

The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum

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Abstract

While force used by a state in self-defence must meet the demands of proportionality there is confusion over the meaning of the term in this, jus ad bellum, context. One source of confusion lies in the existence of two competing tests of proportionality, the 'tit for tat' and the 'means-end' tests. Since the legality of unilateral use of force by a state depends on the legitimacy of its aim – self-defence against an armed attack – the 'means-end' test would seem more appropriate. However, there is no agreement over the legitimate ends of force employed to achieve this aim. Is the defending state limited to halting and repelling the attack that has occurred, or may it protect itself against future attacks by the same enemy? May a state that has been attacked use force in order to deter the attacker from mounting further attacks? The 'means-end' test of proportionality rests primarily on the necessity of the means used to achieve legitimate ends. Disagreements over proportionality are in this context usually really disagreements over those ends. While the appropriate test in this context is generally the 'means-end' test, in some cases, such as use of force in response to a limited armed attack, the 'tit for tat' test of proportionality might be more appropriate. Finally, I show that little attention has been paid in the jus ad bellum context to the 'narrow proportionality' test, which assesses whether the harm caused by the force outweighs the benefits to the state using that force. The apparent reason for this is the assumption that this question is only relevant in jus in bello. I argue that while necessity of the force used is indeed the main issue in jus ad bellum, there is still place for assessing narrow proportionality.

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1 Introduction

In the Newsletter of the American Society of International Law (ASIL) published in September/October 2006 the President of the Society, Professor José Alvarez, wrote an editorial entitled ‘The Guns of August’ in which he discussed legal aspects of the 2006 Israeli military campaign against the Hezbollah in Lebanon, and related specifically to questions of proportionality, mainly in *jus in bello*.¹ In the same Newsletter five international lawyers, all members of the Executive Council of the ASIL, were asked how they would analyse ‘the recent conflict between Israel and Hezbollah in terms of the *jus ad bellum* and *jus in bello* rules requiring necessity and proportionality’.² One of the respondents thought that in *jus ad bellum* proportionality played a part only in precluding ‘the legality of one state’s destroying or wholly occupying another by reason of a real or imagined minor infraction, such as a trivial border raid’.³ This did ‘not preclude Israel, under the circumstances, from attacking Hezbollah wherever it is to be found (including not only Lebanon but also Syria) in response to its string of attacks and incursions against Israel and its armed forces’.⁴ Another respondent opined that the question was whether ‘Israel’s response to the capture of two Israeli soldiers and the killing of eight’ was proportionate. His answer was that Israel’s response ‘wasn’t even close’.⁵ A third respondent considered that the question was whether the force used was ‘required to deter and protect against further attacks’. Applying this test he concluded that Israel’s actions were clearly legitimate acts of self-defence that met the demands of proportionality.⁶

All are agreed that the proportionality principle plays a central role both in *jus in bello* and *jus ad bellum*. In *jus in bello* the meaning of the principle itself is quite clear; it involves assessing whether the expected collateral damage to civilians and civilian objects of an attack on a legitimate military target is excessive in relation to the concrete and direct military advantage anticipated.⁷ It is admittedly notoriously difficult to apply this test,⁸ but the difficulty lies in evaluating and comparing factors that are

¹ The American Society of International Law, 22(5) Newsletter, Sept./Oct. 2006, 1.

² *Ibid.*, at 5.

³ Reply of the late Professor Thomas M. Franck, in *ibid.*

⁴ *Ibid.*

⁵ Reply of Professor Douglass W. Cassel, Jr, in *ibid.*

⁶ Reply of Attorney William H. Taft, IV, in *ibid.*, at 12. Mr Taft served in the past both as general counsel to the US Department of Defense and as chief legal adviser to the US Department of State. In the latter capacity he appeared before the International Court of Justice (ICJ) on behalf of the US in the *Oil Platforms case (Islamic Republic of Iran v. United States of America)* [2003] ICJ Rep 161. The other two respondents, Professors Richard Falk and Michael Scharf, did not present a view of the test of proportionality in *jus ad bellum*.

⁷ Art. 51(5)(b) of Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (API). This is widely regarded as an accurate presentation of the norm of proportionality in customary law of *jus in bello*. See J.-M. Henckaerts and L. Doswald-Beck for International Committee of the Red Cross, *Customary International Humanitarian Law* (2005), i: Rules, at 46–50; Hampson, ‘The Principle of Proportionality in the Law of Armed Conflict’ in S. Perrigo and J.H. Whitman (eds), *The Geneva Conventions Under Assault* (2010), at 42.

⁸ *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, available at: www.icty.org/sid/10052 (last accessed 27 Jan. 2011), at para 48: ‘[i]t is much easier to formulate the principle of proportionality in general terms than it is to apply it to

not quantifiable rather than in the meaning of the principle itself. On the other had, as the above exchange so clearly reveals, in *jus ad bellum* the very meaning of the principle is shrouded in uncertainty.

Under just war theories proportionality has long been regarded as one of the elements for determining whether resort to war is justified.⁹ In traditional just war theory proportionality was based on an assessment of the anticipated goods of waging war in relation to its harms.¹⁰ The views of the international lawyers cited above reflect the confusion amongst contemporary moral philosophers and international lawyers, who, while acknowledging that states resorting to force must comply with the demands of proportionality, display little, if any, agreement on what this implies. Some take the view that it is the very decision to resort to force that must meet a proportionality test.¹¹ Others adopt what has been termed a 'tit for tat' approach, under which the amount of force used by a state as a countermeasure against B must be proportionate to the force previously used by B.¹² Yet others, probably the majority, argue that proportionality must be judged against the legitimate ends of using force¹³ or in relation to the threat.¹⁴ Antonio Cassese argues that the force used must be judged both against the legitimate ends and the attack against which it is

a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.'

⁹ See H.M. Hensel (ed.), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (2008), at ch. 1; B. Coppieters and N. Fotion (eds), *Moral Constraints on War* (2002), at 13; M. Walzer, *Arguing about War* (2004), at 86; J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2004), at 8–9; Franck, 'On Proportionality of Countermeasures in International Law', 102 *AJIL* (2008) 715, at 719. In relating to just war theory in his Oslo speech accepting the Nobel Peace Prize, US President Barack Obama stated, 'The concept of a "just war" emerged, suggesting that war is justified only when it meets certain preconditions: if it is waged as a last resort or in self-defense; if the forced used is proportional, and if, whenever possible, civilians are spared from violence', available at: www.msnbc.msn.com/id/34360743/ns/politics-white_house/ (last accessed 30 Jan. 2011). And see S.L. Carter, *The Violence of Peace: America's Wars in the Age of Obama* (2011).

¹⁰ M.W. Brough, J.W. Lango, and H. van der Linden, *Rethinking the Just War Tradition* (2007), at 245–246. There is disagreement whether in making this assessment the benefits of the war must merely outweigh its harms or whether the expected harms must not greatly exceed the benefits. The authors note that given 'the history of controversies about how to measure utility, it is not surprising that some just war theorists have contested whether the proportionality principle provides significant moral guidance'.

¹¹ See Fotion, 'Proportionality', in Coppieters and Fotion, *supra* note 9, at 91–98; Franck, *supra* note 9, at 721: 'proportionality is relevant to determining whether there is any right, in the specific context of a provocation, to use military force in self-defence or only a right to take more limited counter-measure (*jus ad bellum*)'.

¹² This approach is described by A.C. Arend and R.J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (1993), at 165–166. And see Ranzhofer, 'Article 51', in B. Simma *et al.* (eds), *The Charter of the United Nations: A Commentary* (2nd edn, 2002), at 788, 805.

¹³ Gardam, *supra* note 9, at 11; O. Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2010), at 470; Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures', 12 *EJIL* (2001) 889; M.W. Doyle, *Striking First: Preemption and Prevention in International Conflict* (2008), at 10.

¹⁴ I. Brownlie, *International Law and the Use of Force by States* (1963), at 261; L. Moir, *Reappraising the Resort to Force: International Law, jus ad bellum and the War on Terror* (2010), at 68–70.

responding.¹⁵ Finally, Yoram Dinstein suggests that '[i]t 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'.¹⁶

The very right of states to use of force in international relations and the parameters of that right are obviously highly loaded questions. States that are themselves faced with armed attacks or threats of such attacks are inevitably going to have a different perspective from uninvolved states. The perspective of the latter is likely to change radically once they too are faced with an attack. The bias of involved states is self-evident; that of uninvolved states may be less so. Yet experience tends to show that uninvolved states and outside observers will often be highly selective in deciding whether use of force was both justified and proportionate. When force is used in situations in which they have sympathy for the victim state, and little or no sympathy for the state or group that provoked the use of force by that state, they are not likely to be critical of the force used, provided it is not obviously incompatible with *jus in bello*. However, when similar force is used by a state to which they are either unsympathetic or outwardly hostile, or when they actually identify with some or all of the goals of the state or group whose actions provoked the use of force, they are likely to condemn that use of force as disproportionate.

The bias that will affect the attitudes of both involved and uninvolved states and consequently of inter-state organizations is facilitated by the confusion amongst international lawyers over the meaning of proportionality in the *jus ad bellum* context. While conceding the obvious political dimensions of the issue, my object in this article is to explore that meaning and hopefully thereby to reduce the confusion.

My analysis rests on the following assumptions and propositions:

- a. The term 'proportionality' is used in various legal contexts. But it is used to mean two radically different things. Sometimes the term refers to the relationship between an act and the legitimate response to that act ('just desserts', 'eye for an eye', or 'tit for tat' proportionality). The response must be proportionate to the act that provoked it. This is the way the term is used in judging criminal sanctions: the punishment must fit the crime.¹⁷ In other contexts, proportionality relates to an assessment of the harm caused by means used to further legitimate ends ('means-ends proportionality'). That harm must not be disproportionate to the expected benefits of achieving those ends. In human rights law, for example, proportionality judges the harm caused by restrictions on a protected liberty when weighed against the legitimate ends those restrictions are meant to serve.¹⁸

¹⁵ A. Cassese, *International Law* (2nd edn, 2005), at 355: '[t]he victim of aggression must use an amount of force strictly necessary to repel the attack and proportional to the force used by the aggressor'. See also Cannizzaro, 'Contextualizing proportionality: *jus ad bellum* and *jus in bello* in the Lebanese War', 88 *IRRC* (2006) 779.

¹⁶ Roberto Ago, Special Rapporteur to the International Law Commission, *Eighth Report on State Responsibility*, (1980) *ILC Yrbk*, ii, I, 13, at para. 120, UN Doc A/CN.4/318/ADD.5–7; Y. Dinstein, *War, Aggression and Self-Defence* (3rd edn, 2001), at 184.

¹⁷ See von Hirsch, 'Proportionality in the Philosophy of Punishment', 16 *Crime and Justice* (1992) 55.

¹⁸ See A. Barak, *Proportionality: Constitutional Rights and their Limitations* (2010), at 169 (in Hebrew).

- b. In *jus ad bellum* proportionality has traditionally been used in both of the above senses.¹⁹ When judging armed reprisals that were once regarded as legitimate the accepted meaning referred to weighing the force used in the reprisal against the unlawful act that provoked the reprisal.²⁰ On the other hand, when placed in the context of a state defending itself against an armed attack, proportionality relates to whether the force used (the means) is proportionate to the legitimate ends of using that force (self-defence).²¹
- c. In the post-Charter era unilateral use of force by states is limited to the exercise of their inherent right to self-defence, recognized in Article 51 of the UN Charter. Proportionality should therefore seemingly be based on an assessment of the force used in relation to that end.²² The problem is that there is no consensus on what that end may be. All accept that a state acting in self-defence may halt and repel an ongoing armed attack, but there is a singular lack of agreement on whether it may also act to prevent or deter further armed attacks from the same enemy. What ends are legitimate becomes especially acute when the response in self-defence takes place after the attack has been carried out and completed, and there is no longer an attack to halt or repel, or when the armed attack has not yet occurred but is imminent.
- d. The legality of force used in self-defence depends, *inter alia*, on necessity and proportionality.²³ Necessity is generally taken to refer to the resort to force, rather than to non-forcible measures, while proportionality assesses the force used.²⁴ However, the term 'necessity' is also used to assess whether the force used was necessary to achieve legitimate ends of self-defence. When used in this sense there is an obvious affinity between necessity and proportionality. Means can only be proportionate when they are necessary to achieve the legitimate ends.²⁵
- e. The first stage in assessing proportionality is to define the legitimate ends of using force in the specific case. The second stage will involve assessing whether the forcible means used by the state acting in self-defence were necessary to achieve those ends. In this context, 'necessary' may have one of two meanings: that there is a rational connection between the means and the ends, or that there were no less drastic means available to achieve those ends.
- f. In other contexts in which proportionality is assessed according to a means-ends test, after establishing whether the means used were necessary in both of the

¹⁹ N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010), at 64.

²⁰ Ago, *supra* note 16, at 69; Dinstein, *supra* note 16, at 197–199.

²¹ Gardam, *supra* note 9; Corten, *supra* note 13; M. Walzer, *Just and Unjust Wars* (3rd edn, 1977), at 120.

²² D. Rodin, *War and Self-Defense* (2003), at 115.

²³ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* [1986] ICJ. Rep 94, at para. 176; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, at para. 41; C. Gray, *International Law and the Use of Force* (3rd edn, 2008), at 150; Gardam, *supra* note 9, at 1–4; Dinstein, *supra* note 16, at 183–185; Brownlie, *supra* note 14), at 261; Corten, *supra* note 13), at 470–494.

²⁴ Dinstein, *supra* note 16, at 207–210.

²⁵ Corten, *supra* note 13, at 488.

above senses, they are then subjected to a ‘narrow proportionality’ test.²⁶ This requires assessing whether the harm caused by those necessary means outweighs the expected benefits. There is a difference of opinion whether this narrow proportionality test is relevant in *jus ad bellum*. Many experts assume that it is only relevant in *jus in bello*. If we adopt their view, proportionality in *jus ad bellum* boils down to assessing whether the forcible means used were necessary in light of the legitimate ends of self-defence in the particular case. Differences of opinion on whether force was proportionate reflect disagreement on the legitimate ends of force in the case under discussion.

- g. All actions of a state that exercises its right to use force in self-defence must comply with *jus in bello*.²⁷ Hence all its actions must be compatible with the principle of proportionality in IHL. The demand for proportionality in *jus ad bellum* is an independent demand that is divorced from the question whether the defending state complies with *jus in bello*. Use of force may be disproportionate under *jus ad bellum* even if all forcible measures are compatible with *jus in bello* in general, and the proportionality principle in *jus in bello* in particular.
- h. Proportionality arises in this, and other, contexts only when the aim or ends pursued are legitimate. When it comes to state liability, if those ends are illegitimate all forcible measures used will *ipse facto* be illegitimate, whether they are proportionate or not. Thus, for example, the Iraqi invasion of Kuwait in 1990 involved unlawful use of force and no question of proportionality in *jus ad bellum* arose. Consequently the UN Security Council ‘reaffirmed that Iraq is liable under international law for any direct loss, damage, or injury to individuals, governments, and business organizations resulting from Iraq’s invasion and occupation of Kuwait starting on Aug. 2, 1990’.²⁸

My argument in this article is that the legitimate ends of using force in self-defence may differ, depending, *inter alia*, on the nature and scale of the armed attack, the identity of those who carried it out, and the preceding relationship between the aggressors and the victim state. Proportionality will usually, but not exclusively, involve a means-end test. Whether such a test is employed and, if it is, whether force used will be regarded as proportionate will both depend on the legitimate ends of force in the concrete case.²⁹

Assessing proportionality requires exploring the scope of the right of a state to use force in self-defence. The second section of this article is devoted to exploration of this question. In the third section I examine various theories regarding the legitimate ends of using force in self-defence. In the final section I draw the conclusions regarding the test of proportionality.

²⁶ See, e.g., Andenas and Zleptnig, ‘Proportionality: WTO Law in Comparative Perspective’, 42 *Texas Int’l LJ* (2007) 371; Barak, *supra* note 18.

²⁷ *Nuclear Weapons case*, *supra* note 23, at para. 42; Dinstein, *supra* note 16.

²⁸ UN SC Res 687 adopted on 3 Apr. 1991, UN Doc S/RES/687 (1991).

²⁹ For a similar argument regarding the proportionality of countermeasures in general see Cannizzaro, *supra* note 13.

2 Use of Force in International Law

A Charter Principles

To what extent international law prohibited unilateral use of force in the pre-Charter era of the 20th century is a matter of debate.³⁰ Whatever the position may have been before the adoption of the UN Charter, the principles on use of force since the adoption of the Charter have been fairly clear. The Charter set out to ban war between states. To achieve this aim it adopted a policy of collective security to be guaranteed by the Security Council, which is responsible for maintaining and restoring international peace and security. Under Article 2(4) of the Charter states are prohibited 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'. The only concession made in the Charter for the unilateral use of force by states is the recognition in Article 51 of their inherent right of individual or collective self-defence when an armed attack occurs, and even then only 'until the Security Council has taken measures necessary to maintain international peace and security'. The Charter prohibition on unilateral use of force and its exception in the case of self-defence against an armed attack are regarded as part of customary international law,³¹ and have the status of *jus cogens*.³²

Restricting the right of a state to use force to the case of self-defence would seem to be uncontroversial. The problems with, criticisms of, and attempts to modify the Charter regime do not relate to the principle itself, but to the parameters of the right to use force in self-defence defined in Article 51. Discussion of proportionality in the use of force in self-defence requires consideration of these parameters. While there have been experts who have argued that states may have a right to use force in self-defence which does not meet the requirement of Article 51, their views have not gained much credence.³³ My assumption in this article shall be that the only basis for unilateral use

³⁰ See Brownlie, *supra* note 14; D.W. Bowett, *Self-Defense in International Law* (1958); S.A. Alexandrov, *Self-Defense Against the Use of Force in International Law* (1996).

³¹ *Nicaragua* case, *supra* note 23.

³² Frowein, 'Jus Cogens' in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, available at: www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1437&recno=1&searchType=Quick&query=jus+cogens (last accessed 1 Feb. 2011); Corten, *supra* note 13, at 200–213; Dinstein, *supra* note 16, at 86–98; Ago, *supra* note 16, at para. 58.

³³ For views that a right to use force may exist even when an armed attack mentioned in Art. 51 has neither occurred nor is imminent see Waldock, 'The Regulation of the Use of Force by Individual States in International Law', 81 *Collected Courses* (1952–11) 451, at 496–497; Bowett, *supra* note 30, at 182–193; M.N. Shaw, *International Law* (6th edn, 2008), at 1131. This view was forcefully rejected by Brownlie, *supra* note 14, at 231–280. Others who followed suit include Ago, *supra* note 16, at para. 114; Schachter, 'International Law: The Right of States to Use Armed Force', 82 *Michigan L Rev* (1984) 1620; Dinstein, *supra* note 16, at 167–168; Corten, *supra* note 13, at 198–248; Lubell, *supra* note 19, at 67–80; Gardam, *supra* note 9, at 141–142; T. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (2002), at 12. Franck accepted that under the original reading of the Charter, use of force in the territory of another state was restricted to the case of an armed attack occurring. 'Under pressure of changing circumstances, however, this exception to the general prohibition on nation's unilateral recourse to force has also undergone adaption and expansion through institutional practice.'

of force against another state or against non-state actors in its territory is self-defence under Article 51 of the Charter.³⁴

B The Boundaries of Article 51

Restricting the right of a state to resort to force in self-defence solely to the confines of Article 51 of the Charter requires us to examine these confines. It is accepted that exercise of the right to self-defence must meet the demands of immediacy, necessity, and proportionality.³⁵

Controversy has arisen over a number of issues that relate both to the interpretation of Article 51 and to the question whether state practice and the attitude of the UN Security Council to the use of force have led to a widening of the right to resort to force not contemplated in the text itself.³⁶ I shall briefly discuss three controversial issues that are relevant to the discussion of proportionality: (1) the scale of force required for the use of force to be considered an armed attack; (2) whether an attack by non-state actors may be the kind of attack contemplated by Article 51; (3) whether preemptive use of force may ever be lawful.

1 Armed Attack – The Scale and Effects of Force Required

The definition of the term ‘armed attack’ that appears in Article 51 must take into account a number of factors: the scale of the force; the target of the attack; the identity of the attacker; the military nature of the attack; and the attribution of the attack to the state against which force in self-defence is to be employed.³⁷ In this section I confine myself to the scale of force.

There is an obvious disparity between the language of Articles 2(4) and 51 of the Charter. While the former speaks of ‘the threat or use of force’ (*‘à la menace ou à l’emploi de la force’* in the French version), the latter refers to ‘an armed attack’ (*‘une agression armée’* in the French version). The clear implication is that while every use of force against the territorial integrity or political independence of another state is prohibited, not every such use of force will constitute an armed attack.³⁸ In the *Nicaragua* case, the ICJ stated that ‘it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms’.³⁹ As an example of use of force that would not be of the ‘scale and effects’ to warrant being termed an armed attack the Court mentioned ‘a mere frontier’ incident.⁴⁰

³⁴ But see note 116 *infra*.

³⁵ Dinstein, *supra* note 16, at 184.

³⁶ See Franck, *supra* note 33, at 12; Tams, ‘Light Treatment of a Complex Problem: The Law of Self-Defence in the *Wall* Case’, 16 *EJIL* (2005) 963 and the answer by Corten, *supra* note 13. See also Cassese, *supra* note 15, at 354, who states that ‘it is not clear whether customary international rules have evolved on the matter, derogating from the general ban on unilateral use of armed force, laid down in the body of law [in Arts 2.4 and 51 of the Charter]’.

³⁷ Ratner, ‘Self-Defense Against Terrorists: The Meaning of Armed Attack’, in L. van den Herik and N. Schrijver (eds), *Counter-terrorism Strategies in a Fragmented Legal Order: Meeting the Challenges* (forthcoming 2013).

³⁸ Corten, *supra* note 13, at 403; Dinstein, *supra* note 16, at 174; Randelzhofer, *supra* note 12, at 790–791.

³⁹ *Nicaragua* case, *supra* note 23, at para 195; *Oil Platforms* case, *supra* note 6, at para. 51.

⁴⁰ *Ibid.*, at para. 194. The approach of the ICJ in the *Nicaragua* and *Oil Platforms* cases is discussed and criticized by Moir, *supra* note 14, at 117–140.

The Eritrea–Ethiopia Claims Commission opined that ‘[l]ocalized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter’.⁴¹

The demand for the force used to meet a threshold of ‘scale and effects’, or gravity of harm in order for it to be regarded as an armed attack for the purposes of Article 51 has not been universally accepted. Yoram Dinstein concedes that not every use of force will amount to an armed attack, but rejects the view that frontier incidents are not necessarily armed attacks. He argues that the gap between ‘use of force’ under Article 2(4) and ‘an armed attack’ under Article 51 ought to be quite narrow. In his view any use of force causing human casualties or serious damage to property constitutes an armed attack. The authors of the *Chatham House Principles of International Law on Use of Force in Self-Defence* take the view that ‘[a]n armed attack means any use of armed force, and does not need to cross some threshold of intensity’.⁴² This has also been the view taken by the US.⁴³

While there is a lack of consensus on whether the force has to meet a threshold of intensity or not, and what that threshold should be if required,⁴⁴ even according to those who demand a threshold it is not very high.⁴⁵ On the contrary, excluded are only ‘mere frontier incidents’ or, at the very most, ‘localized border encounters between small infantry units’. Hence an armed attack that serves as the trigger for exercise by the victim state of its right to use force in self-defence may range from a fairly restricted use of force, such as a border raid causing limited loss or damage, to a full-scale invasion of its territory.

In justifying the use of force in response to cross-border attacks or bombings Israel has consistently relied on the ‘accumulation of events theory’.⁴⁶ So have other states

⁴¹ Eritrea Ethiopia Claims Commission, Partial Award, *Jus ad Bellum*, Ethiopia’s Claims 1–8, The Hague, 19 Dec. 2005, at para. 11, available at: www.pca-cpa.org/showpage.asp?pag_id=1151 (last accessed 3 Feb. 2011).

⁴² *Chatham House Principles of International Law on Use of Force in Self-Defence*, available at: www.chatham-house.org.uk/publications/papers/view/-/id/308 (last accessed 3 Feb. 2011). The authors of these principles were major UK experts in international law, including former legal advisers at the Foreign and Commonwealth Office, leading academics, and barristers. They concede that the ICJ has stated that some uses of force may not be of sufficient gravity to constitute an armed attack, but argue that this view has not been generally accepted.

⁴³ Sofaer, ‘Terrorism, the Law, and the National Defense’, 126 *Military L Rev* (1989) 89; Ratner, *supra* note 37.

⁴⁴ *Ibid.*

⁴⁵ See Schmitt, ‘Counter-Terrorism and the Use of Force in International Law’, in George C. Marshall European Center for Security Studies, *The Marshall Center Papers*, No. 5 (2002), at 19. The one exception would seem to be Cassese, *supra* note 15, at 354, who refers to the right to use force in self-defence as a reaction to ‘massive armed aggression’. However, the authorities cited for this view are the decisions of the ICJ in the *Nicaragua* and *Oil Platforms* cases, *supra* notes 23 and 6 respectively. These decisions do not refer to ‘massive aggression’ but to ‘grave forms of the use of force’.

⁴⁶ Ronen, ‘Israel, Hizbollah and the Second Lebanon War’, 9 *Yrbk Int’l Humanitarian L* (2006) 362, at 372. In her statement to the UN SC after Israel began its attack on Gaza in Dec. 2008, Israel’s Permanent Representative relied expressly on Israel’s right to self-defence under Art. 51 of the Charter in response to many weeks, months, and years in which its citizens were subject to deliberate terrorist attacks: Statement by Ambassador Gabriela Shalev, Permanent Representative Security Council, 31 Dec. 2008, available at: <http://israel-un.mfa.gov.il/statements-at-the-united-nations/security-council/30-sitme311208> (last accessed 9 Feb. 2011).

faced with a series of low-scale attacks.⁴⁷ This theory has implications not only for deciding whether an armed attack has taken place at all, but whether the victim state may defend itself not only against the use of force which triggered its forcible response in self-defence, but against the threat arising from the whole series.⁴⁸

The ‘accumulation of events theory’ has received a cold reception in the UN Security Council.⁴⁹ On the other hand, while the International Court of Justice has never expressly endorsed the theory, preferring always to judge whether specific attacks amounted to an armed attack, in the *Oil Platforms* case it used language that suggested that the cumulative nature of a series of forcible actions could possibly turn them into an ‘armed attack’.⁵⁰

The accumulation of events theory has not gained general acceptance in the international community. There are, however, signs that with the growing awareness that transnational terrorist attacks present states with a serious problem, it is not as widely rejected as it was in the past.⁵¹ As Christian Tams puts it, ‘states seem to have shown a new willingness to accept the “accumulation of events” doctrine which previously had received little support’.⁵²

2 Attacks by Non-state Actors

May an attack by non-state actors be the kind of armed attack that allows a state to exercise its right of self-defence by using armed force that would ordinarily be regarded as a violation of Article 2(4)? If the attack may be imputed to a state, the answer is obviously positive.⁵³ But what is the situation if the attack cannot be imputed to a

⁴⁷ See Ochoa-Ruiz and Salamanca-Aguado, ‘Exploring the Limits of International Law relating to the Use of Force in Self-defence’, 16 *EJIL* (2005) 499, at 516 (describing US reliance on this theory in the *Oil Platforms* case, *supra* note 6), and Lubell, *supra* note 19, at 51 (describing UK reliance on the theory to justify the use of force against Yemen).

⁴⁸ In the *Oil Platforms* case the US argued that the ‘pattern of Iranian conduct added to the gravity of the specific attacks, reinforced the necessity of action in self-defence, and helped to shape the appropriate response’: *Oil Platforms* case, Counter-Memorandum and Counter-Claim submitted by the United States of America, at para. 4.10, available at: www.icj-cij.org/docket/index.php?p1=3&p2=3&k=0a&case=90&code=op&p3=1 (last accessed 9 Feb. 2011). And see Ochoa-Ruiz and Salamanca-Aguado, *supra* note 47; Lubell, *supra* note 19, at 53.

⁴⁹ *Ibid.*, at 51; Tams, ‘The Use of Force against Terrorists’, 20 *EJIL* (2009) 359; Bowett, ‘Reprisals Involving Recourse to Armed Force’, 66 *AJIL* (1972) 1.

⁵⁰ *Oil Platforms* case, *supra* note 63, at para. 64: ‘[e]ven taken cumulatively ... these incidents do not seem to the Court to constitute an armed attack on the United States’. Ratner, *supra* note 37, regards this dictum, together with the reference in the *Nicaragua* case, *supra* note 23, to the scale and effects of attacks by non-state actors, as elaboration by the ICJ of the view ‘that a series of attacks, none of which individually could amount to an armed attack, might together constitute an armed attack.’ In its judgment in *Armed Activities on the Territory of the Congo (DRC v. Uganda)* [2005] ICJ Rep 53, at para. 147, the Court stated that ‘even if this series of deplorable attacks could be regarded as cumulative in character’ they could not be attributed to the DRC and therefore did not give licence to Uganda to exercise its right to self-defence against that state.

⁵¹ Reinold, ‘State Weakness, Irregular Warfare, and the Right to Self-Defense Post 9/11’, 105 *AJIL* (2011) 244.

⁵² Tams, *supra* note 49, at 388.

⁵³ When an attack by non-state actors may be imputed to a state is a question on which there are a variety of opinions: see, e.g., Travalio and Altenburg, ‘State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility, and the Use of Military Force’, 4 *Chicago J Int’l L* (2003) 97; Jinks, ‘State Responsibility for the Acts of Private Armed Groups’, 4 *Chicago J Int’l L* (2003)

state, or at least not to the state from whose territory those non-state actors are operating and in which the victim state wishes to use force? There is hardly an issue that has given rise to more controversy than this. It raises the question whether the rules of international law could be such as to prevent states from taking action necessary to defend their citizens and residents from attacks, merely because no state is responsible for them.

In its Advisory Opinion on the *Legal Consequences of Construction of a Wall*, the International Court of Justice opined that Israel could not defend the legality of the separation barrier it was building on the West Bank on the basis of its right to self-defence under Article 51 since it did not claim that the attacks which the barrier was designed to prevent were imputable to another state.⁵⁴ The implied assumption was that under Article 51 only an armed attack by a state triggers the right to use force in self-defence.⁵⁵ Three judges on the Court saw fit to disassociate themselves from this view,⁵⁶ which has been subjected to scathing academic criticism.⁵⁷

83; Brown, 'Use of Force against Terrorism after September 11th: State Responsibility, Self-Defence and Other Responses', 11 *Cardozo J Int'l & Comp L* (2003) 1; Frank and Rehman, 'Assessing the Legality of the Attacks by the International Coalition Against Al-Qaeda and the Taleban in Afghanistan: An Inquiry into the Self-Defense Argument Under Article 51 of the UN Charter', 67 *J Crim L* (2003) 415; Schmitt, *supra* note 45. What seems to be clear according to all opinions is that the mere fact that a group of non-state actors operates out of the territory of a state does not imply that an armed attack by the group on another state may be imputed to the host state. While all states have the duty under international law to prevent their territory from being used by non-state actors to mount attacks on other states, violation of this duty does not of itself amount to an armed attack, and therefore does not trigger the right of the victim state to use force against the host state in self-defence. But see Reinold, *supra* note 51, who argues that current practice supports the view that states that harbour irregular forces have duties towards the civilians in the victim states and that failure to fulfil these duties 'activates the injured state's right to self-defence': *ibid.*, at 284. Reinold argues that this also applies to weak states which are unable to fulfil their duty to prevent their territory being used as a base for activities against the injured state.

⁵⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, at para. 139 (hereinafter *Legal Consequences of a Wall*). In its later decision in *Armed Activities in the Congo*, the ICJ left open the question 'whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces': *DRC v. Uganda*, *supra* note 50, at para. 147.

⁵⁵ The Court also gave another reason for its rejection of Israel's reliance on self-defence: that the attacks against which the barrier was aimed to protect originated in the occupied territories over which Israel has effective control. The implications were that the legality of the barrier had to be judged under rules of *jus in bello* rather than *jus ad bellum*. This argument has some merit to it. See Scobbie, 'Words My Mother Never Taught Me – "In Defense of the International Court"', 99 *AJIL* (2005) 76.

⁵⁶ *Legal Consequences of a Wall*, *supra* note 54, Separate Opinion of Judge Higgins, at paras 33–34; Separate Opinion of Judge Kooijmans, at paras 35–36; Declaration of Judge Buerghenthal, at paras 5–6.

⁵⁷ Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense', 99 *AJIL* (2005) 52, at 56; Murphy, 'Self-Defense and the Israeli Wall Advisory Opinion: An *Ipse Dixit* from the ICJ?', 99 *AJIL* (2005) 62; Tams, *supra* note 36. Cf. Moir, *supra* note 14, at 131–135, who argues (at 133) that the 'Court's pronouncement could, in fairness, be seen as ambiguous on this point. It does not, after all, say in explicit terms that the right of self-defence can be invoked under Article 51 *only* in the event of an armed attack by another state' (emphasis in original).

The view that an attack by non-state actors that is not imputable to a state cannot constitute an ‘armed attack’ has been rejected by the vast majority of publicists,⁵⁸ who base rejection of this view on a variety of arguments: that Article 51 does not refer to an armed attack by a state; that the inherent right to self-defence to which Article 51 refers has always included the right to use force in defence against an attack by non-state actors; that Security Council Resolutions 1368 and 1373, passed after the 9/11 attack on the US by non-state actors, refers within the context of this attack to the inherent right of individual and collective self-defence in accordance with the Charter; that state practice confirms the right to use force in international waters and in the territory of another state in defence against an attack by non-state actors; and that denying that an attack on a state by a group of non-state actors may ever be an armed attack under Article 51 places the victim state in an impossible position and is therefore unrealistic. States have a duty and a right to protect their citizens and residents from attack. When the persons planning and executing attacks are operating from outside its borders, if neither the state from which those non-state actors operate nor the international community takes effective measures to stop the attacks the victim state must have the right to use force in self-defence. The support, either passive or active, given by large sections of the international community to major instances of a state using force against non-state actors in the territory of another state in such circumstances lends support to the argument that state practice today accepts that this right exists.⁵⁹

Notwithstanding these arguments, some scholars still stick to the view that Article 51 refers solely to armed attacks by states. Their main argument is that the prohibition on use of force in Article 2(4) of the Charter refers expressly to the use of force by one state against the territorial integrity or political independence of another. As Article 51 is an exception to this prohibition, it obviously refers only to the kind of force that is the subject of the prohibition, namely force by one state against another.⁶⁰

It should be stressed that the debate does not refer to the question whether a state attacked by non-state actors may take measures to defend itself. Obviously it may. Rather the question is whether those measures may include the use of force against the non-state actors in the territory of another state that cannot be held responsible for the attack by the non-state actors.

⁵⁸ See, e.g., Dinstein, *supra* note 16, at 214; Cassese, *supra* note 15, at 355; Lubell, *supra* note 19, at 35; Reinold, *supra* note 51, at 248; Greenwood, ‘International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’, 4 *San Diego Int’l LJ* (2003) 7; Franck, ‘Editorial Comments: Terrorism and the Right of Self-Defence’, 94 *AJIL* (2001) 839; Paust, ‘Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond’, 35 *Cornell Int’l LJ* (2002) 533; Brown, *supra* note 53; Stahn, ‘Terrorist Acts as “Armed Attack”: The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism’, 27 *Fletcher Forum World Aff* (2003) 35; Müllerson, ‘Jus Ad Bellum and International Terrorism’, 32 *Israel Yrbk on Human Rts* (2002) 1; Schmitt, *supra* note 45; Murphy, *supra* note 57.

⁵⁹ See Ruys, ‘Quo Vadit Ius ad Bellum? A Legal Analysis of Turkey’s Military Operations Against the PKK in Northern Iraq’, 10 *Melbourne J Int’l L* (2008) 334; Reinold, *supra* note 51; Moir, *supra* note 14, at 151.

⁶⁰ See Ago, *supra* note 16; Bothe, ‘Terrorism and the Legality of Pre-emptive Force’, 14 *EJIL* (2003) 227. The most extensive presentation of the case against recognizing attacks by non-state actors as armed attacks under Art. 51 is that of Corten, *supra* note 13, at 160–197.

Notwithstanding the statements of the ICJ in *Legal Consequences of the Construction of a Wall*, and the analysis of some experts,⁶¹ for the purposes of my discussion of proportionality I shall accept the view of the majority of scholars that an attack by a group of non-state actors may constitute an armed attack. If the attack may be imputed to the state from which the non-state actors are operating, the victim state may use force in self-defence both against the host state and against the non-state actors present in that state's territory. If, on the other hand, the host state cannot be held responsible for the attack by the non-state actors on the victim state, but does not take effective action to prevent the non-state actors from carrying out their attacks, the victim state must restrict its use of force to the non-state actors themselves.⁶² What proportionality requires in this case will obviously depend on which form of self-defence is being exercised: self-defence against the state and the non-state actors in its territory, or self-defence solely against the non-state actors.⁶³

3 Pre-emptive Use of Force

Article 51 of the Charter expressly limits the right to use self-defence to the case in which an armed attack occurs, thus implying not only that states may not use force to prevent or deter a future attack, but that they may not even use force to thwart an imminent attack which, if it takes place, could have catastrophic consequences for the victim state or afford the attacking state a significant military advantage.⁶⁴ There is evidence that in drawing up the Charter many states assumed that the inherent right to self-defence includes the right to use force against an imminent attack if the conditions of the *Caroline* test are met,⁶⁵ namely that a state is faced with the threat of

⁶¹ Foremost amongst these is Olivier Corten, *ibid.*

⁶² See Greenwood, *supra* note 58; Dinstein, *supra* note 16, at 213–221, who terms such action 'extra-territorial law enforcement'; Lubell, *supra* note 19, at 36–42; Schmitt, *supra* note 45; Trapp, 'Back to the Basics: Necessity, Proportionality, and the Right of Self-defence against Non-state Terrorist Actors', 56 *ICLQ* (2007) 141; Tams, *supra* note 49, at 378–381. Tams argues that the last 20 years have seen a change in the attitudes of UN organs and states to use of force against terrorists in the territory of a state which is not regarded as responsible for the armed attack on the victim state. He claims that this has been achieved by relaxing the demands for imputing an attack to the host state. Rather than demanding a high level of involvement in the terrorists' activities, aiding and abetting them, or complicity in the activities is regarded as sufficient: *ibid.*, at 385–386. Tams' view ignores the crucial distinction that I have accepted between forcible action against the non-state actors in the host state and forcible action against the host state itself. On this distinction see Trapp, 'The Use of Force against Terrorists: A Reply to Christian J. Tams', 20 *EJIL* (2010) 1049. Also see Reinold, *supra* note 51, who argues that recent practice has widened the right of victim states to act in self-defence against non-state actors who operate from the territory of 'weak states', namely states that are incapable of preventing their activities.

⁶³ Trapp, 'Back to the Basics', *supra* note 62.

⁶⁴ The terminology used in distinguishing between force to thwart an imminent attack and force to pre-empt a non-imminent attack is somewhat confusing. An anticipatory attack is usually taken to refer to action against another state which is about to launch a concrete attack; a pre-emptive attack refers to action to prevent the state from mounting an attack in the future. Some authors prefer to distinguish between a pre-emptive attack and a preventive attack. See, e.g., A.D. Sofaer, *The Best Defense? Legitimacy of Preventive Force* (2010), at 9–10; Doyle, *supra* note 13.

⁶⁵ See Greenwood, *supra* note 58, at 12–13; Bowett, *supra* note 30, at 184–185. Cf. Franck, *supra* note 33, at 50, who claims that 'it is beyond dispute that the negotiators deliberately closed the door on any claim of "anticipatory self-defense" ...'. This is also the view of Corten, *supra* note 13, at 414–416.

an armed attack which presents a ‘necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment of deliberation’.⁶⁶ Nevertheless, it must be conceded that the literal reading of Article 51 favoured by some scholars is not devoid of logic, and may be regarded as consistent with the collective security policy adopted in the Charter.⁶⁷ Under this policy a state facing an imminent attack should not pre-empt the attack by using force but should run to the Security Council for help. Furthermore, the actual occurrence of an armed attack is usually evident and leaves little room for abuse by states, whereas the fear of an imminent attack rests by its very nature on subjective assessments of likely developments in the future.⁶⁸ Allowing states to act on the basis of such assessment would open up the right to use force in self-defence to abuse.

The arguments for recognizing a right to anticipatory use of force in the face of an imminent attack rely not only, or not mainly, on the meaning of the ‘inherent right to self-defence’ recognized in Article 51, nor on the drafting history of this provision, but on the reality both of modern warfare and international politics.⁶⁹ With the development of new weapons of mass destruction it would border on the perverse to maintain that a state facing an imminent attack by an enemy armed with such weapons would have to sit by idly and wait for the attack to start before it could defend itself.⁷⁰ Similar arguments have been made in light of the threat from terrorist attacks.⁷¹ Given the rather poor record of the Security Council in preventing acts of aggression, demanding that a state rely on the Council to protect it is not likely to be an appealing option for a state that is convinced that it is threatened with an imminent attack that could have catastrophic consequences.

Not surprisingly, therefore, while it is almost universally accepted that a state may not use force in order to prevent or deter future attacks,⁷² it is widely (but certainly not

⁶⁶ See note of US Secretary of State Daniel Webster dated 24 Apr. 1841, in *Caroline Case*, 29 British and Foreign State Papers (1841) 1137–1138, available at: http://avalon.law.yale.edu/19th_century/br-1842d.asp (last accessed 19 July 2011).

⁶⁷ See Corten, *supra* note 13, at 407–416.

⁶⁸ See Randelzhofer, *supra* note 12, at 803; O’Connell, ‘Lawful Self-Defense to Terrorism’, 63 *U Pittsburgh L Rev* (2002) 889, at 895. O’Connell discusses the evidence needed to support the claim of a pending attack.

⁶⁹ See R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 242; Franck, *supra* note 33, at 98; Moir, *supra* note 14, at 12–13.

⁷⁰ Higgins, *supra* note 69.

⁷¹ Arend, ‘International Law and the Preemptive Use of Military Force’, 26(2) *The Washington Quarterly* (2003) 89; Tams, *supra* note 49.

⁷² In the *National Security Strategy of the United States* 2002, available at: www.globalsecurity.org/military/library/policy/national/nss-020920.htm (last accessed 21 Feb. 2011), the US declared that if necessary it would act pre-emptively to forestall or prevent hostile acts by its adversaries, ‘even if uncertainty remains as to the time and place of the enemy’s attack’. This idea was repeated in the US *National Security Strategy* 2006, available at: <http://georgewbush-whitehouse.archives.gov/nsc/nss/2006> (last accessed 21 Feb. 2011). This view has been criticized by experts and foreign governments alike. Even the UK, the closest ally of the US in the struggle against terror, has taken issue with this view. See the statement of the UK Attorney-General, Lord Goldsmith, speaking in the House of Lords on 21 Apr. 2004: ‘[i]t is therefore the Government’s view that international law permits the use of force in self-defence against an imminent attack but does not authorize the use of force to mount a pre-emptive strike against a threat that is

universally) acknowledged that it may do so to thwart an imminent attack. The High Level Panel of Experts appointed by UN Secretary-General Kofi Annan to examine UN reform, after having cited the 'restrictive' language of Article 51, took a clear stand on this issue when it wrote:

However, a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate.⁷³

The Secretary-General adopted the same position in a report he published a year after the release of the High Level Panel's report.⁷⁴ Many experts accept the High Level Panel's view as reflective of the inherent right to self-defence recognized in Article 51.⁷⁵

A few experts, bothered by the apparent contradiction between the express demand in Article 51 that 'an armed attack occurs' and recognition of any right to use force before it has occurred, have sought alternative explanations for recognizing the right to use force in the face of an imminent attack. Thomas Franck argued that state practice, as reflected in the decisions of the UN Security Council and other UN organs, altered the original confines of Article 51 by acknowledging response to a clearly imminent attack as equivalent to response to an armed attack that has occurred.⁷⁶ Dinstein accepts that Article 51 excludes any use of force until an armed attack has actually occurred, but widens the time-frame for deciding when such an attack begins by equating a situation in which one state 'embarks on an irreversible course of action' to an actual attack on the victim state.⁷⁷

more remote': HL Debs, vol. 660, col. 370, available at: www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm#40421-07_head0 (last accessed 31 Oct. 2010). But see Doyle, *supra* note 13, for the view that under certain conditions a state should be entitled to use force to prevent a future, non-imminent threat.

⁷³ *A More Secure World: Our Shared Responsibility*, Report of the High-level Panel on Threats, Challenges and Change, (2004) UN Doc A/59/565, at para. 188, available at: www2.ohchr.org/English/bodies/hrcouncil/docs/gaA.59.565_En.pdf (last accessed 9 Feb. 2011) (emphasis in original text).

⁷⁴ *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, (2005) UN Doc A/59/2005, at para. 124, available at: www2.ohchr.org/English/bodies/hrcouncil/docs/gaA.59.2005_En.pdf (last accessed 9 Feb. 2011): '[i]mmminent 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.'

⁷⁵ See Gardam, *supra* note 9, at 153; *Chatham House Principles*, *supra* note 42. In his legal opinion of 7 Mar. 2003 on the legality of using force against Iraq UK Attorney General Peter Goldsmith wrote that it is now widely accepted that an imminent armed attack will justify use of force in self-defence if other conditions (presumably necessity and proportionality) are met. The opinion is available at: www.irishtimes.com/newspaper/special/2005/iraq-advice/index.pdf (last accessed 9 Feb. 2011)

⁷⁶ Franck, *supra* note 33, at 107. Franck notes, however, that the UN organs reserve for themselves the ultimate decision on the 'propriety or culpability of such anticipatory use of force'.

⁷⁷ Dinstein, *supra* note 16, at 172. Dinstein's argument would seem to be consistent with the French version of Art. 51 which, rather than an armed attack occurring, refers to 'une agression armée' that could conceivably be said to begin before the first shot has been fired. Dinstein cites Waldock in support of this view: see Waldock, *supra* note 33. Brownlie describes Waldock's view as 'ingenious but rather casuistic' since it 'involves delicate questions of unequivocal intention to attack and an assumption that an attack can occur, as it were, constructively': Brownlie, *supra* note 14, at 276.

The question whether a state may respond forcibly to thwart an imminent attack is clearly relevant when addressing the issue of proportionality and the related issue of necessity. In his report on state responsibility Roberto Ago mentioned that the duty to try non-forcible measures before resorting to force (generally thought of as the question of necessity, but regarded by some as an issue of proportionality) is especially relevant if force may be used before the armed attack has actually started.⁷⁸ Assessing proportionality between the force used and an attack that might (and might not) have taken place if the force had not been used poses tricky questions.

Notwithstanding the arguments presented by purists who maintain that Article 51 means what it says, and only what it says,⁷⁹ my assumption in discussing proportionality will be that the view of the majority of experts is the preferred position. When a state is faced with the threat of an armed attack that creates a ‘necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation’⁸⁰ it may use force to remove the threat. The international community will have to review the matter after the event and offer a ‘second opinion’ on whether that state’s assessment that an attack was imminent was well-founded.⁸¹

3 The Meaning of Self-defence

The assumption of Article 51 is that when an armed attack actually occurs the victim state obviously cannot be expected to remain passive while it waits for the Security Council to act. It may therefore use force in self-defence as an interim measure until the Security Council takes measures to restore peace and security.⁸² The primary object of using force in self-defence in such a situation seems pretty clear: it is to halt and repel the attack. If the enemy has invaded the victim state’s territory self-defence may include using force to expel it.

But does the matter stop there? What if the attack is over before the victim state is able to respond? Assuming that the aggressor has not invaded the victim state’s territory, or even if it has that it no longer retains any presence there, what exactly is the victim state defending itself against? Any use of force by that state will not be to defend itself against the armed attack that occurred, but against the threat of further attacks by the state or non-state actor which carried out the armed attack. The object of using force in such a case may be preventive, punitive, deterrent, or a combination of these. In some cases use of force by the victim state may be based on a credible assessment that another attack is imminent; in others there may not be any credible evidence on which such an assessment could be based, and to the extent that the use of force is

⁷⁸ Ago, *supra* note 16, at para. 120.

⁷⁹ See Corten, *supra* note 13; Cassese, *supra* note 15.

⁸⁰ See the note of Daniel Webster in the *Caroline case*, *supra* note 66.

⁸¹ See Franck, *supra* note 9; O’Connell, *supra* note 68.

⁸² See B. Asrat, *Prohibition of Force Under the UN Charter: A Study of Art. 2(4)* (1991), at 201–211; Rodin, *supra* note 22, raises the important question relating to the very values protected under the notion of self-defence by states. Is the state protecting the lives of its citizens, its sovereignty, its territorial integrity, or some other values? I shall not discuss this question here.

forward-looking, rather than purely punitive, it may appear to be an example of preventive use of force.

In this section I review the fundamental assumptions behind the right to self-defence recognized in Article 51, and the conclusions that states and international bodies have drawn from these assumptions. As it is widely accepted that armed reprisals are prohibited under the Charter regime, in an attempt to draw conclusions regarding the legitimate aims of self-defence I shall first discuss the legality of armed reprisals and the distinction between such reprisals and actions in self-defence. Following this discussion I shall examine conceptions of the aims and scope of force that may be used in self-defence when an armed attack occurs or is imminent.

A Armed Reprisals

In the pre-Charter era armed reprisals were accepted as a lawful response to the use of force against a state.⁸³ The essence of such reprisals is that they involve the use of force that would normally be regarded as unlawful, but is permitted when carried out in response to an unlawful act by another state in an attempt to achieve redress by compensation and/or to prevent or deter repetition of the unlawful act in the future. In the famous *Naulilaa* arbitration between Portugal and Germany that followed an attack by Germany on Portuguese territory in Africa, the arbitrators held that in order to be regarded as lawful an armed reprisal must meet three conditions: an unlawful act by the state that is the object of the reprisal; a prior non-forcible unsatisfied demand for redress; and proportionality of the reprisal to the unlawful act which provoked it.⁸⁴

In the post-Charter era the rhetoric of unaffected states, international bodies, and experts in international law stresses that armed reprisals are incompatible with Article 51 and are therefore unlawful.⁸⁵ This rhetoric appears in numerous resolutions of the Security Council and General Assembly, the commentaries of the International Law Commission, and the writings of a host of highly qualified publicists.⁸⁶ In a 1964 Resolution relating to a complaint by Yemen regarding a British air attack on Yemeni territory, the Security Council declared that it '[c]ondemns reprisals as incompatible with the purposes and principles of the United Nations'.⁸⁷ The Security Council included an identical condemnation in resolutions relating to the use of force by Israel in the

⁸³ Bowett, *supra* note 49, at 2; Brownlie, *supra* note 14, at 219–223; Alexandrov, *supra* note 30, at 15–18.

⁸⁴ Pfeil, 'Naulilaa Arbitration (Portugal v. Germany)', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2007), available at: www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e178&recno=2&author=Pfeil%20%20Julia (last accessed 31 July 2012).

⁸⁵ Writing in 1972 Bowett proclaimed that 'few propositions about international law have enjoyed more support than the proposition that, under the Charter of the United Nations, use of force by way of reprisals is illegal': Bowett, *supra* note 49, at 1.

⁸⁶ For a thorough discussion of the various resolutions stressing the unlawfulness of armed reprisals see *ibid.*; Barsotti, 'Armed Reprisals', in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (1986), at 79; O'Brien, 'Reprisals, Deterrence and Self-Defense in Counterterrorism Operations', 30 *Virginia J Int'l L* (1990) 421; Corten, *supra* note 13, at 234–236.

⁸⁷ UN SC Res 188 (1964), UN Doc S/5650.

territory of Arab countries.⁸⁸ In its 1970 Declaration on Principles of International Law Concerning Friendly Relations the General Assembly declared that ‘States have a duty to refrain from acts of reprisal involving the use of force’.⁸⁹ The General Assembly has included a similar statement in other resolutions.⁹⁰ In its Articles on State Responsibility approved by the General Assembly, the International Law Commission states that countermeasures incompatible with the rules on use of force under the UN Charter are outlawed.⁹¹ This in itself does not necessarily imply that armed reprisals are prohibited.⁹² However, in its commentaries on the Draft Articles the Commission cites the above statement in the General Assembly Declaration on Friendly Relations with approval, and opines that it is consistent ‘with the prevailing doctrine as well as a number of authoritative pronouncements of international judicial and other bodies’.⁹³

Despite the wide degree of consensus that armed reprisals are unlawful, such reprisals have not always met with disapproval and condemnation by the international community and international organs, especially the Security Council. In an article published in 1972 Derek Bowett attempted to show that there was a clear disparity between the rhetoric condemning reprisals in principle and the failure of the Security Council to condemn all specific reprisals as unlawful *ipso se*, preferring on occasion to stress that disproportionate force had been used, that the provocation had not been severe enough to justify the use of force, or that the use of force had been premeditated rather than a response to an unlawful act.⁹⁴ Bowett regarded the total exclusion of reprisals as unrealistic, and suggested conditions under which an armed reprisal should be regarded as legitimate. In a 1990 follow-up to Bowett’s seminal article, William V. O’Brien showed that since Bowett’s article had been published the Security Council had continued to condemn Israel’s use of force against targets of the PLO and other organizations in Lebanon and other Arab countries as unlawful reprisals.⁹⁵

⁸⁸ See Bowett, *supra* note 49; O’Brien, *supra* note 86.

⁸⁹ UN GA Res 2625 (XXV), available at: www.un.org/documents/ga/res/25/ares25.htm (last accessed 26 June 2011).

⁹⁰ See, e.g., Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States of 9 Dec. 1981, UN Doc A/Res/36/103.

⁹¹ Art. 21 of the Articles states that ‘the wrongfulness of an act is precluded if it constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations’. Art. 50 clarifies that ‘[c]ountermeasures shall not affect ... [t]he obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations’: International Law Commission, *Responsibility of States for Internationally Wrong Acts* (2001), available at: http://untreaty.un.org/ilc/texts/9_6.htm (last accessed 11 Feb. 2011).

⁹² See Dinstein, *supra* note 16, at 199.

⁹³ International Law Commission, *Draft articles on Responsibility of States for Internationally Wrong Acts with commentaries* (2001), at 132, available at: http://untreaty.un.org/ilc/texts/9_6.htm (last accessed 11 Feb. 2011).

⁹⁴ Bowett, *supra* note 83.

⁹⁵ In an article published in 1986, *supra* note 86, Roberto Barsotti pointed out that the military operations conducted by Israel against neighbouring Arab countries had formed ‘the main nucleus of modern practice on armed reprisals’ (at 88). Since Barsotti’s article was published the US has also used force in cases that were widely regarded as armed reprisals. All these attacks followed terrorist attacks against American targets outside the US that the US attributed to terrorist groups which, it was claimed, were given cover and support by the states in whose territory the US attacks were carried out. The most discussed of these were the attacks during the Reagan administration on targets in Libya in 1986, and during the Clinton administration on targets in Sudan and Afghanistan in 1998. See Intoccia, ‘American Bombing

O'Brien also called for reconsideration of the prohibition on reprisals when it comes to counter-terror measures.⁹⁶ Since then the debate on the desirability of the prohibition of armed reprisals has continued.⁹⁷

Although armed reprisals are regarded as unlawful, it is far from clear what the difference is between such reprisals and legitimate forcible acts of self-defence. Hence it is not that clear *why* armed reprisals are regarded as prohibited under the Charter regime.⁹⁸ In the various Security Council debates on use of force that was condemned as unlawful, often with a sentence included in the Resolution adopted recalling the prohibition on armed reprisals, states participating in the debates gave different reasons for their objections to the particular use of force, and the Security Council itself did not take a position on the issue.⁹⁹

There are three conceivable reasons why the use of force in the territory of another state might be regarded as an armed reprisal rather than a legitimate use of force:

- a. *Absence of an armed attack.* One of the elements of an armed reprisal is that it is a response to a delinquent act by a state. However, even if that delinquent act involves use of force that is incompatible with Article 2(4), it does not necessarily amount to an armed attack which gives rise to the right to use force in self-defence. One of the possible grounds for regarding use of force as an illegitimate 'armed reprisal' is that the use of force which served as provocation for the armed action was not regarded as an armed attack that could be attributed to the state in whose territory the armed action was carried out. Following this line of thought Arend and Beck define a forcible reprisal as 'a quick, limited, forcible response by one state against a prior action by another state that did not amount to the level of an armed attack'.¹⁰⁰

The lack of an armed attack could be due to an assessment that the scale of force used did not reach the gravity required for an armed attack, that the state which was reacting to the force used against it was relying on the 'accumulation of events' theory that has been rejected by the Security Council, or that it was reacting to an attack by non-state actors which the Security Council was not prepared to impute to the state in whose territory the reprisal was conducted. One can find strong support for all of the above grounds in the SC debates on Israeli

of Libya: An International Legal Analysis', 19 *Case Western Reserve J Int'l L* (1987) 177; Turnof, 'The U.S. Raid on Libya: A Forceful Response to Terrorism', 14 *Brooklyn J Int'l L* (1988) 187; Campbell, Comment, 'Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan', 74 *Tulane L Rev* (2000) 1067; Hendrickson, 'Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter', 19 *Boston U Int'l LJ* (2001) 207.

⁹⁶ O'Brien, *supra* note 86.

⁹⁷ See Seymour, 'The Legitimacy of Peacetime Reprisal as a Tool against State Sponsored Terrorism', 39 *Naval L Rev* (1990) 221; Kelly, 'Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law', 13 *J Transnat'l L & Policy* (2003) 1.

⁹⁸ See Tucker, 'Reprisals and Self-Defense: The Customary Law', 66 *AJIL* (1972) 586. Tucker questions whether armed reprisals and other acts of self-defence are really different and distinct forms of self-help.

⁹⁹ See Bowett, *supra* note 49; O'Brien, *supra* note 86, and Combacau, 'The Exception of Self-defence in UN Practice', in Cassese (ed.), *supra* note 86, at 9.

¹⁰⁰ Arend and Beck, *supra* note 12, at 42.

military operations in the territory of Arab countries where the issue of reprisals was often raised.¹⁰¹

- b. *The punitive nature of the action.* This is the most widely cited basis for regarding the use of force as an armed reprisal rather than a legitimate act in self-defence.¹⁰² The notion here is that the aim of force used in self-defence must be protection against an ongoing or imminent attack, whereas the aim of a reprisal is to punish for the harm done, either out of a feeling of justice or outrage, or to deter the delinquent state from using force against the victim state in the future. As described by Jean Combacau, the state carrying out the reprisal attempts to dissuade the other state 'by a "punitive" action, either from persisting [in the delinquent behaviour] or from reverting to it in the future; the aim is therefore entirely foreign to self-defence'.¹⁰³ The assumption behind this view is, of course, that the primary goal of using force in self-defence must be to ward off an ongoing or imminent armed attack.¹⁰⁴ I return to this below in the discussion of the distinction between the retributive and deterrent functions of punitive measures.
- c. *The timing of the action.* Reprisals are carried out after the delinquent act to which they are responding has been completed and they are unconnected with protection against that act. Obviously, this has some affinity with the punitive rationale, since punitive action is by its nature carried out after the event that is said to justify it. However, while every punitive action is carried out after the event, action carried out after the event will not necessarily have a punitive aim. It may be aimed to prevent, rather than to deter, future attacks against the victim state. If such an attack is imminent the use of force may be regarded as defensive.

Many writers combine both the punitive and timing rationales as explanations for the incompatibility of armed reprisals with the notion of self-defence recognized under Article 51 of the Charter.¹⁰⁵ This was essentially the position taken by Roberto Ago in the seminal paper he wrote for the International Law Commission on the issue of state responsibility. In explaining the difference between defensive action and reprisals Ago wrote:

'Self-defence' and 'sanction' are reactions relevant to different moments and, above all, are distinct in logic. Besides, action in a situation of self-defence is, as its name indicates, action taken by a State in order to defend its territorial integrity or its independence against violent attack; it is action whereby 'defensive' use of force is opposed to an 'offensive' use of comparable force, with the object – and this is the core of the matter – of preventing another's wrongful action from proceeding, succeeding and achieving its purpose. Action taking the form of a sanction on the other hand involves the application *ex post facto* to the State committing the international wrong of one of the possible consequences that international law attaches to the commission of an act of this nature. The peculiarity of a sanction is that its object is essentially

¹⁰¹ See the detailed descriptions of the debates in Bowett, *supra* note 49, Combacau, *supra* note 99, and O'Brien, *supra* note 86.

¹⁰² See Bowett, *supra* note 49; Alexandrov, *supra* note 30, at 166.

¹⁰³ Combacau, *supra* note 99, at 27.

¹⁰⁴ See Kelly, *supra* note 97.

¹⁰⁵ See Bowett, *supra* note 49; Alexandrov, *supra* note 30, at 15–18.

punitive or repressive; this punitive purpose may in its turn be exclusive and as such represent an objective *per se*, or else it may be accompanied by the intention to give a warning against a possible repetition of conduct like that which is being punished, or again it might constitute a means of exerting pressure in order to obtain compensation for a prejudice suffered.¹⁰⁶

The significance of the grounds for the prohibition on armed reprisals for the definition of 'self-defence', and consequently for the test of proportionality in *jus ad bellum*, is self-evident. If the grounds for the prohibition are solely the lack of an armed attack that may be imputed to the state in whose territory the use of force takes place, when such an armed attack *has* taken place it may be lawful for the victim state to respond with a use of force the dominant aim of which is punitive, and which takes place after the armed attack has been completed. And indeed Yoram Dinstein, the one major publicist who supports a limited right to what he terms 'defensive armed reprisals', stresses that such reprisals can be justified only if they are in response to an armed attack.¹⁰⁷

On the other hand, if the grounds for the prohibition on armed reprisals relate to their aim and/or timing, the assumption must be that the right to use force in self-defence is protective in nature. This fits well with the limitation in Article 51 that this right may be exercised only 'until the Security Council has taken measures necessary to maintain international peace and security', a reflection of the policy of collective security adopted by the Charter.¹⁰⁸ For the purposes of proportionality, the implications are that it must be judged by the means-end rather than the just desserts test. This was indeed the view advanced by Roberto Ago, who, as we have seen, based the objections to reprisals on their punitive purpose and timing. Ago regarded it as 'mistaken ... to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct'.¹⁰⁹

The differing perspectives on the distinction between illegitimate armed reprisals and lawful use of force in self-defence were clearly articulated in the pleadings of the parties in the *Oil Platforms* case. That case involved a claim by Iran against the United States following US attacks on Iranian oil platforms. The US argued that these attacks were actions in self-defence taken in response to a series of attacks on US and neutral shipping which the US attributed to Iran.¹¹⁰ More specifically the US argued that attacks on two ships amounted to armed attacks against the US by Iran. While the US denied that its attacks on the oil platforms had a punitive intent, it contested the Iranian argument that the use of force in self-defence is limited to the time the attack is in progress. It stated that the Iranian attacks on the ships had lasted only a few seconds and that the '*status quo ante* could not be restored simply by driving an attacking force back across the border from whence they came'.¹¹¹ Mindful of the objection to

¹⁰⁶ Ago, *supra* note 16, at para. 90.

¹⁰⁷ Dinstein, *supra* note 16, at 195. Dinstein's view is supported by Schachter: see Schachter, *supra* note 33; and O'Brien, *supra* note 86.

¹⁰⁸ See Combacau, *supra* note 99.

¹⁰⁹ *Ibid.*

¹¹⁰ For an excellent discussion of this case see Ochoa-Ruiz and Salamanca-Aguado, *supra* note 47.

¹¹¹ *Oil Platforms case, Counter-memorial and counter-claim submitted by the United States of America*, 23 June 1997, at 140, available at: www.icj-cij.org/docket/index.php?p1=3&p2=3&k=0a&case=90&code=0p&p3=1 (last accessed 13 Feb. 2011).

the use of force the only object of which is punitive or deterrent, the US claimed that the oil platforms had been used to identify and target vessels for attack. In its reply Iran contested the US claim that it had been subjected to an armed attack, arguing not only that the US had not proved that the attacks on the US ships could be attributed to Iran, but that an armed attack had to be a specific attack and not a series of events. More importantly for the present discussion, Iran argued that ‘self-defence is limited to that use of force which is necessary to repel an attack’, and that ‘once an attack is over, as was the case here, there is no need to repel it, and any counter-force no longer constitutes self-defence. Instead it is an unlawful armed reprisal or a punitive action.’¹¹² It added that use of force to deter future attacks is not included in the right to self-defence, but constitutes unlawful pre-emptive use of force.¹¹³

In deciding the case the Court did not expressly choose between the two opposing views on the nature of forcible action allowed in self-defence, nor did it opine on the difference between such action and an armed reprisal. Rather it held that the US had not lifted the burden of proof to show that the attacks on its ships were carried out by Iran. Hence *any* use of force by the US against Iranian installations was unlawful. The Court did intimate, however, that in judging the response in self-defence to a limited armed attack, such as an attack on one vessel, the test of proportionality would be one that assessed the scale of the response in relation to that of the armed attack.¹¹⁴

A number of attempts have been made in recent years to revive armed reprisals as a legitimate use of force in certain circumstances. I have already mentioned Dinstein’s view that ‘defensive armed reprisals’ may be a lawful response to a limited armed attack. Dinstein’s argument rests on his position that a rather low threshold of armed force is required for the use of force to qualify as an armed attack, and that in exercising its right to self-defence a range of possibilities is therefore available to the victim state. These include both ‘measures short of war’ and outright war.¹¹⁵ The former may be divided into limited on-the-spot reactions to a small-scale localized armed attack and ‘defensive armed reprisals’ that take place after a small-scale armed attack has been completed.¹¹⁶ Such reprisals may not be based on ‘purely punitive, non-defensive, motives’, although some

¹¹² *Oil Platforms case, Reply and Defence to Counter-claim submitted by the Islamic Republic of Iran*, i, 10 Mar. 1999, at 136, available at: www.icj-cij.org/docket/index.php?p1=3&p2=3&k=0a&case=90&code=op&p3=1 (last accessed 13 Feb. 2011).

¹¹³ *Ibid.*

¹¹⁴ *Oil Platforms case*, *supra* note 6, at para. 77. The Court also conceded that an attack on one vessel could conceivably constitute an armed attack: *ibid.*

¹¹⁵ In the pre-Charter period the distinction between ‘war’ and ‘measures short of war’ was well accepted: Alexandrov, *supra* note 30, at 29–34. With the change in conceptions after World War II that was reflected in the Charter provisions on ‘use of force’ and ‘armed attack’, and in the preference for the term ‘armed conflict’ rather than ‘war’ in the 1949 Geneva Conventions, it may be doubted whether these concepts retain their meaning in international law.

¹¹⁶ The notion that there may be room for an ‘on the spot’ reaction to use of force against a state even when that use of force does not amount to an armed attack under Art. 51 was raised by Judge Simma in his dissenting view in the *Oil Platforms case*, *supra* note 6. There is some support for Judge Simma’s view in the ICJ’s decision in the *Nicaragua case*, *supra* note 23. In that case, the Court addressed the question whether a state may take counter-measures when force has been used against it that does not amount to an armed attack. It ruled that ‘States do not have a right of “collective” armed response to acts which do not constitute an “armed attack”’: *ibid.*, at para. 211. The obvious implication is that states may have the

element of retribution is likely to be present. Their dominant motive must be forward-looking, in the sense that they are based on an assessment that the aggressor is likely to repeat the attack in the future and that their object is to deter it from doing so. Dinstein stresses that all defensive armed reprisals must meet the demands of immediacy, necessity, and proportionality. As mentioned above, given their nature as deterrent measures, proportionality here is one of 'just desserts' and not of means-end. As Dinstein puts it:

the responding State must adapt the magnitude of its counter-measures to the 'scale and effects' of armed attack. A calculus of force, introducing some symmetry or approximation between the dimensions of the lawful counter-force and the original (unlawful) use of force, is imperative.¹¹⁷

While some other writers have also expressed support for the idea that armed reprisals may, in certain circumstances, be legitimate measures of self-defence under Article 51,¹¹⁸ Dinstein himself concedes that his view does not reflect that of the majority of scholars.¹¹⁹ The majority of writers take it as settled law that use of force following an armed attack that has been completed, and the only object of which is deterrent rather than protective, will amount to an armed reprisal that is not a legitimate exercise of the right to self-defence recognized under Article 51 of the Charter.¹²⁰

While the prevailing view is clearly that armed reprisals are incompatible with the Charter principles on use of force, military operations which look very much like armed reprisals are still fairly prevalent. States that carry out such operations invariably present them as exercises of their right to self-defence following an armed attack. They are careful to stress that the objects of the operations are not punitive, or at least not predominantly so, but preventive. I have already mentioned the US arguments in the *Oil Platforms* case, in which the argument was that the platforms served as a base for military attacks. Another case in point is the attack by the US on targets in Libya, following a series of attacks on US targets abroad that culminated in a bomb attack on a Berlin discothèque frequented by US military personnel.¹²¹ While initial statements by President Reagan and senior officials gave the impression that the object of the attack had been retaliation and deterrence,¹²² when the matter reached the UN Security Council the US Permanent Representative was careful to stress only the preventive aspects of the attack. In summing up the US case the Permanent Representative stated:

In light of this reprehensible act of violence – only the latest in an ongoing pattern of attacks by Libya – and clear evidence that Libya is planning a multitude of future attacks, the United States was compelled to exercise its rights of self-defence.¹²³

right to an *individual* response against such force. This would seem to make some sense, as states surely have the right to what Dinstein terms an 'on the spot response' to use of force against them, even before it is clear whether that use of force amounts to an armed attack. For criticism of Judge Simma's view see Corten, *supra* note 13, at 229–230.

¹¹⁷ Dinstein, *supra* note 16, at 198.

¹¹⁸ O'Brien, *supra* note 86.

¹¹⁹ Dinstein, *supra* note 16, at 199.

¹²⁰ See Kelly, *supra* note 97, who reviews the literature on this matter.

¹²¹ See Intocchia, *supra* note 95.

¹²² *Ibid.*

¹²³ Address of Ambassador Walters, cited in *ibid.*, at 191.

This attempt to underplay the punitive and deterrent motives of the US attack failed to convince many observers. A number of scholars regarded the attack as an unlawful armed reprisal.¹²⁴ There was a similar reaction to the 1998 US attacks on targets in Sudan and Afghanistan following Al Qaeda attacks on US embassies in Africa.¹²⁵

It is not only the involved states themselves who try to present armed reprisals as actions of preventive self-defence. In some cases the reaction of the international community towards armed reprisals has been surprisingly restrained and has failed to call the child by its name. Thus, for example, the US attack on the buildings of army intelligence in Baghdad in 1993, carried out in response to the attempted assassination of former President Bush that was attributed to the Iraqi intelligence, was not strongly condemned by the international community. It is difficult to regard this action as anything other than an armed reprisal the aims of which were largely retribution and deterrence.¹²⁶

The disparity between the formal rules and the actual practice of states which are faced with limited attacks inevitably leads those states to deny that their armed actions are aimed at punishing or deterring the parties responsible for those attacks, and to claim that they are defensive in character. This lends credence to Dinstein's view that 'defensive armed reprisals', which in his view have a clear deterrent motive, are in reality still, or again, an accepted form of responding to a limited armed attack. I shall argue below that while the use of force the motive of which is clearly retributive is still universally condemned as an unlawful armed reprisal, there is often a more tolerant attitude towards the use of force as a deterrent against further attacks by the parties responsible for the armed attack.

B Protective Self-defence

Under traditional laws of war, once a war had started each party could carry on fighting until victory (whatever that may mean) was achieved. Proportionality was relevant in assessing how one fought (*jus in bello*), but not whether one continued to fight until victory. Yoram Dinstein is the foremost proponent of the view that this doctrine is still valid.¹²⁷ As we have seen above, Dinstein distinguishes between armed attacks and armed attacks. Minor or localized armed attacks will justify only on-the-spot responses or 'defensive armed reprisals'. However, more serious attacks that either themselves amount to war, or are of such a critical nature as to demand a massive response, justify the state under attack engaging in or resorting to war. Under this view, proportionality comes into play only in judging whether resort to war in response to the armed attack is justified.¹²⁸ If it is justified, proportionality (in the *jus ad bellum* sense) is no

¹²⁴ See the discussion in Bonafede, 'Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11 Attacks', 88 *Cornell L Rev* (2002) 155, at 171–178.

¹²⁵ *Ibid.*, at 178–181.

¹²⁶ Randelzhofer, *supra* note 12.

¹²⁷ Dinstein, *supra* note 16, at 208–212. Also see Kunz, 'Editorial Comment: Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations', 41 *AJIL* (1947) 872.

¹²⁸ This is similar to the view propounded by the late Thomas Franck: see text accompanying notes 2–3 *supra*.

longer relevant. In Dinstein's words, 'Once a war of self-defence is legitimately started, whether as a counter-war or in response to an isolated armed attack, it can be fought to the finish (despite any ultimate lack of proportionality).'¹²⁹ In making this statement Dinstein's assumption seems to be that proportionality necessarily implies a 'just desserts' rather than a 'means-end' test, for as support for his approach he cites the view of Ago, quoted above, that in self-defence it is mistaken to think that the force used must be proportionate to the force of the armed attack.¹³⁰

Dinstein may be correct in stating that when the armed attack itself takes the form of 'war', such as would be the case when there is a full-scale invasion by one state of the territory of another, the response of the victim state may be full-scale war which is fought until the enemy state is vanquished. It is much more problematical to take his approach when the armed attack is indeed fairly large-scale, but is isolated and has been completed before the victim state has had the chance to respond. It is also more problematical when the attack was carried out by a group of non-state actors. And these are the more common scenarios in the present world. The question must be what self-defence against such attacks implies and, on the basis of the answer to that question, what place proportionality has to play in assessing the response of the victim state. These were the questions that arose both in relation to Israel's conflict with the Hezbollah in the summer of 2006 and its conflict with the Hamas in Gaza in 2008–2009. They would also seem to be the questions that arise when assessing the response to the 9/11 attack on the US.¹³¹

If one takes the text of Article 51 seriously, the right to use unilateral force in self-defence would appear to be a function of the 'emergency situation' in which a state finds itself. An armed attack occurs and the victim state must obviously have the right to defend itself against *that* attack until such time as the Security Council takes measures to secure international peace and security. This implies that the victim state can do anything compatible with *jus in bello* that is needed to halt and to repel the attack. However, if the attack has taken place and the damage has been done, and the attacker is no longer attacking nor present on the territory of the victim state, the victim state may have a valid complaint about a severe violation of international law, but in what sense can it defend itself against the armed attack, as opposed to the armed attacker?¹³² If it takes forcible measures in this situation it will be doing so for one or more of a number of reasons: to prevent the enemy from attacking again in the near or not-so-near future, to punish the enemy for its attack, or to deter it from attacking again.¹³³ Which, if any, of these are legitimate aims for using force following an armed attack?

¹²⁹ Dinstein, *supra* note 16, at 209.

¹³⁰ *Ibid.* It should be recalled that Ago did not reject a test of proportionality in use of counter-force, but only proportionality based on a 'just desserts' test.

¹³¹ See Bonafede, *supra* note 124; Quigley, 'The Afghanistan War and Self-Defense', 37 *Valparaiso U L Rev* (2003) 541.

¹³² See Corten, *supra* note 13, at 486; Quigley, *supra* note 131.

¹³³ I distinguish here between a punitive and deterrent motive. True, deterrence may be one of the aims of punishment, but it is not necessarily the only aim. I assume that there may be a desire for retribution that is unconnected with any notion of deterrence. As I note below (text accompanying notes 175–177 *infra*) in some situations governments may be motivated by the desire to display to their own public that they are responding to an attack, even if they assess that the response may aggravate matters or be counter-productive.

Ostensibly all of them present difficulties. States do not have the right to use pre-emptive force unless they are faced with an imminent attack. If there is no evidence that the aggressor intends launching another attack imminently, should the fact that the victim state has been subjected to an armed attack allow it to use pre-emptive force? Punitive motives for the use of force are regarded as illegitimate and incompatible with the very notion of self-defence. If the response of the victim state is purely punitive it will be regarded (by most, at least) as an unlawful armed reprisal. And what about deterrence? Can one distinguish between it and punishment? In an age in which it is the duty of the Security Council to maintain and restore international peace and security surely deterrence should be in its hands? It has the powers to adopt both non-forcible and forcible measures to prevent and deter states from violating their international obligations. If the victim state is not faced with the threat of an imminent attack, surely the regime perceived under the Charter requires that it refrain from the unilateral use of force and that it place the matter in the lap of the international community?

C The Aims of Self-defence

On the basis of the fundamental assumptions of Article 51, that a state may exercise the right to self-defence when, and only when, an armed attack occurs or is imminent, what does the right to self-defence imply? One can discern a number of possible answers to this question:

1 Halting and Repelling the Attack

In his report on state responsibility Roberto Ago took issue with the ‘tit for tat’ test of proportionality and made it clear that proportionality was to be judged by the purpose of using force. Ago wrote:

The requirement of the *proportionality* of the action taken in self-defence, as we have said, concerns the relationship between that action and its purpose, namely – and this can never be repeated too often – that of halting and repelling the attack or even, in so far as preventive self-defence is recognized, of preventing it from occurring.¹³⁴

In her separate opinion in the *Nuclear Weapons* case, Judge Rosalyn Higgins cited Ago’s view with approval.¹³⁵

The notion that the object of using force in self-defence is restricted to halting and repelling the armed attack enjoys fairly wide support among academic writers. In her monograph on necessity and proportionality in the use of force, Judith Gardam points out quite correctly that the first step in examining proportionality is to determine the legitimate aim of self-defence. She distinguishes between response to an armed attack that has occurred and the use of force to thwart an imminent attack. In relation to the former she has this to say:

In the case of self-defence against an armed attack that has already occurred, it is the repulsing of the attack giving rise to the right that is the criterion against which the response is

¹³⁴ Ago, *supra* note 16, at para. 121.

¹³⁵ *Nuclear Weapons* case, *supra* note 23, Separate opinion of Judge Higgins, at para. 5.

measured. Repulsion of the attack in this context encompasses not only resistance to an ongoing armed attack but the expulsion of an invader and the restoration of the territorial *status quo ante bellum*.¹³⁶

Having said this Gardam concedes that it may make a difference whether the defence is against an isolated attack 'or whether there is an ongoing state of armed conflict'.¹³⁷ She also mentions that state practice and commentators differ as 'to the extent to which the destruction of the enemy is justified in order to repulse the attack', and she asks whether 'the requirements of proportionality in self-defence under the Charter proscribe action to remove a continuing threat'.¹³⁸ Gardam then poses the question that must be addressed by proponents of the 'halting and repelling' concept of self-defence: if this is indeed the object 'is it proportionate to take action that is designed to prevent such an attack occurring again and restore the security of the State?'¹³⁹ This is not really a question of proportionality, but one that goes back to the very aim of using force in self-defence. And, as Gardam herself admits, one cannot discuss proportionality without defining the legitimate aims of self-defence. Acceptance that a state that has been attacked may take action to prevent such an attack occurring again necessarily rejects the 'halting and repelling' theory.

The 'halting and repelling' theory is supported by Cassese,¹⁴⁰ Corten,¹⁴¹ and Cannizzaro.¹⁴² While Cassese seems to accept that this means what it says, namely that the Charter norms and the corresponding norms of general international law 'do not authorize or condone any military action above mere opposition to, and repelling of, aggression',¹⁴³ like Gardam, Corten displays an ambivalence in accepting that the victim state can go no further than that. He sticks to his guns in supporting the 'halting and repelling' test, but concedes that in some cases a state may be entitled to respond to an attack that has been completed, such as a missile attack on a state. Arguing otherwise, in Corten's view, 'would be a plainly absurd and unreasonable interpretation in respect of the very objective of self-defence'.¹⁴⁴ Unfortunately he does not offer an explanation of what the objective of self-defence becomes once the attack has been completed and can no longer be halted or repelled. Cannizzaro is emphatic that the use of force 'must necessarily be commensurate with the concrete need to repel the current attack, and not with the need to produce the level of security sought by the attacked state'.¹⁴⁵ In his view 'the forcible removal of threatening situations

¹³⁶ Gardam, *supra* note 9, at 156.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*, at 165.

¹³⁹ *Ibid.*

¹⁴⁰ Cassese, *supra* note 15, at 355: 'self-defence must limit itself to rejecting the armed attack; it must not go beyond this purpose'.

¹⁴¹ Corten, *supra* note 13, at 484–493: 'proportionality invariably implies comparing the military action justified by self-defence with its essential objective, which is to repel an attack that is underway' (at 489).

¹⁴² Cannizzaro, *supra* note 15.

¹⁴³ Cassese, *supra* note 15, at 355.

¹⁴⁴ Corten, *supra* note 13, at 486.

¹⁴⁵ Cannizzaro, *supra* note 15, at 785.

and the creation of permanent conditions of security seem to have been reserved by the international community as tasks to be performed collectively'.¹⁴⁶

The claim that the sole aim of using force in self-defence is to halt and repel the armed attack that triggered the right to use force seems removed from reality. It may reflect the rhetoric of states that have not themselves been subject to a fairly large-scale attack or series of attacks, but it certainly does not reflect the practice of states that have been the victims of such attacks. The failure of the international community to provide effective protection for states that have been subject to repeated attacks is hardly an encouragement to those states to rely on that community to remove the threatening conditions and provide them with permanent conditions of security.

Support for the 'halting and repelling theory' is strongest amongst those, such as Cassese, Corten, and Cannizzaro, who are strong supporters of the philosophy behind Article 51 of the UN Charter, for it is the theory that is most compatible with that philosophy. Licence is given to states to use only the minimum force necessary to defend themselves against the armed attack that has occurred until such time as the Security Council fulfils its function of restoring and maintaining international peace and security.

Unfortunately, as many commentators have pointed out time and again, the Charter philosophy has not been implemented in practice.¹⁴⁷ The UN SC has not proved itself to be capable of restoring and maintaining international peace and security and providing effective protection for vulnerable states, especially when those states are not popular amongst UN member states, or when one or more of the permanent members of the UN SC sides with the aggressor state. In these conditions it does not seem reasonable to demand that the victim state restrict its response to halting and repelling the attack, even when it has well-founded fears that the aggressor may well mount another attack in the future. Furthermore, the halting and repelling theory stacks the cards in favour of the aggressor. The most the aggressor stands to lose is that its attack will be halted and repelled. If the armed attack is successful it will have attained its goals; if not, it will merely be returned to the *ante bellum* situation. It may then prepare for another attack at a time of its choosing.

2 The Trigger Theory

Proponents of the 'trigger theory' accept that states may not use force unless they have been subject to an armed attack. Once such an attack has occurred, however, the victim state may defend itself not only against that attack, but against threats posed by the aggressor, whether imminent or not. In this situation the victim state may use a show of force in order to deter the aggressor from repeating its attack in the future or to destroy the military potential of that state so that it will not be able to mount another attack in the near future.¹⁴⁸ This theory has an obvious affinity with Dinstein's view,

¹⁴⁶ *Ibid.*, at 782.

¹⁴⁷ Dinstein, *supra* note 16, at 188 and 'Part III: Case Studies', in V.A. Lowe, *The United Nations Security Council and War: the Evolution of Thought and Practice since 1945* (2008), at 265–515.

¹⁴⁸ See Mellow, 'Counterfactuals and the Proportionality Criterion', 20 *Ethics and Int'l Affairs* (2006) 434.

presented above, that when a state has been subjected to a large-scale armed attack it may resort to war that may be pursued until the victim state has achieved its aims. The difference between Dinstein's theory and the trigger theory is that the latter does not rest on a distinction between different levels of armed attack. The original proponent of the idea that Article 51 is based on the trigger theory maintained that the right of self-defence in that Article is the right to resort to war, and that this right may be exercised as long as an armed attack has occurred, whatever its scale.¹⁴⁹

The trigger theory is not likely to appeal to those who are attached to the collective security philosophy behind the Charter. It widens the scope for the legitimate use of force by states, rather than containing it to the minimum necessary to allow a state to defend itself until the UN SC fulfils its duty to restore international peace and security. Proponents of the theory may reply that the collective security philosophy behind the Charter is reflected in the powers of the SC under Chapter VII to take measures to maintain international peace and security.¹⁵⁰ In exercising these powers the SC may impose a cease-fire between the parties or subject them to other demands, such as withdrawal from territory taken by force.¹⁵¹ Such a decision will bind the *states* involved (although, if the conflict involves a non-state actor such as Al Qaeda, it will not necessarily bind all the parties involved in the conflict).

When it comes to inter-state use of force, it is generally accepted that the threshold for an armed attack is not high. Only excluded, according to the ICJ, are mere frontier incidents, and even this exclusion has been criticized. It does not seem reasonable that even a low-level armed attack should by itself allow the attacked state to respond by destroying the military capacity of the aggressor. Thus Dinstein's distinction between different levels of armed attacks and the response each level justifies has more appeal and logic than the 'pure' trigger theory. The trigger for an all-out military campaign to destroy the military potential of the aggressor and to deter it from further attacks in the future may only be a large-scale attack, or at least a series of attacks culminating in the attack which is the final straw that triggers the response. As we have seen, the SC and uninvolved states have been highly reluctant to accept an 'accumulation of events' test for an armed attack. There are some signs, however, that when an event which constitutes an armed attack has occurred they may be willing to consider prior events in assessing the legitimacy of the force used in response to the attack.¹⁵²

The trigger theory may not appear to be the kind of theory that serves the purpose of reducing the scope of armed conflicts. It is impossible to draw a clear line between armed attacks that justify a limited response and those that trigger the right to use

¹⁴⁹ Kunz, *supra* note 127, at 876–877. Kunz limited this to the case in which an armed attack has actually occurred and did not accept that the right of self-defence could be exercised to prevent an imminent attack.

¹⁵⁰ *Ibid.*, at 877.

¹⁵¹ See Dinstein, *supra* note 16, at 185–191.

¹⁵² See Tams, *supra* note 49; Cannizzaro, *supra* note 15, at 783. Cannizzaro claims that acceptance by the international community of Israel's claim to be acting in self-defence when it responded to the Hezbollah cross-border raid of 12 July 2006 'seems to imply that, for this purpose [defining an armed attack], one must not take into account single actions performed by the attacker but rather the entire plan of aggression, which can unfold throughout a series of small-scale attacks'.

massive force to destroy the enemy. States may use a fairly low level attack as an excuse to pursue aims that are unconnected with that attack. It would seem that one of the grounds for the general perception that Israel's use of force in response to the Hezbollah attack of 12 July 2006 was disproportionate was exactly the feeling that that attack served merely as a pretext for Israel to pursue aims that had been defined beforehand.¹⁵³ On the pro- side, the trigger theory sends a clear message to potential aggressors that they will not be able to determine the level of force used in response to an armed attack. The knowledge that any armed attack on another state could trigger a massive response could potentially serve as a deterrent against launching an attack.¹⁵⁴

Under the trigger theory, once a large-scale armed attack has been launched *jus ad bellum* proportionality no longer plays a part. The victim state is constrained by the norms of *jus in bello* and possibly by the notion of military necessity, namely that it may use only such force as is necessary to achieve its military objectives.¹⁵⁵ But given the acceptance that those objectives may be extremely wide, it may be difficult to regard as unnecessary a concrete military action that is compatible with the rules of *jus in bello*.

3 The Future Attack Theory

As stressed above, it is widely accepted that a state may use force to thwart an imminent attack. It would seem illogical to argue that if a state has not yet been attacked it may use force to thwart an imminent armed attack, but that if it has already been attacked it may not do so. Even some scholars who reject in principle the notion that a state that has not been subject to an armed attack may mount an anticipatory attack accept that if a state has been attacked it may use force to prevent further attacks.¹⁵⁶

Is a state that has been attacked in the same situation as a state that has not yet been attacked and wishes to pre-empt a future attack? Obviously, as long as the fighting with the aggressor continues there is not much point in trying to find a line between imminent and non-imminent future attacks. But the question has arisen in recent years in relation to 9/11 type attacks, which are over and done with before the victim

¹⁵³ See Security Council debate of 21 July 2006: UN Doc. S/PV.5346.

¹⁵⁴ According to a CNN report of 27 Aug. 2006 the head of the Hezbollah, Hassan Nasrallah, stated that he would have refrained from the 12 July attack had he known how Israel would respond: 'Nasrallah: Soldiers' Abduction a Mistake', available at: <http://forum.go-bengals.com/index.php?showtopic=21448> (last accessed 16 Feb. 2011).

¹⁵⁵ There is a difference of opinion whether necessity in this sense is a demand of *jus ad bellum*, *jus in bello*, or perhaps of both. Christopher Greenwood, 'The Relationship between *jus ad bellum* and *jus in bello*', 9 *Rev Int'l Studies* (1983) 221, argues that *jus ad bellum* remains relevant throughout an armed conflict, in the sense that all military action must be necessary to achieve the legitimate goals of self-defence; Nils Melzer presents the same demand as a requirement of IHL, namely *jus in bello*: N. Melzer, *Targeted Killings in International Law* (2008), at 278–291. Since Melzer himself wrote the ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities in International Humanitarian Law* (2009), it is not surprising that his view is adopted in the *Guidance* (*ibid.*, chap. 9). Melzer's view has been subject to harsh criticism: Hays Parks, 'FORUM: Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance: Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise and Legally Incorrect', 42 *NYU J Int'l L & Politics* (2010) 769. And see the reply by Melzer, in *ibid.*, at 831.

¹⁵⁶ Corten, *supra* note 13.

state has had a chance to respond. Some commentators maintain that even in such a situation the victim state may use force only if it has evidence that further attacks are imminent.¹⁵⁷ Others accept that, having been attacked, the victim state may use force not only to repel that attack but to prevent future attacks too, without requiring that such attacks be imminent.¹⁵⁸ Michael Schmitt speaks of a response which is 'no more than necessary to defeat the armed attack and remove the threat of reasonably foreseeable future attacks'.¹⁵⁹

Defence against future attacks seems to be the fairly standard argument advanced by states in justifying their response to an armed attack that has been completed. Sometimes states expressly refer to imminent attacks. More often, however, they simply refer to future planned attacks. Examples are the statement of the US representative in the SC debate on the US attacks on targets in Libya and the arguments of the US before the International Court of Justice in the *Oil Platforms* case. This was also the argument made by both the US¹⁶⁰ and the UK¹⁶¹ when justifying their resort to force against Afghanistan following the attacks of 9/11. Aligned with this approach is the reliance of states on a pattern of attacks as evidence that further use of force against them in the future is anticipated.¹⁶² As I noted above, while non-involved states and UN bodies have been reluctant to accept a definition of an armed attack that is based on the 'accumulation of events' theory, once there has been a single attack that reaches the scale and effects required for an armed attack, they seem more open to accepting that in judging the forcible response previous uses of force against the victim state should be relevant.¹⁶³ This view was originally presented by Roberto Ago in his report on state responsibility, in which he wrote:

If ... a state suffers a series of successive and different acts of armed attack from another state, the requirement of proportionality will certainly not mean that the victim state is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks.¹⁶⁴

Allowing states to act to prevent or deter future attacks, whether imminent or not, would seem to give them wide leeway, and in some respects resemble the trigger theory.

¹⁵⁷ Quigley, *supra* note 131.

¹⁵⁸ See Schachter, 'The Extraterritorial Use of Force Against Terrorist Bases', 11 *Houston J Int'l L* (1988) 309, at 312; O'Connell, *supra* note 68.

¹⁵⁹ Schmitt, *supra* note 45.

¹⁶⁰ Letter dated 7 Oct. 2001 from the Permanent Representative of the USA to the UN addressed to the President of the Security Council, UN Doc S/2001/946. The letter states that in response to the 9/11 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'.

¹⁶¹ Letter dated 7 Oct. 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the UK to the UN addressed to the President of the Security Council, UN Doc S/2001/947. The letter refers to the need 'to avert the continuing threat of attacks from the same source [as carried out the 9/11 attacks]'.

¹⁶² This was the argument made by Israel on numerous occasions when it reacted to use of force from armed groups operating out of neighbouring countries that were usually regarded as armed reprisals by the international community. See the discussion of some of these cases in O'Brien, *supra* note 86; Alexandrov, *supra* note 30, at 165–179.

¹⁶³ Ronen, *supra* note 46, at 373–374.

¹⁶⁴ Ago, *supra* note 16, at para. 121. Also see Schachter, *supra* note 33.

Maybe it is this fear of opening the door to massive use of deterrent force in the face of an amorphous fear of future attacks that led one well-respected expert to interpret the above US and UK explanations for their military campaign against Al Qaida and the Taliban in Afghanistan as referring to *imminent* attacks even though the explanations themselves do not include this description.¹⁶⁵

Obviously it will usually be extremely difficult, if not impossible, to gauge whether attacks, or further attacks, are really imminent. Restricting the right of states that have been attacked to halt and repel the attack and, if the attack has been repelled or has been completed before the victim state may respond, to prevent *imminent* attacks therefore has an air of artificiality about it. It might change the rhetoric of states so that their standard justification for use of force in response to a completed attack would be that future attacks were imminent, but it would be unlikely to change their practice. While a state that has not been attacked is likely to meet a sceptical reaction when it claims that it used force to stop an imminent attack, states that have already been subject to an armed attack, especially one nearing the scale and effects of the 9/11 attack, would probably find other states and international organs more understanding of their claim that they were acting to prevent future attacks.¹⁶⁶ Michael Schmitt argues that the same test of imminence will apply whether the state has been attacked or not, but the mere fact that a state has been attacked already will make it easier to conclude that it will be attacked again. Furthermore, 'it may also be reasonable to conclude that the first attack was part of an overall campaign that in itself constitutes a single extended armed attack'.¹⁶⁷

Licence to states that have been the victims of an armed attack to use force in anticipation of future attacks will in practice provide such states with the justification for using the force needed to weaken the military potential of the aggressor. This was in essence one of the central aims of Israel's military campaign in response to the Hezbollah attack of 2006 July.¹⁶⁸ Even many states that accepted Israel's right to use force in self-defence in this case were apparently not persuaded that this was a legitimate aim, since they criticized Israel's use of force as disproportionate.¹⁶⁹ It must be conceded, however, that this is not the only possible explanation for their criticism. They may well have felt that even if the aim itself was legitimate the damage caused by the means used to achieve that aim was excessive in relation to the that aim.¹⁷⁰

¹⁶⁵ See Greenwood, 'International Law and "War against Terrorism"', 78 *Int'l Affairs* (2002) 301, at 312.

¹⁶⁶ Greenwood (*ibid.*) mentions that US and UK explanations of their decision to use force against Afghanistan did not meet with resistance of states 'which might have been expected if there were no right of anticipatory self-defence in international law, or if there had been real doubts whether the conditions for the exercise of that right existed'.

¹⁶⁷ Schmitt, *supra* note 45, at 24.

¹⁶⁸ See the statements of Israel's leaders quoted in Ronen, *supra* note 46, at 389–390.

¹⁶⁹ See the statements of various states cited in *ibid.*, at 391, n. 171.

¹⁷⁰ *Ibid.*, at 388–392.

4 Self-defence and Proportionality

The diverse types of situation in which a state might use force in self-defence, and the different ends that might be legitimate in those situations, lead to the conclusion that differing tests of proportionality might be appropriate in different cases. This is not a case of 'one size fits all'.

Several variables may affect the ends of the force used in self-defence, and hence the test for assessing its proportionality; whether the attack is ongoing, completed, or imminent; whether it was carried out by non-state actors and, if so, whether it can be imputed to a state; and, finally, the scale and effects of the attack, when judged in the context of the relations between those responsible for the attack and the victim state. In the analysis that follows I shall attempt to show how these variables will affect the issue of proportionality. Before I do so it is important to dwell on the distinction between various end-goals behind the use of force and on the dynamics of force and counter-force.

A Motives of Force in Self-defence

When faced with an ongoing attack the primary goal of the victim state will be halting and repelling that attack. However, even when that is the initial goal of the forcible response the matter may not end there. Unless the armed attack is limited and localized the situation is likely to be dynamic and could deteriorate rapidly into a wider armed conflict. As David Rodin mentions, when an armed conflict begins 'the scale of force is intrinsically open-ended on both sides and open to escalation'.¹⁷¹ In such a situation each side may do what is necessary to weaken the military capacity of its enemy, constrained only by the norms of *jus in bello*.¹⁷² According to some views, at this stage proportionality is judged solely by those norms and has no relevance in *jus ad bellum*.¹⁷³ These views would seem to be based on the assumption that assessment of proportionality in *jus ad bellum* is a once-and-for-all decision, made in advance when the decision to use force in response to the armed attack is made.

The point in time at which evaluation of proportionality is supposed to be made by the state using force is far more complicated in *jus ad bellum* than it is in *jus in bello*. In the latter context evaluation of the *anticipated* military advantages and *expected* damage to civilians must obviously be made before the attack. When deciding to use force in self-defence decision-makers in the state involved should ideally define the aims of such force and assess the scope of the force and the means necessary to achieve those aims. But once force has been used in response to an armed attack the dynamics of the situation are likely to require ongoing decision-making. War aims may have to be redefined and consideration given to the necessity of using further force as well as

¹⁷¹ Rodin, *supra* note 22, at 115.

¹⁷² The St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectives under 400 Grams of Weight (1968) states that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy'.

¹⁷³ Dinstein, *supra* note 16, at 208; Rodin, *supra* note 22, at 112; Wrachford, 'The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defense, or a Reprisal Gone Bad?', 60 *Air Force L Rev* (2007) 29, at 87.

to the harm that has been caused, is still being caused, and is going to be caused by pursuing those aims. Hence, examining the proportionality of the force may become an ongoing process that must pay heed to the harm that has already been caused, and not only to the expected harm from further use of force.¹⁷⁴

While halting and repelling an attack is accepted as a legitimate goal of self-defence, the matter becomes more complicated when the armed attack is completed before the victim state can respond, or when an armed attack is imminent. Any use of force by the victim state in such circumstances will necessarily be forward-looking and will involve one or more of three possible motives: punishing the aggressor, preventing further attacks, and deterrence. It is important to distinguish between these potential motives for using force.

By the term ‘punishing the aggressor’ we are referring to a notion of retribution or just desserts. In reality, as Yoram Dinstein so aptly remarks, some element of retribution may be present in many, if not all, cases in which a state responds to an armed attack.¹⁷⁵ There may be strong political reasons for this, since the governments of victim states may perceive (rightly or wrongly) that public opinion demands a response to the armed attack even when it recognizes that such a response will serve no purpose other than retribution, and may even be counter-productive. Be this as it may, in our discussion of armed reprisals we saw that if there is one thing that is universally accepted it is that the notion of self-defence does not allow for the use of force the motive of which is purely retributive.

Prevention entails force the object of which is to weaken the military *capacity* of the enemy, thereby reducing the chances that it will be capable of mounting another attack. In the short term, at least, it is clear that the more damage done to that military capacity the less chance there will be of a further attack by the same enemy.

As opposed to prevention, deterrence involves trying to influence the *willingness* or *motivation* of potential enemies to use force against the victim state.¹⁷⁶ A distinction must be made here between general deterrence and specific deterrence. The former is designed to send a warning message to all potential aggressors regarding the likely costs to them of attacking the victim state; the latter to affect only the willingness of the state or armed group responsible for the armed attack from mounting another attack. As general deterrence is not directed to defence against the armed attack that occurred, nor even solely to defence against further attacks by the party responsible for that attack, it cannot be regarded as a legitimate aim of the use of force in self-defence. But what of specific deterrence?

Deterrence is an inherent part of punitive measures, and it may be argued that, since these are not considered compatible with the right to self-defence, deterrence itself cannot be recognized as a legitimate motive for using force. The counter-argument differentiates between the retributive and deterrent motives of punitive measures, and holds that only the former are never legitimate, while the latter may conceivably

¹⁷⁴ Greenwood, *supra* note 155.

¹⁷⁵ Dinstein, *supra* note 16, at 199.

¹⁷⁶ Evron, ‘Deterrence and its Limitations’, 9(2) *Strategic Assessment* (2006), available at: www.inss.org.il/publications.php?cat=21&incat=&read=116 (last accessed 1 Mar. 2011).

be legitimate in certain circumstances. Taking the latter view in the context of force against terrorists, Oscar Schachter wrote that self-defence may include force that is 'sufficient to cause the terrorist to change his expectations about the costs and benefits so that he would cease terrorist activity'.¹⁷⁷ Michael Schmitt takes the same position.¹⁷⁸ It would seem to me that their view is reflective of state practice, especially in cases of armed attacks by non-state actors. In many such cases specific deterrence may not be the sole motive for the use of force, but it is highly unrealistic to believe that it will not be one of the motives.¹⁷⁹

Assuming that specific deterrence may in some circumstances, and to a certain degree, be a legitimate motive for the use of force in self-defence, the big question in the present context is by which test of proportionality it should be judged: by the means-end or 'tit for tat' test? The argument could be that the force used as a deterrent should be judged by its potential of achieving its ends, namely reducing the willingness of the aggressor to mount a further attack. Under this test it would seem that the greater the force used the more effective it is likely to be.¹⁸⁰ Contrarily, as deterrence is generally regarded as part and parcel of the aims of punishment, the argument could be that it should be judged according to the 'just desserts' notion of proportionality. Any other notion would lead to results which are incompatible with the fundamental philosophy behind the UN Charter and its principles on the use of force by states – that the use of unilateral force should be contained and restricted as far as possible – since even a small-scale armed attack could justify a massive deterrent response. It seems to me that this latter argument should have the upper hand. To the extent that specific deterrence is a legitimate motive for using force in response to an armed attack, the proportionality of the force used must be measured in relation to the scale and effects of the armed attack. This does not imply that the victim state can use no greater force than was used against it, but that it cannot justify force that vastly exceeds the force used against it on the strength of the argument that the greater the counter-force the more effective it is likely to be as a deterrent.

B The Variables of Self-defence, Legitimate Motives and Proportionality

1 Ongoing Attacks

When the aim of forcible measures is to halt and repel an ongoing armed attack, the test of proportionality is a clear means-end test. Anything necessary to achieve this

¹⁷⁷ Schachter, *supra* note 158, at 315.

¹⁷⁸ Schmitt, *supra* note 45.

¹⁷⁹ On the role of deterrence in Israel's campaign against the Hezbollah see Evron, *supra* note 176.

¹⁸⁰ Glennon, 'The Fog of Law: Self-Defense, Inherence and Incoherence in Article 51 of the UN Charter', 25 *Harvard J L & Public Policy* (2002) 539, at 552. The idea that force which is disproportionate to the armed attack should be used as a deterrent was raised by several Israeli military and former military officers when discussing the policy that should be adopted in any future conflict with the Hezbollah: see Harel, 'IDF plans to use disproportionate force in next war', *Haaretz*, 5 Nov. 2008, available at: www.haaretz.com/print-edition/news/analysis-idf-plans-to-use-disproportionate-force-in-next-war-1.254954 (last accessed 20 Mar. 2011).

aim that is compatible with norms of *jus in bello* will be proportionate for the purposes of *jus ad bellum*. However, as we have seen above, despite the prevalence of the ‘halting and repelling’ school of thought on the purpose of self-defence the matter is not as simple as all that. Halting and repelling as the *sole* end of self-defence is appropriate only when the ongoing attack is of a limited scale and does not fit into a wider picture of hostility between the aggressor and the victim state. When there is a wide-scale attack, or an attack that is part of an ‘accumulation of events’ that reveals a clearly hostile intent towards the victim state, and consequently makes the chance of further attacks a real possibility, many experts agree that the victim state may also use force to remove the immediate threat from that same aggressor. Some go further and accept that the victim state may even use force to eliminate future threats that are reasonably foreseeable, or that it may use measures ‘to restore the security of the State after an armed attack’.¹⁸¹ The most extreme view holds that if the armed attack was wide-scale the victim state may go to war and fight until victory.

I shall take the middle road and accept that unless the armed attack is limited, localized, and unconnected to a previous ‘accumulation of events’ or war-threatening situation, the victim state may use force to reduce reasonably foreseeable future threats. While the primary aim of such force must be to damage the military capacity of the aggressor, it would be naïve to pretend that such force may not also be aimed at affecting the willingness of the aggressor to mount another attack. In other words, in such a case the legitimate ends of using force in self-defence might be halting and repelling the ongoing attack and reducing the threat of further attacks by prevention and deterrence. The proportionality of the force used will have to be assessed in light of these ends.

This poses a problem since, while the tests both of halting and repelling and prevention of threats are means-ends tests that rely first and foremost on gauging whether the means are necessary to achieve the ends, the test for deterrence is a ‘tit for tat’ test that must consider the proportionality of the force used in self-defence against the scale and effects of the armed attack. I maintain, however, that while deterrence may in practice be an additional end, it should not affect the proportionality test used in these cases. Proportionality will be based on the necessity of the means used to halt and repel the attack and to prevent further attacks by harming the military capacity of the enemy. Deterrence will have to be a function of the force used to achieve these ends.

2 *Imminent Attacks*

What is the situation when an armed attack has not yet occurred but is imminent? As seen above, according to most experts, including the High Level Panel appointed by the UN Secretary General and indeed the previous Secretary General himself, in this situation the threatened state does not have to sit and wait until the armed attack occurs but may act to thwart the pending attack. What are the legitimate objects of force in this situation? Are they restricted to thwarting the imminent attack, or may

¹⁸¹ Gardam, *supra* note 9, at 157.

the threatened state go one step further and act to prevent reasonably foreseeable but non-imminent attacks, or even to deter the 'imminent aggressor' from attacking in the future?

Finding the appropriate test of proportionality when a state that has been subjected to an armed attack acts to prevent future attacks is a tricky enough matter. It is even trickier when the state has not yet been attacked and uses force based on its assessment both that an armed attack is imminent and that the anticipated scale of the attack is such as to demand the anticipatory use of force. Seemingly the state should not be permitted to do anything beyond what is needed to thwart the imminent attack. But how is one to gauge whether the force used was indeed necessary to do this? As long as the enemy retains some military potential it may have the capability of mounting another attack in the immediate future. Whether another attack is imminent depends, of course, not only on the capacity to carry out an attack, but on the motivation and intention to do so.¹⁸² Is there any objective standard for assessing whether such motivation and intention have been destroyed by the counter-force? Or are we talking about use of force as a deterrent against further attacks? If deterrence, the test of proportionality will be the 'tit for tat' test.

Even if we accept that both prevention of non-imminent future attacks and deterrence are legitimate objectives after an armed attack has occurred, when the victim state has used force on the basis of its assessment that an armed attack was imminent there will almost inevitably be a problem of evidence and credibility. If the potential victim state succeeds in frustrating an attack that was indeed about to take place, it may afterwards meet a great deal of scepticism over its claim that the attack was imminent. The degree of that scepticism will probably be influenced by the previous relationship between the victim state and the alleged aggressor.¹⁸³ In all events, while the victim state will have to act on the basis of its own assessment of the likelihood and scope of the pending attack, its assessment will be subject to a second opinion by the international community after the event.¹⁸⁴ States making use of their inherent right to self-defence in the face of an imminent attack must be prepared after the event to present evidence which supports the assessment they made of imminence.

The aim of using force in face of an imminent attack will be largely dependent on the context.¹⁸⁵ Judith Gardam maintains that force 'must be limited to countering the threatened attack and no more'.¹⁸⁶ At the same time she recognizes that 'the scale and mode of the response will be dictated by the nature and magnitude of the anticipated armed attack'.¹⁸⁷ It seems to me that the expected scale of the imminent attack affects not only the scale of force that may be used, but its very purpose. If the pending attack is expected to be isolated and limited, the purpose of the force used in self-defence should be restricted to stopping that attack from occurring. If, however, the expected

¹⁸² Schmitt, *supra* note 45.

¹⁸³ Gardam, *supra* note 9, at 179.

¹⁸⁴ On the notion of a 'second opinion' see Franck, *supra* note 9.

¹⁸⁵ Gardam, *supra* note 9, at 179.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*, at 180.

attack is one of a massive scale, amounting to war, an invasion of the victim state's territory or wide-scale bombardment of its territory, or is part of an 'accumulation of events', the victim state cannot be expected to restrict its anticipatory use of force to thwarting the imminent attack alone. It may act to remove the wider threat of reasonable foreseeable future attacks by the 'imminent aggressor'.

The legitimate ends of using force to thwart an imminent attack will of course dictate how proportionality is to be gauged. Once again the primary test will be whether the force used was necessary to achieve those ends.

3 Completed Attacks

As mentioned above, when the attack has been completed before the victim state can respond it is meaningless to speak of halting and repelling it. Neither especially affected states nor the international community have accepted the argument that this implies that the attacked state may therefore no longer exercise its right to self-defence, and must rely solely on non-forcible measures or action by the SC.

In responding to a completed attack it is self-evident that any force used by the victim state will necessarily relate to punishing the attacker or to preventing or deterring further attacks. Punishing the aggressor by use of force is not regarded as a legitimate exercise of the right to self-defence. We are left with force as a preventive or deterrent measure.

Use of force to pre-empt future attacks is not regarded as legitimate unless the attacks are imminent. As I showed above, however, once a state has been attacked the demand that forcible action to prevent further attacks relate to imminent attacks is severely weakened. The aggressive intentions of those responsible for the armed attack have been revealed and are not purely a matter for surmise. Still, there must be a 'sound basis for believing that further attacks will be mounted',¹⁸⁸ and the force used must be necessary to 'prevent any further reasonably foreseeable attacks'.¹⁸⁹

In this case much must also depend on the scale of the completed armed attack and whether it may reasonably be seen as a localized one-time attack, or part of a wider pattern of aggression towards the victim state. This is where Dinstein's distinction between 'defensive armed reprisals' and wider use of force is most relevant. If the armed attack is limited and localized, any forcible reaction by the victim state will have to be limited in scope too. Such force should be directed only against the military capacity of the state or group that carried out the attack and should be limited in both scope and location. While nobody except Dinstein seems prepared to call such use of force by its name – an armed reprisal – that is in essence what it will be, and its proportionality should be gauged accordingly. It is not surprising that the main criticism in many cases of forcible responses that look very much like armed reprisals is that they were disproportionate. In such cases the criticism would appear to rely on the 'tit for tat' test of proportionality.

¹⁸⁸ Schmitt, *supra* note 45, at 64.

¹⁸⁹ *Ibid.*, at 65.

On the other hand, when the completed armed attack is wide-scale, or part of a pattern of events, the legitimate ends of the force used in response will be both to prevent and to deter further reasonably foreseeable attacks. While in practice deterrence is likely to be one of the ends of such action, it should not be included as an end when gauging proportionality. The test here is once again whether the force used was necessary to damage the military capacity of the aggressor and thereby reduce the chances of future attacks.

4 Non-state Actors

A great deal has been written in recent years about extraterritorial use of force against terrorists or other non-state actors.¹⁹⁰ As mentioned above, there are still some experts who maintain that unless a cross-border attack by non-state actors may be attributed to another state, the victim state may not use extra-territorial force against those non-state actors. This is no longer the majority view. I have proceeded on the basis of the well-accepted approach, according to which if the host state does not act to curb the activities of the non-state actors in its territory, a state which has been victim to an armed attack by those non-state actors may use force against them in that territory. In doing so it will be exercising its inherent right to self-defence recognized in Article 51 of the Charter. It will therefore obviously be bound by all the limitations that apply to the exercise of that right, including necessity and proportionality. Necessity in this context implies that the victim state has unsuccessfully tried non-forcible measures to persuade the host state to stop the activities directed against it by the non-state actors acting in that state's territory, and that, given the pattern of attacks, it is left with no other effective way to defend itself.¹⁹¹ In order to understand what proportionality implies in this context we have once again first to consider what the legitimate ends of self-defence are in this case.

Whether the armed attack by non-state actors may be attributed to the host state or not will affect the ends of the force used. When the armed attack may be attributed to the host state, the victim state may use force in self-defence, both against that state and against the non-state actors who carried out the attack. The aims of such force will have to be either preventive or deterrent.

Preventive force against the host state will be relevant only when the nature of the connection between that state and the group of non-state actors is reflected in military support. Attacking the capacity of the state to provide such support could then be regarded as preventive in nature. A more radical preventive approach, adopted by the US in Afghanistan, would involve toppling the regime in the host state and replacing it with a regime that would no longer give support to the non-state actors. This is a highly problematical approach that does not seem compatible with the limited

¹⁹⁰ See especially Lubell, *supra* note 19; Melzer, *supra* note 155; Schmitt, *supra* note 45; O'Connell, *supra* note 68; Shah, 'Self-Defence, Anticipatory Self-Defence and Pre-emption: International Law's Response to Terrorism', 12 *J Conflict and Security L* (2007) 95; Kittrich, 'Can Self-Defense Serve as an Appropriate Tool against International Terrorism?', 61 *Maine L Rev* (2009) 133.

¹⁹¹ Schachter, *supra* note 158.

self-defence doctrine that lies behind Article 51 of the Charter.¹⁹² It is unlikely to find much support in the international community unless there are cogent reasons for believing that regime change will serve wider purposes, such as preventing crimes against humanity.

It is in this context, more than any other, that the legitimacy of specific deterrence as a motive for the use of force must be addressed. The distinction between prevention and deterrence is not purely semantic. The former involves destroying or harming the *capacity* to mount future attacks; the latter trying to affect the *willingness* or *motivation* to do so. Could affecting the willingness of the host state to continue its support of the non-state actors be a legitimate aim of force when the armed attack by those actors may be attributed to that state? While it seems that victim states will most probably have this aim in mind when responding with force against the host state, given the prevailing view that deterrence on its own is not a legitimate aim of self-defence they will usually claim that the real purpose of their action was preventive. The case of the 1986 US attack on targets in Libya in response to terrorist attacks by a group of non-state actors for which the US held Libya responsible is a case in point.¹⁹³ The ambivalent attitude of the government of Israel whether its war aims in the 2006 campaign in Lebanon were directed solely against the Hezbollah or were also directed against the government of Lebanon is another.¹⁹⁴

What about transnational attacks by non-state actors that may not be attributed to the host state? They will usually be of two kinds. In some cases, there is a pattern of small-scale attacks, some or all of which in isolation may not constitute an armed attack. These may or may not culminate in the ‘last straw’ attack, which may or may not be of the scale and effects to constitute an armed attack. In other cases there may be a dramatic once-and-for-all large-scale attack such as the 9/11 attack that in itself certainly triggers the right of the victim state to use force in self-defence. Common to both types of cases is that in responding with force the victim state will not be defending itself against the armed attack that is occurring, but against further attacks from the same group of non-state actors. The difference between the two types of cases is that when there is a pattern of attacks, the victim state has fairly strong evidence that there are likely to be further attacks if it does not react.¹⁹⁵ On the other hand, when subjected to an isolated attack the attack itself does not necessarily indicate that future attacks are in the offing. Use of force against the non-state actors will therefore be based on notions of retribution for the attack, deterrence against further attacks,

¹⁹² See Glennon, *supra* note 180, at 545–546 and authorities cited there in n. 22.

¹⁹³ See *supra* notes 121–124 and accompanying text.

¹⁹⁴ See Ben Meir, ‘Israeli Government Policy and the War’s Objectives’, 9(2) *Strategic Assessment* (2006), available at: www.inss.org.il/publications.php?cat=21&incat=&read=93 (last accessed 1 Mar. 2011); Ronen, *supra* note 46. In an article published some time after the Lebanon War, a retired IDF general and former head of the Israel’s National Security Council argued that in any future war Israel would have to use massive destructive force against Lebanon itself in order to deter it from supporting the Hezbollah: Eiland, ‘Who’s the real enemy?’, *Ynet*, 24 July 2008, available at: www.ynetnews.com/articles/0,7340.L-3572777,00.html (last accessed 20 Mar. 2011).

¹⁹⁵ Schachter, *supra* note 158, at 314, puts it this way: ‘[i]f there had been a pattern of prior attacks and a substantial threat, the need to have definite knowledge of future attacks should be less demanding’.

or preemption of further attacks on the basis of intelligence information, statements by heads of the group which carried out the attack, or surmise that such attacks are planned or being planned.

What will be the legitimate ends of using force in such cases? States know only too well that retribution on its own is not regarded as an aim that is compatible with the notion of self-defence, and that forcible action that is motivated solely by the desire for retribution will be regarded as an illegitimate armed reprisal. Hence they are seldom, if ever, likely to admit that their use of force is based on motives of retribution. Prevention of further attacks is regarded as a legitimate aim, although there is disagreement on how imminent those attacks must be when an armed attack has already occurred. Michael Schmitt argues that, given the difficulty in locating and tracking terrorists in the territory of another state, when it comes to terrorists the imminence requirement for use of pre-emptive force is not judged by the imminence in time of the expected terrorist attack but 'by the extent to which the self-defense occurred during the last window of opportunity'.¹⁹⁶ In such circumstances the prime purpose of using force must be preventing future attacks.

What about deterrence? Schmitt rules out *general* deterrence of terrorists as a primary aim of the use of force, but includes deterrence of the group of terrorists who carried out the armed attack as part and parcel of the preventive purpose. As we saw above, in using force against terrorists Oscar Schachter considered the latter type of deterrence to be legitimate. It seems to me that this reflects the way that states involved in responding to terrorist attacks do in fact regard the purpose of using force.¹⁹⁷

As in all other cases, the proportionality test for the force used will depend on the legitimate ends of using that force. The problem here is that we have two conceivable ends that lead to different and competing tests of proportionality. As far as the preventive aim is concerned – damaging the capacity of the non-state actors to attack again – the test will be an instrumental one: is the force used needed to damage that capacity? If, on the other hand, the purpose is to deter the terrorists from further attacks, the scale of the armed attack will be relevant in assessing the proportionality of the force used. As we have seen, many experts and certainly especially affected states argue that in making this assessment the 'accumulation of events', and not only the armed attack which triggered the forcible response, is relevant in assessing the proportionality of the response.

In its *National Security Strategy*, first published in 2002, the Bush administration argued that traditional concepts of deterrence are inadequate in fighting against terrorists committed to wanton destruction and martyrdom. It therefore declared that it would expand its use of pre-emptive force beyond traditional ideas of an imminent attack. As declared in the Strategy:

The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time

¹⁹⁶ *Ibid.*

¹⁹⁷ See Evron, *supra* note 176.

and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.¹⁹⁸

Some writers have also suggested a different model of self-defence for the struggle against terrorism.¹⁹⁹ This would widen the goals of using force against suspected terrorists, thereby necessarily widening the notions of proportionality.

The Bush administration's declaration was widely criticized and was not repeated in the *National Security Strategy* published in 2010 by the Obama administration.²⁰⁰ Other suggestions to widen the scope of self-defence when it comes to terrorism are not likely to gain recognition by states that are not especially affected by terrorist attacks. It seems to me that the present position, when taken to include the right to use force both against imminent attacks and against non-state actors whose host state is unwilling or unable to take action to curb their activities, is probably still the best balance we can find between the need to contain the use of force by states while allowing some recourse to the unilateral use of force in self-defence.

C Assessing Proportionality

The discussion so far has been based on the premise that the first step in gauging proportionality must be to determine the legitimate ends of using force in the particular case. The force used must then be judged by whether it was necessary to achieve those ends. We can certainly conclude that force that was not necessary to achieve legitimate ends will be regarded as disproportionate. As Olivier Corten writes:

What is a disproportionate measure if not a measure that goes beyond what its purpose requires, that is, which is not necessary for the pursuit of that same purpose?²⁰¹

This does not imply, however, that the use of force that is necessary to achieve those ends is *ipse facto* proportionate. Two questions arise in relation to such force. The first relates to the meaning of 'necessary' in this context; the second to weighing the harm caused by necessary measures against their concededly legitimate ends.

The means-end test of proportionality is used in other legal contexts, among which are the legitimacy of restrictions on protected liberties and the legality of administrative action that affects the interests of the individual. In these contexts proportionality is widely reviewed by the three-pronged test that was first developed in German administrative law and was later adopted in other legal systems, including those of Canada and Israel, as the test for examining the proportionality of limitations on protected rights.²⁰² When used in this last context the test involves three questions:

¹⁹⁸ White House, *The National Security Strategy of the United States of America*, Sept. 2002, at 15, available at: www.globalsecurity.org/military/library/policy/national/nss-020920.htm (last accessed 2 Mar. 2011).

¹⁹⁹ See, e.g., Bonafede, *supra* note 124; Doyle, *supra* note 13.

²⁰⁰ White House, *National Security Strategy*, May 2010, available at: www.cfr.org/defensehomeland-security/national-security-strategy-2010/p22232 (last accessed 2 Mar. 2011). Malcolm Shaw notes that '[i]n so far as it goes beyond the *Caroline* criteria, this doctrine of pre-emption must be seen as going beyond what is currently acceptable in international law': Shaw, *supra* note 33, at 1140.

²⁰¹ Corten, *supra* note 13, at 488.

²⁰² In German law proportionality is known as *Verhältnismäßigkeit*. For a comprehensive discussion of the doctrine as it developed in German law and spread to other legal systems see Barak, *supra* note 18.

- a. whether the restriction serves to achieve the legitimate ends;
- b. whether those ends could be achieved by less restrictive means; and
- c. whether the harm to the protected right caused by the restriction outweighs its benefits.

The first two questions both relate to aspects of what may be regarded as 'necessary', but it is important to appreciate the difference between them. The first question relates to the *functional* aspect of the restriction: was it necessary in the sense that it *could* achieve the legitimate ends? As often phrased in jurisprudence on human rights: was there a rational connection between the means and the ends, or were those means suited to the ends? The second question relates to the *comparative* aspect of the restriction: was it necessary in the sense that no less drastic means were available for achieving the same ends?

In *jus ad bellum* it seems to me that the term 'necessary' is used in both ways. When asking whether the very resort to self-defence was necessary, the question is whether there were non-forcible means of dealing with the armed attack.²⁰³ Once there has been a resort to force, many, but not all, experts argue that a second necessity test arises: were the means used by the state acting in self-defence necessary to achieve the legitimate ends of self-defence in the specific context?²⁰⁴ This question is usually answered by the first test of what is necessary, namely by asking whether there is a rational connection between the force used and the legitimate ends of its use.²⁰⁵ There are, however, many cases in which reference is made to use of 'excessive force'.²⁰⁶ It is not clear whether the implications are that the same legitimate ends could have been

²⁰³ Dinstein, *supra* note 16, at 184; Lubell, *supra* note 19, at 43–48. Also see Corten, *supra* note 13, at 479–483, who shows that this does not mean that a state resorting to force in self-defence has to show that it has exhausted all available non-forcible means. It would seem that it only must show that it made a reasonable attempt to defend itself by non-forcible means before resorting to force. As we have seen, the duty to try non-forcible means before resorting to force will be relevant only when dealing with an imminent or completed attack, as when the attack is ongoing. Use of counter-force by the victim state would seem to be clearly necessary: Dinstein, *supra* note 16, at 207; Lubell, *supra* note 19, at 43.

²⁰⁴ The prime proponent of this view is Greenwood, *supra* note 155. Cf. Dinstein, *supra* note 16, at 210–221, and Rodin, *supra* note 22, at 112. Rodin argues that in international law 'the test of necessity is applied only to the commencement of a conflict, not throughout the war. A state fighting a legitimate defensive war is not required in law to cease hostilities when it has vindicated its rights.'

²⁰⁵ See, e.g., the *Armed Activities in the Congo* case, *supra* note 50, at para. 147. The ICJ stated that the taking by Uganda of airports and towns hundreds of kilometres from its border with DRC where the claimed armed attacks had occurred was neither proportionate nor necessary to the end of defending itself against those attacks. In the *Oil Platforms* case, *supra* note 6, at para. 76, the ICJ stated that the attack by the US on the oil platforms was not necessary since it had not proved that these platforms had any military function. The UN Commission of Inquiry on Lebanon found that many of the attacks by Israel were unlawful as the targets 'do not normally contribute to defeating the enemy'. They therefore did not meet the demand of necessity: *Report of the Commission of Inquiry on Lebanon*, 23 Nov. 2006, UN Doc A/HRC/3/2, at para. 315.

²⁰⁶ See Gardam, *supra* note 9, at 166–167, in which she refers to the scale of force used by the US in its 1989 invasion of Panama (leaving aside the question whether there was an armed attack that justified using force in self-defence). In reacting to Israel's military action in Lebanon in 2006, the representatives of many states referred to use of excessive force: see, e.g., the statements before the SC of Argentina and Algeria cited in Ronen, *supra* note 46, at 390, n. 171.

achieved by less force, or whether the reference is to the final peg of the three-pronged test. I turn to that peg now.

Surprising as it may seem, while the question whether the harm caused was excessive in relation to the benefits is the very essence of the proportionality means-end test,²⁰⁷ this aspect of proportionality in *jus ad bellum* has received very little attention. Discussions of proportionality in this context have dwelt more on the necessity issues discussed above, and especially on the first of these issues, namely whether the force used had a rational connection to the legitimate ends of using force. There are probably a number of reasons for this. Assessing whether the costs outweighed the benefits, sometimes referred to as ‘narrow proportionality’, is possibly the most difficult question to answer, as it involves comparing values that are not quantifiable. This is an inherent problem in gauging proportionality, which has been widely discussed in the context of proportionality in *jus in bello*. Both the ICJ and commentators may well have found it easier to deal with the necessity issues than get to grips with this inherently difficult issue.

As proportionality in the narrow sense plays an important role in *jus in bello*, it was perhaps considered unnecessary to discuss the question in the context of *jus ad bellum*. Some commentators hold that the damage caused by the use of force is only relevant in *jus in bello*.²⁰⁸ It should be appreciated, however, that the questions in the two contexts are somewhat different. While the question in *jus in bello* relates to attacks on specific targets, in *jus ad bellum* the question relates to the whole picture. Use of force could conceivably be disproportionate under *jus ad bellum* even if all specific attacks met the demands of proportionality in *jus in bello*. The *jus in bello* test refers to collateral damage to civilians or civilian objects which are not in themselves legitimate targets, whereas the *jus ad bellum* test includes (but is certainly not confined to) damage to combatants and military objects.²⁰⁹ Finally, in *jus in bello* the question relates to the *expected collateral damage* and the *anticipated* military advantage. In *jus ad bellum* the question refers to the *actual* damage caused by the means used to pursue the legitimate ends of military force.²¹⁰ It is therefore necessarily based on an approach that calls for constant assessment of the marginal benefits and costs of force used to pursue those ends.²¹¹

Issues of ‘narrow proportionality’ in *jus ad bellum* have not been subjected to much academic analysis, and the impression is that many experts assume that whether the

²⁰⁷ See Rodin, *supra* note 22, at 115.

²⁰⁸ See Ronen, *supra* note 46, and Zimmermann, ‘The Second Lebanon War: Jus ad bellum, jus in bello and the Issue of Proportionality’, *Max Planck Yrbk of United Nations Law* (2007), xi, at 99. In discussing the Israeli military campaign in Lebanon in 2006 both of these writers regard the issue of the damage caused as one only of *jus in bello*.

²⁰⁹ Gardam, *supra* note 9.

²¹⁰ It should be pointed out, however, that a question of proof will often arise. On whom lies the burden of proving that the military action was proportionate (or disproportionate)? If the burden is on the state which uses the force it has been suggested that what the military planners and commanders knew at the time of making their decisions on use of force will be relevant in proving proportionality: Zimmerman, *supra* note 208, at 125.

²¹¹ Greenwood, *supra* note 155.

means were necessary to achieve the legitimate ends is the be-all and end-all of proportionality in *jus ad bellum*.²¹² However, in the reaction of states and commentators to specific cases of force used in self-defence, the damage caused plays a major role in descriptions of the force as disproportionate. Thus, in their criticism of Israel's use of force in Lebanon in the summer of 2006 as being disproportionate, many states referred to the extensive damage caused to civilians and to infrastructure.²¹³ In his analysis of this same case, Enzo Cannizzaro also mentions the threat to and harm sustained by civilians as one of the three factors which explained why Israel's use of force was regarded as disproportionate.²¹⁴ The problem in such statements 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. It is perhaps inevitable that such an analysis is likely to be biased. The states using force will invariably tend to give undue weight to the contribution of the force used to achieving their 'war aims', while outside observers will tend to see the concrete damage caused as the determining factor. Courts and other decision-making bodies do not seem equipped to decide between the conflicting perspectives.

D Proportionality and Israel's Campaign in Lebanon

I began this article by citing the widely differing approaches to whether Israel's campaign in Lebanon was compatible with proportionality in *jus ad bellum*. I have no intention of answering that specific question here. But I shall end by using four analyses of that question to illustrate the arguments employed here.

In his assessment of Israel's military campaign, Enzo Cannizzaro mentions three reasons for his conclusion that the campaign did not meet the demands of proportionality in *jus ad bellum*: the scale of the action, which exceeded the force necessary to repel the attack; that attacks were made on infrastructures hundreds of miles from the area in which the armed attack took place, and 'were therefore unrelated to the defensive objective of the action'; and 'the threat and harm sustained by civilians'.²¹⁵

The first two reasons provided by Cannizzaro are clearly determined by his view that the only legitimate ends of using force were to repel the specific armed attack that took place on 12 July. The force used by Israel was not necessary to achieve these ends and was therefore disproportionate. This view is problematical on at least three levels.²¹⁶ In the first place, by the time Israel could respond the armed attack was over. Repelling that attack was no longer on the cards, and use of force could only have

²¹² See the authorities cited in *supra* note 208; Lubell, *supra* note 19, at 63–68.

²¹³ Ronen, *supra* note 46, at 390, n. 171.

²¹⁴ Cannizzaro, *supra* note 15, at 784. The other two factors were based on the assessment that the force used was unnecessary since the only legitimate ends were halting and repelling the attack.

²¹⁵ *Ibid.*

²¹⁶ I shall not deal with the factual level. The UN Commission of Inquiry held that the conflict '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': *Report of Commission of Inquiry*, *supra* note 205, at para. 40.

been forward-looking. Secondly, as we have seen above, the notion that halting and repelling an armed attack is the *only* legitimate aim of using force in self-defence is not widely accepted. Most experts concede that the victim state may use force to prevent reasonably foreseeable future attacks. Thus the legitimate ‘defensive objective of the action’ was not dealing solely with the armed attack that had taken place on 12 July, but with the reasonably foreseeable threat posed by Hezbollah. If this were a legitimate objective, it is difficult to see why destroying long-range missiles of the Hezbollah aimed at various points in Israel and control centres of the Hezbollah was unrelated to the ‘defensive objective of the action’. Finally, Cannizzaro ignores the dynamics of the situation. As Wrachford, whose analysis is reviewed below, stresses, the Israeli forcible response to the attack resulted in a counter-response that involved massive bombardment of Israeli territory with rockets and missiles. This cannot be ignored when assessing the necessity of action taken to weaken the military capacity of Hezbollah.

Cannizzaro’s last point really does raise a question of ‘narrow proportionality’, which, as we have seen, is regarded by some as being a question only for *jus in bello*. If one accepts that ‘narrow proportionality’ is indeed part of the calculation in *jus ad bellum*, Cannizzaro’s argument cannot be dismissed that easily. The problem is, however, that it provides only one side of the equation. Just as mentioning the military benefits of action cannot answer the question of narrow proportionality unless account is also taken of the damage caused by that action, citing the damage caused cannot by itself answer the question. We have to know what the gains were in terms of the legitimate ends of using force – in this case reducing the threat of future attacks by Hezbollah. Given his approach that the only legitimate aim was halting and repelling the initial armed attack, it is not surprising that Cannizzaro simply ignores this issue.

In his analysis of the same military campaign Andreas Zimmermann is far less sure that Israel’s use of force was disproportionate. Zimmermann’s starting point is that proportionality in *jus ad bellum* is determined by the nature and scope of the armed attack and how in the specific circumstances that attack could be repelled. In judging that question Zimmermann takes into account the dynamics of the conflict that ensued and opines that much depends on factual questions, such as the control and command structure of the aggressor. Applying this approach, Zimmermann concedes that attacking Hezbollah control centres in the Lebanese *hinterland* met the test of proportionality even if the armed attack that provoked the Israeli response ‘only originated from a limited territory adjacent to the territory of the attacked state’.²¹⁷ He also accepts that the longer the attacks by Hezbollah on Israel continued, the wider the measures of self-defence could be, provided that such wider measures were necessary to stop those attacks. In the context of *jus ad bellum* Zimmermann does not mention the damage caused to civilians and infrastructure, which he regards as matters to be considered as part of *jus in bello*.

In her discussion of the Lebanon campaign Yael Ronen quite rightly points out that proportionality depends on whether the right to self-defence is restricted to repelling an ongoing attack or includes the prevention of future attacks.²¹⁸ She discusses the

²¹⁷ Zimmermann, *supra* note 208, at 123.

²¹⁸ Ronen, *supra* note 46.

requirements of proportionality under both theories, and after analysing the various goals Israeli decision-makers mentioned, voices the opinion that even if Israel was entitled to use force to prevent future attacks, it could not use such force as a general deterrent to enforce SC Resolution 1559 that called for the disbandment of all militias in Lebanon, or to prevent Hezbollah from 'establishing itself' as a regional provocateur'. To the extent that force was used to further these objectives it was disproportionate. Like Zimmermann, Ronen tends to think that the question of the damage caused to civilians and to infrastructure is a *jus in bello* rather than a *jus ad bellum* question.

Jason S. Wrachford takes a different line. He argues that as Israel's initial response to the armed attack was met by a massive Hezbollah rocket and missile bombardment of Israel, the situation deteriorated into a large-scale armed conflict. Following Dinstein's approach which was discussed above, Wrachford holds that in such a situation proportionality has no place in *jus ad bellum* and should only be judged by norms of *jus in bello*. Nevertheless, Wrachford opines that the proportionality of force was problematical for two reasons. In the first place, it seems that Israel's intent was both punitive and deterrent, and while

proportionality may very well have some notion of deterrence, and possibly even some aspect of punishment to it, deterrence and punishment should not be the ultimate purpose for continued use of armed force. This would turn the military action into more of a reprisal, rather than an act of self-defence.²¹⁹

Secondly, while Israel was justified in taking some action against Lebanon, its 'extensive actions against Lebanon itself were simply not proportional in response to Lebanon's failure to control Hezbollah'.²²⁰ It is not at all clear on what Wrachford bases this statement. Given his view that Lebanon could not be held responsible for the Hezbollah attack on Israel, the conclusion should have been that any action against Lebanon itself (as opposed to action directed solely at Hezbollah) was unlawful. Hence proportionality should have been irrelevant. But, even assuming that some notion of proportionality was indeed relevant in assessing Israel's actions against Lebanon itself, what test of proportionality is Wrachford using here? That the same result could have been achieved by less force? Or some kind of 'just desserts' notion of proportionality?

Examining the above analyses reveals that, when it comes down to it, the real division of opinion on proportionality in *jus ad bellum* relates to the legitimate ends of using force in given circumstances. Common to all the analyses is that the forcible measures used in self-defence must serve legitimate ends. Use of force that seems to be largely punitive, the primary motive of which is deterrence or which has wide political aims will be regarded as disproportionate. Beyond that consensus, the differing views reflect the various theories on the legitimate ends of using force in self-defence, and their applicability in this specific case. Cannizzaro, a strict 'halting and repelling' proponent, ignores both the dynamics of the situation and threats of future attacks by the same enemy, and assesses whether the force used by the victim state was necessary to halt and repel the original armed attack that occurred. Zimmermann, taking a wider

²¹⁹ Wrachford, *supra* note 173, at 88.

²²⁰ *Ibid.*

view of the ‘halting and repelling’ theory, considers both the nature of the enemy’s control structure and the dynamics of the conflict as it develops, but still examines the force in the light of armed attacks which have occurred, and not in the light of future threats. Ronen accepts that preventing reasonably foreseeable future attacks is a legitimate end, and that force that was necessary to pursue this end was proportionate. She stresses that wider political aims are not legitimate and that force to achieve such aims was disproportionate. Wrachford’s analysis reflects the Dinstein version of the trigger theory: once a wide-scale armed conflict ensues, proportionality in *jus ad bellum* is no longer relevant.

It is worth noting that only one of the four experts considers that the damage caused is a *jus ad bellum* question. According to the majority view among these commentators proportionality in *jus ad bellum* is not really proportionality at all, but purely a question of whether the force was necessary to achieve the legitimate ends of using force in self-defence.

5 Concluding Comments

Proportionality is invariably an elusive concept. It becomes even more so when used in a context which is as highly loaded as the right of a state to use force in self-defence. Nevertheless, to paraphrase the Duchess in *Alice’s Adventures in Wonderland*, everything has a meaning, ‘if only you can find it’.²²¹

One source of confusion over the meaning of the principle of proportionality in *jus ad bellum* lies in the natural and popular tendency to assume that proportionality must imply some notion of ‘tit for tat’. I have argued, however, that the main source of disagreement and confusion flows from the lack of consensus over the legitimate ends of force employed by a state that is exercising its inherent right to self-defence. Even when it is accepted that the appropriate test of proportionality is a ‘means-end’ test, in the absence of agreement on these ends it is obviously impossible to agree on the necessary means to achieve them. It is also impossible to apply the ‘narrow proportionality’ test that can enter the picture only once a determination has been made that the means used were indeed necessary to achieve a legitimate war aim.

In stressing the lack of consensus on the legitimate ends of force in self-defence it may seem to the reader that I have merely replaced one area of uncertainty and indeterminacy with another. Rather than over whether force used in response to an armed attack was proportionate, the argument will relate to the legitimate ends of using that force and whether the means used were indeed necessary to achieve those ends. That may well be the case. But at least we will then know what it is we are arguing about.

²²¹ Lewis Carroll, *Alice’s Adventures in Wonderland* (1865), chap. 9: ‘[t]ut, tut, child!’ said the Duchess. ‘Everything’s got a moral, if only you can find it.’