion on the question of attribution. Is Lebanon responsible (or partly responsible) for the armed attacks orchestrated by Hezbollah?

Article 8 of the ILC on State Responsibility states that an action carried out 'on the instruction of, or under the direction or control of, that State,' amounts to an act of a State.⁷⁴ In *Nicaragua*, the Court cited Article 3(g) of Definition of Aggression 1971 which created the 'effective control' test to determine state's responsibility for the conduct of a non-state actor.⁷⁵ Similarly, the test propounded in *Tadic*, the 'overall control' test may be considered in this state practice.⁷⁶ However, it must be noted the test in *Tadic* was an issue to determine the characterisation of the armed conflict.

Applying the tests stated above to the present state practice, it is hard to make conclusive answer that Lebanon was responsible for the conduct of Hezbollah. At least publicly, the government of Lebanon denied any

(2005) 12 Yearbook of Islamic and Middle Eastern Law 31-50, (in SSRN pg. 13-14) The author argues that even if Israel that the 12th July attack is a series of attack (using the needle prick justification to invoke self-defence) needle prick doctrine is 'only a theory and not a rule of international law, it carries little judicial weight'. Lebanon may also use this doctrine likewise by arguing that Israel frequently entered Lebanon's water and territory in the past.

⁷³ Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution. A/HRC/3/2 (23 November 2006) para. 61 p.23; Michael Schmitt, "'Change Direction" 2006: Israeli Operations in Lebanon and the International Law of Self-Defense' (2008) 29 Michigan Journal of International Law 127-164, 139-141

⁷⁴ Article 8 of Drafts Articles on Responsibility of States for Internationally Wrongful Acts 2001 UN Doc. A/56/49(Vol.1)/Corr.4 (12 December 2001)

⁷⁵ *Nicaragua* (n 30) p 103 para 195

⁷⁶ Prosecutor v. Dusko Tadic Judgment in the Appeals Chamber of International Criminal Tribunal for the former Yugoslavia (ICTY) IT-94-1-A (15 July 1999) pp. 34-35 paras. 83-87

involvement of the attacks against Israel and claimed it was unaware of the attacks in advance. As such, the question remains, whether it was lawful for Israel to use self-defence against Hezbollah based in Lebanon?

Article 51 of the UN Charter is silent with regards to the author of an armed attack and it imposes no restriction whether self-defence can be directed against a state or a non-state actor. In *Nicaragua*, the Court states that 'if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.'⁷⁷ Israel claimed that the attacks executed by Hezbollah, the death of two Israeli soldiers, the kidnaping of several IDF soldiers and continuous attacks in Israel amounts to an armed attack for the purpose of Article 51. Furthermore, as argued in Chapter 2, there is a strong body of opinion based on state practice that a state may invoke the right to self-defence against a non-state actor.⁷⁸ As such, it may be argued that Israel has the right to self-defence against Hezbollah although it is contestable whether Lebanon is responsible (or partly responsible) for the conduct of Hezbollah.

The next question relating to necessity as a requirement is whether force was a last resort for Israel. The existence of an armed attack against Israel may be an indicator that it was necessary for Israel to respond in self-defence. Israel asserted that the armed attack caused the launch of operations for self-defence necessary. According to Israel, there were two main justifications for the use of armed force in self-defence. Firstly, the armed attacks against Israel and the kidnaping of two Israeli soldiers compelled Israel to respond with force.⁷⁹ Furthermore, Israel asserted that it had restrained itself for several years 'bearing the brunt of countless attacks' and the incident on 12 July left Israel no choice but to react.⁸⁰ Secondly, Israel viewed the attacks as 'a grave threat' to Israel's northern border and

⁷⁷ *Nicaragua* (n 30) p 103 para 195

⁷⁸ See discussion in Chapter 2 – 'd. State Practice in Self-Defence against Non-State Actors'

⁷⁹ UN Doc. A/60/937 – S/2006/515 (12 July 2006)

⁸⁰ UN Doc. S/PV.5489 (14 July 2006) p.6

claimed that ‘the ineptitude and inaction of the Government of Lebanon has led to a situation in which it has not exercised jurisdiction over its own territory for many years’.⁸¹ On both grounds, Israel considered that it was necessary to use force in response to the attacks.

It is debatable whether Israel’s recourse to force was a matter of last resort. Following the *Caroline* formula, self-defence can only be justified if there is a situation, which is ‘instant, overwhelming, leaving no choice of means, and no moment of deliberation’. It may be argued that Israel fell short of meeting this standard of necessity as portrayed in the *Caroline* case. Given that Israel had a strategic advantage in terms of military capability and diplomacy, it did in fact have had other options apart from recourse to force, if it so wished.⁸² Although this does not necessarily mean that Israel was prevented from using force in self-defence, it does show that Israel had other non-forcible options, which it could have chosen. However, even if there were alternative options, it is questionable in such circumstances where several IDF soldiers were kidnapped, it is effective to employ non-forcible measure. Necessity as a matter of last resort does not entail the invoking state to use all alternative means to redress the conflict but rather for the state to use practicable means within reach.⁸³

It could also be argued that, although its need to respond to the continuous rocket attacks by Hezbollah was pressing, Israel could have sought cooperation from Lebanon prior to invoking self-defence against Hezbollah. Tams and Devaney describe the principle of necessity in self-defence against non-state actors, arguing that:

“As a general rule, for self-defence to be necessary, the victim state has to make an attempt to have the host state suppress the terrorist threat. Alternatively, the victim state might attempt to cooperate with

⁸¹ UN Doc. A/60/937 – S/2006/515 (12 July 2006)

⁸² Victor Kattan, ‘The Use and Abuse of Self-Defence in International Law: The Israel –Hezbollah Conflict as a Case Study’ (2005) 12 Yearbook of Islamic and Middle Eastern Law 31-50, 46

⁸³ Dinstein (n 3) 232

the host state against terrorists (so that joint enforcement operations help to avoid resort to force), or seek the host state's consent to extraterritorial anti-terrorist measures."⁸⁴

Israel could have asked for Lebanon's assistance in finding both the perpetrator of the rocket attacks and the kidnapped soldier. However, the history of the two countries and their past conflicts might have meant that it was not conducive for Israel to request military assistance from government of Lebanon. This left Israel with no choice of means but recourse to self-defence. Therefore, it could be argued that Israel fulfilled the requirement of necessity to exercise the right to self-defence.

As a summary, necessity as a requirement in self-defence explores the situation that necessitates Israel to use force before launching any defensive measures. The rocket attacks initiated by Hezbollah against Israel which resulted in two deaths of IDF soldiers triggered Israel to invoke the right to self-defence. Israel claimed that this was an armed attack in accordance with Article 51 of the UN Charter and thus satisfied the criteria set out in the provision. Furthermore, several IDF soldiers were kidnapped by Hezbollah and continuous rocket attacks compelled Israel to claim that it was necessary to use force in self-defence. The claim of necessity to launch self-defence by Israel could be supported by the broad agreement from member states in the Security Council. Therefore, it can be concluded that Israel reasonably justified the necessity of launching self-defence operations, and thus meets the requirement aspect of necessity.

ii. Second Part of Necessity (Limitation)

The second role of necessity acts a limitation to self-defence. To determine necessity as a limitation is to analyse whether the force used by the invoking

⁸⁴ Christian Tams and James Devaney, 'Applying Necessity and Proportionality to Anti-Terrorist Self-Defence' (2012) 45 Israel Law Review 91-106, 98

state was indeed necessary to achieve the legitimate aim of self-defence.⁸⁵ In this case, if the force employed by Israel does not achieve the intended outcome of legitimate self-defence, it may be deemed that Israel used unnecessary force, which would consequently be regarded as unlawful use of force.

Recalling the discussion regarding the difference between necessity as a limitation and proportionality, the principle of proportionality focuses on the intensity of the use of force. While necessity as a limitation emphasise on whether the invoking state employs force meeting the aim of self-defence.

Necessity as a limitation can be assessed by examining the physical consequence of the defensive measures and whether the force employed able to achieve the aim of self-defence.⁸⁶ In doing so, it is unavoidable that the facts that are relevant for assessing necessity is also relevant in

⁸⁵ The ICJ held that 'the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective' Oil Platforms (Iran v. US) 2003 ICJ Rep 161, para. 73; Natalia Ochoa-Ruiz and Esther Salamanca-Aguado, 'Exploring the Limits of International Law relating to the Use of Force in Self-defence' (2005) 16 EJIL 499-524, 515

⁸⁶ The assessment in terms of physical effects as a result of military strikes some writers argue that this must only be seen in terms of *jus in bello* and should not be conflated with *jus ad bellum*. See Andreas Zimmermann 'The Second Lebanon War: Jus ad bellum, jus in bello and the Issue of Proportionality' (2007) 11 Max Planck Yrbk of United Nations Law (2007) 99-141, 125-126; Yael Ronen, 'Israel, Hizbollah, and the Second Lebanon War' 9 (2006) Yearbook of International Humanitarian Law 362-393, 390-391

However, The ICJ in its Advisory Opinion concerning the Legality of the Threat or Use of Nuclear Weapons held that the assessment of proportionality in *jus ad bellum* may overlap in *jus in bello*. The Court stated that:

'use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflicts which comprise in particular the principles of humanitarian law.' (Legality of the Threat or Use of Nuclear Weapons para. 42)

determining proportionality.⁸⁷ This is because the nature of both principles of necessity and proportionality are interrelated.⁸⁸ This makes necessity relevant to the meaning of proportionality and vice versa. Thus, the measurement of proportionality partly informs the meaning of necessity.⁸⁹

In a debate in the Security Council following the first attacks on 12 July 2006, the majority of the member states agreed that Israel had the right to exercise self-defence.⁹⁰ However, not all of those states agreed that Israel employed proportionate force for the purpose of self-defence. Throughout the conflict, the main criticism of Israel was its excessive use of defensive force. This can be illustrated by some remarks from member states in the Security Council; for instance, the Argentinian representative Mr Mayoral said:

“My country is extremely concerned at the Israeli military actions... at the excessive use of force, the imposition of collective punishment the destruction of civilian infrastructure – in particular the destruction of airports, power station bridges and roads – as well as attacks against populated areas that endanger the lives of innocent civilians, and the imposition of a sea, air and land blockade against Lebanon.”⁹¹

⁸⁷ Israel's use of force in Lebanon is regarded as disproportionate but this also links to other analysis, the principle of necessity in pursue of legitimate aim of self-defence. David Kretzmer argues that:

‘The problem... is not the consideration of the damage caused as a factor in assessing proportionality, but the absence of a serious analysis of the other side of the coin: the necessity of the force which caused the damage in advancing the legitimate ends of self-defence.’ David Kretzmer, ‘The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum’ (2013) 24 EJIL 235-282, 279

⁸⁸ Anders Henriksen, ‘Jus ad Bellum and American Targeted Use of Force to Fight Terrorism’ (2014) 19 JCSL 211-250, 231; Albrecht Randelzhofer and Georg Nolte, ‘Article 51’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (Vol. 2, 3rd edn, OUP 2012) 1427

⁸⁹ Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 64

⁹⁰ UN Doc. S/PV.5489 (14 July 2006) with exception with Lebanon which regards Israel action as an aggression.

⁹¹ UN Doc. S/PV.5489 (14 July 2006) p.9

Similar criticism was also raised by other member states such as Japan, who regarded Israel's action as excessive use of force, and the UK, who called for Israel to take measured and proportionate force.⁹² France too made the same assessment, condemning the disproportionate nature of Israel's response.⁹³ Therefore, there was widespread disapproval amongst the member states of the Security Council of the excessive force used by Israel. Israel, meanwhile, did not offer any justification for the use of force in such a scale, but did argue that its actions were in direct response to the attacks committed by Hezbollah.⁹⁴

With regard to second role of necessity as a limiting factor in the use of force, it is argued that Israel failed to limit the use of force to what is necessary to achieve the legitimate aim of self-defence. In addition, it is also argued that Israel failed to comply with the principle of proportionality. This could also be exemplified by the deliberation of the Security Council. The main theme of the debate was the excessive use of force and disproportionate defensive measures by Israel. The analysis of necessity as a limiting factor focuses on the physical damages perpetrated by Israel, such as sea blockades and the destruction of bridges, airports and other major infrastructures in Lebanon. The question raised is: were these actions, which were the result of force taken by Israel, necessary to neutralise the threat of an armed attack by Hezbollah?

Israel may argue that extensive use of force was necessary to defend itself. The destruction of major infrastructures in Lebanon and the unfortunate deaths of civilians during the conflict may still be regarded as necessary self-defence. Israel was responding to the threat of a non-state actor, a terrorist group that is known for its secretive and evasive nature, and was simultaneously trying to recover its captured soldiers. Moreover, continuous attacks were targeted against Israel's territory during that conflict and

⁹² UN Doc. S/PV.5489 (14 July 2006) p.12

⁹³ UN Doc. S/PV.5489 (14 July 2006) p.17

⁹⁴ UN Doc. S/PV.5489 (14 July 2006) p.6

consequently, Israel responded in self-defence. In such a situation, it could be understood why Israel deemed the use of extensive force to be necessary.

Proportionality in *jus ad bellum* relates to the overall operation of the defensive attacks.⁹⁵ In this state practice, the scale and nature of Israel's attacks in response to Hezbollah would raise the question of proportionality, as heavy attacks were executed in some areas of Lebanon.⁹⁶ The disproportionality of Israel's defensive response can be demonstrated by the figures from the UN mandated Commission of Inquiry, which found that by the end of the 33-day conflict, 1,191 people had been killed, 4409 injured, and 900,000 people had fled their homes.⁹⁷ The extensive damage caused by Israel's bombardment throughout the conflict could lead some people to question whether Israel's actions in Lebanon were defensive at all: the aftermath of the conflict could be characterised as offensive, and even punitive.⁹⁸ Thus, Israel's response in self-defence can be regarded as a disproportionate and excessive use of force.⁹⁹

As observed by the Security Council, no other member states besides Lebanon denied that Israel had the right to invoke Article 51. However, other states were concerned by the disproportionate force pursued by Israel in Lebanon.¹⁰⁰ The action taken by Israel does not reflect the assertion that the

⁹⁵ See Judith Gardam, *Necessity, Proportionality and the Use of Force* (CUP 2004) 156

⁹⁶ Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 252

⁹⁷ Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution. A/HRC/3/2 (23 November 2006) para. 11 pg. 3

⁹⁸ Victor Kattan, 'The Use and Abuse of Self-Defence in International Law: The Israel –Hezbollah Conflict as a Case Study' (2005) 12 Yearbook of Islamic and Middle Eastern Law 31-50, 32

⁹⁹ Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 241

¹⁰⁰ When the Lebanon conflict broke out the first meeting in the Security Council was held on 14 July 2006. Except Lebanon, other member states accepted Israel has the right to self-defence. Those states were France, Argentina, China, Congo, Denmark, Ghanam Greece, Japan,

use of force was merely responding to the threat from Hezbollah or repelling an attack in progress; this is important to show that Israel was at least trying to achieve the legitimate aim of self-defence. The force exerted by Israel was more than what was necessary, thus constituting a disproportionate use of force. This excessive use of force devastated infrastructures and caused a high number of deaths. Therefore, it is argued that in this instance, Israel failed to limit the use of force to what was necessary for defensive purposes.

If it is argued that in this state practice Israel failed on both counts, the principles of necessity as a limitation and proportionality, then what is the difference between the two concepts in practical terms? As suggested earlier, necessity as a limitation focuses on the aim of self-defence.

Israel in this instance, whilst invoking the right to self-defence, it also has other objectives for the use of force. On this basis, it is argued that the acts of Israel is no longer confined to halting and repelling an armed attack from succeeding (legitimate aim of self-defence). Prime Minister Olmert explained the objectives of Israel action as follows:

“And in Lebanon, we will insist on compliance with the terms stipulated long ago by the international community; The return of the hostages, A complete cease fire, Deployment of the Lebanese army in all of Southern Lebanon, Expulsion of Hizballah from the area, and fulfillment of United Nations Resolution 1559... We will not suspend our actions... we are exercising self-defense in the most basic and essential sense.”¹⁰¹

Peru, Qatar, Russia, Slovakia, the United Kingdom, Tanzania and the United States. Some states were explicit in their condemnation of the attacks at Israel and some called for de-escalation. See S/PV.5489 (2006) (14 July 2006)

¹⁰¹ Prime Minister Ehud Olmert speech at Knesset 17 July 2006 (available at: https://www.knesset.gov.il/docs/eng/olmertspeech2006_eng.htm) See also UN Doc. S/PV.5492 (20 July 2006) p.3

In addition, Israel also pursued the objective of reinstating its deterrence policy during the conflict.¹⁰² This had, amongst other aims, the aim of neutralising Hezbollah's military power by eliminating its senior leaders, undermining Hezbollah's military symbol in the region and preventing further weaponry supply to Hezbollah by foreign states.¹⁰³ However, the objective of restoring Israel's power of deterrence may be considered as an excessive use of force in the context of self-defence, as this would demonstrate that Israel may have used more force that was necessary to bring about an immediate end to the conflict.¹⁰⁴ By creating other aims of self-defence to justify its use of force, Israel was no longer claiming to use force purely for self-defence. Therefore, Israel did not meet the principle of necessity as a limitation to self-defence.

able to claim that it was conforming to the principle of necessity in self-defence. Despite the extensive use of force by Israel, it may be argued that, because Israel had expressed its objectives of self-defence, it was acting lawfully in compliance with the principle of necessity.¹⁰⁵

Several states in the Security Council criticised Israel for not focusing the use of force for self-defence. For instance, Mr Churkin, the Russian representative in the Security Council, claimed that 'the scale of the use of force [used by Israel], the casualties and the destruction demonstrate that the actions stated for achieving this purpose go far beyond a counter-terrorist operation'.¹⁰⁶ The Ghanaian representative also described Israel's actions of the previous eight days as 'disproportionate and excessive'.¹⁰⁷ The remarks made by Russia and Ghana were not exceptional. Other states

¹⁰² Yehuda Ben Meir, 'Israel Government Policy and the War Objective' (The Institute for National Security Studies, Vol. 9, Aug. 2006) p.2

¹⁰³ Yehuda Ben Meir, 'Israel Government Policy and the War Objective' (The Institute for National Security Studies, Vol. 9, Aug. 2006) p.2

¹⁰⁴ Yäel Ronen, 'Israel, Hizbollah, and the Second Lebanon War' (2006) 9 Yearbook of International Humanitarian Law 362-393, 390

¹⁰⁵ Yäel Ronen, 'Israel, Hizbollah, and the Second Lebanon War' (2006) 9 Yearbook of International Humanitarian Law 362-393, 387-388

¹⁰⁶ UN Doc. S/PV.5493 (Resumption 1) (21 July 2006) p.2

¹⁰⁷ UN Doc. S/PV.5493 (Resumption 1) (21 July 2006) p.9

agreed that Israel indeed has the right to exercise self-defence, but believe that its claim of self-defence is weakened by the fact that it exercised force without limitation and consequently used unnecessary force.

There are several conclusions which can be drawn from this case study. Firstly, this case study confirms that, in practice, the principle of necessity in self-defence has a broad definition and can generally be divided into two categories, which correspond to the two roles of necessity - as a requirement to self-defence and also as a limitation to the use of force. For example, Israel justified its use of force by claiming that that had been compelled to respond with force due to the armed attacks and the imminence of the attacks. Furthermore, Israel argued that it had no other choice apart from recourse to self-defence. Most member states in the Security Council agree that Israel was right to initiate self-defence, but the same states that agreed that Israel had the right to self-defence also criticised its failure to limit the use of force to what was necessary to achieve the legitimate aim of self-defence. Therefore, this illustrates that necessity in self-defence has two different roles.

Secondly, Israel was criticised for employing disproportionate use of force and it is argued that Israel also failed to meet the second aspect of necessity. This is because Israel expressly state that it had other objectives in pursuing the use of force alongside with defensive use of force. Therefore, it cannot be said that the use of force by Israel was purely to achieve the aim of self-defence. This state practice shows that a state fails on both counts, necessity as a limitation and proportionality. So does this mean that any state that employs disproportionate use of defensive force automatically fails the second aspect of necessity? The role of necessity as a limitation in the framework of self-defence, its purpose is to observe whether the use of force by a state meets the legitimate aim of self-defence. As for proportionality, the issue is the scale and intensity of the force employed by a state. In hypothetical scenario, a state may achieve the legitimate aim of self-defence (by halting or repelling an armed attack from succeeding) but nonetheless the state may be guilty for employing disproportionate use of force. The

distinction can be seen here, necessity as a limitation focuses on achieving the aim of self-defence.

c. Conclusion

In summary, the Israel-Hezbollah war in 2006 makes it possible for this study to examine the application of necessity in a situation of self-defence against a non-state actor. Israel maintained that there was a case of self-defence against Hezbollah, where the initial armed attacks originated from territory of Lebanon. With regard to the first role of necessity as a precondition to self-defence, Israel was able to reasonably justify that the use of force against Hezbollah was necessary, on the basis that the attacks were continuous and several soldiers had been killed and kidnapped. As argued by Israel, these actions compelled them to launch force in response to the attacks. However, Israel failed to limit its use of force to what was necessary to achieve the legitimate aim of self-defence. Rather, Israel explained that not only was it using force to address the current threat from Hezbollah, it was also trying to use the opportunity to resolve disputes between Israel and Hezbollah by adopting a deterrence policy towards Hezbollah. If necessity is strictly seen only as the temporal use of force for the purpose of defence, Israel needed to restrict its use of force to a response to the armed attacks fired by Hezbollah from the 12 June 2006 onwards. The destruction caused by Israel's actions indicates that the extensive use of force was not necessary. Therefore, Israel cannot be said to have limited its defensive measures to what was necessary, even though it was right to initiate self-defence.

4. Islamic State (2014)¹⁰⁸

On 23 September 2014, a coalition force led by the US launched air strikes in Syria against two terrorist organisations: *Khorasan Group*, a splinter

¹⁰⁸ The terrorist group is often referred as IS, ISIL/ISIS (Islamic State in Iraq and the Levant/Syria) or Dawlah al-Islamiyah fi al-Iraq wa-Sham, Arabic acronym Dai'sh or Daesh.

terrorist organisation from Al-Qaeda, and Islamic State.¹⁰⁹ Iraq had requested assistance from the US and other states in responding to the terrorist threats by Islamic State headquartered in Syria. The US invoked Article 51 of the UN Charter for collective self-defence in response to the request made by Iraq, and invoked individual self-defence against Khorasan Group.

This part of the chapter will specifically examine the legality of the self-defence conducted by the coalition forces against Khorasan Group and Islamic state on 23 September 2014 and will assess whether the use of force meets the requirement of necessity. This will be approached by separating the two roles of necessity. Firstly, this part seeks to investigate whether the claim of necessity to self-defence warranted the launch of defensive air strikes by the coalition against the terrorist groups. This will include an investigation of whether the victim states had any non-forcible options available to them. Additionally, it will examine whether the armed attack or threats made by Islamic State can be attributable to Syria. Secondly, necessity will be considered as a limiting factor in the use of force by the coalition forces. This will be done by assessing whether the air strikes employed were consistent with the legitimate aim of self-defence.

a. Introduction

The establishment of Islamic State is still unclear, but it has some origins in another terrorist group, Al-Qaeda. In 2002, Abu Musab al-Zarqawi is reported to have set up an organisation, Tawhid wa Al-Jihad, and later pledged allegiance to Bin Laden and al-Qaeda in Iraq (AQI).¹¹⁰ Following the

¹⁰⁹ 'US Confirms 14 Air Strikes against ISIS in Syria' (the Guardian, 23 September 2014) <http://www.theguardian.com/world/2014/sep/23/us-launches-air-strikes-against-isis-targets-in-syria> (accessed: 23 July 2015); 'Syria: US Begins Air Strikes on Islamic State Targets' (BBC, 23 September 2014) <http://www.bbc.co.uk/news/world-middle-east-29321136> (accessed: 23 July 2015)

¹¹⁰ 'What is Islamic State' <http://www.bbc.co.uk/news/world-middle-east-29052144> (Accessed: 23 March 2015). For more information see

death of al-Zarqawi in 2006, AQI created another group, which was called Islamic State in Iraq (ISI). In 2010, Abu Bakar al-Baghdadi became the new leader of ISI. He later strengthened ISI's capabilities and in 2013, he announced the merger of ISI with forces in Levant, naming the newly merged force as Islamic State in Iraq and Levant (ISIL or ISIS). At the time of writing, Islamic State is currently in control of parts of Syria and northern Iraq, with 31,000 fighters and estimated assets of \$2 billion USD, making it the wealthiest terrorist group in the world.¹¹¹

According to international law, Islamic State has the status of a non-state actor or a terrorist group.¹¹² On 15 August 2014, the Security Council adopted a Resolution recognising Islamic State as splinter group of Al-Qaida which is associated with Al-Nusra Front, another terrorist group based in Syria.¹¹³ Acting under Chapter VII of the UN Charter, the Security Council tacitly approved the use of force against Islamic State, Al-Qaida, and Al-Nusra Front.¹¹⁴

Although the conflict against Islamic State is sanctioned by the SC, there is a case that it may be viewed under the right to self-defence. This is because

<http://www.dw.de/evolution-of-the-islamic-state/a-17842591> ;

<http://www.theguardian.com/world/2014/dec/11/-sp-isis-the-inside-story>

¹¹¹ <http://www.telegraph.co.uk/news/worldnews/islamic-state/11146689/The-rise-of-Islamic-State-how-the-jihadi-group-conquered-territory-in-Iraq-and-Syria-in-90-seconds.html> (Accessed: 28 March 2015)

¹¹² Analysis on the statehood of Islamic State based on 1933 Montevideo Convention on the Rights and Duties of States – Yuval Shany and others, 'ISIS: Is the Islamic State Really a State?' The Israel Democracy Institute (14 September 2014) <http://en.idi.org.il/analysis/articles/isis-is-the-islamic-state-really-a-state/>

¹¹³ Security Council Resolution (S/Res/2170 (2014)) 15 August 2014 p.5 para 18

¹¹⁴ Security Council Resolution (S/Res/2170 (2014)) 15 August 2014 p. 3 para. 6. The Security Council states that:

'Reiterates its call upon all States to take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts motivated by extremism and intolerance perpetrated by individuals or entities associated with ISIL, ANF and Al-Qaida and to prevent the subversion of educational, cultural, and religious institutions by terrorists and their supporters.'

Islamic State's base is in Syria. Syria, thus far, has not publicly given permission to other states (except Russia and Iran) to use force in its territory. Since the civil unrest in Syria, the National Coalition for Syrian Revolutionary and Opposition Forces was established in November 2012 and was recognised by some states as the 'the legitimate representative' of the Syrian people.¹¹⁵ However, the *de facto* government led by Bashar Al-Assad is still in control of other parts of Syria, including the capital city, Damascus.¹¹⁶ Thus far, the *de facto* government of Syria has not given consent to Iraq or the coalition forces for the use force in Syria.¹¹⁷ This leaves self-defence as the only lawful basis for intervention in Syria.

In contrast to the situation in Iraq, the use of force in Iraq does not require Iraq (or other coalition forces) to invoke the right to self-defence. This is a matter of internal security which requires the government of Iraq to enforce its national law.¹¹⁸ The involvement of other countries in countering Islamic State within Iraq is lawful with the consent of Iraq. However, nearly all states participating in the operation against Islamic State in Iraq have the consent of the Iraqi government.¹¹⁹

¹¹⁵<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2016392%202012%20INIT> - Council of the European Union Resolution 16392/12 (19 November 2012). The Syrian Opposition Council was recognized as representative of Syrian people by the United States see. <http://www.state.gov/r/pa/prs/ps/2012/11/200435.htm> (11 November 2012)

¹¹⁶<http://www.bbc.co.uk/news/world-middle-east-14703856> (Accessed: 13 April 2015)

¹¹⁷ See *Around the World, Mixed Reaction to U.S-Led Airstrikes in Syria*, Washington Post (23 September 2014) http://www.washingtonpost.com/world/national-security/around-world-mixed-reaction-to-us-led-airstrikes-in-syria/2014/09/23/16985bb6-4352-11e4-9a15-137aa0153527_story.html

¹¹⁸ See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 2004 p. 194 para. 138. The Court stated that Article 51 is only applicable if the attacks emanate from outside the victim's territory and not within the border of the affected state.

¹¹⁹ See. e.g., <http://justsecurity.org/21431/canadian-bombs-syria-readers-guide-legality-airstrikes-isil/> (Accessed: 3 April 20, 2015)

This part focuses on the airstrike operation conducted against Islamic State in Syria on 23 September 2014. It will examine whether the actions of the coalition forces during that operation were lawful in accordance with *jus ad bellum*, in particular the principle of necessity.

b. Necessity as a Requirement

Necessity as a requirement in the framework of self-defence requires the evaluation of circumstances prior to exercising defensive measures. This is done by deciding if an armed attack has taken place against Iraq or members of the coalition forces, which would then trigger Article 51. In addition, it is necessary to determine if attacks are attributable to Islamic State and, if so, whether Syria contributed to the occurrence of an armed attack.

According to public sources, Islamic State, which is based in Ar-Raqqah in Syria, has conquered large swathes of land in northern Iraq, including the important cities of Mosul and Tikrit.¹²⁰ The Iraqi government is currently trying to push Islamic State from its territory, but the centre of Islamic State's administration is in Syria. Islamic State has become infamous for the atrocities that it has committed against Yazidis, a minority religious sect in northern Iraq; these include the killing of hundreds of men and the enslavement of abducted women.¹²¹ Islamic State has also made other attacks on foreign nationals. For instance, the terrorist group beheaded several foreign citizens, including, among others, two British aid workers,¹²² an American,¹²³ 30 Ethiopian Christians,¹²⁴ and 21 Egyptians¹²⁵. Thus, the attacks and threats of Islamic State can be said to be worldwide, and are not

¹²⁰ <http://www.cfr.org/iraq/islamic-state/p14811>

¹²¹ 'IS Yazidi attacks may be genocide, say UN' BBC (19 March 2015)
<http://www.bbc.co.uk/news/world-middle-east-31962755>

¹²² <http://edition.cnn.com/2014/09/13/world/meast/isis-haines-family-message/>; <http://www.bbc.co.uk/news/uk-29485405>

¹²³ <http://www.bbc.co.uk/news/world-middle-east-30073602>

¹²⁴ <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/11548360/islamic-state-murders-30-ethiopian-christians-in-libya.html>

¹²⁵ <http://uk.reuters.com/article/2015/02/16/uk-mideast-crisis-egypt-village-idUKKBN0LK1L420150216>

exclusive to Iraq. This is in line with the UN Security Council Resolution, which describes Islamic State as a threat to international peace and security.¹²⁶

The conduct of Islamic State in Iraq has undoubtedly reached the threshold of scale and effects for constituting an armed attack as described in Article 51.¹²⁷ However, it is questionable whether the beheading of an American, for instance, constitutes an armed attack against America by the Islamic State. In *Nicaragua*, the Court distinguished 'the most grave forms of the use of force' (those constituting an armed attack) from 'other less grave forms'.¹²⁸ This jurisprudence of the ICJ was confirmed in the *Eritrea Ethiopia Claim Commission*, where the Commission held that 'relatively minor incidents' do not fall within the meaning of armed attack in Article 51 of the UN Charter.¹²⁹ However, this line of narrative may be in conflict with the judgment in *Oil Platforms*, where the Court held that it cannot 'exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the inherent right to self-defence'.¹³⁰ Accordingly, the beheading of foreign citizens by the Islamic State cannot conclusively be said to be an armed attack on those countries affected.

Nonetheless, even if no direct armed attack by Islamic State on the countries of the affected victims took place, this does not prevent other states from joining Iraq in collective self-defence against Islamic State in Syria. In a letter to the President of the Security Council, Iraq's Foreign Minister informed the Security Council that it had asked the US to lead international forces in

¹²⁶ S/RES/2170 (2014) 15 August 2014 p.3

¹²⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ Rep. 1986 p. 14 p.195

¹²⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ Rep. 1986 p 101 para 191

¹²⁹ *Partial Award Jus Ad Bellum Ethiopia's Claims 1-8 Ethiopia v. Eritrea* (19 December 2005) p 4 para 12

¹³⁰ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United State of America)* ICJ Rep. 2003 p 195 para 72

strikes on Islamic State strongholds.¹³¹ This was later confirmed by the letter from the US to the Security Council, in which the US invoked their right to individual and collective self-defence in accordance with Article 51.¹³² The act of inviting the US and other states to join Iraq in countering Islamic States in Syria allows other states to use force in collective self-defence.

Prior to exercising self-defence, Iraq was required to consider whether any non-forcible means of ending the conflict were available. Following the *Caroline* formula, necessity can only be considered if the circumstances requiring Iraq to initiate self-defence were ‘...instant, overwhelming, leaving no choice of means, and no moment of deliberation.’¹³³ Assuming that Iraq had other alternatives besides the use of force, such as peaceful negotiation, it is highly unlikely that Iraq would have conceded any territory to Islamic State or recognised Islamic State as a legal entity.

The situation regarding Islamic State is murkier when viewed through the lens of international politics. In order to appreciate the complexity of the situation and the necessity of the use of force against Islamic State, the assessment on the law of self-defence against Islamic State cannot exclude the politics that shapes the current state of affairs. As explained earlier, Islamic State is currently in control of parts of Iraq and Syria. The governments of Iraq and Syria are continuously trying to remove Islamic State from their respective territories. All members of international community, including the US, United Kingdom, Turkey, Iraq, and Syria, are affected, either directly or indirectly, by the rise of Islamic State. As such, these countries all have a common opponent. In view of the fact that the

¹³¹ Letter from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council S/2014/691 (22 September 2014)

¹³² Letter from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-general S/2014/695 (23 September 2014)

¹³³ *British and Foreign State Papers 1840-1841* (Vol. XXIX, James Ridgway and Sons 1857) 1337-1138

Security Council has unanimously passed resolutions¹³⁴ allowing member states to take necessary steps to prevent terrorism, including endorsement to act under Chapter VII of the UN Charter, the international community is still divided on how to circumvent Islamic State. This is particularly the case for states that have a strong interest in the conflict. The conflict could possibly end sooner if the various member states were to make a concerted effort to cooperate with one another in order to diminish Islamic State.

Nevertheless, the politics between countries affects how states react to Islamic State. In Iraq, the government has given the coalition forces¹³⁵ permission to strike Islamic State within its territory.¹³⁶ At the same time, Iraq has invoked the right to collective self-defence against Islamic State¹³⁷ by targeting several Islamic State strongholds in Syria alongside the coalition forces. In Syria, the government is also attacking Islamic State, the same opponent targeted by Iraq. However, Syria has not given permission for foreign forces to enter its airspace, even though it would be beneficial for Syria to do so. In part, the reason for Syria's decision not to grant permission for foreign forces to enter its airspace is the fact that Syria is a close ally of both Russia and Iran, and is suspicious of any American intervention within its border. Furthermore, Syria deploys Hezbollah, a militia group from

¹³⁴ See UN Security Council Resolutions S/RES/2169 (2014)(30 July 2014); S/RES/2171 (2014) (21 August 2014); S/RES/2178 (2014) (24 September 2014); S/RES/2170 (2014) (15 August 2014); S/RES/2199 (2015) (12 February 2015)

¹³⁵ List of countries participating in anti-Islamic State coalition. This operation is known as 'Combined Joint Task Force – Operation Inherent Resolve' with the aim of responding to Islamic State. See press release by Staff Sgt. Bryan Dominique, 'Inside the Coalition to defeat ISIL' (CJT-OIR, 21 April 2015). See also 'Who is in the anti-Islamic State Coalition and What they are Contributing?' (The Telegraph, 26 September 2014) <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/11124070/Who-is-in-the-anti-Islamic-State-coalition-and-what-they-are-contributing.html> (accessed: 31 July 2015)

¹³⁶ Letter from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council S/2014/691 (22 September 2014)

¹³⁷ Letter from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council S/2014/691 (22 September 2014)

Lebanon, to counter Islamic State and internal opposition to Bashar Al-Assad's presidency in Syria.¹³⁸

As for the coalition forces, not all partners agree to the use of force against Islamic State in Syria. For example, the United Kingdom allowed its forces to strike Islamic State in Iraq, but not in Syria; this was due to a lack of support from British Parliamentarians.¹³⁹ However, since several British holidaymakers were murdered in Tunisia by a terrorist linked to Islamic State, the British government is reconsidering its stance towards striking Islamic State.¹⁴⁰ Turkey, a country that shares a border with Iraq and Syria and is a member of NATO, is greatly affected by Islamic State, although the terrorist group has not acquired any land from Turkey. Nonetheless, Turkey has suffered from an influx of refugees from Syria and Iraq: at the time of writing, the total number of refugees has reached nearly 1.5 million.¹⁴¹ In

¹³⁸ 'Syrian President Admits Military Setbacks, in First Public Speech for a Year' (The Guardian, 26 July 2015). In his speech, President Bashar al-Assad acknowledged Hezbollah's assistance as important and effective in pushing back Islamic State and Al-Nusra Front from the Syrian-Lebanese border. <http://www.theguardian.com/world/2015/jul/26/syrian-president-public-speech-bashar-al-assad> (accessed: 30 July 2015)

¹³⁹ House of Commons Hansard on Syria and the Use of Chemical Weapons. The motion to strike in Syria was defeated by 285 votes and 272 votes in favour of military operation. (Thursday, 29 August 2013). <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130829/debtext/130829-0001.htm#1308298000001> (accessed: 30 July 2015) ; 'Syria Crisis: Cameron Loses Commons Vote on Syria' <http://www.bbc.co.uk/news/uk-politics-23892783> (accessed: 28 July 2015). At the time of writing, the UK undertook drone operation in Syria and killed two of its citizens involved in Islamic State. Prime Minister David Cameron informed the House of Commons that the UK invoked the right to self-defence under Article 51 see <http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150907/debtext/150907-0001.htm#1509074000002> (House of Commons Hansard, 7 September 2015 at Column 25 and 26.) See also UK submission to the President of the UN Security Council UN Doc. S/2015/688 (7 September 2015)

¹⁴⁰ See Michael Fallon, the Secretary of State for Defence on Britain and International Security (Column 1669, 2 July 2015) <http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150702/debtext/150702-0002.htm#15070233000001>

¹⁴¹ The United Nations Refugee Agency (UNHCR) as of January 2015. <http://www.unhcr.org/pages/49e48e0fa7f.html> (accessed: 31 July 2015)

addition to fighting against Islamic State, Turkey has a long standing dispute with the Kurds, who are seeking self-determination. This dispute particularly concerns the Kurdistan Workers' Party (PKK), which the Turkish government considers to be a terrorist group.¹⁴² At the same time, the same PKK is fighting against Islamic State in northern Iraq. On 24 July 2015, Turkey launched air attacks against Islamic State in Syria and PKK bases in northern Iraq for the first time.¹⁴³

The description above explains the complexities of countering one terrorist group which have been caused by the political situations of the states involved. This analysis does not take the longstanding Sunni-Shia divide into consideration; this division has affected the greater Middle-East region for a long time. With this in mind, it is even more difficult to determine when it is necessary to act in self-defence against Islamic State, given that Syria is also fighting against Islamic State. As such, the question is: is it necessary for the coalition forces to attack Islamic State in Syria if Syria is also countering Islamic State? However, the ability of the Syrian government to effectively prevent Islamic State from operating beyond its territory is questionable.

¹⁴² For further analysis, see Chatham House Research Paper, Cengiz Gunes and Robert Lowe, 'The Impact of the Syrian War on Kurdish Politics Across the Middle East' (Chatham House, July 2015); Neil Quilliam and Jonathan Friedman, 'Turkey Joined the Fight Against Islamic State, but not for the Reasons You Think' (Reuters Blog, 28 July 2015) <http://blogs.reuters.com/great-debate/2015/07/28/turkey-joined-the-fight-against-islamic-state-but-not-for-the-reasons-you-think/> (accessed: 31 July 2015)

¹⁴³ 'Turkey Stages First Air Strikes on Islamic State in Syria' (Reuters, 24 July 2015) (accessed: 29 July 2015) <http://uk.reuters.com/article/2015/07/24/uk-mideast-crisis-turkey-islamicstate-idUKKCN0PY0AQ20150724>. See also a letter sent by Turkish representative at the UN to UN Secretary-General and the UN Security Council by citing Article 51 of the UN Charter. 'Turkey Justifies Syria Air Strikes in Letter to the United Nations' (Reuters, 25 July 2015) <http://uk.reuters.com/article/2015/07/24/uk-mideast-crisis-turkey-un-idUKKCN0PY2H420150724?mod=related&channelName=worldNews> (accessed: 29 July 2015)

The fact that the non-state actor in this case is a terrorist group makes it difficult to consider the use of non-forcible measures. A terrorist group often operates in secrecy, their methods of attack are usually violent and, more importantly, terrorist groups have no standing in international law, as international law is state-centric. Naturally, states find it very difficult to seek non-forcible options when they are under attack from a non-state actor, so they immediately launch into self-defence.

It is worth considering Syria's position in relation to the meaning of necessity. Islamic State's centre of administration is based in the territory of Syria, over which Syria has jurisdiction. This raises the following question: due to its reluctance or inability to prevent Islamic State's attacks from going abroad, can Syria be held responsible for the actions committed by Islamic State? Syria's unwillingness or inability to stop Islamic State may justify Iraq to use necessity as grounds for invoking self-defence against Islamic State in Syria.¹⁴⁴

The "unwilling or unable" theory is not widely embraced by scholars and there are strong oppositions to its absorption in the literature on *jus ad bellum*. Yet, the phrase "unwilling or unable" was used by the US in a letter to the Security Council in which it attacked Islamic State:

"ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region... as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is *unwilling or unable* to prevent the use of its territory for such attacks."¹⁴⁵

¹⁴⁴ See. Ryan Goodman, 'International Law – and the Unwilling and Unable Test – for US Military Operations in Syria' (12 September 2014) <http://justsecurity.org/14949/international-law-unwilling-unable-test-military-operations-syria/>

¹⁴⁵ Letter from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-general S/2014/695 (23 September 2014) (emphasis added)

The letter further adds:

“The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself.”¹⁴⁶

The Syrian government was unable to prevent Islamic State from exporting its attacks beyond the Syrian border; consequently, Iraq was victimised by Islamic State. As a result, Iraq’s territory is partially controlled by the terrorist group. Such a situation leaves Iraq with little choice but to resort to the use of force in order to regain its territory and also to defend itself against Islamic State fighters based in Syria.

Another point that can be raised here is whether Syria is responsible for the conduct of Islamic State within its territory. Applying the tests introduced in *Nicaragua*, ‘effective control test’ and ‘dependence test’¹⁴⁷, and the ‘overall control test’ propounded in *Tadic*,¹⁴⁸ it seems that Syria cannot be attributed to the conduct of Islamic State. This is because Syria itself is a victim of the terrorist attacks by the Islamic State and trying to neutralise the threat within its border.

As such, the attacks coordinated by Islamic State towards other states might be contentious and some, e.g. the beheading, may possibly fall short of the threshold for constituting an armed attack. Nevertheless, there is no doubt that the invasion of Iraq’s territory by Islamic State meets the requirements of an armed attack as stipulated in Article 51. This also signifies that Iraq was in a situation where it needed to invoke the right to self-defence in order to regain its lost territory and to use defensive measures to stop attacks from

¹⁴⁶ Letter from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-general S/2014/695 (23 September 2014)

¹⁴⁷ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*) ICJ Rep 1986 p 64-65 para 114 and p 109

¹⁴⁸ Prosecutor v Dusko Tadic Judgment in the Appeals Chamber of International Criminal Tribunal for the former Yugoslavia (ICTY) IT-94-1-A (15 July 1999) para 131 p 56

Syria. Therefore, it can be argued that Iraq, and the coalition forces acting under collective self-defence, satisfy the requirement aspect of necessity to exercise self-defence.

c. Necessity as a Limitation

Once the requirement aspect of necessity has been fulfilled and the defensive measure is launched, necessity is then seen as limitation on self-defence. The use of force in self-defence must be limited to that which is necessary to achieve the legitimate aim of self-defence.¹⁴⁹ In this instance, Iraq and the coalition forces must restrict their use of force, only using the amount of force which is necessary for the purpose of self-defence. Force must be directed to repel an armed attack or threat launched by Islamic State. This part will examine the calculi of necessity during the airstrike and the difficulty of assessing necessary force against a non-state actor that controls a vast territory.

The air operation which took place on the night of 22 September 2014 targeted two terrorist groups in Syria, namely the Khorasan Group and Islamic State. President Barack Obama described the Khorasan Group as 'seasoned operatives in Syria', whereas the attack targeted at Islamic state was in response to the situation in Iraq.¹⁵⁰ Thus, there were two separate justifications offered to explain the attacks.

The airstrikes against Islamic State was a direct response to the attacks by Islamic State against Iraq. Iraq gave the following explanation of these attacks to the Security Council:

"ISIL has established a safe haven outside Iraq's borders that is a direct threat to the security of our people and territory. By establishing this safe haven, ISIL has secured for itself the ability to train for, plan,

¹⁴⁹ See in Chapter 5 3ii) Necessity and the Aim of Self-Defence

¹⁵⁰ Statement by President Barrack Obama on Airstrikes in Syria on 23 September 2014. <https://www.whitehouse.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria>

finance and carry out terrorist operations across our borders. The presence of this safe haven has made our borders impossible to defend and exposed our citizens to the threat of terrorist attacks.”¹⁵¹

The US confirmed that it had joined the other partners in collective self-defence against Islamic State by firing several air missiles targeted at Islamic State, primarily in Ar-Raqqah and Aleppo.¹⁵² The US Department of Defense spokesperson described the strikes as ‘very successful’.¹⁵³ Because this action was invoked in self-defence, the US and the coalition forces must meet the requirements of the principles of necessity and proportionality in their use of force.

The same response was directed against Khorasan Group, which was the target of several air missiles. However, the legal situation with regard to Khorasan Group is different to that regarding the strikes against Islamic State, even though both groups are geographically based in Syria. The airstrike against Khorasan Group was an act of individual self-defence by the US and this airstrike was not related to any attacks made by Islamic State in Iraq.¹⁵⁴ It was further revealed that the US claimed that this attack was an act of anticipatory self-defence against Khorasan Group which was made on the following basis:

“In terms of the Khorasan group... these strikes were undertaken to disrupt imminent attack plotting against the United States and western targets. These targets have established a safe haven in Syria to plan

¹⁵¹ Letter from Iraq’s Permanent Representative to the United Nations addressed to the President of the Security Council S/2014/691 (22 September 2014)

¹⁵² Department of Defense Press Briefing on Operations in Syria on 23 September 2014.
<http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5505>

¹⁵³ Department of Defense Press Briefing on Operations in Syria on 23 September 2014.
<http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5505>

¹⁵⁴ Letter from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-general S/2014/695 (23 September 2014)

external attacks, construct and test improvised explosive devices, and recruit westerners to conduct operations. The United States took action to protect our interests and to remove their capability to act.”¹⁵⁵

The lawfulness of anticipatory self-defence against the Khorasan Group is more complex than that of the strikes against Islamic State. The legality of anticipatory self-defence as a legal basis for the use of force in *jus ad bellum* is contentious amongst scholars, and this is further complicated in a situation of anticipatory self-defence against a non-state actor.¹⁵⁶

Whilst the two airstrikes against Khorasan Group and Islamic state are invoked under individual and collective self-defence respectively, they are still subject to the conditions of necessity and proportionality. The question of how one determines if the use of force meets the principles of necessity and proportionality in a terrorist-controlled area such as Syria makes it difficult to fulfil the limitations of self-defence against a terrorist group. Fact-based assessment is used to make a judgement on whether the defensive measures are deemed necessary and proportionate.¹⁵⁷ The targeted areas were located within an Islamic State stronghold and there is no independent mechanism to verify if the use of force meets the criteria of necessity and proportionality. If Iraq and the US claimed that the strikes were necessary for self-defence, it would be very difficult to disagree without hard proof that the force was unnecessary and disproportionate.

The restriction of information is an apparent difficulty of applying the principle of necessity and proportionality in self-defence against a non-state actor.

¹⁵⁵ Department of Defense Press Briefing on Operations in Syria on 23 September 2014.

<http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5505>

¹⁵⁶ See D'Alessandra F, 'Jus ad bellum in Syria: The Meaning of the US Airpower Campaign' International Bar Association: Human Rights Law Newsletter (March, 2015) 37-41 at 39. The author rejects the argument of anticipatory self-defence exists in the airstrike against Khorasan and the US failed to prove the imminence of the attack by Khorasan.

¹⁵⁷ Monica Hakimi, 'Defensive force against Non-State Actors: The State Play' (2015) 91 International Law Studies 1-31, 30

The case of Syria illustrates that it is not easy to determine if the use of a defensive measure is necessary or proportionate. Both of these principles act as a legal benchmark for the use of force in self-defence. Thus far, it is unknown whether such use of force is limited to defensive purposes. However, Iraq and the coalition forces must comply with the limitations, and failure to do so may result in the action being deemed to be unlawful. The objective assessment of whether the use of force is limited to achieve the aim of self-defence is adversely affected by lack of knowledge.

In some circumstances, the use of force can be shown to be necessary at some point in the future. For instance, parties to the conflict may refer the matter to international tribunal or to the ICJ to determine the lawfulness of the action in *jus ad bellum*. In previous cases, the ICJ referred to documents disclosed by involved parties and independent reports assessing the conflicts.¹⁵⁸ Alternatively, necessity and proportionality can be assessed by a UN commission, which may judge the totality of the conflict.¹⁵⁹ However, this shows that necessity as a limitation to self-defence cannot be determined immediately or soon after force is launched.

The problem of limited information also has implications for the theory of 'unwilling or unable',¹⁶⁰ if this theory is to be accepted. To suggest that Syria is unwilling or unable to fight Islamic State, and thus allow the use of force in

¹⁵⁸ For instance, in *DRC v Uganda*, the Court examined the documents presented by both parties to determine the claim of self-defence (High Command document from Uganda dated 11 September 1998 for operation 'Safe Haven'. However, the Court was cautious to accept documents that were unsigned, unauthenticated especially political and intelligence documents. See *Armed Activities on the Territory of the Congo* (DRC v Uganda) ICJ Rep. 2005 p. 168, para. 127 p. 218

¹⁵⁹ For example, recently the UN Human Rights Council established a commission of enquiry to investigate violations of international humanitarian law and international human rights law in the Occupied Palestinian Territory for the military operations that occurred on 13 June 2014. See Mandate to establish commission of enquiry UN Doc A/HRC/28/79 (26 March 2015). Outcome of the enquiry, UN Doc A/HRC/29/CRP.24 (24 June 2015)

¹⁶⁰ See discussion in Chapter 5 Section 4

self-defence in Syria, is merely an assumption.¹⁶¹ Based on open records, there is, to date, no public pronouncement by the Syrian government of it being incapable or reluctant to combat Islamic State. In fact, Syria is determined to fight Islamic State as this group is threatening the national security of Syria as much as it is destabilising the internal security of Iraq. Therefore, hard proof of evidence is required to deem Syria to be unwilling or unable, but this cannot be proved if the information available is limited.

In summary, whilst the role of necessity can be seen as limiting defensive measures, validated data is required to analyse if the invoking state or states abide by the rule. The problem stems from the limited amount of information available to corroborate if the extent of the force used was necessary to repel or avert an armed attack and threats from Islamic State and Khorasan Group. This problem is inherently unique to cases of self-defence between a state and a non-state actor. In particular, the problem is further complicated by the inaccessibility of the targeted areas, as these places are strongholds of terrorist groups.

5. Analysis and Conclusion

The three case studies examined above exemplify the points of law raised when a state invokes the right to self-defence against a non-state actor and the commentaries focus on the aspect of necessity during the course of military operations in each incident. Several noteworthy conclusions can be derived from all three state practices, and these can be divided generally into three themes.

Firstly, the concept of necessity itself can be seen from multiple paradigms, and this concept is subject to how necessity is perceived by the affected states in a conflict. This matter can be further sub-divided into two considerations. The first of these is the overlap (although not the same) in

¹⁶¹ There is also a possibility that the Syrian government is harbouring or supporting Islamic State. However, this position is denied by the government of Syria.

the meanings of necessity and proportionality, as described earlier in this thesis. Some criteria of necessity are also relevant in determining the meaning of proportionality. This can be exemplified by the state practices analysed earlier. An example of this is the question ‘to what extent is force necessary to achieve the legitimate aim of self-defence?’ The implication of such a question inevitably encroaches on the analysis of proportionality, i.e. determining whether such force is proportionate in self-defence.

In the context of necessity, a lawful use of defensive force must achieve the legitimate aim of self-defence, and force taken must only be intended for self-defence. It should not serve any other purpose and self-defence must not be invoked as a smokescreen for aggression. However, in remote circumstances, achieving the legitimate aim of self-defence may result in what appears to be a disproportionate use of force. If the use of defensive force is disproportionate, it may easily be argued that the force used is unnecessary, meaning that the invoking state fails to meet the conditions of necessity. This complexity and interrelation between necessity and proportionality can be illustrated by the Israel-Hezbollah conflict, in which Lebanon’s public infrastructures were badly destroyed by Israel and many lives were lost, to which many members of the Security Council described Israel’s response as disproportionate. Therefore, necessity does not stand as a principle on its own in the framework of self-defence, but it is influenced by the principle of proportionality. Commentators should perhaps pay greater attention to the similarities and differences between the two concepts in the literature on *jus ad bellum* in order to appreciate the overlaps and distinctions of the two concepts.

Secondly, necessity can be judged on the aim of self-defence. The extent to which self-defence is necessary relates to the aim of self-defence. In this thesis, it is argued that a state must maintain that the purpose of self-defence is to halt and repel an ongoing armed attack, although anticipatory self-defence is permissible in some instances. A state that does not subscribe to the “halt and repel” school of thought can easily undermine the strict procedure of *jus ad bellum*. For instance, a state that has a lawful right

to exercise defensive force and uses the opportunity to pursue a different nationalistic agenda undermines the premise that self-defence is merely for self-defence. Therefore, necessity can be examined in light of the purpose of self-defence.

The second theme that can be derived from the state practices is the role of the host state in relation to the meaning of necessity. In the case of self-defence against a non-state actor, where the host state's relationship with the non-state actor is minimal, or when the terrorist group is independent from the host state, this relationship may alter the meaning of necessity in self-defence. This can be seen in all of the three case studies above, namely as Al-Qaeda in Afghanistan, Hezbollah in Lebanon, and Islamic State in Syria. Each of these terrorist groups has a different relationship with the host state. For instance, the Taliban government was not willing to cooperate with the US government to destroy Al-Qaeda, although there is no proof that Al-Qaeda was operating under the instruction of Taliban government. Meanwhile, Islamic State is based in Syria and is in control of a large part of the country. The Syrian government is trying to prevent the attacks by Islamic State from going abroad but simultaneously rejects any foreign intervention. This reflects the different dynamics of the necessity to use force in self-defence by the victim state, which are partly subject to the relationship between the host state and the non-state actor.

The final theme illustrated by the case studies is the threat of terrorism in international security. The first two case studies (Al-Qaeda in Afghanistan and Hezbollah in Syria, which happened in 2001 and 2006 respectively) show that a vague relationship existed between the host state and the terrorist group. In Lebanon, the government denied that it supported Hezbollah in the attack against Israel. In contrast, in 2014, Islamic State was in control of large territories in two states, Syria and Iraq, and has used their occupied territory to launch armed attacks. By comparing the two situations in Lebanon and Syria, it can be seen that the terrorists in Syria represent a greater risk to international security than Hezbollah. Of course, the three state practices cited in this study do not comprise a complete picture of

terrorism on a global scale. However, they do show that it is feasible that non-state actors may become more dangerous and capable of subjugating lands from a state. The emergence of terrorism on an international level has implication for the law on the use of force. Due to the significance of contemporary terrorism in international security, the principle of necessity in *jus ad bellum* must also be adjusted to suit the current threat. Therefore, the concept of necessity in self-defence cannot be seen as a static concept incapable of enacting changes in international law, but rather as a concept that can adapt to new circumstance without undermining the essential purpose of self-defence, whether the threat emanates from terrorism or from other states.

In conclusion, the principle of necessity in the framework of self-defence is essential for analysing the lawfulness of a defensive measure. Despite the restrictions imposed on the invoking state which require it to comply with the principle of necessity, it is not easy to determine an abstract concept such as the principle of necessity in a complex military situation, especially with regard to the use of force against terrorism. As a result, there are a multitude of ways in which the meaning of necessity in the law of self-defence can be interpreted and applied. Nonetheless, the principle of necessity acts a requirement to launch self-defence and as a limitation to the use of defensive force. The use of force must only be employed to achieve the legitimate aim of self-defence, and self-defence cannot be used as an excuse to advance any other national interest. The state practices mentioned earlier reveal that not all circumstances share the same elements of necessity. Different circumstances require a different analysis of necessity.

Chapter 7: Conclusion: Overall Observations about Necessity in Self-Defence Framework and State Practice

This thesis began by outlining the general framework of self-defence in international law. This involved analysing Article 51 of the UN Charter in reference to the right to self-defence in customary international law. Within customary international law on self-defence, any use of force for the purpose of defensive measure must comply with a well-established condition with the requirements of necessity and proportionality.

In this thesis, there are two main contribution to the existing legal literature on the law of self-defence. First, this research focuses on the establishment of the guiding principles of self-defence in customary international law. The principles of necessity and proportionality find its origin from the Caroline incident in 1837. From this incident, several other legal rules that are associated with it such as the right to anticipatory self-defence, pre-emptive self-defence and the use of force in self-defence against non-state actors. However, the present literature does not justify how the Caroline doctrines came into existence. It is assumed that there was interpretive process that transformed the Caroline incident into legal rules. This thesis attempts to validate the Caroline doctrines by using several methods of creating customary law. This research observes that it is difficult convert the Caroline affair in legal rules due to unclear method of interpreting classical incident like the Caroline case. As a result, several interpretations can be created by relying on the Caroline incident and this may open misinterpretation and even worse, abuse.

The second contribution of this thesis is by exploring the meaning of necessity. This is by examining factors that affect the meaning of necessity in self-defence such as the aim of self-defence, anticipatory or pre-emptive self-defence, and whether the aggressor is a state or a non-state actor. This research also investigate the role of necessity in jus ad bellum. It can be

argued that necessity has two roles. First, it acts as a requirement to self-defence and this is by establishing the existence of threat or an armed attack and force as the only last resort. The second part of necessity is it acts as limitation when state exercises the right to self-defence. This restraint role of necessity is linked with the legitimate aim of self-defence which is halt and repel an armed attack. The use of force beyond the aim of self-defence is regarded as unnecessary use of force. Therefore, the second role of necessity is measured by the aim of self-defence. In order to validate the existence of the two roles of necessity, three state practices are used to demonstrate how necessity is viewed in a particular situation. However, it is discovered that it is difficult to maintain necessity as a limitation in self-defence against terrorism. This is because non-state actors are often secretive and evasive thus difficult to validate the use of force meets the aim of self-defence.

Aside from the areas examined in this thesis regarding necessity in self-defence framework, there are additional unresolved elements of necessity that would benefit from further analysis by researchers in the future. Firstly, it is beneficial to understand the threshold of necessity in self-defence against a non-state actor. This area of discussion raises a concern regarding the extent to which an armed attack or violence executed by a non-state actor can be regarded as necessary as a trigger for the right to self-defence. Refining the threshold of necessity for a terrorist armed attack might restrict a state's use of force in self-defence to only what is necessary.

Secondly, another issue that is important to highlight here is the role of the *Caroline* incident in shaping the meaning of necessity. Most lawyers concur that the *Caroline* incident established the principles of necessity and proportionality. When recalling that these principles were established in the nineteenth century it becomes imperative to re-examine them to determine if there is any relevance to attached contemporary legal argument concerning necessity to the past.

Another aspect that has been highlighted throughout this study is the aim of self-defence against a non-state actor. Initially, when reviewing former judgments, this thesis argued for the importance of maintaining the legitimate aims of self-defence, irrespective of the entity of the aggressor. However, existing state practice illustrates that there are difficulties meeting the legitimate aims of self-defence when countering terrorism. This therefore raises a question regarding whether the aim of self-defence, as one currently accepted in *jus ad bellum* literature, should be amended to reflect the reality that states are facing terrorist groups and not state armed attacks.

Finally, an aspect of the consideration of necessity refers to the principle of imminence. The role of imminence in the framework of self-defence deserves greatest attention when considering self-defence against a non-state actor. It is pivotal for international legal literature to represent how, and to what extent, imminence shapes the outcomes of self-defence. To date, imminence has had a role in contributing to self-defence narratives; this is an important aspect to reappraise in the current international context.

a. Threshold of Necessity in Self-Defence against Non-State Actors

The application of necessity is currently more relevant in self-defence against non-state actors than in self-defence between states. This is because the two entities have different responsibilities under international law. There is a general acceptance that a high burden of proof is required if self-defence is to be applied against a non-state actor.¹ The UN Special Rapporteur on Extrajudicial Executions, asserted in 2013 that ‘there is an emerging view that the level of violence necessary to justify a resort to self-defence ought to be set higher when it is in response to an armed attack by

¹ Albrecht Randelzhofer and Georg Nolte, ‘Article 51’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (Vol. 2, 3rd edn, OUP 2012) 1424

non-State actors than to an attack by another State'.² This remark resonates with the principles of international law, which require states to respect the sovereignty and territorial integrity of other states, even when the lawful use of force targets a non-state actor.

When self-defence is directed toward a non-state actor, this act inevitably compromises the sovereignty and territorial integrity of the host state. Although the use of force must be directed toward the non-state actor, and the host state may not have consented to the use of its territory as a base for terrorist operations, the use of defensive force implies that the host state is responsible for the conduct of a non-state actor in its border. For this reason, it seems logical that the standard of necessity be elevated to trigger the right to self-defence against a non-state actor, relative to that applied when directed toward a state actor. The level of armed attack deemed necessary by a non-state actor must be more serious than an armed attack undertaken by a state.

The three state practices enumerated above illustrate the difficulty encountered when applying necessity to real life situations. For example, in cases targeting the Islamic State, the application of necessity is problematic in areas that are inaccessible and controlled by terrorist groups. It is problematic to determine if an airstrike launched by the US can ever be limited to what is necessary to achieve the intended outcome. It may be that the airstrikes fall below the threshold of action required to repel an armed attack by Islamic State, but due to a lack of information, this view cannot be substantiated.

To complicate the debate over necessity, claims made for anticipatory self-defence make it even more challenging to conform to the principle of necessity as a requirement and limitation in cases of self-defence. For example, when US launched strikes against Khorasan Group on the basis of anticipatory self-defence, it is hard to verify when an attack from the terrorist

² Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions at 89. UN Doc A/68/382 (13 September 2013) by Christof Heyns

group was imminent. Researchers and practitioners are at the mercy of upholding the US version of events, being forced to accept the narrative they offer at face value, in the absence of concrete contradictory evidence. However, if it is true that it was necessary for the US to launch action in self-defence against Khorasan Group, then the problem persists. Certainly, it is unknown whether the airstrike was limited to what is necessary; thus, by implication it is also not possible to argue that it was proportionate. Thus, if necessity and proportionality cannot be proven, this renders the airstrike as *prima facie* unlawful. However, this may not necessarily be the correct judgment, thereby underlining the difficulty encountered when seeking to apply the principle of necessity against a non-state actor in an area controlled by terrorists. Therefore, this shows the need to understand and refine the threshold of necessity in a self-defence framework to target non-state entities.

b. Standard of Necessity based on the *Caroline* formula

Another observation that can be made in this thesis concerns the relevance of the *Caroline* incident in the framework of self-defence. The customary principles of necessity and proportionality were established as a result of the *Caroline* incident in 1837, based on phrases adopted from correspondence penned by Mr Daniel Webster.³ The incident happened long before a proper international legal system was established; however, the spirit of the *Caroline* still reverberates in contemporary international law. The inclusion of the *Caroline* incident as a foundation to the parameters of self-defence continues to beset doctrinal divisions in *jus ad bellum*.

³ Some authors dismiss the significance of the *Caroline* doctrine in *jus ad bellum*. See Maria Ocelli, 'Sinking' the *Caroline*: Why the *Caroline* Doctrine's Restrictions on Self-Defense Should Not Be Regarded as Customary International Law', (2003) 4 San Diego International Law Journal 467-490

According to the *Caroline* incident, the definition of necessity is 'instant, overwhelming, leaving no choice of means, and no moment of deliberation'.⁴ It is questionable whether this definition remains pertinent in contemporary warfare. As shown above, in state practice there is a broad acceptance that it is lawful for a state to exercise in self-defence against a non-state actor and when so doing that states must fulfil the principle of necessity. It then follows that it is important to establish the elements of necessity that must be applied when invoking self-defence against a non-state actor. Some would opine that the *Caroline* incident formula is still applicable, even if self-defence is directed against a non-state actor.⁵ Furthermore, some would argue that *Caroline* self-defence is applicable in today's world, because customary self-defence is not a static concept and is capable of adaption.⁶ If accepting this narrative, then the meaning of necessity in the *Caroline* formula must be altered to respond to current problems.

The dilemma of *Caroline* necessity is twofold. First, necessity as a guiding principle in self-defence continues to be shaped by history. This means adhering to the phrase 'instant, overwhelming, leaving no choice of means, and no moment of deliberation' in all circumstances, irrespective of whether self-defence is against a state or a non-state actor, or whether the conflict involves weapons of mass destruction or is a minor border clash. This may result in a rigid definition of necessity that could then be deemed inapplicable. Second, necessity is taken solely as a principle detached from its history.⁷ The danger of the latter option is that the term necessity is too abstract to have a concrete impact on circumscribing state to use force. A state may justify necessity as a pretext for aggression and yet still claim to

⁴ Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 56

⁵ See. Albrecht Randelzhofer and Georg Nolte, 'Article 51' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (Vol. 2, 3rd edn, OUP 2012) 1423-1424

⁶ 21 April 2004, Parliament Debate House of Lords (2004) 356

⁷ Michael Bothe, 'Terrorism and the Legality of Pre-emptive Force' (2003) 14 EJIL 227-240, 232 The author argues that the *Caroline* formula did not survive during the Kellogg-Briand Pact or the UN Charter although admits that the *Caroline* formula has influence customary international law in *jus ad bellum*.

be acting within the law of self-defence. For this reason, the former option to attach necessity to the *Caroline* definition might still seem to be the best option although it is unsatisfactory. Indeed, at the very least, it does define the restrictions imposed on a state in using force in self-defence.⁸

The influence of the *Caroline* incident in the law of self-defence still appears relevant, including in how it shapes the meaning of necessity in self-defence against a non-state actor. The definition of necessity provided by the *Caroline* incident has been criticised as restrictive and incapable of adjusting to current threats; however, there is no credible alternative upon which to base the meaning of necessity in self-defence. At present, *Caroline* necessity seems to be the standard for necessity in the law of self-defence.

c. Aim of Self-Defence against Non-State Actors

A further issue discussed in this thesis, in relation to necessity against a non-state actor, was the aim of the act of self-defence. In Chapter 5, this thesis maintained that a legitimate aim in self-defence, whether against a state or a non-state actor should be to repel or avert an armed attack.⁹ The sole reason for exercising force must be defensive. Arguably, this position is increasingly being recognised as unachievable in the context of facing terrorism.

The framework of self-defence gives the invoking state a temporary right to use force, stating that it must be for the sole purpose of self-defence. This prevents states from using self-defence to disguise other motivations. However, self-defence against a non-state actor is not often a straight choice between using force or not using force. The threats and attacks launched by terrorist groups come in various forms, and typically involve 'pin prick'

⁸ See. Michael Bothe, 'Terrorism and the Legality of Pre-emptive Force' (2003) 14 EJIL 227-240. The author limits the scope of necessity to anticipatory self-defence but rejects pre-emptive self-defence because it overstretches the meaning of necessity in the *Caroline* formula.

⁹ See Chapter 4 in 2 d) Aim of Self-Defence in Relation to Necessity

attacks on a large scale, such as the 9/11 attacks, attacks by small cells in foreign countries, and suicide bombings.¹⁰ With these kinds of attacks, it is reasonable to re-visit how the threat proffered affects the aim of self-defence, and question whether the aim to 'halt and repel' an armed attack is still appropriate.

The difficulty of the strict application of the legitimate aims of self-defence was exemplified in relation to state practice in Chapter 6. For example, when Israel launched action in self-defence against Hezbollah, the Prime Minister of Israel explicitly announced that the force used was not only intended to resist immediate attacks and recapture the abducted soldiers, but also to establish Israel's supremacy in the conflict to prevent future attacks. If legal literature accepts that the aim of self-defence is only to address the immediate threat then it is questionable whether the action by Israel was in line with the legitimate aims of self-defence. Noting the uncertainty that a non-state actor may pose to the victim state, it is understandable, although legally contentious, that sometimes when countering terrorism, the use of force in self-defence might also include action intended to maintain the security of the host state.

Conversely, if accepting the argument that self-defence must be purely for self-defence, no other motives are permissible in any instance, whether against a state or a terrorist group. This seems to be the majority view of scholars. When a state responds only in self-defence to individual armed attacks executed by terrorist groups the possibility of another attack occurring is acknowledged. Therefore, it may be reasonable for a victim state to utilise force that extends beyond the aim of repelling or averting an armed attack, to fulfil the motive of stopping a further attack. The problem is most pertinent when the host state is struggling to enforce national law within its territory. This can be seen in all the examples given in Chapter 6: Al-Qaeda in Afghanistan, Hezbollah in Lebanon, and Islamic State in Syria. Host states have become safe havens, from which these respective terrorist

¹⁰ Yoram Dinstein categorises conflict as measure short of war and war.
Dinstein Y, *War Aggression and Self-Defence* (5th ed, CUP 2012) 242

groups can launch attacks into other states. In view of these circumstances, it is essential to ask if the international legal community is willing to continue to apply existing definitions of the legitimate aims of self-defence loosely, or if it will establish another aim of self-defence specifically to respond to terrorism. This question is yet to be resolved, although it is being, and will be, shaped by ongoing state practice.

Another factor that might affect the aim of self-defence is the character of the aggressor. The aims of self-defence are also informed by dispute as to whether an aggressor is a state or a non-state actor. In situations where the aggressor is a state, international legal mechanisms and diplomacy provide channels to hold the aggressor state accountable for its conduct. For instance, political and economic sanctions may be imposed on the attacking state in response to its aggression towards another state. Alternatively, belligerent states might seek to resolve disputes through negotiation, persuasion, or by submitting cases to international tribunals. In contrast, in situations where a state responds to an attack or threat from a terrorist group, the victim state does not have the privilege of relying on an international mechanism to hold the aggressor accountable for its conduct. This is because terrorist groups have no legal standing in international law. Comparing the two scenarios, a victim state is at a disadvantage if the attacking entity is a non-state actor because it is expected that the victim state to use force by maintaining the legitimate aims of self-defence. Therefore, it is appropriate to ask if there is an imbalance in the threat posed by terrorist groups in comparison to state actors; and if so if this might require the victim state to use force beyond the normal aim of halting or repelling averting an armed attack when facing a terrorist group.

If the reality suggests that states cannot fulfil the legitimate aims of self-defence when facing a non-state actor, or that to adhere to such aims would be at the cost of future instability within the victim state, then: should the legitimate aims of self-defence be adapted to meet the type of the aggressor? This contentious area cannot be resolved by merely illustrating several instances of state practice. Rather, it is incumbent upon legal

scholars to craft appropriate self-defence aims to suit the threats and armed attacks non-state actors pose. Certainly, as noted by the UK Attorney General, self-defence is not a static concept, which means that it must be reviewed in light of the current international environment.¹¹

d. Imminence in Self-Defence against Non-State Actors

A final observation that can be identified in this thesis is the principle of imminence within the law of self-defence. Doubtless, imminence plays an important role in the framework of self-defence, and imminence influences how self-defence is executed. For instance, proponents of anticipatory self-defence justify the lawful use of force, only if the invoking state can prove an attack is imminent. However, scholars rarely extensively debate the issue of imminence in self-defence. The few academics that had sought to analyse imminence have faced a struggle voicing their ideas, only achieving limited success in articulating the meaning of imminence.¹²

Several issues are associated with imminence in *jus ad bellum* literature. First, the concept of imminence in self-defence can be analysed critically in respect to evidence. Supporters of anticipatory self-defence rely on the principle of imminence to justify self-defence prior to an armed attack, for which Article 51 requires the existence of an armed attack to exercise force. This makes imminence a partial requirement of self-defence. This issue rests upon the evidence that there is an imminent armed attack. The requirement stipulated in Article 51 states that there must be an armed

¹¹ The UK-Attorney General position the law of self-defence in the House of Lords Debate 21 April 2004, Column 370.

¹² Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 AJIL 769-777; Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense' (2013) 107 AJIL 563-570 See opposing debate. Dire Tladi, 'The Nonconsenting Innocent State: The Problem with Bethlehem's Principle 12' (2013) 107 AJIL 570-576; Mahmoud Hmoud, 'Are New Principles Needed? The Potential of the Establishment Distinction Between Responsibility for Attacks by Nonstate Actors and the Law of Self-Defense' (2013) 107 AJIL 576-579

attack to initiate self-defence, offering the benefit of tangible proof that a victim state has been attacked. Whilst a state claiming an imminent attack and subsequently using force on the basis of self-defence might not necessarily provide concrete evidence that an armed attack is imminent.

The evidential problem of imminence becomes more acute in situations of self-defence against terrorism. Understandably, for states to obtain information from terrorist groups requires them to work in covert operations thus, information gathered is not usually disclosed publicly. The risk of exposing secretive information publicly is that it may jeopardise intelligence work by the defending state. However, if imminence is regarded as a pre-requisite for self-defence, there must be evidence to show that an armed attack by a non-state actor is imminent. Absence of proof is tantamount to failure to meet the requirement, and the act of self-defence may subsequently be regarded as unlawful.

The discussion of state practice in Chapter 6, examined the case in which the US invoked anticipatory self-defence against Khorasan group located in Syria, asserting that it anticipated an imminent attack from the terrorist group.¹³ However, the US never explained the nature of the attack, nor did it offer corroborating evidence. Merely suggesting that an attack from a terrorist organisation is imminent does not necessarily justify that a state can lawfully use force in self-defence. Evidence of an imminent attack is an important precursor to enhance credibility in the use of force, to avoid the accusation that self-defence is being used as a pretext for aggression.

¹³ Rear Admiral John Kirby, Press Secretary for Department of Defense said: 'In terms of the Khorasan group, which is a network of seasoned Al Qaida veterans, these strikes were undertaken to disrupt imminent attack plotting against the United States and western targets. These targets have established a safe haven in Syria to plan external attacks, construct and test improvised explosive devices, and recruit westerners to conduct operations.'

Department of Defense Press Briefing on 23 September 2014. Can be found at
<http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5505>

It appears that the difficulty in establishing evidentiary proof in the context of imminence in self-defence affects two extreme ends of the spectrum. On the one hand, a state claiming imminent armed attack by disclosing in-depth information could risk exposing its intelligence operations but it enhance its credibility to use force. However, failure to show substantiated evidence that there is an imminent attack could easily raise the suspicion that the defending state uses self-defence to cover up the unlawful use of force. Thus, a middle ground must be found to balance the competing interests of lawful self-defence on the grounds that there is an imminent attack, thereby preventing misuse of self-defence as an excuse for unlawful force.

Furtherance on the complex point of imminence; assuming that a middle ground can be found, however it is formulated, and a state has a lawful claim to anticipatory self-defence, i.e. there is an imminent armed attack, there is no authority for the defending state to submit its case to for a judgment of its claims. Ultimately, the victim state itself must judge whether the information compiled suggests an imminent armed attack. Notwithstanding what happens when the conflict is referred to an international tribunal sometime in the future, Article 51 only requires that the defending state inform the Security Council it has invoked the right to self-defence. However, state practice seems to suggest the Security Council or the General Assembly are amongst the appropriate bodies to probe evidence with regard to imminent attack in anticipatory self-defence.¹⁴ Nevertheless, these organisations are highly politicised bodies, and may not necessarily make decisions based on objective legal examinations. Thus, the concept of imminence is reliant on the existence of evidence, as eventually determined by the invoking state.

Another observation highlighted in this study dealt with the elements comprising imminence. It is important that this area of law is further developed to establish a clear understanding of the elements that comprise imminence in *jus ad bellum*. The discussion regarding what constitutes an

¹⁴ Thomas Frank, *Recourse to Force* (CUP 2004) 107

an imminent armed attack was reignited by Daniel Bethlehem in 2012, in which he outlines several considerations that are relevant when deciding there will be an imminent or actual armed attack by non-state actors.¹⁵ He argues: 'there is little scholarly consensus on what is properly meant by 'imminence' in the context of contemporary threats'.¹⁶ He further states that the meaning of imminence should be shaped and refined according to threats or attacks from today's non-state actors.

By dividing the principle of imminence into two categories potentially expands the meaning of imminence. Some writers are reluctant to accept states invoking anticipatory self-defence without providing specific evidence on the nature and planning of the imminent attack.¹⁷ This is because failure to provide evidence of an imminent attack may be seen as endorsing anticipatory self-defence and also pre-emptive self-defence, which is a highly contentious area of law.¹⁸ As a result, the strict requirement for anticipatory self-defence based on an imminent attack may be defeated where there is a loose interpretation of imminence. For imminence to have a significant effect, such as curbing states from abusing anticipatory self-defence whilst maintaining the need for states to respond to incoming attack, evidence is required to show an attack is imminent.

In summary, this thesis attempted to unravel the meaning of necessity in self-defence, to apply it in the situation of self-defence against non-state actors. Whilst this thesis analyses the meaning of necessity, other areas of self-defence are equally important, as they may also contribute to our

¹⁵ Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 AJIL 769-777. See also. Michael J Glennon, 'The Emerging Use-of-Force Paradigm' (2006) 11 JCSL 309-317, 311-312

¹⁶ Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 AJIL 769-777; 773

¹⁷ Mahmoud Hmoud, 'Are New Principles Needed? The Potential of the Establishment Distinction Between Responsibility for Attacks by Nonstate Actors and the Law of Self-Defense' (2013) 107 AJIL 576-579

¹⁸ Ibid.

understanding of necessity. The challenge posed now is to investigate and analyse other concepts within the law of self-defence that are relevant to approaches to threats and attacks by terrorist groups.

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