

# **The Legality of the USA's Use of Force to Counter Terrorism**

Minor Dissertation

in completion of a Master's Degree specialising in International Law

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## ABSTRACT

The United States of America (“USA”) has often resorted to the use of force as a means to counter terrorism citing the right to use force in self-defence as the justification for it. A history of the USA’s use of force against other states and non-state actors in the name of countering terrorism portrays that the country has often gone too far opening up the narrow exceptions to the customary prohibition on the use of force as well as the right to use force as provided for in the United Nations Charter. This disregards the fundamental requirements that must be met before a country can rightfully use force in international law. This is evinced in the actions of the USA after the 9/11 attacks, and particularly in the justifications for the Iraq War. After the events of 9/11, Bush declared that the USA was at war and then enacted drastic state responses to counter terrorism, including the use of military force. The legality of this has been challenged. There has been a shift away from the stringent requirement of state attribution of terrorist attacks after 9/11 and a move towards self-defence being lawful in response to attacks perpetrated by non-state actors. Self-defence against terrorism has often been cited as the legal justification for the USA’s military action against other states and non-state actors. This dissertation will assess the lawfulness of the USA’s use of force against states and non-state actors to combat terrorism. The analysis will draw on both the customary rule regarding the prohibition on the use of force as well as the treaty rule providing for the right to use force in lawful self-defence as custom and treaty are intrinsically linked, especially in this area of law.

The topic is relevant because of the long history of states attempting to rely on the Charter right to use force in self-defence, however failing to meet the necessary requirements for such use of force rendering their actions unlawful in International Law. The topic is also relevant given the ongoing uses of force in the Israel-Palestine conflict. The use of force in international law is an area of law of fundamental importance as the unrestrained use of force by states is one of the greatest threats to international peace and security. Because the vital interests of states are involved in the decisions on when to use force, states are often willing to break rules when they believe it is politically or morally acceptable to do so. The law must therefore seek to establish mechanisms that can restrain and punish the resort to violence by states. This paper thus aims to contribute towards a clearer framework on the use of force in international law, specifically in the context of countering terrorism.

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## CHAPTER 1: INTRODUCTORY CHAPTER

### I. INTRODUCTION

Article 2(4) of the United Nations Charter (hereafter “UNC” OR “UN Charter”) contains a broad prohibition on the use of force. It provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>1</sup> The prohibition is part of Customary International Law.<sup>2</sup> It is a rule of *jus cogens* meaning it is a peremptory norm of international law that states cannot contract out of or persistently object to. While Article 2(4) of the UNC prohibits the use of force in International Law, Article 51 provides for two justifiable derogations from the prohibition.<sup>3</sup> The first is the use of force in lawful self-defence, and the second is the lawful use of force through United Nations Security Council (“UNSC”) authorization. The 9/11 terrorist attacks transformed the way in which the United States of America (“USA”) responded to terrorism. They began increasingly using force to counter it invoking Article 51 as a justification. However, the citing of such justification has often gone beyond the Charter provisions, thus challenging the substantive framework of the use of force in International Law. The exceptions to the prohibition on the use of force are narrow and there are strict requirements for the use of force in self-defence to be deemed lawful.<sup>4</sup> This calls into question whether the USA’s history of using force against terrorism has been lawful under International Law. This dissertation will focus on the legality of such force. As such, some of the USA’s military operations and air strikes against other countries in the name of countering terrorism will be assessed. It has been asserted that the USA has used the narrative of “war against terrorism” to undermine their international obligations.<sup>5</sup> With the growing recognition that counter-terrorism measures, including the military force, must comply with International Law so as to not “exacerbate the very phenomenon that counterterrorism purports to fight”, the fact that the legality of such force is highly contested is of grave concern in International Law.<sup>6</sup>

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<sup>1</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI at Article 2(4).

<sup>2</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ, Judgement, 26 November 1984 at para 193.

<sup>3</sup> Op cit note 1.

<sup>4</sup> Ibid at Article 51.

<sup>5</sup> Roach, Kent ‘*The 9/11 Effect: Comparative Counter-Terrorism*’ Cambridge University Press (2011) at 21.

<sup>6</sup> International Committee of The Red Cross: Measures to eliminate international terrorism: ICRC statement to the United Nations, 2016.

## II. STATEMENT OF THE PROBLEM

The events of 9/11 changed the global response to terrorism.<sup>7</sup> The USA began to use force to prevent the threat of terrorism with Article 51 of the UN Charter being cited as the justification for such force. However, the requirements to use force in lawful self-defence are strict and narrow. The problem is that the USA has often gone beyond the Charter provisions in its invocation of Article 51 thus challenging the substantive framework of the use of force and posing serious challenges to the rule of law. International organizations and human right activists have “raised red flags” over the disregarding of state obligations when implementing operations to combat terrorism.<sup>8</sup> Therefore, the fact that many of the USA’s counter-terrorist air strikes and military operations are highly contested is of serious concern. The issue to be addressed is therefore whether the USA’s history of using force against terrorism has been lawful under International Law.

## III. THE CONCEPT OF TERRORISM IN INTERNATIONAL LAW

Defining terrorism within the scope of International Law is a complex and contentious matter due to the multifaceted nature of terrorist activities and the absence of a universally accepted definition thereof. However, several key elements of the concept emerge in various legal instruments, scholarly works, and international agreements. The United Nations has played a pivotal role in attempting to define terrorism. They have established various conventions and resolutions addressing terrorism and specific aspects of terrorist acts. The General Assembly Resolution 49/60, for example, emphasised the urgency of developing a comprehensive legal framework to combat terrorism while acknowledging the difficulty in arriving at a precise definition of terrorism due to states having diverse interpretations and perceptions of it.<sup>9</sup> One prevalent notion in defining terrorism revolves around the deliberate use of violence or threats thereof to intimidate or coerce governments, societies or individuals for political, ideological or religious objectives.<sup>10</sup> This often entails acts that aim to spread fear and destabilise societies.<sup>11</sup> Notably, these acts typically target civilians, and their primary intent is to instil terror within populations.

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<sup>7</sup> United Nations, United Nations Office on Drugs and Crime, ‘*Counter-terrorism in the International Law Context*’ (2021) at 76.

<sup>8</sup> Nyadera, I.N. and Bincof, M.O., Human security, terrorism, and counterterrorism: Boko Haram and the Taliban. *International Journal on World Peace* (2019) at 7.

<sup>9</sup> United Nations General Assembly Resolution 49/60 (1994).

<sup>10</sup> Op cit note 1 at 6.

<sup>11</sup> Ibid.

International legal instruments, such as the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression and Financing of Terrorism, emphasise the criminalization of acts like bombings and the financial support aiding terrorist activities.<sup>12</sup> These instruments contribute to a collective effort in combatting terrorism globally. However, as previously stated, challenges persist in formulating a universally accepted definition of terrorism due to nations having different perceptions about what terrorism entails as well as political and cultural societal disparities and different perspectives regarding freedom struggles and resistance movements.<sup>13</sup> This complicates the development of a single, comprehensive definition of terrorism in International Law.<sup>14</sup>

The USA deems terrorism to be a multifaceted threat that presents complex challenges to national security and global stability.<sup>15</sup> The USA categorizes various groups and entities as terrorist organizations based on their engagement in activities that threaten their interests.<sup>16</sup> The US State Department make such categorizations based on what their interpretation of terrorism is and are guided by their international policies and initiatives. Their understanding of and response to the terrorism is deeply rooted in historical events and legislative measures aimed at combatting the phenomenon.<sup>17</sup> The USA's perception of terrorism has been significantly shaped by the 9/11 terrorist attacks on the World Trade Center and Pentagon in 2001. The event led to the enactment of comprehensive counterterrorism strategies and the adoption of legislation aimed at enhancing the government's ability to prevent and combat terrorism.

#### IV. OBJECTS AND PURPOSE OF THE RESEARCH

Since the events of 9/11, there has been a notable change in security perspectives, focusing on the threats posed by non-state actors and the actions needed to safeguard national security.<sup>18</sup> This has also occurred due to the ongoing surge in the phenomenon of nationals of one country travelling abroad to join non-State armed groups in another country. The impact of terrorism

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<sup>12</sup> International Convention for the Suppression of Terrorist Bombings (1997) and International Convention for the Suppression of the Financing of Terrorism (1999).

<sup>13</sup> Cassese, A. Terrorism is Also Disrupting Some Crucial Legal Categories of International Law. *European Journal of International Law*, 13(5), (2000) at 994.

<sup>14</sup> *Ibid.*

<sup>15</sup> National Strategy for Counterterrorism of the United States of America (2018).

<sup>16</sup> Council on Foreign Relations. *The U.S. Approach to Global Terrorism: Trends and Implications* (2019).

<sup>17</sup> National Strategy for Counterterrorism of the United States of America (2018).

<sup>18</sup> Human Security, Terrorism and Counter-terrorism: Boko Haram and the Taliban; Israel Nyaburi and Mohamed Bincof; 2019; 7

has been deeply felt across the globe, affecting fundamental values outlined in the United Nations Charter.<sup>19</sup> To address the risks posed by terrorism, states have taken a variety of measures, including the use of force.<sup>20</sup> The 9/11 attacks resulted in more forcible measures being taken by the USA to prevent terrorism and the threat thereof with Article 51 of the UN Charter being cited as the justification for such measures.<sup>21</sup> However, the requirements to use force in lawful self-defence are strict and narrow. The problem is that the USA has often gone beyond the Charter provisions in its invocation of Article 51 thus challenging the substantive framework of the use of force and posing serious challenges to the rule of law. International organizations and human right activists have “raised red flags” over the disregarding of state obligations when implementing operations to combat terrorism.<sup>22</sup> Terrorism directly challenges human rights, undermines the rule of law, and threatens the safety of civilians.<sup>23</sup> The United Nations, including bodies like the Security Council, General Assembly, former Commission on Human Rights, and the Human Rights Council, has acknowledged that terrorism hinders broader developmental goals and undermines national peace and security.<sup>24</sup> At the same time, however, the unlawful use of force to counter terrorism may undermine the legitimacy and effectiveness of such force and potentially worsen the problem of terrorism.<sup>25</sup> Therefore, the fact that many of the USA’s counter-terrorist air strikes and military operations are highly contested is of serious concern. This research therefore seeks to assess the legality the USA’s use of force to combat terrorism. The main research questions to be answered is: (i) has the USA’s use of force in self-defence against terrorism met the requirements for the exceptions to the customary rule regarding the prohibition on the use of force or the treaty rule as set out in the UN Charter providing for the right to use force in lawful self-defence. Additionally, (ii) has the USA complied with its international obligations in using force to counter terrorism.

## V. RESEARCH METHODOLOGY

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<sup>19</sup> Human Rights; Terrorism and Counter-terrorism; Fact sheet no 32; at 1.

<sup>20</sup> International Committee of The Red Cross; Terrorism, Counter-Terrorism and International Humanitarian Law-Statement 17<sup>th</sup> October, (2016).

<sup>21</sup> United Nations, United Nations Office on Drugs and Crime, ‘*Counter-terrorism in the International Law Context* (2021) at 76.

<sup>22</sup> Nyadera, I.N. and Bincof, M.O., Human security, terrorism, and counterterrorism: Boko Haram and the Taliban. *International Journal on World Peace* (2019) at 7.

<sup>23</sup> Human Rights; Terrorism and Counter-terrorism; Fact sheet no 32; at 7.

<sup>24</sup> United Nations Human Rights Council, ‘*Negative effects of terrorism on the enjoyment of human rights- Report of the United Nations High Commissioner for Human Rights*’ (2016) at 16.

<sup>25</sup> Op cit note 21 at 17.

The research method used for writing this dissertation will be conducted via online research using UCT databases via UCT's online library. The sources relied upon will be peer-viewed journals written by legal scholars with expertise in the relevant areas of International Human Rights and International Humanitarian Law.

## VI. DELIMITATIONS

- (1) Not all uses of force by the USA to combat terrorism will be assessed. Rather, significant events that have been the topic of much scholarly critique and debate and that have explicitly relied on the right to use force in lawful self-defence against terrorism as a justification for such force will be assessed.
- (2) The legality of the uses of force will be considered in terms of the Customary International Law right or rule of *jus cogens* to use force in self-defence as well as the United Nations Charter provisions on the use of force.

## VII. DISSERTATION OUTLINE

Chapter One has set out an introduction to the research question to be assessed, as well as any delimitations thereto. It has also portrayed the way in which the traditional right of self-defence has expanded because of the War on Terror. It has also provided a brief analysis on the concept of terrorism in International Law. Chapter Two introduces how the traditional right of self-defence has been expanded in the aftermath of 9/11 and the War on Terror. It refers to key counter-terrorist actions taken by the USA that have been highly contested in International Law. Thereafter, it will provide a substantive framework on the use of force in self-defence including the Customary International Law Concept and United Nations Charter Provisions thereof. With regard to the customary law right, the Caroline Incident is referred to as it provides for the origin of the Customary International Law right of self-defence which includes that the right to use force must be both necessary and proportional. Article 51 of the UN Charter, which is the key treaty provision on the use of force by states in self-defence and provides the requirements of lawful self-defence, will thereafter be analysed. The expansion of the traditional right of self-defence will be addressed in greater detail. Chapter Three seeks to determine whether Article 51 allows for self-defence against non-state actors as this is a primary concern with regard to an assessment of the lawfulness of the USA's use of force against terrorism. It further addresses whether terrorist attacks can constitute an "armed attack" in terms of Article 51. Chapter Three will portray that the "armed attack" requirement has expanded in light of the growing threat of terrorism. Chapter Four will determine whether,

generally, lawful self-defence can be in the form of pre-emptive or anticipatory action. After providing an analysis of each concept, the doctrine of pre-emptive self-defence as a justification for the use of force against terrorism will be rejected. However, it will be asserted that states may be able to take anticipatory action against terrorism. Since the substantive framework on the use of force and arguments regarding the legal nature of force would have been provided throughout the dissertation, Chapter Five aims to critique the legality of the USA's history of the use of force citing the to key counter-terrorist actions which were introduced in Chapter One and Two to do so. Lastly, Chapter Six will conclude this dissertation and thereafter, Chapter Seven will provide a bibliography.

**CHAPTER 2:**  
**THE EXPANSION OF THE TRADITIONAL RIGHT OF SELF-DEFENCE IN THE  
WAR ON TERROR**

I. INTRODUCTION

Article 2(4) of the UN Charter prohibit the use of force in International Law subject to the exception laid out in Article 51 whereby a state can use lawful force in self-defence. Article 51 was applied narrowly by the USA until after the Cold War where the first use of force that re-interpreted the Article in a way that weakened its express requirements was called for. The events of 9/11 resulted in the substantive framework on the use of force in self-defence being further challenged by the USA. Prior to the terrorist attacks, the USA treated terrorism as a criminal activity and did not use force to attempt to counter it.<sup>26</sup> After the attacks, however, the USA's approach to fighting terrorism was deemed inadequate and the treaty right to use of force in lawful self-defence was utilised to combat terrorism.<sup>27</sup> The USA has increasingly invoked the right to use force in self-defence as a justification for military action against terrorism. For example, the US invasion of Iraq was justified on the basis of a type of pre-emptive self-defence against terrorism. Further, the use of force against Syria in 2014 was justified by the USA as being the lawful use of force in self-defence despite them not having suffered an armed attack by Syria. Trump has justified multiple counter-terrorism air strikes with the notion of a type of self-defence that stretches the parameters of the traditional right. Additionally, Biden has justified US bombings along Syria and Iraq's border as the use of force in self-defence in compliance with Article 51 of the UN Charter. The USA has therefore clearly relied on Article 51 to justify the use of military force against terrorism. However, the citing of such justification has often gone beyond the UN Charter provisions thus challenging the substantive framework of the use of force. The exceptions to the prohibition on the use of force are narrow and there are strict requirements for self-defence to be deemed lawful under International Law.<sup>28</sup> This raises the question whether the multiple uses of force by the USA were lawful under International Law. This dissertation intends to analyse the legality of the USA's use of force against non-state actors. As such, an analysis of the parameters of the right to use force in self-defence must be assessed. This chapter will therefore demonstrate how the

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<sup>26</sup> Webber, Diane, 'Preventative Detention in the Law of Armed Conflict: Throwing Away the Key?' *J. Nat'l Sec. L. & Pol'y*, (2012) at 174.

<sup>27</sup> *Ibid* at 175.

<sup>28</sup> *Op cit* note 1 at Article 51.

‘traditional’ right to use force in self-defence has expanded in the global war on terror. It will thereafter provide a substantive framework on the use of force in self-defence making reference to both the Customary International Law right as well as the treaty right as contained in Articles 2(4) and 51 of the UN Charter.

## II. THE WAR ON TERROR

After 9/11, President Bush proclaimed a “war on terrorism”.<sup>29</sup> He asserted that the 9/11 attacks displayed the threat of terrorists and terrorism.<sup>30</sup> The Administration asserted that force would be used to combat terrorism.<sup>31</sup> A week after 9/11, a joint resolution was passed by the USA which authorized the use of military force and provided that the duty to protect Americans made it necessary for the USA to use force against the organizations and persons deemed responsible for 9/11. Bush was thus given the right, as a matter of self-defense, to attack terrorists. The USA and its allies launched a global “War on Terror” targeting terrorists without warning.<sup>32</sup> This culminated in the Afghanistan War. Furthermore, in the light of the events of 9/11, the USA developed and adopted a new National Security Strategy (“NSS”) in 2002 which set out how the military would meet growing threats to national security interests and re-examined the law of self-defence.<sup>33</sup> The NSS recognised the right of pre-emptive self-defence as it set out that the USA would, if necessary, “act pre-emptively” with regard to threats from terrorism.<sup>34</sup> It set out the USA’s intention to retaliate against terrorism by way of force as a sort of a counter terrorist measure.<sup>35</sup> It emphasised that military action would be relied on to retaliate against and deter future terrorist attacks.<sup>36</sup> The Strategy therefore seems to recognise pre-emptive self-defense as law.<sup>37</sup> The USA thus began to apply the notion of pre-emptive self-defence as a counter-terrorist measure against states.<sup>38</sup>

The use of force in self-defence against terrorism also culminated in the 2003 USA invasion of Iraq.<sup>39</sup> On the 19<sup>th</sup> of March 2003, Bush announced the beginning of Operation Iraqi Freedom

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<sup>29</sup> Op cit note 26 at 174.

<sup>30</sup> Damrosh, Lori Fisler and Oxman, Bernard H. ‘*Agora: Future Implications of the Iraq Conflict*’ (2003) at 565.

<sup>31</sup> Op cit note 16.

<sup>32</sup> Ibid at 38.

<sup>33</sup> Gray, Christine ‘*The Use of Force and the International Legal Order*’ International Law, 589, (2003) at 198.

<sup>34</sup> Weller, Marc ‘*Iraq and the Use of Force in International Law*’ Oxford University Press, USA (2010) at 143.

<sup>35</sup> Ibid at 8.

<sup>36</sup> Op cit note 33.

<sup>37</sup> Bothe, M ‘*Terrorism and the Legality of Preemptive Force*’ EJIL (2002), at 231.

<sup>38</sup> Op cit note 34 at 8.

<sup>39</sup> Mary Ellen O’ Connell ‘*Forever air wars and the lawful purpose of self-defence*’ Journal on the Use of Force and International War (2022) at 35.

which commenced the next day with a “shock and awe” strike.<sup>40</sup> This is a military strategy based on the use of overwhelming power. The USA presented Iraq as part of the larger global war on terror following 9/11 and the use of force against them was justified as being necessary to neutralise the alleged threat of terror emanating from them.<sup>41</sup> The invasion was essentially argued to be taken in self-defence against terrorism.<sup>42</sup>

The global war on terror was an ongoing international counter-terrorism military campaign initiated by the USA after 9/11. Obama criticised it as a war against a concept, but continued to use force against terrorism.<sup>43</sup> However, he relied on a different legal basis for such force. This was through a new and expansive interpretation of Article 51.<sup>44</sup> It was on the basis of this expansive approach that Obama authorised air attacks in 2014 in Iraq and Syria against ISIS, a terrorist organisation.<sup>45</sup> Though Iraq had formally requested the USA’s military assistance, Syria had not.<sup>46</sup> The USA therefore argued, in a letter provided to the Secretary General of the United Nations, that the terrorist groups in Syria were a threat to them and therefore, in accordance with the right of individual and collective self-defence as reflected in Article 51 of the UN Charter, it was necessary to defend themselves from the threat.<sup>47</sup> They further asserted that such use of force was proportionate.<sup>48</sup>

Obama’s successor, President Donald Trump, renewed and further initiated air strikes to counter terrorism.<sup>49</sup> He granted military commanders the “discretion” to attack certain countries without the approval of the White House asserting that the use of force was in self-defence against terrorism and aimed to deter future support for militant organisations that were against the USA.<sup>50</sup>

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<sup>40</sup> Op cit note 25 at 184.

<sup>41</sup> Usha Natarajan, ‘*A Third World Approach to Debating the Legality of the Iraq War*’ (2007), at 407.

<sup>42</sup> Ibid.

<sup>43</sup> Carvin, Stephanie, ‘*How not to war*’ *International Affairs*, 98(5), 1695-1716, 2022 at 1705.

<sup>44</sup> Op cit note 9 at 39.

<sup>45</sup> Ibid at 45.

<sup>46</sup> Ibid.

<sup>47</sup> United Nations, *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*, UN Doc. S/2014/695 (23 September 2014).

<sup>48</sup> Ibid.

<sup>49</sup> Op cit note 39 at 40.

<sup>50</sup> Ibid.

When President Joe Biden took over the presidency in 2021, he suspended air attacks to counter terrorism, however this suspension did not last very long.<sup>51</sup> He shortly authorised the launch of multiple air attacks outside of armed conflict zones in Syria, Iraq, Afghanistan, and Somalia.<sup>52</sup> The first of these occurred on the 25<sup>th</sup> of February 2021 in the form of the dropping of bombs in Syria.<sup>53</sup>

On the 27<sup>th</sup> of June, Biden authorised further bombings.<sup>54</sup> Bombs were dropped along the border of Syria and Iraq, killing at least 22 people, seven of whom were children.<sup>55</sup> In a letter to the United Nations Security Council, the USA justified the attack as self-defence taken in compliance with Article 51 of the UNC.<sup>56</sup> The USA held that the use of force was a response to a rocket attack launched by Syria on the 15<sup>th</sup> of February against them which resulted in one death.<sup>57</sup> The USA deemed the action as being necessary and proportionate in order to defend against and deter further attacks.<sup>58</sup> The attack was explicitly justified as being a form of self-defence in compliance with Article 51 of the UN Charter.<sup>59</sup>

### III. THE CUSTOMARY INTERNATIONAL LAW CONCEPT OF THE USE OF FORCE IN SELF-DEFENCE

As established, the use of force in lawful self-defence is an exception to the customary prohibition against the use of force. The traditional right of self-defence is stipulated in the *Caroline* case of 1837.<sup>60</sup> Despite preceding the UN Charter by over a century, the case is considered by many academics and International Law practitioners to be a valuable source of the norms on the use of force.<sup>61</sup> It is considered the origin of the Customary International Law right of self-defence.<sup>62</sup>

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<sup>51</sup> Op cit note 39 at 33.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid at 43.

<sup>55</sup> Ibid at 34.

<sup>56</sup> United Nations, *Letter dated 27 February 2021 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/2021/202 (3 March 2021).

<sup>57</sup> Op cit note 39 at 34.

<sup>58</sup> Op cit note 47.

<sup>59</sup> Ibid.

<sup>60</sup> Collins, Edward Jr. and Rogoff, Martin A. *The Caroline Incident of 1837, the McLeod Affair of 1840–1841, and the Development of International Law* (1990) at 1.

<sup>61</sup> Ibid.

<sup>62</sup> Stark, Catherine *The Legality of the Use of Force against Terrorists: An Examination of the United States' Air Strikes against the Islamic State in Syria* (2016) at 16.

#### IV. THE CAROLINE INCIDENT AND SELF-DEFENCE

The Caroline incident involved the rebellion against British rule in Upper Canada and the destruction of a privately owned American steamboat, '*The Caroline*', which was carrying armed rebels in American territory.<sup>63</sup> The leader of the group, William Mackenzie, went to New York to search for support for the rebellion.<sup>64</sup> He established headquarters on an island situated on the Canadian side of the Niagara River where he proclaimed a provisional government of Upper Canada.<sup>65</sup> The rebellion group prepared to invade the Canadian mainland and the USA supported this preparation by providing them with recruits and weapons.<sup>66</sup> On the 23<sup>rd</sup> of December 1837, the USA was requested to stop its activities in support of the rebels.<sup>67</sup> Acting to counter the possible invasion by the rebellion group, an army was set up on the Canadian shore opposite the island.<sup>68</sup> On the 29<sup>th</sup> of December, the Caroline made several expeditions to the island to provide military men and materials to the rebel forces.<sup>69</sup> To prevent the continued use of the Caroline as a supply ship, the British forces intruded into the USA's territory, forcibly seized the ship, towed it into the Niagara River and destroyed it by fire.<sup>70</sup> Two Americans were killed in the process.<sup>71</sup> The destruction of the ship was justified by British officials as lawful self-defence. It was, however, criticized by the USA as being an illegal use of force against them.<sup>72</sup> The destruction of the Caroline was regarded by Daniel Webster, who was the US Secretary of State, as a justifiable act of self-defence. Webster defined the circumstances and conditions under which the concept of self-defence could serve as a legitimate justification for the use of force by one state against another. In his view, only a clear and absolute necessity for using force in self-defence could justify such use of force.<sup>73</sup> Webster demanded that the British government show "a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation" to justify their use of force.<sup>74</sup> Furthermore, that they explain why the force was reasonable and not excessive.<sup>75</sup> This is because self-defence is limited by necessity.<sup>76</sup> Webster's formulation, which is called

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<sup>63</sup> Op cit note 62.

<sup>64</sup> Op cit note 60 at 1.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid at 82.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid at 81.

<sup>69</sup> Ibid at 82.

<sup>70</sup> Ibid at 83.

<sup>71</sup> Ibid at 82.

<sup>72</sup> Ibid at 83.

<sup>73</sup> Ibid at 85.

<sup>74</sup> Ibid.

<sup>75</sup> Note from Webster to Fox, dated April 24, 1841, *ibid.*, Document 99, at 159.

<sup>76</sup> Ibid.

“the Caroline doctrine”, asserts that use of force by one nation against another is permissible as self-defence if it is necessary and proportionate.<sup>77</sup>

In sum, the Caroline incident provides that in order for a state to rely on the right to use force in self-defence, the use of force must be both necessary and proportional.<sup>78</sup> Further, there must be no other means by which to respond to the attacks.<sup>79</sup> Necessity means that force may only be resorted to in response to an armed attack or the imminent threat thereof when alternative means of redress are not available.<sup>80</sup> Proportionality requires that the use of force in self-defence “must not exceed in manner or aim the necessity provoking it.”<sup>81</sup> The criteria are accepted as part of Customary International Law.<sup>82</sup>

## V. THE UNITED NATIONS CHARTER PROVISIONS ON THE USE OF FORCE IN SELF-DEFENCE

Article 51 of the UNC may be relied upon to justify a state’s derogation from the prohibition of the use of force. It provides: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the United Nations Security Council has taken measures necessary to maintain international peace and security”.<sup>83</sup> Article 51 thus provides two exceptions to the prohibition in Article 2(4): (i) The use of force in self-defence; and (ii) The use of force through authorisation by the United Nations Security Council.<sup>84</sup>

## VI. THE REQUIREMENTS OF LAWFUL SELF-DEFENCE

The resort to force by a state does not violate the prohibition stated in Article 2(4) of the UN Charter if that State is entitled to take action in self-defence and if the action which it takes remains within the limits of the right of self-defence being that the use of force is both necessary and proportional.<sup>85</sup> Self-defence must always comply with the principles of necessity and

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<sup>77</sup> Op cit note 60 at 85.

<sup>78</sup> Caroline case.

<sup>79</sup> Shiryaev, Yaroslav ‘*The Right of Armed Self-Defence in International Law and Self-Defense Arguments Used in the Second Lebanon War*’, Acta Societatis Martensis 3 (2007) sat 80.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Supra note 56 at paras 187–201.

<sup>83</sup> Op cit note 1 at Article 51.

<sup>84</sup> Alex Ansong, ‘Unilateral Enforcement of UN Security Council Resolutions: The Case of Operation Iraqi Freedom (2018), at 62.

<sup>85</sup> Op cit note 61 at para 4.

proportionality. This is so even when it is against non-state actors such as members of an armed terrorist group that has attacked a state.<sup>86</sup> There is no special set of rules for dealing with terrorists or terrorist groups and instead, the rules of necessity and proportionality apply in the same way as it would against other actors.<sup>87</sup> To constitute “a lawful exercise of the right of self-defence”, the use of force by a state must meet the following requirements: (i) The force must be in response to an armed attack;<sup>88</sup> (ii) the attack must be attributable to a state; and (iii) The use and degree of such force must be both necessary and proportional.<sup>89</sup> It is necessary to consider each of these requirements.

(i) “Armed attack”

Article 51 of the UN Charter provides that in order for a state to respond to an attack with the lawful use of force in self-defence, they must be the victim of an “armed attack”.<sup>90</sup> Article 51 thus does not allow for self-defence in response to all uses of force, but rather in response to the more limited concept of an “armed attack”.<sup>91</sup> The Caroline incident also portrays that force may only be resorted to by states in response to an armed attack or the imminent threat thereof.<sup>92</sup> Although the Charter does not define what would constitute an “armed attack”, not every use of force will rise to the level of one and it is only in the event that it does that a State is entitled to respond using force in self-defence.

(ii) Attribution

In addition to the attack being “armed”, Article 51 of the UN Charter provides that it must be attributable to the state against which the force in self-defence is being used.<sup>93</sup> This is also the International Court of Justice’s (“ICJ”) position in *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion* in which it was asserted that Article 51 “recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State”.<sup>94</sup> In such Opinion, the ICJ therefore confined the

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<sup>86</sup> Op cit note 5 at 77.

<sup>87</sup> Ibid at 75.

<sup>88</sup> Op cit note 61 at para 8.

<sup>89</sup> Ibid.

<sup>90</sup> Op cit note 1 at Article 51.

<sup>91</sup> Waxman, Matthew C. "Self-defensive force against cyber attacks: legal, strategic and political dimensions." *International Law Studies* 89 (2013) at 427.

<sup>92</sup> Op cit note 60 at 85.

<sup>93</sup> Op cit note 1 at Article 51.

<sup>94</sup> *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136 at para 139.

right to use force in self-defence against attacks that are attributable to states only, not non-state actors.<sup>95</sup>

(iii) Necessary and Proportional

*Necessary requirement*

The use and degree of force must be both necessary and proportional to constitute a lawful exercise of the right of self-defence.<sup>96</sup> This means that violence against a state must have reached a certain level of intensity and it would be insufficient to put an end to such tensions without using force.<sup>97</sup> The use of force must be necessary “to successfully repel an imminent armed attack or defeat one that is underway.”<sup>98</sup> Whether it is necessary depends on immediacy. In other words, a response must occur while there is still an immediate threat to the victim state and the use of force must be only way to repel the attack.<sup>99</sup> If the victim state could protect itself using other means, the use of force might not be considered necessary, however, the victim state need not try peaceful means first.<sup>100</sup> Imminence suggests that there is an impending armed attack.<sup>101</sup> Whether the use of force is necessary is a subjective standard and is judged from the victim state’s perspective.<sup>102</sup> However, such perspective must be rational and based on all of the circumstances.<sup>103</sup> Self-defence is strictly limited in terms of the trigger event meaning that only an actual or imminent armed attack of some severity will do. There should be a specific indication as to the nature of the threat or, more particularly, its imminence.<sup>104</sup> For example, an overt act against a state or its interests. There should not merely be a “gathering danger” or threat, but rather a threat that is “imminent”.<sup>105</sup> Gray asserts that “where the threat is not imminent, a state cannot act pre-emptively against a non-imminent or non-proximate

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<sup>95</sup> Lubell, Noam ‘*Extraterritorial Use of Force against Non-state Actors*’ Oxford University Press (2010) at 32.

<sup>96</sup> United Nations, United Nations Office on Drugs and Crime, ‘*Counter-terrorism in the International Law Context* (2021) at 101.

<sup>97</sup> Ibid.

<sup>98</sup> Schmitt, Michael N. ed., 2013. *Tallinn manual on the international law applicable to cyber warfare*. Cambridge University Press at 62.

<sup>99</sup> Stark, Catherine ‘*The Legality of the Use of Force against Terrorists: An Examination of the United States’ Air Strikes against the Islamic State in Syria*’ (2016) at 55.

<sup>100</sup> Weller, Marc ‘*Iraq and the Use of Force in International Law*’ Oxford University Press, USA (2010) at 184.

<sup>101</sup> Stark, Catherine ‘*The Legality of the Use of Force against Terrorists: An Examination of the United States’ Air Strikes against the Islamic State in Syria*’ (2016) at 55.

<sup>102</sup> Geoffrey S. DeWeese, ‘Anticipatory and Preemptive Self-Defense in Cyberspace: The Challenge of Imminence’ (2015), at 86.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Geoffrey S. DeWeese, ‘Anticipatory and Preemptive Self-Defense in Cyberspace: The Challenge of Imminence’ (2015), at 144.

threat.”<sup>106</sup> She declares that in such a situation, the Security Council must authorize the military action.<sup>107</sup>

### *Proportionality requirement*

Proportionality requires that the use of force in self-defence must be proportionate to the original use of force that was suffered by the victim state.<sup>108</sup> The aim, scope, and scale of the use of force must be proportionate to the armed attack, and strictly necessary to defeat it.<sup>109</sup> The proportionality rule recognizes that collateral damage may be likely when military operations are carried out, but it aims to limit it.<sup>110</sup> It thus allows some damage- particularly with regard to civilian objects and civilians- provided that it is “not excessive in relation to the concrete and direct military advantage anticipated.”<sup>111</sup> In other words, as asserted by the United Nations Office on Drugs and Crime, civilian casualties must not be disproportionate.<sup>112</sup> The incidental injuring of civilians or damage to civilian objects which are excessive in relation to the force and military advantage gained may constitute the unlawful use of force.<sup>113</sup> Furthermore, the incidental killing as a result of such use of force, or, in other words, the excessive and disproportionate use of force that results in the loss of life, may constitute an arbitrary deprivation of life.<sup>114</sup> In conclusion, the proportional use of force in self-defence minimizes civilian casualties and maintains an advantage that is greater than the expected loss of civilian life.<sup>115</sup> The principle of proportionality permits civilian casualties so long as the benefit to the attacker can be justified in relation to those deaths.<sup>116</sup> The use of force and harm to the population and civilian objects which is excessive in relation to the concrete military advantage anticipated from the attack is not a proportional use of force.<sup>117</sup> Weller maintains that, to minimize the risk of abusing the doctrine of the use of force in self-defence, states may

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<sup>106</sup> Christine Gray, ‘International Law and the Use of Force’ at 212.

<sup>107</sup> *Ibid* at 211.

<sup>108</sup> Webber, Diane, ‘Preventative Detention in the Law of Armed Conflict: Throwing Away the Key?’ *J. Nat'l Sec. L. & Pol'y*, (2012) at 108.

<sup>109</sup> United Nations, United Nations Office on Drugs and Crime, ‘Counter-terrorism in the International Law Context (2021) at 101.

<sup>110</sup> *Ibid*.

<sup>111</sup> *Ibid*.

<sup>112</sup> *Ibid*.

<sup>113</sup> *Ibid* at 86.

<sup>114</sup> Webber, Diane, ‘Preventative Detention in the Law of Armed Conflict: Throwing Away the Key?’ *J. Nat'l Sec. L. & Pol'y*, (2012) at 108.

<sup>115</sup> Docherty, B.L and Garlasco, M.E. ‘Off Target: The Conduct of the War and Civilian Casualties in Iraq. Human Rights Watch (2003).

<sup>116</sup> Webber, Diane, ‘Preventative Detention in the Law of Armed Conflict: Throwing Away the Key?’ *J. Nat'l Sec. L. & Pol'y*, (2012) at 174.

<sup>117</sup> Docherty, B.L and Garlasco, M.E. ‘Off Target: The Conduct of the War and Civilian Casualties in Iraq. Human Rights Watch (2003).

only use force “on a proper factual basis” and after “a good faith assessment of the facts”.<sup>118</sup> However, in each incident in which the USA used force to counter terrorism provided for in chapter two, the USA did not carry out such an analysis and instead, used force without considering the extent of the risk posed to them.<sup>119</sup>

## VII. THE EXPANSION OF THE TRADITIONAL RIGHT OF SELF-DEFENCE

The UN Charter provides strict parameters for the use of force in self-defence to be deemed lawful in terms of International Law.<sup>120</sup> Articles 2(4) and 51 of the UN Charter were applied in conformity with the way in which they were written until the Cold War.<sup>121</sup> Thereafter, the right to use force in a way that reinterpreted Article 51 was applied by President Ronald Reagan.<sup>122</sup> Reagan expressly ordered the first use of force that weakened the explicit requirement that an armed attack need to have occurred before the lawful use of force in self-defence could be taken.<sup>123</sup> The USA bombed Libya, whom they regarded as state sponsor of terrorism, and justified it as being a means of lawful self-defence against terrorism.<sup>124</sup> This was despite the fact that an armed attack had not occurred against them.<sup>125</sup> Thereafter, in June of 1993, President Clinton ordered a missile attack on Iraq to retaliate against a suspected plot to assassinate the former President of the USA.<sup>126</sup> The attack killed at least six people and, again, was justified as lawful self-defence.<sup>127</sup> The USA thus brought the attack within the realm of Article 51. Multiple air attacks launched by the USA over the years that followed also involved explicit references to, and reliance on, self-defence and Article 51.<sup>128</sup>

## VIII. CONCLUSION

This Chapter has analysed both the Customary International Law right to use force in self-defence, as well as the UN Charter provision expressing such right in an attempt to provide a substantive framework on using force in lawful self-defence. The customary right provides that the use of force in self-defence must be both necessary and proportional to be deemed lawful.

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<sup>118</sup>Weller, Marc ‘*Iraq and the Use of Force in International Law*’ Oxford University Press, USA (2010) at 139.

<sup>119</sup>. Docherty, B.L and Garlasco, M.E. ‘*Off Target: The Conduct of the War and Civilian Casualties in Iraq*.’ Human Rights Watch (2003).

<sup>120</sup> Op cit note 1 at Article 51.

<sup>121</sup> Op cit note 39 at 35.

<sup>122</sup> Ibid at 35.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid at 36.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid at 35

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

Further, that there must be no other means by which to respond to the attacks. In terms of the UN Charter, the use of force in lawful self-defence must be in response to an armed attack that is attributable to a state and must be both necessary and proportionate. This Chapter has also clearly demonstrated how the substantive framework on the use of force was challenged by the events of 9/11 and how the USA has increasingly invoked the right to use force in self-defence to justify military action against terrorism. This is a concern in light of the customary law probation as the as the narrow exception to the prohibition as set out in the UN Charter. Article 51 of the UNC has been widely interpreted such that the Article's express requirements have been weakened. The following Chapter will assess whether the USA's use of force in self-defence against terrorism is lawful. Given that state attributability of an armed attack has been identified by this Chapter as a requirement for the lawful use of force in self-defence, the following Chapter will debate whether the notion of using force against attacks by non-state actors is lawful, and further, whether there has been a shift away from the requirement of state attribution after the events of 9/11.

**CHAPTER 3:**  
**THE USE OF FORCE IN SELF-DEFENCE AGAINST TERRORISM**

I. INTRODUCTION

Article 51 of the UN Charter refers to the need for there to be an armed attack against a state but does not mention the source of such an attack.<sup>129</sup> It mentions the entity that has the right to respond to an armed attack in self-defence, being a United Nations member state, but does not provide that the party responsible for the attack must be a state.<sup>130</sup> However, as provided in the previous Chapter, the ICJ, in *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion* confined the right to use force in self-defence against attacks that are attributable to states only, not non-state actors.<sup>131</sup> However, as demonstrated, the use of force in self-defence against terrorism has often been cited as the legal justification for the USA's military action against other states. There is therefore controversy as to whether an armed attack must be attributable to a state in order to give the victim state a right to use force in self-defence.<sup>132</sup> This has become increasingly important because many states have resorted to the use of force in response to terrorism and terrorist attacks. Terrorists are non-state actors. Thus, the requirement of state attribution leaves terrorist attacks out of Article 51's scope as such attacks is usually independent of a government and instead carried out by non-state actors.<sup>133</sup> Whether Article 51 allows for self-defence against non-state actors is thus a primary concern with regard to an assessment of the lawfulness of the USA's use of force against terrorism. Further, the fact that the USA has often resorted to force against terrorism before a terrorist attack has been carried out against them creates a hurdle with regard to the self-defence requirement that a state can use force *in response to* an attack by another state. This chapter thus seeks to answer whether Article 51 can be invoked despite the requirement of state attribution of such attacks, and further, whether terrorist attacks can constitute an "armed attack" in terms of Article 51. This chapter will assert, by relying on the wording of the UN Charter, judgments of the International Court of Justice, recent state practice as evidenced by the North Atlantic Treaty Organization's ('NATO') position on the matter, as well as specific Security Council Resolutions, that there has been a shift away from the

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<sup>129</sup> Christopher Greenwood, 'Self-Defence' (2017) at 6.

<sup>130</sup> Lubell, Noam 'Extraterritorial Use of Force against Non-state Actors' Oxford University Press (2010) at 31.

<sup>131</sup> Ibid at 32.

<sup>132</sup> Op cit note 61 at 5.

<sup>133</sup> Supra note 56 at para 115

stringent requirement of state attribution after 9/11.<sup>134</sup> It will submit that self-defence may be lawful in response to attacks perpetrated by non-state actors, including terrorists.

## II. THE SOURCE OF THE ATTACK- OVERCOMING ISSUES OF ATTRIBUTION

Greenwood asserts that lawful self-defence can be taken in response to armed attacks by non-state actors and that a terrorist attack carried out by non-state entities may amount to an armed attack.<sup>135</sup> This dissertation similarly asserts that non-state actors can be responsible for armed attacks which give rise to self-defence as there is a lot of evidence to support the contention.<sup>136</sup> State attribution is not a stringent requirement for the lawful exercise of self-defence as indicated by the Caroline Incident; certain ICJ Judgements; Recent State Practice; and Security Council Resolutions Concerning Self-Defence against Terrorist Groups.<sup>137</sup> The rest of this chapter will delve into each aspect individually.

### (i) The Caroline Incident

The Caroline incident, which involves the claim to use force in self-defence against attacks by a non-state actor, portrays that an armed attack need not emanate from a state in order for the state that is the victim of the attack to lawfully respond to it using force in self-defence.<sup>138</sup> The correspondence between the Governments involved in the matter portrays that no limitation in terms of the party responsible for the attack exists<sup>139</sup> The attacks from the US territory, which were the basis for the claim to self-defence by Britain, were not the responsibility of the United States.<sup>140</sup> However, the US and British governments did not exclude the possibility that the right of self-defence might have been triggered.<sup>141</sup> The dispute thus illustrates that self-defence is available against non-state actors.

### (ii) International Court of Justice Judgments

In *Nicaragua*, the ICJ held that armed attacks “can include the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force

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<sup>134</sup> Stark, Catherine ‘*The Legality of the Use of Force against Terrorists: An Examination of the United States’ Air Strikes against the Islamic State in Syria*’ (2016) at 19.

<sup>135</sup> *Ibid.*

<sup>136</sup> Lubell, Noam ‘*Extraterritorial Use of Force against Non-state Actors*’ Oxford University Press (2010) at 31.

<sup>137</sup> Stark, Catherine ‘*The Legality of the Use of Force against Terrorists: An Examination of the United States’ Air Strikes against the Islamic State in Syria*’ (2016) at 40.

<sup>138</sup> *Ibid* at 35.

<sup>139</sup> Christopher Greenwood, ‘Self-Defence’ (2017) at 6.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

against another State of such gravity as to amount to an actual armed attack conducted by regular forces”.<sup>142</sup>

In the *Corfu Channel* case, the ICJ confirmed that military forces operating outside a state’s boundaries could be lawfully defended in accordance with Article 51.<sup>143</sup> The case portrays that a broad consensus has developed to support the notion that an attack that is not attributable to a state may be included within the scope of an armed attack justifying the use of force in self-defence.<sup>144</sup>

In his separate opinion regarding the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, Judge Higgins has similarly asserted that Article 51 does not explicitly provide for the requirement of state attribution.<sup>145</sup> Additionally, it has been asserted by prominent ICJ judge, Judge Kooimans, that nothing in the language of Article 51 prevents a victim state from exercising its right of self-defence if it has suffered an attack whose scale and effects meet the threshold of an armed attack, despite such attack being carried out by a non-state actor.<sup>146</sup> This approach has been endorsed in academia by many International Law experts as well as in practice by the ICJ.<sup>147</sup>

These three cases thus illustrate the availability of Article 51 to states that have been the victim of an armed attack that was not carried out by another state, but rather a non-state actor.

### (iii) Recent State Practice

For a limitation as to the nature of the party responsible for the armed attack in terms of Article 51 to have been included onto the right of self-defence, it would have been necessary for that practice to have reflected widespread *opinio juris* that International Law precluded resort to self-defence in response to other armed attacks.<sup>148</sup>

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<sup>142</sup> Supra note 56 at para 195.

<sup>143</sup> *Corfu Channel Case (United Kingdom v. Albania) (Merits)* [1949] ICJ Rep 4 at page 33.

<sup>144</sup> William K. Lietzau, ‘Old Laws, New Wars: Jus ad Bellum in an age of Terrorism’, at 392.

<sup>145</sup> Separate Opinion of Judge Higgins in Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [2004] ICJ Rep 136 at para 33.

<sup>146</sup> Separate Opinion of Judge Kooimans in Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [2004] ICJ Rep 136 at para 35.

<sup>147</sup> Ibid.

<sup>148</sup> Christopher Greenwood, ‘Self-Defence’ (2017) at 6.

However, state practice, especially after 9/11, has suggested a shift away from the stringent requirement of state attribution and appears to support the position that non-state actors might be behind armed attacks which give rise to self-defence.<sup>149</sup> Though the position may not be easily reconciled with the traditional right of self-defence, it may be justifiable in terms of customary International Law.<sup>150</sup> This is because customary law consists of unwritten rules that arise out of the practice of states in their international relations over time and requires both state practice and *opinio juris* to establish it.<sup>151</sup>

State practice requires sufficiently uniform and consistent practice over a sufficient period of time and *opinion juris* requires that the practice be considered to be legally obligatory.<sup>152</sup> In other words, states must believe or accept that a practice is carried out as it is required by law.<sup>153</sup>

State practice portrays the growing recognition by states that self-defence may be invoked against non-state actors.<sup>154</sup> An example of such an acceptance of is the North Atlantic Treaty Organization's ("NATO") pronouncement that the 9/11 terrorist attacks constitute armed attacks within the meaning of the NATO Charter. NATO recognised the right of its members, including the US, to use military force in self-defense against the non-state actors.

There was little contestation by other states when, shortly after 9/11, the USA claim that they were acting in self-defence when taking action against a terrorist group in Afghanistan.<sup>155</sup> This indicates state attribution as not being a stringent requirement for the lawful exercise of force in self-defence.<sup>156</sup>

Whether, for the purposes of the right of self-defence, an armed attack must be attributable to a state is unsettled. Terrorist groups are increasingly engaging in armed attacks and acts of violence, therefore a limitation in terms of Article 51 would unreasonably restrict the right of victim states of such attacks to defend itself. On the other hand, there is concern that a state which has been the victim of an attack by a terrorist group should not be free to take action

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<sup>149</sup> Op cit note 99 at 26.

<sup>150</sup> Op cit note 65 at 19

<sup>151</sup> Op cit note 5 at 17.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Lubell, Noam 'Extraterritorial Use of Force against Non-state Actors' Oxford University Press (2010) at 26.

<sup>155</sup> Christopher Greenwood, 'Self-Defence' (2017) at 6.

<sup>156</sup> Ibid.

against that group in the territory of other states.<sup>157</sup> In this regard, it is opined that this concern can be overcome by a proper application of the principles of necessity and proportionality.

(iv) United Nations Security Council Resolutions

The response of the UN Security Council to the 9/11 terrorist attacks, specifically in the Council's adoption of Resolutions, also portrays the way in which state attribution is not a stringent requirement for the lawful exercise of self-defence. Resolutions adopted after 9/11 depict the implicit acceptance of a right of self-defence in response to terrorism and imminent threats emanating therefrom by the United Nations.

Resolution 1368, described as the "cornerstone" of the UN's efforts to counter terrorism, recognised the "inherent right of individual or collective self-defence" against terrorism.<sup>158</sup> It recognised that the 9/11 attacks threatened international peace and security and thus trigger the individual right of self-defence by the US against the perpetrators of the attack as well as triggered the collective rights and responsibilities of other nations to assist the US.<sup>159</sup> It expressly reaffirmed the right of self-defence but made no mention of whether or not the attacks were in some way the responsibility of a State.<sup>160</sup>

The legitimacy of self-defence against terrorism was also recognised by the Security Council in Resolution 1373.<sup>161</sup> The resolution called acts of terrorism a "threat to international peace and security" which authorizes it to act under Chapter seven of the UN Charter.<sup>162</sup> The acts of terrorism were not qualified meaning that such acts need not be ascribed to a particular state for the victim state thereof to respond with force in lawful self-defence."<sup>163</sup> Furthermore, although the resolution did not expressly pronounce that terrorist attacks amounted to an "armed attack", the Security Council affirmed the right of self-defence in the resolution's preamble and Gray asserts that this may amount to an implicit acceptance of the right.<sup>164</sup>

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<sup>157</sup> Christopher Greenwood, 'Self-Defence' (2017) at 7.

<sup>158</sup> Security Council Resolution no 1368 (2001).

<sup>159</sup> Ibid.

<sup>160</sup> Op cit note 155.

<sup>161</sup> Op cit note 24 at 629.

<sup>162</sup> Op cit note 187.

<sup>163</sup> Ibid.

<sup>164</sup> Gray, Christine 'The Use of Force and the International Legal Order' International Law, 589, (2003) at 629.

Resolution 1377 labelled terrorists an enemy of all humankind and called on all states to engage in counterterrorism against them and engage against those who “finance, plan, prepare, and support terrorists in any way”.<sup>165</sup> The UN recognised that terrorists could, by attacking a state, become the lawful object of military force in self-defence. Judge Kooijmans has opined that the resolution alludes to self-defence in the wake of terrorism.<sup>166</sup>

### III. AN “ARMED ATTACK”

Article 51 of the UN Charter specifies that self-defence is permissible in response to an armed attack which is an attack that reaches a particular threshold in International Law.<sup>167</sup> The issue is therefore that acts of terrorism or single terrorist attacks will often not cross the threshold at which point the use of force in self-defence may be activated.<sup>168</sup>

In the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005], the ICJ The example of 9/11 constituting an armed attack within the meaning of Article 51 of the UN Charter has been used by the Court to portray the way in which armed attacks need not necessarily take the form of action by regular armed forces.<sup>169</sup> In this regard, however, the 9/11 attacks on the World Trade Centre in New York and the Pentagon were treated as armed attacks within the meaning of Article 51 despite being single acts of terrorism.<sup>170</sup>

In the *Nicaragua* case, the ICJ contrasted an “armed attack” with a “mere frontier incident”.<sup>171</sup> The Court held that if a use of force violates Article 2(4) of the UN Charter but does not pass the threshold of a “mere frontier incident”, then the state who has been the victim of that attack cannot respond to it by using force in self-defence.<sup>172</sup> The Court did, however, provide that the victim state is entitled to lawful countermeasures, but did not specify whether this includes the use of force.<sup>173</sup> Greenwood asserts that the approach of the Court has resulted in controversy

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<sup>165</sup> Security Council Resolution 1377 (2001).

<sup>166</sup> Security Council Resolution no 1373 (2001).

<sup>167</sup> Gray, Christine ‘*The Use of Force and the International Legal Order*’ International Law, 589, (2003) at 198.

<sup>168</sup> Christopher Greenwood, ‘Self-Defence’ (2017) at 9.

<sup>169</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 201 at para 195.

<sup>170</sup> UNSC Res 1368 [2001] [12 September 2001] and UNSC Res 1373 [2001] [28 September 2001]).

<sup>171</sup> *Supra* note 56 at para 195.

<sup>172</sup> Christopher Greenwood, ‘Self-Defence’ (2017) at para 33.

<sup>173</sup> *Ibid.*

with both States and commentators.<sup>174</sup> However, he opines that “despite the language differences between Article 2(4) and 51, there is no evident textual reason for holding that the concept of armed attack excludes some attacks which, though armed, fall below an unspecified threshold of intensity of violence.”<sup>175</sup> He further states that such distinction was not apparent in state practice prior to the decision of the Court in the *Nicaragua* case.<sup>176</sup> It is opined that, although there may be more appropriate responses than using military action to respond to minor terrorist incidents, the requirement that self-defence be necessary and proportional already caters for excessive and disproportionate responses to terrorism not being brought within the right.<sup>177</sup>

The *Nicaragua* judgment also gives little guidance on how to distinguish between sufficiently serious uses of force which constitute armed attacks and less serious uses of force which do not.<sup>178</sup> Some attacks may cross the threshold established in *Nicaragua* because they are sufficiently severe. However, for the assessment of whether or not there is an armed attack in cases of smaller attacks that may not individually meet such requirement, it has been suggested that the attacks be looked at in their totality.<sup>179</sup> In this regard, there is a growing argument for, and declaration by states, that the right of self-defence in Article 51 may be evoked to repel certain acts of terrorism. It has been accepted that a single incident can amount to an armed attack if it is serious enough to constitute a “most grave use of force”.<sup>180</sup> Terrorist threats and small-scale terrorist attacks will likely not meet this requirement in isolation, however, given that the attacks can cumulatively meet the threshold, brings such attacks within the scope of Article 51.<sup>181</sup> This essentially means that such attacks may give rise to the right of self-defence.<sup>182</sup>

Furthermore, the idea that states be able to utilise the use of force in self-defence against smaller armed attacks in the name of terrorism can be reconciled with an interpretation of the UN Charter that takes cognisance of the Charter’s aims, preamble and purposes. Given that the term “armed attack” is not defined in the UNC, reference is made to Articles 31 and 32 of the

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<sup>174</sup> Ibid.

<sup>175</sup> Ibid at para 34.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid at para 17.

<sup>179</sup> Christopher Greenwood, ‘Self-Defence’ (2017) at 1.

<sup>180</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* [2003] ICJ Rep 803 at para 44.

<sup>181</sup> Ibid.

<sup>182</sup> Christopher Greenwood, ‘Self-Defence’ (2017) at para 18.

Vienna Convention on the Law of Treaties (“VCLT”) to aid interpretation.<sup>183</sup> Despite coming into force after the UN Charter, the Convention is a codification of customary International Law and can thus be relied on.<sup>184</sup>

Article 31(1) of the VCLT provides that treaties be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>185</sup> This dissertation will demonstrate how an interpretation of Article 51 in line with the VCLT interpretation of treaties will encompass terrorist attacks in its ambit.<sup>186</sup>

Article 1(1) of the UNC provides for the purposes of the UN, the primary of which is to “maintain international peace and security”, and to that end, prevent and remove threats to peace.<sup>187</sup> It has been suggested that the way in which the terms “peace” and “security” are used throughout the Charter indicate that the concept of peace consists of more than just the absence of war.<sup>188</sup> Some scholars argue that the provisions refer to the development in the state of international relations which is meant to lead to the reduction of issues likely to cause war.<sup>189</sup> If the purpose of the UN is to reduce issues likely to cause war, then it is opined that terrorist attacks would be included in the notion of an “armed attack” as excluding them from the ambit of self-defence may inadvertently permit them. This would be contrary to the aims of the Charter.<sup>190</sup> The UNC aimed to set up an effective prohibition of the use of force. As such, the scope of Article 51 must be interpreted in light of this aim.

Article 2 of the UN Charter contains principles that indicate the purpose of the UN.<sup>191</sup> They express rules that states must abide by to achieve the purposes of Article 1.<sup>192</sup> Not including terrorist acts in the scope of Article 51 would undermine the UN’s aim of preserving

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<sup>183</sup> TW Bennet and J Strug, *‘Introduction to International Law’* (2013) at 128.

<sup>184</sup> Ibid.

<sup>185</sup> United Nations, Vienna Convention on the Law of Treaties between States, (1969), at Article 31(1).

<sup>186</sup> Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf. *‘The Charter of the United Nations (3<sup>rd</sup> edition): A Commentary’* (2012) at 110.

<sup>187</sup> Op cit note 1 at Article 1(1).

<sup>188</sup> Alex Ansong, ‘Unilateral Enforcement of UN Security Council Resolutions: The Case of Operation Iraqi Freedom (2018), at 62.

<sup>189</sup> Ibid.

<sup>190</sup> Tshepo Tlhacoane, *‘Cyberattacks: The Latest Threat to International Peace and Security, and How International Law can respond’* (2020) at 43.

<sup>191</sup> Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf. *‘The Charter of the United Nations (3<sup>rd</sup> edition): A Commentary’* (2012) at 127.

<sup>192</sup> Ibid.

international peace and security and thus contradict the purpose of the Charter.<sup>193</sup> Essentially, it would be paradoxical for states to commit to the pursuit of the purpose of the UN while allowing acts of terrorism to take place on their land without being able to lawfully respond to them in self-defence<sup>194</sup>

Among the purposes of the UN, Article 1(1) also includes the suppression of acts of aggression and threats to peace. Despite not having a single globally accepted definition, terrorism has been defined as “the unlawful use, or threat, of violence by non-state actors against persons, property, critical infrastructures or key resources, intended to intimidate or coerce a government, or all or part of the general public, in furtherance of political, religious, or ideological objectives.”<sup>195</sup> The notion that terrorism can threaten peace is trite. Suppressing the threat of it is therefore easily reconcilable with the purposes of the UNC. This is strong support for including threats from terrorism and terrorist attacks within the ambit of “armed attacks” in the Article 51.

The right to self-defence must therefore be interpreted widely as this will ensure that the purpose and principles of the Charter will be upheld and meet contemporary security challenges which include terrorist acts. A narrow interpretation of the right would only prohibit armed attacks, but not other acts of aggression such as terrorist attacks.<sup>196</sup>

The preamble of the UNC, which can serve as an interpretive guide for its provisions, provides, *inter alia*, that the UN is determined to “save succeeding generations from the scourge of war” and “establish conditions under which justice and respect for the obligations arising from treaties and other sources of International Law can be maintained”.<sup>197</sup> The preamble indicates the intention of the Member States to suppress war as well as maintain conditions where states do not need to engage in conflict.<sup>198</sup> This suggests that, although they are not explicitly referred to, acts of terrorism should be brought into the notion of an “armed attack” in terms of Article 51. Therefore, based on the provisions of the preamble, it is opined that acts of terrorism may

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<sup>193</sup> Ibid at 45.

<sup>194</sup> Ibid at 46.

<sup>195</sup> Webber, Human Rights Law and Counter Terrorism Strategies Dead, Detained or Stateless, at 43.

<sup>196</sup> Ibid.

<sup>197</sup> Op cit note 1 at preamble.

<sup>198</sup> Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf. ‘*The Charter of the United Nations (3<sup>rd</sup> edition): A Commentary*’ (2012) at 103.

activate the right of self-defence. However, this is only provided that such defence is both necessary and proportional.

#### IV. CONCLUSION

Prior to 9/11, resorting to the use of force against non-state actors was almost systematically rejected.<sup>199</sup> The right to use force in self-defence was viewed in a very restrictive way and could only be relied on if an armed attack was attributable to a state.<sup>200</sup> The 9/11 attacks, however, prompted “a fundamental re-appraisal of the law on self-defence” and represented a “revolutionary challenge” to the traditional doctrine.<sup>201</sup> The right was expanded to cover the use of force by terrorist organizations, even in the absence of state attribution of the attack.<sup>202</sup> This chapter therefore sought to provide clarity on whether Article 51 of the UN Charter can be invoked before a state has suffered an armed attack and further, whether terrorist attacks can constitute an “armed attack” in terms of Article 51. It submitted that state attribution of an armed attack is not a stringent requirement for the lawful exercise of self-defence in terms of Article 51 despite this being the opinion of the ICJ in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*. The assertion was supported by the certain ICJ judgments, recent state practice as evidenced by the North Atlantic Treaty Organization’s (‘NATO’) position on the matter, as well as specific Security Council Resolutions. It is opined that since 9/11, there has been a shift away from the stringent requirement of state attribution and that self-defence may be lawful in response to attacks perpetrated by non-state actors, including terrorists.

It is further submitted that the rise of terrorism globally highlights the need to implement defensive measures that are not dependent on a strict reading of Article 51 and that terrorist attacks may often constitute smaller attacks which, viewed individually, may not amount to an “armed attack”.<sup>203</sup> The Caroline Incident and ICJ judgments in the *Nicaragua* and *Armed Activities* cases indicate that acts of terrorism amount to armed attacks provided that they are of sufficient intensity. Therefore, although smaller terrorist attacks as well as individual acts of

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<sup>199</sup> Stark, Catherine ‘*The Legality of the Use of Force against Terrorists: An Examination of the United States’ Air Strikes against the Islamic State in Syria*’ (2016) at 44.

<sup>200</sup> Supra note 56 at para 115.

<sup>201</sup> Ibid at 46.

<sup>202</sup> Gray, Christine ‘*The Use of Force and the International Legal Order*’ *International Law*, 589, (2003) at 629.

<sup>203</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ, Judgement, 26 November 1984 at para 393.

terrorism may not constitute an armed attack, their collective impact may meet the threshold of one.<sup>204</sup> Such a view is in line with recent state practice on the matter, an interpretation of the right in line with the VCLT, and the recognition that terrorism can present grave challenges to international peace and security and that states should be able to respond to them in self-defence as an evolving security need.<sup>205</sup> This dissertation aims to determine whether, in using force against terrorists, the USA has complied with its international obligations. It therefore first had to be determined whether self-defence against terrorism may be a justifiable use of force in International Law. This was answered in the affirmative and it was portrayed how the state attribution requirement of such attack and a strict reading of “armed attack” can be overcome so as that self-defence against single incidents of terrorism or smaller-scale terrorist attacks can give rise to the right for a state to use force in self-defence.

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<sup>204</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* [2003] ICJ Rep 803 at para 44.

<sup>205</sup> *Op cit* note 1.

**CHAPTER 4:**  
**PRE-EMPTIVE SELF-DEFENCE OR ANTICIPATORY SELF-DEFENCE AS A  
JUSTIFICATION FOR THE USE OF FORCE AGAINST TERRORISM**

I. INTRODUCTION

Article 51 of the UN Charter provides that UN Member States have the inherent right of individual or collective self-defence if an armed attack occurs against them.<sup>206</sup> It thus seemingly asserts that the lawful use of force by a state in self-defence is in response to an armed attack and as such, a state must have already suffered an attack in order to use force in lawful self-defence.<sup>207</sup> The USA has, however, often alluded to the right to use pre-emptive or anticipatory force to counter terrorism. After the events of 9/11, the USA increasingly asserted that they would act in response to threats from terrorism even if such threats were not imminent.<sup>208</sup> Such a justification for using force is rooted in the right to use force pre-emptively, not the traditional self-defence doctrine. This dissertation aims to determine whether, in using force against terrorists, the USA has complied with its international obligations. It is therefore necessary to determine whether, generally, lawful self-defence can be in the form of pre-emptive or anticipatory action. While some scholars have conflated these concepts, this chapter will provide an analysis of each as they are not the same. An exploration of the legality of pre-emptive self-defence will be provided and will include the views of prominent International Law scholars including Malcolm Davis and Christine Gray. Thereafter, anticipatory self-defence and its role in relation to threats from terrorism will be assessed. It will be submitted that states cannot legitimize their use of force against other states on the basis of pre-emptive self-defence as employing military action before an armed attack violates the standards of lawful self-defence. It will further be submitted that there has been a shift towards an acceptance of anticipatory self-defence and that such shift is in keeping with the maintenance of global peace and security. However, that anticipatory self-defence is still controversial. Therefore, this dissertation asserts that in order for a state to lawfully use force in self-defence, the threat of terrorism must be instant and overwhelming and the response to such threat, in the form of force, is both necessary and proportional.

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<sup>206</sup> Op cit note 1 at Article 51.

<sup>207</sup> Christopher Greenwood, 'Self-Defence' (2017) at 1.

<sup>208</sup> Alex Ansong, 'Unilateral Enforcement of UN Security Council Resolutions: The Case of Operation Iraqi Freedom (2018), at 62.

## II. PRE-EMPTIVE SELF-DEFENCE

Pre-emptive self-defence is the use of force prior to a suspected attack.<sup>209</sup> It is what Gazzini asserts as preventative in nature and “future-orientated”.<sup>210</sup> It encompasses “action employed to counter non-imminent threats”.<sup>211</sup> It therefore does not require a current, definitive threat.<sup>212</sup>

Davis asserts that the use of force in self-defence based on the future possibility of an attack or as a precautionary measure is impermissible.<sup>213</sup> Shiryayev similarly opines that a state can only lawfully respond to an attack that is imminent and that destroying threats that are “still gathering” cannot be reconciled with the doctrine.<sup>214</sup> Gray holds that the use of force in self-defence must be an “instant and overwhelming necessity” which portrays that self-defence may only be used against attacks that are ongoing, or attacks that have already occurred, not for precautionary purposes or to defend against attacks which may occur.<sup>215</sup>

Although Bothe recognises that the concept of imminence should be adapted to meet emerging threats to peace and that there is a compelling case for taking pre-emptive action even if there is uncertainty as to the time and place of an attack, he holds that a good factual argument “does not make new law” and that current state practice does not suggest an overly broad construction of the doctrine of self-defence.<sup>216</sup> He asserts that a change in the law to broaden self-defence is not desirable and that lawful self-defence requires the actual existence of an armed attack or of a situation equivalent to an armed attack.<sup>217</sup> Furthermore, that a broader definition may lead to vagueness and the possibility of abuse and thus that the traditional strict approach should be maintained.<sup>218</sup> He recognises the concept of necessity as expressed in the Caroline formula as not static and allowing for flexibility to adapt to the circumstances of each case, however ultimately holds that the idea of necessity cannot be extended to a situation where there is uncertainty as to whether an armed attack will occur.<sup>219</sup>

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<sup>209</sup> Tarcisio Gazzini *The Changing Rules on the Use of Force in International Law* (2005) at 180.

<sup>210</sup> *Ibid.*

<sup>211</sup> Geoffrey S. DeWeese, ‘Anticipatory and Preemptive Self-Defense in Cyberspace: The Challenge of Imminence’ (2015), 86.

<sup>212</sup> *Ibid* at 87.

<sup>213</sup> Davis.

<sup>214</sup> The Caroline incident of 1837.

<sup>215</sup> Gray, Christine ‘*The Use of Force and the International Legal Order*’ *International Law*, 589, (2003) at 633.

<sup>216</sup> Bothe, M ‘*Terrorism and the Legality of Preemptive Force*’ *EJIL* (2002), at 232.

<sup>217</sup> *Ibid* at 1.

<sup>218</sup> Bothe, M ‘*Terrorism and the Legality of Preemptive Force*’ *EJIL* (2002), at 231.

<sup>219</sup> *Ibid* at 233.

Gray asserts that the transformation of self-defence along the lines suggested by President Bush is radical and that there is little sign of support for it.<sup>220</sup> She holds that a unilateral right of pre-emptive self-defence would be dangerously destabilizing.<sup>221</sup>

The notion of pre-emptive self-defence was also rejected by the UN High-level Panel which was created in 2003 to analyse global threats to peace and recommend actions based on this analysis.<sup>222</sup> Similarly, the ICJ has held that Article 51 may justify a use of force in self-defence only within the strict confines laid down in the Article.<sup>223</sup> It does not allow the use of force by a state to protect perceived security interests beyond those parameters.

In conclusion, states cannot justify their use of force against other states on the basis of pre-emptive self-defence. This is because using military force to pre-empt an armed attack does not conform with the requirements of lawful self-defence.

### III. ANTICIPATORY SELF-DEFENCE

Anticipatory self-defence is the use of force in anticipation of an armed imminent attack.<sup>224</sup> This differs from pre-emptive self-defence because the measure is not precautionary, but rather taken in response to an imminent threat.<sup>225</sup> Reisman asserts that it occurs in response to a “palpable” and “imminent” threat.<sup>226</sup> Sadorf similarly describes the fundamental difference between pre-emptive and anticipatory action as being the imminence of the threat posed by the aggressor State.<sup>227</sup>

Academic debate regarding anticipatory self-defence is divided.<sup>228</sup> The argument that lawful self-defence can only be taken once a state has suffered an armed attack is mostly based on the

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<sup>220</sup> Gray, Christine ‘*The Use of Force and the International Legal Order*’ *International Law*, 589, (2003) at 633.

<sup>221</sup> *Ibid* at 634

<sup>222</sup> Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565 para 188.

<sup>223</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 201 at para 195.

<sup>224</sup> Gray, Christine ‘*The Use of Force and the International Legal Order*’ *International Law*, 589, (2003) at 628.

<sup>225</sup> Geoffrey S. DeWeese, ‘Anticipatory and Preemptive Self-Defense in Cyberspace: The Challenge of Imminence’ (2015), at 85.

<sup>226</sup> W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, (2006), 526.

<sup>227</sup> David A. Sadorf, *A Question of Determinacy: The Legal Status of Anticipatory Self-Defense*, 529.

<sup>228</sup> Stark, Catherine ‘*The Legality of the Use of Force against Terrorists: An Examination of the United States’ Air Strikes against the Islamic State in Syria*’ (2016) at 16.

wording of Article 51 as it provides that the right occurs “if an armed attack occurs”.<sup>229</sup> Article 51 thus seems to exclude the possibility of a state using self-defence against an attack which has not yet materialized.<sup>230</sup> It is often argued that the drafters of the UN Charter did not intend to trigger the right in the face of an imminent threat or attack, but only after an armed attack that has occurred.<sup>231</sup>

Many have deemed anticipatory self-defence related justifications for the use of force under the UN Charter as unlawful based on the fact that it excludes the principle of necessity and immediacy.<sup>232</sup> Detter, for example, views it as falling under the prohibitions of the use of force under Article 2(4) of the UN Charter, thus deeming it illegal.<sup>233</sup>

On the one hand, there is a recognition that states should be able to respond to imminent attacks as the threat thereof may be so direct and overwhelming that a state should not be required to wait to respond to it.<sup>234</sup> Webber, for example, asserts that anticipatory self-defence is lawful in response to existing threats.<sup>235</sup> Greenwood asserts that there is a strong argument that International Law recognizes a right of anticipatory self-defence when an armed attack is imminent.<sup>236</sup> In this regard, he points to the *Caroline* case and specifically the government correspondence therein as the US and UK accepted that anticipatory self-defence was part of the customary International Law of self-defence.<sup>237</sup> After the *Caroline* incident, the permissibility of anticipatory self-defence was alluded to where it was stated that self-defence may be taken where the need was “instant” and left “no moment for deliberation”.<sup>238</sup> Greenwood additionally holds that it is “plainly arguable” that since Article 2(4) of the UN Charter prohibiting the use of force did not exclude the lawful use of force in self-defence, and Article 51 was later introduced to confirm the existence of the right, it cannot be inferred from

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<sup>229</sup> Christopher Greenwood, ‘Self-Defence’ (2017) at 10.

<sup>230</sup> *Ibid.*

<sup>231</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ, Judgement, 26 November 1984 at paras 187–201

<sup>232</sup> *Ibid.*

<sup>233</sup> Alex Ansong, ‘Unilateral Enforcement of UN Security Council Resolutions: The Case of Operation Iraqi Freedom’ (2018), at 56.

<sup>234</sup> Bothe, M ‘*Terrorism and the Legality of Preemptive Force*’ EJIL (2002), at 1.

<sup>235</sup> Webber, Human Rights Law and Counter Terrorism Strategies Dead, Detained or Stateless, at 100.

<sup>236</sup> Christopher Greenwood, ‘Self-Defence’ (2017) at 10.

<sup>237</sup> *Ibid.*

<sup>238</sup> William K. Lietzau, ‘Old Laws, New Wars: Jus ad Bellum in an age of Terrorism’, at 398.

the Article 51 phrase “if an armed attack occurs” that an important change in the scope of the right occurred.<sup>239</sup>

Cassese acknowledges that moral and political grounds justify anticipatory self-defence against terrorism.<sup>240</sup> Additionally, Oppenheim acknowledges that while anticipatory action in self-defence is normally unlawful, there are circumstances in which it should be deemed lawful, one of which is in the case of terrorism.<sup>241</sup> In this regard, however, the threat as well as the degree to which the action is necessary to avoid such threat must be carefully assessed before such action is taken.<sup>242</sup>

It has been asserted that the doctrine of anticipatory self-defence is a natural extension of and fully consistent with the traditional right of individual self-defence.<sup>243</sup> Furthermore, that anticipatory action ensures that the right is meaningful and effective.<sup>244</sup> It has also been argued that the conservative readings of self-defence law should be discredited in light of the events of 9/11 and that states should be able to act in self-defence to situations in which a terrorist attack is imminent.

#### IV. CONCLUSION

Although Article 51 of the UN Charter condones the use of force in self-defence, such use of force should only be permitted to prevent or terminate an armed attack or an attack or threat that is imminent. Further, the use of force must be both necessary and proportional in relation to the attack or threat thereof.<sup>245</sup> Anticipatory action acknowledges that waiting for an actual terrorist attack to occur before initiating defensive measures would undermine international peace and security. It has been submitted that the utilization of force for self-defence as a preventative step is impermissible in International Law. Consequently, any rationale for employing military force against potential or non-imminent terrorist threats cannot align with the principles of lawful self-defence. The bane of terrorism has, however, weakened a very conservative reading of self-defence law and there has been a shift towards an acceptance of

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<sup>239</sup> Ibid.

<sup>240</sup> Alex Ansong, ‘Unilateral Enforcement of UN Security Council Resolutions: The Case of Operation Iraqi Freedom’ (2018), at 56.

<sup>241</sup> Sir Robert Jennings, ‘Oppenheim’s International Law’ (2008) at 452.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid.

<sup>245</sup> Weller, Marc ‘*Iraq and the Use of Force in International Law*’ Oxford University Press, USA (2010) at 140.

anticipatory self- defence. Given that anticipatory self-defence is still highly controversial and that Article 51 requires, *inter alia*, that a state must have suffered an armed attack to use self-defence, this dissertation opines that the requirements of necessity and proportionality will dictate whether using force in self-defence is lawful.<sup>246</sup> The necessity and proportionality requirements ensure are a way in which to determine whether the threat of terrorism is instant and overwhelming and leaves “no choice of means and moment for deliberation”.<sup>247</sup> Necessity determines imminence and ensures that a state can act in self-defence before it is too late.<sup>248</sup>

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<sup>246</sup> Sir Robert Jennings, ‘Oppenheim’s International Law’ (2008) at 452

<sup>247</sup> Henckaerts, Jean-Marie, ‘*Customary International Humanitarian Law*’, Vol. I, Rules (Vol. 1) (2005) at 46.

<sup>248</sup> *Ibid.*

**CHAPTER 5:**  
**CRITICISMS ABOUT THE LEGALITY OF THE USA’S HISTORY OF THE USE  
OF FORCE TO COUNTER TERRORISM**

I. INTRODUCTION

Chapter two of this dissertation portrayed the way in which the concept of self-defence has expanded because of the war on terror. It cited some significant events relating to the USA’s use of force against terrorism in which the USA relied on Article 51 of the UN Charter to justify such force. It was portrayed that the way in which the right was invoked, however, was through an interpretation of Article 51 in a way that has weakened the article’s express requirements. A detailed framework on the use of force has been provided throughout this dissertation, and pre-emptive and retaliatory self-defence rejected. The exceptions to the prohibition on the use of force have been shown to be narrow and the use of force in lawful self-defence based on strict requirements.<sup>249</sup> As such, whether the multiple uses of force by the USA were lawful under International Law is called into question. This chapter therefore intends to assess the legality of the USA’s military action and will rely on the substantive framework on the use of force to do so.

II. ATTACKS ON LIBYA

The USA’s military operation against Libya in 1986, Operation El Dorado Canyon, emerged in response to allegations of Libyan involvement in the bombing which occurred on the 5<sup>th</sup> of April 1986 which killed two American soldiers and injured seventy-nine of them.<sup>250</sup> The USA attributed responsibility for the bombing to Libya, alleging state-sponsored terrorism orchestrated by Muammar Gaddafi’s regime.<sup>251</sup> After the terrorist attack, Reagan ordered air strikes on several cities in Libya. President Ronald Reagan defended the strike as a form of self-defence against state-sponsored terrorism emanating from Libya and that such force was within Article 51.<sup>252</sup> However, Libya had not committed an armed attack against the USA.<sup>253</sup> The USA’s actions were therefore what on O’Connell describes as a departure from the USA’s long-standing interpretation of the Charter.<sup>254</sup> In justifying the attack on Libya, the Reagan

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<sup>249</sup> Op cit note 1 at Article 51.

<sup>250</sup> Ibid.

<sup>251</sup> Dinstein, Y. *War, Aggression and Self-Defence* (6th ed.). Cambridge University Press (2016).

<sup>252</sup> Mary Ellen O’ Connell ‘*Forever air wars and the lawful purpose of self-defence*’ *Journal on the Use of Force and International War*, pp. 1-22 (2022) at 35.

<sup>253</sup> Ibid.

<sup>254</sup> Ibid at 34.

administration argued that the 5<sup>th</sup> of April bombing constituted an armed attack attributable to Libya. They posited that the military operation was a defensive measure intended to deter future acts of terrorism orchestrated by the Libyan government, thereby safeguarding American interests and personnel. However, international legal experts and critics questioned the characterization of the incident as an armed attack sufficient to trigger the right to self-defense under Article 51. Some argued that while the attack was deplorable, it might not have met the threshold required for a legitimate exercise of self-defense under International Law. The airstrikes' collateral damage, including civilian casualties, raised ethical considerations about the proportional use of force and adherence to the principles of distinction and proportionality in armed conflict.<sup>255</sup>

The USA asserted that their actions were necessary to signify that people could not commit such atrocities and “get away with it”.<sup>256</sup> The USA, in a letter To Libya, asserted that their objective was “to destroy facilities used to carry out Libya’s hostile policy of international terrorism and to discourage Libyan terrorist attacks in the future” making it clear that they were not responding to an emergency.<sup>257</sup> Cannizzaro and Rasi consider the letter as showing that the USA was interested in deterrence, instead of defence in the moment.<sup>258</sup> As such, the use of force constitutes pre-emptive action. Reagan argued, in a letter to the UN Security Council, that the USA had suffered a series of attacks. Although an accumulation of smaller attacks over a period of time can cumulatively meet the armed attack requirement, the attack against the US nationals was a sporadic event and was too minor to require a military response in self-defence.<sup>259</sup> It has also been asserted that the USA’s response was not necessary nor proportional.

Based on the above, it is opined that the USA’s use of force was neither necessary nor proportional. It was taken weeks after a relatively minor violent incident on foreign territory

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<sup>255</sup> Tétreault, M. A. U.S. Military Operations and Libya. *Mediterranean Quarterly*, 10(4), 139–156 (1999) at 142.

<sup>256</sup> Mary Ellen O’Connell ‘*Forever air wars and the lawful purpose of self-defence*’ *Journal on the Use of Force and International War*, pp. 1-22 (2022) at 35.

<sup>257</sup> United Nations, *Letter dated 14 April 1986 from the Acting Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc S/17990 (14 April 1986).

<sup>258</sup> Mary Ellen O’Connell ‘*Forever air wars and the lawful purpose of self-defence*’ *Journal on the Use of Force and International War*, pp. 1-22 (2022) at 43.

<sup>259</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* [2003] ICJ Rep 803 at para 44

which makes it difficult to reconcile with the notion of necessity.<sup>260</sup> It resulted in the death of thirty-seven people, most being civilians including children whereas the incident which occurred on 5 April 2023 resulted in the death of two Americans.<sup>261</sup> The US attacks on Libya therefore, fall short of meeting the requirements of lawful self-defence, thus rendering the USA's use of force in this instance illegal in terms of International Law.

### III. 1993 MISSILE ATTACKS ON IRAQ

The USA'S military action against Iraq in 1993, under President Bill Clinton's administration, represented a pivotal moment in American foreign policy and raised significant questions about the authorization for the use of force against Iraq. Clinton ordered a missile attack on Iraq in retaliation for an alleged plot to assassinate President George H.W. Bush during his visit to Kuwait in April 1993. The USA contended that Iraqi intelligence was involved in the assassination attempt, leading to the decision to launch a retaliatory strike against them. The USA cited Article 51 of the UN Charter as the justification for the attack.<sup>262</sup> They specifically asserted that the missile attack on Iraq was a form of self-defense, citing the need to protect former President Bush and deter future threats from Iraq. Following the attack, however, the legality and authorization for the use of force became the subject of scrutiny. Critics questioned the adequacy of the self-defense argument, raising doubts about the immediacy and severity of the threat posed by Iraq. Some argued that the assassination attempt, while serious, might not have met the threshold required for an immediate and proportionate use of force in self-defense under International Law.<sup>263</sup>

Quigley deemed the missile attacks on Iraq as not being for the purpose of protection in an emergency, but rather to deter future terrorist incidents.<sup>264</sup> This is significant given that Article 51 forbids using force for the purpose of retaliation, reprisal or deterrence regardless of whether the aim of the action is to enhance national security.<sup>265</sup> Quigley held that Clinton "plainly embraced the use of force for deterrence", not for defence.<sup>266</sup> O'Connell further provides that even if a plot against Bush "was afoot" and could be deemed an armed attack against the USA,

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<sup>260</sup> Ibid.

<sup>261</sup> United Nations, *Letter dated 14 April 1986 from the Acting Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc S/17990 (14 April 1986).

<sup>262</sup> Ibid at 38.

<sup>263</sup> Brownlie, I. *Principles of Public International Law* (7th ed.). Oxford University Press (2008) at 342.

<sup>264</sup> Op cit note 9 at 37.

<sup>265</sup> Ibid at 35.

<sup>266</sup> Ibid at 49

it was “thwarted at the Iraq-Kuwait border” and “there was no possibility it would be carried to completion and thus “no necessity to stop it.”<sup>267</sup> It is therefore asserted that the USA’s missile attacks on Iraq were not in response to an armed attack or imminent threat and thus do not meet the requirements of lawful self-defence. They therefore constitute the unlawful use of force in International Law.

#### IV. ATTACKS ON SYRIA

The 25<sup>th</sup> of February attacks on Syria under Obama’s presidency raised pertinent questions about the legality and justification for the USA’s use of force under International Law. The events leading to the strikes stemmed from concerns about chemical weapons usage in Syria. The Obama administration asserted that the Syrian government, led by President Bashar al-Assad, had employed chemical weapons, thus violating international norms and causing significant harm to civilians. The USA also deemed terrorist groups from Syria as being linked to a “series of threats and attacks” on the USA and asserted that Syria should have prevented such attacks from being carried out on US soil.<sup>268</sup> Therefore, in response to these concerns, the USA conducted targeted airstrikes against specific Syrian government facilities associated with chemical weapons production and storage.<sup>269</sup> They justified the attacks as the necessary and lawful use of force in self-defence. The Obama administration justified the strikes on Syria as a limited and proportionate response to the use of chemical weapons, arguing that it was necessary to prevent further atrocities and deter the Syrian government from using such weapons against civilians. However, critics raised concerns about the operation’s compliance with international legal standards.<sup>270</sup>

The USA’s use of force against Syria had to be both necessary and proportional in order to be lawful. However, the immediate threat posed by Syria’s chemical weapons usage and the proportionality of the response have been subjects of debate. Some argued that while the use of chemical weapons was egregious, the threshold required for immediate self-defence or collective security action might not have been met to justify unilateral military strikes under International Law.

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<sup>267</sup> Ibid at 50.

<sup>268</sup> Mary Ellen O’Connell ‘*Forever air wars and the lawful purpose of self-defence*’ *Journal on the Use of Force and International War*, pp. 1-22 (2022) at 45.

<sup>269</sup> Ibid.

<sup>270</sup> Crawford, J. *Brownlie's Principles of Public International Law* (8th ed.). Oxford University Press (2013) at 749.

The USA asserted that self-defence is particularly important when “the government of the state where the threat is located is unwilling or unable to prevent the use of its territory for such attacks”.<sup>271</sup> Article 51, however, does not refer to a state’s unwillingness or inability to act in relation to threats.<sup>272</sup> It merely provides that an armed attack occur before a state use force in self-defence.<sup>273</sup> Although, as O’Connell asserts, Syria should have attempted to prevent or stop such attacks, they did not carry out an armed attack against the USA.<sup>274</sup> It is therefore argued that the attacks were unlawful for failing to comply with the self-defence requirements.

## V. 2017/2018 ATTACKS ON SYRIA

The military actions taken by the United States in 2017 and 2018 in Syria, under the administration of President Donald Trump, prompted intense scrutiny regarding the legitimacy and legality of the use of force within the realm of International Law. The events leading to these airstrikes stemmed from allegations of the Syrian government's use of chemical weapons against civilians.<sup>275</sup> The Trump administration contended that the Assad regime had employed chemical weapons in violation of international norms, resulting in civilian casualties and suffering. In response, the United States launched targeted airstrikes against Syrian government facilities associated with chemical weapons production and storage. The Trump administration justified these airstrikes as necessary and proportionate responses to prevent further use of chemical weapons and to deter the Syrian government from committing similar atrocities against civilians. However, the legal basis for these actions faced several challenges and raised questions about compliance with international legal standards.

The USA justified the attacks as being a form of punishment and asserted that they were aimed at deterring the use of chemical weapons by Syria.<sup>276</sup> The use of force was not in response to an armed attack or immediate threat. Therefore, it cannot be justified on the basis of lawful self-defence.

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<sup>271</sup> United Nations, *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*, UN Doc. S/2014/695 (23 September 2014).

<sup>272</sup> Mary Ellen O’Connell ‘*Forever air wars and the lawful purpose of self-defence*’ *Journal on the Use of Force and International War*, pp. 1-22 (2022) at 52.

<sup>273</sup> *Ibid.*

<sup>274</sup> *Ibid.*

<sup>275</sup> *Ibid* at 53.

<sup>276</sup> *Ibid* at 46.

## VI. 2021 AIR ATTACKS ON TERRORIST GROUPS IN IRAQ, SYRIA AND AFGHANISTAN

The Biden-ordered air attacks on terrorist groups outside of armed conflict zones in Iraq, Syria and Afghanistan, which were conducted between February and August of 2021, provide further insights into the illegal use of force by the USA in countering terrorism.<sup>277</sup> The rationale behind these airstrikes lay in the Biden administration's pursuit of countering terrorist threats and safeguarding national security interests beyond conventional armed conflict zones. The operations aimed to diminish the functioning capacities of terrorist organizations, prevent immediate threats, and reduce risks to both regional stability and the interests of the United States. The Biden administration defended these airstrikes as a legitimate exercise of self-defense against imminent threats posed by these terrorist entities. They argued that these actions were necessary and proportionate responses to prevent future attacks, protect civilians, and safeguard national security interests. However, the legality of these airstrikes within the framework of International Law faced multifaceted challenges

The first of these attacks occurred on the 25<sup>th</sup> of February when Biden authorised bombings Syria.<sup>278</sup> The attack was justified, in a letter to the Security Council, as the lawful exercise of self-defence.<sup>279</sup> The letter asserted that the air strikes were a response to the Syrian attacks which occurred ten days earlier and resulted in one death.<sup>280</sup> The USA held that the action was both “necessary and proportionate to defend U.S. personnel and to deter further attacks”.<sup>281</sup> On the 27<sup>th</sup> of June, Biden authorised the bombing of Iranian-backed militias along the border of Syria and Iraq, killing at least 22 people, seven of whom were children.<sup>282</sup> The USA argued that they had taken military action “to deter the Islamic Republic of Iran and Iran-backed militia groups from conducting or supporting further attacks.”<sup>283</sup> A further US-launched drone in Afghanistan on the 29<sup>th</sup> of August, which killed a family of ten, including seven children, was

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<sup>277</sup> Ibid at 48.

<sup>278</sup> Ibid at 33.

<sup>279</sup> United Nations, *Letter dated 27 February 2021 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/2021/202 (3 March 2021).

<sup>280</sup> Mary Ellen O’Connell ‘*Forever air wars and the lawful purpose of self-defence*’ *Journal on the Use of Force and International War*, pp. 1-22 (2022) at 34.

<sup>281</sup> United Nations, *Letter dated 27 February 2021 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/2021/202 (3 March 2021).

<sup>282</sup> Mary Ellen O’Connell ‘*Forever air wars and the lawful purpose of self-defence*’ *Journal on the Use of Force and International War*, pp. 1-22 (2022) at 34.

<sup>283</sup> Ibid at 50.

justified by Article 51 of the UN Charter. O’Connell asserts that the tragedy should have put an end to the unlawful and ineffective air war, yet attacks continued through the end of 2021.<sup>284</sup> Biden ordered a further three air attacks on terrorist targets in Afghanistan and provided no legal justification for the use of force.<sup>285</sup> They launched the missile in an urban setting and did not provide whether this was a necessary and proportionate way to respond to terrorism.<sup>286</sup> Biden asserted that he would continue to authorise air strikes to counter terrorism without providing a legal basis for doing so.<sup>287</sup>

It has been asserted that the USA has, in carrying out the air attacks on terrorist groups in Iraq, Syria, and Afghanistan, interpreted and applied the requirements in terms of Article 51’s right to use force in self-defence too broadly. It was submitted in Chapter 4 of this dissertation that states cannot justify their military action against other states on the basis of pre-emptive self-defence. Furthermore, that in order for a state to lawfully use force in self-defence against terrorism, the threat of terrorism must be instant and overwhelming and the response to such threat, in the form of force, must be both necessary and proportional. There has, however, been much controversy regarding the immediacy and severity of the threats posed by the terrorist groups in Iraq, Syria and Afghanistan to the peace and security of the USA. It cannot be said that in each and every case that they used force against Iraq, Syria and Afghanistan, the USA had suffered an armed attack or imminent threat by them.<sup>288</sup> Although, as previously asserted by relying on the Caroline Incident and ICJ judgments in the *Nicaragua* and *Armed Activities* cases, the collective impact of smaller terrorist attacks and individual acts of terrorism may meet the threshold of an armed attack, it cannot be declared that the threat posed by terrorist groups in Iraq, Syria and Afghanistan met such a threshold.<sup>289</sup> This dissertation therefore opines that the USA military action was not necessary as it was taken in the absence of an immediate, ongoing, or direct threat to them.<sup>290</sup> The action was therefore pre-emptive. Furthermore, it was not proportional because, as asserted by Luban, the USA, in carrying out

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<sup>284</sup> Ibid at 54.

<sup>285</sup> Ibid at 48.

<sup>286</sup> Ibid.

<sup>287</sup> Ibid at 48.

<sup>288</sup> Ibid at 33.

<sup>289</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* [2003] ICJ Rep 803 at para 44

<sup>290</sup> Mary Ellen O’Connell ‘Forever air wars and the lawful purpose of self-defence’ *Journal on the Use of Force and International War*, pp. 1-22 (2022) at 33.

the air strikes, continuously inflicted harm beyond the intended goal of using force for the purpose of self-defence.<sup>291</sup>

## VII. CONCLUSION

The USA has often cited the use of force in self-defence against terrorism as the legal justification for their military action against other states. This Chapter has, however, portrayed how the USA's justifications for using force in the name of countering terrorism have persistently gone beyond the scope of what is required for the lawful use of force in self-defence in terms of both the UN Charter provision in Article 51 as well as the customary law prohibition. Although Article 51 caters for self-defence in response to the accumulation of smaller-scale terrorist attacks as well as single terrorist attacks that constitute the gravest uses of force, the 5<sup>th</sup> of April 1986 attack which the USA relied on to justify their military operation against Libya in 1986 does not meet such requirement. The USA's missile attacks on Iraq in 1993 were similarly not in response to an armed attack or imminent threat by Iraq thus constituting the unlawful use of force in International Law. The USA's air strikes against Syria were intended to punish Syria for not taking adequate counter-terrorist measures as well as deter them from using chemical weapons. The use of force cannot be reconciled with the doctrine of self-defence as Syria did not pose an immediate threat to the USA. O'Driscoll has declared that the "war on terrorism" is often punitive and that the USA's counter-terrorist actions are often "couched largely in terms of punishing the states actions that allowed terrorists to operate on their territory".<sup>292</sup> The USA's actions against Iraq, Syria and Afghanistan seem to fall within such scope.<sup>293</sup> They are punitive rather than defensive.<sup>294</sup> Additionally, the USA's use of force in Iraq, Syria and Afghanistan which were conducted between February and August of 2021, were, in most cases, unlawful as the threat of terrorism was not instant and overwhelming and the response to such threat was not necessary and proportional. The Biden-ordered air attacks were pre-emptive in nature and, as opined, a State cannot justify their military action against other states on the basis of pre-emptive self-defence.

A state's use of force will not breach Article 2(4) of the UN Charter if it is acting in self-defense and stays within the boundaries of necessity and proportionality. This is so even when the use

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<sup>291</sup> Luban, David 'War as Punishment' *Philosophy & Public Affairs*, 39(4), at 304 and 326.

<sup>292</sup> O'Driscoll, Cian 'Re-negotiating the Just War: The Invasion of Iraq and Punitive War' *Cambridge Review of International Affairs*, 19(3), pp. 405-420. (2006) at 406.

<sup>293</sup> Ibid at 50.

<sup>294</sup> Christine Gray, 'International Law and the Use of Force' at 98.

of force is against non-state actors such as members of an armed terrorist group that has attacked a state. However, as portrayed throughout this Chapter, the use of force by the USA in self-defence against terrorism has often fallen short of being necessary and proportional. It is opined that much of the US military action in this regard is taken with the aim of punishment or deterrence. The use of force is often, as provided by Luban, excessive in relation to the terrorist threats which the USA faces. As such, the USA uses force to ‘send a message’, not to act proportionally against an actual attack or imminent threat.<sup>295</sup> Given that Article 51’s right of self-defence is premised on responding to armed attacks or imminent danger and threats, the multiple uses of force explained above are difficult to reconcile with the notion of lawful self-defence in International Law.

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<sup>295</sup> Mary Ellen O’Connell ‘*Forever air wars and the lawful purpose of self-defence*’ *Journal on the Use of Force and International War*, pp. 1-22 (2022) at 50.

## **CHAPTER 6:**

### **CONCLUDING REMARKS**

#### **I. INTRODUCTION**

The events of 9/11 resulted in the USA challenging the substantive framework on the use of force in self-defence. Before the terrorist attacks, the USA viewed terrorism as a criminal act and refrained from employing force to counter it. However, following the attacks, the USA deemed their counter-terrorist strategies as insufficient, prompting the utilization of the legal right to use force in self-defense to address terrorism. The "War on Terror" significantly impacted the right to use force in self-defense. The response to the 9/11 attacks stretched the boundaries of the right and the USA progressively began to engage in counter-terrorist military operations citing the right to employ force in self-defense under Article 51 of the UN Charter as the rationale for such force. As asserted, however, there are strict requirements for the use of force in self-defence to be deemed lawful under International Law. The customary right provides that the use of force in self-defence must be both necessary and proportional to be deemed lawful. Furthermore, that there must be no other means by which to respond to the attacks. In terms of the UN Charter and specifically Article 51 thereof, the use of force in lawful self-defence must be in response to an armed attack or imminent threat thereof and must be both necessary and proportionate.

Through an analysis of USA's counter-terrorist action, and specifically, their 1986 attacks on Libya, 1993 attack on Iraq, airstrikes in Syria and 2021 airstrikes on terrorist groups outside of armed conflict zones in Iraq, Syria and Afghanistan, the USA has stretched the right beyond its parameters, using force to engage in pre-emptive military action against potential terrorist threats. The issue is that potential terrorist threats do not fall within the scope of an armed attack nor a threat that is imminent leading to the debate about the scope for the threshold of self-defense particularly when dealing with non-state entities. This has, in turn, prompted concern about the USA's compliance with International Law. The USA's counter-terrorist actions, with the goal of dismantling terrorist networks, eliminating perceived threats, and advancing democratic values, also resulted in prolonged conflicts, strained global relations, and unintended outcomes, such as civilian casualties and destabilized regions. The fact that many of the USA's counter-terrorist air strikes and military operations are highly contested is of serious concern. As such, the purpose of this research was to assess the legality of the USA's use of force to combat terrorism exploring examples of counter-terrorist military action that is

highly contested in International Law. The main research questions concerned whether the USA's use of force in self-defence against terrorism has met the requirements for the exceptions to the customary rule regarding the prohibition on the use of force or the treaty rule as set out in the UN Charter providing for the right to use force in lawful self-defence. Additionally, whether the USA complied with its international obligations in using force to counter terrorism.

## **II. WHETHER THE USA'S USE OF FORCE IN SELF-DEFENCE AGAINST TERRORISM HAS MET THE REQUIREMENTS FOR THE EXCEPTIONS TO THE PROHIBITION OF FORCE IN TERMS OF THE UN CHARTER**

Due to the fact that the unlawful use of force to counter terrorism may undermine the legitimacy and effectiveness of such force and potentially exacerbate the problem of terrorism, this dissertation aimed to determine whether, in using force against terrorism, the USA has complied with its international obligations. It therefore first had to be determined whether self-defence against terrorist threats and smaller scale attacks could be reconciled with the requirements of lawful self-defence which include that a state must have suffered an armed attack; the response to such attack must be necessary and proportionate; and the exercise of force must be reported to the United Nations Security Council. This was answered in the affirmative and it was portrayed how a strict reading of "armed attack" and the requirement of state attribution of such attack can be overcome so as that self-defence against single incidents of terrorism or smaller-scale terrorist attacks can fall within the right. Although states may only use force within the parameters of Article 51, the events of 9/11 have weakened the traditional self-defence framework and the rise of terrorism has resulted in the implementation of defensive measures that are not dependent on a strict reading of Article 51. In line with recent state practice on the matter, an interpretation of Article 51 in line with the VCLT, and the recognition that states should be able to terrorism as an evolving security need, the collective impact of smaller terrorist attacks as well as individual acts of terrorism may meet the threshold of an armed attack. Furthermore, as indicated by the wording of Article 51, the Caroline Incident, certain ICJ judgments, recent state practice as well as the Security Council Resolutions proceeding 9/11 that concerned self-defence against terrorist groups, it is clear that state attribution of an armed attack is not a stringent requirement for the lawful exercise of self-defence in terms of Article 51.

### III. WHETHER THE USA HAS GENERALLY COMPLIED WITH ITS INTERNATIONAL OBLIGATIONS IN USING FORCE TO COUNTER TERRORISM.

With regard to the second issue, the USA's justifications for their military action taken in the name of defending themselves against terrorism have persistently not met the self-defence requirements. It is unlikely that the threats that the USA faced, and even the attacks that they suffered, will meet the requirement of an armed attack. This was seen in the example of the Libyan attacks. Furthermore, though force taken in anticipation of a terrorist attack or imminent threat may be lawful, the USA's actions have fallen short of being necessary and proportional, thus making them unlawful. Additionally, their military action seems to be taken with the purpose of punishing other states, not to act against an actual attack or imminent threat. Given that Article 51 is premised on responding to armed attacks or imminent danger and threats, not on deterrence, the multiple uses of force are thus unlawful. Article 51 is a temporary and emergency exception to the prohibition on force, not a permissive basis on which to implement policy.<sup>296</sup> Therefore, the invocation of it by the USA to justify force which clearly does not meet the requirements of lawful self-defence is unlawful in International Law. It is hoped that this paper has contributed toward a clearer framework on the use of force in self-defence against terrorism and has emphasised that, although Article 51 has expanded in the global war on terror to meet contemporary challenges and threats to peace, there are still strict requirements that a state must meet before the use of force in self-defence can be deemed lawful in terms of International Law.

The USA has often cited the use of force in self-defence against terrorism as the legal justification for their military action against other states. This Chapter has, however, portrayed how the USA's justifications for using force in the name of countering terrorism have persistently gone beyond the scope of what is required for the lawful use of force in self-defence in terms of both the UN Charter provision in Article 51 as well as the customary law prohibition. Although Article 51 caters for self-defence in response to the accumulation of smaller-scale terrorist attacks as well as single terrorist attacks that constitute the gravest uses of force, the 5<sup>th</sup> of April 1986 attack which the USA relied on to justify their military operation against Libya in 1986 does not meet such requirement. The USA's missile attacks on Iraq in

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<sup>296</sup> Mary Ellen O'Connell 'Forever air wars and the lawful purpose of self-defence' *Journal on the Use of Force and International War*, pp. 1-22 (2022) at 52.

1993 were similarly not in response to an armed attack or imminent threat by Iraq thus constituting the unlawful use of force in International Law. The USA's air strikes against Syria were intended to punish Syria for not taking adequate counter-terrorist measures as well as deter them from using chemical weapons. The use of force cannot be reconciled with the doctrine of self-defence as Syria did not pose an immediate threat to the USA. O'Driscoll has declared that the "war on terrorism" is often punitive and that the USA's counter-terrorist actions are often "couched largely in terms of punishing the states actions that allowed terrorists to operate on their territory".<sup>297</sup> The USA's actions against Iraq, Syria and Afghanistan seem to fall within such scope.<sup>298</sup> They are punitive rather than defensive.<sup>299</sup> Additionally, the USA's use of force in Iraq, Syria and Afghanistan which were conducted between February and August of 2021, were, in most cases, unlawful as the threat of terrorism was not instant and overwhelming and the response to such threat was not necessary and proportional. The Biden-ordered air attacks were pre-emptive in nature and, as opined, a State cannot justify their military action against other states on the basis of pre-emptive self-defence.

A state's use of force will not breach Article 2(4) of the UN Charter if it is acting in self-defence and stays within the boundaries of necessity and proportionality. This is so even when the use of force is against non-state actors such as members of an armed terrorist group that has attacked a state. However, as portrayed throughout this Chapter, the use of force by the USA in self-defence against terrorism has often fallen short of being necessary and proportional. It is opined that much of the US military action in this regard is taken with the aim of punishment or deterrence. The use of force is often, as provided by Luban, excessive in relation to the terrorist threats which the USA faces. As such, the USA uses force to 'send a message', not to act proportionally against an actual attack or imminent threat.<sup>300</sup> Given that Article 51's right of self-defence is premised on responding to armed attacks or imminent danger and threats, the multiple uses of force explained above are difficult to reconcile with the notion of lawful self-defence in International Law

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<sup>297</sup> O'Driscoll, Cian 'Re-negotiating the Just War: The Invasion of Iraq and Punitive War' *Cambridge Review of International Affairs*, 19(3), pp. 405-420. (2006) at 406.

<sup>298</sup> Ibid at 50.

<sup>299</sup> a Christine Gray, 'International Law and the Use of Force' at 98.

<sup>300</sup> Mary Ellen O'Connell 'Forever air wars and the lawful purpose of self-defence' *Journal on the Use of Force and International War*, pp. 1-22 (2022) at 50.

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