

THE USE OF NUCLEAR WEAPONS UNDER THE DOCTRINE OF SELF DEFENCE
UNIVERSITY OF CAPE TOWN



INTERNATIONAL LAW

MPHIL

STUDENT NAME: JESSICA RAE LAING

STUDENT ID: LNGJES010

WORD COUNT:22023

SUPERVISOR: CATHLEEN POWELL

Research dissertation/ research paper presented for the approval of Senate in fulfilment of part of the requirements for the <qualification for which the student is registered> in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of <qualification for which the student is registered> dissertations/ research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

Signed by candidate

SIGN: DATE: 11

February 2019

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

ABSTRACT

The lawful use of nuclear weapons in self-defence sits in a precarious and fraught position amongst lawyers, states and scholars, primarily due to their indiscriminate destructive nature. The use of nuclear weapons is the biggest threat to peace and security yet they exist under obscurity in International Law. The purpose of this paper is to examine at what point, and under what circumstances, a State is lawfully permitted to use nuclear weapons in self-defence. The right to self-defence is a basic normative right codified in the United Nations Charter (UN Charter). The inherent right to self-defence is the primary justification for the use of nuclear weapons according to the International Court of Justice in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*. Even so, nuclear weapons would still have to meet the threshold of self-defence and the cardinal principals of ‘imminence’, ‘necessity’ and ‘proportionality’ which regulate the lawfulness of a state’s actions in self-defence. Since there has only been two situations where nuclear weapons have been used- in Hiroshima and Nagasaki in 1945- it is necessary to examine three hypothetical situations in which nuclear weapons are used in self-defence to determine if, under any, exceptional circumstances such action could be lawful.

CONTENTS PAGE:

INTRODUCTION

CHAPTER 1: NUCLEAR WEAPONS UNDER INTERNATIONAL LAW AND HOW THEY HAVE ALTERED THE DOCTRINE OF SELF-DEFENCE

I. NUCLEAR WEAPONS UNDER INTERNATIONAL LAW

II. HOW NUCLEAR WEAPONS HAVE ALTERED THE DOCTRINE OF SELF-DEFENCE

CHAPTER 2: SELF-DEFENCE UNDER INTERNATIONAL LAW

I. THRESHOLD OF AN ARMED ATTACK

I. EXCEPTION TO THE RULE

1. TERMINOLOGY

2. PREEMPTIVE SELF-DEFENCE

3. ICJ

II. THE CHANGED NATURE OF THE THREAT: NUCLEAR WEAPONS

CHAPTER 3: REQUIREMENTS OF IMMINENCE, NECESSITY AND PROPORTIONALITY

I. THE CAROLINE CASE

a. *OPINIO JURIS*

b. INEXORABLE LINKS BETWEEN THE CRITERIA

c. THE CONTEMPORARY CONTEXT OF THE CAROLINA FORMULA

II. IMMINENCE

a. GENERAL REQUIREMENT

b. JUSTIFICATION FOR PRE-EMPTIVE SELF-DEFENCE

III. NECESSITY

a. LAST RESORT

b. FORCE IS NECESSARY TO AVERT AN UNJUSTIFIED THREAT

IV. PROPORTIONALITY

a. SCALE AND MEANS

b. THE MEASURES TAKEN ARE PROPORTIONATE TO THE ULTIMATE GOAL OF ABATING THE SUFFERED ATTACK

CHAPTER 4: HYPOTHETICAL SCENARIOS

- I. A NUCLEAR RESPONSE
- II. CONVENTIONAL ATTACK
- III. NUCLEAR ATTACK
- IV. PRE-EMPTIVE ATTCK

CONCLUSION

INTRODUCTION

The purpose of this paper is to examine under what circumstances, is a state lawfully permitted to use nuclear weapons in self-defence. The development of nuclear weapons and their unprecedented catastrophic power has certainly caused uncertainty about the concept of self-defence in international law. Chapter 1 will examine how nuclear weapons are governed under international law and how they have altered the concept of self-defence. Chapter 2 will address the doctrine of self-defence in itself, the threshold of an Armed attack, and pre-emptive self-defence- a possible exception to the requirement of an armed attack in the nuclear era. Chapter 3 will assess the principals of imminence, necessity and proportionality, which will involve an examination of customary international law that undeniably govern the right to self-defence and will involve the evaluation of state practice and *opinion juris*. Lastly chapter 4 will consider three hypothetical scenarios in which nuclear weapons are used in self-defence and attempt to identify in what circumstance if any, can a state be permitted to use nuclear weapons. Since the outbreak of the North Korean crisis and their defiance on the non-nuclear proliferation regime, nuclear war between the USA and North Korea seems inevitable. That is why I use the two states as guinea pigs to assess the legitimate right of self-defence. Scenario 1 will involve a nuclear response to a conventional attack, Scenario 2 will be a nuclear response to a nuclear attack and the last scenario number 3 will examine a pre-emptive¹ nuclear attack.

CHAPTER 1: NUCLEAR WEAPONS UNDER INTERNATIONAL LAW AND HOW THEY HAVE ALTERED THE DOCTRINE OF SELF-DEFENCE

I. NUCLEAR WEAPONS UNDER INTERNATIONAL LAW

Under current international law, the law governing the use of force is evidently subject to Article 2(4) which prohibits the use of force unless such force falls under the exception of self-defence which is encompassed in Article 51 of the United Nations Charter² (UN Charter) or sanctioned by the Security Council³. The effects of nuclear weapons are considered against International Humanitarian Law (IHL) but the court decided in its *Nuclear Weapons Advisory*

¹ A pre-emptive strike is action taken in response to an imminent, already-materialized threat.

² *United Nations Charter*, United Nations (1945).

³ Security Council authorization of force goes beyond the scope of this paper.

*Opinion (Advisory Opinion)*⁴ the International Court of Justice (ICJ) decided that the legality of nuclear weapons should be judged based on the law of the use of force. There are various conventions that restrict or outlaw Weapons of mass destruction (WMD), yet nuclear weapons are not unlawful. Nuclear weapons fall under the obligations of the UN Charter and ultimately either the security council or Article 51. Although there is no international convention that explicitly prohibits all uses of nuclear weapons, the effects of all weapons are governed by numerous conventions and customary international law and multilateral treaties.⁵ Significantly, the International Atomic Energy Agency (IAEA) helps the international community limit the acquisition, manufacture, possession, deployment and testing of nuclear weapons. The Nuclear Proliferation Treaty (NPT) is also a key player in regulating and promoting cooperation with an end goal of nuclear disarmament. However, the most notable analysis of the international law concerning nuclear weapons comes from the ICJ's *Advisory Opinion* in 1996, which was written at the request of the General Assembly.⁶ Asked to assess the legality of the threat or use of nuclear weapons,⁷ the Court had the opportunity, for the first time, 'to address the legality of nuclear weapons.'⁸ Following a comprehensive examination of contrasting areas of international law (*jus ad bellum* and *jus in bello*), the Court decided that it could not definitively conclude that in every circumstance the threat or use of nuclear weapons was axiomatically contrary to international law, especially in the context of a state whose survival is in question⁹. The use of nuclear weapons may be used in self-defense only to avert an imminent attack or when it is necessary to bring an attack to an end. There must be no practical alternative and the requirement of proportionality must be considered. The ICJ did not succeed in giving a definitive answer,¹⁰ but concluded that it could not rule against the lawfulness of the use of nuclear weapons except in 'extreme circumstances of self-defence'¹¹ this became the corner stone for the

⁴ *Advisory Opinion Concerning the Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion by the General Assembly of the United Nations)*, International Court of Justice (ICJ) (1996, Jul 08).

⁵ Anti-Balistic Missile Treaty, The Comprehensive-Test-Ban Treaty, Strategic Arms Reduction Treaty (START), The Intermediate-Range Nuclear Forces Treaty (INF), Partial Test Ban Treaty (PTBT), the Outer Space Treaty and many others

⁶ *Advisory Opinion* supra note 4.

⁷ *Advisory Opinion* supra note 4.

⁸ Louise Doswald-Beck 'International humanitarian law and the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons' (1997) 37 *International Review of the Red Cross*.

⁹ Yoram Dinstein *War, aggression and self-defence* 3 ed (2001) at 144–6.

¹⁰ *Advisory Opinion* supra note 4: "the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance."

¹¹ *Advisory Opinion* supra note 4, para. 105(2)(E).

legality of nuclear weapons.

II. HOW NUCLEAR WEAPONS HAVE ALTERED THE DOCTRINE OF SELF-DEFENCE

The Advisory opinion used two branches of the law *jus ad bellum* and *jus in bello* to define limitations to using nuclear weapons in self-defence. The Court makes it clear that the test for legality is a cumulative one. It has to satisfy the rules on the use of force under the UN charter, as well as the rules of armed conflict (IHL). The Court is clear in paragraph 42 that:

‘a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.’¹²

By doing this the court stated that the use of force in self-defence must be not only governed by the UN Charter but also by customary law or principles of IHL such as imminence, necessity and proportionality. These three intertwined conditions apply to the use of force. The international law regarding nuclear weapons is grounded on humanitarian considerations as the use of nuclear weapons ‘seems scarcely reconcilable’¹³ with IHL and environmental law. With the scientific advancements, and the lack of nuclear proliferation, the law related to nuclear weapons will surely change. Notably after the atomic bomb dropped over Japan and the scientific advances, which has deepened our knowledge of the humanitarian and environmental effects of nuclear weapons. The technological advances, have focused the legal debate on nonstrategic nuclear weapons (‘low-yield’ or ‘tactical’ variety) which could potentially blur the lines between conventional and nuclear weapons.

In addition, the difficulty of adopting an effective defensive measure after a strategic nuclear missile attack has been launched has prompted speculation as to whether pre-emptive action is lawful.¹⁴ Nuclear Weapons have given rise to states accepting the doctrine of self-defence. Pre-emptive force is considered illegal under International Law, but an essential doctrine for a state confronted by an imminent nuclear attack, allowing the state to take steps

¹² Ibid para 42.

¹³ Ibid.

¹⁴ Iain Cameron ‘Anti-ballistic missile systems and international law’ in Istvan Pogany (ed.) *Nuclear weapons and international law* (1987).

immediately to ensure its national survival.¹⁵ Under the NPT, all states have the right to peaceful nuclear technology, therefore not all nuclear technologies are threats. Much of the technology cannot be detected whether it is used for peaceful purposes such as medicine, power generation or similar to the technology used for military purposes. This has led to states destroying other states nuclear facilities claiming pre-emptive self-defence as a justification. International Law needs to place limits on pre-emptive self-defence instead of outlawing the practice completely, but the limits must be specific to nuclear weapons.

Nuclear weapons pose the greatest threat to ‘international peace and security’ that the UN Charter was created to preserve. The International system, including the law needs to be adjusted to address the nuclear threat. ‘The traditional threshold of an armed attack seems obsolete in the face of a nuclear attack and the requirements of imminence, necessity and proportionality need to be relaxed to compensate for the unique threat posed by nuclear weapons.’¹⁶ State practice and the *opinio juris* of the international community precludes that nuclear weapons have changed the doctrine of self-defence and it requires the UN to redefine international law or make a definitive judgement on the legality of nuclear weapons, or set limitation on pre-emptive self-defence. There must be a contextual reassessment of the indoctrinated and customary right of individual and collective self-defence (discussed below in chapter 2), ‘the question ultimately before us must be whether any defensive use or threat of the use of nuclear weapons can be justified?’¹⁷

CHAPTER 2: SELF-DEFENCE UNDER INTERNATIONAL LAW

The prohibition of the use of force by and amongst nations is widely known to be a rule of customary international law that has existed and guided the law of nations prior to the formation of the UN. Before the creation of the UN Charter there was a general notion of ‘just war’¹⁸, which emerged from religious and philosophic principals and considered the justifications of war. War was justified if it met certain conditions such as just cause, force as a last resort, the proportionality of the force and distinction that would prevent innocent

¹⁵ Waldock, Sir Claud Humphrey Meredith *The regulation of the use of force by individual states in international law* (1952).

¹⁶ David Sloss ‘Forcible arms control: Preemptive attacks on nuclear facilities’ (2003) 4 *Chi. J. Int’l L.* at 54.

¹⁷ Burns H Weston ‘Nuclear weapons versus international law: A contextual reassessment’ (1982) 28 *McGill Lj.* at 549.

¹⁸ FT Abioye ‘Examining the international law right of self-defence: The case of Russia and Georgia; Israel and Gaza’ (2010) 31 *Obiter* at 400.

civilians were spared from violence.¹⁹ Aspects would have evolved into *jus ad bello* and *jus ad bellum*, vital aspect of international law.

Then the concept of self-defence was redefined by Webster following the *Caroline* incident (hereafter the *Caroline case*), using much of the same justifications as in the ‘just war’ theory. Webster declared that a state is entitled to take forcible measures in self-defence, where it can demonstrate a "necessity . . . instant, overwhelming, leaving no choice of means and no moment for deliberation."²⁰ (This will be discussed in depth in the Chapter 4). Then with the aim to restore international peace and security following the world wars, the international community adopted the UN Charter.

In order to substantially discuss self-defence within the context of *jus ad bellum* it is essential to begin with Article 2(4) the prohibition on the use of force and how it exists within customary international law. ‘The prohibition on the use of force is the most universally accepted fundamental rule of international law and is considered to have *jus cogens*²¹ status. There is much debate about whether Article 2(4) was intended to prohibit all uses of force which are not explicitly treated as exceptions in the Charter, such as humanitarian intervention and national liberation struggles. These topics are beyond the scope of this paper and only serve to display that there are legal debates that identify exceptions to the charter. Consequently, the use of force outside of the framework of the charter is *prima facie* illegal, apart from the recognized exceptions.

Exceptions to Article 2(4) are Security Council authorization and the inherent right to self-defence outlined in Article 51. Article 51 is an exception to the rule of the prohibition of the use of force, allowing for an individual and/or collective to use of force in self-defence in the case of an armed attack. This individual or collective use of force is allowed to continue until such a time as the Security Council takes such actions that are necessary for the maintenance of international peace and security.²² Article 51 preserves the right to use force in self-defence ‘if an armed attack occurs’. This limits the right to circumstances in which a real armed attack has taken place²³. Unfortunately, Article 51 does not elaborate on what

¹⁹ Howard M Hensel (ed.) *The legitimate use of military force: The just war tradition and the customary law of armed conflict* (2008).

²⁰ *British Foreign and State Papers* vol. 30 (1841).

²¹ Yoram Dinstein *War, aggression and self-defence* 2 ed (1997).

²² *UN Charter* art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

²³ The International Court of Justice (ICJ) expressly left open the issue of the lawfulness of a response to the threat of an imminent armed attack in the *Case concerning Military and Paramilitary Activities in and against*

constitutes as an armed attack only that it is a prerequisite for the lawful exercise of self-defence. Article 51, seems incomplete, leaving open for debate as to what constitutes as an armed attack. Therefore, we must rely on the jurisprudence from the ICJ in the form of state practice and *opino juris* to determine what can be considered as an armed attack.

The jurisprudence of the ICJ certainly supports Article 51 in that an armed attack is a prerequisite for the lawful exercise of self-defence and has attempted to determine potential requirements. The court for the first-time tackled self-defence head on, in the *Military and Paramilitary Activities in and Against Nicaragua* (hereafter *Nicaragua*)²⁴. In that decision, the court provided an extensive analysis of the concept of an armed attack and much of the law of self-defence. This case is crucial to this paper, as well as the *Case Concerning Oil Platforms* (Islamic Republic of Iran v. United States of America) (hereafter *Oil Platforms*) which determined the ‘scale of force’, the target of the attack, the identity of the attacker and the military nature of the attack.

In both the *Nicaragua Case* and the *Oil Platforms* the ICJ held that an armed attack is vital in order to trigger self-defence, ‘In the case of individual self-defence, the exercise of this right is subject to the state concerned having been a victim of an armed attack’²⁵. In the *Oil platforms case*, it is reaffirmed the *sine qua non* condition of an armed attack by holding that the USA must legally justify their attack in self-defence on the Iranian platforms by showing that Iran was responsible for a previous armed attack. The requirement of an armed attack is an evident requirement reaffirmed in later cases: ‘The *Legal Consequences of the Construction of the Wall in the Occupied Territory*²⁶ and the *DRC v. Uganda case*. In the *DRC v Uganda* the court determined that an armed attack is a self-evident requirement’²⁷ again without defining what constitutes as an armed attack. The ICJ judgements have set a relevant standard for assessing the lawfulness of self-defence claims²⁸ by using armed attack as the primary benchmark.

Nicaragua (Merits, 1986 ICJ Rep. 14, at para. 194). When the question of the existence of an armed attack featured in the Court’s overall reasoning on the law of self-defence, it appeared before the principles of necessity and proportionality.

²⁴ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits, International Court of Justice (1986, Jun 27).

²⁵ *Nicaragua v United States of America* supra note 24.

²⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (2003, Dec 08).

²⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, International Court of Justice (2005, Dec 19).

²⁸ James A Green ‘The *ratione temporis* elements of self-defence’ (2015) 2 *Journal on the Use of Force and International Law*.

With this in mind, there is still uncertainty if an actual armed attack is a requirement in the context of nuclear weapons. The concept of a pre-emptive attack was born out of the language of the UN Charter; State have an inherent right to act in self-defence. It is unrealistic in practice to suppose that self-defence must in all cases await an actual attack. This will be discussed later in the chapter (i.2.) as it serves an important issue within the context of nuclear weapons. In the meantime, we will examine the fundamental threshold for lawful self-defence: an armed attack.

I. THRESHOLD OF AN ARMED ATTACK

As to the question of what constitutes an armed attack we have some indication on the basis of the *Nicaragua* case.²⁹ In that judgement, the ICJ relied heavily upon the General Assembly's declaratory resolution known as the 'Definition of Aggression' and the particular circumstances as well as factual evidence from the *Nicaragua* case. The ICJ determined that an armed attack consisted of a significant direct use of force by a State against another State, as well as the sending by or on behalf of a State of armed bands, militias and the like to carry out armed actions against another State; 'provided such activities were comparable in their scale and effects to a conventional armed attack carried out by regular forces'³⁰. This however, is a very restrictive formula and doesn't take into account the different circumstances of the use of force specifically terrorism and WMD such as nuclear weapons. Because not every use of force against the territorial integrity or political independence of a state constitutes as an armed attack³¹, therefore it is necessary to distinguish between them.

In determining what measures taken can amount to a lawful exercise of self-defence, we need to assess the nature of an armed attack in the jurisprudence of the ICJ. In the *Nicaragua Case* the court viewed it as 'necessary to distinguish the gravest forms of the use of force from other less grave forms'.³² Hence, we can conclude that gravity is the primary distinction of whether an armed attack has occurred or not.

In the *Nicaragua case*, the ICJ differentiated from 'a mere frontier' incident to the 'most grave forms of the use of force', suggesting that the use of force must meet a threshold of

²⁹ *Nicaragua v United States of America* supra note 24.

³⁰ *Nicaragua v United States of America* supra note 24.

³¹ Olivier Corten *The law against war: The prohibition on the use of force in contemporary international law* (2010).

³² *Nicaragua v United States of America* supra note 24.

‘scale and effects’ or intensity in order for it to be regarded as an armed attack for the purposes of Article 51. The use of force required to meet the threshold of gravity and intensity must be more than ‘mere frontier incidents’ and range from ‘localized border encountered between small infantry units’ and a full-scale invasion of its territorial integrity or direct destruction of its interests. In other words, “minor violations of the prohibition of the use of force falling below the threshold of the notion of armed attack do not justify a corresponding minor use of force as self-defence.”³³

Intention has also been used by the court to determine if an armed attack has occurred. In the *Oil Platforms* Case the ICJ made reference to this requirement when it inquired into the question whether the USA was able to prove that certain of Iran’s actions were “specifically aimed” at the USA or that Iran had “the specific intention” of harming USA vessels³⁴. This suggests that an armed attack does not require to meet a certain threshold of intensity and requires only an intention to do harm which seems to contradict the purpose of the UN Charter. If intention is the requirement to use force in self-defence then as long as an aggressor state indiscriminately attacks a state or its vessels it would trigger self-defence. This does not seem to be a valid justification that coincides with the law. It can be inferred from the courts judgement that the threshold of gravity is flexible and take into consideration the specific considerations of each case.³⁵ The requirement of intention is highly criticized among the international community.

Although, the ICJ excluded ‘small-scale attacks’, it has been argued in the age of terrorism by non-state actors, that every use of force against a state can amount to an armed attack. Customary practice gives no clear guidelines as to the scale and effects required for a ‘frontier incident’ to qualify as an armed attack.³⁶ ‘The USA is an avid supporter of the theory that ‘an armed attack means any use of armed force, and does not need to cross some threshold of intensity’.³⁷ The accumulation of events theory means that a series of attacks or several armed incursions must be views as a whole rather than separate unrelated incidents. This theory has implications not only for deciding whether an armed attack has taken place at

³³ Enzo Cannizzaro ‘Contextualizing proportionality: *jus ad bellum* and *jus in bello* in the Lebanese war’ (2006) 88 *International Review of the Red Cross*

³⁴ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, International Court of Justice (2003, Nov 06)

³⁵ Tom Ruys ‘Armed Attack’ and Article 51 of the UN Charter: *Evolutions in customary law and practice* (2010)

³⁶ Ruys op cit note 35 at 57.

³⁷ Elizabeth Wilmshurst ‘The Chatham House principles of international law on the use of force in self-defence’ (2006) 55 *International & Comparative Law Quarterly*.

all, but whether the victim state may defend itself not only against the use of force which triggered its forcible response in self-defence, but against the threat arising from the whole series.³⁸ In justifying the use of force in response to cross-border attacks or bombings Israel has consistently relied on the ‘accumulation of events theory’.³⁹ Israel’s intervention in Lebanon in 2006, Israel claimed they used for in self-defence against, small-scale cross-border attacks by Hezbollah militants. Israel conduct was disproportionate however a majority of the security council (11/15) accepted in principal that Israel could exercise its right to self-defence.⁴⁰ As well as in the ‘*Oil platforms* case it used language that suggested that the cumulative nature of a series of forcible actions could possibly turn them into an ‘armed attack’.⁴¹ This theory has not been expressly endorsed by the ICJ or the Security Council, in fact it is highly contested and has only gained general acceptance due to the increased amount of transnational terrorist attacks. However, it stands to reason that states have shown a new willingness to support this theory that would legitimized small-scale events as armed attacks under Article 51. The creation of nuclear weapons, beg the question that under the consideration of these new threats, self-defence should not be limited to an armed attack. To require a state to suffer a such a devastating attack in order to evoke its right of self-defence would be unreasonable.

a) POSSIBLE EXCEPTION FOR AN ARMED ATTACK

1. TERMINOLOGY

States and scholars tend to use three different terms when discussing the use of force in self-defence prior to an armed attack: anticipatory self-defence, pre-emptive self-defence, and preventive self-defence. For the purpose of this paper I will use pre-emptive self-defence as it is the most used term when discussing the potential threat that nuclear weapons pose. ‘Pre-emptive self-defence is defined as the use of force in self-defence to halt a particular tangible

³⁸ *Case Concerning Oil Platforms* supra note 34.

³⁹ *Responding to Hezbollah Attacks from Lebanon: Issues of Proportionality*, Israel Ministry of Foreign Affairs (2006, Jul 25).

⁴⁰ United Nations Security Council, 35th Sess., 5493rd mtg, UN Doc S/PV.5493 (2006, Jul 21).

⁴¹ *Case Concerning Oil Platforms* supra note 34: The Court stated that ‘even if this series of deplorable attacks could be regarded as cumulative in character’ they could not be attributed to the DRC and therefore did not give licence to Uganda to exercise its right to self-defence against that state.

course of action that the potential victim state perceives will shortly evolve into an armed attack against it.’⁴²

2. PRE-EMPTIVE USE OF FORCE

Pre-emptive use of force is considered illegal under the UN Charter, the arguments for recognizing a right to pre-emptive use of force in the face of an imminent attack rely not only on the meaning of the ‘inherent right to self-defence’ recognized in Article 51, nor in international customary law (*Caroline Case*), but on modern warfare (WMD) and international politics.⁴³ With the development of nuclear weapons it would seem illogical to maintain that a state facing an imminent attack by an enemy armed with such weapons would have to sit by idly and wait for the attack to start before it could defend itself.⁴⁴ The requirement that there be an armed attack is clear, but not without conflict. Divided views exist on whether it is permissible for a state to use force in self-defence against an attack which has not yet actually begun but is reasonably believed to be *imminent*. Below we will examine two different schools of thought in terms of the language of Article 51.

In accordance with the UN charter, if read strictly the legality of pre-emptive self-defence cannot be a lawful because of the requirement of an armed attack. Yoram Dinstein⁴⁵ and scholars⁴⁶ under the strict school consider the materializing of a threat that is imminent a responsibility for the security council and that pre-emptive action can only be used if given authorization from the security council. It must be conceded that the strict reading of Article 51 is not without logic, and may be regarded as consistent with the collective security policy adopted in the Charter.⁴⁷ Under this policy a state facing an imminent attack should not engage in forceful action but should request aid from the Security Council. However, given that the Security Council has a reputation for being unreliable in carrying out its mandate to protect states from threatened or imminent attacks, therefore waiting for Security Council authorization is not an appealing option. Especially in the age of nuclear weapons when waiting for authorization can have catastrophic consequences.

⁴² Sean D Murphy ‘The doctrine of preemptive self-defense’ (2005) 50 *Vill. L. Rev.* at 704.

⁴³ Rosalyn Higgins *Problems and process: International law and how we use it* (1995) at 242.

⁴⁴ Higgins op cit note 43.

⁴⁵ Dinstein op cit note 9.

⁴⁶ Philip C Jessup *A modern law of nations: An introduction* (1968) and Louis Henkin *International law: politics, values and functions* (1989) support the strict reading of the *UN Charter*.

⁴⁷ Corten op cit note 29 at 407–16.

A second school of thought accepts pre-emptive self-defence in the face of an ‘imminent threat’. The vernacular used in Article 51 implies that states have the ‘inherent right’ of self-defence in the face of an *imminent* threat. ‘Whereas parts of the jurisprudence claim that Article 51 of the Charter has suppressed this aspect of self-defence by requiring a prior armed attack, others claim that the Charter preserves the customary right of self-defence in the word ‘inherent’.’⁴⁸This principal of ‘imminence’ relies on ICL and the precedent of the *Caroline* case, which justifies a pre-emptive attack ‘an attack on foreign territory would be justified only if the aggressor were able to show a “necessity of self-defence instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”’⁴⁹ Imminence becomes the requirement for legitimate pre-emptive self-defence. UN Secretary general Kofi Annan appointed a High Level Panel of Experts to examine UN reform, after having cited the ‘restrictive’ language of Article 51, he stated that: “A threatened State, according to long established international law, can take military action as long as the threatened attack is imminent.”⁵⁰

This reflects the *opinio juris* of states and the need for the UN Charter to be adjusted. State practice tends to reflect the evolution of the original restriction outlined in Article 51 by justifying pre-emptive self-defence in response to an imminent attack. Most famously, in 2002 the US produced a *National Security Strategy (The Strategy)* that clearly argued for the propriety of pre-emptive self-defence.⁵¹ This is set in the context of terrorist organizations, such as al Qaeda, or so-called rogue states, such as Iraq or North Korea, acquiring and threatening to use WMD such as chemical, biological, or nuclear weapons.⁵² The USA even went so far as to say that “for centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.”⁵³*The Strategy* emphasizes the option to use pre-emptive military strikes to address threats to the USA and its allies before they fully

⁴⁸ DW Bowett *Self-defence in international law* (1958) at 182–93.

⁴⁹ John Bassett Moore *A digest of international law* (1906) (quoting Webster’s correspondence to Lord Ashburton, a special British representative to Washington in the Caroline dispute).

⁵⁰ United Nations *The Secretary-General’s High-level Panel Report on threats, challenges and change, A more secure world: Our shared responsibility* (2004).

⁵¹ 2002 *US National Security Strategy*, 15. Several scholars characterize this argument as one in support of preventive—not merely pre-emptive—self-defence. Doyle, *Striking First*, 25; Ivo Daalder and James Steinberg, ‘The future of preemption’ (2005) *American Interest* 1 fn 1.

⁵² Thomas Graham Jr ‘National self-defence, international law, and weapons of mass destruction’ (2003) 4 *Chi. J. Int’l L* at 1.

⁵³ United States *The national security strategy of the United States of America* (2002), available at <https://history.defense.gov/Portals/70/Documents/nss/nss2002.pdf?ver=2014-06-25-121337-027>.

materialize, this will be important to note for hypothetical scenario 3. This strategy was created in the context of rogue states such as North Korea acquiring and developing their nuclear weapons program. Australia, Japan, and the UK have also defended their right to use force in certain situations to prevent terrorist or WMD threats from materializing.⁵⁴ Japan, for example, has publicly contemplated using pre-emptive force against North Korea if it has strong evidence that North Korea is planning a missile attack against it.⁵⁵ When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialise. ‘This is the principle and logic behind pre-emption.’⁵⁶

3. THE JURISPRUDENCE OF THE ICJ

The Cuban missile crisis of 1962 was one of the first post UN charter examples of pre-emptive action. During the Cuban missile crisis, the USA made a number of formal legal arguments in support of the institution of a “defensive quarantine” in advance of any actual Soviet or Cuban use of force. The Security Council deliberated about pre-emption although there was no conclusive consensus to support or oppose the doctrine, most of the arguments were about if the criteria established under customary law (*Caroline Case*) were met in this case. The delegate from Ghana stated that ‘the threat was of not of such a nature as to warrant action on the scale so far taken, prior to a reference to this Council’.⁵⁷ Essentially the delegate accepted the use of pre-emptive force but refused it to be legal based on the principal of necessity, which was not met.

The ICJ has refused to make any judgements regarding pre-emptive self-defence leaving the issue open for interpretation. In the *Nicaragua*, *Oil Platforms* and *DRC v Uganda* self-defence was not explicitly claimed by the parties, so the court although identified pre-emptive self-defence, decided it was unable to pronounce upon the subject. The ICJ does not confirm the lawfulness of pre-emptive self-defence nor affirm that it is unlawful. However, the lawful use of force in response to a threat contradicts the court’s claim that ‘the exercise of this the right to self-defence is subject to the state concerned having been the *victim of an armed attack*’.⁵⁸ Thus the acknowledgement of pre-emptive use of force.

⁵⁴ Phil Mercer ‘Tensions rise over Australia’s pre-emptive strike policy ahead of ASEAN Summit’ *Epoch Times* 26 November 2004.

⁵⁵ Anthony Faiola ‘In Japan, tough talk about preemptive capability’ *Washington Post* 11 July 2006.

⁵⁶ United States *op cit* note 51.

⁵⁷ Mr. Quaison-Sackey, quoted in United Nations Security Council, 17th Sess., 1024th mtg, UN Doc S/PV.1024 (1962, Oct 24).

⁵⁸ *Nicaragua v United States of America* *supra* note 23 para 35.

Having said this, there is also implicit statements made by the ICJ for pre-emptive self-defence. In the *Oil Platforms* case, the United States insisted that response to the attacks was necessary for self-defence and also to *secure against future threats*.⁵⁹ Also in the *DRC v Uganda* case, the court referred in detail to Uganda's future security and the need to secure against future attacks to support their self-defence claim, even though in decision, the court clearly states that the self-defence was only taken in a response to actual attacks, it did mention the need for pre-emptive measures.⁶⁰

Given this brief examination of some important indicators of state practice in the post-UN Charter period, it would be difficult to conclude that there is an established rule of customary international law prohibiting the pre-emptive use of force when undertaken in pre-emptive self-defence. In light of the presented evidence, it can be concluded that there has indeed been a shift in States' *opinio juris* insofar as support for pre-emptive self-defence has become more widespread and explicit in recent years (post 2001). At the same time, it seems a step too far to claim that there exists today widespread acceptance of the legality of self-defence against so-called 'imminent' threat.

II. THE CHANGED NATURE OF THE THREAT: NUCLEAR WEAPONS

In terms of a potential nuclear threat, Article 51 a more tolerant definition of what constitutes as an armed attack which includes a possible threat justifying pre-emptive military action. But only in very specific circumstances as it could lead to misuse and abuses by aggressive or self-serving states.

A nuclear threat can reasonably be treated as imminent in circumstances where an attack by conventional means would not be so regarded' because of the extreme risk to a state forced to wait until the attack takes place and the impossibility of affording that state's population any effective protection after the attack has been launched.⁶¹ Waiting for an actual nuclear armed attack can be exceedingly dangerous but so can the doctrine of pre-emptive use of force. For example, the use of force by Israel on the Osiraq nuclear power reactor in Iraq in 1981, was considered an illegal act under international law and received much condemnation. Israel claimed the right of pre-emptive self-defence, asserting that an

⁵⁹ *Case Concerning Oil Platforms* supra note 34 paras 4.27–4.30.

⁶⁰ *DRC v. Uganda* supra note 26 para 143.

⁶¹ Christopher Greenwood 'International law and the pre-emptive use of force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 *San Diego Int'l LJ* 7 at 16.

operational reactor would be a step in the direction of Iraq acquiring nuclear weapons, which would pose a direct and immediate threat to Israel.⁶² Even though Iraq refuses to recognize Israel's existence and its continuously endorsing and committing violence against Israel, even though Iraq was on a path to creating nuclear weapons that could be used against Israel, and even though it could be justified and consistent with the *Caroline* case, Israel's actions was strongly condemned by the Security council and international community through resolution 487. An "armed attack in such circumstances cannot be justified as it represents a grave breach of international law."⁶³ The initiation of a nuclear program did not constitute as an 'imminent threat'. Despite that, Israel's actions resonated with states and made them question the consequences of delinquent states or terrorists acquiring nuclear weapons, it was change the status quo and make the nuclear non-proliferation regimes obsolete.

As we can see by Israel's actions against Syria in 2007, received a different response from the international community. Implying that the *opinio juris* of states had evolved. Israel bombed an industrial facility, which was housing a nuclear reactor, near al Kibar in Syria.⁶⁴ The same defence was used to justify pre-emptive self-defence but very little outcry or criticism was received from the international community. There are several factors that could explain the radically different reactions of Osirak and Kibar. Iraq, was public about its facilities and allowed the IAEA to inspect the facilities. Syria on the other hand was building the nuclear reactor in secrecy with the aid of North Korea, another delinquent state. Another different between the two operations was the intention of the nuclear reactor, the Nork Korean built reactor in Syria was designed to produce nuclear weapons (produced plutonium) while there was no significant proof that Iraq was building a reactor for the purpose of producing weapons, in fact it could have been used for energy (peaceful means).

However, the difference between the two operations is not significant and one can only assume that the spread of nuclear weapons in the last decade has place pressure on Article 51 and that the proliferation of nuclear technology to rogue states raises concerns.⁶⁵ Consequently, the threat of nuclear weapons in the hands of states with a reputation of

⁶² Graham op cit note 50 at 11.

⁶³ Bruce Ackerman 'But what's the legal case for preemption?' *Wash Post* 18 Aug 2002.

⁶⁴ Leonard S Spector & Avner Cohen 'Israel's Airstrike on Syria's Reactor: Implications for the Non-proliferation Regime' (2008) 38 *Arms Control Today*.

⁶⁵ Matthew C Waxman 'The use of force against states that might have weapons of mass destruction' (2009) 31 *Mich. J. Int'l L* at 9-10.

unpredictable and irrational behaviour has caused states to adjust their views of the propriety of pre-emptive self-defence against such a threat.⁶⁶

In summary, pre-emptive self-defence has not been expressly excluded from Article 51, in my opinion international law in order to be sustainable to address contemporary threats permits pre-emptive self-defence and the question becomes what constraints or circumstances can such a right be exercised. And while pre-emptive self-defence is generally unlawful, it is not necessarily unlawful in all circumstances, the ‘matter depending on the facts of the situation including in particular the gravity and consequential nature of the threat and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat.’⁶⁷

From the above it can be said that pre-emptive self-defence is changing into a more accepted practice within customary as well as of the UN law on self-defence.⁶⁸ Although it is true that contemporary international law dealing with the possibility to use force in self-defence does not adequately address the problem of WMD and terrorism, no clear legal standard has yet emerged to determine when pre-emptive force would be permissible in such cases.⁶⁹ Incidentally the law has focused on the force used meeting the required criteria significantly imminence, necessity and proportionality which are even more pressing in relation to pre-emptive self-defence than they are in other circumstances.

CHAPTER 3: REQUIREMENTS OF IMMINENCE, NECESSITY AND PROPORTIONALITY

Although, the focal point of the courts jurisprudence is an armed attack, the court has been consistent in requiring restrictions of imminence, necessity and proportionality across its relevant judgements. Indeed, as the Court pronounced, ‘the right of self-defence under Article 51 of the Charter was subject to the limitations of proportionality and necessity’-the proportionality element in particular is crucial to such a discussion⁷⁰.Explicit reference was made to these principals in the *Nicaragua case*, the *Oil Platform*, *Armed Activities on the*

⁶⁶ Andrew Garwood-Gowers ‘Israel’s airstrike on Syria’s Al-Kibar Facility: A test case for the doctrine of pre-emptive self-defence?’ (2011) 16 *Journal of Conflict & Security Law*.

⁶⁷ Robert Jennings & Arthur Watts *Oppenheim’s International Law, Volume I: Peace* 9 ed (1992) at 421–2.

⁶⁸ ‘Pre-emptive self-defence has been endorsed by the Dutch government’ (2008) 39 *Netherlands Yearbook of International Law*.

⁶⁹ Anthony Clark Arend ‘International law and the preemptive use of military force’ (2003) 26.2 *The Washington Quarterly* at 89–103.

⁷⁰ Christopher Greenwood ‘Self-defence and the conduct of international armed conflict’ in Yoram Dinstein (ed.) *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989).

Territory of the Congo (hereafter DRC v Uganda) and the *Advisory opinion. The Advisory opinion* is a crucial case regarding the legality of nuclear weapons in which the ICJ declared that: ‘The submission of the exercise of the right to self-defence to the conditions of necessity and proportionality is a rule of customary law.’⁷¹ Given that the criteria do not exist within the UN Charter, this chapter involves the evaluation of international customary law and ICJ judgements. Starting with the *Caroline case* which is generally regarded as the reference point for any discussion of the criteria governing the use of force in self-defence. The *Caroline Case* outlined a formula for which actions of self-defence should be balanced against before armed attack was conceived in international legal vernacular.

I. THE CAROLINE CASE

In 1837, an attempted rebellion transpired against the British empire in Canada. The Leader of the failed rebellion escaped to the USA. He drew support from empathetic people in the USA and created a rebel force which he stationed on Navy Island, located in British territory. They were incidentally supplied with personnel, food and weapons by the US steamboat the *Caroline*. Tensions were high between rebels and British-Canadian forces and on the 29 December, while the *Caroline* was docked on US territory, it was attacked and consequently set on fire and towed over Niagara Falls⁷² by British-Canadian forces. In the process one person was killed, a USA citizen. The death of a national and territorial infringement caused uproar in the USA in which they demanded reparations. However, Britain claimed that the attack was an act of ‘self-defence’ stating that ‘the necessity of self-defence and self-preservation, under which Her Majesty’s subjects acted on destroying the *Caroline*, was sufficiently established’.⁷³ To which the USA responded that the British forces were in ‘no imminent danger, and therefore could not claim to have acted in self-defence’.⁷⁴ Correspondence continued for five years until the USA and Britain finally come to an agreement. During negotiations, US Secretary of State Daniel Webster, as part of the settlement, defined the conditions of necessity and proportionality that determine a legitimate action in self-defence.⁷⁵ It was Webster that developed the concept of self-defence in general

⁷¹ *Advisory Opinion* supra note 3 para 41.

⁷² Robert Y Jennings ‘The *Caroline* and *McLeod Cases*’ (1938) 32 *American Journal of International Law* at 82–4.

⁷³ Letter dated 6 February 1838 from Henry S Fox to John Forsyth, FO Doc 5/322.

⁷⁴ Letter dated 22 May 1838 from Andrew Stevenson to Lord Palmerston, FO Doc 5/327.

⁷⁵ Graham op cit note 50.

international law in the 19th century. He gave birth to the Caroline formula which has become the *locus classicus* of the law of self-defence.⁷⁶

A state would have to demonstrate that the "necessity of self-defence instant, overwhelming, and leaving no choice of means, and no moment for deliberation."⁷⁷ In other words; the state would first have to prove that the use of force by an aggressor was imminent and that there was no other course besides forcible action to forestall such an attack (imminence). Second that the state seeking to exercise force in self-defence would need to demonstrate necessity (necessity). And third that the force used in self-defence would be obligated to respond in a manner proportionate to the threat or desired end (proportionality). Thus, Webster devised a formula that had three principals that must be met for an act of self-defence to be regarded as lawful. Immediacy, necessity and proportionality.

It must be noted that the concept of immediacy was introduced in accordance with pre-emptive self-defence and has been received more acceptance with the emergence of WMD and terrorism. The pre-emptive doctrine became a topic in foreign police and international law as a solution to immediate threats. The Caroline case has been criticized for being a formula for only pre-emptive self defence claims as the rebels on Navy island had not yet launched an attack. It is a rather evident formula for the justification of pre-emptive self-defence but it is also evident that through state practice and ICJ judgments the criteria of imminence, necessity and proportionality are not restricted to pre-emptive self-defence in this way. It is generally accepted that the Caroline formula is applied to all actions of self-defence.

a) OPINIO JURIS

Incidentally states have rarely invoked the Caroline case in relation to their self defence claims, instead recalling the principals of imminence, necessity and proportionality to justify their actions in self-defence. The Caroline case has been referred to on several occasions, such as by Iraq in 1980⁷⁸ and similarly by Israel in 1976⁷⁹ as well as in 1981⁸⁰. Even though the Caroline formula has not been used frequently in the UN era it does not mean that it is not part of contemporary customary law. In fact, states using the criteria determined by the

⁷⁶ Jennings op cit note 72 at 92.

⁷⁷ Moore op cit note 47.

⁷⁸ United Nations Security Council, 38th Sess., 8285th mtg, UN Doc S/PV.8285 (1980, Oct 15).

⁷⁹ United Nations Security Council, 35th Sess., 1939th mtg, UN Doc S/PV.1939 (1976, Jul 09).

⁸⁰ United Nations Security Council, 36th Sess., 2282d mtg, UN Doc S/PV.2282 (1981, Jun 15).

Caroline formula is determined *opinion juris* in itself and sufficient to claim ICL status. It is undeniable that state practice supports the ‘necessity’ and ‘proportionality’ criteria. In the same Israel case of 1981, many states condemned Israel due to the fact that its actions did not meet the requirements outlined in the Caroline Formula. The United Kingdom delegate, Sir Anthony Parsons, contended that the Israeli operation violated international law insofar as "[t]here was no instant or overwhelming necessity for self-defence."⁸¹

Sierra Leone quoted approvingly from the Caroline: "as for the principle of self-defence, it has long been accepted that, for it to be invoked or justified the necessity for action must be instant, overwhelming and leaving no choice of means and no moment for deliberation."⁸² Irrespective, the Caroline sets a precedent, and has played a crucial role in state justification of self-defence.

b. THE INEXORABLE LINKS BETWEEN THE CRITERIA

It should be noted that imminence, necessity and proportionality are cumulative, and if one of them is not satisfied then the state is deemed a violator of the law.⁸³ The existence of these legal principals, although not absolutely defined, provide general restraints on decision-makers when considering force in self-defence. Even in the Caroline case, all three requirements were dependent on each other.

In general, the principals of necessity and proportionality both have a temporal connection. This temporal connection is the need for immediate action in the face of an attack that has already occurred or pre-emptive action. Either way, every state that has claimed self-defence has invoked the criteria of imminence, necessity and proportionality to some degree.⁸⁴ An act of self-defence can only be necessary if it is imminent and the means can only be proportionate when they are necessary to achieve the legitimate ends.⁸⁵ These factors all together constitute as a minimum test by which to determine the lawful use of force in self-defence. In the next section, each principal will be examined thoroughly.

⁸¹ UNSC *supra* note 79.

⁸² United Nations Security Council, 36th Sess., 2283rd mtg, UN Doc S/PV.2283 (1981, Jun 15).

⁸³ Vaidas Miliauskas *Whether international law allows preemptive use of military force?* (Master's thesis, Vytautas Magnus University, 2011) at 21.

⁸⁴ James A Green 'Docking the Caroline: Understanding the relevance of the formula in contemporary customary international law concerning self-defense' (2006) 14 *Cardozo Journal of International & Comparative Law* at 108.

⁸⁵ Corten *op cit* note 29 at 488.

c. THE CONTEMPORARY CONTEXT OF THE CAROLINE FORMULA

It has been argued that the Caroline formula should be redefined in terms of contemporary threats. The exercise of the inherent right to self-defence with regard to nuclear weapons has certainly altered the traditional conceptions of the criteria. It is argued that the Caroline formula in itself does not represent the criteria of imminence, necessity and proportionality as they are today.⁸⁶

The following section examines the usefulness of the Caroline criteria of imminence, necessity and proportionality in the light of contemporary threats. By examining each criterion individually, we will be able to examine if they reflect the realities of today's world of ballistic missiles and weapons of mass destruction.⁸⁷

II. IMMINENCE

Imminence is a temporal element but does not necessarily exist outside of necessity and proportionality. Measures taken in self-defence should be 'temporally proximate' meaning there should be no delay in the use of force. There are various *ratione temporis* elements underpinning the lawful exercise of the right of self-defence, the timeline between the initial attack and response are notably controversial.⁸⁸ Nonetheless, self-defence has a definite temporal element that directly relates to assessments of the lawful exercise of the right.⁸⁹ Also, in terms of pre-emptive self-defence, in order for imminence to be triggered, there must be 'a specific and identifiable threat, which is highly likely to occur'⁹⁰ or have just occurred. In other words, it must effectively fall somewhere 'between (1) absolute certainty of a future attack (which is impossible); and (2) a threat that is not specific, objectively verifiable and already being prepared (which would thus not be sufficiently "imminent")'.⁹¹ The requirement of imminence plays a critical role in assessing the seriousness of the threat, the necessary response and proportionality of the lethal response and the availability of legal alternatives⁹². The reason for the contention that 'self-defence is subject to a requirement of

⁸⁶ Green op cit note 84 at 429.

⁸⁷ Graham op cit note 50.

⁸⁸ Green op cit note 28 at 97–118.

⁸⁹ Kinga Tibori Szabó *Anticipatory action in self-defence: Essence and limits under international law* (2011) at 2.

⁹⁰ Noam Lubell 'The problem of imminence in an uncertain world' in Marc Weller (ed.) *The Oxford Handbook of the Use of Force in International Law* (2012) at 697–720.

⁹¹ *Ibid* 697–720.

⁹² Victoria F Nourse 'Self-defence and subjectivity' (2001) 68 *University of Chicago Law Review*.

immediate exercise following the occurrence of an armed attack, or the manifestation of a threat of armed attack can be accredited to the understandable desire to have a clear distinction between the right of self-defence which is recognized under the Charter and under customary international law as lawful, and the concept of pre-emptive use of force, which has no legal basis under contemporary international law⁹³. Therefore, we must analyse two distinct definitions of imminence; imminence as one of the conditions for the exercise of self-defence in a more general sense⁹⁴ and secondly, we will examine how immediacy will primarily be used in relation to the notion of an imminent threat of attack from nuclear weapons within the context of pre-emptive self-defence.

a. GENERAL REQUIREMENT

Here we will discuss the timeline of a state's defensive action and the obligation for an 'immediate' response. Returning to the *Caroline case*, Webster held that self-defence can only be exercised in situations when the threat is 'instant, overwhelming, leaving no choice of means, and no moment for deliberation'. This phrase indicates the relevance of a time frame for self-defence.

In this sense imminence is measured by the difference between the point at which a state is notified of a 'pending attack and the point at which the attack has occurred and its impact materializes'.⁹⁵ The requirement of imminence in the traditional sense means that the use of force must be directly following threats or acts of aggression for them to be legitimate actions of self-defence. A state of irreversible emergency must exist. The temporal element is important as waiting too long to respond to an attack can negate the legitimacy of a self-defence claim. The responding State is placed under a temporal restriction—there must be a reasonable temporal proximity between the victim State's response and the armed attack itself.⁹⁶ The concept of the parameter of reasonableness is vague and open to interpretation particularly in terms of 'a context-specific appraisal of the various factors that may delay a

⁹³ Roberto Barsotti 'Armed reprisals' in Antonio Cassese (ed.) *The current legal regulation of the use of force* vol. 10 (1986). And Dinstein op cit note 9.

⁹⁴ Michael N Schmitt 'Preemptive strategies in international law' (2002) 24 *Mich. J. Int'l L.*

⁹⁵ Kalliopi Chainoglou 'Reconceptualising self-defence in international law' (2007) 18 *King's Law Journal* at 82.

⁹⁶ Green op cit note 28.

self-defence action: intelligence gathering, initial resort to negotiation, geographical disparity, and so on'.⁹⁷

Such as in the *Nicaragua case*, the court stated that the actions of the USA could not be considered necessary as the investigation of the attacks from El Salvador happened months after they actually took place thus invalidating the response. Here necessity was linked to a temporal limit for legitimacy. But a time frame is unclear, it has not been defined in international law, in the above months were seen as too far from the initial attack but below the British took 23 days to respond and it was regarded as lawful self-defence. The delayed British response to the Argentinian attack and occupation of the Falklands Islands was accepted due to the geographical location as well as the “occupation” following the invasion. Geographically, time was needed to mobilize a force necessary to respond. It would seem that the court has linked the geographic location to the response time making the principle of Imminence dependent on the location. The need for an immediate response seems to be flexible and depends on the initial attack. As an investigation, negotiations and mobilizing a necessary force can create delays. Certainly, the requirement to act immediately following an attack is not absolute and will depend on the specific circumstance.

The time it takes a state to respond depends on a few issues as stated above, it is also important to note that self-defence taken a long time after the fact negates the imminence principle.⁹⁸ This is an obvious requirement as excessively tardy responses will likely be interpreted as indicating that there was no genuine immediate need to respond.⁹⁹ For example, the 1986 attacks by South Africa against the African National Congress (ANC) were considered unnecessary because South Africa had suffered no attacks by the ANC in weeks, therefore there was no need for immediate action. In this sense imminence restricts the use of military force to the attainment of legitimate military objectives and when this purpose is achieved, Therefore, when an enemy has been conquered or has no abilities to continue the fight, the use of force should cease.

A response may become illegitimate and no longer meet the requirements of proportionality if it continues past the point in time that is necessary to deal effectively with the armed attack. Imminence is the temporal aspect that proportionality and necessity depend on. If the action of self-defence continues long after the threat has been dealt with it no longer

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Barsotti op cit note 91.

meets the imminence requirement. In the case of the USA in Granada, even if the actions of the USA fall under legitimate self-defence, the fact remains that the forces remained in place some period after the initial invasion and thus exceeded the imminence requirement and the invasion was then regarded as disproportionate.

Whether the attack is ‘imminent’ also depends upon the nature of the threat and the possibility of dealing effectively with it at any given stage. Factors that may be taken into account include: the **gravity**¹⁰⁰ of the threatened attack – how severe will the attack be and whether what is threatened is the catastrophic use of nuclear weapons. ‘That is why the in the context of nuclear weapons criterion of imminence implies that any further delay in countering the intended attack will result in the inability of the defending state effectively to defend itself against the attack’.¹⁰¹ The traditional temporal element is diminished slightly and a new interpretation evolves. This framework is less restrictive in the light to technological advancements. For this reason, the traditional imminence requirement of self-defence must be relaxed to compensate for the unique threat posed by nuclear weapons, and can be replaced with other limits on the use of pre-emptive self-defence.

b. JUSTIFICATION FOR PRE-EMPTIVE SELF DEFENCE

In chapter 2, it was determined that the international community recognizes that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. The adoption of more destructive weapons and new methods of warfare requires that self-defence should not be limited only to an armed attack. It should be adapted to new circumstances in which the force is used. To require a state to suffer a devastating attack in order to invoke its right of self-defence would be unreasonable. Moreover, developments in the contemporary weaponry allow delivering a fatal blow against a state more rapidly than before reducing the geographical limitations imposed by the temporal proxy. Therefore, states faced with an exigency to use force in self-defence should not be required to act as easy targets. ‘The threat must be legitimate and most often there must be a visible mobilization or the preparing to attack and or public threats must be made. Although, pre-emptive self-defence is regarded as illegal under international law, it

¹⁰⁰ Daniel Bethlehem ‘The relationship between international humanitarian law and international human rights law in situations of armed conflict.’ (2013) 180 *Cambridge J. Int'l & Comp. L* at 2.

¹⁰¹ Michael Wood ‘International Law and the Use of Force: What Happens in Practice?’ (2013) 53 *Indian Journal of International Law* at 345–67.

is not necessarily unlawful in all circumstances, the matter depending on the facts of the situation including in particular the seriousness of the threat and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat.¹⁰²

In the light of nuclear weapons the criterion of immediacy has often been criticised as it requires states to use force as the last possible point on the timeline, when there is no alternative. Nuclear weapons however, create a large incentive for states to use force before a threat meets the legal threshold of imminence.¹⁰³ A threat is imminent if it is about to materialize or expected to occur within a short timeframe. With nuclear weapons, especially in the hands of rogue states, the imminence requirement requires waiting too late until a nuclear threat has developed to its full capacity. It can also be very difficult to determine whether a state possesses WMD, and by the time its use is imminent, it could be extremely difficult for a state to mount an effective defence.¹⁰⁴ Therefore, the traditional temporal understanding of imminence is inadequate to deal with nuclear weapons, especially as with rogue states the inability to gain accurate intelligence regarding the development of their nuclear program such as North Korea. So, even though pre-emptive self-defence is not explicitly accepted in international law, states have often supported the doctrine in general with compliance of the concept of imminence as a vital part of any attempt to establish the lawfulness of such an action.¹⁰⁵ It is doubtful whether the present concept of demonstrable imminence, and hence that of permissible interception, is adequate for an attack with nuclear weapons, especially when delivered with missiles, because that attack has a distinct quality: it may cripple the State as a whole and annihilate its capacity to defend itself if it is not blocked in time.

Various states support the imminent threat claim and have used this as a justification for pre-emptive self-defence. Such as United Kingdom actions in Jordan¹⁰⁶ and Pakistani use of force in Kashmir as well as USA in Iraq, all responses were justified using the imminence requirement. The classic example of justifying pre-emptive self-defence based on an imminent threat posed by the Osiraq nuclear reactor. Israel explicitly justified their attacks upon the Iraqi Osiraq nuclear reactor as a response to an immediate threat.¹⁰⁷ As Iraq had not

¹⁰² Jennings & Watts op cit note 67 at 421–2.

¹⁰³ Anthony Aust *Handbook of international law* (2010).

¹⁰⁴ AC Arend 'International law and the preemptive use of military force' (2003) 26 *The Washington Quarterly* at 100.

¹⁰⁵ Tarcisio Gazzini *The changing rules on the use of force in international law* (2005) at 199.

¹⁰⁶ Sumit Ganguly and Steven H. Lee 'Conflict unending: India-Pakistan tensions since 1947' (2002) 57.4 *International Journal*

¹⁰⁷ United Nations Security Council, 36th Sess., 2288th mtg, UN Doc S/PV. 2288 (1981, Jun 19).

developed nuclear weapons yet, Israel claimed that although an actual nuclear strike was not imminent, Iraq as an anti-Semitic state and its policies against Israel provided a significant threat and if they acquired nuclear weapons would pose a very real and immediate threat to Israel's security and interests. This action was seen as highly contradictory and almost entirely condemned by the international community as plutonium production and uranium enrichment are not threats in and of themselves, and as indirect threats, they are not imminently threatening in the traditional sense. However, the ICJ has stated that, 'possession of nuclear weapons may indeed justify an inference of preparedness to use them.' It follows that preparation to make a nuclear weapon can also justify an inference of preparedness to use them.¹⁰⁸ Thus, some argue that the UN recognizes the legitimacy of destroying nuclear facilities in pre-emptive self-defence as it is undisputed that most states practice this form of pre-emptive self-defence. State practice recognizes this practice as legitimate. Another example is the USA invasion of Iraq in 2003 in order to eradicate its nuclear weapons program. Even though the claim of preemptive self-defence has not been made since the inception of the UN charter, states practice has contradicted this with states referring to an imminent threat as a justification for using force in self-defence. In both cases the imminent threat of nuclear weapons was used as a justification for a pre-emptive self-defence. Even though both acts were criticized by the international community, state practice continuously suggests that belligerent state's development of a nuclear reactor is regarded as an imminent threat to peace and security. As seen in both examples above and an older one The Cuban Missile Crises, 1962.

In summary, because it is hard to define imminence, especially in the light of current threats which cannot be traced fully from their initial stages of formation, imminence needs to be reconceptualised. The concept of imminent threat must be redefined to fit the capabilities and objectives of today's adversaries. Belligerent states and terrorists do not follow basic IHL or are constrained by the regulations of the UN or law. The continuing development of nuclear technology and the myriad of uses available make it increasingly difficult to determine the purposes or intent making it extremely difficult to detect, rendering the situation manifestly imminent.¹⁰⁹ Now due to the nature of modern threats, it is crucial to understand how imminence is addressed as it is the first stage of determining if self-defence

¹⁰⁸ *Advisory Opinion* supra note 3.

¹⁰⁹ Christine Gray *International law and the use of force* (2018).

is lawful or not. The traditional method was solely determined in temporal terms referring to the proximity of the threat¹¹⁰, but now the use of factual evidence is taken into consideration.

III. NECESSITY

The legality of the use of force in self-defence depends *inter alia* on necessity. The criterion of necessity is fundamental to the law of self-defence. Force in self-defence may be used only when it is necessary to end or avert an attack. Thus, all peaceful means of ending or averting the attack must have been exhausted or be unavailable.¹¹¹ Necessity is generally regarded as the reasonable response to an attack, either as a last resort or a response to an emergency that justifies extraordinary action in order to protect the state or essential interests that are in danger of being irreparably damaged.

The current interpretation of necessity is two-fold: (1) the State must demonstrate that it exhausted all non-forcible measures¹¹² and (2) that force is necessary to avert an unjustified attack.¹¹³

a. LAST RESORT

To understand the principal of necessity as a ‘last resort’ it is usefully to start with the *Caroline case*, Webster claimed that the need to respond in self-defence must be ‘overwhelming’ and ‘no choice of means’. In this context, it can be argued that the formula indicates that in order to evoke self-defence the attack must be of a nature as to threaten a state’s survival or vital interests. This would mean attacks that have a detrimental effect upon a State would not necessitate a response unless they impinge upon the continuous existence of a State.¹¹⁴ ‘Invocation of a state of necessity is construed as meaning a claim that a State finds itself in a situation where the sole means of safeguarding an essential interest of the State, when threatened by a grave and imminent peril, is to adopt conduct not in conformity with what is required of the State by an international obligation, owed to another State’.¹¹⁵

¹¹⁰ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, International Court of Justice (1997, Sep 25).

¹¹¹ Elizabeth Wilmshurst ‘The Chatham House principles of international law on the use of force in self-defence’ (2006) 55, no. 4 *International & Comparative Law Quarterly* at 963–72.

¹¹² JA Green & F Grimal ‘The threat of force as an action in self-defense under international law’ (2011) 44 *Vand. J. Transnat’l L.*

¹¹³ *Ibid* at 300.

¹¹⁴ Green *op cit* note 84 at 451.

¹¹⁵ James Crawford *The International Law Commission's articles on state responsibility: Introduction, text and commentaries* (2002) at 178.

In terms of the *Advisory Opinion*, the use of nuclear weapons is only permitted in extreme cases of self-defence which therefore could be adopted that a response in self-defence can only be necessary when the survival of the state is at risk.¹¹⁶ Although, it had not been suggested by the ICJ or UN in other situations so we can assume it is only in terms of nuclear weapons as the necessity clause has not been limited to state survival in the jurisprudence of the court. In reality, nothing as devastating as state survival is required before a response can be seen as legally necessary. In the *Nicaragua* and *Oil Platforms* opinions, the necessity principal is not restricted to extreme cases of state survival. In practice, nothing so devastating as survival is required before a response is legally necessary.¹¹⁷ With this in mind, the principal of necessity is not absolute and does not require the state to defend itself from total destruction.

Sometimes, states refer to the use of self-defence as vital to secure and protect their ‘vital interests’. Therefore, it must be noted that, not only the physical existence of the state but a host of interests belonging to the political, economic, legal, and social sphere of the state that deserve protection.¹¹⁸ The ‘vital interest’ of a state need not concern the survival of the state.¹¹⁹

Alternative means of settling the dispute must be considered before forceful action is taken to liberate the occupied territory.¹²⁰ Specifically, a forcible reprisal must be considered as the last resort, and that no alternative to force existed.¹²¹ In other words, there must be an attempt at a non-military alternative to the proposed use of force that could potentially end or avert an attack. This implies that a State must exhaust all other measures to avert the use of force, such as diplomatic negotiations, imposing economic sanctions or unarmed intervention by the UN SC.¹²² Furthermore, states must also exhibit that both the external threat is real and that peaceful means have been exhausted.¹²³ Even though necessity doesn’t have to be absolute it is considered to be a last resort, a state can use force in self-defence only if there is

¹¹⁶ *Advisory Opinion* supra note 4.

¹¹⁷ Dinstein op cit note 9 at 175.

¹¹⁸ *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1 (2006, Oct 03) para 251.

¹¹⁹ Roman Boed ‘State of necessity as a justification for internationally wrongful conduct’ (2000) 3 *Yale Hum. Rts. & Dev. LJ* at 15.

¹²⁰ J Gardam *Necessity, proportionality and the use of force by states* vol. 35 (2004) at 1656.

¹²¹ John Quigley ‘The Afghanistan War and self-defense’ (2002) 37 *Val. UL Rev.*

¹²² LawTeacher ‘Overview of the doctrine of self defence’ November 2013, available at <https://www.lawteacher.net/free-law-essays/international-law/overview-of-the-doctrine-of-self-defence-international-law-essay.php?vref=1>

¹²³ *Ibid.*

no other option. For example, in the Six Day War, Israel stressed that only when there was no alternative did they responded with force. Claiming in front of the security council that “despite the mounting threats from terrorists, it refrained from action in the hope of securing a peaceful settlement.”¹²⁴ Similarly the Tunisian government in their attempt to remove French troops from its territory in 1958, maintained that ‘it did everything in its power to avoid aggravating the situation.’¹²⁵ The requirement of seeking a peaceful resolution prior to using force is essential, in the *Oil Platforms case*, the ICJ did not find the actions of the USA necessary due to the fact that they never made an official complaint regarding Iran’s military activities.¹²⁶ The USA didn’t even give Iran an opportunity to negotiate. Similarly in 2002 when South Korea claimed that its naval clash with North Korea was necessary, as it had provided ample warning and gave the North Korean vessel time and an opportunity to respond, hence satisfying the attempt to negotiate.¹²⁷ Regarding the necessity principal, war always entails destruction and human suffering, therefore if there is a less harmful method to achieve a state’s goal, it is obligated to attempt that first.¹²⁸ The necessity principal does not procedurally require that other measures – negotiation, for example – must first be attempted, although where such an attempt is made and yet fails this may be indicative of the necessity of a forcible response.¹²⁹ For example, in 2001, The USA made several demands to the Taliban in Afghanistan. These demands were rejected and the USA used their failed attempts at “negotiating” as satisfying the necessity clause thus constituting lawful self-defence.¹³⁰ When a state suffers an attack against its territory and threaten the structure and institutions of a state, the armed attack itself acts as an extremely evident demonstration for the necessity of a response.

b. FORCE IS NECESSARY TO AVERT AN UNJUSTIFIED ATTACK

Necessity is satisfied if and only if the harm inflicted necessary to avert the threat faced. There must be a balancing of rights and interests of states against the general

¹²⁴ United Nations Security Council, 22nd Sess., 1348th mtg, UN Doc S/PV.1348 (1967, Jun 06) at 71–5.

¹²⁵ United Nations Security Council, 13th Sess., 819th mtg, UN Doc S/PV.819 (1958, Jun 02) at 6.

¹²⁶ *Case Concerning Oil Platforms* supra note 34 para 76.

¹²⁷ ‘Koreas clash in sea battle’ *BBC News* 29 June 2002.

¹²⁸ Dieter Janssen ‘Preventive defense and forcible regime change: A normative assessment’ (2004) 3 *Journal of Military Ethics* at 105–28.

¹²⁹ Dinstein op cit note 21 at 187.

¹³⁰ Quigley op cit note 119 at 546–8.

prohibition of force.¹³¹ It may be the case that that a large scaled attack has occurred or an invasion of territory, in these circumstances a state has suffered an attack of such character, it would be unreasonable to expect it to employ means other than force in self-defence. The *Caroline case* also stipulated that the attacked state has ‘no choice of means’ available other than force to defend itself.¹³² Action involving armed force, such as an invasion, is a legitimate trigger of self-defence only if there is no practical alternative to such an action, such as appeal to the authorities or an international organization.¹³³ The occurrence of an armed attack will meet the test of necessity, such as where a state is subjected to an ongoing armed attack can demonstrate that there is no reasonable prospect of the efficacy of peaceful measures of settlement. This was experienced by Kuwait during the Persian Gulf conflict 1990-91¹³⁴. Alas, this is not always the case, if a threat is not imminent or ongoing and there is time for diplomatic intervention or the potential to resolve a conflict peacefully, then the state is under the obligation to settle the dispute peacefully. The whole point of the UN charter is to ‘prevent future generations from the scourge of war’. The reason is that states must exhaust all viable peaceful options before resorting to the use of force.

In summary, all reasonable alternative measures should have been exhausted prior to the use of force and the requirement of necessity implies that there must be a significant level of reliability concerning an aggression. ‘It has been stated that a victim state may legally use counter military force if it has prudent grounds to believe that the use of force is the only way to conquer the aggressor and to diminish or completely eliminate the threat of future attacks’¹³⁵. It can be said that necessity not only restricts the circumstances in which force may be used in self-defence, but it also puts the limit on the duration of the counter force. The continuing validity of the forceful response now depends on its proportionality to the legitimate aims of self-defence.

IV. PROPORTIONALITY

The principal of proportionality plays a central role in both *jus in bello* and *jus ad bellum*. In *jus in bello* the meaning of the principle itself is quite clear; it involves assessing whether the expected collateral damage to civilians and civilian objects of an attack on a legitimate

¹³¹ Green, James A *The International Court of Justice and self-defence in international law* (2009) at 86.

¹³² Gardam op cit note 120 at 1667.

¹³³ Jennings & Watts op cit note 67 at 422.

¹³⁴ Adam Roberts ‘The laws of war in the 1990–91 Gulf Conflict’ (1993) 18 *International Security* at 134–81.

¹³⁵ Norman G Printer Jr ‘The use of force against non-state actors under international law: An analysis of the US predator strike in Yemen.’ (2003) 8 *UCLA J. Int’l L. & Foreign Aff.*

military target is excessive in relation to the concrete and direct military advantage anticipated.¹³⁶ In *jus ad bellum* it is also one of the factors that determine whether the use of force in self-defence is justified. Compliance with the principle of proportionality requires that the ‘force employed must not be excessive with regard to the goal of abating or repelling the attack’.¹³⁷ ‘Generally, under *jus ad bellum*, proportionality requires a consideration of matters such as the geographical and destructive scope of the response, the selection of means and methods of warfare and targets and the effects on their states’.¹³⁸ Proportionality is the resort to and the scale of force and must be judged against the legitimate end of using force or in relation to the threat of force.¹³⁹

Looking at the *Caroline case*, the term ‘excessive’ which has been interpreted as the principal of proportionality, it is unclear whether this refers to either or both interpretations above. There for we must look at the post-UN charter era to determine what states or the ICJ refer to proportionality as. The ICJ has confirmed that it is a well-established rule of customary international law that a use of force in self-defence must be ‘proportional to the armed attack and necessary to respond to it.’ Therefore, there are two conditions essential to proportionality which cannot be divorced from one another, and in reality both of them affect whether the use of force in self-defence can be considered proportionate. 1. The scale and means of the attack being responded to (in terms of destruction of life and property)¹⁴⁰ or, 2. The defensive requirements of the defending state (meaning that the measures taken are proportional to the ultimate goal of abating the attack suffered). Together they established a relationship between the threat and response.

a. THE SCALE AND MEANS

The principle of proportionality under the ‘scale and means’ interpretation requires that the degree of force used in self-defence must be commensurate with the ends to be achieved, such that every self-defence measure should be quantified by the scale of the

¹³⁶ Art. 51(5)(b) of *Protocols Additional to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross (2010, May).

¹³⁷ Avra Constantinou *The right of self-defence under customary international law and Article 51 of the United Nations Charter* (PhD dissertation University of Nottingham, 1996) at 159–61.

¹³⁸ DP O’Connell *The international law of the sea* vol. 2 (1984). In context of naval warfare, identifies (a) the theatre of operations, (b) the scale of operations and the level of weaponry. And (c) the graduation of force and the scale of response, as relevant to the assessment of proportionality.

¹³⁹ Ian Brownlie *International law and the use of force by states* (1963) at 261.

¹⁴⁰ Gazzini op cit note 103 at 148.

unlawful act which provoked it.¹⁴¹ This condition requires a state using coercive measures in self-defence must correspond to quantitative characteristics of the aggression, such as the extent of the attack, the type of weapons used and the size of the damage.¹⁴² An important point, in this regard, is civilian casualties. It is thought that proportionality necessitates that potential civilian casualties must be balanced, basically the link between *jus ad bellum* and *jus ad bello* must be satisfied. If the significance of a response does not commensurate with the loss of life or destruction of civilian possession, a state should not undertake that action¹⁴³. This interpretation of “necessity” in a self-defence context is closely linked to the scale of the attack or threatened attack and the idea of prospective proportionality, i.e., what is necessary to effectively address the attack or threatened attack.

A state using force in self-defence would not inflict unnecessary harm, while trying to achieve its aim. An important point, in this regard, is civilian casualties. It is thought that potential civilian casualties must be balanced. If the significance of a response does not commensurate with the loss of life or destruction of civilian possession, a state should not undertake that action. This condition of proportionality requires that the degree of force used in self-defence must be equivalent to the desired end result or that every self-defence measure should be quantified by the scale of the unlawful act which provoked it.¹⁴⁴

‘Proportionality in coercion relies on the scale of force should be taken into account as attacks that are disproportionate such as regime change are unlikely to be legally proportional’¹⁴⁵. For example, the USA invasion and occupation of Iraq, and the replacement of its system of government, could not have been covered by the law of self-defence on the argument that that was the only way to deal effectively with the threat posed to neighbouring states (for example, Israel) by Iraq’s weapons of mass destruction. The proportionality requirement cannot be met if the harms of any use of force outweighs its benefits.

State practice has often used the scale and means approach. Such as the USA in Grenada 1983¹⁴⁶ and the USA in Panama 1989, both which were condemned as

¹⁴¹ D Kritsiotis ‘The legality of the 1993 US missile strike on Iraq and the right of self-defence in international law’ (1996) 45 *International & Comparative Law Quarterly* at 170.

¹⁴² Cannizzaro op cit note 31.

¹⁴³ Mary Ellen O’Connell ‘The myth of preemptive self-defense’ (2002) *American Society of International Law Task Force on Terrorism*.

¹⁴⁴ Bowett op cit note 46.

¹⁴⁵ Oscar Schachter ‘The right of states to use armed force’ (1983) 82 *Mich. L. Rev.* at 1620.

¹⁴⁶ Self-defence of USA national in Grenada; however, the USA forces stayed long after their nationals were removed therefore their actions are regarded as disproportionate.

disproportional¹⁴⁷. The USA invasion of Panama was on the basis of exercising the right to self-defence to protect its nationals. The acts alleged prompting this reprisal was the death of one USA soldier and the threat to do more harm to other soldiers. The USA responded with a full-scale invasion, resulting in significant civilian casualties, destruction of property and the overthrow of the government of General Noriega.¹⁴⁸ As the scale of force used to achieve the desired end result were excessive and unjustified. Once the attack has been abated, any military response after will no longer be considered proportionate. The East Pakistan conflict of 1971, India's force used in self-defence was considered disproportionate considering the scale of activity by Pakistan¹⁴⁹. Again, the scale of action taken by Israel in the conflict with Lebanon in 1972¹⁵⁰ was considered disproportionate. As well in relation to the 2002 Korean naval clash, North Korea argued that it had responded in self-defence¹⁵¹ justifying proportionately in terms of *means* and *scale*. Thus, much of state practice solves the self-defence equation by assessing proportionality by referencing the scale of an attack that has already been initiated and the harm in the process of being done. An assessment of what will achieve the end result of self-defence, 'that of halting and repelling the attack', consists neither merely of a comparison of weapons or the scale of force used¹⁵² nor 'the forms, substance and strength of the action itself.'¹⁵³

The requirements of proportionality in the exercise of self-defence also regulate the choice of means and method of warfare and targets available to the state.¹⁵⁴ In order to make decisions regarding the choice of means there must be a consideration of the anticipated damage to civilian life, infrastructure, environmental impact etc. This is a part of proportionality that sit very comfortably under *jus ad bello*. The requirement of proportionality in the *jus ad bellum* sense but as stated earlier, the *Advisory Opinion* implied that both are an important when determining the proportionality equation and under the doctrine of self-defence it is sometimes necessary to use disproportionate force to achieve the

¹⁴⁷ United Nations Security Council, 38th Sess., 2491th mtg UN Doc S/PV.2491 (1983, Oct 27).

¹⁴⁸ Louis Henkin 'The invasion of Panama under international law: a gross violation' (1991) 29 *Colum. J. Transnat'l L.* at 306.

¹⁴⁹ United Nations Security Council, 26th Sess., 1606th mtg, UN Doc S/PV. 1606 (1971, Dec 04).

¹⁵⁰ United Nations Security Council, 66th Sess., 6718th mtg, UN Doc SC/10550 (2012, Feb 22).

¹⁵¹ Green op cit note 131 at 119.

¹⁵² R. Ago 'Addendum – Eighth report on state responsibility (1980) 2 *Yearbook of the International Law Commission* at 69.

¹⁵³ William V O'Brien 'McDougal and Feliciano: Law and minimum world public order: or the legal regulations of international coercion' (1962) 72 *Yale Law Journal* at 69.

¹⁵⁴ Gardam op cit note 120 at 1838.

necessary ends.

In the context of weapons there is a distinction between whether a particular weapon is inherently disproportionate and the manner in which it is used.¹⁵⁵ This issue in proportionality is raised when considering non-conventional weapons, whether some weapons by nature can never be considered a proportionate use of force. In spite of that, it is more so how and when non-conventional weapons are used and in what quantity and against what targets that will invoke an assessment of proportionality in terms of nuclear weapons.¹⁵⁶

There are many situations where third states are affected by the use of force by other states. Especially concerning the use of WMD such as nuclear weapons. Conventional weapons too have violated a third states sovereignty. This is important when considering the means and scale of the force as it can affect non-participating states. For example, in the *Corfu Channel Case*. This case has had a lasting influence on the law of the sea in regard to the concept of innocent passage. Neutral shipping may be damaged or interfered with by naval hostilities or blockades¹⁵⁷, and on many occasions the right of third states are interfered with by the establishment of various types of maritime zones. There is no significant doctrine under the UN Charter or legal study or ICJ judgement that resolves the relationship between the exercise of self-defence and the rights of third party states. Prior to the UN charter, third party states were protected by the law of neutrality however this concept has not been elaborated on and exist rather obscurely. Proportionality required that forceful actions in self-defence must be confined to the area of the attack that they are designed to repel.¹⁵⁸ State practice is ferly consistent with this requirement especially in regard to the sea.¹⁵⁹ A state's territorial waters are an extension of the state and force used at sea would still have to follow the proportionate requirement.

b. THE MEASURES TAKEN ARE PROPORTIONAL TO THE ULTIMATE GOAL OF ABATING THE ATTACK SUFFERED.

¹⁵⁵ Ibid at 1854.

¹⁵⁶ DP O'Connell *The influence of law on sea power* (1975) at 86-90.

¹⁵⁷ Ibid at 101-3.

¹⁵⁸ Greenwood op cit note 68 at 227.

¹⁵⁹ O'Connell op cit note 154 at 65.

In extreme circumstances, it can be accepted that legitimate self-defence is not only restricted to halting or repelling an armed attack or that it must be directly proportional to the action taken but could require the total defeat of the armed forces including the use of force on the aggressing states territory to prevent any further attack and restore security and peace. This condition of proportionality indicates that the force used to repel or halt the attack and does not require symmetry between the attack and the response. In essence, it is difficult to determine precisely, at the beginning of the conflict, what amount of force in self-defence will be necessary to defeat an enemy. But in terms of self-defence, proportionality is not only whether the means are proportionating to an armed attack but that it is proportionate to achieving the legitimate ends of using that force. Therefore, ‘this condition of proportionality, which is more subjective than the first, requires that a state using force in self-defence would not inflict unnecessary harm, while trying to achieve its aim, i.e. to repulse the attack’¹⁶⁰.

The *Advisory opinion* reflects the condition that the proportionate response to an attack is to be measured in regards to what is necessary to remove the overall threat.¹⁶¹ Therefore, “The proportionality principal does not in itself exclude the use of nuclear weapons in self-defence in all circumstances.”¹⁶² This is also reaffirmed in the *Nicaragua case*, that the principal of proportionality must be applied to the force used defending the states security and not the force used by the aggressor state.

Under this condition, the use of force does not have to be symmetrical, only that force used must be proportionate to the legitimate end. Such as in the Korea conflict in 1950, the actions of the USA forces in pursuing the North Korean forces above the dividing 38th parallel was regarded as permissible despite being disproportionate in terms of scale, because it was required to ensure the security of South Korea.¹⁶³

Therefore, there is not always proportionate conduct between the aggressor and the state using force in self-defence in other words an equivalence of scale approach may not always be appropriate.¹⁶⁴ Lawful reprisals are limited to actions that are proportionate to their antecedent provocation.¹⁶⁵ ‘In other words, the harm caused by a retaliatory attack must be in proportion to the original attack. The purpose of permitting retaliatory actions is to deter the

¹⁶⁰ Cannizzaro op cit note 31.

¹⁶¹ *Responding to Hezbollah Attacks* supra note 39.

¹⁶² *Advisory Opinion* supra note 3 para 42.

¹⁶³ JA Meyer ‘Collective security and regional security: Necessary exceptions to a globalist doctrine’ (1993) 11 *Boston University International Law Journal* at 403.

¹⁶⁴ *Advisory Opinion* supra note 33 dissenting opinion of Judge Weeramantry paras 514–6.

¹⁶⁵ *Protocols Additional to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross (2010, May).

aggressor from future transgressions by informing the aggressor that any attack will be met by an equally destructive response.¹⁶⁶ But this is not the case, the use of force does not have to mirror the original attack, the use of force must only be proportionally to achieve the desired end result.

The Security Councils implicit acceptance of British action against Argentina over the Falklands islands affirmed the position that action taken must be proportionate to the desired goal¹⁶⁷. The United Kingdom only used what was considered proportionate force to abate the attack from Argentina. Also, in the case of the 1990-91 Persian Gulf conflict an invasion and occupation of Iraq by a coalition of allies¹⁶⁸ to restore security to the region, and the replacement of its system of government, could not have been covered by the law of self-defence on the argument that that was the only way to deal effectively with the threat posed to neighbouring states.¹⁶⁹ The use of force corresponded with the specific circumstances and thus was passably proportionate to the threat faced.

The force used to resist an attack is not always proportionate to the actual attack, as there is no certainty the same force would halt or end the hostilities. Especially in circumstances where there are a series of attacks that differ in weapons and size, what would the appropriate response be to many isolated armed attacks. Argo write: ‘if a state suffers a series of successive and different acts of armed attack from another state, the requirement of proportionality will certainly not mean that the victim state is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks.’¹⁷⁰

CHAPTER4: HYPOTHETICAL SCENARIOS

I. A NUCLEAR RESPONSE

¹⁶⁶ John HE Fried ‘The nuclear collision course: Can international law be of help’ (1985) 14 *Denv. J. Int’l L. & Pol’y.* at 113.

¹⁶⁷ Gardam op cit note 120 at 159.

¹⁶⁸ United Nations Security Council Resolution 687, UN Doc S/RES/687 (1991, Apr 03).

¹⁶⁹ JG Gardam ‘Proportionality and force in international law’ (1993) 87 *American Journal of International Law* at 1743.

¹⁷⁰ Ago op cit note 152.

In the perspective of nuclear weapons, the three previously discussed principals of imminence, necessary and proportionality must still be satisfied. It seems very unlikely that some as cataclysmic as nuclear weapons could ever be deemed necessary and proportionate under the doctrine of self-defence.

Imminence principal must be absolutely met to justify the use of nuclear weapons in a pre-emptive manner. The reason for this is due to the nature of nuclear weapons, one of the inherent reasons of possessing nuclear weapons is existential deterrence.¹⁷¹ A threatened nuclear response would only be responded to if an attack was imminent due to the nature of nuclear weapons, necessity would have to operate as a last resort and for a threat to be proportionate, it must pose an effective deterrent—to stop or repel a future attack).¹⁷² Either the threat must be materializing or on its way. In this sense, the time constraints on using nuclear weapons are very tight, realistically once a nuclear weapon has been launched into trajectory any response would be imminent and necessary. In terms of the necessity element, if a State waits until it has actually suffered a nuclear ‘armed attack’, chances are, it will no longer be in a position to defend itself. The most common standard of necessity balances the harm caused by the weapon against the necessity of the military goals sought to be achieved.¹⁷³ The atomic bombings of Hiroshima and Nagasaki by the United States are a perfect illustration of this problem. The United States endeavored to exempt its conduct from international condemnation by invoking the principle of military necessity. The greatest difficulty lies instead with satisfying the proportionality element. The use of a nuclear response must not be excessive in abating or repelling the attack—a State may be able to defend itself and repel a future attack without necessarily ‘wiping the other State off the map’. That harm must not be disproportionate to the expected benefits of achieving those ends. Also, because nuclear weapons have the unique potential to inflict irreparable levels of damage on the territory and population of the target state, but also are environmentally catastrophic in terms of states at large.¹⁷⁴ Thus, the proportionality of their effects on third states must be considered.¹⁷⁵ Nuclear weapons just like conventional weapons must meet the requirements for legitimate self-defence. The use of nuclear weapons certainly alters the game of war but not necessarily the rules.

¹⁷¹ *Advisory Opinion* supra note 3. Judge Shi’s dissenting opinion.

¹⁷² Green & Grimal op cit note 112 at 322.

¹⁷³ David M Corwin ‘The legality of nuclear arms under international law’ (1986) 5 *Dick. J. Int’l L.* at 271.

¹⁷⁴ Gardam op cit note 120 at 1858.

¹⁷⁵ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, International Court of Justice (1949, Apr 09).

The use of a nuclear response must not be excessive in abating or repelling the attack—a State may be able to defend itself and repel a future attack without necessarily ‘wiping the other State off the map’¹⁷⁶. The next section will examine at what point a state can lawfully respond with the option of a nuclear weapon by using three practical yet hypothetical scenarios. North Korea’s nuclear and missile programs are rapidly colliding with Trump’s recklessness making the possibility of war in the Korean peninsula the single greatest threat to world peace in 2019. Even though North Korea have made steps to rejoining the international community, notably reopening communications with South Korea and the groundbreaking meeting between Kim Jong Un and Donald Trump. There has been no radical changes or disarmament made by either side. As long as this lack of confidence persists, the United States and North Korea will just be going around in a vicious circle. By using real life relations and the deteriorating situation between the two states as a backdrop to three hypothetical situations, we can answer the question posed by this paper.

1. A CONVENTIONAL ATTACK

For years South Korea have dismissed and sometimes were forcefully prevented from retaliating against many of North Korea’s provocations¹⁷⁷. In 2010, a North Korea submarine’s torpedo sank a South Korean navy vessel causing the deaths of 46 sailors, and later that year, North Korea fired dozens of artillery shells at one of its border islands killing two marines. South Korea has showed restraint at the continuous “acts of aggression” from North Korea that have threatened peace in the region. However, due to rising tensions between the USA and North Korea, and the twitter berates between the presidents of the two states and defiant North Korean nuclear program, nuclear catastrophe has never seemed more imminent. The use of nuclear weapons as a self-defence option sits within a legal and political grey area. And North Korea have openly stated that they would use Nuclear weapons in self-defence.¹⁷⁸ In The purpose of this particular hypothetical scenario is to determine whether the nuclear option is lawfully permitted in response to a conventional attack.

¹⁷⁶ Green & Grimal op cit note 112 at 344.

¹⁷⁷ Lewis, Jeffrey ‘This is how nuclear war with North Korea would unfold’ *Wash Post* 08 December 2017, available at https://www.washingtonpost.com/outlook/this-is-how-nuclear-war-with-north-korea-would-unfold/2017/12/08/4e298a28-db07-11e7-a841-2066faf731ef_story.html?noredirect=on&utm_term=.cf24af2572f3

¹⁷⁸ Paul Braken ‘Nuclear weapons and state survival in North Korea’ (1993) 35 *Survival*.

Beginning of 2019, a South Korean airliner strayed into North Korean airspace, North Korea on high alert fires missiles bringing the plane down killing the 250 passengers on board. Trump then tweets “THIS IS THE END LITTLE ROCKET MAN”¹⁷⁹, and orders troops in Guam and Japan to mobilize and prepare for an attack. Together, the USA’s response gave South Korea the confidence to carry out a retaliation. At this stage, the escalation of violence to follow could not be controlled by allies or negotiations. South Korea responds with ten MOABs (GBU-43/B Massive Ordnance Air burst bomb)¹⁸⁰ at North Korea’s various air bases and nuclear facilities as well as targeted killings of specific military leaders. This crippled North Korea’s land-based conventional capabilities forcing them to resort to using nuclear weapons as a way to abate any further attacks. North Korea used their ‘low yield’ nuclear weapons against South Korea and surrounding allied forces. By doing this the conflict was halted and all sides entered into negotiations, as both North and South Korea had been almost obliterated due to war, the North Korean leadership was in shambles and required international support.

The current test for determining the lawfulness of the use of nuclear weapons in self-defence was articulated by the ICJ in the Nuclear Weapons Advisory Opinion¹⁸¹ and in Article 51 of the UN Charter which outlines use of force for self-defence. This will help us answer our hypothetical question. Is the use of nuclear weapons in self-defence against a conventional attack lawful? One must also look at the traditional issues of proportionality and necessity from the *Caroline* case and International customary law to determine the lawfulness.

ANALYSES

Two of the requirements needed to meet the threshold of imminence, is that the nature and gravity of the attack and if any delay in response could have catastrophic consequences (temporal proxy). Nuclear Weapons used in Self-Defence by a State must be due to an extreme circumstance, in which its very survival would be at stake. The nature and gravity of the attack in this hypothetical scenario could equate to threatening state survival.¹⁸² The

¹⁷⁹ Emphasis added.

¹⁸⁰ ‘GBU-43/B "Mother Of All Bombs" / MOAB – Massive Ordnance Air Blast Bomb’ *GlobalSecurity.org*, available at <https://www.globalsecurity.org/military/systems/munitions/moab.htm> Often referred to as the ‘MOTHER OF ALL BOMBS’ the most powerful non-nuclear weapon in Americans arsenal.

¹⁸¹ *Advisory Opinion* supra note 4.

¹⁸² *Advisory Opinion* supra note 4 para 96. And Georg Schwarzenberger *The fundamental principles of international law* (1955).

crippling on North Korea's conventional capabilities and the targeted killing of important military leaders would certainly justify an imminent attack in self-defence. Especially since any delay would only damage the state more. Even though nothing as severe as state survival has been expected by the ICJ to invoke self-defence, in this case the survival is at state therefore certainly meets the immanency requirement.

North Korea knew that once the South Korean Allies specifically the USA were able to mobilize their weapons, particularly their nuclear weapons, it could mean the absolute end of the North Korean state and leadership (or what was left of it). Therefore, the time to respond to South Korea's very tactical and successful conventional front was to use nuclear weapons. The imminent threat of the looming allies was just one of their justifications for using nuclear weapons. The temporal element of self-defence is satisfied. However, State response to an imminent threat cannot be justified if there were any practical alternatives to removing the threat.¹⁸³

For the necessity clause to be met, a state must justify that the use of force was their 'last resort', either by showing that all possible procedures have been exhausted, the action must be by way of a last resort after all peaceful means have failed¹⁸⁴, or there should be 'no choice of means'¹⁸⁵ which means that the state had no plausible or reasonable choice other than force to resolve the situation. But in our scenario, no peaceful negotiations were even attempted. We would have to look back into previously diplomatic missions with North Korea. The international community have tried to broker peace between the two states but North Korea has yet to respond in good faith, in previous meeting with South Korean leader were solely Olympics related and even though the world celebrated the meeting between Kim Jong Un and Trump, nothing definitive came from the meeting. It can also be said that no attempt to negotiate was taken by either side, USA acted knowing they would be supported by allies in the region. However, it can also be argued that in accordance with the ICJ and state practice, negotiations or any attempt at peaceful solution are not required for lawful self-defence in the face of an imminent threat and such attempts are not usually taken.

Clearly, without any conventional capabilities aside from nuclear weapons then a nuclear response could be considered necessary. As there were no 'choice of means' available other than nuclear weapons. That is to say that the use of nuclear weapons is *permissible*

¹⁸³ Jennings & Watts op cit note 65 at 421–2.

¹⁸⁴ Dinstein op cit note 21 at 225.

¹⁸⁵ Gro Nystuen, Stuart Casey-Maslen & Annie Golden Bersagel (eds) *Nuclear weapons under international law* (2014).

when conventional weapons are ineffective, then if a State has no other military capabilities in the first place (other than the nuclear option), the use of a nuclear weapon would indeed be lawful.¹⁸⁶

Repelling or abating a further attack is the entire point of self-defence to prevent further destruction and suffering. The necessity elements are seemingly satisfied: this is a last resort option and there are no alternatives. However, necessity and proportionality are by nature connected and both requirements must be met for the use of force in self-defence to be satisfied. It begs the question then that even if the principal of military necessity is satisfied, can the incinerating of urban populations and defiling of not only South Korea's territory but their own and surrounding states does not seem to meet the proportionality threshold. It would certainly repel/abate any future attack but on the other hand, wiping that State off the face of the map might be deemed 'excessive'.¹⁸⁷ The question then becomes does the defensive necessity negate the slightly 'disproportionate' element?

It is difficult to conceive of a nuclear reprisal that would be proportionate to a conventional attack. The vast capacity for destruction possessed by nuclear weapons far exceeds the damage that can be caused by conventional means, and it is therefore unlikely that this defense would be accepted by the international community.¹⁸⁸ This is not to say that a state must match its mode and level of response to that of the aggressor's attack, indeed, with this in mind the use of nuclear weapons may, in specific circumstances, constitute a proportionate response to an attack with conventional weapons.¹⁸⁹ However, in response to the ten MOABs (GBU-43/B Massive Ordnance Air Burst—one of the most powerful 'conventional' ordnances) would then North Korea be lawfully entitled to respond with a 'low yield' compact/ strategic nuclear option which, has exactly the same destructive capacity?¹⁹⁰ It has been argued that the strategic or low yield tactical version of nuclear weapons do not differ so much from conventional weapons in their intensity and scale of their physical effects. But if you analyse the effects of each, the conclusion is that conventional weapons still do not reach the level of destruction that nuclear weapons can. 'The chief characteristic of conventional weapons is their potential for "blast" or "shock"

¹⁸⁶ Nagendra Singh 'The right of self-defence in relation to the use of nuclear weapons' (1956) 5 *Indian Yearb Int Aff.* at 32–4.

¹⁸⁷ Francis Grimal 'Jus ad Bellum: Nuclear weapons and the inherent right of self-defence' in Jonathan L Black-Branch & Dieter Fleck (eds) *Nuclear Non-Proliferation in International Law* vol. 2 (2016) at 344.

¹⁸⁸ Corwin op cit note 171 at 283.

¹⁸⁹ Brownlie op cit note 137 at 262–3.

¹⁹⁰ Gazzini op cit note 103 at 219.

damage, accompanied by some thermal or heat effects.¹⁹¹ 'By contrast, although with variations depending on their yield and place of detonation, nuclear weapons produce 'blast' or "shock" damage and, in addition, extended "thermal radiation", "electromagnetic pulse" effects, followed by "residual nuclear radiation" in the form of delayed radioactive fallout across potentially great distances and over extended periods of time.'¹⁹² The radiation effects, it should be noted, which consist of the transmission of gamma rays (neutrons, beta particles, and some alpha particles), are not unlike the effects produced by chemical and biological weapons as opposed to conventional high-explosive weapons.¹⁹³ Nuclear weapons, even those with fairly low yields would still have harmful effects on combatants, the environment and third-party states. North Korea knew that using a nuclear weapon on South Korea would evidently affect the Korean peninsula including their own state. Here, the very meaning of proportionality becomes lost, and we come dangerously close to condoning the crime of genocide, that is, a military campaign directed more towards the extinction of the enemy than towards the winning of a battle or conflict,¹⁹⁴ and inflicting the same on one's own population.

Although it can also be argued that nuclear weapons extreme as they may be, do not obliterate an entire state and the effects can be localized to some degree. If this was not true then Japan would no longer exist today and people would not be living in Belarus. The dropping of the two atomic bombs over Hiroshima and Nagasaki in World War Two were undoubtedly massively destructive and inhumane but Japan was not obliterated from existence¹⁹⁵. This of course is a debate treading on thin ice and a highly criticized. As both Japan and Chernobyl in north-western Ukraine and neighbouring Belarus are still suffering the consequences of nuclear fallout.

The proportionality principle mandates that the force used, even in a defensive posture, must be proportional to the quantum of force used by the aggressor.¹⁹⁶ Because of the disparity between any nuclear weapons and any conventional means of warfare, it is difficult

¹⁹¹ Samuel Glasstone & Philip J Dolan *The Effects of nuclear weapons* 3 ed (1977).

¹⁹² Weston op cit note 28 at 550.

¹⁹³ Patricia J Lindop & Joseph Rotblat 'Consequences of radioactive fallout' in Ruth Adams & Susan Cullen *Final epidemic: Physicians and scientists on nuclear war* (1981).

¹⁹⁴ *Protocols Additional to the Geneva Conventions* supra note 164.

¹⁹⁵ Green & Grimal op cit note 112 at 414–227.

¹⁹⁶ Richard Falk, Lee Meyerowitz & Jack Sanderson 'Nuclear weapons and international law' (1980) 20 *Indian J. Int'l L.* (1980) at 567–58.

to conceive of a proportionate nuclear defence to a conventional attack.¹⁹⁷ Although it can be argued that the force used was proportionate to arrive at a stage where both states and allies halted their force and began pursuing a peaceful end.

2. SELF-DEFENSE AGAINST A NUCLEAR ATTACK

North Korea remains a threat to the world due to their constant disobedience and irrational decision making regarding their nuclear weapons. Especially with tensions running high between the USA and North Korea at the end of 2018. Twitter war and constant boasting of power and prestige between the two states has brought the world to the precipice of nuclear war. Also, the continuous trade between North Korea and belligerent states have caused for harsher sanctions.

After disregarding the Comprehensive Test Ban Treaty (CTBT), North Korea continued to test their nuclear weapons in 2016, causing international outrage. The utter disregard for international law in an already complicated situation only increased anxiety in the region.¹⁹⁸ Again in 2017 missile tests by the North Korea highlighted concerns over the state's nuclear program and increased anxiety in the region¹⁹⁹. Then after the North Korea's most powerful nuclear test in 2017, the world grew uneasy, as a successfully tested miniaturised hydrogen bomb that could be loaded onto an intercontinental missile, as North Korea's nuclear program went from hypothetical to real threat not only to the region but to the world.

At the end of 2018, North Korea announced that their nuclear weapons program had evolved into a nuclear triad²⁰⁰ and had the capability to destroy a state's nuclear forces in a first strike attack. This increased the militarization of the South Korea Boarder, Guam and Japan looked towards the USA for support, and the USA delivered more troops and artillery. The international community under the auspicious of Treaty of Non-proliferation of Nuclear weapons²⁰¹ united in increased sanctions, halting of aid and minimizing communication.

¹⁹⁷ Marjorie M Whiteman *Digest of international law* (1971) at 568.

¹⁹⁸ Daniel Rietiker 'The (Il?)legality of nuclear weapons tests under international law: Filling the possible legal gap by ensuring the comprehensive test ban treaty's entry into force' (2017) 21 *Insights*.

¹⁹⁹ 'North Korea: Four ballistic missiles fired into sea' *BBC News* 06 March 2017.

²⁰⁰ A Jerry Davydov & Bryan Lee 'Russia's nuclear rearmament: Policy shift or business as usual?' *Nuclear Threat Initiative* 18 December 2013, available at

https://www.nti.org/analysis/articles/russias_nuclear_rearmament_policy_shift_or_business_as_usual/

²⁰¹ Ivo Daalder & James Steinberg 'The future of preemption' (2005) *American Interest*.

Then in 2019, the USA began moving their military forces into the region for the annual ‘Foal Eagle’²⁰² military exercise with South Korea. It was the first joint exercise as it was cancelled in 2018 due to the Winter Olympics in PyeongChang. This exercise was extremely important as a tactic to scare North Korean forces. The USS Ronald Reagan warship was the head of the incredibly large fleet. North Korea had threatened the exercise via twitter Kim Jong Un stated “IF THIS EXERCISE TAKES PLACE WE WILL RESPOND WITH FORCE”, underestimating the threat, the states involved carried on as they would not be entering North Korean waters therefore any action would be irrational especially with the size of the joint military. Alas, North Korea felt extremely threatened and with their nuclear tirade capabilities, the international community misread the threat. As the first of the USA fleet arrived, Kim Jon Un fired fission devices with smaller nuclear yields, meant to prevent further intrusion, however they destroyed the USS Ronald Reagan killing the crew of 5000 sailors²⁰³, they also hit some small vessels which carried military crew and diplomatic politicians. The blast from the nuclear weapon knocked out communications and destroyed the USS Wasp, an 843-foot-long amphibious assault ship²⁰⁴ which was carrying 1,687 Troops and a variety of military cargo. Since there were no lines of communication, an error in judgement set off a cascading series of responses that ultimately lead to all-out war.

On the realization that North Korea were fully prepared to use nuclear weapons to ensure their security and state survival, the USA responded with full nuclear capacity. Before North Korea could target USA bases in South Korea, Guam and Japan or the USA mainland, the USA under the leadership of trump, responded with ‘FIRE AND FURY’ targeting the air defense battery and military bases in North Korea, this time, North Korea would be punished for their insolence. The USA targeted Hwajin-ri Missile Base²⁰⁵ and Junghwa-gun Missile Base²⁰⁶ which are both located in the Pyongyang province killing countless civilians, destroying the infrastructure and crippling the country. In order to prevent North Korea's second strike nuclear capacity, the USA targeted other suspected launch bases to avoid

²⁰² Cronk, Terry Moon ‘U.S., South Korea Launch Annual Foal Eagle Exercise’ *US Department of Defence* 13 March 2017, available at <https://dod.defense.gov/News/Article/Article/1102331/us-south-korea-launch-annual-foal-eagle-exercise/>

²⁰³ Chris Bishop & Christopher Chant *Aircraft carriers: The world's greatest naval vessels and their aircraft* (2004).

²⁰⁴ Ibid.

²⁰⁵ Davydov & Lee op cit note 198.

²⁰⁶ Ibid.

further nuclear retaliation. The USA used their nuclear tipped missiles (B61-12 gravity bombs) that were on their submarines²⁰⁷ these have incredibly accurate capabilities.

ANALYSES

A nuclear response to an actual nuclear attack, presents the strongest case for permitting a nuclear strike in some capacity. The imminence criteria are reasonably met due to the nuclear attack, with both states having second strike capabilities, there is no time to deliberate or negotiate and a nuclear strike can certainly be interpreted as ‘overwhelming’. The nature of nuclear weapons as discussed in chapter 3 require an imminent response whether to an attack or threat.

Necessity relates to the existence of an ongoing armed attack or the existence of a credible threat of an impending armed attack, as well as to the existence of feasible alternatives to the taking of armed action in self-defence.²⁰⁸ It has been established that when considering a nuclear attack that the requirement of imminence is satisfied. North Korea has already threatened to use nuclear weapons in self-defence, therefore the USA knew that it was a possibility that North Korea would use intercontinental missiles to target mainland USA, Japan or Guam if their response wasn’t effective enough to repel or halt that threat. The use of nuclear weapon was necessary to achieve the military goals of pausing the conflict and attempting to find a peaceful resolution.

In extreme cases, such as nuclear weapons it has been argued that the total defeat of the armed forces of the aggressor state would be necessary to achieve this end.²⁰⁹ However, in this hypothetical scenario, the USA and allies did not just defeat the armed forces for North Korea, they obliterated the state. The death toll would amount to over 2 million people²¹⁰ with catastrophic damage to the infrastructure and irreparable damage to the environment. Although, it is the right of a State to use the necessary counter-force to achieve that end. No more than is necessary and no less than is required under the circumstances. This is what defines it and distinguishes it from other forms of the use of force, both those which are legal and those which are not. But even if the response was reasonable, and

²⁰⁷ Hans M Kristensen & Robert S Norris ‘United States nuclear forces, 2017’ *Bulletin of the Atomic Scientists* 02 January 2017, available at <https://thebulletin.org/2017/01/united-states-nuclear-forces-2017/>

²⁰⁸ Gray op cit note 107.

²⁰⁹ Louise Doswald-Beck ‘San Remo manual on international law applicable to armed conflict at sea’ (1995) 35 *International Review of the Red Cross*.

²¹⁰ Jeffrey Lewis ‘North Korea is practicing for nuclear war’ *Foreign Policy* 09 March 2017, available at <https://foreignpolicy.com/2017/03/09/north-korea-is-practicing-for-nuclear-war/>

satisfied the necessity threshold and even if such a threat would not commensurate²¹¹, it still needs to satisfy the proportionality criteria for the response to be legitimate.

Proportionality in connection with the exercise of self-defence relates both to the overall scale and effect of the attack, as well as what is required under the circumstances to repel the attack and put an end to the threat of further attacks.²¹² If you judge proportionality on a scale and effects. The force used and by the USA was disproportionate. In the case of large scale attacks aimed at totally or significantly disrupting the target State, or taking over its territory, proportionality would allow for the waging of a full-scale war in self-defence aimed at reducing or eliminating the attacking party's capacity to conduct military operations, or otherwise continue with its attack. However, proportionality is considered to be limited in intensity and magnitude to what is reasonably necessary to promptly secure permissible objectives of self-defence.²¹³ In this sense the USA used what force was 'reasonably' proportionate to end the conflict as well as to protect themselves and allies from a second nuclear strike from North Korea. The USA's response was proportionate to achieve the legitimate goal, the repulsion of the attack.²¹⁴

Although it is still difficult to ascertain if the degree of the response was appropriate, the doctrine of self-defence exists in order to prevent further damage to a state's territory, its civilians, and those of their allies. North Korea had used nuclear weapons on ships in international waters, however the USA targeted mainland North Korea, the loss of civilian lives and infrastructure is significantly more than ships carrying military personal and diplomatic leaders. The human toll is disproportionate. But in order for the USA to defend themselves against an additional nuclear strike, they needed to target North Korea's available nuclear weapons. A full-scale assault of North Korea's nuclear forces would doubtlessly result in incalculable destruction and would therefore be disproportionate. Nevertheless, a more limited or conventional response would not achieve the same objectives and prevent further harm from being inflicted. 'Therein lies the flaw with nuclear responses in self-defence to a nuclear attack: the degree of force needed to effectively defend against future attacks is inherently disproportionate to the destruction that it would necessarily cause, particularly given the fact that there is no guarantee that the aggressor would launch additional

²¹¹ Green & Grimal op cit note 112 at 321.

²¹² Terry D Gill 'The temporal dimension of self-defence: anticipation, pre-emption, prevention and immediacy' (2006) 11 *Journal of Conflict and Security Law*.

²¹³ Eduardo Jiménez de Aréchaga *International law in the past third of a century* (1978) at 97.

²¹⁴ *Advisory Opinion* supra note 3. Dissenting opinion of Judge Higgins.

weapons.²¹⁵ In the Advisory opinion, the court did not confirm that the use of nuclear weapons is proportional to only an attack involving the use of nuclear weapons, it was only implied that they would need to employ an ‘equivalence to scale’ based approach.²¹⁶

3. PRE-EMPTIVE SELF-DEFENSE

The USA especially under its current Trump have been avid supporters of pre-emptive self-defence²¹⁷ and have shown little interest in preserving international law and has at times been very hostile towards the UN. The escalating tensions between North Korea and the USA have brought the Korean peninsula close to the brink of war. However, under the trump administration, Washington is just as likely to initiate the first strike as Pyongyang is. And both states would certainly use nuclear weapons to do so. Such a strike may be the only way to decisively end the North Korean nuclear program, but its incalculable effects would extend far beyond the devastation and destruction in Korea. The North Korean nuclear program has achieved capabilities that threaten the world, the recent test of their hydrogen bomb along with its intercontinental ballistic missile capabilities, which means they could reach mainland USA, have caused tremendous fear in the region and world especially under an unpredictable and dangerous North Korean leadership. These very real threats have been aggravated by the provocative and antagonistic reactions by Trump.

He has escalated the bellicosity to unprecedented levels, publicly threatening to respond to North Korean threats with “fire and fury like the world has never seen,” and promising to “totally destroy North Korea” if forced to defend the United States or its allies. After Trump, personally denigrated Kim Jong Un as “rocket man” during a U.N. speech, Kim warned that he would “tame the mentally deranged US dotard with fire.” Shortly thereafter, the United States flew bombers further north along the North Korean coastline than at any time since 2000. North Korea’s foreign minister responded by saying the United States had “declared war” on his country and specifically threatened to shoot down U.S. bombers even if they were outside North Korean airspace. North Korea have also in the past stated that they have

²¹⁵ Corwin op cit note 171 at 285.

²¹⁶ *Advisory Opinion* supra note 3. ‘This is the interpretation of the majority’s application of proportionality in the Nuclear Weapons Advisory Opinion and Judge Weeramantry comments on the nuclear-in-response-to-nuclear scenario.’

²¹⁷ United States op cit note 51.

no problem with using their nuclear weapons in self-defence²¹⁸. Therefore, North Korea do not only have the capability to carry out a nuclear threat but are fully prepared to use them.

Say that 2019 starts off with Pyongyang deifying the international community and testing a hydrogen bomb over the Pacific Ocean, confirming the USA's worst fear, North Korea had now developed an Intercontinental ballistic missile that a nuclear warhead can be attached to.

The USA has always reserved the right to use its nuclear weapons first against such a compelling threat as states in *The Strategy*. Convinced that a conventional attack would be ineffective as it would take too long and the USA military cannot guarantee that they would be able to destroy North Korea's second strike capability or destroy and locate every single North Korean warhead. A conventional strike would leave open the possibility of nuclear retaliation against the USA allies and possibly even the USA homeland, an outcome Trump would not accept.

Thus, the USA initiated a surprise nuclear first strike attack which carries much less USA military risks and speculation. The USA was able to deploy ships, airplanes and nuclear munitions into already established bases with little attention. By using a significant number of lower-yielding nuclear weapons they were able to eliminate any suspected North Korean launch pad, storage site and other facilities, as well as chemical stockpiles to remove the possibility of a retaliatory second strike. A first strike nuclear attack although annihilated the North Korea nuclear threat had inconceivable economic, political and moral costs.

ANALYSES

Assuming the legitimacy of a pre-emptive self-defence as discussed in detail in Chapter 2 (ai2). The application of the proportionality equation will first require identifying the aim of the use of force.²¹⁹ The principle of proportionality must be limited to countering the threatened attack and the scale and mode of the response will be determined by the nature and gravity of the anticipated armed attack.²²⁰ It is within this condition of proportionality that the goal of securing against future attacks may be acceptable.

²¹⁸ Tim Kelly 'U.S. carrier patrols off Korean peninsula in warning to Pyongyang' *Reuters* 19 October 2017, available at <https://www.reuters.com/article/us-northkorea-missiles-usa-carrier/u-s-carrier-patrols-off-korean-peninsula-in-warning-to-pyongyang-idUSKBN1CO1AH>

²¹⁹ Gardam op cit note 169.

²²⁰ United States Memorandum No. 3 (1946, Jul 17) *International control of atomic energy: Growth of a Policy*, Dept. of State Pub. 2702.

Does the threat of nuclear war satisfy the imminence requirement? It is difficult to assert whether North Korea's actions constitute as an imminent threat, as many times North Korea has defied the UN and tested their weapons and often made aggressive actions towards the USA and allies but never have they attempted a full scaled attack. Although, the attempt to acquire and possess nuclear weapons is troubling, especially considering their devastating character, the International Court of Justice has recognized that these activities are not per se illegal.²²¹ Alas, imminence under pre-emptive self-defence is not primarily a question of time, but one of the existence of a credible threat of probable or in exceptional cases potential attack, which together with necessity, the absence of feasible alternatives, make the taking of pre-emptive action.²²² There is a consensus among states that the use of force in response to an imminent threat cannot be justified if there were alternative to removing the threat²²³. The USA in this scenario would have to prove that all peaceful means had been attempted and that the threat was real.²²⁴ Thus, all peaceful means of ending or averting the attack were unavailable.²²⁵ In this scenario, we can acknowledge the previous attempts at negotiations by the international community, including the UN and USA President Donald Trump.

The sanctions imposed on North Korea by the international community have had very little effect, North Korea has continued to develop its nuclear and missile programs.²²⁶ North Korea continues to forgo the arms embargo and trade embargos finding unique ways to trade with Syria and other individuals and companies. However, this assertion by the USA is problematic, North Korea cannot represent an imminent threat for trading nuclear technology with delinquent states or terrorists because the ICJ in the *Nicaragua case* did not consider that the concept of armed attack stretched as far as assistance to rebels in the form of the provision of weapons or logistic or other support.²²⁷

North Korea continues to defy the sanctions. The idea is that the sanctions would force North Korea to seek a peaceful resolution. Sanctions constitute a means of exerting international influence that is more powerful than diplomatic mediation but lies below the threshold of military intervention. Can sanctions be regarded as fulfilling the requirement of seeking peaceful alternative to force? This is essential security council action, ineffective and

²²¹ *Advisory Opinion* supra note 3.

²²² Gill op cit note 212.

²²³ M Reisman, 'Assessing claims to revise the laws of war' (2003) 97 *AJIL* at 87.

²²⁴ Jennings & Watts op cit note 67 at 421–2.

²²⁵ Wilmshurst op cit note 37.

²²⁶ Marcus Noland 'The (non-) impact of UN sanctions on North Korea' (2009) 7 *Asia policy* at 61–88.

²²⁷ Gray op cit note 109.

it is difficult to believe that states would agree to give up their right to self-defence to an international body, particularly the Security Council no matter what Article 51 denotes. Therefore, we can assume that all peacefully alternative were made to no avail, North Korea a rouge state would not bend its will even if its people starved to death. Although, negotiations are still an option, in fact Trump has stated that he is willing to negotiate with Kim Jong Un in an effort to curtail North Korea's nuclear program, the North wants a guarantee of security from the US, and a policy of pressure will only make North Korea feel even more insecure. Also, the deal that the USA has given to North Korea is complete disarmament and doesn't give many options for North Korea. It's a bad deal and without the USA making moves to reduce their military presence and lessen their aggression then there will be no change in the region.

As discussed in chapter 2, pre-emptive self-defence should be limited to nuclear threats as the threat of nuclear weapons change the calculus of self-defence because waiting until a nuclear attack is materializing requires waiting until it is too late. A nuclear threat by nature must be regarded as imminent. State practice also supports this with the Iraq and Syria. Rouge states that have access to nuclear technology or are in the initial stages of developing a nuclear reactor have been destroyed as they pose imminent threats to international peace and security. The threat of WMD in the hands of states with a track record of unpredictable behaviour has caused states to shift their views of the propriety of pre-emptive self-defence against such a threat.²²⁸

Therefore, the use of force in self-defence will be legitimate as there was an immediate and real threat posed by North Korea. However, according to the ICJ the attempt to acquire and possess nuclear weapons is troubling, especially considering their irrational leadership and thuggish behaviours but are not illegal per se. Such as in the *Osirak* case, even though there was no clear evidence that North Korea was materializing an attack, the relations between the two states and various remarks made by each side suggested that an attack was eminent however, there is no conclusive evidence that North Korea were about to attack the USA mainland. Although, North Korea have illegally developed nuclear weapons, and sold them to rouge states while also bating and threatening the USA and allies. Thus, instead of forcing the USA to wait until the attack was underway, or about to commence, the pre-emptive use of force deems a lawful a response that takes place in the last window of

²²⁸ Garwood-Gowers op cit note 66 at 290.

opportunity in which a state may act effectively to defend itself against an entity that has both the intent and capacity to attack.²²⁹ This along with state practice would imply that the USA is legally allowed to use force as it had concrete evidence that North Korea intended to use nuclear weapons against the USA and allies.

It can also be confirmed that state practice has changed post 11 September 2001, after the USA suffered such a devastating attack, they took the role of pre-emptive self-defence more seriously. The threat itself became enough to evoke self-defence regarding rouge states, more so terrorism but WMD have also been included as they pose the greatest threat to the world peace and security. In this scenario, the threat posed by North Korea would be argued greater than the Iraqi threat in 2001, the effects of a nuclear weapons would devastate the USA and the Korean Peninsula. It was necessary to prevent a possibility of catastrophe and rather limit it to just one state. Necessity is an integral aspect of pre-emptive use of force, the need to establish the necessity threshold is more onerous in the case of pre-emptive action. Were the actions of the USA reasonable? According to the USA the use of nuclear weapons was necessary to destroy north Koreas second strike capabilities. However, any use of force in North Korea will not meet the requirement of necessity because any war on the peninsula would be costly in human lives and economic terms. ‘Any war would bring many casualties and the costs of reconstruction would be huge, because according with a report of the analyst Gary Luck, the costs would surpass the 100 billion dollars and the destruction and interruption of trade would cost a trillion dollars to the countries involved and their neighbors.’²³⁰

There was an absence of practical alternatives as a conventional front in its geographical and destructive scope and its duration would not guarantee that all North Koreas nuclear launch sites and stockpiles would be confiscated or destroyed. The USA and allies would find it extremely difficult to penetrate North Korea not only because of the Demilitarized zone but also because of the terrain. Most of the warehouses are located in mountains surrounded by rivers therefore a major attack would difficult and there would be no element of surprise. There needs to be certainty when considering nuclear weapons. But how can we be certain of the evidence, since any unilateral determination that it is the imminent target of a nuclear attack may be based on unreliable or inaccurate information.

²²⁹ Chainoglou op cit note 95 at 334–5.

²³⁰ Sudakov, Dmitry ‘War against North Korea would cost USA 100 billion dollars and 100,000 lives’ (2006, Oct 20) *Pravda.ru*, available at http://www.pravdareport.com/world/85148-korea_war/

It is conceivable that a nuclear first strike might be in response to a perceived but yet expected threat of nuclear attack. Even though, the imminent nature of the attack would negate the rules of use of force, it can be argued that it would not meet the test of proportionality. In just ad bellum, proportionality has a dual role, it serves to identify the situations in which the unilateral use of force is permissible, and it serves to determine the intensity and the magnitude of military action.²³¹

In both the Nicaragua and Nuclear Advisory case proportionality was applied regarding the aim of abating the attack being responded to, rather than in regard to an equivalence of scale or intensity.²³² However, a war on the Korean Peninsula would take place in densely populated areas. It is likely that hundreds of thousands of persons US, ROK and DPRK, military and civilian would perish and millions of refugees would be created. The expense of a regime change would be enormous. A pre-emptive strike of the sort contemplated here, particularly if surface bursts are involved, still would inflict large-scale collateral harms beyond the place and moment of immediate conflict.²³³ The massive potential for destruction from using nuclear weapons renders it even more important for the nations involved not to initiate a nuclear response to a nuclear threat. The strategy on the USA that broadens their right to first use should be avoided. The collateral damage is too much for the action to be proportionate.

In conclusion, this situation does not satisfy the conditions that warrant a pre-emptive strike. Instead available intelligence will probably be questionable, the threats uncertain and in no way clearly imminent, and the military option but one of several policies available.²³⁴ Even if the path to denuclearize the Korean Peninsula is not an easy task, it is necessary to establish the basis to solve the nuclear puzzle through negotiations and appealing to mutual thrust and cooperation. Negotiation is the key to solving this dilemma as no use of nuclear weapons, especially in a pre-emptive manner, in self-defence could meet the required principals of imminence, necessity and proportionality in the traditional sense.

CONCLUSION

²³¹ Rojas Gloria Milena Torres 'The North Korean Nuclear Crisis: An assessment of the legal justification of the use of force by the United States' (2017) 5 *Global Journal of Politics and Law Research* at 15–25.

²³² Green op cit note 132 at 93.

²³³ David Kretzmer 'The inherent right to self defense and proportionality' (2013) 2 *European Journal of International Law*.

²³⁴ Richard Hass 'Regime change and its limits' (2005) 66 *Foreign Affairs*.

International law may find itself in need of a new doctrine that can adequately address the threat of nuclear weapons. Thankfully these scenarios remain hypothetical as nuclear weapons are the most destructive man-made weapon on the planet. International law and numerous different treaties are ineffective in disarming and halting the proliferation of nuclear weapons. The NPT, IEA and Security council have not effectively made headway towards totally nuclear disarmament. It seems to me that we are in need of a new framework to particularly law out rules for the use of nuclear weapons or the changed doctrine of self-defence. Self-defence needs to be readdressed and extended to include modern threats until the significant gaps in the legal and institutional framework to combat the contemporary threats to peace and security are filled. Of course, it would be naive to expect that the law alone can make the progressive difference, particularly when, as here, it touches sensitively upon prevailing notions of national security. Therefore, it must be a collective effort to disarmament as the ‘complete elimination of nuclear weapons is the only guarantee against the threat of nuclear war.’²³⁵

²³⁵ *Advisory Opinion* supra note 4.

Bibliography

Primary sources

Advisory Opinion Concerning the Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion by the General Assembly of the United Nations), International Court of Justice (ICJ) (1996, Jul 08) <https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), International Court of Justice (2005, Dec 19) <https://www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-BI.pdf>

British Foreign and State Papers vol. 30 (1841)
<https://babel.hathitrust.org/cgi/pt?id=mdp.35112103940203;view=1up;seq=6>

Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), International Court of Justice (2003, Nov 06) <https://www.icj-cij.org/en/case/90>

Counter-Memorial and Counter-claim submitted by the United States of America, International Court of Justice (1997, 23 Jun) <https://www.icj-cij.org/en/case/90/counter-claims>

Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), International Court of Justice (1949, Apr 09) <https://www.icj-cij.org/en/case/1>

Gabčíkovo-Nagymaros Project (Hungary/Slovakia), International Court of Justice (1997, Sep 25) <https://www.icj-cij.org/en/case/92>

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (2003, Dec 08) <https://www.icj-cij.org/en/case/131>

LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1 (2006, Oct 03) <https://www.italaw.com/cases/621>

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) Merits, International Court of Justice (1986, Jun 27) <https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>

Protocols Additional to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross (2010, May)

Responding to Hezbollah Attacks from Lebanon: Issues of Proportionality, Israel Ministry of Foreign Affairs (2006, Jul 25)

<https://mfa.gov.il/mfa/aboutisrael/state/law/pages/responding%20to%20hizbullah%20attacks%20from%20lebanon-%20issues%20of%20proportionality%20july%202006.aspx>

United Nations Charter, United Nations (1945)

<https://treaties.un.org/doc/publication/ctc/uncharter.pdf>

United Nations General Assembly Resolution 2625 (xxv) UN Doc. A/RES/25/2625 (1970, Oct 24) available at <http://www.un-documents.net/a25r2625.htm>

United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) No. 1021,

<https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf>

United Nations Security Council, 66th Sess., 6718th mtg UN Doc SC/10550 (2012, Feb 22)

<https://www.un.org/press/en/2012/sc10550.doc.htm>

United Nations Security Council, 35th Sess., 5493rd mtg, S/PV.5493 (2006, Jul 21)

<https://unispal.un.org/DPA/DPR/unispal.nsf/0/DD44A6E786A583A9852571B50060F873>

United Nations Security Council, 61st Sess., 5489th mtg, S/PV.5489 (2006, Jul 14)

<https://documents-dds-ny.un.org/doc/UNDOC/PRO/N06/429/93/PDF/N0642993.pdf>

United Nations Security Council Resolution 687, UN Doc S/RES/687 (1991, Apr 03)

<http://www.un.org/Depts/unmovic/documents/687.pdf>

United Nations Security Council, 38th Sess., 2491th mtg UN Docs S/PV.2491 (1983, Oct 27)

[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.2491\(OR\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.2491(OR))

United Nations Security Council, 36th Sess., 2288th mtg, UN Doc S/PV. 2288 (1981, Jun 19)

<https://unispal.un.org/DPA/DPR/unispal.nsf/0/4AED70BAA0B37B53052567FD00762F30>

United Nations Security Council, 36th Sess., 2283rd mtg, U.N. Doc. S/PV.2283 (1981, Jun 15)

<https://unispal.un.org/DPA/DPR/unispal.nsf/0/E90D6AEA878B380D052567FC0052B050>

United Nations Security Council, 36th Sess., 2282d mtg, UN Doc. S/PV.2282 (1981, Jun 15)

<https://unispal.un.org/DPA/DPR/unispal.nsf/0/4AED70BAA0B37B53052567FD00762F30>

United Nations Security Council, 38th Sess., 8285th mtg, S/PV.8285 (1980, Oct 15)
<https://undocs.org/S/PV.6627>

United Nations Security Council, 35th Sess., 1939th mtg, UN Doc. S/PV.1939 (1976, Jul 09)
<https://digitallibrary.un.org/record/86947>

United Nations Security Council, 26th Sess., 1606th mtg, UN Doc S/PV.1606 (1971, Dec 04)
[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.1606\(OR\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.1606(OR))

United Nations Security Council, 22nd Sess., 1348th mtg, UN Doc S/PV.1348 (1967, Jun 06)
<https://unispal.un.org/DPA/DPR/unispal.nsf/0/F0E5CF015592D4D10525672700590136>

United Nations Security Council, 17th Sess., 1024th mtg, UN Doc S/PV.1024 (1962, Oct 24)
[http://www.un.org/ga/search/view_doc.asp?symbol=s/pv.1024\(or\)](http://www.un.org/ga/search/view_doc.asp?symbol=s/pv.1024(or))

United Nations Security Council, 13th Sess., 819th mtg, UN Doc S/PV.819 (1958, Jun 02)
<https://undocs.org/S/PV.819>

Secondary sources

Abioye, FT ‘Examining the international law right of self-defence: The case of Russia and Georgia; Israel and Gaza’ (2010) 31, no. 2 *Obiter* 396–413.

Ackerman, Bruce ‘But what’s the legal case for preemption?’ (2002, Aug 18) *Wash Post* B2.

Ago, Richard ‘Addendum – Eighth report on State responsibility (1980) 2, no. 1 *Yearbook of the International Law Commission*, 13–86.

Arend, Anthony Clark ‘International law and the preemptive use of military force’ (2003) 26, no. 2 *The Washington Quarterly* 89–103.

Aust, Anthony *Handbook of international law* (2010) Cambridge University Press, Cambridge.

Barsotti, Roberto ‘Armed reprisals’ in Antonio Cassese (ed.) *The current legal regulation of the use of force* vol. 10 (1986) Martinus Nijhoff Publishers, Dordrecht 79–110.

BBC News ‘Koreas clash in sea battle’ (2002, Jun 29) available at
<http://news.bbc.co.uk/2/hi/asia-pacific/2073694.stm>

BBC News ‘North Korea: Four ballistic missiles fired into sea’ (2017, Mar 06) available at
<http://www.bbc.com/news/world-asia-39175704>

Bethlehem, Daniel 'The relationship between international humanitarian law and international human rights law in situations of armed conflict' (2013) 180 *Cambridge J. Int'l & Comp. L.* 2.

Bishop, Chris & Christopher Chant *Aircraft carriers: The world's greatest naval vessels and their aircraft* (2004) MBI, London.

Boed, Roman 'State of necessity as a justification for internationally wrongful conduct' (2000) 3 *Yale Hum. Rts. & Dev. LJ* 1–XX.

Bowett, Derek William *Self-defence in international law* (1958) Manchester University Press, Manchester.

Brownlie, Ian *International law and the use of force by states* (1963) Clarendon Press, Oxford.

Cannizzaro, Enzo 'Contextualizing proportionality: *jus ad bellum* and *jus in bello* in the Lebanese war' (2006) 88, no. 864 *International Review of the Red Cross* 779–92.

Cameron, Iain 'Anti-ballistic missile systems and international law' in Istvan Pogany (ed.) *Nuclear weapons and international law* (1987) Avebury, Aldershot.

Cassese, Antonio ed. *The current legal regulation of the use of force* vol. 10 (1986) Martinus Nijhoff Publishers, Dordrecht.

Chainoglou, Kalliopi 'Reconceptualising self-defence in international law' (2007) 18, no. 1 *King's Law Journal* 61–94.

Clark, Anthony Arend. 'International law and the preemptive use of military force' (2003) 26.2 *The Washington Quarterly* at 89-103.

Constantinou, Avra *The right of self-defence under customary international law and Article 51 of the United Nations Charter* PhD dissertation (1996) University of Nottingham.

Corten, Olivier *The law against war: The prohibition on the use of force in contemporary international law* (2010) Bloomsbury Publishing, London.

Corwin, David M 'The legality of nuclear arms under international law' (1986) 5 *Dick. J. Int'l L.* 271.

Crawford, James *The International Law Commission's articles on state responsibility: Introduction, text and commentaries* (2002) Cambridge University Press, Cambridge.

Cronk, Terry Moon 'U.S., South Korea Launch Annual Foal Eagle Exercise' (2017, Mar 13) US Department of Defence, available at <https://dod.defense.gov/News/Article/Article/1102331/us-south-korea-launch-annual-foal-eagle-exercise/>

Daalder, Ivo & James Steinberg 'The future of preemption' (2005) *American Interest* 163–4.

Davydov, Jerry & Bryan Lee 'Russia's Nuclear Rearmament: Policy Shift or Business as Usual?' (2013, Dec 18) Nuclear Threat Initiative, available at https://www.nti.org/analysis/articles/russias_nuclear_rearmament_policy_shift_or_business_as_usual/

De Arechaga, Eduardo Jimenez *International law in the past third of a century* (1978) Martinus Nijhoff Publishers, Dordrecht.

Dinstein, Yoram *War, aggression and self-defence* 3ed (2001) Cambridge University Press, Cambridge.

Dinstein, Yoram *War, aggression and self-defence* 2ed (1997) Cambridge University Press, Cambridge.

Doswald-Beck, Louise 'International humanitarian law and the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons' (1997) 37, no. 316 *International Review of the Red Cross* 35–55.

Doswald-Beck, Louise 'San Remo manual on international law applicable to armed conflict at sea' (1995) 35, no. 309 *International Review of the Red Cross* 583–94.

Doyle, Michael W *Striking first: Preemption and prevention in international conflict* (2008) Princeton University Press, Princeton.

Faiola, Anthony 'In Japan, tough talk about preemptive capability' (2006, Oct 23) *Wash Post* available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/10/AR2006071000106.html>

Falk, Richard, Lee Meyerowitz & Jack Sanderson 'Nuclear weapons and international law' (1980) 20 *Indian J. Int'l L.* (1980) 541–67.

Fried, John HE 'The nuclear collision course: Can international law be of help' (1985) 14 *Denv. J. Int'l L. & Pol'y* 97.

Ganguly, Sumit, and Steven H. Lee 'Conflict unending: India-Pakistan tensions since 1947' (2002) 57.4 *International Journal* at 654.

Gardam, Judith *Necessity, proportionality and the use of force by states* vol. 35 (2004) Cambridge University Press, Cambridge.

Gardam, Judith Gail 'Proportionality and force in international law' (1993) 87, no. 3 *American Journal of International Law* 391–413.

Garwood-Gowers, Andrew 'Israel's airstrike on Syria's Al-Kibar Facility: A test case for the doctrine of pre-emptive self-defence?' (2011) 16, no. 2 *Journal of Conflict & Security Law* 263–91.

Gazzini, Tarcisio *The changing rules on the use of force in international law* (2005) Manchester University Press, Manchester.

Glasstone, Samuel & Philip J Dolan *The Effects of nuclear weapons* 3ed (1977) United States Department of Defence, Washington, DC.

'GBU-43/B "Mother Of All Bombs" / MOAB – Massive Ordnance Air Blast Bomb' *GlobalSecurity.org*, available at <https://www.globalsecurity.org/military/systems/munitions/moab.htm>

Graham Jr, Thomas 'National self-defense, international law, and weapons of mass destruction' (2003) 4, no. 1 *Chi. J. Int'l L.* 1.

Gray, Christine *International law and the use of force* (2018) Oxford University Press, Oxford.

Green, James A 'Docking the Caroline: Understanding the relevance of the formula in contemporary customary international law concerning self-defense' (2006) 14 *Cardozo Journal of International & Comparative Law* 429.

Green, James A *The International Court of Justice and self-defence in international law* (2009) Hart Publishing, Oxford.

Green, James A & Francis Grimal 'The threat of force as an action in self-defense under International Law' (2011) 44 *Vand. J. Transnat'l L.* 285.

Green, James A 'The *ratione temporis* elements of self-defence' (2015) 2, no. 1 *Journal on the Use of Force and International Law* 97–118

<https://doi.org/10.1080/20531702.2015.1043097>.

Greenwood, Christopher 'International law and the pre-emptive use of force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 *San Diego Int'l LJ* 7.

Greenwood, Christopher 'Self-Defence and the Conduct of International Armed Conflict', in Yoram Dinstein (ed.) *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) Martinus Nijhoff, Dordrecht 278–79.

Grimal, Francis '*Jus ad Bellum*: Nuclear weapons and the inherent right of self-defence' in Jonathan L Black-Branch & Dieter Fleck (eds) *Nuclear Non-Proliferation in International Law* vol. 2 (2016) TMC Asser Press, The Hague 337–50.

Hass, Richard 'Regime change and its limits' (2005) 66 *Foreign Affairs*.

Henkin, Louis *International law: politics, values and functions* (1989) Martinus Nijhoff Publishers, Dordrecht.

Henkin, Louis 'The invasion of Panama under international law: a gross violation' (1991) 29 *Colum. J. Transnat'l L.* 293.

Hensel, Howard M ed. *The legitimate use of military force: The just war tradition and the customary law of armed conflict* (2008) Ashgate, Hampshire.

Higgins, Rosalyn. *Problems and process: International law and how we use it* (1995) Oxford University Press, Oxford.

Jennings, Robert & Arthur Watts *Oppenheim's International Law, Volume I: Peace* 9ed (1992) Longman, London.

Jennings, Robert Y 'The Caroline and McLeod Cases' (1938) 32, no. 1 *American Journal of International Law* 82–99.

Jessup, Philip Caryl *A modern law of nations: An introduction* (1968) Archon Books, Hamden.

Kelly, Tim 'U.S. carrier patrols off Korean peninsula in warning to Pyongyang' (2017, Oct 19) *Reuters* available at <https://www.reuters.com/article/us-northkorea-missiles-usa-carrier/u-s-carrier-patrols-off-korean-peninsula-in-warning-to-pyongyang-idUSKBN1CO1AH>

Kennedy, Paul & George J Andreopoulos 'The laws of war: Some concluding reflections' in Michael Howard, George J Andreopoulos & Mark R Shulman (eds) *The Laws of War: Constraints on Warfare in the Western World* (1994) Yale University Press, New Haven.

Kretzmer, David 'The inherent right to self defense and proportionality' (2013) 2 *European Journal of International Law*.

Kritsiotis, Dino 'The legality of the 1993 US missile strike on Iraq and the right of self-defence in international law' (1996) 45, no. 1 *International & Comparative Law Quarterly* 162–177.

Kristensen, Hans M & Robert S Norris 'United States nuclear forces, 2017' (2017, Jan 02) *Bulletin of the Atomic Scientists*, available at <https://thebulletin.org/2017/01/united-states-nuclear-forces-2017/>

LawTeacher 'Overview of the doctrine of self defence' (2013, Nov) available at <https://www.lawteacher.net/free-law-essays/international-law/overview-of-the-doctrine-of-self-defence-international-law-essay.php?vref=1>

Lewis, Jeffrey 'This is how nuclear war with North Korea would unfold' (2017, Dec 08) *Wash Post* available at https://www.washingtonpost.com/outlook/this-is-how-nuclear-war-with-north-korea-would-unfold/2017/12/08/4e298a28-db07-11e7-a841-2066faf731ef_story.html?noredirect=on&utm_term=.cf24af2572f3

Lewis, Jeffrey 'North Korea is practicing for nuclear war' (2017, Mar 09) *Foreign Policy*, available at <https://foreignpolicy.com/2017/03/09/north-korea-is-practicing-for-nuclear-war/>

Lindop, Patricia J & Joseph Rotblat 'Consequences of radioactive fallout' in Ruth Adams & Susan Cullen *Final epidemic: physicians and scientists on nuclear war* (1981) University of Chicago Press, Chicago.

Lubell, Noam 'The problem of imminence in an uncertain world' in Marc Weller (ed.) *The Oxford Handbook of the Use of Force in International Law* (2012) Oxford University Press, Oxford.

Mercer, Phil 'Tensions rise over Australia's Pre-Emptive Strike Policy Ahead of ASEAN Summit' (2004, Nov 26) *Epoch Times*.

Meyer, JA 'Collective security and regional security: Necessary exceptions to a globalist doctrine' (1993) 11 *Boston University International Law Journal* 391–403.

- Miliauskas, Vaidas *Whether international law allows preemptive use of military force?* Master's thesis (2011) Vytautas Magnus University.
- Moir, Lindsay *Reappraising the resort to force: international law, jus ad bellum and the war on terror* (2010) Hart Publishing, Oxford.
- Moore, John Bassett *A digest of international law* (1906) Government Printing Office, Washington, DC.
- Murphy, Sean D 'The doctrine of preemptive self-defense' (2005) 50 *Vill. L. Rev.* 699.
- Nourse, Victoria F 'Self-defense and subjectivity' (2001) 68, no. 4 *University of Chicago Law Review* 1235–1308.
- Nystuen, Gro, Stuart Casey-Maslen & Annie Golden Bersagel, eds. *Nuclear weapons under international law* (2014) Cambridge University, Cambridge.
- O'Brien, William V 'McDougal and Feliciano: Law and minimum world public order: or the legal regulations of international coercion' (1962) 72, no. 2 *Yale Law Journal* 9.
- O'Connell, Daniel Patrick *The International Law of the Sea* vol. 2 (1984) Clarendon Press, Oxford.
- O'Connell, Daniel Patrick *The influence of law on sea power* (1975) Manchester University Press, Manchester.
- O'Connell, Mary Ellen 'The myth of preemptive self-defense' (2002) *American Society of International Law Task Force on Terrorism* 1–21.
- Pogany, Istvan 'Nuclear weapons and self-defence in International Law' (1986) 2 *Conn. J. Int'l L.* 97.
- 'Pre-emptive self-defence has been endorsed by the Dutch government' (2008) 39 *Netherlands Yearbook of International Law* 304, 311–2.
- Printer Jr, Norman G. 'The use of force against non-state actors under international law: An analysis of the US predator strike in Yemen.' (2003) 8 *UCLA J. Int'l L. & Foreign Aff.* 8 (2003) at 331.
- Quigley, John 'The Afghanistan War and Self-Defense' (2002) 37 *Val. UL Rev.* 541.

Rietiker, Daniel 'The (Il?)legality of nuclear weapons tests under international law: Filling the possible legal gap by ensuring the comprehensive test ban treaty's entry into force' (2017) 21, no. 4 *Insights*, available at <https://www.asil.org/insights/volume/21/issue/4/illegality-nuclear-weapons-tests-under-international-law%E2%80%94filling-possible>

Roberts, Adam 'The laws of war in the 1990–91 Gulf Conflict' (1993) 18, no. 3 *International Security* 134–81.

Ruys, Tom '*Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2010) Cambridge University Press, Cambridge.

Schachter, Oscar. 'The right of states to use armed force' (1983) 82 *Mich. L. Rev.* at 1620.

Schmitt, Michael N 'Preemptive strategies in international law' (2002) 24 *Mich. J. Int'l L.* 513.

Schwarzenberger, Georg *The fundamental principles of international law* (1955) Martinus Nijhoff, Boston.

Singh, Nagendra 'The right of self-defence in relation to the use of nuclear weapons' (1956) 5 *Indian Yearb Int Aff* 3–26.

Sloss, David 'Forcible arms control: Preemptive attacks on nuclear facilities' (2003) 4 *Chi. J. Int'l L.* 39–54.

Spector, Leonard S & Avner Cohen 'Israel's Airstrike on Syria's Reactor: Implications for the Nonproliferation Regime' (2008) 38, no. 6 *Arms Control Today* 15.

Sudakov, Dmitry 'War against North Korea would cost USA 100 billion dollars and 100,000 lives' (2006, Oct 20) *Pravda.ru*, available at http://www.pravdareport.com/world/85148-korea_war/

Szabó, Kinga Tibori. *Anticipatory action in self-defence: Essence and limits under international law* (2011) TMC Asser Press, The Hague.

Torres Milena, Rojas Gloria. 'The North Korean nuclear crisis: An assessment of the legal justification of the use of force by the United States' (2017) 5, no. 1 *Global Journal of Politics and Law Research* 15–25.

United Nations *The Secretary-General's High-level Panel Report on Threats, Challenges and Change, A more secure world: our shared responsibility* (2004) available at <https://www.un.org/ruleoflaw/blog/document/the-secretary-generals-high-level-panel-report-on-threats-challenges-and-change-a-more-secure-world-our-shared-responsibility/>

United States *The national security strategy of the United States of America* (2002) available at <https://history.defense.gov/Portals/70/Documents/nss/nss2002.pdf?ver=2014-06-25-121337-027>

Waldock, Sir Claud Humphrey Meredith *The regulation of the use of force by individual states in international law* (1952) Martinus Nijhoff, Dordrecht.

Waxman, Matthew C 'The use of force against states that might have weapons of mass destruction' (2009) 31 *Mich. J. Int'l L.* 1.

Weston, Burns H 'Nuclear weapons versus international law: A contextual reassessment' (1982) 28 *McGill Lj* 542.

Whiteman, Marjorie M *Digest of international law* (1971) Washington, DC, Government Printing Office.

Wilmshurst, Elizabeth 'The Chatham House principles of international law on the use of force in self-defence' (2006) 55, no. 4 *International & Comparative Law Quarterly* 963–72.

Wood, Michael 'International law and the use of force: What happens in practice?' (2013) 53 *Indian Journal of International Law* 345–67.