Institute for International
Law and Justice

IILJ International Legal Theory Colloquium Spring 2011
Convened by Professor Joseph Weiler

Wednesdays 2pm-3:50pm on dates shown

NYU Law School
Vanderbilt Hall 208, 40 Washington Square South
(unless otherwise noted)

SCHEDULE OF SESSIONS:

February 9 Yitzhak Benbaji, *Bar-Ilan University*
"The Moral Power of Soldiers to Undertake the Duty of Obedience"

February 16 Michael Walzer, *Institute for Advanced Study in Princeton / Tikvah and Straus Fellow at NYU School of Law*
"Can the Good Guys Win"

February 23 No Colloquium

March 2 Doreen Lustig, *NYU School of Law*
"Doing Business, Fighting a War: Non-State Actors and the Non State: the Industrialist Cases at Nuremberg"

March 9 Gabriella Blum, *Harvard Law School / Tikvah Fellow at NYU School of Law*
"States' Crime and Punishment"

March 16 No Colloquium – SPRING BREAK

March 23 Matthew C. Waxman, *Columbia Law School*
"Regulating Resort to Force: Form and Substance of the UN Charter Regime"

March 30 Paul Kahn, *Yale Law School*
"Imagining Warfare, or I know It When I See It"

April 6 David Kretzmer, *Hebrew University of Jerusalem and Academic Center of Law and Business, Ramat Gan*
"The Inherent Right to Self-Defense and Proportionality in Ius ad Bellum"

April 13 Andreas Zimmermann, *University of Potsdam,* and Philip Alston, *NYU School of Law*
"Enforcing International Humanitarian Law in Asymmetric Armed Conflicts - the Case of Gaza"

April 20 No Colloquium

April 27 J.H.H. Weiler, *NYU School of Law*
"Not So Quiet on the Western Front: Reflections on the Bellicose Debate Concerning
the Distinction between Ius ad Bellum and Ius in Bello"

The Inherent Right to Self-Defense and Proportionality in *Ius Ad Bellum*

David Kretzmer*

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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'. Professor Alvarez discussed legal aspects of the Israeli military campaign against the Hezbollah in Lebanon, which had taken place in July and August of that year and related specifically to questions of proportionality, mainly in *ius in bello*.[1] In the same Newsletter five international lawyers, all members of the Executive Council of the ASIL, were asked how they would analyze 'the recent conflict between Israel and Hezbollah in terms of the *jus ad bellum* and *jus in bello* rules requiring necessity and proportionality'.[2] The answers of these lawyers provide telling evidence (if needed) of the utter confusion and lack of fundamental agreement that exists regarding proportionality (P) in *ius ad bellum*. One of the respondents thought that in *ius ad bellum* proportionality only played a part 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-defense that met the demands of proportionality.[6]

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* Hebrew University of Jerusalem. The writer would like to thank Efrat Bouganim and Liron Odiz for their research assistance and helpful comments.

[1]The American Society of International Law, *Newsletter*, Vol. 22, Issue 5, September/October 2006, 1.

[2] Ibid., 5.

[3] Reply of the late Professor Thomas M. Franck, ibid.

[4] Ibid.

[5] Reply of Professor Douglass W. Cassel, Jnr, ibid.

[6] Reply of Attorney William H. Taft, IV, ibid., 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 on behalf of the US in the *Oil Platforms case* (*Islamic Republic of Iran* v. *United States of America*). The other two respondents, Professors Richard Falk and Michael Scharf, did not present a view of the test of proportionality in *ius ad bellum.*

All are agreed that the proportionality principle plays a central role both in *ius in bello* and *ius ad bellum*. In *ius 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 not quantifiable rather than in the meaning of the principle itself. As the above exchange reveals, in *ius 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] Prevailing standards of international law also consider the legality of resort to force in self-defense to be dependent, inter alia, on the necessity and proportionality of that force.[10] While necessity is generally taken to judge whether the resort to force rather than non-

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[7] Article 51 para. 5 (b) of Protocol Additional to the Geneva Conventions of 12 August 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 *ius in bello*. See International Committee of the Red Cross, *Customary International Humanitarian Law,* by Jean-Marie Henckaerts and Louise Doswald-Beck (CUP, 2005), Vol. I: Rules, 46-50.

[8] *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, available at http://www.icty.org/sid/10052 (accessed 27 January 2011), at para 48: 'It is much easier to formulate the principle of proportionality in general terms than it is to apply it to 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 Howard M. Hensel (editor), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (Ashgate 2008), chapter 1; Bruno Coppieters and Nick Fotion (editors), *Moral Constraints on War* (Lexington, 2002), 13; Michael Walzer, *Arguing about War* (Yale University Press, 2004), 86; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP, 2004), 8-9; Thomas M. Franck, 'On Proportionality of Countermeasures in International Law', (2008) 102 *AJIL* 715, 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: http://www.msnbc.msn.com/id/34360743/ns/politics-white_house/ (accessed 30 January 2011). And see Stephen L. Carter, *The Violence of Peace: America's Wars in the Age of Obama* (Beast Books, 2011)

[10] International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *U.S.A.*), [1986] ICJ. Rep 94, para. 176; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226, para. 41; Yoram Dinstein, *War, Aggression and Self-Defense*, 3rd ed., (CUP, 2001), 183-185; Christine Gray, *International Law and the Use of Force*, 3rd ed., (OUP, 2008) 150; Gardam (n. 9), 1-4; Ian Brownlie, *International Law and the Use of Force by States* (OUP. 1963) 261; Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart, 2010), 470-494.

forcible measures was justified, proportionality relates to an assessment of the force employed.[11]

In traditional just war theory proportionality was based on an assessment of the anticipated goods of waging war in relation to its harms.[12] But amongst contemporary moral philosophers and international lawyers, beyond accepting that states resorting to force must comply with the demands of proportionality, there is 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.[13] As Thomas Franck put it: 'proportionality is relevant to determining whether there is any *right*, in the specific context of a provocation, to use military force in self-defense or only a right to take more limited counter-measure (*jus ad bellum*).'[14] 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.[15] Yet others, probably the majority, argue that proportionality must be judged against the legitimate ends of using force[16] or in relation to the threat.[17] Antonio Cassese argues that the force used must be judged both against the legitimate ends and the attack against which it is responding.[18] Finally, Yoram Dinstein suggests that '[i]t is perhaps best to consider the demand for proportionality in the province of self-defense as a standard of reasonableness in response to force by counter-force.'[19]

The object of this paper is to explore the meaning of proportionality in *ius ad bellum*. 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 criminal

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[11] Roberto Ago, Special Rapporteur to the International Law Commission, *Eighth Report on State Responsibility*, (1980) *ILC Yearbook*, Vol. II, I, 13, para. 120-21, UN Doc. A/CN.4/318/ADD.5-7; Dinstein (n.10), 184;

[12] Michael W. Brough, John W. Lango and Harry van der Linden, *Rethinking the Just War Tradition* (SUNY Press, 2007), 245-246. On the basis of this comparison there is disagreement whether 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.'

[13] See Nick Fotion, 'Proportionality' in Coppieters and Folton (n.9), 91-98; Franck (n. 9) 721;

[14] Ibid. Emphasis in original text.

[15] This approach is described by Arend and Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (Routledge, 1993), 165-166. And see A. Randelzhofer, 'Article 51', in B. Simma et al (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed, (OUP, 2002), 788, 805.

[16] Gardam (n. 9) 11; Corten (n. 9) 470; Enzo Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 *EJIL* 889.

[17] Brownlie (n. 10), 261.

[18] Antonio Cassese, *International Law*, 2nd ed., (OUP, 2005) 355: 'The 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 Enzo Cannizzaro, 'Contextualizing proportionality: *jus ad bellum* and *jus in bello* in the Lebanese War', (2006) 88 *International Review of the Red Cross* 779.

[19] Ago, (n. 11), para. 120; Dinstein (n. 10) 184.

punishment must be proportionate to the crime of which the criminal has been convicted.[20] 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 refers to the harm caused by restrictions on a protected liberty when weighed against the legitimate ends those restrictions are meant to serve.[21] In *ius in bello* proportionality serves to gauge whether the expected collateral damage to civilians or civilian objects is excessive in relation to the anticipated concrete and direct military advantage of an attack.[22]

b. In *ius ad bellum* P has traditionally been used in both of the above senses.[23] When judging armed reprisals the question is whether the force used in the reprisal is proportionate to the unlawful act that provoked the reprisal.[24] On the other hand, when placed in the context of a state defending itself against an armed attack, the question most often relates to whether the force used (the means) is proportionate to the legitimate ends of using that force (self-defense).[25]

c. In the post-Charter era unilateral use of force by states is limited to the case of self-defense. The rhetoric of international bodies and highly qualified publicists stresses that armed reprisals are no longer regarded as legitimate. Proportionality should therefore seemingly be based on an assessment of the force used in relation to its only legitimate ends, namely self-defense.[26] The problem is that there is no consensus on what those ends include. All accept that a state acting in self-defense 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-defense takes place after the attack has been carried out and completed, and there is no longer any 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-defense depends, inter alia, on necessity and proportionality. Necessity is generally taken to refer to the resort to force, rather than to non-forcible measures, while proportionality assesses the force used.[27] However, the term 'necessity' is also often used to assess whether the force used was necessary to achieve legitimate ends of self-defense. 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.[28]

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-defense were necessary to achieve to 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

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

[21] See Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Nevo, 2010) 169.

[22] See article 51, para. 5(b) of API.

[23] Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP, 2010), 64.

[24] Ago (n. 11), 69; Dinstein (n. 10), 197-199.

[25] Gardam (n. 9); Corten (n. 10); Walzer, *Just and Unjust Wars*, 3rd ed., (Basic Books, 1977), 120.

[26] David Rodin, *War and Self-Defense* (OUP, 2003), 115.

[27] Dinstein (n. 10), 207-10;

[28] Corten (n. 10), 488.

means available to achieve those ends. While in deciding whether forcible means should have been used the term 'necessary' is close to the latter meaning, once force is used the term usually has the former meaning.

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 above senses, they are then subjected to a 'narrow proportionality' test. This requires assessing whether the harm caused by those means outweighs the expected benefits. There is a difference of opinion whether this narrow proportionality test is relevant in *ius ad bellum*. Many experts assume that it is only relevant in *ius in bello*. If we adopt their view, proportionality in *ius ad bellum* boils down to assessing whether the forcible means used were necessary in light of the legitimate ends of self-defense 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. When a state has the right to use force in self-defense all its actions must comply with *ius in bello*.[29] This means, inter alia, that all hostile acts that a state commits when exercising its right to use force as a counter-measure must be compatible with the principle of proportionality in IHL. The demand for proportionality in *ius ad bellum* is an independent demand that is divorced from the question of whether the defending state complies with *ius in bello.* Use of force may be disproportionate under *ius ad bellum* even if all forcible measures are compatible with *ius in bello* in general, and the proportionality principle in *ius in bello* in particular.

h. Proportionality only arises in this, and other, contexts when the aim or ends pursued are legitimate. 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 *ius 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'.[30]

My argument in this paper is that the legitimate ends of using force in self-defense 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.[31]

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

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[29] *Nuclear Weapons case* (n. 10), para. 42; Dinstein (n. 10)

[30] *UNSC Res*. 687 adopted on April 3, 1991.

[31] For a similar argument regarding the proportionality of countermeasures in general see Cannizzaro (n. 16).

2. Use of force in international law

2.1 Charter Principles

To what extent international law prohibited use of force in the pre-Charter era of the twentieth century is a matter of debate.[32] But whatever the position may have been before adoption of the UN Charter, the principles on use of force since 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 unilateral use of force by states is the recognition in article 51 of their inherent right of individual or collective self-defense 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 self-defense against an armed attack are regarded as part of customary international law,[33] and have the status of *ius cogens*.[34]

Restricting the right of a state to use force to the case of self-defense would seem to be uncontroversial. When placed in the context of just war theory, the original basis for the principles of *ius ad bellum* in international law, it implies that the only just cause for war – and just cause is the fundamental notion of every just war theory – is self-defense or resistance of aggression. Even if there are other situations in which resort to armed force may be morally justifiable – humanitarian intervention is one, and possibly the only, example – use of such force should be based on a collective decision, made by the body representing all states that is responsible for maintaining and restoring international peace and security. 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-defense defined in article 51. Discussion of proportionality in use of force in self-defense requires consideration of these parameters. Before considering these parameters, I shall relate to a preliminary question that is highly pertinent to our discussion: is there any place for lawful use of force in the territory of another state that does not meet the requirements of article 51?

2.2 Article 51: the only exception to the prohibition in article 2 (4)?

A number of arguments have been made in order to allow for lawful use of force in self-defense that does not meet the fundamental requirement of article 51 – namely, occurrence of an armed attack. These rely either on the 'inherent right to

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[32] See Brownlie (n. 10); DW Bowett, *Self-Defense in International Law* (Praeger, 1958); Stanimir A. Alexandrov, *Self-Defense Against the Use of Force in International Law* (Kluwer, 1996).

[33] *Nicaragua* case (n. 10)

[34] Jochein Ab. Frowein, "Ius Cogens" in *Max Planck Encyclopedia of Public International Law,* Available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1437&recno=1&searchType=Quick&query=ius+cogens (accessed 1 February 2011); Corten (n. 10) 200-213; Dinstein (n. 10), 86-98; Ago, (n. 11) para. 58.

self-defense' recognized in article 51, or on a restrictive interpretation of the type of force that constitutes a violation of article 2 (4).

Article 51 refers to the 'inherent right of individual or collective self-defense'. The argument that there may be place for lawful use of force in self-defense by a state that is not covered by article 51 rests on the idea that the Charter recognized the existing right to self-defense in international law and did not attempt to curb that right. Article 51 merely serves to emphasize that the right of individual and collective self-defense may be exercised in the case of an armed attack against a state, without implying that this is the only case in which it may be exercised.[35] According to this view the boundaries of the right to use force in self-defense under customary international law are those articulated by US Secretary of State Daniel Webster in the correspondence following the famous *Caroline* incident.[36] Webster maintained that this right may be exercised when a state is faced with 'a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.'[37] Such a situation may exist even if an armed attack has not already occurred.

In his 1958 book *Self-Defense in International Law* Professor Derek Bowett argued that not every use of force in the territory of another state would involve violation of the territorial integrity or political independence of that state and would therefore not necessarily be a violation of the prohibition on the use of force in article 2 (4) of the Charter.[38] Bowett claimed that '[a]ction undertaken for the purpose of, and limited to, the defense of a state's political independence, territorial integrity, the lives and property of its nationals (and even to protect its economic independence) cannot by definition involve a threat or use of force 'against the territorial integrity of another state.'[39] This restrictive reading of article 2 (4) has gained some support from other scholars.[40]

Notwithstanding these views by highly qualified publicists the notion that there may be room for lawful use of force in the territory of another state that is not covered by the prohibition in article 2 (4) or that does not meet the requirements for use of force in self-defense under article 51 has been rejected by virtually all

[35] See C. H. M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", *Collected Courses***,** The Hague (1952-11). pp. 496-497: 'It would be a misreading of the whole intention of Article 51 to interpret it by mere implication as forbidding forcible self-defense in resistance to an illegal use of force not constituting an 'armed attack'.' ;Bowett (n. 32), 182 –193; Ago (n. 11), para. 110, n. 257, citing the different authors who adopt this view. Also see the *Nicaragua case* (n. 10), dissenting opinion of Judge Schwebel, paras. 172-3. In that case the Court itself ruled that article 51 had not replaced the customary law on self-defense. *Nicaragua case*, paras. 172-176. While there may be some differences between art. 51 and customary law the principles on use of force in the UN Charter 'correspond, in essentials, to those found in customary international law.' (ibid., para. 188).

[36] Malcolm N. Shaw, *International Law*, 6th edition (CUP, 2008), 1131.

[37] Note of Daniel Webster dated April 24, 1841, Available at: http://avalon.law.yale.edu/19th_century/br-1842d.asp#web2 (accessed 2 February 2011). For discussion of the relationship between the Caroline doctrine and customary international law see Gardam (n. 9), 148-50.

[38] Bowett (n. 32), 31-38, 182-186.

[39] Ibid.

[40] Paust, 'Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond', (2002) 35 *Cornell Int'l L. J.* 533

contemporary experts in international law.[41] The restrictive reading of article 2 (4) suggested by Bowett has been dismissed even by some scholars who argue that the customary right to self-defense is wider than the right mentioned in article 51, and that this right may have survived the Charter.[42] This latter view has been widely discredited. The assumption that Webster's famous statement reflected customary law when it was made, and more pertinently when the Charter was adopted, has been challenged;[43] the notion that article 51 does not refer to the exclusive case in which a state may invoke the individual or collective right of self-defense is said to be clearly incompatible with the language of that article;[44] and restriction of the right to unilateral resort to force to the case of an armed attack occurring is claimed to be a logical outcome of the object and purpose of the Charter, which are to replace unilateral use of force with a system of collective security.[45]

In summary: views that there remain grounds for lawful unilateral use of force by states that are not covered by the prohibition on use of force in article 2 (4) and its exception in article 51 have gained little credence. The assumption of any analysis of *ius ad bellum* in contemporary international law must therefore rest on the premise that self-defense against an armed attack is the only available legal justification for use of force in the territory of another state. And indeed this would seem to be recognized by states, which resort to force in cases that seemingly do not fit into this scheme. Such states consistently cite their right to self-defense under article 51 of the Charter as the legal justification for their actions.[46]

2.3. The boundaries of article 51

Restricting the right of a state to resort to force in self-defense 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-defense must meet demands of immediacy, necessity and proportionality. Immediacy requires that there should not be an undue time-lag between the armed attack and the use of force in self-defense.[47] Necessity in this context means that the victim state should not resort to force in self-defense if

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[41] For an early attack on the views of Bowett see Brownlie (n. 10). Brownlie takes issue not only with the view that a right in customary law to use force in self-defense in situations that do not meet the requirements of article 51 has survived the Charter, but also with the view that customary international law as it stood when the Charter was adopted allowed use of force in cases not covered by article 51: Ibid., 231-80. This view is shared by Ago (n. 11), para. 114. Also see Oscar Schachter, 'International Law: The Right of States to Use Armed Force', (1984) 82 *Mich. L. Rev.* 1620; Dinstein (n. 10) 167-8; Corten (n. 10), 198-248; Lubell (n. 23), 67-80; Gardam (n. 9), 141-42; Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (CUP, 2002), 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. However, it was argued that '[u]nder 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.'

[42] Shaw (n. 36), at1127 who notes that weight of opinion supports the wider view.

[43] See Brownlie (n. 10); Corten (n. 10)

[44] Dinstein (n. 10); Corten (n.10) ; Christian J. Tams, 'Light Treatment of a Complext Problem: The Law of Self-Defense in the *Wall* Case', (2006) 16 *EJIL* 963.

; Michael Bothe, 'Terrorism and the Legality of Pre-emptive Force' (2003) 14 *EJIL* 227.

[45] Franck (n. 9), 3 and 45; Corten (n. 10); Cassese (n. 18), 361; Bothe, (n. 44)

[46] See the examples cited by Cassese (n. 18), 356-7;

[47] Dinstein (n. 10), 184

non-forcible measures to defend itself are available.[48] The term is also sometimes used to assess whether the forcible means used in self-defense were indeed needed to achieve that aim. As mentioned above and as I discuss below, when used in this sense, it has an affinity with proportionality.

Controversy has arisen over a number of issues relating both to the interpretation of Article 51 and to the question whether state practice and the attitude of the UN Security Council to use of force which is ostensibly incompatible with language of that provision have led to a widening of the right to resort to force not originally contemplated in the text itself.[49] I shall briefly discuss three controversial issues that are relevant to the discussion of proportionality: a. the scale of force required for use of force be considered an armed attack; b. whether an attack by non-state actors may be the kind of attack contemplated by article 51; c. whether preemptive use of force may ever be lawful.

2.3.1 Armed attack – the scale and effects of force required

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-defense is to be employed.[50] 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' ('d'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.[51] 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.'[52] However, when giving 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.[53] The Eritrea-Ethiopia Claims Commission also 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'.[54] Having heard evidence of 'geographically limited clashes between small Eritrean and Ethiopian patrols along a remote, unmarked, and disputed border', the

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[48] Ibid.

[49] See Franck (n. 41); Tams (n. 44) and the answer of Corten (n. 10). Professor Cassese leaves the question open, stating 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 articles 2.4 and 51 of the Charter]'. Cassese, (n. 18) 354.

[50] SR Ratner, 'Self-Defense Against Terrorists: The Meaning of Armed Attack' (2010) in Larissa van den Herik and Nico Schrijver (eds), *Counter-terrorism and international law: meeting the challenges*, forthcoming in 2011.

[51] Corten (n. 10), 403; Dinstein (n. 10), 174; Randelzhofer (n. 15), 790-91.

[52] Nicaragua case (n. 10) para 195.

[53] *Nicaragua* case (n. 10) para. 194. The *Oil Platforms(Islamic Republic of Iran vs. United Staes of America) ICJ Rep (2006),* para. 51.

[54] Eritrea Ethiopia Claims Commission, Partial Award, *Jus ad Bellum,* Ethiopia's Claims 1-8, The Hague 19 December 2005, para. 11, Available at: http://www.pca-cpa.org/showpage.asp?pag_id=1151 (accessed 3 February 2011)

Commission held these clashes were not of the magnitude required for use of force to be regarded as an armed attack.[55]

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-Defense* take the view that '[a]n armed attack means any use of armed force, and does not need to cross some threshold of intensity.'[56] This has also been the view taken by the US.[57]

While there is a lack of consensus whether the force has to meet a threshold of intensity or not, and what that threshold should be if required,[58] even according to those who demand a threshold, it is not very high.[59] 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-defense may range from a fairly restricted use of force, such as a border raid causing minimal loss or damage, to a full-scale invasion of its territory. This obviously has implications for the scale of force that may be used in self-defense.

In justifying use of force in response to cross-border attacks or bombings Israel has consistently relied on the 'accumulation of events theory'.[60] So have other

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[55] Ibid., 12.

[56] *Chatham House Principles of International Law on Use of Force in Self-Defense,* Available at: http://www.chathamhouse.org.uk/publications/papers/view/-/id/308 (accessed 3 February 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.

[57] Abraham D. Sofaer, 'Terrorism, the Law, and the National Defense', (1989) 126 MIL. L. REV. 89; Ratner (n. 50)

[58] Ratner (n. 50)

[59] See Michael N. Schmitt, 'Counter-Terrorism and the Use of Force in International Law', 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 (n. 18, 354), who refers to the right to use force in self-defense 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. These decisions do not refer to 'massive aggression' but to 'grave forms of the use of force'.

[60] Y. Ronen, 'Israel, Hizbollah and the Second Lebanon War', (2006) 9 *Yearbook of International Humanitarian Law* 362, 372. In her statement to the UN Security Council after Israel began its attack on Gaza in December, 2008, Israel's Permanent Representative relied expressly on Israel's right to self-defense under article 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 December 2008*, Available at: http://israel-un.mfa.gov.il/statements-at-the-united-nations/security-council/30-sitme311208 (accessed 9 February 2011).

states faced with a series of low-scale attacks.[61] 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-defense, but against the threat rising from the whole series.[62]

The 'accumulation of events theory' has generally received a cold reception in the UN Security Council.[63] 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'.[64]

While it is not possible to say that the accumulation of events theory has gained wide acceptance in the international community, there are 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. 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.'[65]

2.3.2 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-defense 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.[66] But what is the situation if the attack cannot be

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[61] See N. Ochoa-Ruiz and E. Salamanca-Aguado, 'Exploring the Limits of International Law relating to the Use of Force in Self-defense', (2005) 16 EJIL 499, 516 (describing US reliance on this theory in the *Oil Platforms* case), and Lubell (n. 23), 51 (describing UK reliance on theory in to justify use of force against Yemen).

[62] 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-defense, and helped to shape the appropriate response.' *Oil Platforms* case, Counter-Memorandum and Counter-Claim submitted by the United States of America, para. 4.10, Available at: http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=0a&case=90&code=op&p3=1 (accessed 9 February 2011). And see N. Ochoa-Ruiz and E. Salamanca-Aguado (n. 61) '; Lubell (n. 23) 53.

[63] Lubell,ibid, 51; Tams (n. 44), 370.; Bowett, (n. 32).

[64] *Oil Platforms* case (n. 53), para. 64: 'Even taken cumulatively…these incidents do not seem to the Court to constitute an armed attack on the United States'. Ratner (n. 50), regards this dictum, together with the reference in the *Nicaragua case* 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. *Congo*), ICJ Reports (2005), 53, 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 license to Uganda to exercise its right to self-defense against that state.

[65] Tams (n. 44), 388.

[66] 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., G Travalio and J Altenburg, 'State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility, and the Use of Military Force' (2003) 4 Chicago JIL 97; D Jinks, 'State Responsibility for Sponsorship of Terrorist and Insurgent Groups: State Responsibility for the Acts of Private Armed Groups' (2003) 4 Chicago JIL 83; D Brown, 'Use of Force against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses'(2003) 11 Cardozo JICL 1; JNB

imputed to a 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 a question that has given rise to more controversy than this. The controversy relates to the very nature of the Charter regime on the use of force and to the relationship between the prohibition on use of force in article 2 (4) and the right to use force in self-defense recognized in article 51. It raises the question of 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 the 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-defense under article 51 since it did not claim that the attacks which the barrier was designed to prevent were imputable to another state.[67] The implications were that only an armed attack by a state triggers the right to use force in self-defense under article 51.[68] Three judges on the Court saw fit to disassociate themselves from this view,[69] which has been subjected to scathing academic criticism.[70]

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,[71] who base rejection of this view on a variety of arguments: that article 51

Frank and J 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' (2003) 67 J Crim L 415; Schmitt, (59). 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 that 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 it in self-defense.

[67] ICJ, *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, 43 ILM (2004) 1009, at para. 139 (Hereinafter *Legal Consequences of the Wall*). In its later decision in *Armed Activities in the Congo*, the ICJ left open the question of 'whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces': ICJ, *Case Concerning Armed Activities in the Territory of the Congo* (*Democratic Republic of Congo* v. *Uganda*), para. 147.

[68] The Court also gave another reason for its rejection of Israel's reliance on self-defense: 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 *ius in bello* rather than *ius ad bellum*. This argument has some merit to it. See Iain Scobbie, 'Words My Mother Never Taught Me – "In Defense of the International Court"', (2005) 99 *AJIL* 76.

[69] *Legal Consequences of Construction of the Wall* (n. 67), Separate Opinion of Judge Higgins, paras. 33–34; Separate Opinion of Judge Kooijmans, paras. 35–36; Declaration of Judge Buergenthal, paras. 5–6.

[70] Ruth Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense', (2005) 99 AJIL 52, 56; Sean D. Murphy, 'Self-Defense and the Israeli *Wall* Advisory Opinion: An *Ipse Dixit* from the ICJ?', Ibid., 62; Christian J. Tams (n. 44).

[71] See, e.g., Dinstein (n. 10), 214; Cassese (n. 18), 355; Lubell (n. 23), 35; Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', (2003) 4 San Diego Int'l L.J. 7; Thomas Franck, 'Editorial Comments: Terrorism and the Right of Self-Defense', (2001) 94 *AJIL* 839; Paust (n. 40); Brown, 'Use of Force

does not refer to an armed attack by a state; that the inherent right to self-defense to which article 51 refers has always included the right to use force in defense 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-defense 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 defense 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 take effective measures to stop the attacks the victim state must have the right to use force in self-defense. 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 would seem to lend support to the argument that state practice today accepts that this right exists.[72]

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 use of force by one state against the territorial integrity or political independence as 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.[73]

It should be stressed that the debate does not refer to the question of 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 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. In his comprehensive study on the use of force Olivier Corten is adamant that the answer is negative. He claims that it is clear from the provisions of the Charter and of conventions against terror 'that no State can claim to carry out a military action in another State's territory on the sole pretext that it is merely riposting in 'self-defense' to terrorist acts conducted from that territory.'[74] After a comprehensive summary of all the arguments and evidence Corten opines that 'there is nothing to lead to the radical conclusion that self-defense, as it must be understood within the meaning of article 51 of the Charter, would henceforth allow military operations to be conducted in the territory of another State that was not guilty, through the scope of its support for a terrorist organization, of armed attack.'[75]

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against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses', (2003) 11 *Cardozo J Int'l& Comp L* 1; Stahn, 'Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism', (2003) 27 *Fletcher Forum World Aff.* 35; R. Müllerson, '*Jus Ad Bellum* and International Terrorism', (2002) 32 *Israel Yrbk on HR* 1; Schmitt (n. 59); Murphy (n. 70).

[72] See, e.g., Tom Ruys, 'Quo Vadit Ius ad Bellum? A Legal Analysis of Turkey's Military Operations Against the PKK in Northern Iraq', (2008) 10 *Melbourne J. Int'l L.* 334.

[73] See Ago (n. 11), ; Bothe (n. 44). The most extensive presentation of the case against recognizing attacks by non-state actors as armed attacks under article 51 is that of Corten (n. 10), 160-197

[74] Corten, ibid., 166.

[75] Ibid., 196.

Notwithstanding the statements of the ICJ in *Legal Consequences of Construction of the Wall,* and Corten's analysis, 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-defense both against the host state as well as 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 its attacks, the victim state must restrict its use of force to the non-state actors themselves.[76] What proportionality requires in this case will obviously depend on which form of self-defense is being exercised: self-defense against the state and the non-state actors in its territory, or self-defense solely against the non-state actors.[77]

2.3.3 Pre-emptive use of force

Article 51 of the Charter expressly limits the right to use self-defense 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 major strategic advantage. While there is evidence that in drawing up the Charter many states assumed that the inherent right to self-defense included the right to use force against an imminent attack if the conditions of the *Caroline* test were met,[78] 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.[79] In a system based on collective security, until such stage as an armed attack actually occurs states fearing aggression should place the responsibility of containing the situation on the Security Council, whose duty it is to maintain international peace and security. According to this logic, when a state faces an imminent attack it should not pre-empt the attack by using force; it 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

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[76] See Greenwood (n. 71); Dinstein (n. 10), 213-221, who terms such action 'extra-territorial law enforcement'; Lubell (n. 23), 36-42; Schmitt (n/59); Kimbery N. Trapp, 'Back to the basics: necessity, proportionality, and the right of self-defense against non-state terrorist actors', (2007) 56 I.C.L.Q. 141. Tams (n. 44), 378-81. Tams argues that the last twenty 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 terrorist's activities aiding and abetting them or complicity in the activities are regarded as sufficient (Tams, 385-6). 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 K.N. Trapp, 'The Use of Force against Terrorist: A Reply to Christian J. Tams', (2010) 20 EJIL 1049.

[77] Trapp, 'Back to basics', (n. 76)

[78] See Greenwood (n. 71), 12-13; Bowett (n. 32), 184-85. cf. Franck (n. 41), 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 (n. 10), 414 – 416.

[79] See Corten (n. 10); Bothe (n. 44).

assessments of likely developments in the future.[80] Allowing states to act on the basis of such assessment would open up the right to use force in self-defense to abuse.

The arguments for recognizing a right to anticipatory use of force in face of an imminent attack rely not only, or not mainly, on the meaning of the 'inherent right to self-defense' recognized in article 51, nor on the drafting history of this provision, but on the reality both of modern warfare and international politics.[81] 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. Similar arguments have been made in light of the threat from terrorist attacks.[82] 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,[83] it is widely (but certainly not 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

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[80] See Randelzhofer (n. 15), 803; Mary Ellen O'Connell, 'Lawful Self-Defense to Terrorism', (2002) 63 U.Pitt. L.Rev. 889, 895. O'Connell discusses the evidence needed to support the claim of a pending attack.

[81] The terminology used in distinguishing between force to thwart an imminent attack and force to preempt 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 country from mounting an attack in the future. Some authors prefer to distinguish between a pre-emptive attack and a preventive attack. A. D. Sofaer, *The Best Defense? Legitimacy of Preventive Force* (Hoover Institute Press, Stanford 2010) 9-10.

[82] A.C. Arend, 'International Law and the Preemptive Use of Military Force', (2003) 26 (2) *The Washington Quarterly* 89; C. J. Tams, 'The Use of Force against Terrorists', (2009) 20 *EJIL* 359

[83] In the *National Security Strategy of the United States* 2002 Available at: (<http://www.globalsecurity.org/military/library/policy/national/nss-020920.htm> (accessed 21 February 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/> (accessed 21 February 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 April 2004: 'It is therefore the Government's view that international law permits the use of force in self-defense against an imminent attack but does not authorize the use of force to mount a pre-emptive strike against a threat that is more remote.' HL Debates, Vol 660, Column 370 < Available at: http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/ 40421-07.htm#40421-07_head0> (accessed 31 October 2010).

means would deflect it and the action is proportionate.[84]

The Secretary-General adopted the same position in a report he published a year after release of the High Level Panel's report.[85]

Many experts accept the High Level Panel's view as reflective of the inherent right to self-defense recognized in article 51. Judith Gardam writes that a state may not use force to thwart an imminent attack 'if there were practical alternatives for removing the threat',[86] but that there is 'general accord that a forceful action will be legitimate …where there is overwhelming evidence of the intention 'to launch a devastating attack almost immediately'.'[87] The authors of *The Chatham House Principles of International Law on the Use of Force in Self-Defense* opine that 'the view that States have a right to act in self-defense in order to avert the threat of an *imminent* attack … is widely, though not universally, accepted. It is unrealistic in practice to suppose that self-defense must in all cases await an actual attack.'[88] Hence one of the *Chatham House Principles* is that '*Force may be used in self-defense only in relation to an 'armed attack' whether imminent or ongoing.'*[89]

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 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

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[84] *A more secure world: our shared responsibility*, Report of the High-level Panel on Threats, Challenges and Change, (2004) UN Doc. A/59/565, para. 188, Available at: www2.ohchr.org/English/bodies/hrcouncil/docs/gaA.59.565_En.pdf (accessed 9 February 2011) (emphasis in original text).

[85] *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General (2005) UN Doc A/59/2005, para. 124, Available at: www2.ohchr.org/English/bodies/hrcouncil/docs/gaA,59.2005_En.pdf (accessed 9 February 2011): 'Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.'

[86] Gardam (n. 9), 153. In his legal opinion of 7 March 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-defense, if other conditions (presumably necessity and proportionality) are met. The opinion is available at: www.irishtimes.com/newspaper/special/2005/iraq-advice/index.pdf (accessed 9 February 2011)

[87] Gardam, (n.9), 154, citing Brownlie (n. 10) 259. However, Brownlie only mentioned that it is possible under customary law that use of force might be a reaction proportionate to the danger. In discussing the rule since adoption of the Charter, Brownlie concluded 'that the view that Article 51 does not permit anticipatory action is correct and that the arguments to the contrary are either unconvincing or based on inconclusive evidence.' Ibid., 278. However, Brownlie was writing in 1963 and as Thomas Franck (n. 9) displayed, while the text of article 51 has remain unchanged state practice does not display that Brownlie's conclusion was accepted.

[88] Chatham House Principles (n. 56) 964.

[89] Ibid., 965. Other experts who accept this view include Schachter (n. 41);

occurred.[90] Yoram 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.[91]

While the majority of writers support the right to use force in anticipation of an imminent attack, there are still a few purists who argue that article 51 means exactly what is says, and only what it says: the right to use force in self-defense may be exercised only if an armed attack occurs. A leading spokesman for the purist view today is Corten, who attempts to debunk all the arguments of those who support any pre-emptive or preventive use of force, whether an armed attack is imminent or not.[92] In answering the policy arguments in favour of recognizing a right to anticipatory use of force in face of an imminent attack, Corten argues that the risk of abuse of a right to use force before an armed attack has actually occurred is greater than the real risk of annihilation faced by a state which is not allowed to thwart an imminent threat.[93] This view is shared by Cassese who writes that while the overwhelming majority of states firmly believe that anticipatory force is not allowed under the Charter, 'one may not conclude that there is universal agreement as to the illegality under the UN Charter of anticipatory self-defense.'[94] In these circumstances the matter should be decided by resort to the object and scope of Article 51. Like Corten he concludes that the risk of abuse of any exception to the demand of an armed attack actually occurring is greater than the risk posed by the unrealistic nature of a ban on use of force in face of an imminent attack. Cassese's solution is to stick to the legal prohibition on anticipatory self-defense, but to concede that when a breach of the prohibition may be justified on moral and political grounds it will be up to the international community to condone such a breach or to mete out lenient condemnation.[95]

Corten accepts that a total ban on use of force until the rockets have actually fallen in the territory of the victim state might seem detached from reality. He attempts to soften his stance by stressing that 'interceptive self-defense' is clearly acceptable. He then states the obvious – that a state may destroy a missile heading for its territory. Presumably, however, in his view the victim state may not take forcible action until the missile has actually been launched. As Corten himself writes, 'self-defense can only be implemented once the armed attack has materially begun.'[96] Experts who adopt such a position should not be surprised by the disparity between the law as they perceive it and the practice of especially affected states.

The question of whether a state may respond forcibly to thwart an imminent attack is clearly relevant when addressing the issue of proportionality and the related

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[90] Franck (n. 41) 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'.

[91] Dinsten (n. 10) 172. Dinstein's argument would seem to be consistent with the French version of article 51 which rather than an armed attack occurring refers to 'd'une agression armée' that could conceivably be said to begin before the first shot has been fired. Dinstein cites Waldock (n. 35) in support of this view. 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 (n. 10) 276.

[92] Corten (n. 10), 406– 443. Also see Bothe (n. 44)

[93] Corten, ibid., 412-3.

[94] Cassese (n. 18), 361.

[95] Ibid., 362

[96] Ibid., 414

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.[97] Furthermore, how does one assess proportionality between the force used and an attack that might (and might not) have taken place if the force had not been used?

My assumption in discussing proportionality will be that the view of the majority of experts is the preferred position. Following the *Caroline* test, when a state is faced with the threat of an armed attack which presents a 'necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment of deliberation' a state 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.[98]

3. The Meaning of Self-Defense

The assumption of article 51 is that when an armed attack actually occurs the victim state cannot be expected to sit by and wait for the Security Council to act. It may therefore use force in self-defense as an interim measure until the Security Council takes measures to restore peace and security.[99] The object of using force in self-defense in such a situation seems pretty clear: it is first and foremost to halt and repel the attack. If the enemy has invaded the victims state's territory self-defense obviously includes 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 the armed attack that occurred, but against the threats 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 forward-looking, rather than purely punitive, it may appear to be an example of pre-emptive use of force.

In this section I review the fundamental assumptions behind the right to self-defense 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-defense I shall first discuss the legality of armed reprisals and the distinction between such reprisals and actions in self-defense. Following this discussion I shall examine conceptions of the aims and scope of force

[97] Ago (n. 11) para 120.
[98] See Franck (n. 9); O'Connell (n. 80).
[99] See Belatchew Asrat, *Prohibition of Force Under the UN Charter: A Study of Art. 2(4),* (Iustus Forlag, 1991) 201– 211. David Rodin (n. 26) raises the important question relating to the very values protected under the notion of self-defense 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.

that may be used in self-defense when an armed attack occurs.

3.1 Armed reprisals

In the pre-Charter era armed reprisals were accepted as a lawful response to use of force against a state.[100] The essence of such reprisals is that they involve 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.[101]

If one thing is clear in the post-Charter era it is that 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.[102] 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.[103] In a 1966 Resolution relating to a complaint by Yemen regarding a British air attack on Yemeni territory, the Security Council declared that it '*Condemns* reprisals as incompatible with the purposes and principles of the United Nations'.[104] The Security Council included an identical condemnation in numerous resolutions relating to use of force by Israel in the territory of Arab countries.[105] 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'.[106] It included a similar statement in later resolutions.[107] In its *Draft 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.[108] This in itself does not

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[100] DW Bowett, 'Reprisals Involving Recourse to Armed Force' (1972) 66 AJIL 2; Brownlie (n. 10), 219-223; Alexandrov (n. 32), 15-18.

[101] Julia Pfeil, 'Naulilaa Arbitration (Portugal v. Germany)' (2007), Max *Planck Encyclopedia of Public International Law*

[102] 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, (n. 100)..

[103] For a thorough discussion of the various resolutions stressing the unlawfulness of armed reprisals see Bowett (n. 100); Roberto Barsotti, 'Armed Reprisals', in A. Cassese (ed.,) 'The Current Legal Regulation of the Use of Force' (Martinus Nijhoff, 1986), 79; William V. O'Brien, 'Reprisals, Deterrence and Self-Defense in Counterterror Operations', (1990) 30 Va. J. Int'l L. 421; Corten (n. 10), 234-236.

[104] UNSC Res. 188 (1964), UN Doc S/5650.

[105] See Bowett (n. 100); O'Brien (n. 103).

[106] UNGA Res. 2625 (XXV), UN Doc.

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

[108] Article 21 of the Draft states that 'the wrongfulness of an act is precluded if it constitutes a lawful measure of self-defense taken in conformity with the Charter of the United Nations. Article 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

imply that armed reprisals are prohibited.[109] 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.'[110]

While there is a wide degree of consensus that in principle 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 *ipse 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.[111] 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 was 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.[112] O'Brien also called for reconsideration of the prohibition on reprisals when it comes to counter-terror measures.[113] Since then the debate on the desirability of the prohibition of armed reprisals has continued.[114]

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-defense.

Commission, *Responsibility of States for Internationaly Wrong Acts,* 2001, Available at: http://untreaty.un.org/ilc/texts/9_6.htm (accessed 11 February 2011)

[109] See Dinstein (n. 10), 199

[110] International Law Commission, *Draft articles on Responsibility of States for Internationaly Wrong Acts with commentaries,* 2001, at 132, Available at: http://untreaty.un.org/ilc/texts/9_6.htm (accessed 11 February 2011)

[111] Bowett (n. 100)

[112] In an article published in 1986 Roberto Barsotti (n. 103) pointed out that the military operations conducted by Israel against neighboring Arab countries had formed 'the main nucleus of modern practice on armed reprisals.' (Ibid., 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 armed attacks were carried out. The most discussed of these were the attacks during the Reagan administration on targets in Lybia in 1986, and during the Clinton administration on targets in Sudan and Afghanistan in 1998. See Gregory Francis Intoccia, 'American Bombing of Libya: An International Legal Analysis', (1987) 19 Case W. Res. J. Int'l L. 177; David Turnof, 'The U.S. Raid on Libya: A Forceful Response to Terrorism', (1988) 14 Brook. J. Int'l L. 187; Leah M. Campbell, Comment, 'Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan', (2000) 74 Tul. L. Rev. 1067; Ryan C. Hendrickson, 'Article 51 and the Clinton Presidency: Military Strikes and the U.N Charter', (2001) 19 B.U. Int'l L. J. 207

[113] O'Brien (n. 103).

[114] See Philip A. Seymour, 'The Legitimacy Of Peacetime Reprisal as a Tool Against State Sponsored Terrorism', (1990) 39 Naval L. Rev 221. ; Michael J. Kelly, 'Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law', (2003) 13 J. Transnat'l L. & Pol'y 1.

Hence it is not that clear *why* armed reprisals are regarded as prohibited under the Charter regime.[115] 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.[116]

There are three conceivable reasons why 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-defense. 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.'[117]

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. Many of the cases condemned as unlawful reprisals by the Security Council related to military operations by Israel in Arab countries. The statements made by representatives of states in the Security Council debates that followed these operations reveal little consistency in the grounds cited for condemning those operations. One can find strong support for all of the above grounds in those debates.[118] Some writers have cited these grounds in explaining why a certain action was regarded as an illegitimate armed reprisal.[119]

b. *The punitive nature of the action*. This is the most widely cited basis for regarding use of force as an armed reprisal rather than a legitimate act in self-defense.[120] The notion here is that the aim of force used in self-defense 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

[115] See R.W. Tucker, 'Reprisals and Self-Defense: The Customary Law', (1972) 66 AJIL 586. Tucker questions whether armed reprisals and other acts of self-defense are really different and distinct forms of self-help.

[116] See Bowett (n. 100); O'Brien (n. 103) and Jean Combacau, 'The exception of self-defense in UN practice' in 'The Current Legal Regulation of the Use of Force' (n. 103), 9.

[117] Arend and Beck (n. 15), 42.

[118] See the detailed descriptions of the debates in Bowett (n. 100), Combacau (n. 116) and O'Brien (n. 103)

[119] See Corten (n. 10), 229-230. In discussing the prohibition on armed reprisals Corten takes issue with the dissenting view of Judge Simma in the *Oil Platforms* case that at times it may be legitimate to use force in response to an attack that does not meet the demands of an armed attack under article 51.

[120] See Bowett (n. 100); Alexandrov (n. 32), 166;

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-defense.'[121] The assumption behind this view is, of course, that the primary goal of using force in self-defense must be to ward off an ongoing or imminent armed attack.[122] 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, not every action carried out after the event will necessarily have a punitive aim. It might be aimed to prevent, rather than to deter, future attacks against the victim state. If such attacks are imminent the use of force might 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-defense recognized under article 51 of the Charter.[123] 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-defense" and "sanction" are reactions relevant to different moments and, above all, are distinct in logic. Besides, action in a situation of self-defense 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 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.[124]

The significance of the grounds for the prohibition on armed reprisals for the definition of 'self-defense', and consequently for the test of proportionality in *ius 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 use of force whose dominant aim is punitive and which is carried out after the armed attack has been completed. And indeed Yoram Dinstein, the one major publicist who supports a limited right to carry out what he terms 'defensive

[121] Combacau (n. 116), 27.
[122] See Kelly (n. 114)
[123] See Bowett (n. 100); Alexandrov, (n. 32), 15-18.
[124] Ago (n. 11), para. 90.

armed reprisals', stresses that such reprisals can only be justified if they are in response to an armed attack.[125]

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-defense is protective in nature. This fits well with the limitation in article 51 that this right may only be exercised '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.[126] 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 their timing. Ago argued strongly that proportionality of force used in self-defense must be assessed by the means-end test.[127] He regarded it as 'mistaken… to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct.'[128]

The differing perspectives on the distinction between illegitimate armed reprisals and lawful use of force in self-defense 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 taken in self-defense in response to a series of attacks on US and neutral shipping which the US attributed to Iran.[129] 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-defense 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.'[130] Mindful of the objection to use of force whose only object 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-defense 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-defense. Instead it is an unlawful armed reprisal or a punitive action.'[131] It added that use of force to deter future

[125] Dinstein (n. 10), 195. Dinstein's view is supported by Schachter (n. 41) and O'Brien (n. 103)
[126] See Combacau (n. 116)
[127] Ago (n. 11), para. 121.
[128] Ibid.
[129] For an excellent discussion of this case see Ochoa-Ruiz and Salamanca-Aguado (n. 61)
[130] ICJ, *Oil Platforms case, Counter-memorial and counter-claim submitted by the United States of America*, 23 June 1997, at 140, Available at: http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=0a&case=90&code=op&p3=1 (accessed on 13 February 2011).

[131] ICJ, *Oil Platforms case*, *Reply and Defense to Counter-claim submitted by the Islamic Republic of Iran*, Volume I, 10 March 1999, at 136 Available at ICJ site (n. 130).

attacks is not included in the right to self-defense, but constitutes unlawful pre-emptive use of force.[132]

In deciding the case the Court did not expressly choose between the two opposing views on the nature of forcible action allowed in self-defense and 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. It obviously followed that *any* use of force by the US against Iranian installations was unlawful. The Court did intimate, however, that in judging the response in self-defense to a limited armed attack, such as an attack on one vessel, the test of proportionality would be one that assesses the scale of the response in relation to that of the armed attack.[133]

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 use of force to qualify as an armed attack, and that there is therefore a range of possibilities open to the victim state in exercising its right to self-defense. These include both 'measures short war' and outright war.[134] 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. Such reprisals may not be based on 'purely punitive, non-defensive, motives', although some 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 end-means. 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.[135]

While some other writers have also expressed support for the idea that armed reprisals may, in certain circumstances, be legitimate measures of self-defense under article 51,[136] Dinstein himself concedes that his view does not reflect that of the majority of scholars.[137] The majority of writers take it as settled law that use of force following an armed attack that has been completed, and whose only object is deterrent rather than protective, will amount to an armed reprisal that is not a legitimate exercise of the

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[132] Ibid.

[133] ICJ, *Oil Platforms case* (n. 53), para. 77. The Court also conceded that an attack on one vessel could conceivably constitute an armed attack: Ibid.,

[134] In the pre-Charter period the distinction between 'war' and 'measures short of war' was well-accepted: Alexandrov (n. 32) at 29-34. With the change in conceptions after WWII 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.

[135] Dinstein (n. 10), 198.

[136] O'Brien (n. 103).

[137] Dinstein (n. 10), 199.

right to self-defense recognized under article 51 of the Charter.[138]

As stressed above, 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-defense 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 discotheque frequented by US military personnel.[139] While initial statements by President Reagan and senior officials gave the impression that the object of the attack had been retaliation and deterrence,[140] when the matter reached the UN Security Council the US Permanent Representative was careful to stress only the preventive aspects of the attack. He claimed that further attacks on American targets were being planned. 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-defense.[141]

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.[142] 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.[143]

It is not only the involved states themselves who try to present armed reprisals as actions of preventive self-defense. In some cases the reaction of the international community towards armed reprisals have 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 whose aims were largely retribution and deterrence.[144]

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 those regarded as responsible for those attacks, and to claim that they are defensive in character. This leads 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

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[138] See Kelly (n. 114) who reviews the literature on this matter.
[139] See Intoccia (n. 112).
[140] Ibid.
[141] Address of Ambassador Walters, cited ibid., 191.
[142] See the discussion in Michael C. Bonafede, 'Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11 Attacks' (2002) 88 Cornell L. Rev. 155, 171-78.
[143] Ibid., 178-181.
[144] Randelzhofer (n. 15)

limited armed attack. I shall argue below that while use of force whose motive is clearly retributive is still universally condemned as an unlawful armed reprisal, there is often a more tolerant attitude towards use of force as a deterrent against further attacks by the parties responsible for the armed attack. This is reflected in the writing of some leading and highly qualified publicists.

3.2 Protective self-defense

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 is assessing how one fought *(ius 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.[145] 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 amount themselves 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.[146] If resort to war is justified proportionality (in the *ius ad bellum* sense) is no longer relevant. In Dinstein's words: 'Once a war of self-defense 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)'.[147] It should be noted that 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-defense it is mistaken to think that the force used must be proportionate to the force of the armed attack.[148]

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 this approach when the armed attack is indeed fairly large-scale, but is isolated and has been completed before the victim state has 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-defense 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 2008/9. They would also seem to be the questions that arise when assessing the response to the 9/11 attack on the US.[149]

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[145] Dinstein (n. 10) 208-212. Also see Joseph. L. Kunz, 'Editorial Comment: Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations' (1947) 41 *AJIL* 872.

[146] This is similar to the view propounded by the late Thomas Franck: see text accompanying notes 3-4 above.

[147] Dinstein (n. 10), 209.

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

[149] See Michael C. Bonafede, (n. 142) ; John Quigley, 'The Afghanistan War and Self-Defense', (2003) 37 *Val. U. L. Rev.* 541.

If one takes the text of article 51 seriously it would seem that the right to use unilateral force in self-defense is 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 *ius 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?[150] If it takes forcible measures in this situation it will be doing so for one or more of a number 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.[151] Which, if any, of these are legitimate aims for using force following an armed attack? 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 use of force are regarded as illegitimate and incompatible with the very notion of self-defense. They are the most cited grounds for the view that armed reprisals are prohibited under the Charter regime. 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 unilateral use of force and that it places the matter in the lap of the international community?

3.3 The aims of self-defense

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

3.3.1. 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-defense, as

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[150] See Corten (n. 10), 486; Quigley, ibid.

[151] 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. 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.

> 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-defense is recognized, of preventing it from occurring.[152]

In her separate opinion in the *Nuclear Weapons case*, Judge Rosalyn Higgins cited Ago's view with approval.[153]

The notion that the object of using force in self-defense 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-defense. She distinguishes between response to an armed attack that has occurred and use of force to thwart an imminent attack. In relation to the former she has this to say:

> In the case of self-defense 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 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*.[154]

Having said this Gardam concedes that there may be a difference whether the defense is against an isolated attack 'or whether there is an ongoing state of armed conflict.'[155] 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 asks whether 'the requirements of proportionality in self-defense under the Charter proscribe action to remove a continuing threat?'[156] Gardam then poses the question that must be addressed by proponents of the 'halting an repelling' concept of self-defense: 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?'[157] This is not really a question of proportionality but one that goes back to the very aim of using force in self-defense. As Gardam herself admits, one cannot discuss proportionality without defining the legitimate aims of self-defense. 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,[158] Corten[159] and Cannizzaro.[160] 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',[161] like Gardam, Corten displays an ambivalence in accepting that the

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[152] Ago (n. 11) para. 121

[153] ICJ, Nuclear Weapons case (n. 10) Separate opinion of Judge Higgins, para. 5

[154] Gardam (n. 9), 156.

[155] Ibid.

[156] Ibid., 165

[157] Ibid.

[158] Cassese (n. 18), 355: 'self-defense must limit itself to rejecting the armed attack; it must not go beyond thus purpose.'

[159] Corten (n. 10) 484–493: 'proportionality invariably implies comparing the military action justified by self-defense with its essential objective, which is to repel an attack that is underway.' (Ibid., 489)

[160] Cannizzaro (n. 18)

[161] Cassese (n. 18), 355

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 had 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-defense.'[162] Unfortunately he does not offer an explanation of what the object of self-defense 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.'[163] In his view 'the forcible removal of threatening situations and the creation of permanent conditions of security seem to have been reserved by the international community as tasks to be performed collectively.'[164]

The notion that the sole aim of using force in self-defense 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 were not themselves 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 only given to states to use the minimum force necessary to defend themselves against the armed attack that has occurred until such time as the Security Council fulfills 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.[165] The UNSC 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 UNSC 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 might 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.

3.3.2. The trigger theory

Proponents of the 'trigger theory' accept that states may not use force unless they have been subject to an armed attack. Unless such an attack has occurred use of force to deter another state or to pre-empt an attack use of force is illegitimate and

[162] Ibid.
[163] Cannizzaro (n. 18), 785.
[164] Ibid.,782.
[165] Dinstein (n. 10), 188

unlawful. However, once an armed attack has occurred, 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.[166] This theory has an obvious affinity with Dinstein's view, presented above, that when a state has been subjected to a large-scale armed attack it may resort to war which 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-defense 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.[167]

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 UNSC fulfills 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 Security Council under Chapter VII to take measures to maintain international peace and security.[168] In exercising these powers the Security Council may pass a decision that imposes a cease-fire between the parties or subjects them to other demands, such as withdrawal from territory taken by force.[169] 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 Security Council and uninvolved states have been highly reluctant to accept the '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.[170]

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[166] See David Mellow "Counterfactuals and the Proportionality Criterion" (2006) 20 *Ethics and International Affairs* 434-54

[167] Joseph. L. Kunz (n. 145) 876-77. Kunz limited this to the case in which an armed attack has actually occurred and did not accept that the right of self-defense could be exercised to prevent an imminent attack.

[168] Ibid., 877.

[169] See Dinstein (n. 10), 185- 191.

[170] See Tams (n. 44). Cannizzaro (n. 18), 783. claims that acceptance by the international community of Israel's claim to be acting in self-defense when it responded to the Hezbollah cross border raid of 12 July 2006 'seems to imply that, for this purpose [defining an armed

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 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.[171] 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.[172]

Under the trigger theory, once a large-scale armed attack has been launched *ius ad bellum* proportionality no longer plays a part. The victim state is constrained by the norms of *ius in bello* and possibly by the notion of military necessity, namely that it may only use such force as is necessary to achieve its military objectives.[173] 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 *ius in bello.*

3.3.3. 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. It is not surprising therefore that those who support the right of states to use force to thwart imminent attacks will accept the right of states which are attacked to do more than halt and repel the current attack. Even some scholars who reject in principle the notion that a state that has not been subject to an

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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.'

[171] See Corten (n. 10); Bonafende (n. 149).

[172] According to a CNN report of August 27th, 2006 the head of the Hezbollah, Hassan Nasrallah, stated that he would have refrained from the July 12th attack had he known how Israel would respond: 'Nasrallah: Soldiers' Abduction a Mistake', Available at: http://forum.go-bengals.com/index.php?showtopic=21448 (accessed 16 February 2011).

[173] There is a difference of opinion whether necessity in this sense is a demand of *ius ad bellum*, *ius in bello*, or perhaps of both. Christopher Greenwood, 'The relationship between *ius ad bellum* and *ius in bello*' (1983) 9 *Review of International Studies* 221, argues that *ius 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-defense; Nils Melzer presents the same demand as a requirement of IHL, namely ius in bello; N. Melzer, *Targeted Killings in International Law* (OUP 2008) 278 – 291. His view was adopted by ICRC in its *Interpretive Guidance on the Notion of Direct Participation in Hostilities in International Humanitarian Law*, (Geneva, 2009), chap 9 , (which was written by Melzer himself). This view was subject to harsh criticism: W. 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', (2010) 42 N.Y.U.J. Int'l L. & Pol. 769. And see Melzer's reply, ibid., 831.

armed attack may mount an anticipatory attack accept that if a state has been attacked it may use force to prevent further attacks.[174]

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 hostilities between the victim state and the aggressor continue 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 state has a chance to respond. Some commentators maintain that even in such a situation the victim state may only use force if it has evidence that further attacks are imminent.[175] 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.[176] 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.'[177]

Defense 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 Security Council debate on the US attacks on targets in Lybia 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 US[178] and the UK[179] 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.[180] 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.[181] This view was originally presented by Roberto Ago in his report on state responsibility, in which he wrote:

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[174] Corten (n. 10)
[175] Quigley, (n. 149);
[176] See Oscar Schachter, 'The Extraterritorial Use of Force Against Terrorist Bases' (1988) 11 *Houston J. Int'l L.* 309, 312; O'Connel (n. 80).
[177] Schmitt (n. 59),
[178] Letter dated 7th of October, 2001 from the Permanent Representative of the United States of America to the United Nations 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-defense, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States.'
[179] Letter dated 7th of October, 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, 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]'.
[180] This was the argument made by Israel on numerous occasions when it reacted to use of force from armed groups operating out of neighboring countries that were usually regarded as armed reprisals by the international community. See the discussion of some of these cases in O' Brien (n. 103); Alexandrov (n. 32), 165-179.
[181] Ronen (n. 60) 373-74.

> 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.'[182]

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. Maybe it is this fear of opening the door to massive use of deterrent force in 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.[183]

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 with a skeptical 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.[184] Michael Schmitt argues that the same test of imminency 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.'[185]

License 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.[186] Even many states that accepted Israel's right to use force in self-defense in this case were apparently not persuaded that this was a legitimate aim, since they criticized Israel's use of force as disproportionate.[187] 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.[188]

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[182] Ago (n. 11) para. 121. Also see Schachter (n. 41)

[183] See Christopher Greenwood, 'International law and "war against terrorism", (2002) 78 International Affairs 301, 312

[184] 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-defense in international law, or if there had been real doubts whether the conditions for the exercise of that right existed.'

[185] Schmitt (n. 59), 24.

[186] See the statements of Israel's leaders quoted in Ronen (n. 60), 389-90.

[187] See the statements of various states cited Ibid., 391, n. 171.

[188] Ibid., 388-392.

4. Self-Defense and Proportionality

The diverse types of situation in which a state might use force in self-defense, 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-defense, 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 doing so it is important to dwell both on the distinction between various end-goals behind use of force and on the dynamics of force and counter-force.

4.1 End-goals of force in self-defense

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.'[189] 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 *ius in bello*.[190] According to some views, at this stage proportionality is judged solely by those norms and has no relevance in *ius ad bellum*.[191] A counter-view is that the state using force in self-defense has constantly to assess whether the force it is using is necessary to achieve its legitimate self-defense ends.[192]

While halting and repelling an attack is accepted as a legitimate goal of self-defense, 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 Dinstein so correctly remarks, some element of retribution may be present in many, if not all, cases in which a state responds to an armed attack.[193] There may be strong political reasons for this, since the governments

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[189] Rodin (n. 26), 115.

[190] 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.'

[191] Dinstein (n. 10) at, 208 ; Rodin (n. 26), 112; Jason S. Wrachford, 'The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defense, or a Reprisal Gone Bad?' (2007) 60 *A.F.L.Rev* 29, 87.

[192] Greenwood (n. 173).

[193] Dinstein (n. 10), 199.

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 other purpose 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-defense does not allow for use of force whose motive is purely retributive.

Prevention entails force whose object is to weaken the military *capacity* of the enemy, thereby reducing the chances that it will be capable of amounting 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* of potential enemies to use force against the victim state.[194] 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 is designed to affect only the willingness of the state or armed group responsible for the armed attack from mounting another attack. General deterrence is not a legitimate aim of use of force in self-defense. 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-defense, 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 be legitimate in certain circumstances. Taking the latter view in the context of force against terrorists, Oscar Schachter wrote that self-defense 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.'[195] Michael Schmitt takes the same position.[196] 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.[197]

Assuming that specific deterrence may in some circumstances, and to a certain degree, be a legitimate motive for use of force in self-defense, 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.[198] Contrarily, as

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[194] Yair Evron, 'Deterrence and its Limitations' (2006) 9 (2) *Strategic Assessment*, Available at: http://www.inss.org.il/publications.php?cat=21&incat=&read=116 (accessed 1 March 2011).
[195] Schachter (n. 176), 315.
[196] Schmitt (n. 59).
[197] In the role of deterrence in Israel's campaign against the Hezbollah see Evron (n. 194).
[198] Michael J. Glennon, 'The Fog of Law: Self-Defense, Inherence and Incoherence in Article 51 of the UN Charter' (2002) 25 *Harv. J. L. Pub. Policy* 539, 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 Amos Harel, 'IDF plans to use disproportionate force in next war, *Haaretz*, 5 November 2008, available at http://www.haaretz.com/print-

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 use of force by states - that 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.

4.2 The Variables of Self-Defense, Legitimate Ends and Proportionality

4.2.1 Ongoing attacks

The assumption that armed attacks are ongoing when the victim state responds lies behind the widely-held view that the aim of using force in self-defense is halting and repelling the attack. This aim is only relevant if an armed attack is still ongoing when the victim state responds to defend itself. (As mentioned above, I include in the notion of an 'ongoing attack' the case in which the aggressor is still present in the victim state's territory.)

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 aim that is compatible with norms of *ius in bello* will be proportionate for the purposes of *ius ad bellum*. However, as we have seen above, despite the prevalence of the 'halting and repelling' school of thought on the purpose of self-defense the matter is not as simple as all that. Halting and repelling as the *sole* end of self-defense is only appropriate 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.'[199] 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

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edition/news/analysis-idf-plans-to-use-disproportionate-force-in-next-war-1.254954 (accessed 20 March 2011)

[199] Gardam (n. 9), 157.

such a case the legitimate ends of using force in self-defense 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-defense 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.

4.2.2 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 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 scale will be such as to demand an anticipatory attack. 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.[200] 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 skepticism over its claim that the attack was imminent. The degree of that skepticism will probably be influenced by the previous relationship between the victim state and the alleged aggressor.[201] In all

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[200] Schmitt (n. 59.) .
[201] Gardam (n. 9), 179.

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.[202] States making use of their inherent right to self-defense in face of an imminent attack must be prepared after the event to present evidence which supports the assessment they made of imminency.

The aim of using force in face of an imminent attack will be largely dependent on the context.[203] Judith Gardam maintains that force 'must be limited to countering the threatened attack and no more.'[204] 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.'[205] 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-defense should be restricted to stopping that attack from occurring. If, however, the expected 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.

4.2.3 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-defense, and must rely solely on non-forcible measures or action by the Security Council.

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-defense. 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, leaving the potential victim of the attack with 'a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.' 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'[206] and the force used must be necessary to 'prevent any further reasonably foreseeable attacks.'[207]

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[202] On the notion of a 'second opinion' see Franck (n. 9).
[203] Gardam (n. 9) 179
[204] Ibid.
[205] Ibid., 180.
[206] Schmitt (n. 59), 64.
[207] Ibid. 65.

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.

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.

4.2.4 Non-state actors

A great deal has been written in recent years about extraterritorial use of force against terrorists or other non-state actors.[208] As mentioned above, there are still some experts who maintain that unless a cross-border attack by non-state actors may be attributed to their host 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-defense recognized in article 51 of the Charter. It will therefore obviously be bound by all the limitations that apply to 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.[209] In order to understand what proportionality implies in this context we have once again first to consider what the legitimate ends of self-defense 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-defense both against

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[208] See especially Lubell (n. 23); Melzer (n. 173); Schmitt (n. 59); O'Connell (n. 80); Niaz A. Shah, 'Self-Defense, Anticipatory Self-Defense and Pre-emption: International Law's Response to Terrorism' (2007) 12 *J. of Conflict and Security L*. 95; Jan Kittrich, 'Can Self-Defense Serve as an Appropriate Tool against International Terrorism?' ((2009) 61 *Me. L. Rev*. 133

[209] Schachter (n. 176).

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 only be relevant 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 self-defense doctrine that lies behind article 51 of the Charter.[210] 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 use of force must be addressed. It will be recalled here that 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* 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-defense 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.[211] 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.[212]

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 one-time 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-defense. 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

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[210] See Glennon (n. 198), 545-46 and authorities cited there in n. 22.

[211] See n. 139-142 and accompanying text above.

[212] See Yehuda Ben Meir, 'Israeli Government Policy and the War's Objectives', (2006) 9 (2) *Strategic Assessment*, Available at: http://www.inss.org.il/publications.php?cat=21&incat=&read=93 (accessed 1 March 2011); Ronen (n. 60). 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: , Giora Eiland, 'Who's the real enemy?', *Ynet,* 24 July 2008, available at http://www.ynetnews.com/articles/0,7340,L-3572777,00.html (accessed 20 March 2011)

are likely to be further attacks if it does not react.[213] 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 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-defenc 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 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 imminency requirement for use of pre-emptive force is not judged by the imminency in time of the expected terrorist attack but 'by the extent to which the self-defense occurred during the last window of opportunity.'[214] In such circumstance 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 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.[215]

As is 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

[213] Schachter (n. 176), 314, puts it this way: 'If 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.'
[214] Ibid.
[215] See Evron (n. 194).

> compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time 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.[216]

Some writers have also suggested a different model of self-defense for the struggle against terrorism.[217] This would widen the goals of using force against suspected terrorists, thereby necessarily widening the notions of proportionality.

The Bush administration declaration was widely criticized and was not repeated in the National Security Strategy published in 2010 by the Obama administration.[218] Other suggestions to widen the scope of self-defense 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 both the right to use force against imminent attacks and against non-state actors whose host state is unwilling or unable of taking action to curb their activities, is probably still the best balance we can find between the need to contain use of force by states while allowing some recourse to unilateral use of force in self-defense.

4.3 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? [219]

This does not imply, however, that 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, amongst 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

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[216] White House, *The National Security Strategy of the United States of America*, September 2002, at 15, Available at: http://www.globalsecurity.org/military/library/policy/national/nss-020920.htm (accessed 2 March 2011).

[217] See, e.g., Bonafede (n. 142).

[218] White House, *National Security Strategy*, May 2010 Available at: http://www.cfr.org/defensehomeland-security/national-security-strategy-2010/p22232 (accessed 2 March 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 (n. 36), at 1140.

[219] Corten (n. 10), 488.

those of Canada and Israel, as the test for examining the proportionality of limitations on protected rights.[220] When used in this last context the test involves three questions:

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 it 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? 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 *ius ad bellum* it seems to me that the term 'necessary' is used in both ways. When asking whether the very resort to self-defense was necessary, the question is whether there were non-forcible means of dealing with the armed attack.[221] 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-defense necessary to achieve the legitimate ends of self-defense in the specific context?[222] 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.[223] There are, however, many cases in which reference is made to use of 'excessive force'.[224] It is not clear whether the implications are that the same

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[220] 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 (n. 21)

[221] Dinstein (n. 10), 184; Lubell (n. 23), 43-48. Also see Corten (n. 10), 479-483, who shows that this does not mean that a state resorting to force in self-defense has to show that it 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 only be relevant when dealing with an imminent or completed attack, as when the attack in ongoing use of counter-force by the victim state would seem to be clearly necessary: Dinstein (n. 10),207; Lubell (n. 23), 43.

[222] The prime proponent of this view is Greenwood (n. 173). Cf. Dinstein (n. 10), 210-221, and Rodin (n. 26), 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.'

[223] See, e.g., the *Armed Activities in the Congo* case (n. 64), para 147. The ICJ stated that the taking by Uganda of airports and towns hundreds of kilometers 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 (n. 53), para.76, the ICJ stated that the attack by the US on the oil platforms was not necessary since it has 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 November 2006, UN Doc A/HRC/3/2, para. 315.

[224] See Gardam (n. 9), 166-7, in which she refers to the scale of force used by the US in its 1989 invasion of Panama (leaving aside the question of whether there was an armed attack that justified using force in self-defense). In reacting to Israel's military action in Lebanon in

legitimate ends could have been 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 of whether the harm caused was excessive in relation to the benefits is the very essence of the proportionality means-end test,[225] this aspect of proportionality in *ius ad bellum* has received very little attention. Discussions of proportionality in this context have dwelled 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 *ius in bello.* Both the ICJ and commentators may well have found it easier to deal with the necessity issues than groping with this inherently difficult issue.

As proportionality in the narrow sense plays an important role in *ius in bello,* it was perhaps considered unnecessary to discuss the question in the context of *ius ad bellum*. Some commentators hold that the damage caused by the use of force is only relevant in *ius in bello*.[226] It should be appreciated, however, that the questions in the two contexts are somewhat different. While the question in *ius in bello* relates to attacks on specific targets, in *ius ad bellum* the question relates to the whole picture. Use of force could conceivably be disproportionate under *ius ad bellum* even if all specific attacks met the demands of proportionality in *ius in bello*. The *ius in bello* test refers to collateral damage to civilians or civilian objects which are not in themselves legitimate targets, whereas while the *ius ad bellum* test includes (but is certainly not confined to) damage to combatants and military objects.[227] Finally, in *ius in bello* the question relates to the *expected collateral* damage and the *anticipated* military advantage. In *ius ad bellum* the question refers to the *actual* damage caused by the means used to pursue the legitimate ends of military force.[228] 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.[229]

Issues of 'narrow proportionality' in *ius ad bellum* have not been subjected to much academic analysis and the impression is that many experts assume that whether the means were necessary to achieve the legitimate ends is the be-all and end-all of

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2006, the representatives of many states referred to use of excessive force: see, e.g., the statements before the Security Council of Argentina and Algeria cited in Ronen (n. 60),390, n.171

[225] See Rodin (n. 26), 115

[226] See Ronen (n. 60) and Zimmermann, The Second Lebanon War: Jus ad bellum, jus in bello and the Issue of Proportionality (2007) *Max Planck Yrbk of United Nations Law*, Volume 11, 99. In discussing the Israeli military campaign in Lebonon in 2006 both of these writers regard the issue of the damage caused as one only of *ius in bello*.

[227] Gardam (n. 9)

[228] It should be pointed out, however, that a question of proof will often arise. On who lies the burden to prove 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 (n. 226), 125.

[229] Greenwood (n. 173).

proportionality in *ius ad bellum*.[230] However, in the reaction of states and commentators to specific cases of force used in self-defense, 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.[231] 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.[232] 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-defense. 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.

In conclusion, it is not all that clear that proportionality in *ius ad bellum* is really what it purports to be: a test of proportionality between means and ends rather than simply a test of whether the means were necessary to achieve legitimate ends. Popular conceptions would seem to stress the harm caused by the means as a sign that the force was disproportionate; most (but by no means all) experts and judicial organs would seem to stress the necessity issue.

4.4 Proportionality and Israel's campaign in Lebanon

I began this paper by citing the widely differing 'off-the cuff' approaches to whether Israel's campaign in Lebanon was compatible with proportionality in *ius ad bellum*. I have no intention of answering that specific question here. But I shall end by using four analyses of that campaign 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 *ius 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.'[233]

The first two reasons provided by Cannizzaro are determined by his view that the only legitimate ends of using force were to repel the specific armed attack that took place on July 12. The force used by Israel was not necessary to achieve these ends and was therefore disproportionate. This view is problematical on three levels.[234] 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

[230] See the authorities cited in n. 226 ; Lubell (n. 23), 63-68.
[231] Ronen (n. 60), 390, n.171
[232] Cannizzaro (n. 18), 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.
[233] Ibid.
[234] I shall not deal with the factual level. As the UN Commission of Inquiry held 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* (n. 223) para. 40

been forward-looking. Second, as we have seen above, the notion that halting and repelling an armed attack is the *only* legitimate aim of using force in self-defense 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 July 12, 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 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 raises a question of 'narrow proportionality', which as we have seen, is regarded by some as being a question only for *ius in bello*. If one accepts that 'narrow proportionality' is indeed part of the calculation in *ius ad bellum*, Cannizzaro's argument cannot be dismissed that easily. The problem is, however, that it only provides 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.

Andreas Zimmermann is a proponent of the 'halting and repelling theory'. Nevertheless, in analyzing Israel's military campaign he is far less sure that its use of force was disproportionate. Zimmermann's starting point is that proportionality in *ius 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 latter 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.'[235] He also accepts that the longer the attacks of Hezbollah on Israel continued, the wider the measures of self-defense could be, provided that such wider measures were necessary to stop those attacks. In the context of *ius ad bellum* Zimmermann does not mention the damage caused to civilians and infrastructure, which he regards as matters to be considered as part of *ius in bello*.

In her discussion of the Lebanon campaign Yäel Ronen quite rightly points out that proportionality depends on whether the right to self-defense is restricted to repelling an ongoing attack or includes prevention of future attacks.[236] She discusses the requirements of proportionality under both theories and after analyzing the various goals Israel 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

[235] Zimmerman (n. 226), 123.
[236] Ronen (n. 60)

deterrent, to enforce Security Council Resolution 1559 that called for 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 *ius in bello* rather than a *ius 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 that was discussed above, Wrachford holds that in such a situation proportionality has no place in *ius ad bellum* and should only be judged by norms of *ius 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-defense.[237]

Second, 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.'[238] 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 *ius 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-defense must serve legitimate ends. Use of force that seems to be largely punitive, whose primary motive 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 of force in self-defense, 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 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 that 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

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[237] Wrachford (n. 191), 88.
[238] Ibid.

version of the trigger theory: once a wide-scale armed conflict ensues, proportionality in *ius ad bellum* is no longer relevant. However, he modifies this by examining whether the primary motives of the state using force in self-defence were preventive, rather than punitive or deterrent.

It is worthy to note that only one of the four experts considers that the damage caused is a *ius ad bellum* question. According to the majority view of these analysts proportionality in *ius 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-defense.

5. Concluding Comments

Use of force in international relations is invariably a loaded political question. States that are themselves faced with armed attacks or threats of such attacks are inevitably going to have a different perspective from non-involved 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 obvious. Uninvolved states and outside observers will often be highly selective in deciding whether use of force was both justified and proportionate. When used in situations where they have sympathy for the victim state, and little or no sympathy for the state or group which 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 *ius in bello*. On the other hand, 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 other state or group of non-state actors involved, they are likely to condemn that use of force as disproportionate.

Notwithstanding the obvious bias that will affect both the tendency of involved states to describe all uses of force in self-defense as proportionate and the 'second opinions' on proportionality by non-affected states and international bodies, some attempt must be made to define the parameters to be included in the assessment of proportionality. That is what I set out to do in this paper.

It may seem to the reader that I have merely replaced one area of uncertainty and indeterminacy with another. Rather than arguing 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 may then know what it is we are arguing about.