

CHAPTER 1: Introduction

According to Thucydides, a delegation from Athens, then at the height of its powers, told the conquered inhabitants of the small island of Melos that right was only in question between equals in power. The Athenian delegation reportedly said that “the strong do what they can and the weak suffer what they must.”¹ A thousand years later, those sentiments were also cited by Grotius in the opening passages of *De Jure Belli ac Pacis*.² The Athenian concept of imperialism is supposedly outdated, in an age when the UN Charter upholds the rights of independent and equal sovereign states. Modern states have agreed to be bound by the UN Charter and are supposed to refrain from the use or threat of force in their relations with one another, unless the use of force is either sanctioned by the UN Security Council, or they are acting in self-defence.

This thesis is based upon a specific question: did the US and the UK act lawfully when they employed force against Afghanistan on 7 October 2001? To answer that question, an analysis is required not only of the current state of international law pertaining to the resort to force, but also of how the current laws came to be embedded in the UN Charter. States are permitted to use force in individual or collective self-defence. That is a right which is preserved by Article 51 of the Charter. That provision has been interpreted in different ways by states, scholars and judges. The reference to an ‘inherent’ right of self-defence implies that there was a right before the Charter, thus necessitating an historical inquiry. This thesis is not only concerned with the lawfulness of the use of force against Afghanistan; it is also concerned with the broader picture which encompasses inter-connected issues regarding terrorism, war and international law.

This thesis begins, in chapter 2, with a broad sketch of the changing nature of conflict. That chapter examines the evolving nature of threats faced by states, including the progression from large-scale inter-state conflict to smaller-scale, intra-state conflict as well as the increasingly significant threat posed by non-state actors. Chapter 3 moves away from conflict in general to the problem of terrorism

¹ Thucydides, *The History of the Peloponnesian War*, Book V, Chapter XVII, para 89 (Crawley, R. trans. 1963) (Everyman's Library) at 301. A passage with similar meaning appears in Book VI : “Besides, for tyrants and imperial cities nothing is unreasonable if expedient...”; *ibid* , Book VI, Chapter XX, para 85 at 350.

² Grotius, *De Jure Belli ac Pacis*, Prologomena, (Loomis, L trans. 1949) at para 3: “On most men's lips are the words of Euphemus, quoted by Thucydides, that for a king or a free city nothing is wrong that is to their advantage.”

in particular. It analyses the origins of terrorism and it traces both historical and modern attempts to define it. Chapters 4-9 trace the limitations on the resort to force which have evolved across the 'epochs' of international law. The term 'epoch', as used in this thesis, refers to periods of time within which it may be observed that particular developments pertaining to international law occurred.³ Each chapter in this historical series analyses a separate epoch, beginning, in chapter 4, with international law in antiquity and ending, in chapter 9, with an analysis of the developments that occurred from 1945 until the present. Throughout those six chapters, certain themes are consistently highlighted. The focus is on tracing the development of limitations on the use of force, the use of force in self-defence, pre-emptive self-defence,⁴ forcible measures short of war, such as reprisals, and the use of force by, and in response to, non-state actors. What is apparent from the historical inquiry is that the current international law regarding the resort to force has not arisen out of a vacuum in the past few years; it has evolved over millennia.

In chapter 10, the international law on the resort to force is applied to the facts of the 2001 intervention in Afghanistan. Although that use of force was justified on the grounds of self-defence, the analysis therein shows that serious doubts can be raised as to whether it was lawful. In particular, concerns are raised as to whether there was an 'armed attack' that triggered the Article 51 right of self-defence; whether the right to respond forcefully had expired by the time that the invasion began; whether responsibility for the terrorist attacks was adequately attributed to the targets of the military action and whether the customary law elements of the right of self-defence, such as necessity, proportionality and immediacy, were satisfied. Chapter 10 also addresses whether other grounds for intervention could

³ The term 'epoch' could just as easily be replaced with the word 'historical period' or 'age'. Legal historians use all of these terms to describe the different stages through which international law has passed: see, for instance, Grewe, *W The Epochs of International Law* (Byers, M trans and rev) (2000) especially at 1-6.

⁴ The terms 'pre-emptive self-defence' and 'anticipatory self-defence' are used interchangeably in this thesis to refer to the notion of a state using force before an armed attack has occurred. This approach is consistent with the fact that the terms 'pre-emptive', 'preventive' and 'anticipatory' are often used by scholars to refer to the same concept. Some writers use one term to the exclusion of the others, whilst others prefer to use the terms interchangeably: see, *inter alia*, Byers *War Law* (2005) 72-81; Gray "A New War for a New Century? The Use of Force Against Terrorism After September 11, 2001" in Eden and O'Donnell (ed) *September 11, 2001 – A Turning Point in International and Domestic Law?* (2005) 107-113; Maogoto *Battling Terrorism* (2005) 5-7 and 111-37; Gardem, *Necessity, Proportionality and the Use of Force by States* (2004) 146-47; Gray *International Law and the Use of Force* 2nd ed (2004) 95 and also chapter 6; Karoubi *Just or Unjust War – International Law and Unilateral Use of Armed Force by States at the Turn of the 20th Century* (2004) 204; Brownlie, *Principles of International Law* 6th ed (2003) 701-702; Shaw *International Law* 5th ed (2003) 1028-30; Franck *Recourse to Force – State Action Against Threats and Armed Attacks* (2002) 97-108; McCormack *Self-Defense in International Law – The Israeli Raid on the Iraqi Nuclear Reactor* (1996) 122 ff; Arend and Beck *International Law and the Use of Force* (1993) 71-80. For examples of where a distinction is drawn between the concepts of 'anticipation' and 'pre-emption' see Anton, Mathew and Morgan *International Law – Cases and Materials* (2005) 545 and also O'Connell, M "The Myth of Preemptive Self-Defense" (2002) *ASIL Presidential Task Force on Terrorism*. For further discussion of this issue, see chapter 9 'Pre-emptive self-defence' and chapter 10, part F.

have been relied upon, such as humanitarian intervention, Security Council authorisation and intervention by invitation. The purpose of chapter 10 is to discuss all aspects of the justifications for resorting to force against Afghanistan to determine whether any of those grounds, or potential grounds, were satisfied. The analysis suggests that this use of force may have had more in common with the ideals of Athenian imperialism than the rule of law embodied in the UN Charter.

In the final chapter some general comments are offered on the current status of the law regarding the resort to force, and self-defence in particular. Chapter 11 attempts to forecast the implications of accepting that the use of force against Afghanistan was lawful. Reference is made to the use of force against Iraq in 2003 and Lebanon in 2006 as further examples of the way in which militarily powerful states are able to impose their will and their interpretations of international law on less powerful states, thereby weakening the effectiveness of legal limitations on the recourse to force.

The historical perspective is an important aspect of this thesis. As Robert Ago has noted, international law is not a new phenomenon; any scholar who seeks to understand current relations between states without appreciating the historical nexus is bound to be misled.⁵ In the context of the law regarding the resort to force, connections between the past and the present, and the present and the future, are ignored at our peril. Studying the history of inter-state relations may provide us with lessons which are useful: “ancient realities may help us to appreciate how dangerous it is to persist in certain errors of judgment.”⁶

⁵ Ago, R “The First International Communities in the Mediterranean World” (1982) 53 *BYIL* 213.

⁶ *Ibid.*

CHAPTER 2: The changing face of conflict

Introduction

This thesis is principally concerned with the use of force in self-defence, especially when that force is used in response to terrorism. As noted in chapter 1, this thesis is particularly concerned with the use of force by the US and its allies against Afghanistan in response to the terrorist attacks that occurred on 11 September 2001.

Before proceeding to an examination of that central issue, it is useful to reflect on the state of armed conflict that existed prior to the events of 11 September 2001. There have been many comments in the media and in academic journals on the way that the events of 11 September have changed the world. There is something of a presumption that we now live in different times with a heightened level of conflict. Indeed, it has become a cliché to speak about the ‘post-September 11 world’ suggesting that those events have led to fundamental changes in the international political and legal landscape. The implication is that developments in the way that force is used thereby justify changes to international laws which regulate the resort to force. The objective of this chapter is to empirically measure the extent to which we are living in a new, post-September 11 era. It aims to place the events that are at the heart of the thesis into a political and historical context by examining the ways in which armed conflict, as a threat to international peace and security, has changed.

This chapter consists of three parts. In Part A, historical trends in armed conflict are briefly examined. Part B, which focuses on modern armed conflict seeks to determine whether the world is more or less violent today than in the past and the ways in which conflict has changed in type and intensity. Conflict data sets are analysed to identify conflict trends and answer questions such as whether there are a greater or lesser number of conflicts than there used to be; whether conflicts are more or less destructive than they used to be; and what factors differentiate modern conflicts from earlier ones. Part C examines the threat to international peace and security that is posed by non-state actors, and in particular, by acts of

terrorism.¹ Since terrorism is an integral part of the thesis, it is necessary to know something about terrorism *trends*. If trends are changing, that may have implications for the way that states respond, and particularly for the international law that constrains states' resort to force. Part C seeks to answer questions such as whether acts of terrorism are more prevalent today than in the past, whether acts of terrorism result in a greater or lesser number of casualties and the extent to which terrorism poses a threat to international peace and security. For the purposes of effecting change in international law, it is useful to know whether the events of 11 September, and the subsequent use of force against Afghanistan, were isolated incidents, the beginning of a new era, or merely the continuation of an already established one. Knowing something about trends in conflict and terrorism may help to explain why force was used against Afghanistan and whether it can be justified.² In addition, at a time when so many commentators are presuming that the world has been changed forever by the events of 11 September, it is important to consult raw data on conflict and terrorism to determine whether the world really is so different. By examining empirical data to trace conflict and terrorism trends it is hoped that a rational and objective foundation will be set for more perhaps controversial assertions to be made in later chapters.

Part A: Historical trends in armed conflict

A brief history of conflict research

Research into the causes and patterns of conflict has a long and rich history. Quincy Wright is widely regarded as the pioneer in this field. His most famous work on the causes and patterns of war, *The Study of War*, was first published in 1942, during World War II. A parallel has been drawn between his book and Hugo Grotius' *De Jure Belli ac Pacis* or *On the Law of War and Peace*, which appeared in 1625 during the Thirty Years War. As Grotius' book became a basis for the study of what later became known as 'international law' so Quincy Wright's book marks the beginning of what has become known as 'peace research' or 'conflict research'.³

¹ The issue of how 'terrorism' should be defined is discussed in chapter 3.

² The legal issues surrounding the use of force against Afghanistan in 2001 are discussed in chapter 10.

³ Deutsch, K "Preface to the Second Edition" in Wright, Q *A Study of War* (1965).

Wright's research was largely based on the wars that occurred in the period from approximately 1480 to 1940. Although constrained by the time in which it was written, many of Wright's observations seem equally relevant in 2007. He reflected on the reasons why war has come, through the generations, to be regarded by a majority of the population as a problem:⁴

Because the world is getting smaller, because changes occur more rapidly, because wars are more destructive, and because peoples are more impressed by the human responsibility for war, the recurrence of war has become a problem for a larger number of people.

Wright acknowledged that the intensity of war⁵ may be measured by the frequency of battles, of campaigns, or of wars.⁶ These military incidents may in turn be measured according to the absolute number of combatants engaged, to the number engaged relative to the supporting population, to the absolute number of battle casualties of various types (killed, wounded, prisoners), or to the number of casualties relative either to the number of combatants or to the number of the supporting population.⁷ In terms of categorising a conflict as worthy of inclusion in a study, Wright pondered over whether one should place in the same category civil wars between factions of the same civilization, and imperial wars between groups from different civilizations. He questioned the temporal and spatial limitations that should be adopted in a statistical tabulation of military incidents and accepted that there was insufficient data to allow him to include every battle or war between civilised peoples since civilization began. He concluded that it would not be illuminating to 'lump together' in a single tabulation conflicts that occurred in Egyptian, Mesopotamian, Chinese, Indian and Mayan civilizations. If there *are* regular trends or fluctuations in war and peace, then it seemed probable to Wright that they are relative to groups of people in more or less continuous contact with one another, that is, to a civilization.⁸

In addition to the difficulties of defining an area of study within which conflict trends may be analysed, another early researcher identified the problem of

⁴ Ibid at 5.

⁵ Wright provides a definition for 'war' in both the legal and material sense, *ibid* at 8-13.

⁶ Wright's definition of a 'battle' (the most 'persistent type of military incident') was: "a concentrated military operation between armed forces on a limited terrain for a limited time, usually a day or less. At some points in time, battles have been isolated events, whilst at other times, they have been merely incidents in wider campaigns that have stretched over seasons and have involved complicated strategic operations. Campaigns themselves have often been but incidents in a war waged on many fronts with a number of distinct armies over a series of years." He concluded by saying: "Neither the battle, the campaign, nor the war is entirely satisfactory as a unit for statistical tabulation": *ibid* at 102.

⁷ Ibid at 218.

⁸ Ibid at 103.

obtaining accurate statistics on which to base a study.⁹ The difficulty of obtaining accurate statistics remains a problem which affects even the latest research into conflict trends, such as that carried out jointly by the Department of Peace and Conflict Research at Uppsala University and the International Peace Research Institute (PRIO). The researchers in the project known as the Uppsala Conflict Data Project (UCDP), discussed below, noted the need for more accurate casualty statistics in order to study the severity of war, and in particular its human cost.¹⁰

A brief history of conflict research shows that conflict data statistics must be read on the understanding that regardless of whether they relate to the ancient or the recent past, the selections which researchers make will naturally affect the outcome of their study. Conflict researchers are usually careful to point out the limitations of their research and to explain their subjective choices in selecting data for inclusion. These factors must be borne in mind when drawing conclusions about conflict trends.

The history of war - Wright's four stages

Wright divided the history of war into what he described as four very unequal stages dominated respectively by animals, primitive men, civilised men and men using modern technology.¹¹ The first two stages (prehuman/animal warfare and primitive warfare, respectively) are of limited assistance in the present context given the remoteness in time and the scarcity of evidence presently available.¹² It is Wright's third and fourth stages which are of greater relevance.

Stage three: Historical warfare

Wright's third stage of warfare began in the valleys of the Nile and the Euphrates, 6,000-10,000 years ago; in the valleys of the Indus and Yellow Rivers 4,000-5,000 years ago, and in Peru and Mexico around 3,000-4,000 years ago. Evidence of the nature of war in this period is to be found in contemporaneous and older writings; in inscriptions of a descriptive, chronological and analytical nature, and

⁹ Samuel Dumas commented on the difficulties in compiling accurate statistics, due to an absence of records, errors of estimation, and falsification of statistics: see Dumas, S and Vedel-Petersen, K *Losses of Life Caused by War* (1923).

¹⁰ For instance, the number of casualties in the Chechen War is estimated in the UCDP as 30,000-60,000 and the number of civilian deaths in Rwanda in 1994 as 500,000 to 800,000: Gleditsch, N, Wallensteen, P, Eriksson, M, Sollenberg M and Strand, H "Armed Conflict 1946-2001: A New Dataset" (2002) 39 (5) *Journal of Peace Research* 615 at 625-26.

¹¹ Wright, *supra* n3 at 30.

¹² For an account of this period, see Wright, *supra* n3 at 53-101.

in archaeological remains.¹³ A study of warfare in this period is more relevant to the present inquiry, as it concerns warfare between or within the literate civilisations from Egypt to Mesopotamia to the age of discovery in the fifteenth century - a span of over six thousand years.¹⁴ Although trends in modern conflict may be related to conflict in this period, the main difficulty with making any comparison is the dearth of reliable information. Wright acknowledged in his study that even when records of the battles and wars exist, data as to the number of participants and casualties is unreliable.¹⁵

Despite these difficulties, one observable trend was that conflict tended to occur between different civilisations rather than within civilisations. In a comprehensive study of battles that occurred between 500 BCE and 1500 AD most battles fell into the inter-civilisation category.¹⁶ Another study reached a similar finding although the study was confined to far fewer battles.¹⁷ In comparing successive civilisations during this period, Wright concluded that there was a trend towards larger armies, both absolutely and in proportion to the population. Secondly, war tended to become absolutely and relatively more costly, both in life and wealth. Thirdly, military activity tended to become more concentrated, with longer peace intervals between wars. Fourthly, wars tended to become more extended in space with fewer places of safety and more inconvenience to civilians. Fifthly, war became ideologically and legally more distinct from peace and tended to be regarded as more abnormal and more in need of rational justification.¹⁸ Finally, he noted that the changes in war on the whole tended to favour defensive rather than offensive operations.¹⁹

Stage four: Modern warfare (1480-1940)

The fourth and final stage began with the invention of printing in the fifteenth century soon followed by the voyages from Western Europe establishing continuous contacts between the centres of civilisation in Europe, the Near East, the Americas and the Far East. The increased availability of source material means that more detailed analysis of conflict patterns is possible. In Wright's

¹³ Ibid at 31.

¹⁴ Legal, moral and philosophical attempts to limit the resort to force during this period are discussed below in chapters 4-9.

¹⁵ See Wright, *supra* n3 at 101-165.

¹⁶ Harbottle, T *Dictionary of Battles from the Earliest Date to the Present Time* (1904), in Wright, *supra* n3 at 120.

¹⁷ Creasy, E *The Fifteen Decisive Battles of the World* (1851), in Wright, *supra* n3 at 104-20.

¹⁸ This is a point borne out by the analysis presented in chapter 4.

¹⁹ See Wright, *supra* n3 at 120-121.

study of modern warfare from 1480 to 1940, he discussed four conflict trend variables: spatial, temporal, quantitative and qualitative.

With regard to *spatial variability*, he noted that the majority of battles involved great (powerful) states, rather than small states.²⁰ The same conclusion was reached in a study of the proportion of war years in the history of states.²¹ That study showed that from 1480-1940, the states classed as 'great' averaged twice as many wars as the smaller states, although the wars of the smaller states tended to last longer.

In relation to *temporal variability*, trends varied, depending on the type of conflict. *Battles* became more prolonged,²² but the duration of *wars* fluctuated.²³ There was a tendency throughout most of the period (1480-1940) for wars to occur approximately every 50 years, with every alternate period of concentration being more severe. Some authors attributed this cycle to the passage of two generations²⁴ whilst others attributed it to the cycle of business.²⁵ One researcher explained it on the basis that "a long and severe bout of fighting confers immunity on most of those who have experienced it."²⁶ After a decade or two, the immunity fades and the next generation was likely to enter war with enthusiasm.²⁷

Quantitative trends showed that the size of armies tended to increase, both absolutely and in proportion to the population.²⁸ After World War 1, the military and naval establishments diminished but this trend was reversed with vigour in the increasing state of tension that prevailed after 1931. Throughout the period, the trend was towards an increase in the duration of battles, in the number of battles in

²⁰ For example, from 1480 to 1940, there were about 2,600 important battles involving European states. Of those battles, France participated in 42%; Austria-Hungary in 34%; Germany (Prussia) in 25%; Great Britain and Russia each in about 22%; Turkey in 15%; Spain in 12%; the Netherlands in 8%; Sweden in 4% and Denmark in 2%.

²¹ "It is the stronger nations since 1700 that have devoted the most time to war. Moreover, the lesser nations were once the great powers. Spain, Turkey, Holland and Sweden were active in warfare at the same period that they were politically great": Woods, F and Baltzly, A *Is War Diminishing?* (1915) in Wright, supra n3 at 221-22.

²² During the seventeenth century, 96% of battles lasted for a day or less; in the eighteenth century the figure was 93%; in the nineteenth century 84%, and in the twentieth century only 40%: *ibid* at 223-24.

²³ The average duration of participation in a war by the 11 principal European powers from 1450 to 1930 was 2.5 years. The average varied little from the fifteenth to the eighteenth centuries but wars were exceptionally short in the nineteenth century (1.4 years) and exceptionally long in the early years of the twentieth century (four years): *ibid* at 225-27.

²⁴ This theory suggests that the warrior does not wish to fight again himself and prejudices his son against war, but the grandsons are taught to think of war as romantic: Spengler, O *The Decline of the West* (1932), *ibid* at 230.

²⁵ After the activity of building up from the losses of a great war, heavy industries find it impossible to induce armament-building at an increasing rate, and for this purpose mobilise demands for imperialistic expeditions, then for defence from reported aggressions: Stimson, R "The War System", *Conferences on the Cause and Cure of War* (1933), *ibid* at 230.

²⁶ Richardson, L quoted in Blainey, G *The Causes of War* (1973) at 6.

²⁷ *Ibid*.

²⁸ In the sixteenth century, armies seldom reached over 20,000-30,000. In the seventeenth century, armies often reached 50,000-60,000. In the eighteenth century, armies increased greatly in size, with Napoleon having as many as 200,000 men in battles: Wright, supra n3 at 232-33.

a war year and in the total number of battles during a century. The number of battles within a war also tended to increase. There was also an upward trend in the number of belligerents in a war, in the rapidity with which a war spread and in the area covered by a war.²⁹ An upward trend was also observed regarding the costs of war in human and economic terms, both absolutely and relative to the population. However, the proportion of persons engaged in battles who were killed tended to decline.³⁰

The trend may have been towards a decrease in battlefield casualties, but due to the fact that an increasing proportion of the population was engaged in the armies, and that the number of battles tended to increase, the overall effect was an increase in the number of *total* casualties as a result of modern warfare.³¹ One researcher, who estimated the number of war casualties per 1,000 members of the population, found that from the twelfth to the twentieth century, there was a steady increase in the number of war casualties in European countries when compared the total population.³² Along with the rise in *human* cost has been the trend upward in *material* costs. There is agreement amongst researchers that war became increasingly costly to governments in direct financial burdens as well as in indirect losses from misdirection of productive resources.³³

Finally, regarding *qualitative trends*, Wright observed that war has become "less functional, less intentional, less directable and less legal."³⁴ He observed that the warlike states increasingly led their nations to a more complete organisation of the state's resources, economy, opinion and government for war, even in time of peace. During the modern period, states became more militaristic and war became totalitarian to an unparalleled extent. Wright's observations of a trend

²⁹ "The number of participants in a war has tended to increase from 2 or 3 in the sixteenth and seventeenth centuries to 3 or 4 in the nineteenth and twentieth centuries, thus suggesting that wars spread more easily today than formally - a natural result of the development of transport and communications.": *ibid* at 238-41.

³⁰ During the Middle Ages, 30-50% of those engaged in a battle were killed or wounded; in the sixteenth century, the number was around 40% of the defeated side; in the seventeenth, eighteenth and nineteenth centuries, the numbers fell to around 20%, 15% and 10% respectively; in the twentieth century, it was about 6%: *ibid* at 241-42.

³¹ The percentage of the French population who were killed or wounded in battles from 1630-1639 was 0.09%. This number rose steadily to reach a peak in the years 1910-19, when it was 5.63%. A similar trend, although with lower figures, has been noted in Great Britain but not in the United States: *ibid* at 658-63, Tables 54, 55 and 56.

³² Sorokin estimated that for all of Europe, per 1,000 population, there were two casualties in the twelfth century, five in the thirteenth century, eight in the fourteenth century, ten in the fifteenth century, 37 in the seventeenth century, 33 in the eighteenth century, 15 in the nineteenth century and 54 in the first 15 years of the twentieth century: Sorokin, P A *Social and Cultural Dynamics*, (1957), *ibid* at 656, Appendix XX, Table 51.

³³ For the costs in monetary terms of recent conflict and defence spending by individual states, see the Stockholm International Peace Research Institute (SIPRI) Yearbooks.

³⁴ Wright, *supra* n3 at 248.

which later became known as ‘globalisation’ seem equally pertinent in 2007.³⁵ His observations that war has become less easy to localise and that it is “materially more destructive and morally less controllable”³⁶ are born out by the work of modern scholars. Kaldor notes that at the turn of the century, the ratio of military to civilian casualties in wars was eight to one. By 1999, that ratio had been almost exactly reversed: in the wars of the 1990s, the ratio of military to civilian casualties was approximately one to eight.³⁷

Part B : Modern conflict data

This part of the chapter examines conflict trends in the twentieth and twenty-first centuries. One of the difficulties in accurately assessing conflict trends is directly attributed to the lack of official data.³⁸ Since the UN does not collect data on armed conflicts, privately-funded research institutes are the sole source of contemporary conflict datasets.³⁹ According to the Stockholm International Peace Research Institute (SIPRI), there are currently 16 reputable English-language conflict data projects producing information on various aspects of conflict.⁴⁰ Some projects focus on the **patterns of conflict occurrence**, others on the causes and processes of conflict, the costs of conflict and conflict early warning. For present purposes, it is projects that fall into the first of those categories that are of most interest. There are currently four main conflict projects that focus on patterns of conflict occurrence by measuring the frequency, location and severity of conflicts. Those projects are the Correlates of War (COW), the Uppsala Conflict Data Project (UCDP), the Major Episodes of Political Violence (MEPV), and the Conflict Simulation Model (KOSIMO).⁴¹ Before examining their findings, a brief description of their respective objectives and coverage is provided below.⁴² Most of these projects determine whether a conflict should be included in a data set by creating a threshold for the number of people that are

³⁵ Wright seemed to describe the process of globalisation without naming it as such. The effects of globalisation on conflict trends have been discussed by scholars such as Kaldor who has argued that one of the results of the process of globalisation was the emergence of ‘new wars’ which are different from the wars of earlier centuries in terms of their goals, the methods of warfare and how they are financed: see Kaldor, M *New and Old Wars – Organized Violence in a Global Era* (1999).

³⁶ Wright, *supra* n3 at 248.

³⁷ Kaldor, *supra* n35 at 7-8. For an analysis of the way in which war affects civilians, and for an assessment of the indirect costs of war, see Mack, A (ed) *Human Security Report 2005 – War and Peace in the 21st Century* (2005)

<http://www.humansecurityreport.info/HSR2005_PDF/Part1.pdf> (accessed 13 November 2006) at Parts III and IV.

³⁸ Mack *supra* n38 at 18.

³⁹ *Ibid* at 18-20.

⁴⁰ See the SIPRI website on conflict data sets:

<<http://www.sipri.org/contents/conflict/conflictdatasets.html/view?searchterm=conflict%20data%20sets>> (accessed 13 November 2006).

⁴¹ There is a slight overlap between some of the conflict data in this part and the conflict data referred to in the preceding part of this chapter because Wright’s analysis was based on data up to and including 1940, whereas at least one of the modern conflict data projects, the COW, uses data which stretches back to 1816.

⁴² A description of all 16 data sets is available in *SIPRI Yearbook 2002* (2002) at 88-96.

killed in a conflict. Variations in definitions, purposes and coding rules can lead to significant divergence on basic parameters, such as the number, frequency, duration and dispersal of armed conflict, thus, *caveat emptor* - let the user beware.⁴³

Correlates of War (COW) Project⁴⁴

The Correlates of War (COW) is a study of the conditions associated with the outbreak of war, as well as the conditions surrounding militarised disputes.⁴⁵ Interstate conflict is the special focus of this project, with emphasis on conflicts that involve the threat, use or display of force. Intra-state and extra-state conflicts are also studied. Currently, the project includes data from 1816 to 1997.⁴⁶ However, one of the problems of relying on the COW data is its definition of 'interstate war'. Before including a conflict it requires that there be sustained combat between the regular forces of two or more members of the international system and that there be a total of **at least 1,000 battle-related fatalities** in any one year. This relatively high limit has the effect of excluding some conflicts, which it may seem intuitively reasonable to include in a data set of armed conflict.⁴⁷ For example, the Basque conflict has not accumulated enough deaths to qualify for inclusion, nor had the Northern Ireland conflict, which had claimed more than 3,000 casualties but did not qualify under the COW threshold of more than 1,000 deaths in a single year.⁴⁸

Uppsala Conflict Data Project (UCDP)⁴⁹

The Uppsala Conflict Data Project (UCDP) was originally based on data from the post-Cold War period to include conflicts that occurred between 1989 and 2001 but it was recently extended to include data for the entire post-World War II period from 1946 to 2004.⁵⁰ The main point of distinction between the COW project and the UCDP data is in the latter's lower threshold requirement for inclusion. An 'armed conflict' is defined by the UCDP as a contested

⁴³ Ibid at 81 and 96.

⁴⁴ There were previously two projects, the COW and COW2 but in November 2005, the COW2 was renamed and changed back to the Correlates of War project.

⁴⁵ See the COW website for a description of the project: <<http://cow2.la.psu.edu/>> (accessed 11 November 2006).

⁴⁶ COW Inter-State War Data, 1816-1997 v.3: ibid.

⁴⁷ Gleditsch et al, *supra* n10 at 617-19.

⁴⁸ The threshold that 1,000 deaths occur in a *single year* is set for extra-systemic (also known as extra-state war), which is defined as "sustained armed combat between a state member of the international system and a non-system-member political entity outside its territorial boundaries".

⁴⁹ Based at the Department of Peace and Conflict Research at Uppsala University, in Uppsala, Sweden, UCDP: <http://www.pcr.uu.se/research/UCDP/UCDP_toplevel.htm> (accessed 13 November 2006).

⁵⁰ The UCDP data has been published in the SIPRI Yearbooks since 1987.

incompatibility that concerns government or territory or both where the use of armed force between two parties results in **at least 25 battle-related deaths**. Of these two parties, at least one is the government of the state.⁵¹

This is a much lower threshold than the COW's requirement of 1,000 deaths in a single year and it allows for the inclusion of lower-intensity conflicts. The UCDP divides its data on armed conflicts into minor armed conflicts,⁵² intermediate armed conflicts⁵³ and war.⁵⁴ A possible limitation inherent in relying on UCDP data is that it only reaches back to 1946, whereas the COW data dates from 1816. However, extending analysis of conflict occurrence over long periods raises the issue of whether the theoretical explanations are equally reasonable for the whole period and whether variables such as the 'degree of democracy' or 'economic development' mean the same thing across the entire period.⁵⁵ The UCDP data is widely cited and is regarded by some as the most comprehensive single source of information on contemporary global political violence.⁵⁶

Major Episodes of Political Violence (MEPV)⁵⁷

The Major Episodes of Political Violence (MEPV) project categorises all episodes of major political violence of any type in the 'contemporary period', from 1946-2005.⁵⁸ Categories include all forms of inter-state, intra-state and inter-communal warfare. The MEPV draws upon 16 sources of conflict data, including the COW, the UCDP, the SIPRI Yearbooks, as well as from its own researchers.⁵⁹ The MEPV is the only one of the four data sets discussed here that does not require a state to be an antagonist in order for a violent conflict to be included: the MEPV includes conflicts such as inter-communal violence which the other data sets would exclude by definition.⁶⁰ The MEPV findings are incorporated into a

⁵¹ Gleditsch et al, *supra* n10 at 618-19.

⁵² At least 25 battle-related deaths per year and fewer than 1,000 battle-related deaths during the course of the conflict.

⁵³ At least 25 battle-related deaths per year and an accumulated total of at least 1,000 deaths, but fewer than 1,000 in any given year.

⁵⁴ At least 1,000 battle-related deaths per year.

⁵⁵ For a discussion of the advantages and disadvantages of shorter and longer periods over which to include data, see Gleditsch et al, *supra* n10 at 617-18.

⁵⁶ Mack *supra* n38 at 20. The UCDP is also cited by the United Nations "A more secure world: our shared responsibility" Report of the Secretary-General's High Level Panel on Threats, Challenges and Change (2004).

⁵⁷ It is located at the Center for Systemic Peace at the University of Maryland in the United States, MEPV <<http://members.aol.com/CSPmgm/warlist.htm>> (accessed 14 November 2006).

⁵⁸ *Ibid*.

⁵⁹ *Ibid*, for a full list of the sources that are cited in the MEPV.

⁶⁰ The MEPV data includes civil intra-state, ethnic intra-state and international event inter-state conflicts in its study of 'major armed conflicts'.

biannual report⁶¹ on global trends in violent conflict, produced by the Center for International Development and Conflict Management (CIDCM).⁶²

Conflict Simulation Model (KOSIMO)⁶³

Unlike the other three conflict data sets, the Conflict Simulation Model (KOSIMO) uses qualitative rather than quantitative parameters for variables. The other three conflict data projects (COW, UCDP and MEPV) include or exclude a conflict based on the number of people killed, whereas this project attempts to avoid such restrictions by using a qualitative parameter.⁶⁴ The justification for adopting a purely qualitative definition, rather than a quantitative one was to allow for the inclusion of non-violent conflicts that have not yet led to battle deaths - but, in the eyes of the participants, have the potential to escalate into a violent conflict. The KOSIMO definition also excludes all non-national, constitutional, criminal and economic conflicts.⁶⁵ The KOSIMO database, which contains 693 political conflicts from 1945 to 1999, is based on published material from American and European conflict researchers. Each conflict in the data set is coded with 28 variables.⁶⁶ Although this comprehensive coding of each conflict is valuable, the KOSIMO database's usefulness is limited to the extent that it ends in 1999.

In summary, researchers have produced several conflict data sets which can assist in answering questions such as whether conflict is more prevalent today than it was in the past, and whether conflict is changing in type, location, frequency and intensity. The four conflict datasets utilised here relate to the periods 1816-1997 (COW); 1946-2004 (UCDP); 1946-2005 (MEPV) and 1945-1999 (KOSIMO). In light of the data that is available, the discussion on conflict trends below is

⁶¹ The CIDCM reports on peace and conflict were published in 2001, 2003 and 2005

⁶² CIDCM <<http://www.cidcm.umd.edu>> (accessed 14 November 2006); see also Marshall, M and Gurr, T "Peace and Conflict 2003 - A Global Survey of Armed Conflicts, Self-Determination Movements, and Democracy" (2003) available at: <<http://www.cidcm.umd.edu/papers.asp>> (accessed 14 November 2006).

⁶³ The KOSIMO project is located at the Heidelberg Institute of International Conflict at the University of Heidelberg in Germany; KOSIMO <<http://www.hiik.de/en/kosimo/kosimo.htm>> (accessed 14 November 2006) and see the KOSIMO Manual available at: <<http://www.hiik.de/en/manual.htm>> (accessed 14 November 2006).

⁶⁴ In the KOSIMO project, the term conflict is defined as: "the clashing of overlapping interests around national values and issues (independence, self-determination, borders and territory, access to or distribution of domestic or international power); **the conflict has to be of some duration and magnitude** of at least two parties (states, groups of states, organizations or organized groups) that are determined to pursue their interests and win their case. At least one party is the organized state" (emphasis added): Operational Definition, KOSIMO Manual, *ibid*.

⁶⁵ See the 'Operational Definition' in the KOSIMO Manual: *ibid*.

⁶⁶ *Ibid*.

divided into two sections: pre-1946 and post-1946 with a greater emphasis on the latter.⁶⁷

Conflict trends: pre-1946

The COW data⁶⁸ shows that the period 1816-1946 was dominated by large-scale, inter-state wars, mainly waged between European states: a total of 54 inter-state wars were fought beginning with the Franco-Spanish war which started in 1823, and ending with the Franco-Thai war which started in 1940.⁶⁹ The majority of wars (23 out of the 54) were fought wholly or partially in Europe. The second most popular area for conflict was Asia – with 14 out of 54 conflicts being fought partially or entirely within Asian countries.⁷⁰ Europe was consistently found to have been a region of conflict whereas Asia experienced more conflict towards the end of this period, as did Africa, which did not experience an inter-state war in this period until World War I commenced in 1914. The only time that Oceania was involved in an inter-state conflict capable of inclusion in this data set was in the context of World War II, which commenced in 1939.

Frequency of inter-state wars

If the 130-year period prior to 1946 (1816-1946) was divided into quarters of approximately 32 years each, it would be evident from the COW dataset that five conflicts were begun in the first quarter; 18 conflicts in the second quarter; 17 conflicts in the third quarter; and 16 conflicts in the fourth.⁷¹ If the ‘warlikeness’ of states in a particular period can be measured by the numbers of inter-state conflicts that break out, then the years 1849-1881 experienced the most conflict, but only marginally. Overall, the first quarter of this period was relatively peaceful when compared to the following three quarters, which experienced a high and steady level of conflicts.

⁶⁷ Trends in the post-1946 period are emphasised because three of the four data sets use 1945/1946 as a starting point, and there is therefore more reliable data for that period.

⁶⁸ Version 3.0 of the Correlates of War Inter-State War data identifies wars and their participants between 1816 and 1997. The data sets are downloadable from COW <http://cow2.la.psu.edu/> (accessed 17 August 2006).

⁶⁹ The Second World War, which began in 1939, started over a year earlier. No further inter-state wars commenced until the First Kashmir war in 1948.

⁷⁰ In third place were jointly the Middle East and the Western Hemisphere (with 13 conflicts each). African and Oceania were both relatively peaceful with only three and one conflict respectively being fought in those regions: *supra* n68.

⁷¹ By dividing the period into four quarters of 32 years each, the divisions are: first quarter: 1816-1848; second quarter: 1849-1881; third quarter: 1882-1914; and fourth quarter: 1915-1946. This is a rough guide only and the division is made in this way only to provide a breakdown of conflict occurrence trends throughout the period. If divided exactly, each period would be 32.2 years.

Duration

The COW researchers have provided start and end dates for all of the conflicts in their data set and have calculated the duration in days of each of the conflicts. To compare periods, one could add up the number of days of conflict in each period to determine which period experienced the most days of warfare. Alternatively, one could calculate the average duration of each individual conflict within each quarter to determine which quarter experienced the longest or shortest wars. Using the first of these two methods, there were 1,750 days of conflict in the first quarter;⁷² 7,944 days in the second quarter;⁷³ 4,097 days in the third quarter⁷⁴ and 8,912 days in the fourth.⁷⁵ That equates to a total of 22,703 days of conflict, spread over a 130-year period - an average of 174.64 days of conflict per year.

Using the second method, the average duration of wars in the first quarter was 350 days; the average duration in the second quarter was 441.33 days; in the third quarter it was 241 days and in the fourth quarter it was 557 days. Whichever way it is calculated, the fourth quarter (1915-1946) experienced conflict of longer duration than any of the other quarters. That period also experienced more *total* days of conflict and those conflicts lasted on average *longer* than those in the earlier years of the pre-1946 period.

Number of casualties

The COW researchers attempted to estimate the number of deaths in each war. Again using the quarterly divisions, there were 163,810 deaths in the first quarter; 1,192,513 deaths in the second quarter; 8,948,382 deaths in the third quarter, and a massive 18,120,894 deaths in the fourth quarter. Obviously, the fourth quarter (1915-1946) of the pre-1946 period experienced the most number of deaths. Given that each quarter in this calculation is approximately 32 years, the number of deaths per year on average would be over half a million deaths per year for *every year* of the last quarter.⁷⁶ Based on the COW data, the overall total number of battle-field deaths during the whole pre-1946 period from 1816 to 1946 was 28,425,599. On average, for the total period of 130 years, that equates to 218,658 deaths per year.

⁷² 1816-1848.

⁷³ 1849-1881.

⁷⁴ 1882-1914.

⁷⁵ 1915-1946.

⁷⁶ The exact figure would be 566,277.9. Note that these figures are averages for a 30-year period. World War I killed 1-3 million people a year on the battlefield and World War II an average of 3-4 million per year: see Mack, *supra* n37 at 28.

Conclusion

It is evident that in the period 1816-1946 there was a very high level of conflict, especially during the last quarter (from 1915 onwards). The figures above are influenced by the inclusion of the First and Second World Wars, which fell into the third and fourth quarters respectively. Those two wars were long in duration and accounted for more deaths than most other wars put together. However, it was seen from an examination of the *number* of conflicts in each period that the later decades of this period were ahead on this measure too. The overall trend was that as the period progressed, conflict became more prevalent; when conflict began it lasted longer and it was increasingly more destructive, resulting in a greater loss of lives.

Conflict trends: post-1946

According to the UCDP,⁷⁷ there have been 228 armed conflicts in the 1946-2004 period, in 148 locations across the world.⁷⁸ The highest number of armed conflicts in a single year was recorded in 1991 and 1992, with 51 active conflicts.⁷⁹ The number of conflicts that reached the level of war rose steadily throughout the 1950s, 1960s, 1970s and 1980s and peaked around 1992.⁸⁰ From 1991-92, there was a sharp decline, followed by a rise in 1999 and another decline in 2000-2003. In 2004, there were 30 ongoing armed conflicts in 22 locations.⁸¹ After four years of steady decline (from 2000-2003), the number of armed conflicts increased in 2004, but only by one. Despite that slight rise in 2004, *the probability of any state being involved in an armed conflict is presently at its lowest point since the early 1950s.*⁸² Those figures are confirmed by other studies, even if there are slight variations as to which year the peak occurred.⁸³

⁷⁷ The UCDP has a much lower threshold for inclusion than the COW datasets, requiring only 25 annual battle-related deaths, as opposed to the COW's requirement for at least 1,000. Also, intra-state conflicts are included in the UCDP, whereas the COW data only covers inter-state conflict.

⁷⁸ Harbom, L and Wallensteen P "Armed Conflict and Its International Dimensions 1946-2003" (2005) 42(5) *Journal of Peace Research* 623.

⁷⁹ Ibid.

⁸⁰ The other three conflict data projects provide different figures for the total number of conflicts due to the different definitions adopted by each project and the years over which the project spans.

⁸¹ 2004 is the last year for which data and accompanying analysis is available from the UCDP.

⁸² Harbom and Wallensteen, *supra* n78.

⁸³ See Marshall, M and Gurr, T *Peace and Conflict 2005 – A Global Survey of Armed Conflicts, Self-Determination Movements and Democracy* (2005) at 11ff. Their statistics show that total warfare peaked in the late 1980s but societal warfare peaked in about 1992.

Location

Europe was the main location for conflict pre-1946, but it was superseded by Africa, Asia and the Middle East in the post-1946 era. Although it is common to classify conflicts by region, the method by which the data is presented can lead to misleading impressions of the size and location of the zones of peace and the zones of conflict. For instance, a list of countries in conflict could portray the entire country of Russia as being involved in conflict, due to the Chechnya War. A more realistic picture of the zones of conflict emerges by plotting the conflicts by their actual location on a map of the world. That has been done by two researchers who have used UCDP data to trace the geographical location of conflicts for the 1946-2000 period.⁸⁴ During that period, three general zones of conflict became evident: one covers Central America, the Caribbean and South America; the second zone reaches from East Central Europe through to the Balkans, the Middle East and includes India and Indonesia; whilst the third zone is Africa, and spans virtually the entire continent.⁸⁵ This is obviously a significant change from the locations of conflict in the pre-1946 period where it was seen from the COW data that conflict was largely concentrated in the European region.

In the period 1989-2000, the number of armed conflicts in all the major regions of the world, declined, or at worst, remained the same. The number of conflicts in Europe peaked in 1993 at ten; in the Middle East it peaked in 1991, 1992 and 1993 at seven; in Asia the number of armed conflicts peaked in 1992 at 20; and in Africa in 1992 at 15. The number of armed conflicts in the Americas peaked much earlier, in 1989, at eight.⁸⁶ By 2000, the number of conflicts had decreased in each one of those regions.⁸⁷

Research has shown that there is a connection between conflict location and violence. The KOSIMO data shows that in Europe and America, non-violent conflicts outnumbered violent conflicts for the 1945-1995 period.⁸⁸ However, in the Middle East/Maghreb, Sub-Saharan Africa and Asia/Oceania regions, the opposite was true: violent conflicts significantly outnumbered non-violent

⁸⁴ Buhang, H and Gates, S "The Geography of Civil War" (2002) 39(4) *Journal of Peace Research* 417.

⁸⁵ Ibid at 423, see Figure 2.

⁸⁶ Wallensteen, P & Sollenberg, M "Armed Conflict 1989-2000" (2001) 38(5) *Journal of Peace Research* at 632, see Table III.

⁸⁷ In 2000 the corresponding figures were: Europe (one), Middle East (three), Asia (14), Africa (14) and the Americas (one). These comparisons show that in the latter half of the 1990s, the number of conflicts declined in all regions. However, the same two regions - Asia and Africa - were leading the statistics at both the beginning and the end of the period: *ibid*.

⁸⁸ In Europe, there were 75 non-violent conflicts versus 28 violent conflicts; in 'America' there were 56 non-violent conflicts versus 46 violent conflicts: see KOSIMO <<http://www.hiik.de/en/kosimo/kosimo.htm>> (accessed 14 November 2006).

conflicts.⁸⁹ Thus, it can be said that Europe and the Americas not only have experienced less conflict *per se* than other regions, but the conflicts which did occur were more likely to be non-violent.

The latest UCDP figures show that in 2004, the majority of the 30 ongoing armed conflicts involved states in Africa (eight) and Asia (six).⁹⁰ There were relatively few ongoing conflicts in the Americas (three) and Europe (two).⁹¹ That data underlines the distinction between pre-1946 and 1946 conflict: a discernable shift away from Europe towards Africa and Asia.

Frequency

A study of the 432 international crises that occurred from the end of World War I to 2001 has shown that the frequency of international crises declined by nearly half in the first decade after the end of the Cold War.⁹² This sharp reduction in the number of international crises is explained in part by the decline in power of the Soviet Union in the late 1980s, culminating in its disintegration into 15 independent states, coupled with the emergence of the US as the sole dominant military power.⁹³

The two states that triggered the most crises in the post-1989 period were Iraq and Pakistan with five and two crises respectively.⁹⁴ This was a marked change from the previous era in which states such as Africa, Libya, Israel, Rhodesia/Zimbabwe and also Pakistan, were the leading triggering states. Not only were there fewer crises, with fewer triggering actors, but also international crises were fundamentally different in the post-Cold War era as compared with the previous four decades. Protracted conflicts, that is, hostile relations between states that extend over long periods of time with sporadic outbreaks of open warfare, characterised 61% of all crises in the earlier era, but only 50% of post-Cold War international crises. Decisive outcomes are less common in post-1989 crises but an encouraging trend is that the international community has attempted to resolve

⁸⁹ In the Middle East/Maghreb, there were 54 non-violent conflicts versus 113 violent conflicts; in Sub-Saharan Africa there were 43 non-violent conflicts versus 102 violent conflicts and in Asia/Oceania there were 58 non-violent conflicts versus 86 violent conflicts: *ibid*.

⁹⁰ Harbom & Wallensteen, *supra* n78 at 631, Appendix 1.

⁹¹ *Ibid*.

⁹² There was a 47% decline in the number of international crises from the polycentric era (1963-1989) to the post-Cold War unipolar era: International Crisis Behaviour Project, cited by Wilkenfeld, J "International Crises" in "Peace and Conflict 2003", CIDCM, Maryland, February 2003 at 43.

⁹³ *Ibid* at 43.

⁹⁴ As for Iraq, the five crises were the Gulf War 1990-91, Bubiyan 1991, Iraq Deployment in Kuwait 1994, UNSCOM I 1997-98 and UNSCOM II 1998. As for Pakistan, the two crises were Kargil 1999 and the India Parliament Attack 2001: *ibid* at 44.

twice as many conflicts by mediation than in the earlier post-World War II decades.⁹⁵

The latest conflict research figures show that between 2001 and 2005, 11 wars have been suspended or repressed (four in 2001, six in 2002 and one in 2003).⁹⁶ During the same period, only five new wars have broken out (two in 2001, one in 2002 and two in 2003).⁹⁷ During that period, 2004 was a year in which no new conflicts were reported as breaking out, and no conflicts ended in that year either. The clear trend over the past five years is towards greater resolution of existing conflicts and the initiation of fewer new conflicts.⁹⁸

Duration

The COW Project provides exact measures of the duration of the conflicts. The total number of days recorded as being subject to inter-state wars in the 1946-1997 period was 11,034. Given the 51-year time span, there was an average of approximately **216.4** days of conflict per year. The COW Project's data for the pre-1946 period was discussed above where it was calculated that from 1816 to 1946, there were on average **174** days of conflict per year.⁹⁹ When compared to the post-1946 period, it appears that there was on average more conflict per year in the post-1946 period than in the pre-1946 period.

The second method of calculating the duration of wars in the pre-1946 period can also be employed here, for the sake of comparison. In the pre-1946 period, it was calculated that wars lasted 350 days on average in the first quarter; 441 in the second; 241 in the third and 557 in the fourth, giving an overall average war duration of 397.25 days per conflict. In the post-1946 period, the average duration of conflicts recorded in the COW Project was 479.74. This method of calculating the duration of conflict reaches the same conclusion, namely, that the post-1946 period experienced more conflict since not only were there more days spent in a state of conflict, but each individual conflict was longer in duration.

⁹⁵ Mediation characterised only 30 percent of earlier crises but was used by the international community in attempting to resolve international crises in 60 percent of post-Cold War crises: *ibid* at 45.

⁹⁶ Marshall and Gurr, *supra* n83 at 12 and Appendix Table 11.1.

⁹⁷ Two new conflicts broke out in 2001 ("Al Qaeda's attack on the US and the US' punitive attack on Afghanistan"); one conflict in 2002 (Ivory Coast) and two in 2003 (the US invasion of Iraq and an ethnic war in Darfur): *ibid*.

⁹⁸ *Ibid*. Those figures do not yet include conflict data for 2006.

⁹⁹ See discussion *supra* at 16.

Intensity of conflict

The level of violence reached in a conflict has been divided into three categories by the UCDP: minor, intermediate and war.¹⁰⁰ The UCDP data concentrates on the period 1989 to 2004.¹⁰¹ During that period, minor armed conflicts peaked in 1992, with 23 in existence that year; intermediate armed conflicts peaked in 1994 and 1995, with 18, and the number of wars peaked in 1991 and 1992 with 18.¹⁰² If all of the armed conflicts of any type that occurred in a single year are counted, that number peaked at 51 conflicts in both 1991 and 1992.

After those aforementioned peaks, all levels of conflict declined during the remaining years of the decade. By 2004, there were 13 minor armed conflicts, ten intermediate conflicts and seven wars in existence. The total number of conflicts had declined from its peak of 55 in 1992 to a mere 22 in 2004 - the lowest point since 1989. Therefore, the overall trend from 1989-2004 was that all levels of conflict declined significantly. That trend is indisputable, whether one looks at the data individually for each of the three levels of conflict, or at the total number of conflicts.¹⁰³

Type of conflict

Probably the most obvious trend in the post-1946 period has been the significant increase in the number of internal conflicts which is especially noticeable when compared to the decrease in inter-state conflicts.¹⁰⁴ The UCDP data confirms the observation made commonly enough that *internal/intra-state conflict has been the dominant form of conflict in the latter part of the post-1946 era*. The UCDP identifies three types of conflict: intrastate, interstate and internationalised intrastate.¹⁰⁵ The trends for these three types of conflict over the period 1989-2004, may be summarised as follows.

There were seven *inter-state* conflicts from 1989-2004. The pattern of their occurrence is somewhat erratic but it remained low during the entire period. For

¹⁰⁰ A 'minor' armed conflict would require at least 25 battle-related deaths per year, but less than 100 during the course of the conflict; 'intermediate' would require between 25-1,000 deaths per year, but not more than 1,000 deaths throughout the course of the conflict; and 'war' would require at least 1,000 battle-related deaths per year.

¹⁰¹ Harbom and Wallensteen, *supra* n78, Table 1.

¹⁰² *Ibid.*

¹⁰³ *Ibid.* See also Wallensteen and Sollenberg, *supra* n86 at 630.

¹⁰⁴ *Ibid.* at 624, Table II.

¹⁰⁵ Interstate armed conflict occurs between two or more states; intrastate conflict occurs between the government of a state and internal opposition groups and internationalised internal armed conflict occurs between the government of a state and internal opposition groups, with intervention from other states in the form of troops: *ibid.* at 631, Appendix 1.

three of those years (1993, 1994 and 2004) the UCDP researchers found that no inter-state wars occurred. There were 90 *intrastate* conflicts and the pattern of their occurrence is much clearer. They peaked in 1991 with 49 conflicts, and conflicts thereafter decreased year by year to the period-low of 27 conflicts in 2004. There were 21 *internationalised intrastate* conflicts and the pattern of their occurrence is also slightly erratic. They reached their highest point in 1993, 1999 and 2001 (with five conflicts) and there were only three in 2004.

The total number of ongoing armed conflicts in 2004 was 30. This figure was one higher than 2003. There has been a clear *downward trend* since 1991-1992 in the overall number of conflicts. The lowest overall number of conflicts for the 1989-2004 period was experienced in 2003, when there were 29.¹⁰⁶

The data from the MEPV project confirms the above findings. It classifies conflicts as either civil-intrastate,¹⁰⁷ ethnic-intrastate¹⁰⁸ or international event-state.¹⁰⁹ In the post-1946 period, the overwhelming majority of conflicts were civil-intrastate or ethnic-intrastate, rather than international event-state. Thus, it may be confidently concluded that in the post-war era, the predominant form of conflict has been intrastate, rather than interstate.

Number of casualties

The post-1946 trend has been towards fewer conflicts and *fewer casualties per conflict*. According to the COW data, there were 3,333,669 battle-related deaths recorded in the post-1946 inter-state conflicts. Given that the post-1946 period measured by the COW Project is 51 years, this equates on average to 65,366 deaths per year, far fewer than in the pre-1946 period.¹¹⁰ Conflicts in the post-1946 era have become less destructive if measured solely in terms of battle-related deaths.

Estimating the number of casualties per conflict is more difficult in the post-1946 era than in the pre-1946 era due to the increasing difficulty of determining estimates of ‘directly-related’ deaths. Conflict researchers have noted that the

¹⁰⁶ Ibid.

¹⁰⁷ Involving rival political groups.

¹⁰⁸ Involving the state agent and a distinct ethnic group.

¹⁰⁹ Involving two or more states, but may represent a distinct polity resisting foreign domination, that is, colonialism.

¹¹⁰ See discussion supra at 16. There were on average 218,658 deaths per year due to inter-state conflict in the pre-1946 period.

distinction between combatants and non-combatants has grown increasingly obscure as less formal civil conflict interactions predominate. Nevertheless, if one looks at the MEPV estimates for the number of deaths per conflict, it appears that there is a trend towards lower total 'battlefield' deaths in the latter decades of the post-war period. Whereas in the early post-war years it was not unusual to find deaths in the hundreds of thousands, and even millions, that has become the exception in the last two decades of the twentieth century and the early twenty-first century.¹¹¹

The fact that wars have become less deadly is a point also stressed in the *Human Security Report 2005*. World War I killed 1-3 million people a year on the battlefield. World War II averaged 3-4 million battle deaths per year. Since the end of the Korean War, the annual global battle toll has never again reached even half a million.¹¹² When global battlefield deaths are measured per thousand of the world's population (rather than in absolute numbers) it is clear that conflicts in the 1990s were only one-third as deadly as in the 1970s.¹¹³ The decline in battle-deaths may be attributed to the changing nature of conflict: today's wars are predominantly low-intensity intra-state conflicts rather than large-scale inter-state wars involving huge armies and heavy conventional weapons. Although estimating battle-deaths is an important measure of the human costs of war it does not take into account the numbers killed indirectly, such as through the collapse of a society's economy and its infrastructure: there is no global trend data available on indirect deaths.¹¹⁴

Probability of conflict

Throughout the latter part of the 1946-2001 period, there has been a rapidly increasing number of independent states. Assuming that all nations are equally likely to become involved in a conflict, a higher number of countries should logically produce a higher overall frequency of conflict. What the UCDP data shows is that the overall probability of conflict rose only slowly for the last two decades of the Cold War. The recent decline in the number of armed conflicts after the end of the Cold War, together with the increase in the number of states,

¹¹¹ See the MEPV website *supra* n57. From 1945-1975, there were many conflicts where the number of deaths was 100,000 or greater. In conflicts between 1976-2005, conflicts with extreme numbers of deaths were infrequent.

¹¹² Mack *supra* n37 at 29.

¹¹³ *Ibid* at 30, see Figure 1.8.

¹¹⁴ *Ibid* at 31.

has brought the *probability of any single country being in conflict in a given year to a low level* corresponding to the end of the 1950s, and lower than at any time during the Cold War.¹¹⁵ Thus, the risk of a state being embroiled in conflict has dramatically declined.¹¹⁶

Fewer conflicts - greater complexity

One of the notable features of modern intra-state conflicts is their complexity: there is typically a diversity of warring parties and multiple grievances.¹¹⁷ The number of states involved in the same conflict remains very high, perhaps affecting the ability of parties to end conflicts through victory or peace agreements. There has been a significant increase in the number of actors involved in post-1989 conflicts. More than 80 state actors, two regional organisations (NATO and ECOMOG) and one multinational coalition (in the 1991 Gulf War) have been parties to those conflicts. In addition, more than 200 non-governmental parties have been involved, to reach a total of approximately 300 actors involved in the conflicts that occurred from 1989-2000.¹¹⁸ This proliferation of actors probably accounts for the difficulties in ending the post-1989 conflicts and has lead researchers to conclude that this trend projects a "bleak future".¹¹⁹ The latest data from the UCDP shows that of the 165 internal armed conflicts active since World War II, one-fifth have involved troops from an external state.¹²⁰ Thus, although global warfare has been reduced by over 60% since 1991, the conflicts that remain are complex and typically involve multiple actors.

Conclusion

Armed conflict has decreased significantly in the post-Cold War era both in the numbers of states affected by major armed conflict and in overall magnitude. The general magnitude of global warfare has decreased by over 50% since peaking in the mid-1980s, falling by the end of 2002 to its lowest level since the early 1960s.¹²¹ Inter-state wars have become increasingly uncommon since the UN collective security system was established following World War II. The 1990 Iraq

¹¹⁵ Gleditsch et al, *supra* n10 at 621.

¹¹⁶ *Ibid*; see also Mack *supra* n37 at 23.

¹¹⁷ See *SIPRI Yearbook 2005* at 88-96 citing the examples of Burundi and Columbia.

¹¹⁸ Wallensteen and Sollenberg, *supra* n86 at 633-34.

¹¹⁹ *Ibid* at 634.

¹²⁰ Harbom and Wallensteen, *supra* n78 at 627-29.

¹²¹ Marshall and Gurr, *Peace and Conflict 2003*, *supra* n62 at 12.

invasion of Kuwait and the subsequent 1991 US-led Gulf War were perhaps the "only unambiguous inter-state wars during the post-Cold War era".¹²²

There can be no doubt that the nature of conflict is different in the post-World War II era. Prior to the outbreak of World War II, most conflicts were international in character involving massive armies, and massive casualties, with most wars being fought mainly on European soil. The overwhelming number of fatalities in those battles was the combatants themselves, rather than civilians, and the technological innovations in the creation of new weapons systems were underdeveloped. Conflicts since 1946 have been mainly driven by internal ethno-national clashes and inter-state wars have given way to the increasing incidence of intra-state wars. Civilian casualties have gained greater prominence in these internal conflicts and civilian populations have been affected to a much greater extent than in the previous period, especially with the blurring of distinctions between combatants and civilians and the technological developments of more lethal weaponry. A disparity has also arisen between the number of civilians killed in conflicts and the number of soldiers killed. Shaw has noted that the 'relegitimation of war' has been due in part to the very small number of fatalities within the Western armed forces when compared to civilian fatalities, in conflicts such as in Afghanistan.¹²³

While the data suggests that both the numbers and intensity of conflict are decreasing there remain a large number of states in transition, the so-called 'anocracies'.¹²⁴ There was a three-fold jump in the number of 'anocracies' from 16 in 1985 to 47 in 2002. While this does not in itself indicate an increase in conflict, it does indicate that there is the *likelihood* for an increase in conflict in those states because research suggests that 'anocracies' are highly transitory regimes, with over 50% experiencing a major regime change within five years, and they are much more vulnerable to new outbreaks of armed societal conflict.¹²⁵ Furthermore, they are about six times more likely than democracies and two and a

¹²² Ibid at 13.

¹²³ Shaw, M "Risk-Transfer Militarism, Small Massacres and the Historic Legitimacy of War" (2002) 16(3) *International Relations* 343.

¹²⁴ Marshall and Gurr 2003, *supra* n62 at 17 and 19. 'Anocracies' are described as a middling category rather than a distinct form of governance. They are countries whose governments are neither fully democratic nor fully autocratic. They sometimes result from failed attempts to greater democracy, as in, for example, Algeria, Angola, Cambodia and Haiti.

¹²⁵ Ibid at 17.

half times more likely than autocracies to experience new outbreaks of societal wars.¹²⁶

The overall trends in conflict since World War II can be summarised as follows. Warfare is far less deadly in the twenty-first century than it has been in the past. Fewer wars are fought and fewer people die in those wars. The number of battle-deaths has decreased steadily since the 1950s; the 1990s was the least violent decade since the end of World War II.¹²⁷ Inter-state warfare has decreased steadily since the end of World War II, especially since the 1970s. The incidence of intra-state warfare rose steadily after World War II, until peaking in 1992, but since then, it has also been in a steep decline.¹²⁸ An entire category of warfare, extra-state or colonial wars, has virtually disappeared.¹²⁹ In the past decade, 95% of conflicts have taken place within states, not between them.¹³⁰ The nature of conflict has changed, especially since the demise of colonialism and the end of the Cold War and the evidence shows that it currently poses a far lesser threat to global peace and security than it once did.¹³¹

Part C: Non-state actors

Overview

One aspect of the changing nature of conflict that bears particular relevance to this thesis is the asymmetric threat posed by non-state actors, especially those engaged in ‘international terrorism’. The inherent problem in discussing terrorism statistics is that each study uses a different definition, which in turn impacts upon the figures and can render meaningful analysis impossible.¹³² The question of how to define ‘terrorism’ is addressed in chapter 3. For the purposes of this chapter, a brief summary of terrorism trends is attempted without delving too far into the definitional issue.

¹²⁶ Ibid.

¹²⁷ Mack, Human Security Report 2005 supra n37 at 17.

¹²⁸ Ibid at 22.

¹²⁹ Ibid at 23.

¹³⁰ Ibid at 18.

¹³¹ For analysis of the main reasons for the decrease in warfare, see Mack, Human Security Report 2005, supra n38, Part V.

¹³² For example, the controversy of the US Department of State's statistics on terrorism in the report, *Patterns of Global Terrorism 2003*. The US Department of State claimed that the 2003 total of 190 terrorist acts was the lowest since 1969 and that terrorist attacks had decreased by 45% between 2001 and 2003. However, two academics used the same statistics and found that there had been a 36% increase: see Krueger, A and Laitin, D "Misunderestimating 'Terrorism'" *Foreign Affairs* September/October 2004 and see discussion infra at 32.

Terrorism is not a new phenomenon – it is as old as humanity – since brutal violence has long been used as a tool for making strong, and unforgettable, political statements.¹³³ However, unlike warfare, statistics on terrorism incidents are generally limited to the post-World War II period. One study of international terrorism trends has found that incidents of international terrorism have fallen significantly in the post-Cold War period, after two decades (the 1970s and 1980s) of showing no signs of abatement.¹³⁴ Although the number of incidents has dropped dramatically, trans-national/international terrorism still poses a significant threat for at least two reasons: first, each incident is almost 17% more likely to result in death or injuries compared with the previous two decades, and secondly, recent years have witnessed the rise of religious terrorism in which massive civilian casualties are the main goal.¹³⁵

The dramatic fall in the number of terrorist incidents after the Cold War is said to be due to reduced state sponsorship, increased efforts to thwart terrorism and the demise of many leftist groups. Even though international terrorism is less common than it was during the Cold War years, there is reported to be a clear perception that it poses an even greater risk to lives and property.

*Terrorism trends: 1960s-1980s*¹³⁶

From the late 1960s until the late 1980s, international terrorism was primarily motivated by nationalism, separatism, political ideology, racism, nihilism and economic inequality.¹³⁷ The late 1980s and early 1990s saw the demise of many leftist groups due in part to an increase in domestic efforts by some terrorism-prone nations (such as France, Germany, Italy, Spain and the UK) to capture and bring to justice members of these groups. There was also a reduction in state-sponsorship by East-European and Middle Eastern countries coupled with a general decline in the popularity of Marxism following the collapse of many communist regimes.¹³⁸ These three factors were bolstered by collective initiatives

¹³³ Marshall and Gurr, *supra* n83 at 62.

¹³⁴ Enders, W and Sandler, T "Is Transnational Terrorism Becoming More Threatening?" (2000) 44(3) *Journal of Conflict Resolution* 307. That study defines terrorism as "the premeditated use or threat or use of extranormal violence or brutality by subnational groups to obtain a political, religious, or ideological objective through intimidation of a large audience, usually not directly involved with the decision making."

¹³⁵ *Ibid* at 307-308.

¹³⁶ For a discussion of anarchism and its prevalence in the later nineteenth century and early twentieth century, see chapter 7.

¹³⁷ Terrorist groups that were prominent in this period included The Red Brigade, the Red Army Faction, Fighting Communist Cells, Direct Action, Popular Forces 25 April, the Revolutionary Cells, the First of October Anti-Fascists Resistance Group (GRAPO), Revolutionary Organisation 17 November and Dev Sol: Wilkinson, P *Terrorism and the Liberal State* (1986).

¹³⁸ Enders and Sandler, *supra* n134 at 310.

by the European Union (EU) to foster co-operation among EU states over extradition, shared intelligence and accreditation of foreign diplomats.¹³⁹

Terrorism trends: 1980s-2001

The US Department of State's figures show that from 1981 to 2001, the total number of international terrorist attacks peaked in 1987, with 665 attacks that year. Thereafter, there was a steady decline in the number of attacks, but with slightly higher than normal figures in 1991, 1995 and 2000.¹⁴⁰ By comparison, 2001 experienced a relatively low total (348 international terrorist attacks, including the attacks that occurred on 11 September 2001). That figure was the lowest since 1998.¹⁴¹

By region, the US' statistics show that from 1996-2001, Latin America was by far the worst affected: in 2001, there were 194 terrorist attacks in the Latin American region. That figure was greater than in any other region in any other year. The second-highest number of total attacks in any one year also occurred in Latin America, with 192 attacks in 2000. The third-highest number of attacks in any one year was again in Latin America, in 1997, with 128 attacks that year. Moreover, Latin America was the only region in which the number of terrorist attacks peaked in 2001. For all of the other regions, 2001 was a relatively peaceful year.

The next most terrorism-afflicted region for the 1996-2001 period was Western Europe, where international terrorist incidents peaked with 121 incidents in 1996 and thereafter declined to a low of 17 attacks in 2001. The third most affected region was Asia, where terrorism peaked in 2000 with 98 attacks. Following Asia was Africa in which the number of attacks peaked in 2000 after a steady increase from 1996. The fifth-most terrorist prone region for that period was the Middle East, in which attacks peaked in 1996 with 45 international terrorist attacks recorded. In 2001, it experienced only 29. Following the Middle East came Eurasia. The region that was least affected by terrorist attacks was North America which experienced zero terrorist attacks in 1996, 1998 and 2000. In the

¹³⁹ Wilkinson, P "The European response to terrorism: retrospect and prospect" (1992) 3 *Defence Economics* 298-304.

¹⁴⁰ With those years experiencing 565, 440 and 426 attacks, respectively.

¹⁴¹ US Department of State, *Patterns of Global Terrorism 2002* at 157, available for downloading from US Department of State: <<http://www.state.gov/s/ct/rls/pgtrpt/>> (accessed 14 November 2006).

intervening years, it experienced a high of 13 attacks in 1997, two attacks in 1999 and four attacks in 2001.¹⁴²

These statistics show that although the attacks that occurred on 11 September 2001 attracted a great deal of attention, they occurred in a region that otherwise experienced very few international terrorist attacks in the five year period from 1996-2001.

Terrorism trends: 2001-2006

The US Department of State initially claimed that between 2001 and 2003, there was a 45% decrease in the number of international terrorist attacks.¹⁴³ The 190 attacks which occurred in 2003 were claimed to represent the lowest figure since 1969. However, that analysis was challenged, and a new report was issued.¹⁴⁴ The challenge, which was not altogether addressed in the re-released report, was that the US Department of State's figures were based on a *total* number of terrorist attacks, taking into account both 'significant' and 'non-significant' attacks.¹⁴⁵ If only 'significant' attacks had been counted, then the claim of a 45% decrease would have been erroneous – there was in fact a *36% increase in verifiable significant international terrorist attacks*.¹⁴⁶ The US Department of State's claims regarding a decrease between 2001 and 2003 could only be sustained when non-verifiable, non-significant terrorist events were also included in the overall figures.¹⁴⁷

Krueger and Laitin produced figures which suggested that from 1982-2003, significant terrorist attacks increased more than eightfold.¹⁴⁸ Krueger asserted that the US Department of States' figures showed that in 2003, significant terrorist attacks reached a 20-year peak.¹⁴⁹ Another study, which compared the number of terrorist events and terrorist-related deaths in seven six-month segments prior and subsequent to 11 September 2001, showed an initial sharp increase in the number

¹⁴² Ibid at 172, at Appendix 1.

¹⁴³ US Department of State, *Patterns of Global Terrorism 2003*.

¹⁴⁴ Krueger, A and Laitin, D "Faulty Terror Report Card" *Washington Post* 17 May 2004.

¹⁴⁵ 'Significant' meant attacks which involved loss of life, serious injury or major property damage of more than US\$10,000. 'Non-significant' attacks were neither defined nor listed in the initial 2003 report.

¹⁴⁶ Supra n144.

¹⁴⁷ 'Non-verifiable' because the US Department of State initially listed only the significant events, which could be verified, but not the non-significant events.

¹⁴⁸ Mack, supra n37 at 43, Figure 1.13.

¹⁴⁹ Krueger, A "Errors on Terror" Op-ed *New York Times* 25 June 2004, A23.

of terrorist attacks shortly after 9/11.¹⁵⁰ But this short sharp increase was explained almost entirely by the adoption of a highly specialised tactic of warfare by militants in five locations and when those instances of domestic terrorism were removed, the trends showed approximately a doubling of terrorist activity in the post-9/11 period, to about three events per year.¹⁵¹ There was thus “scant evidence of a global terrorist conspiracy in the post 9/11 world that would constitute a threat to global peace and security.”¹⁵²

The latest US government statistics are of limited assistance in determining an overall trend for the 2001-2006 period. As of April 2005, terrorism statistics are now kept by the National Counterterrorism Centre (NCTC), which states in its latest report that its figures are not directly comparable with pre-2005 figures because a different definition of terrorism has been adopted by the NCTC.¹⁵³ One of the main differences is that the NCTC uses a definition of ‘terrorism’ rather than ‘international terrorism’. Furthermore, the NCTC does not believe that “a simple comparison of the total number of incidents from year to year provides meaningful analysis”.¹⁵⁴ The annual NCTC statistics show that there was a significant rise in terrorist attacks between 2003 and 2005, but that was mainly due to attacks which occurred in Iraq.¹⁵⁵

The latest US statistics provide some interesting insights into the number and type of attacks which occurred in 2004 and 2005. The NCTC data shows that in 2005, more than half of all terrorist attacks resulted in no deaths (and only 2% of terrorism attacks resulted in ten or more deaths).¹⁵⁶ In terms of the location of lethal terrorist attacks, the Near East, followed by South Asia, suffered the most attacks as well as the highest deaths in those attacks.¹⁵⁷ In comparing the top 15 countries by fatalities, Iraq suffered the highest number, followed at some distance

¹⁵⁰ Marshall and Gurr, *Peace and Conflict 2005*, supra n83 at 73, Figure 9.2.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ National Counterterrorism Center (NCTC) “Report on Incidents of Terrorism in 2005” 11 April 2006, at ii: <<http://wits.nctc.gov/reports/crot2005nctcannexfinal.pdf>> (accessed 14 November 2006).

¹⁵⁴ Ibid. The reasons put forward by the NTSC are outlined in its report at iii-iv.

¹⁵⁵ In 2003, total attacks were estimated to be 175; in 2004 they were 651 and in 2005 there were 11,111. But note that in 2005, an increase in terrorist incidents in Iraq accounted for approximately one third of all incidents that year and more than half of all deaths from terrorism: see US Department of State, “Fact Sheet on Country Reports on Terrorism 2005” [28 April 2006]: <<http://www.state.gov/r/pa/prs/ps/2006/65422.htm>> (accessed 14 November 2006).

¹⁵⁶ Supra n154, at xxvi, Chart 13. There were 11,111 attacks in 2005. Of those, 5,980 attacks (53.8%) resulted in no fatalities; 2884 attacks (25.9%) resulted in one fatality; 1617 attacks (14.5%) resulted in two-four fatalities; 404 (3.6%) attacks resulted in five-nine fatalities and 226 attacks (2.03%) resulted in ten or more fatalities.

¹⁵⁷ Ibid at xiv, Chart 1.

by India, Columbia and Afghanistan. No Western country was in the top 15.¹⁵⁸ One of the most interesting statistics in the NCTC report is that in 2005, a total of 56 US citizens were killed in terrorist attacks, which amounts to 0.4% of the global fatalities from terrorism in 2005.¹⁵⁹ Thus, 99.6% (or 14,546 in absolute figures) of terrorist fatalities were non-Americans.¹⁶⁰ That figure was down on the previous year in which 1% of terrorist fatalities were American.¹⁶¹

The NCTC data for 2004 and 2005 shows that the number of terrorist attacks rose sharply during those two years (from 651 attacks in 2004 to 11,111 in 2005), as did the number of fatalities (from 9,321 in 2004 to 14,546 in 2005) but the NCTC has noted that due to changes in the way that it defines terrorism, the figures produced for 2005 cannot be compared with pre-2005 data. The most recent report released by the NCTC shows that the number of terrorist attacks increased by approximately 3000 (25%) in 2006 and that the number of fatalities increased by approximately 5,800 (40%).¹⁶² Of the approximately 14,000 terrorist attacks in 2006, 45% of them occurred in Iraq and of the approximately 20,000 deaths resulting from terrorist attacks, 65% were in Iraq.¹⁶³ One of the many interesting details noted in the latest NCTC report is that, as in 2005, “Muslims bore a substantial share of being the victims of terrorist attacks in 2006”¹⁶⁴ with well over 50% of the total victims of terrorist attacks being victims of attacks in Iraq.¹⁶⁵

Although this data is certainly interesting and informative, the statistics released in the NCTC’s reports are probably insufficient to deduce the presence of an overall trend at this point firstly because the data covers a short period of time, secondly, because the 2005 data cannot be compared with earlier years when a different definition of terrorism was used so that only the 2005 and 2006 data may be compared, and thirdly, because there are so many variables in terms of the reliability of data and the inclusion of incidents.¹⁶⁶

¹⁵⁸ Ibid at xix, Chart 6. For the top 15 countries by hostages, the worst-hit country was Nepal, followed by Columbia and Iraq. Again, no Western country was in the top 15: ibid, at xxii, Chart 9.

¹⁵⁹ 83% of the US fatalities (47 from a total of 56) in 2005 were in Iraq: ibid at xx, Chart 7.

¹⁶⁰ Ibid, xxi, Chart 8.

¹⁶¹ NCTC “A Chronology of Significant International Terrorism for 2004” 27 April 2005 at 87. There were 103 US victims in 2004, or 1% of the total number of victims, being 9321.

¹⁶² NCTC “Reports on Terrorist Incidents – 2006” 30 April 2007 at 2 available at: <<http://wits.nctc.gov/reports/crot2006nctcannexfinal.pdf>> (accessed 4 July 2007).

¹⁶³ Ibid.

¹⁶⁴ Ibid, 3

¹⁶⁵ Ibid.

¹⁶⁶ NCTC “reports on Terrorist Incidents – 2005”, supra n83 at ii.

Conclusion

It is difficult to state with any certainty whether there are clear trends in the incidence of international terrorist attacks, especially in the past five years. That uncertainty is driven by many factors including unreliable data, definitional irregularities and a lack of consistency and accuracy in both data collection and analysis. Most research suggests a general downward trend in terrorist incidents of all types since the early 1980s.¹⁶⁷ But it is unclear whether terrorism incidents have risen rapidly in the past few years, as some data suggests.¹⁶⁸

What is clear is that international terrorism looms large in the media and in the psyche of individuals as a threat to their security. Research has shown that globally, 15% of people fear terrorism as a threat to their personal security compared with 8% who fear war; yet as this chapter has shown, war is responsible for a far greater numbers of deaths per annum.¹⁶⁹ Very few examples of terrorism result in more than 100 deaths; the above research shows that in 2005, only 2% of terrorist attacks resulted in more than ten deaths (and more than half of the attacks in 2005 resulted in no deaths).

To put the threat of terrorism in perspective, it has been shown that in the 1990s, there was an average of 3,000 *terrorism-related deaths* per year, but an average of 300,000 *war-related deaths*.¹⁷⁰ This would seem to suggest that people fear terrorism more than they ought to and that whilst international terrorism may be a threat to global peace and security, it is not as substantial a threat as either armed conflict, or other types of violence, such as genocide.¹⁷¹

This chapter has shown that there is a gap between what the public and policymakers *perceive* as the greatest threats to international peace and security, and reality. It is clear that we live in a world that is safer, more so, perhaps than ever before. There are fewer new conflicts being initiated; when new conflicts do occur they are on a smaller scale with a less significant cost in both human and

¹⁶⁷ US Department of State *Patterns of Global Terrorism*; see the International Terrorism: Attributes of Terrorist Events (ITERATE) database and see the MEPV data, cited above.

¹⁶⁸ Krueger and Laitin in Mack *supra* n37 at 43; see Marshall and Gurr, *Peace and Conflict 2005* *supra* n83.

¹⁶⁹ The Human Security Centre commissioned Ipsos-Reid to conduct a global survey of people's fears and experiences of political and criminal violence in 11 countries. The greatest single cause of fear was criminal violence: see Mack *supra* n37 at 50-51.

¹⁷⁰ Marshall and Gurr, *Peace and Conflict 2005* *supra* n83 at 65.

¹⁷¹ Mack *supra* n37 at 40-42. Genocide is not discussed in this chapter but the numbers killed in recent genocides, such as in Cambodia (estimates range from 1.7 to 2.4 million), Bangladesh (between 1.56 and 3.12 million), Rwanda (approximately 800,000), Srebrenica (approximately 7,000) and Darfur (estimated at between 70,000 and 340,000) illustrate that annual terrorism fatalities are far less significant by comparison.

material measures, and in the past five years there has been an increase in the number of existing conflicts being resolved. Terrorism is a phenomenon which largely affects states outside North America. When one considers both the states and the individuals who are most affected by terrorism, it is ironic that North Americans are some of the least affected.¹⁷² Yet, as subsequent chapters will show, the US' Bush Administration has been at the forefront of attempting to enforce an interpretation of self-defence that would allow the use of force in a much broader range of situations than ever before to counter the supposedly increasing threat of terrorism.

¹⁷² See data above, supra 28, which shows that from 1996-2001, the most affected regions were, in descending order, Latin America, Europe, Asia, Africa, the Middle East, Eurasia and North America. See also the data above, supra 30, which shows that in 2005, 99.6% of fatalities from terrorism were non-American.

CHAPTER 3: A definition of 'terrorism'

The term 'terrorism' is unsatisfactory. It is emotive, highly loaded politically and lacking a universally, or even generally, accepted definition...the labelling of a particular act as terroristic tells less about that act than it does about the labeller's political perspective,...it is more of a formulation of a social judgment than a description of a set of phenomena.¹

Introduction

Terrorism, and the 'war on terrorism', has possibly become the most important security theme of the twenty-first century.² This chapter examines how 'terrorism' has been defined, politically and legally. There are three reasons why understanding the meaning of terrorism is important in the context of this thesis. First, terrorism is one form of violence that is a part of the overall changing nature of conflict, as described in chapter 1. Secondly, the UN Security Council regarded the attacks that occurred on 11 September, like all acts of international terrorism, as a threat to international peace and security.³ Thirdly, since the US and the UK justified their use of force against Afghanistan, *inter alia*, on the grounds of preventing or deterring future *terror* attacks, it is crucial to grasp what this term represents.⁴

Chapter 2 described the changing nature of conflict: terrorism may be regarded as a subset of conflict, a kind of surrogate, asymmetric form of warfare.⁵ 'Terrorism' is a term so frequently referred to by scholars, the media, states and international organisations that one might conclude that there exists a consensus as to what 'terrorism' means. The material canvassed in this chapter suggests otherwise. The analysis is divided into four parts: in Part A, the historical roots of terrorism and its original meaning are briefly discussed; Part B addresses political scientists' attempts to define terrorism; Part C examines a selection of domestic jurisdictions' definitions and Part D focuses on efforts to define terrorism within international law.

¹ Lambert, J *Terrorism and Hostages in International Law* (1990) at 13.

² Marshall, M "Global Terrorism: An Overview and Analysis" in Marshall, M and Gurr, T (ed) *Peace and Conflict 2005* (2005) at 62.

³ S/Res/1368, 12 September 2001 and S/Res/1373, 28 September 2001. See discussion in chapter 10 regarding these resolutions.

⁴ The legality of the use of force against Afghanistan in 2001 is discussed in chapter 10.

⁵ Motley, J "Target America: The Undeclared War" in Livingstone, N and Arnold, T *Fighting Back - Winning the War against Terrorism* (1986) at 59-83.

The difficulty of defining terrorism

'Terrorism' is a term that is notoriously difficult to define: "it is imprecise, ambiguous and above all it serves no operative purpose."⁶ Scholars in the fields of political science, law, history, psychology, theology and criminology, have tried to define it, but it seems that there is no single definition.⁷ A conundrum, acknowledged by Mallison and Mallison, is created by the fact that since political scientists cannot agree on the physical reality of what 'terrorism' is, international lawyers do not have a factual definition upon which they can base a legal definition.⁸ Yet it is essential to define a concept that is considered a threat to international peace and security. It is also logically necessary to define 'terrorism' before analysing the lawful responses to it. There may never be one universally acceptable definition of the term 'terrorism'. However, entering into the "definitional quagmire"⁹ will at least provide an awareness of the difficulties which preclude consensus and will provide clarity on the main points of disagreement. An international legal definition will only be possible once those points of disagreement have been acknowledged, and, as far as possible, addressed.

Dictionary definitions

The Shorter Oxford English Dictionary defines terrorism as follows:¹⁰

Terrorism (*te-rōriz'm*). 1795. [- Fr. *terrorisme*, f. L. *terror*; see *-ism*.] A system of terror. 1. Government by intimidation; the system of the 'Terror' (1793-4); see *prec.* 2. gen. A policy intended to strike with terror those against whom it is adopted; the fact of terrorizing or condition of being terrorized 1798.

The Webster's New Twentieth Century Dictionary provides a similar definition:¹¹

ter'ror-ism, n. 1. a terrorizing; use of terror and violence to intimidate, subjugate, etc., especially as a political weapon or policy. 2. intimidation and subjugation so produced.

⁶ Baxter, R "A Sceptical Look at the Concept of Terrorism" (1974) 7 *Akron L. Rev.* 380.

⁷ "There is no consensus on the bounds of terrorism: some observers define as terrorism nearly every act of disruptive violence and ignore violence by established regimes; some scholars want psychopaths and criminals to be examined and others do not; and there are those who, defending a cherished cause, deny that their patriots are terrorists...No one has a definition of terrorism." Bower Bell, J "Trends in Terror: The Analysis of Political Violence" (1977) 29(3) *World Politics* 447 at 481.

⁸ "'Terror' and 'terrorism' are not words which refer to a well-defined and clearly identified set of factual events. Neither do the words have any widely accepted meaning in legal doctrine. 'Terror' and 'terrorism' consequently, do not refer to a unitary concept in either fact or law." Mallison, W and Mallison, S "The Concept of Public Purpose Terror in International Law: Doctrines and Sanctions to Reduce the Destruction of Human and Material Values" (1973) 18 *Howard Law Journal* 12.

⁹ Murphy, J *State Support of International Terrorism - Legal, Political and Economic Dimensions* (1989) 3-30; chapter one is titled "'International Terrorism': The Definitional Quagmire".

¹⁰ Little, W, Fowler, H, Coulson, J, and Onions, C (rev & ed) *The Shorter Oxford English Dictionary-on historical principles*, 3rd ed (1973) at 2268.

¹¹ Webster, N, McKechnie, J (rev) *Webster's New Twentieth Century Dictionary of the English Language Unabridged*, 2nd ed (1975) at 1884.

On the basis of the above definitions, five observations are made regarding the ordinary meaning of terrorism. Both definitions above give only a basic idea about the common understanding of the term. They do not include all the potential elements encompassed by the complicated formulae that have been compiled by scholars, governments, public and private institutions.

Secondly, the definitions suggest that the term ‘terrorism’ originated from the French word *terrorisme*, which was used to describe a period during the French Revolution known as the ‘Reign of Terror’ from approximately September 1793 to July 1794. However, when the term ‘terrorism’ is commonly used today, it refers to a more recent phenomenon, not to that particular historical period.

Thirdly, the *Shorter Oxford* definition states that terrorism can be used as intimidation by a government. Whilst many scholars agree that acts of terrorism can be committed by governments,¹² there are also arguments made by international organisations, governments, private institutions and scholars who regard terrorism as being restricted to acts carried out exclusively by non-state actors.¹³ Historically, terrorism was a type of behaviour perpetrated by *governments* against their *citizens*, whereas now it is more often regarded as a strategy directed against governments via the targeting of their citizens.

Fourthly, only the *Webster's* definition notes that acts of terrorism have political objectives; the *Shorter Oxford* does not mention this element, although its definition of a ‘terrorist’ provides greater clarity on this point.¹⁴ The political dimension of terrorism has been described by some as the ‘key characteristic’ of terrorism and that its recognition is critical to distinguishing it from other forms of violence.¹⁵ ‘Terrorism’ is generally understood to be intimidation with a political or ideological purpose: the terror is meant to cause others to do things that they would otherwise not do. This characteristic is what distinguishes terrorists from

¹² Chomsky, N *September 11* (2001) at 23 and 43-54 where he describes the US as a ‘leading terrorist state’; see Laquer, W *The Age of Terrorism* (1987); George, A *Western State Terrorism* (1991) and Zinn, H *Terrorism and War* (2002).

¹³ Report of the Secretary-General's High Level Panel on Threats, Challenges and Change “A more secure world: our shared responsibility” (2004) at 51-52: <<http://www.un.org/secureworld/report3.pdf>> (accessed 14 November 2006).

¹⁴ “Terrorist...1. As a political term: a. Applied to the Jacobins and their agents and partisans in the French Revolution. b. Any one who attempts to further his views by a system of coercive intimidation; spec. applied to members of one of the extreme revolutionary societies in Russia 1866. 2. An alarmist, a scaremonger 1803”: *The Shorter Oxford English Dictionary*, supra n10 at 2268.

¹⁵ “[T]he terrorist does not strike blindly and pointlessly, left and right, but rather plans his actions carefully, weighing his options and trying for the course of action that will best promote his objective at the lowest cost to himself”: Primoratz, I “What is Terrorism?” (1990) 7(2) *J. App.Phil.* (1990) 129-130, in Gearty, C (ed), *Terrorism* (1996) at 17-18; see also Hoffman, B *Inside Terrorism* (1998) at 14.

other non-state actors, such as pirates, who are motivated purely by personal material gain rather than achieving wider political or ideological objectives.

Finally, neither of these dictionary definitions mentions that ‘terrorism’ requires the targeting of civilians or non-combatants. As will be noted in the analysis below, many political and legal scholars consider that a terrorist act must necessarily be directed against a civilian target. It may be concluded that the ordinary definition of ‘terrorism’, as represented by these dictionaries, does not adequately describe the modern usage of the term.

Part A: Terrorism in historical perspective

Despite differences of opinion as to how ‘terrorism’ should be defined, there is general agreement that this is not a new phenomenon. Terrorism is often said to be as old as history itself.¹⁶ One of the earliest-known examples of a terrorist-type movement was the *sicarii*,¹⁷ a highly-organised religious sect consisting of men of lower orders active in the Jewish Zealot struggle in Palestine in around 66-73 AD.¹⁸ The *sicarii* used unorthodox tactics such as attacking their enemies by daylight, preferably on holidays when crowds congregated in Jerusalem. Their favourite weapon, from which their name was taken, was a short sword, a *sica*, which was kept hidden under their coats. They were an extremist, nationalist, anti-Roman party and their victims were the moderates, the Jewish peace party and Roman sympathisers.¹⁹ Some characteristics of the *sicarii* resonate with the acts of modern terrorists. For example, there was debate over whether the *sicarii* were robbers, out for personal gain and manipulated by outside forces, or whether they were a social protest movement, intent on inciting the poor to rise against the rich, inviting parallels with the modern ‘terrorism/freedom fighter’ distinction. There was an inclination among the *sicarii* to regard martyrdom as something joyful. They believed that after the fall of Jerusalem, the sinful regime would no longer be in authority and God would reveal Himself to His people and deliver them²⁰ – evincing a parallel with the political/religious motivations of many

¹⁶ Alexander, Y (ed) *International Terrorism: Political and Legal Documents* (1992) at ix; Erickson, R J *Legitimate Use of Military Force Against State-Sponsored International Terrorism* (1989) at 34. See also Marshall and Gurr, *supra* n2 at 62: “[T]errorism is as old as humanity.”

¹⁷ Latin plural of the word ‘sicarius’ meaning dagger, and later, contract-killer.

¹⁸ Laquer, *supra* n12 at 12.

¹⁹ *Ibid.*

²⁰ *Ibid* citing Josephus Flavius.

modern terrorists. What mattered most to the *sicarii* was not the action itself but the wider purpose behind it.²¹

The Assassins²² appeared in the eleventh century and were suppressed by the Mongols in the thirteenth century.²³ They were a Shi'ite sect originally based in Persia who later spread to Syria and who were opposed to the Sunni establishment. They killed political and religious leaders, including prefects, governors and caliphs. The vast majority of the Assassins' victims were Sunni Muslims. The first leader of the sect, Hassan Bin Sabbah,²⁴ realised that his group was too small to confront the enemy in open battle and thus he calculated that a planned, systematic, long-term campaign of terror carried out by a small, disciplined force could be a most effective political weapon.²⁵ Their *modus operandi* is described by Laquer:

*The Assassins always used the dagger, never poison or missiles, and not just because the dagger was considered the safer weapon: murder was a sacramental act...they courted death and martyrdom...*²⁶

The Assassins' asymmetric method of warfare was characterised by their utilisation of the surprise attack, their blending in and targeting of non-combatants and their religious/political motivations. Similarities between the medieval assassins and their modern counterparts have been noted elsewhere.²⁷ The use of the suicide attack is one that has recently struck a chord.²⁸ But there are also points of distinction: the Assassins attacked only the "great and powerful, and never harmed ordinary people going about their vocations."²⁹ Their goal was realised with the elimination of the individual concerned, whereas modern terrorism has a broader objective: the main target is usually *not* the particular individuals who are killed, rather, it is the intended demonstrative effect of the

²¹ Ibid at 335, n7.

²² The term 'assassin' is said to be derived from the Arabic word 'hashashin' (those who smoke hashish). It referred to the followers of this sect who apparently conducted their assassinations under the influence of hashish: ibid at 10-12.

²³ Lewis, B *The Assassins: A Radical Sect in Islam* (2003).

²⁴ Born in 1007 AD.

²⁵ See Laquer, supra n12 at 13; also Han, H *Terrorism & Political Violence: Limits and Possibilities of Legal Control* (1993) at 15; Murphy, supra n9 at p4; and Erickson, supra n16 at 34.

²⁶ Laquer, supra n12 at 13.

²⁷ Lewis, supra n23 at viii: "...[T]he Syrian-Iranian connection, the calculated use of terror, the total dedication of the assassin emissary to the point of self-immolation, in the service of his cause and in the expectation of heavenly recompense."

²⁸ The Assassins' strategy of stabbing political opponents at close range with a short dagger, virtually ensuring their own deaths, was noted as a parallel with modern Islamic terrorists' use of people as weapons: see "The Terror Industry Fields Its Own Weapons" *The New York Times*, Week in Review, 24 August 2003.

²⁹ Lewis, supra n23 at ix

killing on the wider social and political environment, including the foreign policy of the victims' government.³⁰

Scholars provide conflicting answers as to whether the Assassins were the first terrorists. Lewis opposes the Assassins being labelled the "first terrorists in history"³¹ yet he acknowledges that Hassan Bin Sabbah may well have invented a method of attack, which latterly became known as 'terrorism'.³² The Assassins were not the first group in history to employ the tactics of murder and tyrannicide but they may well have been the first group to use these tactics in an *organised, systematic and sustained program*, that had as its goal the defeat of the Seljuk state.

To complete this brief analysis of the historical origins of the term 'terrorism' a few observations are made regarding the 'Reign of Terror'. Both *The Shorter Oxford English Dictionary* and *Webster's New Twentieth Century Dictionary* refer to France in the late 1700s.³³ The 'Reign of Terror' which occurred during the French Revolution is the period from which the term 'terrorism' is etymologically derived.³⁴ The system of terror or *régime de la terreur* of 1793-94 had a positive connotation at that time and was of a domestic nature. Revolutionary France was threatened by the upper class emigrants, who were thought to have been conspiring with foreign rulers to invade the country. Treason at home, in support of this reactionary movement, was a clear and present danger. Therefore, the National Convention, led by the Jacobins, declared terror to be the solution, thereby giving legal sanction to a number of emergency measures.³⁵

The regime of terror was designed to consolidate the new government's power by intimidating counter-revolutionaries, subversives and all other dissidents whom the new regime regarded as 'enemies of the people'.³⁶ Approximately 300,000

³⁰ For a discussion of the interaction between the terms 'terrorism' and 'assassination', see Schmid, A *Political Terrorism: a research guide to concepts, theories, data bases and literature* (1983) at 57-63.

³¹ In the preface to the latest publication of his book, *The Assassins - A Radical Sect in Islam*, Lewis notes that an Italian translator of his book retained his subtitle and added "The First Terrorists in History" to the title. He commented that this was "not, by the way, a correct statement": Lewis, *supra* n23 at viii.

³² "Hasan [bin Sabbah] found a new way, by which a small force, disciplined and devoted, could strike effectively against an overwhelmingly superior enemy. 'Terrorism'...is carried on by a narrowly limited organization and is inspired by a sustained program of large-scale objectives in the name of which terror is practised. This was the method that Hasan chose - the method, it may well be, that he invented.": *ibid* at 130.

³³ *Supra* n10 and 11 respectively.

³⁴ Loomis, S *Paris in the Terror: June 1793-July 1794*, (1965) and Cobb, R *The People's Armies - The armées révolutionnaires: instrument of the Terror in the departments April 1793 to Floréal Year II*, Elliott, M (trans) (1987).

³⁵ "It is necessary that the terror caused by the guillotine spreads in all of France and brings to justice all the traitors. There is no other means to inspire this necessary terror which will consolidate the Revolution...": Schmid, *supra* n30 at 66.

³⁶ Hoffman, *supra* n15 at 15.

people were arrested during the Reign of Terror and 17,000-40,000 were officially executed while many died in prison or without a trial.³⁷ The purpose was to send a clear message to all who might oppose the revolution, or grow nostalgic for the old regime. In this sense, the campaign of terrorism that was carried out by Robespierre and the Jacobin government is an accurate reference point for the *Webster's* dictionary definition, which defines 'terrorism' as the use of terror "especially as a political weapon or policy".

The etymology of 'terrorism' gives rise to two observations. First, the meaning of 'terrorism' has undergone a transformation. During the Reign of Terror, a regime or system of terrorism was used as an instrument of governance, wielded by a recently established revolutionary **state** against the enemies of the people. Now the term 'terrorism' is commonly used to describe terrorist acts committed by **non-state or sub-national entities** against a state. From around 1848, terrorism in Europe and Russia was conceived by its exponents as comprising a kind of action against tyrannical rulers. A German radical democrat, Karl Heinzen, wrote an essay in which he set out the philosophical underpinnings of a policy of terrorism directed at tyrannical leaders.³⁸ He argued that while murder was forbidden in principle, this prohibition did not apply to politics, and the murder of political leaders might well be a 'physical necessity'. Heinzen was perhaps the first person to provide a fully-fledged doctrine of modern terrorism.³⁹

Thus, terrorism has undergone a transformation in *meaning* and *perception*. When the Jacobins used the word 'terror' to describe their regime, it had positive connotations, whereas modern commentators agree⁴⁰ that the word 'terrorism' is now perceived as an inherently negative, pejorative, term.⁴¹

The second observation regarding the etymology of 'terrorism' is that since its inception, the term has been linked with virtuous ideals such as justice, liberty, and morality. In 1794, Robespierre linked the goals of the Jacobin system of

³⁷ Ibid at 16; Schmid *supra* n30 at 66.

³⁸ Laquer *supra* n12 at 27-29.

³⁹ Ibid at 28.

⁴⁰ See Crenshaw, M *Terrorism and International Co-operation* (1989) at 5; Jenkins, B *The Study of Terrorism: Definitional Problems* (1980) at 10; Sick, G "The Political Underpinnings of Terrorism" in Kegley Jr, C (ed) *International Terrorism: Characteristics, Causes, Controls* (1990) at 52; Wilkinson, P "Terrorism", in Foley, M (ed) *Ideas that Shape Politics* (1994) at 189.

⁴¹ Barker, J *The No-Nonsense Guide to Terrorism* (2002) at 21-23.

terror with the objectives of the revolution.⁴² This idealism continued to be attached to ‘terrorism’ into the mid-1800s, even though a transition had occurred in the meaning of the term.⁴³ The connection between terrorism and its idealistic objectives continues today. Many organisations, officially considered as ‘terrorist organisations’, have chosen for themselves names which suggest that they are also idealistic.⁴⁴ Self-perception often differs from outsiders’ perceptions of their *raison d’être*.⁴⁵

The gulf that exists between the way that ‘terrorists’ see themselves and the way that others, particularly target governments, see them, is often explained by the well-worn dictum that ‘one man's terrorist is another man's freedom fighter’.⁴⁶ This cliché inevitably appears whenever the issue of defining terrorism is addressed. It represents the idea that terrorism is a *political* term, that it is often used by opponents of the terrorists’ motivating cause in an attempt to attach a ‘stigma to the ‘terrorist’, and it represents the idea that the meaning of ‘terrorism’ in a particular situation is *fluid*, in so far as a group or person might be labelled a terrorist at one point in time, but at another, they might be a legitimate representative of their people.⁴⁷ Schmid has warned against this corruption of the concept, caused by subjecting ‘terrorism’ to a double standard, based on definition power and an in-group/out group distinction.⁴⁸

The political, ideological or religious objective, which has been an integral aspect of terrorism since its inception (whether that be seen as having occurred with the Assassins in the Middle East or with the Jacobins in France) is what differentiates it from mere criminal violence which has no greater goal in mind and which is carried out for instant gratification.⁴⁹ Although it is important to be aware of the

⁴² Hoffman, *supra* n15 at 16.

⁴³ Stepniak-Kravchiski in 1884: “The terrorist is noble, terrible, irresistibly fascinating, for he combines in himself the two sublimities [sic] of human grandeur: the martyr and the hero”: Teichmann, J “How to Define Terrorism” (1989) 64 *Philosophy* 508.

⁴⁴ For example, the National Liberation Front, the National Liberation Army, the Palestine Liberation Front, the Basque Fatherland and Liberty, the Popular Liberation Army, the Lashkar-e-Tayyiba (Army of the Righteous), the Liberation Tigers of Tamil Eelam, the Shining Path and the Irish Republican Army. All of these groups have been categorised by the US Department of State as Foreign Terrorist Organisations (FTOs): US Department of State, *Patterns of Global Terrorism 2001* (2002), Appendix B. Their inclusion here should not be taken as an acknowledgement that these groups necessarily deserve to be categorised as FTOs.

⁴⁵ “We don’t see ourselves as terrorists because we don’t believe in terrorism. We don’t see resisting the occupier as a terrorist action. We see ourselves as mujhadeen [holy warriors] who fight a Holy War for the people”: Sheikh Muhammad Hussein Fadlallah, the spiritual leader of the Lebanese group Hezbollah, and presently a Member of the Lebanese Parliament. Hizbollah is categorised by the US Department of State as an FTO: *ibid* at Appendix B.

⁴⁶ Alternatively phrased as ‘one man's terrorist is another man's patriot’.

⁴⁷ During the Second World War, members of the French resistance were regarded as criminals; during the Algerian War, the French government called the resistance ‘terrorists’; Nelson Mandela was once famously labelled a ‘terrorist’ and Yasser Arafat, who was once branded in the US as a ‘terrorist’ was later received in the White House as a respectable Head of State: see Elagab, O *International Documents Relating to Terrorism* (1995) at iii and see Chomsky, N in Sterba, J (ed) *International Justice and Terrorism* (date).

⁴⁸ Schmid, *supra* n30 at 112.

⁴⁹ A fact that distinguishes piracy from terrorism.

political element, it is also vital to note that the UN Security Council and General Assembly frequently condemn acts of terrorism, regardless of their justifications and irrespective of their motives.⁵⁰

Part B: Political scholars' attempts to define 'terrorism'

The field of political science has produced many definitions of 'terrorism'. A scientific approach was adopted by Schmid who produced what has probably become the most comprehensive analysis of the definition. When he asked scholars to submit their definitions, he found that no single author's definition was universally acceptable to his or her colleagues. The highest response from the scholars was in the category that "there is no adequate definition".⁵¹ The most popular definition was favoured by only four of the 45 respondents.⁵² Since no single author's definition was acceptable to all, or even a majority, of respondents, Schmid identified a number of elements in each definition in order to determine whether there was some agreement. He discovered that there were 22 distinct elements within 109 definitions, which had been constructed over a 45-year span.⁵³ He then tried to reduce the 22 elements into one universally acceptable definition.⁵⁴ In an attempt to incorporate most of the elements, Schmid created a comprehensive but unwieldy definition.⁵⁵ Although this definition would be too cumbersome to be incorporated into a dictionary entry or a statute, Schmid demonstrated that this is a term that is very difficult to accurately define in just a few words.

Other political scholars have put forward more concise definitions which emphasise the elements they consider essential. Lacquer notes that terrorism aims

⁵⁰ For example, see S/Res/1269 (1999); S/Res/1456 (2003) Appendix 2H and see UNGA Res 49/60 (1994), Appendix 2I.

⁵¹ Schmid, *supra* n30 at 73, Table IV where ten of the 45 respondents to Schmid's questionnaire replied that there was no adequate definition. This was closely followed by the number of respondents who felt that their own definition of terrorism was the most adequate (nine out of 45 respondents).

⁵² That was E V Walter's definition, published in 1964, Schmid's paraphrasing of which ran to 29 lines: *ibid* at 121-122.

⁵³ From 1936-1981, *ibid* at 73-78, Table V.

⁵⁴ "Terrorism is a method of combat in which random or symbolic victims serve as instrumental target[s] of violence. These instrumental victims share group or class characteristics which form the basis for their selection for victimization. Through previous use of violence or the credible threat of violence other members of that group or class are put in a state of chronic fear (terror). This group or class, whose members' sense of security is purposively undermined, is the target of terror. The victimization of the target of violence is considered extra-normal by most observers from the witnessing audience on the basis of its atrocity; the time (e.g. peacetime) or place (not a battlefield) of victimization or the disregard for rules of combat accepted in conventional warfare. The norm violation creates an attentive audience beyond the target of terror; sectors of this audience might in turn form the main object of manipulation. The purpose of this indirect method of combat is either to immobilize the target of terror in order to produce disorientation and/or compliance, or to mobilize secondary targets of demands (e.g. a government) or targets of attention (e.g. public opinion) to changes of attitude or behaviour favouring the short or long-term interests of the users of this method of combat.": *ibid* at 111.

⁵⁵ Schmid described it as 'a rather long definition'. It includes 13 of the 22 elements that were identified but it also contains some new elements. It excludes violence against inanimate things and it demands the existence of a target of terror: *ibid* at 111-113.

to induce a state of fear, that it does not conform to humanitarian norms⁵⁶ and that it depends on publicity for its success.⁵⁷ Ganor emphasises that the essence of the activity is violence (or the threat of violence), it deliberately targets civilians and that it does so for political ends.⁵⁸ Theoretically, this definition would apply to governments (and their agencies and proxies) as well as to non-governmental groups and individuals. It excludes non-violent political actions such as protests, strikes, demonstrations and civil disobedience and it excludes violent actions against military and police forces. Therefore, acts of guerrilla warfare and urban insurrection would not be acts of terrorism, in so far as they are usually directed against military forces.

Erickson formulated his definition by reviewing three 'authoritative' versions, from the Vice President's Task Force on Combating Terrorism, the US Department of State and the US Department of Defense. He found that all three of the definitions provided by those agencies were flawed and he constructed his definition by combining the most accurate elements from each.⁵⁹ Erickson's definition does not confine itself to civilians or non-combatants, but it does emphasise the element of generating fear with wider political, social or ideological objectives.⁶⁰ His definition also explicitly requires the target of a terrorist attack to be a person, deliberately excluding attacks against property only. He rationalised that since property is inanimate, it cannot be subjected to feelings of terror. Ultimately, property put at risk must threaten a human being if it is to generate fear or terror - an essential element of terrorism.

Hoffman's definition incorporates what he regards as the five key elements of terrorism: it is political in its aims and motives; it uses or threatens to use violence; it is designed to have far-reaching psychological repercussions; it is conducted by an organisation with an identifiable chain of command or conspiratorial cell structure (whose members wear no uniform or identifying

⁵⁶ Terrorism (which Laquer says 'does not conform to humanitarian norms') must involve attacks against civilians/non-combatants. Presumably, 'terrorism' is limited to *only* these targets. Laquer did not clarify his position on this point in the article from which the definition was quoted.

⁵⁷ "Most experts agree that terrorism is the use or threat of violence, a method of combat or a strategy to achieve certain goals, that its aim is to induce a state of fear in the victim, that it is ruthless and does not conform to humanitarian norms, and that publicity is an essential factor in terrorist strategy": Laquer, W "Reflections on Terrorism" (1986) 64 *Foreign Affairs* 88.

⁵⁸ "Terrorism is the intentional use of, or threat to use violence against civilians or against civilian targets, in order to attain political aims.": Ganor, B "Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?", The International Policy Institute for Counter-Terrorism: <<http://www.ict.org.il>> (accessed 14 November 2006).

⁵⁹ "Terrorism is the unlawful use or threatened use of force or violence against individuals to generate fear with the intent of coercing or intimidating governments, societies, or individuals for political, social, or ideological purposes": Erickson, *supra* n16 at 28.

⁶⁰ It is unclear whether the reference to 'unlawful' in Erickson's definition refers to domestic or international law, or both.

insignia) and it is perpetrated by a sub-national group or non-state entity.⁶¹ The last two elements are contentious because they presume that acts of terrorism can only be carried out by non-state actors, thereby excluding governments and their agents. However, if a government instructed its agents to destroy a civilian aircraft to achieve a political objective, this would arguably be no less an act of 'terrorism' than if the aircraft had been destroyed by a sub-national group. The inclusion or exclusion of the state is a major point of divergence between scholars (and states) and this aspect of the definition will again become a focus of attention when the definitions provided by various governments are examined below.⁶²

In contrast, Wardlaw does not exclude state actors.⁶³ He defines terrorism according to the act itself, regardless of from where it originates. Nor does he emphasise the civilian/non-combatant aspect; he focuses on the use of fear to achieve political ends. Wardlaw believes that terrorism may be used by both insurgents and incumbent regimes and rather than being mindless, senseless or wanton, acts of terrorism are a means to an end: terrorists have firm goals in mind, however perverse these may seem to the terrorist's adversaries.⁶⁴

Conclusion regarding political commentators' definitions

A selection of political commentators' definitions of 'terrorism' have been quoted and commented upon. Schmid, Laquer, Ganor, Erickson, Hoffman and Wardlaw have arrived at different definitions, each based on their individual understanding of the concept of 'terrorism'. These six definitions could be added to, virtually *ad infinitum*, since every scholar who writes on the subject seems to offer their own description.⁶⁵ Schmid has already demonstrated that there are more than a hundred to choose from. The main points to note are, first, that modern terrorism has very little in common with its etymological origins and its historical

⁶¹ "...[T]errorism [is] the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change. All terrorist acts involve violence or the threat of violence. Terrorism is specifically designed to have far-reaching psychological effects beyond the immediate victim(s) or object of the terrorist attack. It is meant to instil fear within, and thereby intimidate, a wider 'target audience' that might include a rival or ethnic or religious group, an entire country, a national government or political party, or public opinion in general. Terrorism is designed to create power where there is none or to consolidate power where there is very little. Through the publicity generated by their violence, terrorists seek to obtain the leverage, influence and power they otherwise lack to effect political change on either a local or an international scale.": Hoffman, supra n15 at 43-44.

⁶² See discussion at Part C below, *infra* 44ff.

⁶³ "[T]he use, or threat of use, of violence by an individual or a group, whether acting for or in opposition to established authority, when such action is designed to create extreme anxiety and/or fear-inducing effects in a target group larger than the immediate victims with the purpose of coercing that group into acceding to the political demands of the perpetrators.": Wardlaw, G *Political Terrorism: Theory, Tactics and Counter-Measures* (1982).

⁶⁴ *Ibid* at 19.

⁶⁵ For more definitions see Schmid, supra n30 at 119-152; see also Shafritz, J, Gibbons, E and Scott, G *Almanac of Modern Terrorism* (1991) at part IV.

antecedents.⁶⁶ Second, it is difficult to define terrorism in any meaningful way because of its inherent political dimensions.⁶⁷ Terrorism is purportedly easier to describe than to define.⁶⁸ Third, despite the controversies over its definition, there do seem to be some elements of terrorism which are beyond, or almost beyond, controversy, such as its use of extreme fear to achieve political, ideological or religious objectives. But there is disagreement over other elements especially as to whether terrorism can be carried out by the state, or only by non-state actors, and whether it is limited to the deliberate targeting of civilians/non-combatants or whether acts of terrorism can also be carried out against military targets.

Part C: Domestic jurisdictions

Academics may argue over the exact formulation of a definition, and may choose to *describe* rather than to *define* the term, but governments must settle on reasonably concise definitions which capture all of the essential elements. This part focuses on definitions that have been employed in five domestic jurisdictions. It will become apparent that state legislatures are more inclined to define a 'terrorist act' than 'terrorism'. Reaching agreement on a definition of 'terrorism' at an international level is bound to be difficult given the number of definitions that abound at the domestic level.⁶⁹

New Zealand

Prior to the events of 11 September 2001, 'terrorism' had been defined in s 2 of the New Zealand Security Intelligence Act 1969.⁷⁰ An 'act of terrorism' for the purposes of immigration law was, and is, separately defined in the Immigration Act 1987.⁷¹ As a consequence of the events of 11 September, the New Zealand Government has produced a much more comprehensive definition of an 'act of terrorism' in the Terrorism Suppression Act 2002.⁷² The latter statute does not

⁶⁶ There is little if anything in common between the "Russian terrorists of the nineteenth century and Abu Nidal": Laquer, *supra* n58 at 88.

⁶⁷ "There is no such thing as terrorism pure and unadulterated, specific and unchanging, comparable to a chemical element; rather there are a great many terrorisms. Historians and sociologists are not in full agreement on what socialism or fascism was. It would be unrealistic to expect unanimity on a topic so close to us in time": *ibid.*

⁶⁸ The US Vice President's Task Force on Combating Terrorism concluded in 1986 that terrorism is "a phenomenon that is easier to describe than define". Others have drawn parallels between terrorism and pornography, quoting Associate Justice Potter Stewart of the US Supreme Court, who asserted (in relation to pornography) that he could not define it, but he knew it when he saw it.

⁶⁹ Comparing definitions across jurisdictions is a methodology that has been utilised by Evans, A and Murphy, J (ed), *Legal Aspects of International Terrorism* (1978) at 345-350 (comparing the former Czechoslovakia, Soviet Union, Mexico and the US); Murphy, *supra* n9 at 11-17 (comparing New Zealand, South Africa, Pakistan, the UK, Republic of Ireland and the US); and Adams, J *The Financing of Terror - How the groups that are terrorizing the world get the money to do it* (1986) at 6-10 (comparing Central Intelligence Agency, US Department of State and UK definitions).

⁷⁰ See Appendix 1.

⁷¹ *Ibid.*

⁷² Terrorism Suppression Act 2002, s 4, see Appendix 1. Note that the Terrorism Suppression Amendment Bill, 2007 No 105-1, which aims to amend the Terrorism Suppression Act 2002, is currently being considered by the Foreign Affairs, Defence and Trade Select

define ‘terrorism’ *per se*. Instead, it provides a detailed definition of a ‘terrorist act’ in s 5. There are three categories of ‘terrorist act’: an act that falls within s 5(2), any act against a specified terrorist convention, and a terrorist act in armed conflict.⁷³ It separately defines a ‘terrorist act in armed conflict’ and a ‘terrorist bombing’.⁷⁴

The New Zealand definition of a ‘terrorist act’ has at least five notable features. First, s 5(2) requires that the intention of the act is *either* to induce terror in a civilian population *or* to unduly compel a government or an international organisation to do or abstain from doing any act. Many political scholars begin from the premise that an essential feature of terrorism is the objective to cause terror, fear or anxiety. Both dictionary definitions referred to earlier defined ‘terrorism’ as involving the use of terror to intimidate.⁷⁵ Yet the New Zealand legislation envisages that an act could be a ‘terrorist act’ even if there was no intention to induce terror in a civilian population.

Secondly, the act must be carried out for the purpose of advancing an ideological, political or religious cause. This ‘political objective’ element is often included in political scholars’ definitions of ‘terrorism’ and it expands on the earlier definition of an ‘act of terrorism’ which referred only to ‘furthering an ideological aim’.⁷⁶

Thirdly, destruction of or damage to property can only be classified as a terrorist act if it was likely to result in one or more of the outcomes specified in s 5(3)(a), (b) or (c). That is, the destruction of or damage to property must have been intended to cause death or serious injury to one or more persons, or to cause a serious risk to the health and safety of a population or to cause serious interference with, or serious disruption to an infrastructure facility if that interference or disruption was likely to endanger human life. Damaging property without intending to cause one or more of these three outcomes on humans would

Committee. The closing date for public submissions was 18 May 2007. According to the Explanatory Note, the Bill aims to amend the 2002 Act to ensure that it is consistent with New Zealand’s obligations under the Charter of the United Nations and United Nations Security Council resolutions on terrorism. However, the definition of a terrorist act (s 5(1)) and a terrorist bombing (s 7) are not affected by the Terrorism Suppression Amendment Bill

⁷³ Ibid, s 5(2).

⁷⁴ Ibid, s 4 and s 7(1).

⁷⁵ Supra n10 and n11 and accompanying text.

⁷⁶ Immigration Act 1987 (NZ), s 2(1). Compare with the US state definitions discussed below which typically do not have an ‘ideological, political or religious objective’ element.

not be sufficient to satisfy the definition of a ‘terrorist act’. The test is whether the act was *intended to cause* harm to a person or population.

The fourth notable feature is the way in which bio-terrorism is defined. If an act is intended to cause the “introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country” and the intent is either to induce terror in a civilian population *or* unduly compel a government or international organisation to act, then that is sufficient in itself to qualify as a ‘terrorist act’.⁷⁷ There is no requirement that such an act was also intended to cause harm to a person or population. It is interesting that an act can be a ‘terrorist act’ even though it does not involve the use of violence. This is a departure from the previous definition⁷⁸ and is a point of differentiation from all six of the abovementioned political scholars’ definitions which require that force or violence be used to harm individuals or a population.⁷⁹

The fifth and final point is the separate definition of a ‘terrorist act in armed conflict’, as defined in s 4.⁸⁰ The separate definition of a ‘terrorist act in armed conflict’ as a sort of special type of ‘terrorist act’, allows for terrorist acts which occur in the course of an armed conflict to be covered by the legislation. However, if the act was in accordance with international humanitarian law, then it will not be deemed a ‘terrorist act’ by virtue of s 5(4). This definition implies that a state and its military or police forces could theoretically be found to have carried out terrorist acts if they target civilians during combat in order to intimidate a civilian population or compel a government or an organisation to act.⁸¹ It is submitted that this is a rather enlightened definition, allowing as it does for acts to be committed not only by individuals and sub-national groups but also by governments, and individuals acting on behalf of their governments in times of conflict, if the legal constraints on warfare, such as the targeting of civilians, are not observed.⁸²

⁷⁷ Terrorism Suppression Act 2002 (NZ), s 5(3)(e).

⁷⁸ New Zealand Security Intelligence Act 1969, s 2.

⁷⁹ Schmid stated that terrorism involved the use of civilians as ‘targets of violence’; Laquer said terrorism involved the ‘use or threat of violence, a method of combat or a strategy’; Ganor thought that it involved the ‘use of, or threat to use violence against civilian targets’; Erickson required the ‘use of force or violence against individuals’ whilst Hoffman also used the term ‘violence’ and Wardlaw used the phrase ‘use, or threat of use, of violence’.

⁸⁰ See Appendix 1.

⁸¹ Terrorism Suppression Act 2002 (NZ) s 4.

⁸² It would be possible to apply this definition to the use of force by other states outside New Zealand, such as, for example, the use of force by the Israeli Defence Forces against the civilian population in southern Lebanon in July 2006 which was intended, *inter alia*, to coerce the Lebanese Government into acting against the Hezbollah insurgents, and/or to intimidate the local civilian population into withdrawing its support for Hezbollah. The ramifications of the New Zealand legislation’s definition of a ‘terrorist act’ are yet to be seen.

Australia

The Suppression of the Financing of Terrorism Act 2002 (Cth) amended a number of other pieces of legislation, including the Criminal Code Act 1995 (Cth). A number of definitions pertaining to terrorism were thereby inserted into the Criminal Code, including a comprehensive definition of a ‘terrorist act’.⁸³ There are some obvious similarities between the Australian and New Zealand legislation. For example, both statutes define an *act* of terrorism rather than terrorism *per se*. Both definitions include a separate definition of a terrorist bombing, although they employ different formulations.⁸⁴ Both definitions have attempted to exclude genuine acts of protest or industrial action by specifically stating that these are not the sorts of acts that are being targeted by the legislation.⁸⁵ Both definitions require that a terrorist act be carried out for the purpose of advancing a political, ideological or religious cause - the wording is the same, with a slightly different ordering of those terms. In common with the New Zealand provision, the Australian legislation requires *either* an intention to intimidate the public *or* an intention to influence the Government, but not both.⁸⁶ Both definitions apply to persons or property beyond their respective jurisdictions.⁸⁷ Despite these similarities, there are at least three significant points of difference.

First, with regard to acts that damage property, the Australian definition does not require that there also be harm to human beings; the Australian definition allows for acts that cause serious damage to property to be called ‘terrorist acts’ even if there is no harm to people or a population.⁸⁸ Secondly, the Australian definition provides that acts which seriously interfere with, seriously disrupt or destroy an electronic system⁸⁹ are also to be considered as ‘terrorist acts’ if they meet the criteria in s 100.1(a), (b) and (c). Again, there is no need to show that such acts caused any deaths, or serious harm or injury to human beings. Thirdly, the

This aspect of the definition has been one of the major stumbling blocks to achieving a comprehensive convention on international terrorism, as discussed below at Part D below.

⁸³ See Appendix 2.

⁸⁴ Terrorism Suppression Act 2002 (NZ) s 7(1); compare with the Criminal Code (Cth) s 72.

⁸⁵ Terrorism Suppression Act 2002 (NZ) s 5(5); compare with the Criminal Code (Cth) s 100.1(3).

⁸⁶ Terrorism Suppression Act 2002 (NZ) s 5(2); compare with the Criminal Code (Cth) s 100.1(1)(c).

⁸⁷ Terrorism Suppression Act 2002 (NZ) s 5(2); compare with Criminal Code (Cth) s 100.1(4).

⁸⁸ Criminal Code (Cth) s 100.1(2); compare with Terrorism Suppression Act 2002 (NZ) s 5(3).

⁸⁹ Including but not limited to the systems listed in the Criminal Code (Cth) s 100.1(2)(f).

Australian legislation does not offer a specific definition for a ‘terrorist act in armed conflict’. It specifically protects members of its armed forces from prosecution whilst they are acting ‘in connection with the defence or security of Australia’. In the context of the other observations, it would appear that even two governments who share much in common will have notable differences of opinion over how best to define a ‘terrorist act’ and over whether or not it should, *inter alia*, apply to members of the armed forces acting on behalf of the state.

United Kingdom

The UK legislature has defined ‘terrorism’ in s 1 of the Terrorism Act 2000 (UK).⁹⁰ This definition preceded in time both the New Zealand and the Australian definitions of ‘terrorist act’ and it appears that the latter two jurisdictions have drawn upon it. The Terrorism Act 2000 (UK) reformed and extended the previous counter-terrorism legislation, which was originally designed to deal with terrorism primarily connected with the affairs of Northern Ireland.⁹¹ Whereas the previous legislation required the use of *violence*, the Terrorism Act 2000 (UK) does not.⁹² The definition of terrorism in the Terrorist Act 2000 (UK) refers to ‘the use or threat of *action*’, rather than the use or threat of *violence*.⁹³ The 2000 Act also extends terrorism beyond political motivations to include religious or ideological goals.⁹⁴ As with the New Zealand and Australian provisions, the UK legislation is not limited to acts that occur in the UK and the ‘public’ does not refer exclusively to the public of the UK.⁹⁵

One particularly interesting aspect of the UK definition of ‘terrorism’ is the provision in s 1(3) regarding actions that involve the “use of firearms or explosives”.⁹⁶ If an action (or threat of action) falls within s 1(2), and it involves the use of firearms or explosives,⁹⁷ then it will be deemed to be terrorism *even if* s 1(1)(b) is not satisfied (s 1(1)(b) requires that an action must be designed to influence the government or to intimidate the public). This is an insight into the

⁹⁰ Terrorism Act 2000 (UK) s 1 is set out in Appendix 3.

⁹¹ The previous legislation was the Prevention of Terrorism (Temporary Provisions) Act 1989 (UK), the Northern Ireland (Emergency Provisions) Act 1996 (UK) and the Criminal Justice (Terrorism and Conspiracy) Act 1998 (UK).

⁹² Prevention of Terrorism (Temporary Provisions) Act 1989 (UK) s 20 defined “terrorism” as “...[T]he use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.” Compare with the Terrorism Act 2000 (UK) s 1 which states that ‘terrorism’ means the “use or threat of action...”, not violence, and see s 1(2)(d) which creates an offence if the action is “designed seriously to interfere with or seriously to disrupt an electronic system.”

⁹³ ‘Act’ and ‘action’ include omissions: see Terrorism Act 2000 (UK) s 121.

⁹⁴ *Ibid*, s 1(1)(c).

⁹⁵ *Ibid*, s 1(4).

⁹⁶ *Ibid*, s 1(3).

⁹⁷ Firearms and explosives are defined in the Terrorism Act 2000 (UK) in s 121.

UK Parliament's conception of terrorism. Although this provision may have been aimed at ensuring the inclusion of assassinations of key individuals within the definition of 'terrorism', its effect could be much wider.⁹⁸ Many terrorist attacks (such as, for example, building, bus and suicide bombings) would involve the use of 'firearms or explosives'. Therefore, they would not be required to meet the prerequisites in s (1)(b). This changes the traditional conception of terrorism, as an act which is by nature designed to intimidate the public or influence governments. This definition has remained substantially in effect, despite the enactment of recent anti-terrorism legislation.⁹⁹

The Terrorism Act 2000 (UK) also provided a definition of a 'terrorist' as a person who has committed particular offences or who has been involved in the preparation, instigation or commission of acts of terrorism.¹⁰⁰ The list of terrorism offences in the 2000 Act is extensive and the types of prohibited acts are specific.¹⁰¹ This is interesting in that it suggests that defining terrorism *per se* is insufficient – acts of terrorism must also be individually prohibited. This point is underlined by the fact that further offences were recently added.¹⁰²

Canada

As a result of new anti-terrorist legislation in 2001,¹⁰³ Canada provides a definition of 'terrorist activity', 'terrorist offence' and 'terrorist group' in the Criminal Code 1985 (Can). In s 83.01(1)(a) of the Criminal Code, 'terrorist activity' includes offences that are proscribed by the ten UN conventions pertaining to terrorism.¹⁰⁴ 'Terrorist activity' is further defined in s 83.01(1)(b) with reference to its objectives and intended effects.¹⁰⁵ There are three main points which distinguish the Canadian from the New Zealand, Australian and UK legislation. First, the 'political motive' element is arguably broader in the Canadian legislation because it refers to an act that is committed "in whole or in

⁹⁸ See the Explanatory Notes to the Terrorism Act 2000 [15 August 2000]: <<http://www.opsi.gov.uk/acts/en2000/2000en11.htm>> (accessed 14 November 2006).

⁹⁹ The Anti-Terrorism, Crime and Security Act 2001 (UK) and the Prevention of Terrorism Act 2005 (UK) did not affect the definition of terrorism. The Terrorism Act 2006 (UK) made various changes including the addition of an offence of 'glorifying terrorism'.

¹⁰⁰ See the Terrorism Act 2000 (UK) s 40 for the definition of a 'terrorist'.

¹⁰¹ The terrorist offences are in ss 11 (membership), 12 (support), 15 (fund-raising), 16 (use or possession of money or property), 17 (funding arrangements), 18 (money laundering), 54 and 56 to 63 of the Terrorism Act 2000 (UK).

¹⁰² For example, the offence of encouragement of terrorism was included in s 1 of the Terrorism Act 2006 (UK); the offence of glorification of terrorism in s 1(3); dissemination of terrorist publications in s2, as well as the preparation of terrorist acts, and providing or receiving instruction or training.

¹⁰³ The Anti-Terrorism Act 2001 (Can) amended a number of other acts including the Criminal Code 1985 (Can).

¹⁰⁴ Criminal Code 1985 (Can) s 83.01(1)(a)(i) – (x) in Appendix 4.

¹⁰⁵ Ibid, s 83.01(1)(b).

part for a political, religious or ideological *purpose, objective or cause*”.¹⁰⁶ This differs from the phrase “advancing a political, religious or ideological *cause*”¹⁰⁷ adopted in New Zealand, Australia and the United Kingdom. The Canadian version would arguably have a wider application because a ‘purpose’ or an ‘objective’ might suggest a lesser degree of organisation or a more limited agenda than a ‘cause’. Secondly, the Canadian definition has a broader description of how the public might be intimidated. Terrorist activity includes activity that is intended to intimidate the public with regard to its security, *including its economic security*.¹⁰⁸ The latter phrase was not used in the other three jurisdictions.

Thirdly, the Canadian definition of ‘terrorist activity’ excludes acts or omissions that occur during an armed conflict, if those acts or omissions are in accordance with the customary international law or conventional international law, applicable to the conflict.¹⁰⁹ Furthermore, the activities undertaken by military forces of a state in the exercise of their official duties are excluded, “to the extent that those activities are governed by other rules of international law.”¹¹⁰ This suggests that ‘terrorist activity’ in Canada is essentially restricted to activity by non-state actors against civilians in times of peace, and that if the same kind of activity is carried out by the military during an armed conflict, then international humanitarian law applies, since that body of law ‘governs’ the armed forces during conflict.¹¹¹ The Canadian legislature considers the use of force by states against civilians as being adequately regulated by international humanitarian law and that domestic ‘terrorism’ laws ought to focus on attacks by non-state actors. This is a point which has been recently raised by the UN¹¹² and which has historically been the subject of disagreement between states.¹¹³

¹⁰⁶ Ibid, s 83.01(1)(b)(i)(A).

¹⁰⁷ See the Terrorism Suppression Act 2002 (NZ) s 5(2); see the Criminal code Act 1995 (Cth) s 100.1(1)(b), and see the Terrorism Act 2000 (UK) s1(1)(c) for the use of this phrase.

¹⁰⁸ Criminal Code 1985 (Can) s 83.01(1)(b)(i)(B).

¹⁰⁹ Criminal Code 1985 (Can) s 83.01(1)(b)(ii)(E).

¹¹⁰ This is the same wording that is used in Article 18 of the Draft Comprehensive Convention on International Terrorism: see *infra* at n239 and accompanying text.

¹¹¹ But note that the ‘military forces of a state in the exercise of their official duties’ does not explicitly state that those duties are being carried out during an armed conflict.

¹¹² Report of the Secretary-General’s High Level Panel on Threats, Challenges and Change, *supra* n13 at 51-52, para 159-164.

¹¹³ See discussion at Part D below regarding points of disagreement over the Draft Convention on International Terrorism.

United States

The final part of this comparative analysis concerns US state and federal attempts to define terrorism.¹¹⁴ The following analysis shows the degree of disagreement within one nation on how this concept should be defined. Definitions of ‘terrorism’ adopted by ten randomly-selected individual states can be separated into three categories: some states adopt the definition of terrorism in section 2331, Title 18 of the United States Code (USC),¹¹⁵ other states formulate their own definitions,¹¹⁶ and some states use both.¹¹⁷

The ‘crime of terrorism’ is commonly defined as a normal felony offence (such as, murder, manslaughter, kidnapping and robbery) with the additional special element of intent (intending to intimidate or coerce a civilian population, or influence the policy or affect the conduct of government).¹¹⁸ From state to state there are many differences in the detail and complexity of the legislation. Regarding intent, some states consider terrorism to be an act of violence which attempts to coerce a government into “granting illegal political and economic demands”¹¹⁹ whilst others are more vague and do not refer to the demands as being legal or illegal.¹²⁰ Most states include a provision that the intent is either to intimidate the civilian population *or* to coerce the government, but some only include the former.¹²¹ Some states require that a minimum number of people be ‘terrorised’.¹²² Others require a minimum number of businesses to be occupying a targeted building, or a minimum number of people to be living in a targeted building.¹²³

Some definitions are long and very specific as to the kinds of acts that are covered,¹²⁴ whilst others are short and generalise.¹²⁵ Some definitions specifically include acts which damage, interrupt or impair computer, telecommunications and

¹¹⁴ All the definitions referred to here are set out in Appendix 5A (US federal) and Appendix 5B (US state). A comprehensive list of each US state’s laws regarding terrorism can be accessed from the National District Attorneys Association (NDAA) website at: http://www.ndaa.org/pdf/key_elements_antiterrorism_statutes.pdf (accessed 13 June 2007).

¹¹⁵ For example, Massachusetts and Washington.

¹¹⁶ For example, Illinois, Michigan, New Jersey, Ohio and Virginia.

¹¹⁷ For example, California, Oklahoma and New York.

¹¹⁸ For example, see Michigan, New Jersey, New York, Ohio, Oklahoma and Virginia in Appendix 5B.

¹¹⁹ Oklahoma, see Appendix 5B.

¹²⁰ Ohio, New York, New Jersey and Michigan: *ibid*.

¹²¹ Illinois, *ibid*.

¹²² New Jersey: the crime of terrorism occurs when five or more people are terrorised.

¹²³ Illinois: an act of terrorism is an act that, *inter alia*, causes substantial damage to a building that contains five or more businesses of any type, or any building in which ten or more people reside.

¹²⁴ Illinois.

¹²⁵ New York.

transportation systems.¹²⁶ Some definitions stipulate that peaceful picketing and boycotts are excluded.¹²⁷ Some definitions appear to only apply to acts of terrorism committed outside the US¹²⁸ whereas other definitions include all acts, whether they are committed within or outside the state¹²⁹ or within or outside the US.¹³⁰ Some states separately define related terms, such as ‘crime of terrorism’, ‘terrorist activity’, ‘act of terrorism’, ‘terrorist’, ‘terror’ and ‘terrorise’ but only one of the ten US states examined here defines ‘terrorism’ *per se*.¹³¹ None of these particular US state legislatures provides a separate definition of ‘terrorism in armed conflict’ as in the New Zealand legislation, nor do any of these US states address the issue of whether the military forces during an armed conflict are exempt from prosecution under these terrorist provisions. Another notable point of difference between the US and other jurisdictions is that in both the state and federal legislation, there is commonly no provision which requires the terrorist to have the intention of advancing a political, religious or ideological cause. This may be due to the difficulty which might be created for prosecutors if such an element had to be proven.¹³²

What is clear from the above is that the definitions adopted by ten US states are both different from one another, and different from other national legislatures. The picture is further complicated when one considers that the US federal definition of terrorism is different from most of the states’ definitions,¹³³ and there are still more variants when one examines the various federal administrative attempts to define terrorism, such as the National Counterterrorism Centre’s adoption of the definition of ‘terrorism’ from Title 22 of the US Code.¹³⁴

¹²⁶ States which specifically include damage to electronic systems include Illinois and New Jersey.

¹²⁷ Virginia.

¹²⁸ Massachusetts, Washington, Oklahoma and New York.

¹²⁹ California.

¹³⁰ California and Ohio.

¹³¹ Oklahoma.

¹³² “[T]he breadth of a generic intent element would severely complicate the task of prosecutors, who would be required to prove beyond a reasonable doubt the presence of a particular political motivation. Consequently, this would leave the Government open to accusations of selective prosecution based on the political views of defendants. A separate but substantial problem would be the likely absence of a similar intent element in the penal law of extradition treaty partners, thus removing the factor of dual criminality, a prerequisite to extradition - and one must wonder what the point would be of an international terrorism offense for which the United States could not successfully request the extradition of suspected offenders”: Levitt, G “Is Terrorism Worth Defining?” (1986) 13 *Ohio Northern University Law Review* 97 at 113 (footnotes in original omitted).

¹³³ Section 2331, Title 18, United States Code (USC), see Appendix 5A. The USC separately defines ‘international terrorism’ and ‘domestic terrorism’.

¹³⁴ Various definitions have been adopted by the US Departments of Justice, State, Defence and Homeland Security. The NCTC, which was set up in 2004 and now produces annual reports on terrorist incidents (discussed in chapter 2) applies the definition of ‘terrorism’ that appears in 22 USC §2656f(d)(2), reproduced in Appendix 5A.

Conclusion

Five nations' efforts at enshrining a definition of 'terrorism' in legislation have been examined here. The similarities and differences between the legislation passed by each government (and between that passed by each state legislature in the case of the US), have been discussed. It is evident that there is neither consensus *between countries* on how to define terrorism nor is there even consensus *within* a single country (the US). This is a prescient conclusion given that the next part of this chapter examines international legal efforts to define terrorism.

Part D International legal definitions of 'terrorism'

There are currently 12 international, and nine regional, conventions or protocols regarding terrorism.¹³⁵ In addition, the International Convention for the Suppression of Acts of Nuclear Terrorism was open for signature and is now awaiting the required number of ratifications to enter into force¹³⁶ and a comprehensive convention on terrorism is currently being negotiated. Internationally, there is no consensus on a definition of terrorism. Nevertheless, international lawyers have made many attempts over the years to define it for the purposes of drafting international laws to suppress it. Those attempts are briefly outlined below.

Pre-World War II efforts to define 'terrorism'

The first international attempt to address the legal definition of 'terrorism' occurred in the late 1920s and early 1930s, in response to an increase in terrorist activity following World War I. A series of meetings was held under the auspices of the International Conference for the Unification of Penal Law, in various European capitals. The meetings were attended by delegations representing states, intergovernmental and private international organisations.¹³⁷ The term 'terrorism' was expressly used for the first time in an international penal

¹³⁵ See Appendix 6. The International Convention for the Suppression of Acts of Nuclear Terrorism is not listed therein because it has not yet come into force.

¹³⁶ It was open for signature until 31st December 2006. As at 10 April 2007, there were 100 signatories and 17 ratifications. It will enter into force upon the 22nd ratification: www.un.org/sc/ctc/law.shtml (accessed 1 May 2007).

¹³⁷ The first Conference was held in Warsaw (1-5 November 1927); the second in Rome (21-25 May 1928); the third in Brussels (26-30 June 1930); the fourth in Paris (27-31 December 1931); the fifth in Madrid (14-20 October 1934) and the sixth in Copenhagen (31 August - 3 September 1935): see Franck, T and Lockwood Jr, B "Preliminary Thoughts Towards an International Convention on Terrorism" (1978) 68 AJIL 69.

instrument at the Third (Brussels) International Conference for the Unification of Penal Law in 1930.¹³⁸

Moves to prohibit terrorism intensified with the assassination of King Alexander of Yugoslavia and Mr Louis Barthou, the Foreign Minister of the French Republic, at Marseilles on 6 October 1934. Following the assassination, the French Government submitted to the Council of the League of Nations a memorandum on bases for an agreement with a view to the suppression of terrorism. A committee of experts set up under a Council resolution met in April-May 1935 and in January 1936 and prepared a draft convention.¹³⁹ In addition, the Sixth Conference in the Unification of Penal Law series, held in Copenhagen in 1935, adopted a model penal provision on terrorism. The key articles covered a series of acts including wilful acts directed against the life, physical integrity, health and freedom of various officials, wilful destruction of public buildings, wilful use of explosives in a public place, or any other wilful act which endangered human lives and the community, where any of those acts “has endangered the community or created a state of terror calculated to cause a change in or impediment to the operation of the public authorities or to disturb international relations.”¹⁴⁰

Pre-war efforts to define and prohibit terrorism culminated in Geneva on 16 November 1937 when the League of Nations Convention for the Prevention and Punishment of Terrorism was opened for signature.¹⁴¹ Article 1(2) states:

In the present Convention, the expression "acts of terrorism" means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons of the general public.

The ‘criminal acts’ referred to in Article 1(2) were listed in Article 2. Conspiracy, incitement, or assistance to commit the criminal acts were also prohibited, by virtue of Article 3. Thus, ‘acts of terrorism’ included any wilful act causing death

¹³⁸ Held from 26th-30th June 1930: Study prepared by the Secretariat for the Sixth Committee, “Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardises Fundamental Freedoms, And Study of the Underlying Causes Of Those Forms of Terrorism And Acts Of Terrorism And Acts of Violence Which Lie In Misery, Frustration, Grievances and Despair And Which Cause Some People to Sacrifice Human Lives, Including Their Own, In an Attempt to Effect Radical Changes”, UN Doc. A/C.6/418 (1972) at 11-12.

¹³⁹ See “Proceedings of the International Conference on the Repression of Terrorism”, League of Nations Doc. C.94.M.47.1938.V (1938.V.3) at 49-50.

¹⁴⁰ Sixth International Conference for the Unification of Penal Law, Copenhagen, 31 August-3 September 1935, quoted in Levitt, *supra* n134 at 98.

¹⁴¹ Convention for the Prevention and Punishment of Terrorism, 19 League of Nations OJ 23 (1938); League of Nations Doc. C.546(I).M383(I).1937.V. (1938) (16 November 1937). The Convention is reproduced in Hudson, M *International Legislation - A collection of the texts of multipartite international instruments of general interest*, Vol VII 1935-1937 (1972) at 862-878.

or grievous bodily harm to heads of state, their wives or husbands, and persons holding public positions when the act was directed against them in their public capacity.¹⁴² As for prosecution, the Committee of Experts also drafted a Convention for the Creation of an International Criminal Court.¹⁴³ The proposed Court was to have been given jurisdiction to prosecute persons accused of offences under the Convention for the Prevention and Punishment of Terrorism.¹⁴⁴ Contracting Parties would have been given the choice of either prosecuting alleged terrorists in their own courts or committing the accused for trial to the International Court.¹⁴⁵

Although the Convention was signed by 23 states,¹⁴⁶ it was only ratified by India¹⁴⁷ and acceded to by Mexico. The breadth of the definition of ‘terrorism’ may have contributed to its ultimate failure.¹⁴⁸ The UK apparently declined to ratify it “due to an anticipation of the difficulty of framing the relevant domestic legislation.”¹⁴⁹ The Convention never entered into force.

Conventions related to air hijacking - 1960s and early 1970s

The international community's attention to the problem of suppressing terrorism was reactivated in the 1960s when a spate of airline hijackings prompted both the UN and the International Civil Aviation Organisation (ICAO) to act. Incidents involving the forcible seizure of aircraft had occurred in isolated instances in the 1940s and 1950s, but modern hijacking, on a large scale, began in 1961.¹⁵⁰ The first reaction to this type of terrorist activity was the signing of the Convention of Offences and Certain Other Acts Committed Onboard Aircraft.¹⁵¹ This

¹⁴² Ibid, Art 2(1).

¹⁴³ Convention for the Creation of an International Criminal Court, 19 League of Nations O.J. 23 (1938); League of Nations Doc. C.546(I).M.383(I).1937.V (1938) (16 November 1937), opened for signature at Geneva on 16 November 1937, reproduced in Hudson, supra n141 at 878-893.

¹⁴⁴ See Article 1 of the Convention for the Creation of an International Criminal Court, *ibid*.

¹⁴⁵ Ibid, see Article 2.

¹⁴⁶ Albania, Argentine Republic, Belgium, India, Bulgaria, Cuba, Dominican Republic, Egypt, Ecuador, Spain, Estonia, France, Greece, Haiti, Monaco, Norway, Netherlands, Peru, Romania, Czechoslovakia, Turkey, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

¹⁴⁷ On 1 January 1941.

¹⁴⁸ Dugard, “Toward the Definition of International Terrorism” Proceedings of the American Society of International Law (1973) 67 *AJIL* 94.

¹⁴⁹ Franck and Lockwood, supra n137 at 70.

¹⁵⁰ On 1 May 1961, a Cuban, Antulio Ramirez Ortiz, diverted a National Airlines plane and forced the pilot to land in Havana. This incident probably marked the beginning of an era in the 1960s and 1970s plagued by this phenomenon: see von Glahn, *G Law Among Nations - An introduction to public international law*, 6th ed (1992) at 332; see also Horlick, G “The Developing Law of Air Hijacking” (1971) 12 *Harv. Int'l L.J.* 33, n1.

¹⁵¹ Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September 1963; see Appendix 6.

Convention prohibited the unlawful seizure of aircraft.¹⁵² It did not mention the word ‘terrorism’ or any similar term.

During the late 1960s there was a significant increase in the number of air hijackings.¹⁵³ This prompted the ICAO to draft an updated agreement, which resulted in the Convention for the Suppression of Unlawful Seizure of Aircraft.¹⁵⁴ It rendered air hijackings a distinct, separate crime and also provided that the state in which the alleged offender was found had to either extradite or prosecute.¹⁵⁵ A further convention regarding aircraft was concluded in 1971.¹⁵⁶ As with the previous two conventions, ‘terrorism’ was not specifically mentioned and the enforcement mechanisms for extradition and prosecution of offenders were weak. Therefore, the ICAO convened a meeting in Washington D.C. in September 1972 with the aim of considering a convention which would provide penalties for countries which did not comply with the rules in the existing conventions. However, the proposals were all voted down when the ICAO assembly met in Rome in August-September 1973.¹⁵⁷ The strengthening of the three air-hijacking conventions did not take place until 1988, when the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation was concluded in Montreal.¹⁵⁸

There were also a number of bilateral and regional agreements complementing those international instruments¹⁵⁹ but all of those documents were only concerned with one particular type of terrorist activity, air hijacking. A definition of ‘terrorism’ was not specifically addressed in any of them.

Regional and Multilateral Conventions related to terrorism - 1970s

Attempts to suppress terrorism continued throughout the 1970s in a piecemeal fashion. The UN issued its Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Between States in 1970 which

¹⁵² Article 11 provides: “1. When a person onboard has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed...”

¹⁵³ There were 30 instances in 1968 and 81 in 1969: von Glahn, *supra* n150 at 333.

¹⁵⁴ Convention for the Suppression of the Unlawful Seizure of Aircraft, 16 December 1970, see Appendix 6.

¹⁵⁵ Article 7.

¹⁵⁶ Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, see Appendix 6.

¹⁵⁷ See von Glahn, *supra* n150 at 333-34.

¹⁵⁸ Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971; done at Montreal on 24 February 1988, in force on 6 August 1989; 27 ILM 627 (1988).

¹⁵⁹ See von Glahn, *supra* n150 at 334-41.

provided, *inter alia*, that each state had the duty to refrain from encouraging the organisation of armed bands, irregular forces and mercenaries for incursion into the territory of another state, and that each state had a “duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.”¹⁶⁰

The Organisation of American States (OAS) adopted the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance.¹⁶¹ That instrument was aimed mainly at the kidnapping of diplomats. Although the word ‘terrorism’ was used in the Convention, it was not defined.¹⁶² With similar objectives, the UN General Assembly adopted the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents.¹⁶³ This Convention listed five offences against ‘internationally protected persons’ which each State Party was obliged to make a crime under its internal law. ‘Terrorism’ was not mentioned in this document. Another instrument was the International Convention against the Taking of Hostages, which continued the UN's piecemeal approach to the problem of legislating against terrorist-like activities.¹⁶⁴ It referred to the crime of hostage-taking as a “manifestation of international terrorism”,¹⁶⁵ but it was concerned with making this *particular* activity unlawful, rather than tackling terrorism generally.

One further document of note was the Council of Europe's Convention on the Suppression of Terrorism.¹⁶⁶ Its adoption was prompted by a desire to “take effective measures”¹⁶⁷ against the increase in acts of terrorism and to prosecute and punish perpetrators of such acts. This Convention was mainly concerned with

¹⁶⁰ UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Between States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV) of 24 October 1970, UN GAOR, 25th Sess., Supp. 28, p121, UN Doc. A/8028 (1971).

¹⁶¹ OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, see Appendix 6.

¹⁶² The preamble stated that the OAS General Assembly “strongly condemned acts of terrorism, especially the kidnapping of persons and extortion in connection with that crime”.

¹⁶³ UN Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, adopted on 14 December 1973; entered into force on 20 February 1977; UNTS vol. 1035, No 15410.

¹⁶⁴ UN International Convention against the Taking of Hostages, adopted on 17 December 1979; entered into force on 3 June 1983; UNTS vol 1316, No 21931.

¹⁶⁵ See paragraph 5 of the preamble, which stated that it was necessary to develop international co-operation in devising and adopting effective measures for the “prevention, prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism.”

¹⁶⁶ European Convention on the Suppression of Terrorism, done at Strasbourg on 27 January 1977; entered into force on 4 August 1978; UNTS vol. 1137, No 17828.

¹⁶⁷ *Ibid*, at paragraphs 3 and 4 of the preamble.

facilitating the extradition of persons who had committed terrorist-like crimes. It did not define ‘terrorism’ but it was implied that all five of the categories of acts referred to in Articles 1 and 2 were *acts* of terrorism.¹⁶⁸ Thus, one commentator has observed that the European Convention “represents a legal ‘definition’ of terrorism as an enumerated series of specific criminal acts”¹⁶⁹ even though there was no linkage of the acts via common characteristics or elements such as intent or motive, identity of the act or identity of the victim.

Early efforts towards an international convention on terrorism¹⁷⁰

The international instruments referred to above were evidence of the international community's desire to address the increasingly prevalent problem of terrorism. However, the regional and multilateral documents adopted during the 1970s represented a piecemeal approach. Although many of the instruments used the word ‘terrorism’ (usually only in the title and/or the preamble) they did not attempt to *define* it, instead opting to criminalise a range of acts, on a convention-by-convention basis. On 18 December 1972, the UN General Assembly on the recommendation of the Sixth Committee, decided to establish an Ad Hoc Committee on Terrorism.¹⁷¹ The Ad Hoc Committee's objectives were to define international terrorism, to study the underlying causes of terrorism and to agree on recommendations for an international document aimed at the prevention of terrorism.¹⁷² Differences of opinion emerged between various factions within the Ad Hoc Committee, particularly over the need to preserve the right of self-determination and the issue of whether states and their military forces could be held responsible for acts of terrorism. The Non-Aligned Group proposed a definition of international terrorism, which would have specifically preserved the “inalienable right to self-determination and independence of all peoples under colonial and racist regimes”¹⁷³ implying that the use of force, which might otherwise be considered terrorism, could be justified in some instances.

¹⁶⁸ Ibid, Article 1, which listed any offence within the scope of the Hague or Montreal Conventions as offences, as well as offences that involved kidnapping, the taking of hostages, offences involving bombs, grenades and rockets.

¹⁶⁹ Levitt, *supra* n132 at 103.

¹⁷⁰ For a more detailed account of the Ad Hoc Committee process and the 1972 Draft Convention, see Lambert, *supra* n1 at 29-39; also Murphy, *supra* n9 at 5-8.

¹⁷¹ See UN Doc. A/8969 (1972) regarding the Sixth Committee's recommendations to establish an Ad Hoc Committee on Terrorism; see GA Res. 3034, 27 UN GAOR Supp. (No 30) at 119, UN Doc. A/Res/3034 (1972), paragraphs 9 and 10 regarding the establishment and objectives of the Ad Hoc Committee.

¹⁷² For a detailed account of the Ad Hoc Committee's study of international terrorism, see Franck and Lockwood, *supra* n139.

¹⁷³ See 28 UN GAOR Supp. (1973). The ‘Non-Aligned Group’ included the Arab states, China and a block of African states: see discussion in Murphy, *supra* n9 at 5.

On 25 September 1972, the US introduced a Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism in the Sixth Committee of the General Assembly.¹⁷⁴ The word ‘terrorism’ did not appear anywhere in the operative text, instead, the neutral phrase ‘offense of international significance’ was employed. It virtually defined international terrorism as an act that met four conditions: the act had to be committed or take effect outside the territory of a state of which the alleged offender was a national; the act had to be committed or take effect outside the state against which the act was directed; the act could not be committed by or against a member of the armed forces of a state in the course of military hostilities and the act had to be intended to damage the interests of or obtain concessions from a state or an international organisation.¹⁷⁵ The US - in contrast to the Non-Aligned states – did not consider that a state’s armed forces could commit acts of terrorism. The Libyan representative described the US’ initiative as “a ploy...against the legitimate struggle of the people under the yoke of colonialism and alien domination”.¹⁷⁶ The disagreement over the meaning of ‘terrorism’ reflected much deeper ideological differences between Western states and developing states on the permissible use of violence, especially with regard to national liberation. Due to the failure of the international community to agree on a definition of ‘terrorism’, a comprehensive convention was unattainable. Therefore, the UN and regional organisations resorted to a piecemeal approach which resulted in a set of international laws that covered acts of terrorism, without having to address what the term ‘terrorism’ meant.

Regional and multilateral instruments - 1980s

During the 1980s, the UN’s methodology of criminalising particular acts of terrorism continued to prevail. Two UN conventions,¹⁷⁷ two UN protocols¹⁷⁸ and one regional convention were adopted.¹⁷⁹ These instruments created criminal,

¹⁷⁴ Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism (Draft Convention to Prevent the Spread of Terrorist Violence), UN Doc. A/C.6/L.850 (1972).

¹⁷⁵ Ibid.

¹⁷⁶ See Murphy, "United Nations Proposals on the Control and Repression of Terrorism" in Bassiouni, M (ed) *International Terrorism and Political Crimes* (1975) at 493-499.

¹⁷⁷ The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation Rome on 10 March 1988, entered into force on 1 March 1992; IMO Doc. Sua/Conf/15; 27 ILM 668 and the Convention on the Physical Protection of Nuclear Material IAEA Doc. C/225; 1456 UNTS 101; 18 ILM 1419 (3 March 1980).

¹⁷⁸ Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation (discussed above) and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf Rome on 10 March 1988, entered into force on 1 March 1992; IMO Doc. Sua/Conf/16/Rev.1; 27 ILM 685.

¹⁷⁹ The States of the South Asian Association for Regional Cooperation (SAARC) adopted the Regional Convention on Suppression of Terrorism in Kathmandu on 4 November 1987, entered into force on 22 August 1988, reprinted in UN Doc. A/51/136.

extraditable offences in respect of terrorist-like activities.¹⁸⁰ The term ‘terrorism’ was used sparingly in these instruments and none of them offered a definition of it.¹⁸¹ Although these conventions can loosely be described as ‘anti-terrorist’, the acts they covered were criminalised regardless of whether the actors involved had a wider *political, religious or ideological objective* in carrying out the prohibited acts.¹⁸²

In addition to the abovementioned conventions and protocols, several UN General Assembly Resolutions were passed condemning terrorism.¹⁸³ General Assembly Resolution 40/61 was adopted by consensus on 9 December 1985 in the immediate aftermath of the *Achille Lauro* hijacking.¹⁸⁴ The General Assembly “unequivocally condemn[ed], as criminal acts, all methods and practices of terrorism wherever and by whomever committed.”¹⁸⁵ The resolution hinted at a possible definition of ‘terrorism’ when it referred to acts that “endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings”.¹⁸⁶

A notable shift had occurred in the General Assembly’s attitude towards terrorism between 1972 and 1985. In 1972, the focus was on the need to study the underlying causes of terrorism, rather than condemning it outright.¹⁸⁷ By contrast, in 1985 the General Assembly may have ‘reaffirmed the inalienable right to self-determination’ but it specifically limited that right by demanding that the struggle of national liberation movements be “in accordance with the purposes and principles of the Charter and of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States”.¹⁸⁸ The latter document, discussed above, explicitly prohibits recourse to terrorism.

¹⁸⁰ For example, Article 7(e)(i) of the Convention on the Physical Protection of Nuclear Material created the offence of threatening “to use nuclear material to cause death or serious injury to any person or substantial property damage...in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act.”

¹⁸¹ ‘Terrorism’ appears in the preamble of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation but not in the body of the Convention (see paragraphs 4, and 8-10 of the preamble) and it does not appear at all in the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

¹⁸² Murphy, *supra* n9 at 8.

¹⁸³ For compilations of terrorism instruments see Bassiouni, M *International Terrorism: Multilateral Conventions (1937-2001)* (2001); Elagab, *supra* n48 and UN *International Instruments related to the Prevention and Suppression of International Terrorism* (2001).

¹⁸⁴ GA Res 40/61, 40 UN GAOR Supp. (No 53) at 301, UN Doc. A/40/53 (1985) also in 25 ILM 239 (1986).

¹⁸⁵ General Assembly Resolution 40/61 (1985), Article 1.

¹⁸⁶ *Ibid.*, para 4 of the preamble.

¹⁸⁷ GA Res. 3034 (XXVIII) of 18 December 1972, UN GAOR, 27th Sess., Supp. 30, UN Doc A/9730 (1973).

¹⁸⁸ See paragraphs 7-8 of GA Res. 40/61 (1985).

In 1987, the General Assembly adopted resolution 42/159. It was another significant development because the draft resolution had called for the convening of an international conference which would define the difference between terrorism and the legitimate right of oppressed peoples to fight for freedom. The draft resolution was not adopted. Instead, the resolution that was adopted called upon the Secretary-General to seek the views of members on international terrorism in all its aspects and on ways to combat it. In addition, the resolution contained another unequivocal condemnation of terrorism, without referring to terrorism by colonial, racist or alien regimes, as it had done in the 1970s.

Regional and multilateral instruments - 1990s

Multilateral instruments

During the 1990s, four relevant UN conventions were adopted: the Convention on the Making of Plastic Explosives for the Purpose of Detection;¹⁸⁹ the Convention on the Safety of United Nations and Associated Personnel;¹⁹⁰ the International Convention for the Suppression of Terrorist Bombings¹⁹¹ and the International Convention for the Suppression of the Financing of Terrorism.¹⁹²

The first convention was aimed at ensuring plastic explosives were appropriately marked for ease of identification, in order to improve detection and prevent plastic explosives from being employed in terrorism.¹⁹³ Although concern was expressed in the preamble about the use of plastic explosives in terrorist acts, the word ‘terrorism’ and ‘terrorist acts’ were not defined. The second convention aimed at improving the protection of UN and associated personnel. Although it did not state that it aimed to protect such persons from terrorist acts – and the term ‘terrorism’ was not used – it would appear that acts of terrorism were the focus. This Convention criminalised certain acts and provided for the trial or extradition of offenders.¹⁹⁴ However, there was no legislative requirement that the criminal acts be carried out in pursuance of a political or ideological objective. The third

¹⁸⁹ Convention on the Making of Plastic Explosives for the Purpose of Detection, signed on 1 March 1991, entered into force on 21 June 1998; UN Doc S/22393/Corr.1; also 30 ILM 721.

¹⁹⁰ Convention on the Safety of United Nations and Associated Personnel, adopted on 9 December 1994, entered into force on 15 January 1999; UN Doc A/Res/49/59, Annex.

¹⁹¹ International Convention for the Suppression of Terrorist Bombings, UNGA Doc A/RES/52/164; adopted by the General Assembly on 15 December 1997 at New York; entered into force on 23 May 2001, UN Doc A/Res/52/164.

¹⁹² International Convention for the Suppression of the Financing of Terrorism, adopted on 9 December 1999, entered into force on 10 April 2002; UNGA Doc A/54/109.

¹⁹³ See the preamble to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, especially paragraphs 2-4.

¹⁹⁴ Prohibited acts are set out in Article 9 and include murder, kidnapping and violent attacks.

convention was prompted by the realisation that terrorist attacks by means of explosives and similar devices were becoming increasingly prevalent and that the existing multilateral legal provisions did not adequately address the problem.¹⁹⁵ The Terrorist Bombings Convention sought to provide effective and practical measures for the prevention of acts of terrorism, as well as for the prosecution and punishment of perpetrators. A list of definitions was provided in Article 1, including the definition of the ‘military forces of a state’, but the Convention did not define ‘terrorism’ or a ‘terrorist bombing’. This conspicuous omission suggests that ‘*terrorist bombing*’ is just as difficult to define as ‘*terrorism*’, since a definition was provided for the ‘bombing’ aspect of this phrase (an ‘explosive or other lethal device’ is defined in Article 1(3)). It is indicative of the UN’s difficulties in defining ‘terrorism’ that this convention was called the International Convention for the Suppression of Terrorist Bombings, but the term ‘terrorist bombing’ is nowhere to be found in the text itself. Significantly, the Terrorist Bombings Convention does not apply to the activities of military forces of states during an armed conflict, which are governed by other rules of international law.¹⁹⁶ That exclusion prompted several declarations from states.¹⁹⁷

The fourth convention was the Terrorism Financing Convention.¹⁹⁸ Unlike the others, this instrument contains what might be interpreted as a definition of an act of terrorism in Article 2(1)(b). This Convention defines an act of terrorism as *either* an offence against one of the existing ‘anti-terrorism’ conventions (Article 2(1)(a)), *or* any other act which aims to kill or injure a civilian or non-combatant with the purpose of intimidating a population or compelling a government or international organisation to act (Article 2(1)(b)). The definition excludes attacks on military personnel, but theoretically includes both state and non-state actors as persons who can potentially commit an offence. It is interesting to note that there must be an intention to cause death or bodily harm – damage to property alone is insufficient. There is no requirement that the act be committed in furtherance of a political or ideological cause.

¹⁹⁵ International Convention for the Suppression of Terrorist Bombings, *supra* n191, preamble.

¹⁹⁶ See the last paragraph to the preamble of the International Convention for the Suppression of Terrorist Bombings, *supra* n197; see Article 1(4) and Article 19.

¹⁹⁷ See the declaration made by Cuba that this Convention applies to the armed forces of one state against another state. See also the declarations of Germany (that ‘military forces’ also means ‘police forces’), Israel (that military, police and security forces are all excluded but civilians who direct military forces are not) and the US regarding the meaning of ‘military forces of a State’: <<http://untreaty.un.org.ezproxy.waikato.ac.nz:2048/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>> (accessed 25 August 2006).

¹⁹⁸ International Convention for the Suppression of the Financing of Terrorism, *supra* n192.

Although the UN General Assembly adopted the Terrorist Bombings Convention in 1997, and the Terrorism Financing Convention in 1999, which are both now in force,¹⁹⁹ gaps in the international anti-terrorism legislation remained. Neither of these instruments provided a comprehensive definition of the term ‘terrorism’ and difficulties arose over the extent to which states and their military forces should be excluded from their provisions. The depth of division is evident from the declaration made by Pakistan when it acceded to the Terrorist Bombing Convention.²⁰⁰

The Terrorist Bombing Convention has attracted widespread support from states.²⁰¹ Pakistan was the only state to lodge a declaration preserving the right of oppressed peoples to use armed struggle in resisting foreign occupation or domination; significantly, Pakistan’s declaration prompted objections from 18 states.²⁰² However, the four regional conventions, discussed below, suggest that many African and Arab states hold similar views to that expressed by Pakistan, and it may be implied that many states still hold the view that ‘terrorism’ does not include acts of armed struggle by oppressed peoples.

Regional instruments – 1990s

Four anti-terrorism instruments were adopted by regional organisations in the 1990s. The Arab Convention on the Suppression of Terrorism (the ‘Arab Convention’) was the first comprehensive attempt by Arab states to legislate collectively against terrorism.²⁰³ The Arab Convention set out a definition of ‘terrorism’ in Article 1.²⁰⁴

¹⁹⁹ The Terrorist Bombings Convention came into force on 23 May 2001; the Terrorism Financing Convention came into force on 10 April 2002.

²⁰⁰ “The Government of the Islamic Republic of Pakistan declares that *nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law*”: (emphasis added). Pakistan acceded to the Terrorist Bombing Convention on 13 August 2002. For its declaration see UN Treaty Collection, 9. International Convention for the Suppression of Terrorist Bombings: <http://untreaty.un.org.ezproxy.waikato.ac.nz:2048/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (accessed 14 November 2006).

²⁰¹ There are 58 signatories and 148 states have either ratified, accepted or acceded to the Terrorist Bombing Convention as of 27 August 2006: <http://untreaty.un.org.ezproxy.waikato.ac.nz:2048/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (accessed 14 November 2006).

²⁰² Austria, Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, The Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States: <http://untreaty.un.org.ezproxy.waikato.ac.nz:2048/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp#N5> (accessed 14 November 2006).

²⁰³ The Arab Convention on the Suppression of Terrorism, signed at Cairo on 22 April 1998, entered into force on 7 May 1999.

²⁰⁴ “2. Terrorism. Any act or threat of violence, whatever its motives or purposes, that occurs for the advancement of an individual or collective criminal agenda, causing terror among people, causing fear by harming them, or placing their lives, liberty or security in danger, or aiming to cause damage to the environment or to public or private installations or property or to occupy or seize them, or aiming to jeopardize a national resource.”: Article 1(2) of the Arab Convention. This translation from the Arabic original was provided by the United Nations Secretariat, as reprinted in UN *International Instruments* (2001) at 152.

The definition is immediately followed by an article that expressly excludes acts that are undertaken as part of a struggle against foreign occupation.²⁰⁵ That exclusion is underlined in the preamble, which affirms the rights of peoples to combat foreign occupation and aggression by any means, including armed struggle, in order to liberate their territories and secure their right to self-determination and independence. However, that right must be exercised in accordance with the purposes and principles of the Charter of the UN and with the UN's resolutions.²⁰⁶ These references to the right to armed struggle against oppression suggest where some of the difficulties may lie in achieving a universal definition of 'terrorism'.

The Commonwealth of Independent States (CIS) signed a Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism in 1999.²⁰⁷ A definition of 'terrorism' was set out in Article 1, followed by a separate definition of 'technological terrorism'. Unlike the Arab Convention (above) and the OAU Convention (below) there was no mention of the right of peoples to engage in armed struggle against oppression and aggression. This omission would suggest that the CIS' definition of terrorism is more akin to the Western states' view of 'terrorism'.

The Convention of the Organisation of the Islamic Conference (OIC) on Combating International Terrorism (the Islamic Conference Convention), was adopted in July 1999.²⁰⁸ The preamble confirms the "legitimacy of the right of peoples to struggle against foreign occupation and colonialist and racist regimes by all means, including armed struggle".²⁰⁹ 'Terrorism' is defined in Article 1(2).²¹⁰

²⁰⁵ See Article 2(a) of the Arab Convention which provides that: "All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence..."

²⁰⁶ See Preamble to the Arab Convention, especially para 5.

²⁰⁷ Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism in 1999, done at Minsk on 4 June 1999. The state signatories to the Treaty are Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, the Republic of Moldova, the Russian Federation and Tajikistan:

http://untreaty.un.org.ezproxy.waikato.ac.nz:2048/English/Terrorism/csi_e.pdf (accessed 14 November 2006).

²⁰⁸ Convention of the Organisation of the Islamic Conference (OIC) on Combating International Terrorism, adopted at Ouagadougou on 1 July 1999.

²⁰⁹ See Preamble to the OIC Convention, para 9.

²¹⁰ "'Terrorism' means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperiling (sic) their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States": *ibid*, Article 1(2).

The Islamic Conference Convention provides a separate definition of a ‘terrorist crime’ and also stipulates that crimes against UN terrorism-related conventions are considered to be ‘terrorist crimes’.²¹¹ Struggle, including armed struggle, by peoples against foreign occupation, aggression, colonialism and hegemony, aimed at liberation and self-determination in accordance with the principles of international law, is not to be considered a terrorist crime.²¹²

The fourth and final regional convention of the 1990s was the Organization of African Unity Convention on the Prevention and Combating of Terrorism (OAU Convention).²¹³ It marked the “first major comprehensive legislative approach to addressing the scourge of terrorism in Africa.”²¹⁴ As in the Arab Convention and the Islamic Conference Convention, the OAU Convention reaffirms the “legitimate right of peoples for self-determination and independence pursuant to the principles of international law”.²¹⁵ A ‘terrorist act’ is defined in Article 1(3). The struggle of peoples for liberation or self-determination, including armed struggle, against colonialism, occupation, aggression and domination by foreign forces, is expressly excluded from the definition of a ‘terrorist act’ by virtue of Article 3. That exclusion is limited by the immediately following provision which states that “political, ideological, racial, ethnic, religious or other motives shall *not* be a justifiable defence against a terrorist act.”²¹⁶ The convention is described by the African Union as offering an “African definition and concept of terrorism”.²¹⁷ The African Union also asserts that this convention “...clearly delineat[es] the legitimate struggle of peoples under colonial rule or foreign occupation for freedom from crimes of terrorism.”²¹⁸

Reflection on the 1990s

The 1990s was a decade in which some in-roads were made into the enduring problem of reaching an internationally acceptable legal definition of ‘terrorism’. However, the progress was mainly made by regional organisations drafting their

²¹¹ Ibid, Article 1(3) and (4).

²¹² Ibid, Article 2(a).

²¹³ Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism, adopted at Algiers on 14 July 1999; not yet in force, text available at UN Treaty Collection, [6 October 2005] http://untreaty.un.org.ezproxy.waikato.ac.nz:2048/English/Terrorism/oau_e.pdf (accessed 14 November 2006).

²¹⁴ This comment was made by the OAU in its submission to the Secretary-General of the UN, published in the Report of the Secretary-General on measures to eliminate international terrorism in July 2003: see *Report of the Secretary-General, Measures to eliminate international terrorism*, UNGA (58th Sess) UNGA Doc A/58/116 at p14.

²¹⁵ OAU Convention, preamble, supra n213.

²¹⁶ OAU Convention, Article 3(2), supra n213.

²¹⁷ *Report of the Secretary-General on measures to eliminate international terrorism*, at 14.

²¹⁸ Ibid.

own multi-lateral instruments, with their own specific interpretations of what the term means. The US and the UN preferred to adopt a piecemeal, subject-driven approach, criminalising particular acts as the need arose via separate and distinct conventions, without defining ‘terrorism’ itself. Contradictions emerged between some regional approaches to terrorism, which reserved the right to armed struggle for oppressed peoples,²¹⁹ and the statements from the wider international community, including the UN General Assembly, which condemned terrorism outright, regardless of its objectives.²²⁰ There was only one example of a definition of ‘terrorism’ being incorporated into a UN convention, in the 1999 International Convention for the Suppression of the Financing of Terrorism, but even there, the definition was necessary for the creation of a crime of *financing* terrorism, rather than prohibiting terrorism *per se*. Thus, even though terrorism was universally condemned by all states and regional organisations, disagreement remained as to exactly *what* was being condemned.

Recent international developments – 2000-2006

Since 2000, there has been a surge in international efforts to outlaw terrorism. On numerous occasions the Security Council has unequivocally condemned terrorism, in all its forms and manifestations, whenever and by whomsoever committed, regardless of motivation.²²¹ Nuclear terrorism has been specifically targeted by the UN. The International Convention for the Suppression of Acts of Nuclear Terrorism was adopted by the General Assembly on 13 April 2005 and opened for signature on 14 September 2005.²²² In April 2007, there were 100 signatories and 17 ratifications of the Convention.²²³ The main objective of the Convention is to suppress acts of nuclear terrorism carried out by individuals.²²⁴ It does not expressly define ‘terrorism’ or ‘nuclear terrorism’ but there are

²¹⁹ See discussion above regarding the Arab Convention, the OAU Convention and the OIC Conventions.

²²⁰ See for example A/Res/51/210, adopted on 16 January 1997, 51st Session, Agenda Item 151, at paras 1 and 2 and see also A/Res/49/60 adopted on 17 February 1995, 49th Session, Agenda Item 142, Annex “Declaration on Measures to Eliminate International Terrorism”.

²²¹ S/Res/1377 (2001) adopted by the Security Council on 12 November 2001 at its 4413th Meeting, and S/Res/1456 (2003) adopted by the Security Council on 20th January 2003 at its 4688th Meeting and S/Res/1566 (2004) adopted by the Security Council on 8 October 2004 at its 5053rd meeting. Most recently, the Secretary-General, Ban Ki-Moon, condemned the terrorist attack at Glasgow airport on 2 July 2007 and the attempted attacks in London: see SG/SM/11068, UN Department of Public Information, “Secretary-General Deplores Terrorist Incidents in Great Britain” 2 July 2007, available at: <<http://www.un.org/News/Press/docs/2007/sgsm11068.doc.htm>> (accessed 5 July 2007). The Secretary-General reiterated that “no cause or belief can justify such acts of terrorism”.

²²² A/RES/59/290, adopted on 13 April 2005, 91st plenary meeting of the General Assembly. It was open for signature in New York from 14 September 2005 until 31 December 2006; for text of the resolution see A/RES/59/290, Annex, available at: <<http://daccessdds.un.org/doc/UNDOC/GEN/N04/494/53/PDF/N0449453.pdf?OpenElement>> (accessed 14 November 2006) and available at UN Treaty Collection, Conventions on Terrorism, <http://untreaty.un.org/English/Terrorism/English_18_15.pdf> (accessed 14 November 2006).

²²³ As noted above at n 138, the Convention will enter into force upon the 22nd ratification.

²²⁴ For general information about this Convention see the UN Treaty Collection: <<http://untreaty.un.org/English/Terrorism/summary.pdf>> (accessed 14 November 2006).

elements of a definition in Article 2. It does not apply to offences which are committed within a single state where the alleged offender and the victims are nationals of that state and no other state has the right to exercise jurisdiction.²²⁵ This Convention is a further example of the UN's overall approach to legislating against terrorism, in this case creating particular offences regarding the possession or use of radioactive or nuclear material or devices.²²⁶ Notably, "the activities of armed forces during an armed conflict" and "the activities undertaken by military forces of a State in the exercise of their official duties", which are governed by international humanitarian law, are both expressly excluded.²²⁷ That provision has so far been the subject of declarations by two states.²²⁸

At the regional level, two new documents have been adopted since 2000. On 3 June 2002, the Organization of American States (OAS) adopted the Inter-American Convention Against Terrorism.²²⁹ On 15 May 2003, the Council of Europe adopted a Protocol Amending the European Convention on the Suppression of Terrorism.²³⁰ Neither of these regional instruments offers a definition of 'terrorism'. A number of existing UN instruments have been amended or have had protocols adopted in relation to them: the Amendment to the Convention on the Physical Protection of Nuclear Material,²³¹ the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Marine Navigation²³² and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.²³³ Many of the existing pre-2001 Conventions and

²²⁵ Nuclear Terrorism Convention, Article 3.

²²⁶ *Ibid*, Article 2.

²²⁷ *Ibid*, Article 4(2). The same definition of the 'military forces of a state' was adopted in the Terrorist Bombings Convention, and the same exclusion for the activities of the armed forces is used in this Convention.

²²⁸ See declarations by Egypt and Turkey regarding the exclusion of activities by the armed forces of a state. Egypt's declaration seems to suggest that it considers that actions of the armed forces of a state should be included and that states *can* commit acts of terrorism: see the UN Treaty Collection:

<<http://untreaty.un.org.ezproxy.waikato.ac.nz:2048/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty20.asp#participant>> (accessed 14 November 2006).

²²⁹ Inter-American Convention Against Terrorism, adopted by the General Assembly of the OAS in Bridgetown, Barbados on 3 June 2002, entered into force on 10 July 2003. General information on the treaty is available from the Office of International Law, Organization of America States, Washington D.C. <<http://www.oas.org/juridico/english/sigs/a-66.html>> (accessed 14 November 2006). This Convention seeks to, *inter alia*, prevent the financing of terrorist activities, strengthen border controls and increase law enforcement cooperation. It calls terrorism 'a serious threat to democratic values and to international peace and security.' However, it does not define 'terrorism' or a 'terrorist act'.

²³⁰ See Council of Europe, "Protocol Amending the European Convention on the Suppression of Terrorism" <http://www.conventions.coe.int/Treaty/en/Summaries/Html/190.htm> (accessed 14 November 2006).

²³¹ Adopted on 8 July 2005 by the Conference to Consider Proposed Amendments to the Convention on the Physical Protection of Nuclear Material: see A/Res/60/43, 6 January 2006, Sixtieth Session, Agenda Item 108.

²³² Adopted on 14 October 2005 by the Diplomatic Conference on the Revision of the SUA Treaties (LEG/CONF.15/21): see A/Res/60/43, 6 January 2006, Sixtieth Session, Agenda Item 108.

²³³ *Ibid*.

the above offences, or to act as an accomplice.²³⁹ A person also commits an offence if they organise, direct, or instigate others to commit an offence;²⁴⁰ as well as if they aid, abet, facilitate or counsel the commission of one of the offences in Article 2(1)(a).²⁴¹ Somewhat controversially, it also makes it an offence if a person contributes “in any other way”²⁴² to the commission of one or more of the offences already proscribed.

Article 18 excludes certain activities of armed/military forces. Article 18, and especially the second paragraph, has attracted as much attention from states as has Article 2.²⁴³ The exclusion of the activities of the military forces of a state repeats the exclusions in the Terrorist Bombings and the Nuclear Terrorism Conventions. This is indicative of the UN’s recent stance on defining terrorism: it does not consider that acts committed by the armed/military forces of the state should be included.

No definition of ‘terrorism’

The term ‘terrorism’ has not been defined in the Draft Comprehensive Convention, despite the efforts of some states. The OIC considered that a definition of terrorism was a “necessary condition for the usefulness and applicability of the convention.”²⁴⁴ Malaysia, on behalf of the OIC states, proposed that the definition of ‘terrorism’ and ‘terrorist crime’ which are contained in the Islamic Conference Convention be imported into Article 1 of the Draft Comprehensive Convention.²⁴⁵ Lebanon and the Syrian Arab Republic made the same proposal.²⁴⁶ Côte d’Ivoire also proposed that a definition of ‘terrorism’ be included in Article 2.²⁴⁷

So far, those suggestions have been rejected. The prevailing attitude is that there is no need to define ‘terrorism’ because Article 2 provides an ‘operational definition’ of a terrorist act, especially with the use of the phrase “within the

²³⁹ Draft Comprehensive Convention, Article 2(2).

²⁴⁰ Ibid, Article 2(3)(a).

²⁴¹ Ibid, Article 2(3)(b).

²⁴² Ibid, Article 2(3)(c). Human Rights Watch and Amnesty International have both objected to the use of this wide-ranging phrase.

²⁴³ Ibid, Article 18. Article 18 is set out in Appendix 7.

²⁴⁴ For the views of Malaysia on behalf of the OIC, see its proposals submitted to the Working Group of the Sixth Committee at the 55th session of the General Assembly in connection with the elaboration of a draft comprehensive convention on international terrorism, UN Doc A/C.6/55/WG.1/CRP.30.

²⁴⁵ *Measures to eliminate international terrorism, Report of the Working Group 55th Session, Sixth Committee, 19 October 2000*; UN Doc A/C.6/55/L.2; Annex III, paragraph 30.

²⁴⁶ Ibid.

²⁴⁷ Ibid, paragraph 26.

meaning of this Convention”.²⁴⁸ However, it was also suggested that in order to take into account the OIC’s concerns, Article 2 may be redrafted so as to indicate more clearly that the phrase “within the meaning of this Convention” referred to terrorist acts.²⁴⁹ That suggestion has not, as yet, been implemented.

The tenth session of the Ad Hoc Committee convened in New York from 27 February to 3 March 2006. Again, no consensus was reached on the three key points of disagreement (definition of terrorism, exclusion of military forces and struggles for self-determination). Although the process had not been completed at the time of writing, it would appear that two significant trends are evident. The UN has taken a position of unequivocal condemnation of terrorist tactics, “even for the most defensible of causes”.²⁵⁰ Secondly, it considers that the activities of the armed forces of a state against civilians should be excluded from the draft terrorism convention because they are already governed by international humanitarian law. That has been the general approach adopted in two existing UN conventions on terrorism.²⁵¹ That is also the view expressed in the Report of the Secretary-General’s High Level Panel on Threats, Challenges and Change.²⁵²

Conclusion regarding international law developments

The evolution of international law pertaining to terrorism suggests that defining ‘terrorism’ is difficult and is influenced by legal and political considerations. International lawyers have had much more success in criminalising specific acts, which are considered as manifestations of terrorism, rather than describing and outlawing terrorism *per se*. Even though virtually all acts of terrorism are prohibited in one of the UN instruments, the development of a normative framework against terrorism is still deemed an important, yet thus far elusive, goal.²⁵³ Developments in 2007/2008 are likely to focus on the adoption of the Draft Convention on International Terrorism and the success of this endeavour will depend on whether the existing disagreements concerning Articles 2 and 18 - relating to the meaning of terrorism, the exclusion of states’ armed forces and the

²⁴⁸ Draft International Convention, Article 2.

²⁴⁹ See *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996*, Fifth Session (12-23 February 2001), General Assembly Official Records, Fifty-Sixth Session, Supplement No. 37, UN Doc A/56/37. This report, along with all of the other reports of the Ad Hoc Committee can be downloaded from its website: <<http://www.un.org/law/terrorism>> (accessed 14 November 2006).

²⁵⁰ Report of the Secretary-General’s High Level Panel on Threats, Challenges and Change, *supra* n13 at 51, para 157.

²⁵¹ The Terrorist Bombings Convention, Article 19 and the Nuclear Terrorism Convention, Article 4.

²⁵² Report of the Secretary-General’s High Level Panel on Threats, Challenges and Change, *supra* n13 at 51-52, paras 160-164.

²⁵³ *Ibid* at 51-52.

right to use force against colonial oppressors or foreign occupying forces - can be overcome. The definitions of 'terrorism' which have been put forward by the Security Council and by the Secretary-General's High Level Panel are likely to form the basis of the definition of terrorism in the comprehensive convention.²⁵⁴

Conclusion

This chapter has sought to demonstrate the following six points. First, terrorism is a method of asymmetric warfare which has been utilised for millennia. The historical analysis in Part A showed that the *sicarii* and the Assassins were probably the first groups to discover that the use of force could be used to greater effect by small groups against the majority and/or ruling group, to achieve the objectives of the former against the latter, when that force was directed against civilians or non-combatants; when it was used at close range such as through the use of hidden daggers in crowded marketplaces, and when the physical act was combined with the wider objective of creating fear within the minds of individuals within the target society.

Secondly, the meaning of 'terrorism' has evolved over time and its current usage is rather different from its etymological origins, which were in the French Reign of Terror. Whereas 'terrorism' was once a term used to describe violence by the state, which carried positive connotations, the above analysis has shown that, despite the abovementioned dictionary definitions' continued references to those origins,²⁵⁵ the term in modern usage usually refers to violence by non-state entities, and it is universally regarded as carrying negative connotations.

Thirdly, it has been demonstrated that the term 'terrorism' is full of political meaning and its usage is fluid. Individuals who have been at one point labelled 'terrorists' have, at another point, become respected leaders and statesmen. The analysis referred to in Part A demonstrates that affixing the label of 'terrorist' on a person or group may sometimes be indicative of nothing more than the labeller's political stance towards that particular person or group. It is apparent that so-called 'terrorist organisations' perceive themselves very differently to the way in which others perceive them, and determining who is deserving of the label

²⁵⁴ Ibid at 52 para 164; see also S/Res/1566 (2004), para 3.

²⁵⁵ See discussion *supra* at 34-35.

‘terrorist’ changes from time-to-time. Its attribution should not be considered an objective and timeless characterisation.

Fourthly, it has been demonstrated that experts in the study of terrorism cannot agree on a definition. The study by Schmid found 109 different definitions and Schmid himself identified 22 distinct elements.²⁵⁶ Even if analysis is limited to just a few scholars’ interpretations, the differences remain significant.²⁵⁷ This leads into the fifth point, which is that in order to legislate against terrorism, the most successful approach has not been to define ‘terrorism’ but to define criminal *acts* that target civilians, which are aimed at intimidating a population or influencing a government and that have a wider political or ideological objective than the immediate target. As discussed in Part C, different jurisdictions have selected quite different definitions. The above analysis of legislation adopted in New Zealand, Australia, the UK, Canada, and the US, demonstrates that there may never be universal agreement on the meaning of ‘terrorism’. The issue of whether the armed forces of a state should be included within the international convention on terrorism is an especially difficult one to resolve because excluding them would amount to a political and legal judgement that states’ armed forces are not capable of committing acts of terrorism. This is probably a step that many states will find difficult to take. If the military actions of state actors *are* excluded from the international convention on terrorism, that may present some difficulties for states such as New Zealand, which have legislation which seemingly allows for the prosecution of terrorist acts in armed conflict.²⁵⁸

The sixth and final point made in this chapter is that the search for an internationally acceptable definition continues and that defining ‘terrorism’ is still an important goal for the international community. The Secretary-General’s High Level Panel has recommended that a definition of terrorism be reached in order for the UN to be able to exert its moral authority and to “send an unequivocal message that terrorism is never an acceptable tactic, even for the most defensible of causes.”²⁵⁹

²⁵⁶ Supra at 41.

²⁵⁷ See discussion above concerning the definitions favoured by Laquer, Ganor, Erickson, Hoffman and Wardlaw.

²⁵⁸ See the Terrorism Suppression Act 2002 (NZ) ss 4(1), 5(1)(c) and s5(4); compare with the UN’s position discussed above that only non-state actors ought to be covered by the draft comprehensive convention.

²⁵⁹ See Report of the Secretary-General’s High Level Panel on Threats, Challenges and Change, supra n13 at 51, para 157.

More than anything else, this chapter has shown the degree of inconsistency and disagreement amongst and within states regarding the meaning of terrorism. The implication is that it is bound to be difficult to assess the legality of states' *responses* to terrorism if states and scholars cannot agree on what terrorism *is*.

CHAPTER 4:

Epoch 1: The evolution of the *ius ad bellum* in antiquity

Overview

This chapter begins an examination of the way in which limitations on states' resort to force have evolved. This is the first in a series of six chapters, each of which considers the developments that occurred within a particular 'epoch'. Within each chapter, five distinct but related aspects of the *ius ad bellum* are pursued: the resort to force by states, the use of force in self-defence, pre-emptive self-defence, forcible measures short of war, such as reprisals, and the use of force in relation to non-state actors. This chapter addresses the developments that occurred in antiquity (epoch I). Chapter 5 considers the developments that occurred in the context of Christian and Islamic theology in the Middle Ages (epoch II). Chapter 6 encompasses the developments that occurred in the seventeenth and eighteenth centuries in Europe under the influence of the secular natural law theorists (epoch III). Chapter 7 traces the Positivists' contribution during the rise of the state system (epoch IV). Chapter 8 focuses on the developments which occurred from the League of Nations to the formation of the United Nations (epoch V). Finally, chapter 9 examines the developments that have occurred since 1945. By focusing on the abovementioned themes throughout the six epochs, this series of chapters provides an overview of the development of law governing the resort to force by states.

Context

The focus of chapter 2 was the changing nature of conflict, especially the transition from inter-state to intra-state conflict during the latter part of the twentieth century and the overall downward trends in the destructiveness of conflict; it also encompassed trends in the occurrence of terrorist acts. That chapter was followed by an inquiry into how 'terrorism', as one particular threat to international peace and security, should be defined. In this and the following five chapters, the focus is on the origins of the international legal framework that presently constrains the use of force by states. These chapters seek to provide an historical context for the core issues of the legality of the use of force in self-defence, which are addressed in the course of this thesis. One of the key objectives of this analysis of the international legal framework is to elucidate the

origin and meaning of the ‘inherent right’ of self-defence that is enshrined in Article 51 of the UN Charter:¹

*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... (emphasis added)*

The reference to an ‘inherent right’ implies that states had a right of self-defence that existed prior to the Charter which remains in force ‘unimpaired’ by the Charter. An historical inquiry is necessary to determine what that ‘right’ entitles modern states to do in their defence since “Misunderstanding of the present is the inevitable consequence of ignorance of the past.”² The provisions enshrined in the UN Charter regarding the use of force did not appear out of a vacuum but evolved over a long period of time, influenced by the overlapping influences of theoretical doctrine, positive law and state practice.

This series of chapters will show that the notion of a ‘just war’, wars of self-defence, pre-emptive self-defence, forcible measures short of war and states’ use of force in response to non-state actors, are distinct themes which have evolved over millennia, across temporal and geographical borders. The five themes that are being pursued here become clearer and more distinct in later epochs. The objective is to provide a summary of the major trends and the scholars who influenced the theory of the recourse to force within each epoch. It does not purport to be an exhaustive analysis of each thinker nor of each period.³

Parameters and themes

In this chapter more emphasis is placed on selected aspects of the *ius ad bellum*, rather than others, due to historical imperatives. For instance, the use of self-defence in relation to non-state actors is given greater emphasis in chapters 8-9, due to the fact that terrorism has become an increasingly popular reason for states’ resort to force in the twentieth and twenty-first centuries. Although terrorism existed prior to 1945, it was not a significant justification for the resort to force in the periods that are discussed in the earlier chapters of this series of chapters. In

¹ The Charter of the United Nations, Article 51, 26 June 1945, *Documents of the United Nations Conference on International Organisation, San Francisco 1945* (UNCIO), vol XV, at 335.

² Bloch, M (Putnam, P, trans.) *The Historian’s Craft* (1954) at 39-47.

³ For an overview of the evolution of international law, see Walker, T *A History of the Law of Nations* (1899); Hall W *International Law* (1890); Brownlie, I *International Law and the Use of Force by States* (1963); Oppenheim, *International Law* (1905); Nussbaum, A A *Concise History of the Law of Nations* (1954); Brierly J *The Law of Nations*, 6th ed (1963); Grewe, W (Byers, M transl and rev) *The Epochs of International Law* (2000).

this chapter, the demarcation between the analysis of the five identified themes is not as clear as it is in later chapters because the sources upon which the analysis is based did not always make clear distinctions between various aspects of the recourse to force. With the passage of time, and the increasing attention given to these issues by legal scholars, the five specific themes become clearer and more distinct in later epochs. Regarding geographical parameters, the analysis is mainly limited to developments that occurred in the Middle East/Near East, Mediterranean area and Europe and, as such, it includes sources from Judaism, Christianity and Islam. It focuses to a lesser extent on the history of international law in ancient India, Africa, China and Byzantium.⁴

The ‘periodisation’ of the history of international law

Regardless of how far back in time their respective discourses reach, most scholars of international law begin with a general statement on the undisputed historical connection between war and law. Some writers state that the history of international laws pertaining to the use of force should only be traced back to the sixteenth century,⁵ whilst others look back further to the writings of St Augustine in the fourth century,⁶ or further still to the Roman and Greek eras, and beyond.⁷ Determining when the first laws regarding the use of force were enacted is very much connected with the question of when ‘international law’ began, which in turn requires consideration of what is meant by the term ‘international law’.⁸ There can be no doubt that the connection between war and law stretches back in time for millennia and spans multiple civilizations and empires.⁹ Just as international law historians disagree on where and when ‘international law’ began, they also disagree on how its history should be divided, for the purposes of determining the prevailing legal norms in each era.¹⁰ Scholars have taken a

⁴ For analysis on the reasons for restricting the inquiry in this way, see Bederman, D *International Law in Antiquity* (2001) at 3 on the concept of an ‘uninterrupted flow of events’. Regarding international law in ancient India and China, see Bederman at 1-5.

⁵ McNeill, J “Contemporary Practice of Public International Law: An Overview”, in Schaffer, E and Snyder, R (eds), *Contemporary Practice of Public International Law* (1997).

⁶ MacDonald, R St. John, “The Use of Force by States in International Law” in Bedjaoui, M *International Law: Achievements and Prospects* (1991) at 717.

⁷ On ancient Greece and Rome, see Phillipson, C *The International Law and Custom of Ancient Greece and Rome*, Vol I and II (1911; reprinted 2001); Dinstein, Y *War, Aggression and Self-Defence* 3rd ed (2001) 59; McCoubrey and White *International Law and Armed Conflict* (1992) 17-19; Arend, A and Beck, R *International Law and the Use of Force: Beyond the UN Charter Paradigm* (1993) 11ff.

⁸ Jeremy Bentham may have been the first to use the term ‘international law’ in his 1789 work, *Introduction to the Principles of Morals and Legislation*: see Nussbaum, supra n3 at 136. As to when ‘international law’ began, there is debate over what degree of order or regulation would be sufficient: see Neff, S “A Short History of International Law”, in Evans, M (ed) *International Law* (2003) at 32.

⁹ For an Islamic view of international law see Khadduri, M *War and Peace in the Law of Islam* (1955) and Khadduri, M *The Islamic Law of Nations – Shaybani’s Siyar* (1966); for international law in ancient India see Bhatia, H (ed) *International Law and Practice in Ancient India* (1977); for Near Eastern, Greek and Roman periods, see Bederman, supra n4 at 281-302.

¹⁰ Sir Paul Vinogradoff, in 1823, asserted the existence of five major epochs: the age of the Greek city-state; the *ius gentium* of the Romans; the empire of Medieval Christendom; the international relations of the early modern territorial states; and the development of an organised society of nations: Grewe, supra n3 at 1-2.

multitude of different approaches and there is no universally accepted categorisation or 'periodisation' of the history of international law.¹¹ The epochs used in this thesis are based on the research of other scholars, notably Moore and Bederman. The remainder of this chapter focuses on the first epoch, antiquity, which is subdivided here into four parts.

Epoch I - Antiquity

The topic of international law in antiquity has been the subject of much analysis and commentary.¹² Bederman considers that there were three distinct eras, within each of which an international legal system operated between relatively independent states: the Ancient Near East encompassing Mesopotamia, Syria and Egypt (2600-700 BCE¹³);¹⁴ the Greek city states (500-338 BCE) and the Roman world (358-168 BCE).¹⁵ Bederman found that ancient states observed rules of war and concluded that international law constitutes a universal human idea.¹⁶ Although other scholars have divided antiquity on a different basis to that chosen by Bederman,¹⁷ the following analysis is based broadly on his tripartite division.

Antiquity I: The Near/Middle East: 2600 – 700 BCE

The first period in which there was a system of authentic states and state systems was a few hundred years in duration when the small network of Sumerian city-states in Mesopotamia existed, until their conquest by the Akkadian empire.¹⁸ During this period (2600-2350 BCE), the Sumerian city-states, which were considered to be sovereign structures, practiced diplomacy, had rules concerning diplomatic immunities, concluded treaties with one another, and possibly also

¹¹ Moore, J "Development of the International Law of Conflict Management" in Moore, J, Tipson, F, and Turner, R (eds) *National Security Law* (1990) at 51-83. Moore's categorisation was also adopted by Arend and Beck, *supra* n7 at 10.

¹² Aldock, F and Mosley, D *Diplomacy in Ancient Greece* (1975); Herman, G *Ritualised Friendship in the Greek City* (1987); McCarthy, D *Treaty and Covenant: A Study in Form in the Ancient Oriental Documents and in the Old Testament* (1978); Watson, A *International Law in Archaic Rome: War and Religion* (1993); Jones, C *Kinship Diplomacy in the Ancient World* (1999); Rigsby, K *Asylia: Territorial Inviolability in the Hellenistic World* (1997); Cohen, R and Westbrook, R (eds) *Amarna Diplomacy: The Beginnings of International Relations* (2000) and Grewe *supra* n3.

¹³ 'BCE' is used to denote references to the period 'Before the Common Era'.

¹⁴ Bederman, *supra* n4 at 21-31.

¹⁵ *Ibid* at 41-47.

¹⁶ For comments on Bederman's text see Grant, A, Thomas D and Bilder, R (ed) "Recent Books on International Law: Book Reviews: 'International Law in Antiquity' by David J Bederman" 97 *AJIL* 218.

¹⁷ Preiser, *Macht und Norm in der Völkerrechtsgeschichte* (1978). Preiser divides Antiquity into the Middle East (1450-1200 BCE); the Greek city-states (600-338 BCE) and the Roman Empire (400-168 BCE). This is slightly different from Bederman's categorisation but the same basic periods are evident.

¹⁸ The Sumerian city-states included Adab, Eridu, Kish, Larsa, Lagash, Nippur, Shuruppak, Umma, Ur and Uruk: see Bederman, *supra* n4 at 22.

shared norms on the conduct of war.¹⁹ However, the evolution of an international order did not progress beyond an early stage.²⁰

A great deal more is known about the peoples and states of the great Near Eastern Empires (1400-1150 BCE) a period during which five great empires flourished, namely, Egypt, Babylon, the Hittites, the Mitanni and the Assyrians.²¹ During this period a “close network of international relations came into existence”.²² Information is available regarding the treaties that were made²³ and the overall ‘balance of power’ system that existed.²⁴ Although evidence suggests that laws pertaining to the humanisation of hostilities existed,²⁵ details are rather sparse when it comes to determining the content of specific rules governing the *resort* to force with outside entities.²⁶ The analysis below centres on the use of force in Jewish law²⁷ towards the latter years of the Near/Middle East period in the relatively limited area of Syria/Palestine, mainly because more information is available from this period regarding the themes that are being pursued in this chapter.

Restrictions on the resort to force in Syria and Palestine

After the destruction of the state system dominated by the Egyptians, Hittites and the Assyrians, a new system emerged, beginning in the ninth century BCE, which saw the emergence of two indigenous state cultures: Israel and Phoenicia.²⁸ Evidence exists regarding the relations between the Jewish states and the Phoenician cities, as well as with outside powers.²⁹ Scripture suggests that there were some restrictions on the Israelites’ resort to force, and what would constitute a ‘just war’, although nothing as structured as a set of laws. According to Maimonides,³⁰ the king of Israel was permitted to fight two kinds of wars.³¹ The

¹⁹ Preisler “Zum Völkerrecht der vorklassischen Antike” (1954) 4 *Archiv des Völkerrechts* 269 as cited in Ago, R “The First International Communities in the Mediterranean World” (1982) 53 *BYIL* 213 at 215; Bederman, supra n4 at 23.

²⁰ Scupin, H-U “History of the Law of Nations: Ancient Times to 1648” in Bernhardt, R (ed) 7 *Encyclopedia of Public International Law* 132 at 133; Bederman, supra n4 at 23.

²¹ Bederman, supra n4 at 24.

²² Scupin, supra n20 at 134.

²³ For example, a treaty was concluded in 1280 BCE (or possibly 1278 BCE) between Rameses II of Egypt and Hattusili of the Hittites. It was a treaty of non-aggression, defensive alliance and mutual assistance against external attack and domestic unrest: *ibid* at 28 and at chapter 5; also Ago, supra n19 at 216.

²⁴ Ago, supra n19 at 216; also Bederman, supra n4 at 25-28.

²⁵ Pirenne, J *Les Grands Courants de l'histoire universelle* vol 1 (1959) at 28, cited in Ago, supra n19 at 216.

²⁶ The state system dominated by the Egyptians, the Hittites and the Assyrians was destroyed by the incursions of the so-called ‘sea peoples’ in the twelfth and eleventh centuries BCE: Ago, supra n19 at 217; Bederman supra n4 at 29-29.

²⁷ ‘Jewish law’ or ‘halakha’ refers to the body of law, custom and tradition that is based on the Torah as developed through discussion and debate in the rabbinic literature, especially the later Mishnah and the Talmud.

²⁸ Bederman, supra n4 at 29.

²⁹ *Ibid*.

³⁰ Although Maimonides’ (1138-1204) commentary does not chronologically fit within the current period being discussed, he is cited for his insights into the meaning of the historical Jewish texts that existed during this period.

first being mandatory or obligatory war (*milchemet mitzvah*), which included war against the seven Canaanite nations, war against the tribe of Amalek and (perhaps) wars fought to assist the Jews against enemies who had attacked them:³²

*But of the cities of these people, which the Lord thy God doth give thee for an inheritance, thou shalt save alive nothing that breatheth. But thou shalt utterly destroy them; namely, the Hittites, and the Amorites, the Canaanites, and the Perizzites, the Hivites, and the Jebusites; as the Lord thy God has commanded thee.*³³

...

*And if ye go to war in your land against the enemy that oppreseth you, then ye shall blow an alarm with the trumpets...and ye shall be saved from your enemies.*³⁴

Only when the king had completed the above military tasks could he engage in a 'discretionary' or permitted war (*milchemet hareshuti* or *reshut*), that is, a war "against other nations to expand Israel's borders and to enhance his greatness and reputation."³⁵ According to the Mishnah, the battles for *self-defence* recorded in the first five chapters of the Bible were *obligatory*, while the wars fought by King David to expand his territory were merely 'permitted'.

Although wars against the seven Canaanite nations and the Amalekites were clearly obligatory wars, the third type - wars fought against 'the enemy that oppreseth you' - are not so easily categorised. Jewish scholars have pointed out that the Torah never explicitly commands Jews to wage war "to assist the Jews against enemies who have attacked them."³⁶ However, the above quote from Numbers which begins, "And if ye go to war",³⁷ read together with a passage from Leviticus,³⁸ show that wars waged against attackers were at least permitted, even if they may not have been obligatory.

Optional warfare (*milchemet reshut*) could have been undertaken to increase territory or to "diminish the heathens so that they shall not march."³⁹ Rosenne states that the distinction between *mitzvah* ('holy') and *reshut* ('secular') wars was a **legal** one in the sense that different legal rules or consequences applied

³¹ Maimonides, *Yad, Melakhim* 5:1.

³² Bederman, *supra* n4 at 76 citing Deuteronomy 7:11 and 25:19; also Deuteronomy 20:16 and 20:17. There is some disagreement among scholars on whether this third category of wars should be included as a form of obligatory war, or whether it should be categorised as a form of permitted war.

³³ Deuteronomy 20:16, 17. Amalek is not mentioned in this verse; the command to wage war against Amalek is found in Deuteronomy 25:17-19.

³⁴ Numbers 10:9.

³⁵ See Mishnah Sotah chapter 8:7.

³⁶ Central Conference of American Rabbis ('CCAR') Responsa Committee, "Preventative War": <http://www.upj.org.au/preventativewar.htm> (accessed 2 September 2006).

³⁷ *Supra* n34.

³⁸ Leviticus 19:16: "...neither shalt thou stand against the blood of thy neighbour".

³⁹ Bederman, *supra* n4 at 210.

according to the nature of the war.⁴⁰ There were notable restrictions on the grounds for declaring optional war but they were largely related to procedural requirements. For example, there was a requirement that before waging *reshut*, the ancient Israelites first had to call the city to peace, that is, give them a chance to surrender before war could begin.⁴¹ By comparison, that was probably not a requirement before commencing obligatory war (*milchemet mitzvah*).⁴²

The concept of 'holy war'

Many present day writers claim that there is no such concept of 'holy war' in Jewish law. Rabbi Saul Berman asserts that Jewish law knows only two types of war: obligatory and discretionary. The argument is that there is no concept of 'holy war' because the taking of life can never be *kaddosh*, holy. He asserts that the taking of human life – even when it is mandated – always results in *tumah*, impurity, the presence of which is an absolute barrier to *kedushah*, holiness.⁴³ Other Jewish writers challenge this, arguing that if obligatory war (*milchemet mitzvah*) is sanctioned by God, then it is in reality a 'holy war' since carrying out God's commands is necessarily a holy act.⁴⁴

It is suggested that despite the claims to the contrary, the concept of 'holy war' does exist in Jewish law, for two reasons. First, in Deuteronomy it is implied that in battles against Israel's enemies, war is fought by God himself, on behalf of his people:⁴⁵

When thou goest out to battle against thine enemies...be not afraid of them for the Lord thy God is with thee... [4]...the Lord your God is He that goeth with you, to fight for you against your enemies, to save you.

⁴⁰ Rosenne, S "The Influence of Judaism on the Development of International Law" (1958) 5 *Netherlands Int'l L. Rev* 119 at 139.

⁴¹ It is unclear whether the 'call to peace' had to be made before all war (obligatory or discretionary) or only before discretionary war (*milchemet reshut*). A close reading of Deuteronomy 20 suggests that a call to peace was not required in obligatory wars, but Maimonides stated that it was required in both: see Maimonides' *Hilchot Melachim* 6:1. See also Chavel, C (trans) *Maimonides – The Commandments, Volume One: Positive Commandments* (1967) at 201 where Maimonides is reported to have written that Jews were not to engage in war with "anyone whatever unless we [first] proclaim peace to him..." The requirement to offer peace before war was really a demand to surrender or fight: "If the inhabitants have responded peaceably, and accepted the seven precepts imposed upon the descendants of Noah, none of them should be slain but taxed, as it is written: 'They shall do forced labour for you and serve you'...": Maimonides, *Mishneh Torah*, Kings 6, verses 1, 3 and 7.

⁴² Bederman, supra n4 at 211; Blidstein, G "Holy War in Maimonidean Law" in *Perspectives on Maimonides – Philosophical and Historical Studies* (1991) at 211, and see sources cited therein at n6-8.

⁴³ Berman, S "The War Against Evil and Ethical Constraints" <<http://www.shma.com/dec01/berman.phtml>> (accessed 3 September 2006). Jonathan Sacks also believes that there was no such concept of 'holy war' in Judaism: see Sacks, "A Clash of Civilizations? Judaic Sources on Co-existence in a World of Difference" [December 2001]: <<http://www.chief Rabbi.org/dd/introduction.html#top>> (accessed 3 September 2006).

⁴⁴ Firestone, R "This War Is About Religion and Cannot Be Won Without It - Our Own House Needs Order" [December 2001] : <<http://www.shma.com/dec01/firestone.phtml>> (accessed 3 September 2006).

⁴⁵ Deuteronomy 20:1 and 20:4. This concept of "holy war" may have been the precursor to the concept of the "just war", developed later by Christian theologians, in the sense that it directly connected the justification for using force against an enemy to the existence of God and the granting of permission from God: Arend and Beck, supra n7 at 12.

Secondly, the concept of ‘holy war’ can be derived from the accepted Jewish distinction between obligatory and discretionary wars. The former are wars that God has ordered the Jewish people to fight; surely, fighting a war that has been commanded by God can not be classified as anything other than a ‘holy war’.⁴⁶

Resort to force in self-defence

The term ‘self-defence’ was not used in the original Jewish sources regarding the *ius ad bellum*, therefore, it is difficult to state categorically what the justifications were for declaring war in self-defence under Jewish law. However, a parallel could be drawn between the ancient Israelites’ practice of *milchemet mitzvah* (obligatory wars), in which the military objectives were apparently unlimited, and the concept of **self-defence**. Historically,⁴⁷ the rationale for specifying some peoples as the subject of unlimited obligatory wars was based squarely on the notion of self-defence. The reason why those particular peoples were subject to war without limits (including the killing of all men, women and children) was because they were considered to be an immediate and immutable threat to the very existence of Israel. Therefore, ancient Israelites perceived themselves to be acting in self-defence *whenever* they resorted to force against the Canaanite tribes, or Amalek.⁴⁸

Two more reasons are advanced here to support the proposition that obligatory wars (*milchemet mitzvah*) were essentially wars of self-defence. First, it is clear that before a discretionary war could be embarked upon, the king would have had to have obtained the permission of the Sanhedrin, a lengthy process which may not have resulted in permission being granted.⁴⁹ This process would not have been required if the war was one of self-defence, where time was of the essence. Second, in discretionary wars there were many reasons why an individual might have been excused from military service, whereas such exemptions did not apply when the king was waging an obligatory war. This implies, again, that the latter

⁴⁶ For a discussion of the origins of holy war in Jewish law see Blidstein supra n42.

⁴⁷ Since the Canaanite tribes no longer exist one would presume that there are no longer any obligatory wars. However, Sacks asserts that the primary application nowadays of *milchemet mitzvah* is in waging a war of self-defence: see Sacks, supra n43. This supports the foregoing argument, that *milchemet mitzvah* were always perceived inherently as wars of self-defence, even though that term was never explicitly used.

⁴⁸ According to the Old Testament, God commanded the Israelites to utterly destroy Amalek (for their uncompromising hatred of Israel and because of their cruelty in attacking the non-combatant Israelites crossing the desert) and the Canaanites who refused to make peace with the Israelites: Deuteronomy 25:19: “...thou shalt blot out the remembrance of Amalek from under heaven; thou shalt not forget it.” See also Wilkes, G “Judaism and Justice in War”, in Robinson, P (ed) *Just War in Comparative Perspective* (2003) 11.

⁴⁹ The Sanhedrin, the highest legal assembly, was a body of 71 sages who constituted the supreme court and legislative body in Judea during the Roman period.

obligatory wars were essentially wars of self-defence, since no one was entitled to stay at home.⁵⁰ The evidence suggests that the obligatory wars (*milchemet mitzvah*) were essentially wars of self-defence, as this is the only way of explaining the special conditions surrounding their commencement and conduct.

Pre-emptive war

The original sources of Jewish law do not specifically mention the possibility of a king using force in a pre-emptive war. Likewise, the later Jewish scholars and codifiers, such as Maimonides, failed to mention 'pre-emptive' use of military force. Ibn Timmon's translation of Maimonides' commentary on the Mishnah suggests that Maimonides considered an obligatory war did not start until an actual attack by an army.⁵¹ However, Wilkes states that a new category of war appeared in the *Talmud*, with regards to "wars fought to reduce the number of idolators that they should not rise up against them."⁵² This concept of striking first before the enemy became too strong is also evident in the Talmudic saying, "If a man comes to kill you, rise early and kill him first", which some modern writers have used as evidence for the permissibility of pre-emptive military strikes.⁵³ Modern Jewish thinkers are divided as to whether preemptive wars are permitted, and if they are permitted, whether they are obligatory or discretionary.⁵⁴ It has been suggested that modern secular governments can wage pre-emptive war to save the nation which is about to be attacked.⁵⁵

Use of force short of war and reprisals

The use of force short of war, such as peacetime military reprisals, were not specifically mentioned in the Hebrew Scriptures nor in the subsequent commentaries, focusing as they did on the division of war into obligatory and discretionary categories. Two brief comments are offered here. First, it is apparent that Jewish law focused on the extremes of war and peace, without

⁵⁰ See extract from the Mishnah cited in Bleich, D "Preemptive War in Jewish Law" (1983) 21 (1) *Tradition* at 4.

⁵¹ See Maimonides' commentary to Sotah 8:7; see Broyde, M "Fighting the War and the Peace: Battlefield Ethics, Peace Talks, Treaties, and Pacifism in the Jewish Tradition" in Patout Burns, J (ed) *War and Its Discontents: Pacifism and Quietism in the Abrahamic Traditions* (1996), also available online at: <<http://www.ilaw.com/Articles/war2.html>> (accessed 3 September 2006).

⁵² Wilkes, supra n48 at 17.

⁵³ Lubling, Y "Just War: Jews Find some Justifications for a War" Centre for the Study of Religion and Society (1991) vol 2(2): <<http://puffin.creighton.edu/human/csrs/news/S91-3.html>> (accessed 3 September 2006).

⁵⁴ A full discussion of this issue is beyond the scope of this chapter. It is acknowledged that modern Jewish scholars are divided on the issue; one view is provided by the CCAR Responsa Committee, supra n36: "While a war fought in direct self-defense is clearly necessary and therefore 'commanded', a war initiated against a nation that might attack some day does not fall into this category. It is a "discretionary" war, a war that the Torah grudgingly allows the king to fight, but a war that, in the context of the history of our time, cannot be justified on moral grounds.

⁵⁵ Broyde, supra n51 and see chapter 9.

discussing anything in between, such as isolated military reprisals.⁵⁶ Second, at an individual level, it is clear that there was a duty to come to the aid of one's brother if attacked: "thou shalt not stand by the blood of thy neighbour."⁵⁷ Expanded to a national scale, this could arguably justify the use of forcible measures short of full-scale war, such as military reprisals.

Conclusion

The distinction between obligatory (*mitzvah*) and optional (*reshut*) wars only really existed between around 1400-1150 BCE. By the time of kings David and Saul (966-700 BCE), the practice of *mitzvah* was less evident and it had apparently disappeared altogether by the seventh century BCE.⁵⁸ Today, the distinction between obligatory and discretionary wars is still relevant.⁵⁹ Jewish scholars continue to grapple with questions of whether wars against Israel's enemies are obligatory or discretionary, over the use of force in self-defence and over the justifications for using force in pre-emptive attacks.

Antiquity II: India and China (1000 BCE -1400 AD)

Within the ancient civilizations of India and China evolved religions and philosophies which addressed the need to restrict the use of force. The people of antiquity who lived along the banks of the River Indus were followers of an eternal cosmic order of 'Rita', and were known to foreigners as Hindus.⁶⁰ Hinduism, governed by the principle of *dharma* (translated as the 'law of righteousness which regulates relations between the individual, the family, the community and the state') contains many references to the use of force, particularly regarding the laws of humane warfare.⁶¹ As for laws restricting the resort to force, there was no concept of 'just war' in the sense of using force against followers of other religions, and thus no equivalent of the '*bellum iustissimum*' in Christianity or its counterpart '*jihad*' in Islam.⁶² Subedi notes that in Hinduism, there is no justification for any wars against foreigners or other

⁵⁶ Ecclesiastes 3:1-8.

⁵⁷ Talmud Bavli, *Sanhedrin* 73a, cited from Union of American Hebrew Congregations, "Reacting to a World at War" at 4 and 6: <http://uri.org/kd/items/actions.cfm?action=Show&item_id=3825&destination=ShowItem> (accessed 4 September 2006).

⁵⁸ Bederman, *supra* n4 at 211.

⁵⁹ Some writers consider that the positive commandment to completely exterminate Amalek stands for all time: see Chavel, *supra* n41 at 200-203.

⁶⁰ Subedi, S "The Concept in Hinduism of Just War" (2003) 8 *JCSL* 339 at 340.

⁶¹ Clooney, F "Pain but not Harm: Some Classical Resources Toward a Hindu Just War Theory" in Robinson *supra* n48 at 109-125; also Subedi, *supra* n60 at 339; also Kautilya's *Arthashastra* (1915 Shamasastri translation): <<http://www.mssu.edu/projectsouthasia/history/primarydocs/Arthashastra/index.htm>> (accessed 4 September 2006), and see section XCVIII, Book 12, *Santi Parva, Mahabharata*, Ganguli, K (trans): <<http://www.sacred-texts.com/hin/m12/m12a097.htm>> (accessed 4 September 2006).

⁶² Subedi, *supra* n 60 at 342. The Christian and Islamic justifications for war are discussed below in chapter 5 of this thesis.

faiths, on religious grounds *per se*, since Hinduism is based on a universalistic approach to the world.⁶³

The concept of ‘just war’ in Hinduism should not necessarily be understood as a war against foreign nations or other faiths; it was against the evil characters of the day, whether they were foreign or not:⁶⁴

In simple terms, the Hindu concept of just war is based on right and wrong, in justice and injustice in the everyday life of all mortals, whether Hindus or non-Hindus. Unlawful and unjust action, for example the denial of the rights to which one was entitled, gave rise to just wars. Abducting someone else's wife or unlawfully taking others' property were the causes of two great wars...

In the twelfth book of the *Mahabharata*, there was a “prolonged argument in favour of the ‘just war’”.⁶⁵ Essentially, war was justified when it was *necessary* and there was *no alternative* – such as when a prince was wrongly deprived of his kingdom.⁶⁶ Warfare was just because:⁶⁷

By restraining the wicked and encouraging the virtuous, and by rites of sacrificial worship and giving gifts, kings become pure and free of taint...The king who guards his subjects from the plunder of their wealth, from slaughter, from affliction by barbarians, he, because he gives life, is truly a king bestowing wealth and happiness...

The above quote hints at an explanation of the justification for resorting to force in Hinduism. Clooney has summarised the Hindu position as holding that “war can at times be more just than refraining from war”.⁶⁸ Scholars note that the ancient Vedic society was largely peaceful and that there was no place for aggression against anyone.⁶⁹ But “when evil is aggressive and sends its challenges to good, the *Veda* advocates acceptance of the battle and challenge.”⁷⁰ This implies that force was essentially to be used in self-defence.⁷¹ Pre-emptive self-defence does not seem to have been expressly permitted, since kings were encouraged to “have their forces always ready for action”⁷² but were not encouraged to strike first.

⁶³ Ibid at 342, 346; see also Bowes, P *The Hindu Religious Tradition: A Philosophical Approach* (1977) at 39.

⁶⁴ Subedi, supra n60 at 343.

⁶⁵ Fitzgerald, J *The Mahabharata, Book 12: The Book of Peace* (2003).

⁶⁶ Clooney, supra n61 at 117-19.

⁶⁷ Chapter 12.98 of the *Mahabharata*; also Clooney, supra n61 at 118.

⁶⁸ Clooney, supra n61, at 124.

⁶⁹ Subedi, supra n60 at 347.

⁷⁰ Bose, A *Hymns From the Vedas: Original Text and English Translation with Introduction and Notes* (1966) at 9.

⁷¹ “Whenever the Hindu *Puranas* speak of a war, they are referring to a defensive war, not an offensive one. The norm in Hindu thinking has been abstention from the use of force...”: Subedi, supra n60 at 348.

⁷² “Let him then, by a force always ready, make all creatures living his own...let him reduce all opposers to submission by negotiation and three other expedients, namely, presents, division and force of arms...”: The *Manusmriti*, cited in Subedi, supra n60 at 352 n58.

In Hinduism, recourse to force was a last resort.⁷³ It could only be used against a foreign power when the other three methods of dispute resolution had been exhausted (conciliation, placating by gifts and dissension or veiled threat). War was not supposed to start without a proper declaration from both sides, considered necessary to ensure ‘fair play’.⁷⁴

Taoism, like Hinduism, also seemed to generally advocate against the use of force. The ancient Chinese scripture, ‘Tao Te Ching’ by Lao Zi,⁷⁵ contains some basic principles on the use of force:⁷⁶

If you used the Way as a principle for ruling you would not dominate the people by military force...If you know what you are doing you will do what is necessary and stop there...Sharp weapons are inauspicious instruments. Everyone hates them. Therefore the man of the Way is not comfortable with them.

Taoism was essentially a pacifist system which recommended submission and non-resistance.⁷⁷ The Tao Te Ching discouraged rulers from using force, but if they had to use it, they were advised not to go beyond what was necessary. There is no mention of the specific grounds that would warrant waging a ‘just war’ or whether using force in self-defence was specifically permitted. Sun Tzu’s essays on ‘The Art of War’ also imply that the use of force was a last resort when dealing with the state’s enemies.⁷⁸

Buddhism is largely assumed to be a religion that never allows for war, although that view has been challenged by at least one modern scholar.⁷⁹ War that was embarked upon to take territory was not justified but, in some circumstances, war that was authorised by the state, to defend people against external aggression could arguably be justified.⁸⁰ Sikhism also includes some elements of just war theory. Its founder, Guru Nanak, is said to have declared that “it is the privilege of a true man to fight for, and die in the cause of righteousness”. Guru Gobind, in

⁷³ Bose, supra n70 at 10; Subedi, supra n60 at 352-53.

⁷⁴ Subedi, supra n60 at 354.

⁷⁵ It is dated between 600 and 200-300 BCE.

⁷⁶ Tao Te Ching or Daode Jing, (literally, “The Book of the Way and its Virtue”), extracts from principles 30 and 31; Muller, C (trans) Toyo Gakuen University [14 July 2004]: <<http://www.hm.tyg.jp/~acmuller/contao/daodejing.html#div-30>> (accessed 5 September 2006). For an alternative translation see the Taoism Information Page, “Peter Merel’s Tao Te Ching”: <<http://www.religiousworlds.com/taoism/ttcmere.html>> (accessed 5 September 2006).

⁷⁷ Harle, V “Towards a Comparative Study of Peace Ideas: Goals, Approaches and Problems” (1989) 26(4) *J. Peace Research* 341 at 343.

⁷⁸ Sun Tzu *The Art of War* (Griffith, S trans) (1963) at 39.

⁷⁹ Bartholomeusz, T *In Defence of Dharma: Just-War Ideology in Buddhist Sri Lanka* (2002).

⁸⁰ Harris, E “Buddhism and the Justification of War: A Case Study from Sri Lanka” in Robinson, supra n48 at 100.

his *Zafernama* (Epistle of Victory) articulated the idea that war is a last resort: “When all other means have failed, it is permissible to draw the sword.”⁸¹

Antiquity III: The Greek city-states: 500-43 BCE

The year 500 BCE marks the beginning of most studies of Greek diplomacy and international relations.⁸² Some scholars use this date as a starting point, on the basis that if one delves back further, there is relatively little documentary evidence on which to base analysis.⁸³ On the other hand, Homer’s accounts of the Trojan War in the *Iliad* and the *Odyssey* - which are arguably dated to 800 BCE⁸⁴ - could provide some insights, based on events, real or imagined, from a much earlier era, into the ancient Greeks’ ideas about the prerequisites for waging war.⁸⁵ Both Homer’s writings, and those of Plato, Aristotle and Isocrates, are drawn on below to elucidate the limitations that existed on the resort to force in ancient Greece. There is a brief discussion below regarding the use of force in relation to non-state actors, such as pirates. Historical evidence suggests piracy started to emerge from around 800-500 BCE,⁸⁶ but the discussion here is somewhat restricted due to limitations enforced by the source material.⁸⁷

Plato

Plato considered war to be an entirely natural and inevitable condition for a state to be in:⁸⁸

‘Peace,’ as the term is commonly employed, is nothing more than a name, the truth being that every State is, by a law of nature, engaged perpetually in an informal war with every other State.

Plato recognised that inter-state war must be initiated by “proper authority and must be lawfully declared”.⁸⁹ He distinguished between wars against ‘barbarians’ and wars against other Greek states: wars against the former were properly called

⁸¹ Singh, G “Sikhism and Just War”, in Robinson, *ibid* at 129.

⁸² Bederman, *supra* n4 at 32; Walker, *supra* n3 at 35-43.

⁸³ Mosley, D *Envoys and Diplomacy in Ancient Greece* (1973).

⁸⁴ “The weight of scholarly opinion now places the composition of the epic poems in the mid-eighth century B.C., the *Iliad* a little earlier than the *Odyssey*.”: Murray, A (trans), Wyatt, W (revis) *Homer: Iliad* (The Loeb Classical Library, 1999) at 4; also Kagan, D *The Great Dialogue – History of Greek Political Thought from Homer to Polybius* (1965) at 2. Kagan estimates that the poems were written down somewhere between 800 and 650 BCE.

⁸⁵ The exact date of the Trojan War is unknown but estimates usually refer to a period around 1100-1200BCE, indicating that the Greeks had turned their minds to what would cause them to wage war many centuries before the actual starting point adopted here of 500BCE.

⁸⁶ Powell, A (ed) *The Greek World* (1995) at 180.

⁸⁷ As to whether pirates are discussed in either Homer’s *The Iliad*, *The Odyssey* or in Thucydides’ *The Peloponnesian War*, see Rubin, A *The Law of Piracy* 2nd ed (1998) at 3-4; also Powell *supra* n87 at 179-198: “War and piracy have always had much in common, but their relationship was especially close among the Greeks...it is often very difficult to distinguish between warfare and piracy in the sources for the archaic, classical and Hellenistic periods.”

⁸⁸ Plato *The Laws*, Book I, 626A-B, (Bury, R transl) (The Loeb Classical Library, 1967).

⁸⁹ *Ibid*, Book XII, 955B12-C6.

‘war’ because Greeks and barbarians were natural enemies, whereas wars between Greek states should be called ‘factional strife’ because Greeks were still, by nature, friends of other Greeks.⁹⁰

Making a distinction between wars and factions, depending on the enemy’s nationality, had repercussions as to how the war ought to be fought and the rules that ought to be followed.⁹¹ Like Euripides, Demosthenes and Isocrates, Plato held the view that all non-Hellenes were natural enemies and could be exterminated or enslaved at will.⁹² It could be implied from this Greek/barbarian distinction that any wars against the barbarians were inherently and necessarily ‘just’ wars since the barbarians were the perpetual enemies of the Greeks, similar in status to the Canaanite tribes and Amalek in relation to the ancient Jews.⁹³

Isocrates

Isocrates published at least three documents advocating a Panhellenic crusade against Persia, starting with his *Address to Philip* in 346 BCE. In his *Panegyricus*,⁹⁴ Isocrates described the war against the Persians as the only war that was better than peace: more like a sacred mission than a military campaign.⁹⁵ Isocrates considered a Panhellenic crusade against Persia to be a *just war*, based on the wrongs committed by Persia in the past. It would also have been a *pre-emptive* war to prevent future aggression.⁹⁶ Isocrates called the Persians the natural and ancestral enemies of the Greeks, but he also advocated war against them because they were more prosperous and incapable of defending themselves in the event of a Greek attack.⁹⁷

Aristotle

More influential than Isocrates was Aristotle, who provided much of the intellectual arguments to support the personal desire of Alexander III of Macedon

⁹⁰ Plato, *The Republic* Book V, 470C-D (Lee, D transl. 1987) (Penguin Classics) at 258.

⁹¹ Ibid; 470B-471C, ibid at 258-59.

⁹² Euripides *Iphigeneia at Aulis*, 1400; Isocrates *Panegyricus*, 184; *Panathenaicus*, 163.

⁹³ See discussion supra at 79-82.

⁹⁴ Circa 380 BCE.

⁹⁵ Isocrates, *Panegyricus* para182, (Freese, J transl): <http://classicpersuasion.org/pw/isocrates/pwisoc4.htm#N_157> (accessed 5 September 2006).

⁹⁶ “...[A]gainst whom should war be made by those who desire no selfish aggression, but look to justice alone? Surely against those who formerly did injury to Hellas, are now scheming against us, and always entertain hostile feelings towards us”: Isocrates, *Panegyricus* para183, ibid.

⁹⁷ “Against whom should a campaign be conducted by those who wish to act as pious men and at the same time desire their own advantage? Surely against those who are both our natural and our ancestral enemies, who possess the highest prosperity with the smallest power of striking a blow in its defence. Now the Persians are open to all these reproaches”: Isocrates, *Panegyricus* para 184, ibid.

to win glory at the expense of the barbarians.⁹⁸ Aristotle, too, believed that some people were designed by nature for subjection. There are several passages in the *Politics* where he referred to the barbarians as being more servile in their nature than the Greeks.⁹⁹ Aristotle thought that Greeks should rule barbarians, and as such, any war against them was inherently just.¹⁰⁰

Hence even the art of war will by nature be in a manner an art of acquisition...that is properly employed both against wild animals and against such of mankind as though designed by nature for subjection refuse to submit to it, inasmuch as this warfare is by nature just.

His perspective on the purpose of military training provides further insight into his conception of a just war.¹⁰¹ Military training, and hence warfare, was to have been employed for three purposes: physical self-defence of the state, gaining control or dominion for the subjects' own benefit, and maintaining control over those who were destined to be slaves. Aristotle considered that the ultimate objective of war was peace.¹⁰² He also felt that war compelled men to be "just and temperate".¹⁰³ In the *Nicomachean Ethics*¹⁰⁴ and in the *Rhetorica ad Alexandrum* Aristotle provided an account of the wide range of circumstances which warranted the use of force.¹⁰⁵

[If] we have been the victims of aggression, we must take vengeance on those who have wronged us, now that a suitable opportunity has presented itself; else, when we are actually being wronged, we must go to war on our own behalf or on behalf of our kindred or our benefactors; or else we must help our allies when they are wronged, or else we must go to war to gain some advantage for the city, in respect either of glory, or resources, or of strength, or of something similar...

In essence, Aristotle recognised that some wars were just and necessary, including any war against the barbarians, wars in self-defence of the state, the state's allies, when the state had been subjected to aggression and in order to gain some 'advantage' for the state.¹⁰⁶

⁹⁸ Aristotle was Alexander's teacher for approximately three years in the Gardens of Midas: Green, P *Alexander of Macedon* 356-323 BC, *A Historical Biography* (1991) at 57-58.

⁹⁹ Aristotle, *Politics*, 1285a line 20, and 1252b lines 8-10, (Rackham, H transl, Page, T ed) (The Loeb Classical Library, 1959) at 37.

¹⁰⁰ Ibid, 1256b lines 24-27.

¹⁰¹ "The proper object of practising military training is not in order that men may enslave those who do not deserve slavery, but in order that first they may themselves avoid becoming enslaved by others; then so that they may seek suzerainty for the benefit of the subject people, but not for the sake of world-wide despotism; and thirdly to hold despotic power over those who deserve to be slaves.": ibid, 1333b line 38 – 1334a line 4.

¹⁰² "[A]s has been said repeatedly, peace is the end of war, leisure of business.": ibid, 1334a line 15.

¹⁰³ Ibid, 1334a line 27.

¹⁰⁴ "...[W]e work to have leisure and wage war to live in peace...no one chooses to make war, or even starts a war, for the sake of making war; for if someone turned his friends into enemies to bring about battles and killings he would seem utterly murderous...": Aristotle, *Nicomachean Ethics* Book X, chapter 7, 1177b, (Crisp, R transl, ed, 2000) at 195.

¹⁰⁵ Aristotle *Rhetorica ad Alexandrum* 1425a; (Rackman, H transl, ed) (Loeb Classical Library, 1953); see also 1425b11-16 on circumstances where warfare had to be abandoned in favour of peace.

¹⁰⁶ Perhaps Aristotle thought it was just to use force for material gain because in the *Rhetorica ad Alexandrum* he referred to gaining some advantage for the city as a justification for war, and that included glory or resources. He may have considered it just to go to war not only in response to physical threats but also if the state's economic strength was threatened.

Empirical sources of the 'just war'

To complete the analysis of the 'just war' in ancient Greece, brief reference is made to the descriptions in Homer and the military actions of Alexander. The loss of Helen of Troy, wife of King Menelaus of Sparta, to Paris, was supposedly the reason (or perhaps the pretext) for the outbreak of the Trojan War. This could be seen as practical proof of the ancient Greeks' desire for a 'just cause': it may be implied that it was considered 'just' to use force in order to retake something wrongly taken. Homer's works, which focused on the Trojan War, thereafter permeated all aspects of Greek life, including warfare.¹⁰⁷ However, Homer's poems are known less for their insights into what might constitute a 'just war' than for their emphasis on war as an instrument in enhancing the hero's personal glory. Aspiring to the Homeric virtue of *arête* (meaning 'greatness' or 'striving to be the best one can be') appears to have been the ultimate objective of waging war. The Greek ideal of *areté* had a significant influence on Alexander who had an essentially Homeric attitude to war, regarding it as "first and last, the royal road to personal *areté*."¹⁰⁸

A contemporary analysis of Alexander's decisions to wage war and his conduct during war indicates that he did not have an overly refined concept of the *ius ad bellum*. One could argue that the underlying justification for Alexander's expedition against Persia was essentially a Greek war of *vengeance*, in retribution for the wrongs which the Persians, especially King Xerxes I, had carried out against Greece a century and a half before.¹⁰⁹ That argument has some weight, up to the point that he subdued Persia (but no further, such as his invasion of India).¹¹⁰

Other factors led Alexander to initiate battle, such as financial considerations,¹¹¹ subduing potential rebellions,¹¹² achieving personal objectives,¹¹³ increasing his

¹⁰⁷ The *Iliad* was used as a reference by warring sides to assist in the arbitration of disputes: Kagan *supra* n84 at 1.

¹⁰⁸ Green, *supra* n98 at 92.

¹⁰⁹ Persia had invaded Greece in 490 and 480-79 BCE. The presumption that Alexander's conquests were the 'Panhellenic crusade' preached by Isocrates is undermined somewhat by the lack of Greek troops in his army, which was mainly Macedonian: *ibid* at 156-158.

¹¹⁰ Alexander advised Darius that he was intending to avenge past wrongs, to halt Persia's assistance to Sparta and to punish Persia for attempting to destroy the League of Corinth's peace. These justifications were set out in a political manifesto sent by Alexander to Darius which began by emphasising the wrong done to Macedonia and the rest of Hellas by Xerxes' invasion. Alexander claimed that it was to avenge this, among other things, that he, as Commander-in-Chief of the League, had crossed the Dardanelles: Tarn, W *Alexander the Great, Narrative* (1979) at 36-37.

¹¹¹ When Alexander took over from his father he found that he was in financial difficulty, unable to pay the troops in the standing army their wages, thus, the attraction of Persian gold may have influenced his military decisions.

¹¹² Alexander's military actions against the Greek city-states and particularly the destruction of Thebes were based on the need to suppress their likely rebellion from Macedonian rule.

personal fame¹¹⁴ and pursuing *arête*.¹¹⁵ Alexander's justifications for waging war were influenced by the ideas of Plato, Isocrates and his teacher, Aristotle, who all regarded war against 'barbarians' as being inherently just.¹¹⁶

It is possible to argue that Alexander's decision to conquer the entire Persian Empire was an act of *pre-emptive war*. The strategy that favours attack as the best form of defence was one that had already proved valuable to his father.¹¹⁷ After the battle of Issus, Alexander had the option of halting and taking Isocrates' advice to hold Asia Minor but Alexander believed that this would have eventually resulted in a defensive war since Persia was bound to try to recover the sea-provinces. Therefore, Alexander decided to go on the offensive in the summer of 331 BCE and take Phoenicia, Egypt, and then march beyond the Euphrates. This strategy could be described as *pre-emptive war* because these later conquests were not strictly necessary to avenge past injustices but Alexander recognised that to avoid future conflict, he had to press on and conquer all of Persia.

Conclusion

Despite some claims to the contrary,¹¹⁸ the concept of international law applicable to the use of force between nations did exist in ancient Greece. Plato, Isocrates and Aristotle all shared common theoretical ground on what would constitute a just war. They all felt that a war was just if it was fought against barbarians who were bound by nature to be the slaves of the Greeks. There are some parallels between the Greeks' and Macedonians' ideas about war, and those of the Israelites, discussed earlier. Plato, Isocrates and Aristotle all believed that Persians were the natural and ancestral enemy of the Greeks, comparable to the Canaanite tribes and the tribe of Amalek, in the eyes of the ancient Israelites. Thus, ancient Jews and Greeks adhered to the notion that some peoples were natural enemies, regardless of the degree of physical threat they posed at any particular time, and any war against such a threat would always be just. Wars of

¹¹³ The capture of Tyre was strategically unnecessary but it had refused to let him enter and perform a sacrifice, so he laid siege to the city for six months and eventually took it, sold most of its citizens into slavery and then performed his sacrifice at Melqart: O'Brien, J *Alexander the Great: The Invisible Enemy* (1994) 36.

¹¹⁴ His decision to invade India was based on his idea that he was following in the footsteps of Dionysus, Heracles and the legendary Queen Semiramis of Assyria: *ibid* at 61-62.

¹¹⁵ See discussion *supra* at 88.

¹¹⁶ Alexander came to realise that "barbarians, like Greeks, must be classified according to merit, and that the best ranked high": Tam, *supra* n110 at 54.

¹¹⁷ "Before the barbarian monarch's [King of Paeonia] successor could establish himself, Philip swept over the northern passes, defeated the Paeonians in a pitched battle, and forced them to acknowledge Macedonian overlordship. Attack is the best defence: Philip knew that at this psychological moment he had a unique chance to smash the Illyrian threat once and for all." Green, *supra* n98 at 24.

¹¹⁸ Walker, *supra* n3 at 38; see also Bederman, *supra* n4 at 34.

self-defence were also considered necessary and just, and even pre-emptive war was sometimes waged. Although some of Alexander's justifications for war may be unpalatable in a modern context, it is apparent that the modern day laws owe something to the ideas expressed and practiced during this period in antiquity.¹¹⁹ The concept and content of 'just war' theory, which was later embellished by the Romans, then the Christian theologians and secular philosophers, often found its origins in the writings of this period.¹²⁰

Antiquity IV: The Roman 'just war' period: c330 – 168 BCE

The Roman Empire was created and sustained by warfare: "from its beginning until its final rupture at the hands of invading barbarians in the fifth century, it was fighting, almost without intermission, one enemy or another."¹²¹ Therefore, there is a great deal of historical material upon which to draw when analysing the Roman conception of the *ius ad bellum*, from which it is only possible to select a few examples.

Cicero and theoretical conceptions of the 'just war'

The gap between the death of Aristotle and the birth of Marcus Tullius Cicero, was almost two hundred years but they shared the same fundamental belief that the purpose of war was peace.¹²² Cicero, an admirer of the Greeks and particularly Aristotle, wrote in *De Officiis*: "The only excuse, therefore, for going to war is that we may live in peace unharmed"¹²³ and "War...should be undertaken in such a way as to make it evident that it has no object other than to secure peace."¹²⁴ Cicero preferred diplomacy and discussion to force,¹²⁵ which he considered should only have been used by states as a last resort.¹²⁶ But if, despite all, war had to be declared, the Romans' gods were called upon to act as judges: their role was to decide that the war was just.¹²⁷

¹¹⁹ "To discuss the morality of the invasion [of Persia] and to call Alexander a glorious robber, is a mere anachronism. Of course, to the best modern thought, the invasion is quite unjustifiable; but it is equally unjustifiable to transfer our own thought to the fourth century B.C": Tam, supra n111 at 9.

¹²⁰ "Doubt cannot be cast on the existence of ancient Greek international law...": Scupin, supra n20 at 134-135.

¹²¹ Wachter, J *The Roman Empire* (1987) at 16.

¹²² Aristotle died in 322 BCE in Euboea; Cicero was born in 106 BCE in Arpinum.

¹²³ Cicero *De Officiis* Book I, XI, at 35 (Miller, W transl) (Loeb Classical Library, 1968) 37.

¹²⁴ *ibid*, XXIII, 80; compare with Aristotle, *Politics* 1334a, above n101.

¹²⁵ "...[D]iplomacy in the friendly settlement of controversies is more desirable than courage in settling them on the battlefield": Cicero *De Officiis* Book I, XXIII, at 80-81.

¹²⁶ "...[T]here are two ways of settling a dispute: first by discussion; second, by physical force; and since the former is characteristic of man, the latter of the brute, we must resort to force only in case we may not avail ourselves of discussion. The only excuse, therefore, for going to war, is that we may live in peace unharmed...": *ibid*, XI, 34-35, at 37.

¹²⁷ See Watson, supra n12, especially at 62-71.

For Cicero, there were at least two pre-requisites for waging a just war: first, there must have been an *iusta causa*, a just cause; second, the proper procedure must have been followed before commencing the war. As for a just cause, Cicero maintained that a state never waged war except in defence of its honour, including seeking revenge for wrongs done, or its safety, that is, in self-defence.¹²⁸ All wars waged without provocation were unjust; all wars waged in revenge or in self-defence were just.¹²⁹ As for the procedural requirement, the laws in the *fetial* code of the Roman People were to have been adhered to before commencing war.¹³⁰ No war would be just unless it was entered after an official demand for satisfaction had been made or a warning had been given and formal declaration made.¹³¹ Livy also outlined the rules in the *fetial* code that were to be observed before commencing war, including the official demand for satisfaction to which Cicero referred, and the hurling of the spear into enemy territory.¹³²

Cicero, like Plato, was also concerned to make a distinction between wars that were fought against ‘enemies’ and those that were fought against ‘rivals’.¹³³ Wars fought against enemies were fought for supremacy and in such wars both life and honour were at stake; whereas wars fought against rivals were fought for mere glory, where only office and position were at risk.¹³⁴ Cicero felt that the latter type of war ought to be “carried on with less bitterness”.¹³⁵ However, both types of war had to start from the same motives discussed above, which were “the only righteous grounds for going to war”.¹³⁶

As for pre-emptive war, it may be argued that Cicero would not have considered it just because, first, he emphasised in *De Re Publica* that only wars waged for revenge or defence were just and that wars undertaken without provocation were unjust; secondly, because the procedural demands implied that a wrong must have

¹²⁸ Cicero *De Republica* Book III, XXIII, 35 (Keyes, C transl) (Loeb Classical Library, 1928) at 213.

¹²⁹ “Those wars are unjust which are undertaken without provocation. For only a war waged for revenge or defence can actually be just...”: *ibid.*

¹³⁰ The *fetial* code or *ius fetiale*, was administered by priests, *fetiales*, who oversaw the declaration of war. Before war could begin, a demand had to be addressed to the opponent, insisting on satisfaction on the grievance caused to Rome, with a fixed time allowed for a proper response. Secondly, a formal declaration of war had to be issued which involved an elaborate ceremony, culminating in the hurling of a spear across the Roman frontier into the enemy’s territory and the recitation of ancient legal formulae. These two procedural conditions had to be met before a war could be judged ‘just’ by the *fetiales*.

¹³¹ Cicero *De Officiis* Book I, XI, 36-38, *supra* n123 at 41; Cicero *De Republica* Book III, XXIII, 35, *supra* n128 at 213.

¹³² Livy, Book 1, xxxii 6-14, (Foster, B trans.) (Loeb Classical Library, 1961).

¹³³ Cicero *De Officiis* Book I, XI, 36-37, *supra* n123 at 38.

¹³⁴ “...[W]ith the rival it is a struggle for office and position, with the enemy for life and honour. So with the Celtiberians and the Cimbrians we fought as with deadly enemies, not to determine which should be supreme, but which should survive; but with the Latins, Sabines, Samnites, Carthaginians, and Pyrrhus we fought for supremacy.”: *ibid.*, XII, at 41.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

actually been done.¹³⁷ It is apparent that Cicero, and the Romans generally, went to great lengths to ensure that they had a just cause before resorting to war.¹³⁸

Empirical sources of the 'just war'

A brief review of some of the key military campaigns of the Roman era provides an understanding of how war was justified in practical terms. It is apparent that the notions of self-defence and honour, identified by Cicero as *iusta causa*, loomed large, and perhaps pre-emptive war was also instigated on occasions. Most of the examples here are from the era of the Roman Republic (508-44 BCE).¹³⁹

During the early years of the Republic, Rome's wars were fought mainly in self-defence. Its first major expansionist war was the First Punic War.¹⁴⁰ This war seems to have been caused by Rome's decision to conquer the island of Sicily, thus allowing it to become a naval power.¹⁴¹ There is debate over the exact causes of the resulting war between Rome and Carthage. There was apparently an appeal by the inhabitants of Sicily not only to Carthage but also to Rome to provide military assistance.¹⁴² Rome agreed to provide such assistance, either because it wanted to halt the likely spread of Carthaginian influence in the region, or because of the prospect of plunder.¹⁴³ It is also quite possible to view the Roman invasion of Sicily as a *pre-emptive* use of force since Rome was aware that if Carthage gained control over the whole island, "it would not be long before they brought Syracuse under their domination as well."¹⁴⁴ Rome apparently invaded Sicily because it wanted to prevent Carthage from turning Sicily into a bridgehead for the invasion of Italy.¹⁴⁵

The First Punic War contained the seeds for the outbreak of the Second Punic War. After Carthage's defeat in Sicily, it turned its attention to Spain, but the two great powers once again came into conflict over a region in southern France that

¹³⁷ On the procedural requirements, see discussion *supra* at 91-92.

¹³⁸ Roman wars were often begun because of a violation of a treaty, the defection of a friendly state to the enemy or the defiling of an ambassador: see Bederman, *supra* n4 at 222-27.

¹³⁹ Roman history can be divided roughly in two: from the founding of Rome until the death of Julius Caesar which marked the end of the Republic (circa 508-44 BCE); and then the Roman Empire from the rule of Caesar Augustus until the sacking of Rome (circa 44 BCE-410 AD): see Opello, W and Rosow, S *The Nation-State and Global Order* (2004).

¹⁴⁰ From 264 to 241 BCE.

¹⁴¹ See Lazenby, J *The First Punic War* (1996) 36-37.

¹⁴² Polybius *The Rise of the Roman Empire*, 10-11 (Kilvert, I transl) (Penguin, 1979) at 50-51.

¹⁴³ *Ibid* at 11, Kilvert translation at 51.

¹⁴⁴ This is not conclusive since there is also evidence that Rome was partly motivated by greed and perhaps the invasion was only part of a wider imperialist agenda: see Polybius, *ibid* at 11; also Lazenby, *supra* n141 at 39-41.

¹⁴⁵ Polybius, *ibid* at 10, *supra* n142 at 50.

was allied to Rome. In this instance, Rome's decision to wage war was based more on *self-defence*, since the region in question, although an ancient Greek colony, was allied to Rome.¹⁴⁶ The reasons why Carthage provoked this war are said to have been related to Carthage's success in Spain, but notions of anger, and a desire for revenge also played a role.¹⁴⁷ Subsequent to its victory in the Second Punic War, the Roman Republic's wars were mainly motivated by notions of *imperialism*.¹⁴⁸

For it was after their victory over the Carthaginians in the Hannibalic War¹⁴⁹ that the Romans came to believe that the principal and most important step in their efforts to achieve universal domination had been taken, and were thereby encouraged to stretch out their hands for the first time to grasp the rest, and to cross with an army into Greece and the lands of Asia.

Julius Caesar waged war against various peoples, including the Helvetii, Germanic tribes under the leadership of Ariovistus, the Belgian confederacy, the Veneti, the Usipetes, the Tencteri and the Nervii.¹⁵⁰ The war between Caesar's army and the Helvetii, which was the initial step in his conquest of Gaul, was arguably waged on the grounds of *self-defence*, given that the Helvetii were planning to migrate *en masse* into Western Gaul.¹⁵¹ The next campaign, against the Germanic tribes under the leadership of Ariovistus, could be viewed either as a *pre-emptive war* as the Germans posed a future threat to the Roman people if left unchecked,¹⁵² or as an *intervention on humanitarian grounds*.¹⁵³ As for the latter, Caesar was addressed by Diviciacus on behalf of the Gallic tribes who sought Caesar's military assistance to "defend the whole of Gaul from the outrage of Ariovistus."¹⁵⁴

¹⁴⁶ Wachter supra n121 at 7.

¹⁴⁷ The 'anger' was that of the Carthaginian citizens; the personal revenge that of Hannibal on behalf of his father, Hamilcar Barca: Polybius *The Rise of the Roman Empire*, supra n142 at 39; see Livy supra n132 at 21.1.5; see also Wachter, supra n121 at 7; and Lazenby supra n141 at 171-73.

¹⁴⁸ Polybius *The Rise of the Roman Empire* supra n142 at 3.

¹⁴⁹ The Second Punic War.

¹⁵⁰ Obviously there is a large gap between the Second Punic War and the campaigns of Julius Caesar. It is beyond the scope of the present work to survey all of the wars that occurred during the Roman Republic and the Roman Empire. The selections here are made to illustrate the point that Roman military leaders were willing to wage war on grounds of self-defence and pre-emption.

¹⁵¹ Caesar was apparently called upon by the Gauls of the province of Gallia Narbonensis, which had already been conquered by Rome, to defend them from the invading Helvetii. The argument that this war was an act of self-defence is open to challenge because the Helvetii were apparently planning to only march through the Roman province, 'without any mischief' because they had no other route. However, Caesar did not believe that "men of unfriendly disposition, if granted an opportunity of marching through the province, would refrain from outrage and mischief": Caesar *The Gallic War* Book 1, 7 (Edwards, H transl) (Loeb Classical Library, 1917) at 13. Caesar conquered the Helvetii in 58 BCE; for historical details of Caesar's campaign against the Helvetii see Fuller, J *Julius Caesar – Man, Soldier, and Tyrant* (1965) at 100-106.

¹⁵² "[H]e could see that the Germans were becoming gradually accustomed to cross the Rhine, and that the arrival of a great host of them in Gaul was dangerous for the Roman people..." Caesar, *The Gallic War*, Book 1, 33, *ibid* at 51.

¹⁵³ It could also be viewed as a war of self-defence because Caesar 'did not admit that Gaul belonged to Ariovistus', bringing arguments to prove that the Arverni and the Ruteni had earlier been subdued by Rome in a campaign by Quintus Fabius Maximus: *ibid*, 45, at 75 of Edward's translation.

¹⁵⁴ Ariovistus was a tyrant, who, according to Caesar, had conquered the forces of the Gauls in battle near Magetobriga and was "exercising a proud and cruel tyranny, demanding as hostages the children of the greatest nobles, and perpetrating upon them all the direst forms of torture...He is a passionate, a reckless barbarian...": *ibid*, 31, at 49 of Edward's translation.

The Gallic War resulted in a large number of successful campaigns for Caesar – in eight years, he had conquered Gaul. The campaigns waged during this war reflected the military reality that commanders had a *great deal of flexibility* in determining when and *upon what grounds they would resort to force*. It also shows that in the late Roman Republic, the use of force could equally be justified on expansionist grounds as on the grounds of self-defence, including pre-emptive self-defence. Those campaigns were also probably motivated, at least in part, by Caesar's aim of personal aggrandisement.¹⁵⁵

The Roman Empire's borders expanded considerably from 27 BCE-410 AD, especially under the rule of Caesar Augustus.¹⁵⁶ He waged numerous wars, all of which he regarded as just:¹⁵⁷

I extended the boundaries of all the provinces which were bordered by races not yet subject to our empire. The provinces of the Gauls, the Spains, and Germany, bounded by the ocean from Gades to the mouth of the Elbe, I reduced to a state of peace. The Alps, from the region which lies nearest to the Adriatic as far as the Tuscan Sea, I brought to a state of peace without waging on any tribe an unjust war. (emphasis added)

Augustus shared the view popular among the ancients that war should be waged to secure peace and that it ought to be just. In reality, the Roman Empire expanded and conquered its neighbours in Europe, Africa and the Mediterranean by wave after wave of military campaigns and any refusal to submit, or later revolt by dissatisfied subjects, was met with harsh consequences.¹⁵⁸

What is apparent from this brief survey of Roman military accomplishments is that the Romans clearly valued the moral high ground that a proper cause for war granted to them.¹⁵⁹ The Romans self-consciously framed their decisions on recourse to war on legal notions of right and wrong. However, it is sometimes difficult to match up the theoretical expositions of just war, as expounded by the likes of Cicero, and actual Roman military practice.¹⁶⁰

¹⁵⁵ Fuller supra n151 at 102.

¹⁵⁶ He ruled from 27 BCE-14 AD.

¹⁵⁷ August Caesar *Res Gestae Divi Augusti* Part V, 26, (Loeb Classical Library, 1924).

¹⁵⁸ The Jewish-Roman Wars exemplified the harsh approach taken by the Roman Empire when its subjects rebelled: see Aberbach, M and Aberbach, D *The Roman-Jewish Wars and Hebrew Cultural Nationalism* (2000).

¹⁵⁹ Bederman, supra n4 at 226.

¹⁶⁰ Bederman notes that Roman rhetoric and actual practice were sometimes difficult to reconcile: *ibid*.

Non-state actors

There are several passages in the works of Roman scholars which suggest that ‘war’ was fought between states. Acts of violence by non-state actors, such as pirates, were considered to be of a different nature. In *De Officiis*, during a discussion as to whether it is perjury to fail to perform a vow made to a pirate, Cicero wrote:¹⁶¹

...[S]uppose that one does not deliver the amount agreed upon with pirates as the price of one's life, that would be accounted no deception....for a pirate is not included in the number of lawful enemies, but is the common foe of all the world [communis hostis omnium]; and with him there ought not to be any pledged word nor any oath mutually binding.

He went on to note that matters were different when one was dealing with a ‘legitimate declared enemy’. Then, the relations were governed by the “whole fetial code as well as other laws that are binding in common between nations.”¹⁶²

Amidst a discussion on wisdom and justice in *De Re Publica*, Cicero recalled an exchange apparently between a pirate and Alexander of Macedon:¹⁶³

...[F]or when he [the pirate] was asked what wickedness drove him to harass the sea with his one pirate galley, he replied: "The same wickedness that drives you to harass the whole world..."

Although the above passage, later quoted by St Augustine,¹⁶⁴ raises issues regarding the legitimacy of the use of force by non-state actors, as compared with the use of force by the state, it is difficult to know what Cicero's views were in light of the fact that the passage is incomplete. In the *Philippics*, in a passage concerning Antonius, it is clear that Cicero considered ‘war’ to be undertaken between legitimate enemies, that is, states:¹⁶⁵

And your ancestors, Romans, had to deal with an enemy that possessed a State, a Senate, a treasury, unanimity and concord amongst its citizens, some principle on which, if the occasion admitted, to found peace and a treaty; this enemy of yours is attacking your State while he himself possesses none...The conflict therefore, Romans, is wholly between the Roman people, the victor over all nations, and an assassin, a brigand, a Spartacus...

A similar differentiation was made between legitimate enemies and brigands or pirates by Pomponius in around 130 AD:¹⁶⁶

¹⁶¹ Cicero *De Officiis* Book III, XXIX, 107, supra n123 at 385.

¹⁶² Ibid, 108 at 387.

¹⁶³ Cicero, *De Re Publica* III, XIV, supra n128 at 203.

¹⁶⁴ See also the quotation in chapter 5 of this thesis at 119-20. St Augustine (*De Civ Dei* IV, 4 25) told the story of Alexander and the pirate, which he is said to have probably taken from Cicero: supra n128 at 202, n1.

¹⁶⁵ Cicero, *Philippics* IV, VI, 14 (Ker, W trans.) (Loeb Classical Library, 1926) at 249.

¹⁶⁶ *Corpus Juris Civilis* L.16.118: Pomponius, Book II.

The enemy are those who have officially declared war upon us, or upon whom we have officially declared war; all others are brigands or pirates.

In respect of property rights, the same distinction was made by Ulpian.¹⁶⁷ It is difficult to know what significance should be attached to these Roman pronouncements on piracy. Rubin argues that the references to ‘piracy’ were not intended to imply criminality under any legal system, and he views the fact that the words ‘*pirata*’ or ‘*peirato*’ were not used in any of these passages as being particularly important, and often overlooked.¹⁶⁸ He asserts that ‘piracy’ to the Romans was a descriptive noun used to describe the practices of a particular land-based Eastern-Mediterranean people whose views of law and intercommunity relations were inconsistent with Roman views of the world order under Roman hegemony.¹⁶⁹ He warns against reading too much into the Romans’ references to piracy: there was no intention to create a separate criminal category or to imply a violation of general international law.¹⁷⁰ In any case, the Romans treated these peoples as capable of going to ‘war’, and indeed as being in a permanent state of ‘war’ with all people except those with whom they had concluded an alliance.¹⁷¹ Whatever may be the legal significance of the references to piracy in the Roman texts, it is clear that violence by essentially non-state actors, against a state, has existed for some time and the question of how the state should respond to such violence is far from novel.

The Roman Republic and the Roman Empire existed at a time when the theoretical concept of the ‘just war’ was gaining legitimacy. But whilst both philosophers and military commanders wrote of the need to wage war for peace and of the need to have a just cause, the actual wars of the Roman armies were often fought for a number of reasons, such as expanding territorial boundaries, securing slaves and attaining personal glory, which were anything but ‘just’.

Conclusion

Despite differences in time and place, common threads persist through both the theoretical expositions and practical demonstrations of the recourse to force. All civilizations in antiquity agreed that the main objective of war ought to be peace,

¹⁶⁷ *Corpus Juris Civilis* XLIX.15.24: Ulpianus. Anyone captured by robbers did not become their slave, but anyone taken by the enemy became their slave.

¹⁶⁸ Rubin *supra* n87 at 16.

¹⁶⁹ *Ibid* at 18.

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid*.

that it should be waged as a last resort, and that if necessary, it must be fought for good reason or 'just cause'. Honour, revenge, injustice, taking back something wrongly taken, and self-defence were generally considered 'just' causes for resorting to force but "gaining some advantage"¹⁷² in terms of resources or glory was also an apparently just cause. As for non-state actors, the threat posed in this epoch was from pirates, which were present in ancient Greece, and remained a problem for ancient Rome. Arguably, they were considered to have a different status to the enemy state and, as the 'common foe of all mankind' were not owed the same courtesies that were granted to legitimate, declared enemies.¹⁷³ These overall themes regarding the use of force continued to develop in the next epoch of international law, when the Christian and Islamic theologians put forth their theories aimed at the limitation of the recourse to force.

¹⁷² See excerpts from the works of Aristotle, *supra* n105; see also the justifications for the use of force by the Roman military.

¹⁷³ See Cicero *supra* at n161 and accompanying text.

CHAPTER 5

Epoch II: Christian and Islamic theology

Introduction

In the second epoch of international law, Christian and Islamic theologians influenced the development of limitations on the use of force, particularly via the ‘just war’ and *jihad* doctrines. The contribution of Christian theologians will be discussed in Part A, followed by a discussion of the Islamic developments in Part B. As in the previous chapter, a thematic approach is pursued throughout, with emphasis on the use of force generally, the use of force in self-defence, pre-emptive self-defence and non-state actors. The use of forcible measures short of war, such as reprisals, are not discussed here as a separate theme since there is insufficient material to garner a clear indication of all of these particular scholars’ views. It is conceded that some themes are emphasised more than others, due to the scholars’ own treatment of these issues.

Part A: Christian theology

Introduction

During the Middle Ages, three Christian theologians were mainly responsible for elaborating upon the Roman conception of a ‘just war’. St Ambrose, St Augustine and St Thomas Aquinas all made significant contributions to the development of the ‘just war’ doctrine, transforming it from a pagan concept into a Christian doctrine.¹ They were succeeded by the Renaissance-era scholars such as Vitoria, Suárez and Gentili, who began the transformation of international law from its connection with theology and morality to a new basis in custom and state practice.

Use of force and the ‘just war’

St Ambrose of Milan² combined his Roman education and earlier political experience with his religious beliefs to formulate some general ideas on the use of force, even though he felt that as a priest his concern was with souls rather than

¹ Other significant contributions include the writings of, *inter alia*, St Isidore of Seville (560-636) who wrote that a just war was one waged, after declaration, to restore good or to defend against evil: see Grewe, W (Byers, M, transl and rev) *The Epochs of International Law* (2000) at 108-09, n12. Isidore’s definition of the *ius gentium* was adopted word-for-word in Gratian’s *Decretum* and it was also adopted by Aquinas in his *Summa Theologiae*.

² Born circa 340, died 397.

with bodies, and with peace rather than with war.³ St Ambrose set out some of his ideas on the state's resort to force in *De Officiis Ministrorum* (On the Duties of the Clergy).⁴ Although St Ambrose came to the just war doctrine from a Christian perspective, he shared with his Greek and Roman predecessors the fundamental idea that barbarians were the natural enemy of the Roman Empire and of the Christians.⁵ Therefore, any war against them was necessary and just, and many underhand methods of warfare could be justified on the grounds of suppressing the threat that they posed.⁶ St Ambrose believed that the ultimate objective of war was peace, but he departed from earlier scholars who shared this view in so far as he believed that the *purpose* of securing peace was so that the empire of God could flourish.

St Ambrose observed that the ancient Hebrews' conquest of the Promised Land was a result of a divine command. As such, the war that was necessary to affect the conquest of Palestine was a holy war and a just war.⁷ Without specifying when a just cause might arise, he clearly held the view that some wars were just, such as when the rights of God were at stake; in any particular circumstances, "one must examine whether or not the war is just".⁸ St Ambrose did not share the pacifist beliefs of the early Christians given that he did not oppose war *per se*; rather, he praised military courage, which defended one's country from barbarians, the weak in their homes and those preyed upon by robbers⁹ and he prayed for the success of the imperial armies who defended the Empire against barbarians.¹⁰

St Ambrose's conception of just war doctrine was heavily influenced by both his political surroundings and his Christian beliefs.¹¹ He believed that the Roman Empire existed for the protection and facilitation of the spread of Christianity, to the extent that any signs of the Empire's collapse signalled the imminence of the

³ *De Officiis Ministrorum* 1.175 in Jacques-Paul Migne's *Patrologia Latina* 16.74.

⁴ *De Officiis Ministrorum* was written around 388-390. The title bears a deliberate reference to Cicero's work. Russell describes St Ambrose as a 'Christian Cicero' because he combined both Roman and Christian morality; even his comments on the Roman just war were supported with references to Old Testament wars: see Russell, F *The Just War in the Middle Ages* (1975) 14.

⁵ For St Ambrose, 'barbarians' referred not only to non-Greeks or non-Romans, but also to non-Christians.

⁶ St Ambrose, for instance, approved of the tactic of giving wine to barbarians so that in a drunken state, they might be more easily subdued.

⁷ *De Officiis*, 3.53, in Migne's *Patrologia Latina* 16.161.

⁸ *Ibid.*, 1.176, *ibid* at 16.75.

⁹ *Ibid.*, 1.129, *ibid* at 16.161.

¹⁰ *Ibid*; see also Russell *supra* n4 at 12-15.

¹¹ Even though he was influenced by Cicero, his objective in *De Officiis* was apparently to prove that Cicero's text was no longer necessary and that the Christian beliefs had eclipsed those of his pagan predecessors.

end of the world and the coming of the Kingdom of God.¹² It may be surmised that for St Ambrose, any war ordered by God was obligatory and other wars were not to be condemned, provided they were ‘just’, that is, waged in defence of one’s country or to vindicate its honour.¹³

St Aurelius Augustine of Hippo¹⁴ expanded upon and further developed the ideas of St Ambrose. Due in large part to the different political setting in which he wrote, he felt obliged to separate Christianity from Roman imperial authority.¹⁵ Rather than regarding the Roman Empire as the only vehicle for the spread of Christianity, St Augustine took the view that earthly kingdoms would come and go,¹⁶ and only the Church, the Heavenly City, would last until the end of the world.¹⁷ In one of his main works, *De Civitate Dei Contra Paganos* (The City of God Against the Pagans),¹⁸ he set out his argument for the existence of two cities: one of God and the other of this world.¹⁹ Before he could define which wars were just, St Augustine first had to establish that war *per se* was permissible. He used scripture to argue against the pacifism that had created a Christian aversion to military service and war.²⁰ By drawing upon the Old Testament, St Augustine argued that Moses’ wars were ordered by God and were therefore just: when Moses had put sinners to death, he was acting on God’s command and he was motivated by love and obedience, not cruelty.²¹ St Augustine also asserted that war was permissible on the basis of John’s response to soldiers who came to be baptised.²² Thus, St Augustine was able to show that war was indeed permitted in Christianity and that pacifism was inconsistent with Scripture.

Regarding the purpose of war, St Augustine believed that:²³

¹² See Morino, C (Costelloe, M transl.) *Church and State in the Teaching of St Ambrose* (1969) at 54 and see Russell, supra n4 at 14.

¹³ Palanque, J *Saint Ambroise et l’Empire Romain* (1933) at 333, as cited in Morino, *ibid* at 54.

¹⁴ Born in 354 and died in 430; for biographical information see McCracken “Introduction” in Saint Augustine *The City of God Against the Pagans* (McCracken, G transl) (Loeb Classical Library, 1967).

¹⁵ *The City of God* was begun three years after Rome had been subjected to its first barbarian invasion, and the fall of the city was blamed by some on the influence of the Christian Church.

¹⁶ *Sermon 105*, in Migne’s *Patrologia Latina* 38.618-25.

¹⁷ St Augustine was affected by the political realities of his time, especially the sacking of Rome by Alaric the Visigoth in 410: see the *Retractions*, Book II, Chapter 69.

¹⁸ *The City of God* was written between 413 and 426, whilst he was Bishop of Hippo, in the modern day city of Annaba in Algeria.

¹⁹ Other works relevant to the current inquiry include *Contra Faustus*, *Manichaeum* (Reply to Faustus, the Manichean); *De Libero Arbitrio* (The Free Choice of the Will); the *Epistulae* (The Letters); and the *Sermons*.

²⁰ When the Roman emperors were pagans, the Church upheld a pacifist posture, forbidding Christians to enlist as soldiers. Early Christian scholars, such as Tertullian (160-24) and Origen (185-284), were pacifists. For Christian pacifism see Dinstein, Y *War, Aggression and Self-Defence*, 3rd ed (2001) at 60; Arend, A and Beck, R *International Law and the Use of Force: Beyond the UN Charter Paradigm* (1993) at 13; and Walker, T A *History of the Law of Nations* (1899) at 204-07.

²¹ St Augustine *Contra Faustum* Book XXII, 74, The Gnostic Society Library: <<http://www.gnosis.org/library/conf2.htm>> (accessed 12 September 2006).

²² *Ibid*.

²³ *The City of God*, Book XIX, 12 (Merton, T transl, 1950) at 687.

It is therefore with the desire for peace that wars are waged, even by those who take pleasure in exercising their warlike nature in command and battle. And hence it is obvious that peace is the end sought for by war.

St Augustine then went a step further and argued that warfare could be a form of charity in so far as it was a way of preventing evil-doers from doing further wrong. The pacifist touchstone to ‘turn the other cheek’ and the precept of ‘resist not evil’ did not preclude the use of force because they referred to the inward disposition of the soldier’s heart, rather than the outward deed.²⁴ What was most important for St Augustine was that the soldier had to have had the right intention because the real danger in soldiering was not military service itself but the malice that so often accompanied it:²⁵

What is the evil in war? Is it the death of some who will soon die in any case, that others may live in peaceful subjection? This is mere cowardly dislike, not any religious feeling. The real evils in war are love of violence, revengeful cruelty, fierce and implacable enmity, wild resistance, and the lust of power, and such like; and it is generally to punish these things, when force is required to inflict the punishment, that, in obedience to God or some lawful authority, good men undertake wars, when they find themselves in such a position as regards the conduct of human affairs, that right conduct requires them to act, or to make others act in this way.

The above passage provides three elements of St Augustine’s conception of the just war. First, war had to be accompanied with the *right intention*. Second, a just war was a form of punishment for those who had sinned. This point is reinforced in passages from *The City of God*.²⁶ Third, a just war had to be declared by a proper authority: either God or a lawful ruler.²⁷

Elsewhere, St Augustine provided a definition of the just war that went further than Cicero’s, and was perhaps the single most important statement of the doctrine in the Middle Ages.²⁸ St Augustine defined the just war as a war that avenged injuries or wrongs (*iusta bella ulciscuntur iniurias*):²⁹

A just war is wont to be described as one that avenges wrongs, when a nation or state has to be punished, for refusing to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly.

²⁴ *Contra Faustum* Book XXII, 76, supra n21. The Biblical references are to the principles of ‘resist not evil’ in Matthew 5:39 and ‘turn the other cheek’ in Luke 6:29.

²⁵ *Contra Faustum* Book XII, 74.

²⁶ *The City of God* Book XIX, 15 supra n23 at 694-95.

²⁷ *Contra Faustum* Book XXII, 75, supra n21.

²⁸ Russell, supra n4 at 18.

²⁹ *Quaestiones in Heptateuchum* (Seven Questions Concerning the Heptateuch) Book VI, 10.

This definition went beyond Cicero's in that, for Cicero, a war was only just when it was fought to redress grievances and to obtain compensation for crimes committed. Thus, Cicero's just war was fought to restore the *status quo ante bellum*. St Augustine's much broader conception of the just war allowed for war not only to avenge the violation of existing *legal* rights but also to punish those who transgressed the *moral* order. A different understanding of the term 'just' or '*ius*' was at the heart of St Augustine's definition.³⁰ In St Augustine's mind, there could be no justice if there was no righteousness, and there could be no righteousness if men were violating God's laws. Thus, St Augustine's definition of a just war included any war, even an offensive war, if it was necessary to punish men for deserting God and if it was necessary to create a new moral order.

Finally, regarding war for the sake of religion, St Augustine drew upon scripture to show that God allowed force to be used against heretics such as when Christ used force to compel Saul to convert to Christianity.³¹ St Augustine's broad conception of a just war as one that 'avenges wrongs or injuries', including sins against God, was used in his time and by later Christian crusaders to persecute heretics, on the basis that heretics were sinful and deserving of punishment, and if force was necessary to effect that punishment then so be it.³² Moral and spiritual sins were regarded as equally just causes of war as were physical crimes against the state, even if no physical attack had been carried out by the heretics against the Christians.³³

Between St Augustine and St Aquinas many writers discussed the notion of just war; however, consolidation of what had already been written was more prevalent than further development. St Isidore of Seville³⁴ set out the general understanding of just war as it existed in the early Middle Ages in Book 18 of his *Etymologiarum sive Originum Libri*. Isidore reverted to a more traditional, Roman conception by requiring a just war to be waged upon *formal declaration* to *recover lost goods* or to *repel and punish enemies*. The unjust war was taken to

³⁰ Whereas the Romans regarded *ius* to mean a body of law recognised as valid by those whom it affected, St Augustine interpreted *ius* in the sense of righteousness: see Russell, *supra* n4 at 18-19.

³¹ *Concerning the Correction of the Donatists* or *Epistle CLXXXV*, chapter 6, 22, NewAdvent.org: <<http://www.newadvent.org/fathers/1410.htm>> (accessed 12 September 2006).

³² *Ibid*, chapter 6, 23 and 24.

³³ This reiterates the point made in *The City of God*, that the ultimate objective of war was peace, but peace could not be attained without justice, and justice could not exist without righteousness, and righteousness could not exist where men sinned against God: *The City of God*, Book XIX, 12, *supra* n23.

³⁴ He was born in 560 and died in 636; see also *supra* n1.

refer to a war that was waged out of madness and without legitimate cause. Isidore's definition was a step backwards in that it did not reflect the more refined interpretation of the just war that had been espoused by St Augustine.³⁵

Pope Gregory I³⁶ considered the physical coercion of heretics to be a proper cause for war.³⁷ He also thought that rulers could count on divine aid in performing military tasks at the behest of the clergy and any refusal to do so rendered them liable to divine punishment at the hands of their enemies.³⁸ During the ninth century, it was widely believed that God was on the side of the Christians and that God would grant them victory in just wars. Writers such as Hincmar of Rheims,³⁹ Hrabanus Maurus⁴⁰ and Sedulius Scotus held the view that divinely-aided wars were necessary to defend the Empire and the faith.⁴¹

Although the period from the fifth to the thirteenth century did not witness many theoretical advances on the just war theory, it is nevertheless well known for its prevalence of warfare. The Christian crusading movement, which began under Pope Urban II in 1095, employed the Augustinian idea that peace was the objective of war, as well as the Gratian ideas that private warfare was unlawful and that the papacy was the supreme judge of war within Christian society. During this period, the concept of the 'just' war evolved into the Christian notion of 'holy' war in the form of the crusades.⁴² Pope Urban II's call to arms against the 'barbarians' referred to both the *justness* of the cause and the *eternal* reward, thereby combining notions of a *just* war, with the honour of fighting a *holy* war.⁴³

Pope Urban II's justification for waging the first crusade was based on two footings: to retake something unjustly taken, namely Christian land, and the need to fight in the self-defence of fellow Christians and Christianity. It is unclear whether he saw *any* war against non-Christians as inherently just on the basis that

³⁵ "...Isidore's jejune approach was outmoded even in Cicero's day and also failed to reflect the impact of Christianity and barbarian practice...": Russell, *supra* n4 at 27.

³⁶ Born 540, died 604.

³⁷ Gregory I, *Registrum Epistolarum*, Book I, 72-3 as quoted in Russell *supra* n4 at 28.

³⁸ *Ibid.*

³⁹ Archbishop of Rheims; born 805, died 882.

⁴⁰ Also known as Rabanus Maurus; born 780, died 856.

⁴¹ Rabanus Maurus' *De Universo*, an encyclopedia which ran to 22 volumes, was based largely on the etymologies of Isidore of Seville.

⁴² When Pope Urban II asked the Frenchmen gathered at the Council of Clermont whether they would turn their swords in favour of God's service, they apparently all replied "*Deus vult*" ("God wills it").

⁴³ "Let those who have been accustomed unjustly to wage private warfare against the faithful now go against the infidels and end with victory this war which should have been begun long ago. Let those who for a long time, have been robbers, now become knights. Let those who have been fighting against their brothers and relatives now fight in a proper way against the barbarians. Let those who have been serving as mercenaries for small pay now obtain the eternal reward. Let those who have been wearing themselves out in both body and soul now work for a double honor." Pope Urban II, Speech at Clermont, Fulcher of Chartres *Gesta Francorum Jerusalem Expugnantium* in Thatcher, O and McNeal, E eds, *A Source Book for Medieval History* (1905) at 513-17.

they were unbelievers, or whether war would be just because of the particular sins committed against the Christians such as the seizing of Christian land. This problem was one that the Decretalists had always had much difficulty in resolving; whether Saracens⁴⁴ and other infidels deserved to suffer because they were non-Christians or because they committed overt crimes against Christians.⁴⁵ Several scholars in this period including Raymond of Penafort and William of Rennes held the view that Saracens could control their own territory. Alanus Anglicus went beyond allowing Saracens to govern their own territory to envisaging that they could even wage just wars.⁴⁶ However, this latitude did not extend to allowing Saracens to control territory that had formally belonged to the Roman Empire, which, in the Christians' view, applied to most of Saracen territory. The scholars in this period blended together the idea of the just war with the new idea of a holy war against non-Christians. Christian scholars such as Johannes de Deo managed this conflation by reasoning that wars waged in defence of property were just; the Saracens had taken property that belonged to Christians (that is, land); therefore, any war against the Saracens was inherently just.⁴⁷

In the middle of the thirteenth century, Albertus Magnus,⁴⁸ St Thomas Aquinas⁴⁹ and a group of contemporaries took up the gauntlet of defining the 'just war'.⁵⁰ St Thomas Aquinas' position on war was set out succinctly in the *Secunda Secundae* (the Second Part of the Second Part) of his *Summa Theologiae*. In the first article he addressed the question of whether it was always sinful to wage war. In response to each of the four objections, he usually replied by quoting St Augustine.⁵¹ As for the first objection, that it is always sinful to wage war because of the passage in Matthew ("he who raises the sword will die by the sword")⁵² he borrowed St Augustine's argument that if war was sanctioned by

⁴⁴ This term, from the Arabic word 'sharqiyyin' or easterners, was used in the early years of the Roman Empire to refer to Arabs but by the time of the Crusades it was probably taken to refer to all Muslims.

⁴⁵ On the inconsistencies in Alanus Anglicus' views on who was the subject of a just war see Russell *supra* n4 at 197-98.

⁴⁶ Raymond of Penafort *Summa de Casibus* 2.5.14; William of Rennes *Glossa* 2.5.14 as discussed by Russell, *ibid* at 197-99.

⁴⁷ Pope Innocent IV took a similar view. He thought that Christians could not make war on Saracens merely because they were infidels, and he expressly prohibited wars of conversion. However, when Saracens invaded Christian territory or attacked Christians then both the Church and the Christian prince of the territory could wage a just war to avenge their losses.

⁴⁸ Albertus Magnus, also known as Saint Albert the Great, born around 1193 and died in 1280. He fused Aristotelian tenets with Christian orthodoxy. Notably, he taught Thomas Aquinas and he also advocated the Eighth Crusade in 1270.

⁴⁹ Born 1224; died 1274.

⁵⁰ The works of St Thomas Aquinas are the main focus here, which are referenced by the question and article.

⁵¹ The first three objections and his response to them are set out below. The fourth objection was related to the medieval practice of holding tournaments.

⁵² Matthew 5:39: "But I say to you not to resist evil"; Romans 12:19: "Not revenging yourselves, my dearly beloved, but give place unto wrath".

public authority it was lawful.⁵³ As for the second objection, that war was contrary to the Divine precept to resist not evil, St Aquinas used St Augustine's reasoning that the *intention* was all important and sometimes force had to be used with a 'kindly severity'.⁵⁴ The third objection, that war was always sinful because it contradicted the virtue of peace was also countered by using St Augustine's argument that wars were waged in *defence of peace*, and thus wars were not evil unless the peace desired was itself evil.⁵⁵

In the course of countering those objections to the sinfulness of war, St Aquinas formulated his definition of a just war. In order for war to be just, **three conditions** had to be met: (i) the war had to be conducted under the authority of a ruler (a 'prince') who had no superior judge (*auctoritas principis*); (ii) there had to be just cause for the war (*iusta causa*), which included a requirement that the adverse party deserved to be fought against because of some guilt (*propter aliquam*); and (iii) there had to be the intention to promote good and avoid evil (*intentio recta*).⁵⁶ Those three elements are referred to here as right authority, sufficient or just cause and right intention.⁵⁷ St Thomas Aquinas' analysis pushed to the forefront of debate the question of the justice of causes of war. This resulted in a flurry of activity from canonists to compile lists of just causes, since Aquinas himself was rather vague on exactly what constituted a 'just cause'.⁵⁸

During the Renaissance, several Christian scholars followed the lead of St Augustine and St Aquinas by continuing to develop and refine the doctrine of the just war. Those who made notable contributions included Spanish scholars Francisco de Vitoria and Francisco Suárez. Also of note was Alberico Gentili, who created a bridge between Christian theology and positivist doctrine.⁵⁹ As with the early Christian theologians, the opinions of the Spanish scholars were influenced by the events of their time. Christopher Columbus had discovered the New World and in doing so had created a demarcation between the Middle Ages

⁵³ Aquinas *Summa Theologiae, Secunda Secundae*, questio 40, reply to objection 1 (Greene, W transl) (Loeb Classical Library, 1960).

⁵⁴ He also borrowed Aristotle's concept of the 'common good' when justifying the use of force against enemies, by arguing that force had to be used for the benefit of those enemies, even if they opposed it, although Aristotle did not use the term 'common good': *ibid*, objection 2.

⁵⁵ *Ibid*, objection 3.

⁵⁶ *Ibid*, objection 1.

⁵⁷ *Summa Theologiae, Secunda Secundae* questio 40, article 1 (Benziger Bros ed, 1947): <<http://www.ccel.org/a/aquinas/summa/SS/SS040.html#SSQ40OUTP1>> (accessed 12 September 2006).

⁵⁸ Later writers, such as Peter of Auvergne, provided concrete examples of what would constitute a just cause for war: see Peter of Auvergne *Expositio in VIII Libros Politicorum*, 7, lecture 2; 7, lecture 11 and *Opera Omnia*, XXI, 640, 677F and *Commentarium*, Ilm 16089, at 290ra-rab, as translated and cited in Russell *supra* n4 at 265.

⁵⁹ Although these three scholars are the focus here, others could also have been included such as Baltasar Ayala and Pierino Belli.

and modern times.⁶⁰ For the Spaniards, the ‘barbarians’ were no longer the non-Greeks or non-Romans of earlier eras: they were essentially the non-Christian indigenous Indians of South America.

The main reference point for Francisco de Vitoria’s⁶¹ opinions on the *ius ad bellum* are to be found in his second *Relectio*, his *De Jure Belli* (On the Laws of War) in which he addressed four key questions on war: first, whether Christians could wage war and since they could, what was the purpose of war; secondly, where the authority to wage war reposed; thirdly, what could and should furnish just causes for war; and fourthly, what measures could be taken against the enemy in a just war. His responses to the first three questions are relevant to this thesis.⁶²

Drawing upon the reasoning of St Augustine, Vitoria concluded that Christians could serve in war and make war.⁶³ He also shared the view of St Augustine that the end and aim of war was the peace and security of the state but there could be no peace unless enemies were made to desist from wrong by the fear of war. The authority of the state to wage war lay in the hands of the prince.⁶⁴ But who could properly be called a sovereign prince? Vitoria addressed this aspect of the question by defining a state as a perfect community; a community that was complete in itself and was not part of another community. It had to have its own laws, its own council and its own magistrates. If it met these requirements, the state, represented by the prince, had the authority to declare war.

Vitoria deemed it necessary to determine the just causes of war, particularly “in connexion [sic] with the case of the Indian aborigines, which is now before us”⁶⁵ and he advanced five propositions. First, a difference of religion was not a just cause of war.⁶⁶ This point was argued in his first *Relectio*, *De Indis Noviter*

⁶⁰ “The flagship of Columbus drew the line between the Middle Ages in which Europe was a commonwealth based upon a system of rigid principles and modern times in which separate and equal States compete with one another”: Scott, J *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (1934).

⁶¹ Born in Spain in around 1492, died 1546. He did not publish any works himself but by drawing upon notes taken by his students, two major *Relectiones* were subsequently published: *De Indis Noviter Inventis* (On the Indians Newly Discovered) and *De Jure Belli* (On the Law of War). The former work was based around his ideas on the Spanish war against the Indians in America, as to which he felt that the Indians’ fight against the Spaniards may have been just.

⁶² His response to the fourth question, regarding the limits of war and the killing of innocents refers to material that is beyond the scope of the thesis.

⁶³ Vitoria quoted from St Augustine and set out eight separate proofs for his conclusion. He found justifications in the Bible, in the law of nature and in morality: Francisco de Vitoria *De Jure Belli* 417-422, (Bate, J transl) in Scott supra n60, at Appendix B.

⁶⁴ Once more drawing directly upon St Augustine; *De Jure Belli* 425, *ibid*.

⁶⁵ *De Jure Belli* 427, *ibid*.

⁶⁶ *Ibid*, third principal question, proposition I.

Inventis (On the Indians Recently Discovered).⁶⁷ Second, extension of empire was not a just cause of war.⁶⁸ This, he added, was also too well known to need proof, for otherwise “the two belligerents might have an equally just cause and so both would be innocent.”⁶⁹ Third, neither the personal glory of the prince nor any other advantage to him was a just cause for war.⁷⁰ This, too, he felt was notorious, “For a prince ought to subordinate both peace and war to the common weal of the State and not spend public revenues in quest of his own glory or gain.”⁷¹

His fourth proposition, relying upon the authority of St Augustine, St Thomas Aquinas and “the opinion of all the doctors”⁷² was that there is only one just cause for commencing war: a wrong received. Fifthly, he concluded that not every kind and degree of wrong could suffice for commencing a war. The degree of the punishment had to correspond to the measure of the offence.⁷³

If the foregoing can be referred to as the ‘core’ of Vitoria’s just war theory, then a few peripheral points, which are relevant to the present thesis, may also be added. First, Vitoria held the view that there had to be sufficient *evidence* of the just causes for war. It was not sufficient for the prince to wage war on his own account of the justness of his cause, because princes “nearly all think that theirs is a just cause.”⁷⁴ This would mean that all wars were just, all belligerents would be innocent and it would be unlawful to kill them.⁷⁵ Second, an exceedingly careful examination had to be made of the justice and causes of war and the reasons of those who opposed it had to be listened to.⁷⁶ War ought not to have been waged on the sole judgment of the king, nor, indeed, on the judgement of a few, but on that of many wise and upright men.⁷⁷

⁶⁷ In *De Indis*, Vitoria argued that the Indians’ rejection of Christianity did not give the Christians the right to occupy their land. He asserted that before the Indians had heard of Christianity they did not commit the sin of unbelief by not believing in Christ: ignorance was not the equivalent of sin. His second proposition was that the Indians were not bound to accept the Christian faith simply upon it being announced to them, without miracles or some other proof of its truth. The corollary was that if the Indians did not accept the faith when presented to them in this way, the Spainards could not “make this a reason for waging war on them”: see Francisco de Vitoria *De Indis* 363-370, (Bate, J transl.) in Scott supra n60 at Appendix A.

⁶⁸ *De Jure Belli* 428, third principal question, proposition II, supra n63.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid* at 427, third principal question, proposition II.

⁷² *Ibid* at 429, third principal question, proposition IV.

⁷³ *Ibid* at 430, third principal question, proposition V.

⁷⁴ *Ibid* at 434, doubt I, proposition I.

⁷⁵ *Ibid* at 434, doubt I.

⁷⁶ *Ibid* at 435, doubt I, proposition II. This is relevant in chapters 10 and 11 of this thesis where it is suggested that the US and the UK may not have adduced sufficient evidence to justify the subsequent invasion of Afghanistan.

⁷⁷ *Ibid* at 437, doubt II, proposition II.

One of the difficulties with Vitoria's conception of the just war was his approach to the question of whether a war could be just on both sides. He replied that, "apart from ignorance, the case clearly cannot occur, for if the right and justice of each side be certain, it is unlawful to fight against it, either in defence or in offence".⁷⁸ However, he then seemed to accept that one side could be on the side of 'true justice' and the other side was also "just in the sense of being excused from sin by reason of good faith".⁷⁹ Vitoria clearly believed that war could be just on both sides. That view is supported from a similar passage in his first *Relectio, De Indis*.⁸⁰ Vitoria took the just war argument to its logical conclusion, by showing that a war could be just on both sides. It is submitted that Vitoria, in his quest to elucidate just war theory, in fact may have reduced its usefulness as a doctrine that could be applied by a prince in determining whether to wage war.⁸¹

Francisco Suárez was a Spanish Jesuit theologian and philosopher who was a strong supporter of Aquinas.⁸² Suárez was influenced by Vitoria, both of whom had a significant influence on Grotius. Suárez defined war as "an external contest at arms which is incompatible with external peace...when carried on between two sovereign princes or between two states."⁸³ A contest between a prince and his own state or between citizens and their state ought not to have been termed 'war' and ought instead to be referred to as 'sedition'.⁸⁴ In Suárez's *De Triplici Virtute Theologica: Fide, Spe, et Charitate* (The Three Theological Virtues: Faith, Hope and Charity), he addressed many of the same questions that Vitoria and others had previously considered.⁸⁵ He argued that war was not intrinsically evil, nor was it contrary to charity to wage war, nor was it forbidden for Christians to wage war.⁸⁶ Drawing upon St Augustine, he argued that war was to be avoided in so far as it was possible and that it should only have been undertaken in cases of extreme

⁷⁸ Ibid.

⁷⁹ Ibid at 444.

⁸⁰ "There is no inconsistency, indeed, in holding the war to be a just war on both sides, seeing that on one side there is right and on the other side there is invincible ignorance": Vitoria, *De Indis Noviter Inventis* Section III, 394, in Scott, supra n60 at Appendix A.

⁸¹ It is submitted that the just war doctrine loses its usefulness if it is recognised that a war can be just on both sides. Even though Vitoria recognised that one side was 'truly' just and the other was ignorant, he nonetheless accepted that a war could be fought with both sides believing that it was a just war. Gentili carried this idea further when he submitted that a war could be just on one side, but even **more** just on the other: see discussion infra at 118ff.

⁸² Born 1548; died 1617.

⁸³ Suárez, *The Three Theological Virtues: On Charity*, Disputation XII, "On War", in Scott, J (ed) *Selections from Three Works of Francisco Suárez* (The Classics of International Law, Vol II, 1944) at 800.

⁸⁴ Ibid.

⁸⁵ Note that his discussion on the laws of war is to be found in his treatise on charity which implies a continuation of the earlier expositions of the Christian scholars that war could be a form of charity, when carried out justly.

⁸⁶ *The Three Theological Virtues: On Charity*, Disputation XIII, Section I supra n83 at 800.

necessity, when there was no alternative. Nevertheless, war was a means of attaining a real and secure peace.⁸⁷

Suárez believed that in order for a war to be just, three essential conditions had to be met. The underlying reason for stipulating those conditions was that war, while not an evil in itself, was nevertheless often carried on in an evil fashion. Therefore, “it require[d] many [justifying] circumstances to make it righteous.”⁸⁸ It was for the sovereign prince to determine if these conditions were met for he was bound to make a diligent examination of the cause and its justice.⁸⁹ First, “the war must be waged by a legitimate power.”⁹⁰ As discussed below, private persons could not declare war.⁹¹ Secondly, the cause itself had to be just.⁹²

[T]here can be no just war without an underlying cause of a legitimate and necessary nature...that just and sufficient reason for war is the infliction of a grave injustice which cannot be avenged or repaired in any other way.

He grouped the just causes for war under three heads: the seizure by a prince of another's property and the refusal to return it; the denial, without reasonable cause, of the common rights of nations, such as the right of transit over highways and trading in common; and any grave injury to one's reputation or honour.⁹³ Thirdly, “the method of its [the just war's] conduct must be proper and due proportion must be observed at its beginning, during its prosecution and after victory.”⁹⁴ He subscribed to the principle of proportionality because he believed that “it is not every cause that is sufficient to justify war, but only those causes which are serious and commensurate with the losses that the war would occasion.”⁹⁵ The injury suffered by the state had to be roughly equivalent to the injuries that would be suffered in war, in order to justify the recourse to war.⁹⁶

As for ‘holy war’, Suárez did not believe that war was the exclusive preserve of Christians, nor did he believe that Christians had the right to wage war against

⁸⁷ Ibid, para 1-3 at 800-01.

⁸⁸ Ibid, section I, para 7 at 805.

⁸⁹ Ibid, section IV, para 1 at 824.

⁹⁰ The question of legitimate authority relates only to aggressive war since “the power of defending oneself against an unjust aggressor is conceded to all”: ibid, section II, at 805.

⁹¹ See discussion infra at 118ff.

⁹² *The Three Theological Virtues: On Charity*, Disputation XIII, Section II, para 7, first conclusion, supra n83 at 816.

⁹³ As for the third cause for just war, it was sufficient if an injury of this kind was inflicted either upon a prince himself or upon his subjects, for the prince was guardian of his state and also of his subjects: ibid, section II, note 2 at 817.

⁹⁴ Ibid, section I, para 7 at 805.

⁹⁵ Ibid, section II, note 1 at 816.

⁹⁶ “For it would be contrary to reason to inflict very grave harm because of a slight injustice”: ibid, section II, at 816.

unbelievers, purely on the basis of their unbelief.⁹⁷ His writings show how far the just war theory had shifted from its roots in Aristotelian theory.⁹⁸ He stated that a Christian prince could not declare war except by reason of some injury inflicted or for the defence of the innocent.⁹⁹

The last scholar discussed here is Alberico Gentili.¹⁰⁰ He was one of the first jurists who tried to separate international law from its basis in theology and ethics.¹⁰¹ Gentili,¹⁰² wrote extensively on the law of war in *De Jure Belli Libri Tres*, which was published in 1598.¹⁰³ In it, he divided the causes of war into divine, natural and human.¹⁰⁴ In short, the command of God legitimised a war under **divine** law; **self-defence** was an instinct implanted in all living beings and, therefore, a **natural** reason for taking up arms; and **human** causes for war occurred when an offended state proceeded to extract reparation for violated positive rights, or as Cicero said, when it was “avenging a wrong”.¹⁰⁵ His arguments on war were comprehensive, thus, only a few key aspects relevant to the present thesis are discussed here.

On the definition of war, Gentili wrote that war is a just and public contest of arms. Thus, he emphasised two essential elements of war: that it must be *public* and that it must be *just*. As for being ‘public’, he believed that the term ‘war’ could not be applied to violence of private individuals and brigands against a foreign prince or people. It had to be restricted to the use of force between adversaries who were equals, that is, between two kings or states.¹⁰⁶ As for being

⁹⁷ Ibid, section V, para 4 at 824.

⁹⁸ Whilst Aristotle, it will be recalled, advocated that war was by nature just when it was waged against barbarians, Suárez recognised that there was no ground for wars reserved exclusively for Christian princes against unbelievers.

⁹⁹ *The Three Theological Virtues: On Charity*, Disputation XIII, Section V, para 7, supra n83 at 824-25.

¹⁰⁰ Alberico Gentili was an Italian Protestant lawyer, who fled to England to avoid papal persecution and later became Professor of Civil Law at Oxford; born 1552, died 1608.

¹⁰¹ For general information on Gentili, see Brierly, J *The Law of Nations*, Sixth ed, Waldock C rev. (1963) at 26-27. Gentili wrote: “Let the theologians keep silence about a matter which is outside of their province” when discussing the natural causes for making war. He felt that war ought not to have been waged against the Turks “when they are quiet and keeping the peace”, thus he instructed the theologians to, in effect, mind their own business when it came to discussing the justifications for war against them: see Alberico Gentili *De Jure Belli Libri Tres* Volume II, Book I, chapter XII, para 92, (Rolfe, J ed) (The Classics of International Law, 1933) at 57.

¹⁰² Note that the Spanish theologians were based in Spain and were Roman Catholic whereas Gentili was from Italy but lived in England and was a Protestant. He was also politically distant from the activities of the Spaniards and was opposed to what he viewed as their quest for world domination.

¹⁰³ His other works which related to international law were *De Legationibus* and *Hispanica Advocatio*.

¹⁰⁴ Gentili *De Jure Belli Libri Tres* Volume II, supra n101; for the “Divine Causes for Making War” see Book I, chapter VIII; for the “Natural Reasons for Making War” see Book I, chapter XIX and for the “Human Reasons for Making War” see Book I, chapter XX.

¹⁰⁵ Gentili, *De Jure Belli Libri Tres*, Volume II, Book I, Chapter V paras 45-47 and Chapter VII, para 56 supra n101.

¹⁰⁶ He went to some length to show that ‘war’ had to be both public and just. He seemed to refute the idea that violent acts of individuals against a state could be called acts of war: “that definition which appeared after ours, ‘war is armed force against a foreign state or prince’, is shown to be incorrect by the fact that it applies the term ‘war’ also to the violence of private individuals and brigands.”: Gentili *De Jure Belli Libri Tres* Volume II, Book I, Chapter II, supra n98 at 12-13.

‘just’, he excluded raids on the territories of others from the definition of war, calling them acts of “brigandage.”¹⁰⁷

Gentili was adamant that a war could only be waged between sovereigns: “the war on both sides must be public and official and there must be sovereigns on both sides to direct the war.”¹⁰⁸ The reason for this was that the origin of war was necessity: since states acknowledge no judge or superior, there could be no judicial processes between them to settle disputes. Consequently, they alone were supreme and they alone merited the title of ‘public’. Gentili concluded that this was the situation that had necessarily prevailed throughout history:¹⁰⁹

Therefore it was inevitable that the decision between sovereigns should be made by arms. ‘War’, says Demosthenes, ‘is made against those who cannot be controlled by the laws, but judicial decisions are rendered in the case of private citizens.

Gentili addressed the objections to war and soldiering that had been raised in the past by Christian pacifists¹¹⁰ and found that wars were just, even though so many things which came from them were evil, because their final aim was good.¹¹¹ Furthermore, a war could be waged justly on both sides:¹¹²

It is the nature of wars for both sides to maintain that they are supporting a just cause. In general, it may be true in nearly every kind of dispute that neither of the two disputants is unjust.

If each side in a war aimed at justice, then neither side could be called unjust.¹¹³ Gentili went further than any previous scholar on this point by postulating that a war would virtually *never* occur in which injustice was clearly evident on one of the two sides.¹¹⁴ He even felt that there could be wars in which one side would be just, but the other side would be even *more* just.¹¹⁵ He did not find these conclusions in any way problematic: regardless of whether both sides were fighting for a just cause, the laws of war should apply to all parties.¹¹⁶

¹⁰⁷ Quoting Sallust *Jugurtha* xcvi and Livy XXVII: “Sallust too says: ‘Rather by brigandage than battle’, and in the same way Scipio called those men brigands and leaders of brigands who waged war, not in regular pitched battles, but by pillage and raids.”: see Gentili *De Jure Belli Libri Tres* Volume II, Book I, Chapter II, supra n101 at 14

¹⁰⁸ Ibid, Chapter III, supra n101 at 15.

¹⁰⁹ Ibid.

¹¹⁰ He referred to Tertullian who forbade Christians to take up military service and to Lactantius who asserted that the just man could not serve as a soldier: ibid, Chapter V at 27.

¹¹¹ Ibid, Chapter V, para 45 supra n101 at 28-29.

¹¹² Ibid, Chapter VI at 31, although he added the proviso that there could be reasonable doubt as to the justice of the cause.

¹¹³ “But if it is doubtful on what side justice is, and if each side aims at justice, neither can be called unjust.”: ibid, Chapter VI at 32.

¹¹⁴ “But although it may sometimes happen (it will not occur very often...) that injustice is clearly evident on one of the two sides, nevertheless, this ought not to affect the general principle, and prevent the laws from applying to both parties.”: ibid, Chapter VI, para 51 at 33.

¹¹⁵ Ibid at 32.

¹¹⁶ Ibid at 32-33.

Although a lust for power or a desire for gold and riches might have been the cause for many a war, according to Gentili, neither would constitute a just cause.¹¹⁷ He considered that there were only three origins for a just war: the **divine**, the **natural** and the **human**. As for the first, Gentili wrote that divine causes for making war were such as could be attributed to God, as if He Himself had ordered the war. For example, the Jews' war against the Cannanites was unquestionably *just* because it was commanded by *God*, in whom there was no injustice and who knew what ought to have been done to each one.¹¹⁸ Gentili asserted that non-Christians could also wage war by appealing to a higher authority.¹¹⁹ However, he was absolutely opposed to the concept of waging war purely for the sake of religion. He strongly believed that religion was a matter of choice, and that no war could justly be waged to force others to change their beliefs.¹²⁰

As for **natural** causes for war, Gentili challenged the view of the ancient philosophers and historians that all of nature was based upon notions of antipathy and that all nations, including the Greeks, the Hebrews and the Persians, had been at perpetual war with their 'natural enemies'.¹²¹ Instead, he argued that men were not foes of one another by nature, but it was their acts and customs which caused harmony or discord among them.¹²² As discussed below, the 'natural' cause for war was self-defence, when war was waged 'under Nature's guidance.' As for **human** causes of war, Gentili thought that a defensive war could be fought 'for the sake of honour', by which he meant, for the sake of humanity. Just as individuals had an obligation to come to the defence of their neighbour, states also had an obligation to protect the safety and interests of neighbouring states. He based his reasoning on that of St Ambrose who wrote that perfect justice was that which defended the weak.¹²³ This cause of war was 'human' in the sense that it

¹¹⁷ Ibid, Volume II, Book I, Chapter VII at 34.

¹¹⁸ Ibid, Chapter VIII at 36-7.

¹¹⁹ Although he confined the divine or holy war to wars prescribed by God, he also thought that using war to compel others to convert to Christianity was unjust: *ibid*, Chapter IX at 38-39.

¹²⁰ "Religion is a matter of the mind and the will which is always accompanied by freedom" and "to attempt by force what cannot be done by force is madness": *ibid*.

¹²¹ "Surely neither the Greeks nor the Hebrews were of such a nature that they were fated to be hostile to all other peoples...": *ibid*, Chapter XII at 53-4.

¹²² Ibid, Chapter XII at 54-57: "War is not waged on account of religion, and war is not natural with others or even with the Turks. But we have war with the Turks because they act as our enemies, plot against us, and threaten us. With the greatest of treachery they always seize our possessions whenever they can. Thus we constantly have a legitimate reason for war against the Turks."

¹²³ St Ambrose, *On Duties* I, xxvii, as cited in Gentili *De Iure Belli Libri Tres* Volume II, Book I, Chapter XV, *supra* n101 at 71.

was based on human nature which commended all men to protect the interests and safety of the other.¹²⁴

Use of force in self-defence

Within each of the Christian scholars' just war doctrines, explicit mention was usually made of the right to use force in self-defence. It was noted earlier that St Ambrose praised military courage which defended one's country from barbarians,¹²⁵ and the fact that he prayed for the success of the imperial armies who defended the Empire against barbarians is also proof that he condoned the recourse to force in self-defence. He also praised David, who, according to St Ambrose, never waged a war unless he had been *provoked* and who never began to fight without first consulting the Lord, implying that for a war to be just, it had to be preceded by a provocation and be sanctioned by God.¹²⁶ Thus, it would seem that wars waged in defence of one's country were considered by St Ambrose to be just wars.

St Augustine embraced the early pacifism of the Church and held the view that lethal force could not be used by individuals in personal self-defence, as that would conflict with Church doctrines which compelled Christians to love their enemy.¹²⁷ Despite his prohibition on *private* self-defence, St Augustine permitted force to be used in *public* self-defence. That is implied in St Augustine's definition of the just war.¹²⁸ As noted above, wars could be waged to avenge wrongs, *ulciscuntur iniurias*, and that those wrongs included moral and not just legal or physical wrongs. Thus, defensive wars were permissible, but so too were offensive wars so long as they were sanctioned by legitimate authority.¹²⁹ Given that he permitted the use of force by the state in self-defence, it may seem incoherent that he would forbid the private person from using force to defend himself from an attack, even if the innocent victim died as a result. These two diverse positions can be reconciled if one examines his understanding of the virtue of charity.¹³⁰

¹²⁴ Ibid, Volume II, Book I, Chapter XV at 69.

¹²⁵ See discussion *supra* at 100ff.

¹²⁶ *De Officiis*, 1.176 in Migne's *Patrologia Latina* 16.75; see also Morino, *Church and State in the Teaching of St Ambrose* *supra* n12 at 56.

¹²⁷ St Augustine *De Libero Arbitrio*, Book I, 4.9; see also *Epistle 47* and *Contra Faustum* Book XXII, 70, *supra* n21.

¹²⁸ *Supra* at 102.

¹²⁹ *Contra Faustum* Book XXII, 75, *supra* n21.

¹³⁰ The reason why an individual could not use force against an attacker was because, as a Christian, he was bound by the superior notion of charity, even towards an unjust aggressor. It was this same notion of charity which allowed St Augustine to justify the use of force by states to avenge injuries (including the injury of 'sin') since the soldiers of the state were supposedly giving charity when they

The Spanish school theologians also considered that the use of force in self-defence was permissible. Vitoria distinguished between defensive and offensive wars on the basis that defensive wars were waged to repel force, whereas offensive wars were waged where “we are not only defending ourselves of property but also we are trying to avenge ourselves for some wrongs done to us.”¹³¹ A defensive war, war waged in defence of one’s country or one’s property, was morally just because, *inter alia*, ‘good and holy men’ had waged such wars. An offensive war could also be just, since Constantine the Great and Theodosius the Elder were examples of good and holy men who had waged such wars.¹³² Vitoria thought that any person, even a private person, could accept and wage a war in defence of his person or his property, without authority from anyone else, because of the principle that force may be repelled by force.¹³³ The difference between a private person and a state was that the person had no right to avenge a wrong done to him, not even to recapture property that had been seized from him, whereas the state was within its rights not only in defending itself but also in *avenging* wrongs done to itself and its subjects.¹³⁴

For Suárez, the right to use force in self-defence was not only permitted, it was sometimes obligatory: “the right of self-defence is natural and necessary...self-defence may sometimes be prescribed, at least in accordance with the order of charity...the same is true of the defence of the State, especially if such a defence is an official duty.”¹³⁵ Suárez felt that the Biblical passages¹³⁶ which referred to pacifism prohibited Christians from seeking vengeance, but did not prohibit the use of force in self-defence. He provided examples of what types of war would be categorised as defensive and what types of war would be aggressive, using the analogy of individual self-defence.¹³⁷ Frequently in his writing he stressed that

forced heretics to return to orthodoxy: see Hartigan, R “Saint Augustine on War and Killing: the Problem of the Innocent” (1966) 27 *Journal of the History of Ideas* 195 at 197; see also Ramsey, P *War and the Christian Conscience* (1961) chapter 2.

¹³¹ “This, I say, is proved by the authority of St Augustine (*Liber 83 Quaestionum*) ‘Those wars are described as just wars which are waged in order to avenge a wrong done, as where punishment has to be meted out to a city or state because it has itself neglected or failed to exact punishment for an offence committed by its citizens or subjects or to return what has been wrongfully taken away.’: Vitoria *De Jure Belli* 420-21, *supra* n60.

¹³² Vitoria *De Jure Belli* 421, *supra* n60.

¹³³ *Ibid* at 422. In this respect he departed from St Augustine who forbade the individual from resorting to force in self-defence.

¹³⁴ *Ibid* at 423. Vitoria drew upon the authority of Aristotle for the proposition that a state was sufficient unto itself: “[I]t [the State] cannot adequately protect the public weal and the position of the State if it cannot avenge a wrong and take measures against its enemies...it is therefore imperative for the due ordering of human affairs that this authority be allowed to States.”: Vitoria *De Jure Belli* 424, *supra* n60.

¹³⁵ Suárez *The Three Theological Virtues: On Charity* “Dispensation XIII: On War” section I, para 4, *supra* n83 at 803.

¹³⁶ Matthew 5:39 and Romans 12:19.

¹³⁷ “Thus, for example, if enemies seize the houses or the property of others, but have themselves suffered invasion from the latter, that is no aggression but self-defence”: Suárez *The Three Theological Virtues: On Charity* “Dispensation XIII: On War” section I, para 6 *supra* n83 at 804.

the conditions for ‘just war’, discussed above, applied only to ‘aggressive war’ because ‘defensive war’ was the natural right of individuals and states.

Gentili’s tripartite division of the causes for war, being divine, natural and human, were discussed above, where it was noted that although there was no ‘natural’ cause for war, sometimes war was waged ‘under Nature’s guidance,’ for example, when war was waged in *self-defence*. If attacked by an enemy, an individual would be entitled to use force in self-defence “for to kill in self-defence is just” and “even the brutes are given the right of defence by nature”.¹³⁸ Once a war of self-defence had begun, it did not end with the recovery of what was previously demanded, but it would go on at the will of the victor.¹³⁹

Pre-emptive self-defence

Pre-emptive self-defence – using force before an attack had materialised – was not specifically addressed by either St Ambrose or St Augustine. It was noted earlier that St Augustine’s definition of the just war referred to the ‘avenging of wrongs or injuries’, which implied that force was to be employed in *response to* rather than in *pre-emption of* a wrong or injury.¹⁴⁰ This interpretation is supported by his reference to war being used to punish sins, which implies that a sin must have been committed before it could be punished.¹⁴¹ On the other hand, his requirements of ‘right intention’ and ‘lawful authority’ were perhaps flexible enough to be applied to a situation of pre-emptive self-defence.¹⁴² His assertion that ‘right conduct’ sometimes required good men to undertake war was also broad enough to provide room for argument. On this aspect of his just war theory, it must be conceded that as he neither expressly supported nor denounced the use of pre-emptive force, both proponents and opponents of pre-emptive self-defence will find passages in his writings to support their respective positions.

Pope Urban II’s justifications for war seemed to suggest that pre-emptive war was permissible. As noted above, he thought that it was legitimate to fight in the self-

¹³⁸ “And it is a necessary right; for what can be done against violence, says Cicero, without resort to violence? This is the most generally accepted of all rights. All laws and all codes allow the repelling of force by force. There is one rule that endures forever, to maintain one’s safety by any and every means”: Gentili *De Iure Belli Libri Tres* Volume II, Book I, Chapter VI, supra n101 at 59.

¹³⁹ Ibid, Chapter XIII, supra n101 at 59.

¹⁴⁰ See discussion supra at 101ff.

¹⁴¹ Supra at 101, n26, 27 and n29.

¹⁴² Right intention and proper authority (together with avenging wrongs or injuries) were pre-requisites for the just war. It could be argued that a pre-emptive war could have been justly waged so long as it was properly authorised and so long as the soldiers were imbued with the right intention.

defence of fellow Christians and Christianity, which arguably may have necessitated acting *pre-emptively* to stop any further advances.¹⁴³

St Thomas Aquinas did not distinguish between defensive and offensive war and did not expressly state his views on pre-emptive war. However, given that he adopted St Augustine's definition of the just war it may be implied that the act must have been committed *before* war could be justified, thus eliminating any notion that pre-emptive war might have been considered just. The same type of analysis could be applied to Vitoria, who similarly did not discuss the subject of pre-emptive war. But in light of the fact that he thought there was only one just cause for war, a wrong received, it may be implied that an act of aggression must have already taken place in order for the victim state to avail itself of the right to self-defence in response. His definition of the just causes of war would support an interpretation that a state was not permitted to pre-empt the use of force by its enemies when it believed its enemies were planning an attack but had not yet launched that attack, and committed the 'wrong'.

Unlike the other Christian theologians discussed here, Suárez seemed to permit force to be used in pre-emptive self-defence:¹⁴⁴

Consequently, we have to consider whether the injustice is, practically speaking, simply about to take place; or whether it has already done so, and redress is sought through war. In this second case, the war is aggressive. In the former case, war has the character of self-defence, provided that it is waged with a moderation of defence which is blameless.

His use of the phrase 'about to take place' implies that the injustice which was about to be suffered by the victim state had to be imminent, although he did not discuss exactly how this could be assessed. Gentili took a further step and approved of pre-emptive self-defence when the enemy was making preparations, because "it was not right for prudent men to wait until he had declared himself their enemy; but to consider his deeds rather than his words."¹⁴⁵ Gentili devoted an entire chapter to pre-emptive war, or what he called "a war of defence on the grounds of expediency"¹⁴⁶ and he cited many historical authorities in support of

¹⁴³ "If you permit them [the Turks and the Arabs] to continue thus for awhile with impurity, the faithful of God will be much more widely attacked by them": Pope Urban II, speech at Clermont, recorded by Fulcher of Chartres, *supra* n43.

¹⁴⁴ Suárez *The Three Theological Virtues: On Charity* "Dispensation XIII: On War" section I, para 6, *supra* n83 at 804.

¹⁴⁵ Referring to the war that was made on Mithridates in response to his formidable preparations for war: Gentili *De Iure Belli Libri Tres* Volume II, Book I, Chapter XIII, *supra* n101 at 58.

¹⁴⁶ *Ibid*, Chapter XIV "Of Defence on Grounds of Expediency" at 61-66.

his proposition. His thoughts on this topic were more developed than the other Christian scholars:¹⁴⁷

I call it a defence dictated by expediency, when we make war through fear that we may ourselves be attacked...we ought not to wait for violence to be offered us, if it is safer to meet it half-way. 'The man who attacks has greater hope and greater courage than one who defends himself', says Livy...One ought not to delay, or wait to avenge at one's peril an injury which one has received, if one may at once strike at the root of the growing plant and check the attempts of an adversary who is meditating evil.

As for when it was necessary to resort to 'expedient defence' Gentili thought that "a just cause for fear was demanded; suspicion was not enough."¹⁴⁸ He acknowledged the problems inherent in such a proviso¹⁴⁹ and found a rather unsatisfactory solution:¹⁵⁰

...[W]e should oppose powerful and ambitious chiefs. For they are content with no bounds, and end by attacking the fortunes of all.

In essence, he advocated war against any powerful nation when it appeared that it was becoming *too* powerful and was posing a threat to its neighbours. On that reasoning, he advocated war against both the Turks and the Spaniards, who were apparently both "planning and plotting universal dominion."¹⁵¹ Arguably, this could have led to a situation where there were no limits on war on the grounds of 'expediency'.

Use of force in relation to non-state actors

The early Christian scholars' views on this aspect of the use of force can be deduced from their brief references to pirates as the non-state actors of their time, together with their opinions on the legitimate authority for waging war. As for the latter, St Augustine considered that war had to be proclaimed by a legitimate authority, God or the Emperor, to be just, from which it may be implied that private war, war by mercenaries and the use of force by non-state actors would necessarily lie outside the bounds of his conception of a just war. Furthermore, since the only men who were allowed to kill were those who had done so as

¹⁴⁷ Gentili *De Iure Belli Libri Tres* Volume II, Book I, Chapter XIV, supra n101 at 61.

¹⁴⁸ Ibid at 62.

¹⁴⁹ "That is, when is fear well-grounded and not just a suspicion? How can fear be accurately measured, and how can one tell whether fear is based on reason, when, as Cicero wrote, every man ought to have the privilege of fearing what he chooses and Euripides acknowledged that no one can prevent another from being afraid of his own shadow?": ibid at 62-63.

¹⁵⁰ Ibid, Chapter XIV para 102 at 64.

¹⁵¹ Ibid.

soldiers on the command of either God or the Emperor, it is implied that anyone else who killed would be implicated in the guilt of murder.¹⁵²

As for the use of terror, St Augustine referred to it when discussing how to force heretics, such as the Donatists, to renounce their beliefs:¹⁵³

*But God in His great mercy, knowing how **necessary was the terror inspired by these laws**, and a kind of medicinal inconvenience for the cold and wicked hearts of many men, and for that hardness of heart which cannot be softened by words, but yet admits of softening through the agency of some little severity of discipline...(emphasis added)*

This passage suggests that St Augustine sanctioned the use of ‘terror’ to force heretics to embrace Christianity, but it arguably does not bear many parallels with the modern conception of terrorism since the ‘terror’ to which St Augustine was referring was the terror inspired by a law which imposed a hefty fine on heretics, rather than acts of indiscriminate violence against civilians.¹⁵⁴

St Augustine specifically referred to the relationship between states, justice and one class of non-state actor – namely, pirates – in his *De Civitate Dei*. St Augustine recalled an exchange between Alexander the Great and a pirate from a passage in Cicero’s *De Re Publica*.¹⁵⁵

*Remove justice, and what are kingdoms but gangs of criminals on a large scale? What are criminal gangs but petty kingdoms?...If this villainy wins so many recruits from the ranks of the demoralized that it acquires territory, establishes a base, captures cities and subdues peoples, it then openly arrogates to itself the title of kingdom....For it was a witty and truthful rejoinder which was given by a captured pirate to Alexander the Great. The king asked the fellow, **‘What is your idea, in infesting the sea?’ And the pirate answered, with uninhibited insolence, ‘The same as yours, in infesting the earth! But because I do it with a tiny craft, I’m called a pirate: because you have a mighty navy, you’re called an emperor.’** (emphasis added)*

The ‘witty and truthful’ response of the pirate suggests St Augustine’s awareness of the irony that is created when states’ use of force to conquer their enemies is contrasted with non-state actors’ use force against *their* enemies, namely, sovereign states.

¹⁵² “And, accordingly, they who have waged war in obedience to the divine command, or in conformity with His laws have represented in their persons the public justice or the wisdom of government, and in this capacity have put to death wicked men: such persons have by no means violated the commandment, ‘Thou shalt not kill’.”: St Augustine *The City of God* Book I, 21.

¹⁵³ St Augustine referred with approval to Theodosius, who had earlier enacted a law that a fine of 10 pounds of gold had be paid by any heretic bishop or clergyman found in any place: St Augustine *The Correction of the Donatists or Epistle CLXXXV* chapter 7, 22 *supra* n31. St Augustine recommended the same sort of law be enacted against the Donatists in Africa; even though it may have caused ‘terror’ in the minds of the heretics it was nevertheless a ‘medicinal inconvenience’.

¹⁵⁴ *Ibid*, chapter 7, 25.

¹⁵⁵ St Augustine, *De Civitate Dei* Book IV, Chapter 4 (Bettenson, H transl) (Penguin Classics, 1972) at 139; Augustine was citing Cicero *De Re Publica* Book III, XIV, 24. See also note in chapter 4 at 95.

St Thomas Aquinas' just war doctrine implied that only conflicts between sovereign princes could be regarded as war.¹⁵⁶ Many other instances of violence did not qualify for that status. For example, when an agent of public authority attacked someone, the victim was not considered an enemy but rather as one guilty of unworthy resistance to authority. Thus, he impliedly condemned all private warfare, giving authority solely to the ruler or 'prince'. Similarly, Vitoria's opinion that only the state, as represented by the prince, had authority to declare war, suggests that the use of force by someone other than the sovereign prince of a perfect and complete state could not be called 'war'. Non-state actors could not declare war on a state because they lacked the authority to do so. Essentially the same view was taken by Suárez, who thought that one of the conditions for a 'just war' was that it was to be waged by a legitimate power, meaning sovereign princes or states with no superior authority. He stated that private persons could not declare war.¹⁵⁷ Although Suárez thought that a contest between a prince and his own state or between citizens and their state ought not to be termed 'war' and should instead be referred to as 'sedition',¹⁵⁸ he did not explicitly refer to a type of conflict where private individuals might have used force against a foreign sovereign state.¹⁵⁹

Gentili clearly differentiated between acts of the state and acts of private individuals. On the misdeeds of private individuals, Gentili thought that it would not be just for the delinquency of private citizens to bring harm upon the entire body of the citizens "since the wrongdoers do not seek the welfare of all. The faults of individuals are not charged against a community."¹⁶⁰ Gentili also quoted with approval the statement of Pomponius that "the enemy are those who have officially declared war upon us, or upon whom we have officially declared war; all others are brigands or pirates".¹⁶¹ For a war to be just, it had to be carried on by a regular army (*iustum exercitum*) and fought by regular soldiers (*iusti milites*). He considered pirates to be the enemies of all mankind and quoted Cicero as support for the conclusion that the laws of war could not apply to them.

¹⁵⁶ Supra at 109ff.

¹⁵⁷ Suárez *The Three Theological Virtues: On Charity* "Disputation XIII: On War" section II, para 2 supra n83 at 806.

¹⁵⁸ Ibid at 800.

¹⁵⁹ For Suárez, a war could only be carried on between two states, the classic form of inter-state war. He did not envisage that private individuals might attack a sovereign state. However, as he felt that a contest between citizens and their state was not war but sedition, it might be argued by analogy that modern terrorist acts would also be seen as acts of sedition, not war, when carried out by citizens against another state.

¹⁶⁰ Gentili *De Iure Belli Libri Tres* Volume II, Book I, Chapter XXI, supra n101 at 99-103.

¹⁶¹ He also quoted a similar passage from Ulpian and cited St Augustine and the other theologians as supporting his point of view: ibid, Chapter III, supra n101 at 15.

He also quoted from Florus, Baldus and Livy to the effect that war could not be declared against pirates because they had withdrawn from the law and had broken the “treaty of the human race”.¹⁶² He concluded that “with pirates and brigands, who violate all laws, no laws remain in force.”¹⁶³

Conclusion

The foregoing discussion has focused on six key Christian scholars of the Middle Ages and Renaissance periods in an effort to illustrate the development of philosophical limitations on the recourse to force. Certain trends have been observed and certain common threads have been evident. From its early and tentative beginnings in the writings of St Ambrose, who provided some vague ideas on when a just war might be waged, through to the increasingly detailed analysis provided by St Augustine, then St Thomas Aquinas followed later by the Spanish theologians and the Italian/English Gentili, it is clear that just war theory evolved and developed into a complex doctrine, moulded to suit the needs of the time.

All of the thinkers discussed above had to counter the early pacifism of the Church and to justify their position that war was not always evil. All of the scholars discussed above agreed that the ultimate objective of war was peace, war was a last resort and although evil results could sometimes flow from it, war was sometimes necessary and justified. For St Ambrose and St Augustine, a just war was tied almost exclusively to the authority of God, to such an extent that for St Augustine war could be a form of charity that could be used to force Christianity upon unbelievers, for their own good. However, Vitoria, Suárez and Gentili completely rejected the concept of war for the sake of religion, agreeing that ‘just war’ was not the exclusive domain of Christians and that war could not be used to force others to change their religion.

Second, the requirement of legitimate authority for waging war became an increasingly important aspect of the doctrine. In the early stages, state and Church were one, so the legitimate authority to wage war rested with God’s representatives. St Augustine separated Church and State to some degree, St

¹⁶² Gentili *De Iure Belli Libri Tres* Volume II, Book I, Chapter II, supra n101 at 22-23.

¹⁶³ Ibid, Chapter IV at 24. The argument could be extended to terrorists who, it might be said, violate all laws, by attacking non-combatants, and in doing so, place themselves outside of any laws. If the analogy stands, it is clear from Gentili’s writings that a ‘war’ cannot be declared by, or in response to, acts of terrorists.

Thomas Aquinas went further by calling for ‘public’ authority to wage war, and the later Spanish scholars as well as Gentili, thought that for a war to be just it had to be waged *by* a state, *against* a state. Gentili’s definition of war as a ‘just and public contest of arms’ excluded attacks against the state by individuals.

Third, the transformation of the meaning of ‘just’ occurred in this epoch, from its Greek and Roman roots as a legal right, to a Christian conception of both a legal as well as a moral right. The Renaissance scholars went beyond the early Christian theologians’ focus on moral sins, and instead focused on defining what amounted to a ‘just cause’. Differing from the views of St Ambrose and St Augustine, the later scholars firmly believed that war for the sake of religion was not a just cause. The Renaissance theologians provided concrete examples of when a just cause for offensive war would arise. The disadvantage of achieving such clarity was the realisation that a war could be just on both sides.

Fourthly, the right to use force in self-defence evolved from its formulation by St Augustine, who completely forbade the individual from using force in self-defence, to the writings of Gentili who not only approved of force being used in private and public self-defence but went so far as to formulate a doctrine of pre-emptive self-defence. In setting out his theory of ‘defence on the grounds of expediency’ he touched upon many of the problems that modern-day international lawyers and states are faced with, namely, in determining when a fear is well-grounded, when an attack is imminent and when it will be legitimate to use force before an attack has actually occurred.

Part B: Islamic theology

Overview

The following section examines the limitations on the resort to force in Islamic theology. This analysis focuses mainly on the meaning of *jihad* which is often understood as the Islamic equivalent of the Christian ‘just war’.¹⁶⁴ This part is shorter in length than the analysis of Christian theology.¹⁶⁵ Although it is acknowledged that although the Islamic developments are relevant to this inquiry,

¹⁶⁴ See Zarwati, H *Is Jihād a Just War? War, Peace and Human Rights under Islamic and Public International Law* (2001) at 55-58.

¹⁶⁵ See Johnson, J *The Holy War Idea in Western and Islamic Traditions* (1997) at 23-24 where he notes that unlike just war, pacifist and international law traditions of the West, there exist no general histories treating the understanding of normative tradition on religion, statecraft and war in Islamic societies. The analysis here is also constrained by the fact that only English-language materials can be accessed which creates a disproportionate amount of available source material, when compared with the previous analysis concerning the Christian just war tradition.

it is not contended that they directly influenced the predominantly Christian-Western influenced limitations on the resort to force which were eventually incorporated into the UN Charter. In examining Islamic law's limitations on the use of force in this period the main emphasis will be on understanding the term '*jihad*' and how it has been applied to Muslims' interactions with non-Muslims. As such, the thematic lines of inquiry are rather more blurred here than in the corresponding analysis of Christian theology. The analysis focuses on the meaning of *jihad*, whether it was defensive or aggressive in nature and whether it permitted force to be used pre-emptively. There is no separate discussion here regarding the issue of forcible measures short of war, such as reprisals, nor is there a separate discussion of the use of force by non-state actors, simply because the sources of Islamic law do not tend to discuss these as separate issues and in light of the Islamic worldview, consideration of them as distinct topics may create an artificial distinction.¹⁶⁶

The Islamic law of nations – '*al siyar*'

The Islamic law of nations was created by virtue of the Islamic state's universalist nature because the need to spread Islam to all humanity necessarily required interaction, often involving the use of force, with non-Muslims.¹⁶⁷ Since the ultimate aim of Islam was to include all of humanity, a law of nations ought logically to have been needed only *temporarily* until all of humanity was brought within the fold of Islam.¹⁶⁸ In its early stages, the Islamic law of nations was initially focused on the law of war since this was the most important type of interaction between Muslims and non-Muslims. Later, the subject of foreign relations assumed a special significance and was discussed under the technical term of '*al-siyar*'. One of the earliest jurists to treat *al-siyar* as an independent subject was 'Abd al-Rahman al-Awza'i.¹⁶⁹ However, his writings mainly concerned the *ius in bello*.¹⁷⁰ One of the most well-known Islamic writers on the

¹⁶⁶ See discussion below regarding the Islamic conception of the world as being divided into the *dar al-harb* and the *dar al-Islam*. As such, there was no 'state' versus 'non-state' actor distinction and, to the author's knowledge, no separate discussion of how non-state actors, such as pirates, ought to be dealt with.

¹⁶⁷ That is not to say that there was no law of nations in pre-Islamic Arabia. There was a system of customary law, consisting of legal and moral principles, referred to as the '*sunna*' (to be distinguished from the '*Sunnah*' which refers to the way or traditions of the Prophet Muhammad). The main rules of this body of customary law were based on practices such as hospitality, asylum and assistance for desert travellers: see Khadduri, *War and Peace in the Law of Islam* (1955) at 20-1.

¹⁶⁸ *Ibid* at 44.

¹⁶⁹ He lived in Syria, at the time of the Umayyad dynasty and died in 774. His writing mainly touched on issues such as the treatment of enemy persons and the distribution of spoils: see Khadduri, *The Islamic Law of Nations – Shaybani's Siyar* (1966) at 24-5.

¹⁷⁰ *Ibid* at 23-26 for a summary of other early Muslim jurists who wrote on the *jihad* and *al siyar*, such as Abu Yusuf and Abu Hanifa.

siyar was Shaybani,¹⁷¹ yet most of his work was focused upon issues such as the spoils of war, the treatment of non-combatants and the treatment of prisoners of war, rather than the issue of when and war could be justly initiated.¹⁷²

The use of force: the meaning of ‘*jihad*’

Translated literally, ‘*jihad*’ means ‘exertion’, coming from the Arabic root meaning ‘to strive’, ‘to exert’ or ‘to fight’, and in the Qur’anic sense, it means exertion in the way of Allah.¹⁷³ *Jihad* does not necessarily imply the use of force since exertion in the way of Allah can be achieved by peaceful as well as violent means. Islamic jurists have described four types of *jihad*: the *jihad* of the heart, the tongue, the hands and the sword.¹⁷⁴ The fourth type, that which is carried out by the sword, known as the ‘lesser *jihad*’, is broadly speaking the equivalent of the Roman *ius fetiale* and Christianity’s doctrine of just war (or, according to some scholars, the Christian Crusade) in that it encompasses the twin requirements that war must be waged for justifiable reasons and it must be commenced and prosecuted in accordance with a system of rules or formalities.¹⁷⁵ As for the latter, *jihad* had to be declared by a duly constituted state authority, such as the caliph; it had to be preceded by a call to Islam¹⁷⁶ and, once initiated, rules of warfare had to be strictly observed.¹⁷⁷ Logically, the fourth type of *jihad*, that of the sword¹⁷⁸ ought to have been necessary only until everyone had either become Muslim or agreed to live under the protection of Islam.¹⁷⁹

¹⁷¹ Born 750; died 840. He wrote numerous works on *al siyar*, some under the supervision of Abu Yusuf, some from his own responsibility without supervision.

¹⁷² Khadduri (1966) supra n167.

¹⁷³ Esposito provides a concise definition of ‘*jihad*’ and points out that its exact meaning depends on context: see ‘*Jihad*’ in Esposito, J (ed) *Oxford Dictionary of Islam* (2003). ‘*Jihad*’ is derived from the verb ‘*jihada*’ which means ‘exerted’: see Khadduri (1955) supra n169 at 55-56.

¹⁷⁴ Khadduri (1955) 56 and the scholars cited therein at n6; see also definition of “*jihad*” in Esposito, ibid.

¹⁷⁵ For a comparison between the Roman *ius fetiale*, the Christian just war and the Islamic *jihad*, see Khadduri (1955) supra n167 at 57-78. *Jihad* of the sword is viewed in Islam as the lesser *jihad*, the ‘greater *jihad*’ being the inner *jihad* that each individual wages by himself, for true submission to Allah.

¹⁷⁶ This practice had existed since antiquity. In the preceding epoch, it was noted that the Israelites also called their enemies to peace in accordance with Deuteronomy 20:10-12. The Romans also required in the *ius fetiale* that a call to peace had to precede war.

¹⁷⁷ See Khadduri (1955) supra n167 at 102.

¹⁷⁸ Note that in the Qur’an, *jihad* is used to refer to struggle in the way of Allah – not warfare. Whenever fighting is referred to in the Qur’an, the term *qital* is used, or a derivative of it. For example, in the oft-quoted verse, “Fight in the way of Allah against those who fight you”, which some writers refer to as the ‘sword *surah*’, the Arabic verb used is *qital*, and there is no reference to *jihad*. Thus, throughout the Qur’an, the term ‘*jihad*’ is used classically and literally in its true sense, a struggle in the path of Allah. Later, the two terms were connected by jurists, and, for ease of reference, the term ‘*jihad*’ is used here rather than ‘*qita*’ as that is the term which is always associated with the use of physical force: see Moulavi Ali, M A *Critical Exposition of the Popular “Jihad”* (1977) and Johnson supra n165 at 35-6, 61.

¹⁷⁹ The People of the Book, known in Arabic as the *dhimmis* are the Christians, the Jews and other people who had revealed books such as the Zoroastrians. The people of these tolerated religions could live in peace with the Muslims so long as they paid the poll tax (*jizya*) to the Islamic authority.

Jihad – a permanent state of war?

Islamic scholars often refer to the world as being divided into the world/abode/territory of peace and the world/abode/territory of war. In Arabic, they are referred to as the *dar al-Islam* and the *dar al-harb* respectively.¹⁸⁰ In theory, the *dar al-Islam* is permanently at war with the *dar al-harb* until the former achieves supremacy over the latter, or, as Khadduri explains, until the *jihad* has **transformed** the *dar al-harb* into the *dar al-Islam*.¹⁸¹ The *dar al-harb* was the object of, rather than the subject of, Islamic rule. The communities of the *dar al-harb* were regarded as being in a ‘state of nature’ for they lacked legal competence to enter into intercourse with Islam on the basis of reciprocity and equality, because they failed to conform to the *dar al-Islam*’s legal and ethical standards.¹⁸²

However, even though the *dar al-Islam* was theoretically in a permanent state of *jihad* until the *dar al-harb* had been overcome, that did not imply a permanent resort to **force**, as *jihad* could be waged by non-violent means.¹⁸³ The *jihad* could be described as a permanent state of war but *not* continuous fighting. Rather than promoting permanent fighting, Islam promoted permanent peace, only allowing the resort to force in self-defence, thus leading some writers to describe Islam as essentially pacifist in nature.¹⁸⁴

Although this summary represents the original view of the permanence of *jihad*, the doctrine was altered and softened over time to take into account the reality that the *dar al-Islam* could not achieve supremacy over the *dar al-harb* in the short term. When Muslim power began to decline, Muslim scholars tacitly admitted that the concept of *jihad* as a permanent war had become obsolete and instead, *jihad* came to assume a dormant status that could be reactivated whenever the imam or caliph deemed it necessary.¹⁸⁵ Ibn Khaldun, who wrote in the fourteenth century, noted that the relaxation of the *jihad* marked the transition in the character of the Muslim nation from the warlike to the civilised stage.¹⁸⁶

¹⁸⁰ Note that the *dar al-Islam* includes not only the community of Muslims (the *umma*) but also the non-Muslims who were tolerated by the Muslims, such as the People of the Book.

¹⁸¹ Khadduri (1966) *supra* n169 at 11-13.

¹⁸² *Ibid* at 12.

¹⁸³ “The universalism of Islam in its all-embracing creed, is imposed on the believers as a continuous process of warfare, psychological and political *if not military*” (emphasis added); Khadduri (1955) *supra* n167 at 64.

¹⁸⁴ Yahya, H “The Pacifism of Islam” Islam Online [23 May 2004]:

<<http://www.islamonline.net/english/introducingislam/politics/System/article06.shtml>> (accessed 14 September 2006).

¹⁸⁵ Khadduri (1955) *supra* n167 at 65.

¹⁸⁶ *Ibid*.

Justifications for waging *jihad*

It was noted above that *jihad*, the Islamic *bellum iustum*, was the approximate equivalent of the Roman *ius fetiale* and the Christian just war. However, one ought to bear in mind that the term *jihad* does not necessarily refer to *war*, since the duty to wage *jihad* could be carried out by a variety of both violent and non-violent means. The following examination of the various grounds which gave rise to *jihad* does not necessarily imply that *force per se* would be legitimate, as Islam's objectives might have been met without the use of force through, for example, diplomatic dialogue and persuasion. This is an important point of distinction because, in the earlier discussion of the Roman and Christian understanding of the *bellum iustum*, references to the *ius fetiale* and the just war necessarily implied the resort to force.

Muslim scholars differ over how many categories of *jihad* exist, but at least five separate grounds for waging *jihad* have been identified: the *jihad* against non-believers, the *jihad* against apostasy (*al-ridda*), the *jihad* against dissension (*baghi*), the *jihad* against deserters and highway robbers and the *jihad* against the People of the Book. The first category relates to *jihad* against non-Muslims in the *dar al-harb*, whilst the other four relate to *jihad* against Muslims, or against non-Muslims under the protection, and physically within, the Muslim state, enjoying the protection of the *dar al-Islam*. For present purposes, only the first category, the *jihad* of Muslims against non-Muslims beyond the territory of the *dar al-Islam* is relevant as it is the only category that resembles present-day inter-state warfare.

The use of force: self-defence versus aggression

It must be acknowledged that disagreement exists between scholars as to the nature of *jihad* in Islam. Some scholars assert that it is essentially defensive in nature whilst others consider that it includes an aggressive or offensive element.¹⁸⁷ The brief analysis offered here cannot hope to resolve that ongoing debate. The view advocated here is that, based on the historical evidence, both theoretical and empirical, *jihad* was established essentially as a means of self-defence. Muslims were prohibited from using force to convert non-Muslims and they were prohibited from using force in any situation other than one in which the Muslims' security had first been threatened. That interpretation is based on two grounds

¹⁸⁷ For an analysis of the conflicting positions, see Ali, S and Rehman, J "The Concept of *Jihad* in Islamic International Law" (2005) 10 *JCSL* 321, especially at 333 and n62.

discussed in turn below: the theoretical argument is based upon extracts from the Qur'an; the empirical argument is based on the practices of the Prophet Muhammad and his followers.

As for the first ground, several passages from the Qur'an suggest that force was *only* to be used in self-defence. The first time that Muslims were permitted to engage in fighting when attacked is recounted in *Surah Al Hajj* (The Pilgrimage), revealed to the Prophet Muhammad in 622:¹⁸⁸

[39] To those against whom war is made, permission is given (to fight), because they are wronged – and verily, Allah is most powerful for their aid – [40] (They are) those who have been expelled from their homes in defiance of right – (for no cause) except that they say “Our Lord is Allah”.

There is some disagreement amongst scholars as to whether this verse abrogated earlier verses which called upon Muslims to respond to aggression with non-violence.¹⁸⁹ In any case, this verse allowed the Muslims, for the first time, to use force, but only in self-defence, if they were first attacked. Two further passages from the Qur'an which were revealed some years after the above verses and which also support the argument that force was only permitted in self-defence, are perhaps the most frequently quoted, and at times misquoted, in Western works on the subject of *jihad*.¹⁹⁰ They are found in *Surah Al-Baqarah* (The Cow), wherein the Muslims are commanded to:¹⁹¹

[190] Fight in the cause of Allah those who fight you. But do not transgress limits; For Allah loveth not transgressors. [191] And slay them wherever ye catch them, and turn them out from where they have turned you out; for tumult and oppression are worse than slaughter; but fight them not at the Sacred Mosque, unless they first fight you there; but if they fight you, slay them. Such is the reward of those who suppress faith.

The literal interpretation of these verses would suggest that force, *qital*, could only be used against those who first fought the Muslims; but once the attack against the Muslims had begun, the Muslims had to slay their attackers. There are **four** references in these two key verses which seem to suggest that force could only be

¹⁸⁸ Yusuf Ali, A (transl) *The Holy Qur'an* (1989) *Surah Al Hajj* (The Pilgrimage) verses 39-40, at 832. The *hijrah*, which occurred in 622, was the migration of the small, persecuted Muslim community from Mecca to Medinah.

¹⁸⁹ Firestone, R *Jihad: The Origin of Holy War in Islam* (1999) at 53-54 for a summary of the scholars' views.

¹⁹⁰ At least one of these verses (191), if not both, refers to the events that occurred at al-Hudibiyyah in the sixth year of the *hijrah*, 628 in the common era. Al-Hudibiyyah was a village on the borders of the Sacred Precinct (*haram*) of Mecca. An agreement was reached between the Prophet Muhammad and the Meccan tribe of Quraysh whereby the Muslims would retreat from entering Mecca that year, but would be allowed to make pilgrimage the following year. The Muslims, nevertheless, feared that they would be attacked when they returned to make the pilgrimage, and that there would be a battle within the Meccan *haram*, something which was strictly forbidden according to pre-Islamic Arabian tradition. This verse (or at least verse 191) gave the Muslims permission to fight if attacked. Some writers only quote verse 191 when analysing the Islamic justification for *jihad* and from that alone it would appear that Muslims can 'slay them wherever ye catch them' thereby distorting the meaning of these verses.

¹⁹¹ *The Holy Qur'an* supra n190, *Surah Al Baqarah* (The Cow) verse 90, at 76-77.

resorted to in *self-defence*.¹⁹² Moreover, if fighting was required, the Muslims could not kill any non-combatants amongst the non-believers.¹⁹³ This interpretation has been favoured by one of the most highly-regarded translators of the Qur'an, 'Abdullah Yusuf Ali, in his commentary on these verses and by some Western scholars.¹⁹⁴ However, not all scholars agree with such an interpretation.¹⁹⁵

The above verses are examples of the way in which resort to force was restricted for the Muslims and they support the proposition that Muslims were only allowed to resort to force if they had been first attacked. Further support for this argument is found in Qur'anic verses which suggest that if non-Muslims did not attack the Muslims, then the Muslims could not go to war against them.¹⁹⁶ On the basis of these passages, and other Islamic doctrines,¹⁹⁷ it is suggested that the Muslims were aware that not everyone would accept Islam but they were never given permission to use force to proselytise.¹⁹⁸ Although Islam was universalist in nature, it did not condone the use of force to achieve that goal. Furthermore, had the Muslims been given permission to use force for *aggressive* war, surely that permission would have been permitted against the non-believers to force them to convert to Islam. Given that these passages mention the essentially peaceful approach to be taken with non-believers, and given that they do not mention the possibility that force may be used except in self-defence, it can be asserted that no such permission was ever granted to Muslims.

¹⁹² The phrase 'those who fight you'; the reference to turning them out 'from where they have turned you out'; fighting at the Sacred Mosque is not permitted 'unless they first fight you there' and the injunction to slay them 'if they fight you there.'

¹⁹³ The *ius in bello* is not the subject of this thesis, suffice to say that 2:190 prohibited the Muslims from killing non-combatants even when they were fighting in self-defence.

¹⁹⁴ Verse 190 means that war was permissible in self-defence, and under well-defined limits. When undertaken, it was to have been pushed with vigour, but not relentlessly, and only to restore peace and freedom for the worship of Allah: *The Holy Qur'an* supra n190, at 76-66, notes 204 and 205. Rudolph Peters considers that verse 190 authorises defensive fighting and it has not been abrogated: see Peters, *R Islam and Colonialism: The Doctrine of Jihad in Modern history* (1979) 14.

¹⁹⁵ Firestone argues that verses 190 and 191 were revealed at different times and in different circumstances and therefore cannot be read together. As a result, despite verse 190's apparent reference to defensive fighting, he asserts the verse was abrogated by the 'nearly limitless proclamation of 2:191': Firestone, supra n 191 at 55. That interpretation is open to dispute on the grounds that there are both classic and modern scholars, such as Ibn al-Jawzi, al-Nahhas and 'Abdullah Yusuf Ali who understand that verse 190 remains in effect and on the grounds that the verses which Firestone cites as evidence that verse 190 has been abrogated do not support such a conclusion. For example, he cites 9:36 and 9:29 as 'abrogating verses' (Firestone, supra n189 at 56, n68). However, verse 9:36 refers to the months in the year in which Muslims were *not* allowed to fight, and there is nothing to suggest that verse 9:29 abrogated verse 2:190.

¹⁹⁶ "If Allah had pleased he could have given them power over you, and they would have fought you: Therefore, if they withdraw from you but fight you not, and (instead) send you (guarantees of) peace, then Allah hath opened no way for you (to war against them)": *The Holy Qur'an* supra n190, *Surah Al Nisa* (The Women), verse 90, at 213-4.

¹⁹⁷ See Khadduri (1966) supra n169 at 13 on the doctrine of safe-conduct (*aman*).

¹⁹⁸ *The Holy Qur'an* supra n188, *Surah Al Nahl* (The Bees), verse 125, where Muslims were commanded to call the non-Muslims to Islam with "wisdom and beautiful preaching." If recourse to force were permitted to spread Islam, there would perhaps have been no value in urging Muslims to use wisdom and beautiful preaching when they called the non-Muslims to Islam.

It was stated above¹⁹⁹ that two grounds are advanced here to support the proposition that force could only be used in self-defence. The first ground was based on passages from the Qur'an; the second ground is based on empirical evidence from the life of the Prophet Muhammad (the *sira*).²⁰⁰ From the point at which the Prophet Muhammad first preached the revelations of the Qur'an, his life can be divided into two parts: the early years that he spent in Mecca and the time after his emigration to Medina. The first period which he spent in Mecca after he began preaching was marked by hostility and persecution from the powerful tribe that controlled Mecca, the Quraysh.²⁰¹ It is clear that the small group of Muslims, and especially the Prophet Muhammad, were subjected to increasingly hostile treatment during this period and many accounts recall that Muslims were physically attacked, beaten, tortured and, in some cases killed, because they had adopted the new religion. However, the Muslim community did not respond to those attacks with violence and Muhammad was even criticised by his enemies for his refusal to engage in violence.²⁰² In the face of persecution, the Muslims responded *non-violently*, whereas some fled Mecca and sought safety elsewhere, such as in Abyssinia.

In 622, the Prophet Muhammad and the small Muslim community in Mecca migrated to Medina. Despite fleeing persecution in Mecca, the Quraysh pursued the Muslims to Medina. In 624, the first Muslim battle occurred, the Battle of Badr. There is some scholarly dispute over whether this war was *defensive* or *aggressive*: proponents of the former view claim that the Quraysh assembled a large army of around 1000 men outside Medina and were planning to invade the city and kill the Muslims;²⁰³ whilst proponents of the latter view hold that the Muslims provoked the battle by attacking a Quraysh convey on its way from Syria to Mecca.²⁰⁴ It is difficult to ascertain which view is historically accurate; although the former seems more plausible as it would appear that the actual battle

¹⁹⁹ Supra at 126.

²⁰⁰ The *sira* refers to the literature, based on *hadiths*, which form a biography of the Prophet Muhammad's life.

²⁰¹ The 'Meccan period' was from 613, when he began preaching, until the *hijrah* in 622.

²⁰² His opponents described him as being *jahul*, meaning that he did not appreciate that he ought to fight them, as was the Arabian tribal custom: see Firestone supra n189 at 107, especially n14.

²⁰³ The Quraysh were gathering their resources and were planning to 'crush and annihilate' the Prophet Muhammad and the Muslims with an 'overwhelming force': *The Holy Qur'an* supra n190, commentary to *Surah Ali-Imran*, verse 13, at 129, n352. For a Muslim-oriented account of how the Battle of Badr began see Islamic Occassions.com: <<http://www.ezsoftech.com/islamic/badr.asp>> (accessed 14 September 2006).

²⁰⁴ Spencer, R *Onward Muslim Soldiers: How jihad still threatens America and the West* (2003) at 153-4.

was initiated by the non-Muslim Quraysh tribe requiring the ill-prepared Muslims to respond in self-defence.²⁰⁵

Due to the confines of the current inquiry as well as the differences of understanding between scholars as to historical fact, it is impossible to review all of the battles which the early Muslims participated in, and to analyse them individually to determine whether they were defensive or aggressive in origin.²⁰⁶

What can be said is that the Muslim community (*umma*) that formed in Medina was an inclusive community that formally incorporated Muslims, Christians, Jews and idolaters. The Constitution of Medina, a document that set out the formal responsibilities of each of these groups, provided in numerous articles that, *inter alia*, all groups were to act together and contribute to the defence of Medina if it was attacked.²⁰⁷ In addition, there were articles in this Constitution which stipulated that both Muslims and Jews had to assist one another against anyone who made a war against the signatories. There was no suggestion that they would assist one another in *aggressive* war, providing further support for the proposition being advanced here, that *jihad* was a defensive mechanism, not an offensive one.²⁰⁸

In summary, it is submitted that observations of the Prophet Muhammad and the early Muslim community demonstrates a *practical* commitment to the *theoretical* principles which prohibited the use of force except in self-defence, which were outlined above.²⁰⁹ It may even be asserted that in Islam, the principle of defence attained a higher position than that of *jihad*. The reason for such an assertion lies in the fact that one night spent in *ribat*, or in the safeguarding of the frontiers of Islam by stationing forces in the harbours and frontier towns, was described in a *hadith* as being worth more than “a thousand nights in prayer.”²¹⁰ It was clear that for the early Muslims, making defensive preparations was a very high priority, but

²⁰⁵ This interpretation is supported by the fact that the Muslims faced considerable numerical inferiority in relation to the Quraysh: see *The Holy Qur'an* and commentary, supra n203.

²⁰⁶ Some Battles were clearly defensive, for example, the Battle of Uhud in 624 was initiated by the Meccan enemies of Islam who were seeking revenge for their losses at the Battle of Badr. The Battle of the Trench was also defensive, because it was initiated by an attack by Meccan forces on Medina in 627.

²⁰⁷ See, for example, Article 37, which provided that Jews and Muslims had to spend of their own resources and that there had to be mutual assistance ‘against anyone who wars against the people of this document’: Firestone supra n189 at 122-3.

²⁰⁸ Moreover, if force was permitted for the purposes of spreading Islam, one would have thought that it could have been used to greater effect against the non-Muslims actually living within Muslim-controlled territory.

²⁰⁹ Supra at 156.

²¹⁰ Khadduri (1955) supra n167 at 81-82, citing a *Hadith* of Bukhari in his *Kitab al-Jami' al-Sahih*.

as the next section will conclude, those defensive preparations were not allowed to turn into a pre-emptive use of force against potential enemies.

Pre-emptive self-defence

Several Qur'anic verses suggest that pre-emptive war was not permitted in Islam. The first passage is from *Surah Al Baqarah*, cited earlier,²¹¹ which commanded the Muslims to “fight in the cause of Allah those who fight you, but do not transgress limits for Allah loveth not transgressors.”²¹² Some translators use the phrase “but do not do aggression, for Allah loves not the aggressors.” Either way, the meaning is apparent that the Muslims were commanded not to fight unless they had been fought, implying that they ought not *initiate* the hostilities.

However, the Muslims were not required to wait, unprepared until the anticipated attack of the non-Muslims was launched. *Surah Al Anfal* (The Spoils of War), which was revealed after the Battle of Badr, suggested that the Muslims could make preparations for war, but the Muslims could not fight anyone who had made peace with them.²¹³ In other passages, the message was clear that unless non-Muslims breached their treaty obligations,²¹⁴ or unless the Muslims were specifically asked by an oppressed people to protect them,²¹⁵ the Muslims could not undertake pre-emptive war. And even if the non-Muslims breached their treaty obligations, still the Muslims had to wait for a period of four months, to allow the treaty-breakers to change their minds.²¹⁶ Historical examples, such as the preparations made by the Muslims in digging a trench before the Battle of the Trench (also called the Battle of the Confederates) emphasise the point that Muslims were permitted to make defensive preparations, but they could not initiate the aggression.

²¹¹ Supra n192.

²¹² Ibid.

²¹³ *Surah Al Anfal*, verse 60: “Against them make ready your strength to the utmost of your power, including steeds of war, to strike terror into (the hearts of) the enemies, of Allah and your enemies, and others besides whom ye may not know, but whom Allah doth know.” See also verse 61: “But if the enemy incline towards peace, do thou (also) incline towards peace, and trust in Allah...”: *The Holy Qur'an* supra n188 at 429.

²¹⁴ *Surah Al-Tawbah* (The Repentance) verses 1-29 set out the conditions under which Muslims had to honour, or revoke, treaties with the Pagans.

²¹⁵ *Surah Al Nisa* (The Women) verse 75: “And why should ye not fight in the cause of Allah and of those who, being weak, are ill-treated (and oppressed)?...”: *The Holy Qur'an* supra n188 at 207.

²¹⁶ *Surah Al Tawbah*, verses 4-5: ibid at 438 n1250.

The issue of pre-emptive strikes was recently discussed by Harfiyah Haleem, in the context of an online discussion on the use of force in Islam.²¹⁷ Haleem argues that pre-emptive strikes are not justified in Islam because, *inter alia*, they would violate the Qur'anic (and Biblical) law of 'an eye for an eye and a tooth for a tooth'. This rule is found in *Surah Al Ma'idah* and the argument seems to be that if the Muslim attacks before the injury is suffered, this central doctrine of Islam would be nullified. Furthermore, even though the Muslim is given the right to take an eye for eye, he or she is encouraged to remit the right of retaliation as a kind of charity. This principle, that mercy is above justice and that the Muslim victim should forsake his right of revenge, negates the notion of a right to use force to pre-empt an anticipated attack.

In conclusion, it can be said that in Islam there were approximately five broad principles that the Muslims were compelled to adhere to with regards to warfare. First, Muslims were encouraged to be strong so that their enemy feared them and would hesitate to attack them; secondly, they were required to work for peace as much as possible and to not begin the hostilities; thirdly, they were commanded to fight only those who fought them; fourthly, they were to halt hostilities as soon as the other party had inclined to peace; and finally, they were required to observe the treaties and agreements between Muslims and their enemies as long as the enemy observed them.²¹⁸ Thus, it is surmised that Islam allowed for force to be used in self-defence, but it did not permit force to be used aggressively, and although Muslims were permitted to make defensive preparations to protect themselves from attack, they were not permitted to use force in pre-emptive self-defence.

Conclusion

The above analysis has attempted to trace the historical roots of the Islamic limitations on the use of force, particularly the use of force in self-defence and pre-emptive self-defence. It is clear that there are some similarities between the Islamic and the Christian positions discussed earlier in this chapter, and indeed between these two traditions and the theories espoused by the Israelites, Greeks

²¹⁷ Haleem, H, Islam Online [22 November 2004]: <<http://www.islamonline.net/askaboutislam/display.asp?hquestionID=3542>> (accessed 14 September 2006).

²¹⁸ Siddiqi, M "Jihad: Its True Meaning and Purpose" Islam Online: <<http://www.islamonline.net/fatwa/english/FatwaDisplay.asp?hFatwaID=51346>> (accessed 7 July 2006).

and Romans discussed in the previous chapter.²¹⁹ However, there are also significant differences. For example, in terms of justifications for war, it has been shown that in Islam, force was probably only ever permitted in self-defence whereas throughout the ancient Greek and Roman periods, and even in early Christianity, force was permitted to be used, and was used, aggressively. In terms of justifications for war, any war against the ‘barbarians’ was considered just by the ancient Greeks and Romans, whereas the Muslims were never given authorisation to use force generally against all non-believers – quite the contrary. There are also differences when one compares the relationship between the theory and practice of *jihad*, with the theory and practice of war in ancient Greece and Rome – in respect of the latter there was often a discernible gap between rhetoric and reality, with military commanders possessing a great deal of latitude in deciding when and where to resort to force.²²⁰

The similarities between the Christian and Islamic positions discussed in this chapter are perhaps closest when one compares the writings of the Renaissance theologians with the Islamic doctrine of *jihad*. For instance, Vitoria, Suárez and Gentili opposed the use of force to spread Christianity and expressly stated that a difference of religion was not a just cause for war.²²¹ But the Christian and Islamic positions seemed to diverge somewhat on the issue of pre-emptive self-defence. Vitoria did not subscribe to the view that force could be used pre-emptively but Gentili arguably did.²²² Although it is sometimes assumed that Islamic law permitted, and permits, force to be used aggressively, the theoretical and empirical evidence traversed here suggests that the Islamic tradition was rather less permissive than the Christian tradition, ostensibly limiting the use of force to self-defence in the event of attack.²²³

²¹⁹ Such as the desire to limit the resort to force, an emphasis on peace as the objective of war, the desire to create a limited set of circumstances in which resort to force would be justified and a universal recognition that force can be used in self-defence.

²²⁰ See chapter 4 at 95.

²²¹ Supra n66 (Vitoria), supra n97 (Suárez) and supra n120 (Gentili).

²²² See discussion supra at 116ff. Compare Vitoria with Gentili who advocated a ‘war of defence on the grounds of expediency’, supra n146 and accompanying text.

²²³ See Ali and Rehman, supra n187 especially at 328-30.

CHAPTER 6

Epoch III: The natural law theorists – 17th – 18th century European developments

Introduction

Overlapping with the Spanish theorists discussed in chapter 5 was a group of European scholars, loosely described as ‘natural law theorists’, who wrote mainly during the seventeenth and eighteenth centuries. Natural law was not a new idea, nor an idea exclusive to this period.¹ However, the theorists discussed in this epoch shared a common understanding that the law of nations ought to be based on notions of natural law and reason. Four scholars are discussed here: Hugo Grotius, Emmerich de Vattel, Christian Wolff and Samuel Pufendorf.² The objective is to ascertain these scholars’ views on the same themes that were pursued in the earlier epochs, namely, the state’s right to resort to force, the use of force in self-defence, pre-emptive self-defence, reprisals and the use of force in response to non-state actors. Once again, the analysis is restricted to their respective contributions to the development of the *ius ad bellum*.

The topics addressed by these scholars, and the views they adopted, were influenced by the political environment in which they wrote. They were predisposed to focus on issues concerning war and sovereignty, such as who possessed the legitimate authority to declare war. The Treaty of Westphalia officially recognised the independence of sovereign states and the wider ideas circulating in the Age of Enlightenment, such as the separation between Church and State, undoubtedly influenced the direction in which they took the *ius gentium* (law of nations). Grotius’ political environment was marked by the Dutch struggle for independence from Spain, the Thirty Years War and the religious controversies that emerged in the struggle between Catholicism, Protestantism and Calvinism; he is described as having “lived in tempestuous times”.³

¹ The concept of ‘natural law’ dates back to the ancient Greeks and Romans and there were also natural law theorists in the preceding epoch. St Thomas Aquinas viewed ‘natural law’ as ‘the rational creature’s participation in the eternal law: see Aquinas, *Summa Theologica* Q. 91 (Art 2). Thus, the term ‘natural law’ cannot be used to create firm divisions or epochs because even theorists who shared a conception of ‘natural law’ were in other ways very dissimilar from one another. The term is used here to assist in categorising the theorists of this epoch under one universal idea: it merely differentiates these scholars from the Christian and Islamic theorists in epoch II and the positivists in epoch IV. The scholars in epoch III may have personally held strong religious beliefs, but they did not base their theories of the law of nations on the premise that God had permitted certain types of wars against certain groups of enemies, as had some of the Christian theologians in epoch II.

² Biographical dates are as follows: Grotius (1583-1645), Vattel (1714-1767), Wolff (1679-1754) and Pufendorf (1632-1704).

³ Bull, H, Kingsbury, B and Roberts, A (eds) *Hugo Grotius and International Relations* (1990) at 1.

However, Grotius was at pains to point out that his ideas were not intended to be limited to the political events of his day.⁴ He clearly felt that his views on the law of nations, including the right to resort to force, contained precepts that were timeless and could be applied to all states at all times.

Use of force and the 'just war'

In this epoch, the development of the *ius ad bellum* began with the writings of Hugo Grotius.⁵ For present purposes his main work of interest was his *De Jure Belli ac Pacis Libri Tres* (The Law of War and Peace in Three Books) published in 1625.⁶ Two of his earlier works, *De Jure Praedae Commentarius* (Commentary on the Law of Prize and Booty) and *Mare Liberum* (Free Sea), contained some of his initial ideas on the law of nations and the resort to force.⁷ In the preface to *De Jure Belli ac Pacis*, Grotius established the very existence of a law of nations by reference to natural law, and he described the relationship between natural law and God.⁸ He considered that the law of nations was permanent, immutable and it existed for all time, whether in war or in peace.⁹

On the purpose of war, Grotius thought that war was undertaken to secure peace¹⁰ and that "war ought not to be undertaken except for the enforcement of rights."¹¹ As for a definition, he claimed that the term 'war' had come to refer not only to the physical act of war, but the condition of war that existed between two rulers or peoples, regardless of whether force had been used.¹² As to whether it was ever lawful to wage war, Grotius agreed with Cicero and the ancient Greeks that one of the first principles of nature was that each animal, from the moment of its birth, had regard for itself and was impelled to preserve itself. However, that instinct must conform with reason, in which moral goodness was of paramount

⁴ Grotius, H *The Law of War and Peace (De Jure Belli ac Pacis)* (Loomis, L. transl 1949) Prolegomena, para 58 at 16.

⁵ His name is Huig de Gruit or Groot, but his Dutch name was Latinized as Hugo Grotius and that is how he is usually referred to in modern scholarly writings.

⁶ For a detailed account of the origins of *De Jure Belli ac Pacis* and its relation to Grotius' earlier work, see Scott, J "Introduction" in Grotius, *De Jure Belli ac Pacis Libri Tres*, (Kelsey, F. transl. 1925) (The Classics of International Law); also Hill, D "Introduction" in Grotius *The Rights of War and Peace* (Campbell, A. transl, 1979).

⁷ The Law of Prize and Booty was written in around 1604-1605 but was not published until 1868; Free Sea was first published in 1609: see Corbett, P "Introduction" in *De Jure Belli ac Pacis*, supra n4, at xii; see also Bull, Kingsbury and Roberts supra n3 at 2.

⁸ *De Jure Belli ac Pacis* (Kelsey, F. transl) Preface, para 5, supra n6 at 10. It is beyond the scope of this chapter to set out Grotius' arguments for the existence of natural law and its relationship to the law of God. Grotius argued that the law of nature would exist even if God did not and that it is "the very nature of man which...is the mother of the law of nature...": *ibid*, Prolegomena, para 15.

⁹ "Let the laws be silent, then, in the midst of arms, but only the laws of the State, those that the courts are concerned with, that are adapted only to a state of peace; not those other laws, which are of perpetual validity and suited to all times...": *ibid*, para 26, supra n6 at 18-19.

¹⁰ *Ibid*, Book I, chapter I, para I at 33.

¹¹ *Ibid*, Prolegomena, para 25 at 18.

¹² *Ibid*, Book I, section II, para 1, (Kelsey, F. transl.), supra n6 at 33, citing the authority of Philo, *On Special Laws*, Book II, who wrote that enemies were not only those who were actually engaged in fighting but also those who had "brought up appliances of war...even if they are not yet commencing to fight."

consideration, which is superior to the body.¹³ He held that all animals, including man, understood some form of fighting and there was nothing in the first principles of nature that was opposed to war.¹⁴ ‘Right reason’ and ‘the nature of society’ did not prohibit all use of force, “but only that use of force which is in conflict with society, that is which that attempts to take away the rights of another.”¹⁵

Having addressed potential social, historical and religious grounds of opposition to war, Grotius also argued that his thesis - that war was not in conflict with the law of nature *per se* - was supported by the “general agreement of all nations, and especially the wise.”¹⁶ Neither was war in conflict with the law of nations since, as far back as Livy, it had been established that arms were to be ward off by arms.¹⁷

Grotius divided war into three major categories: public, private and mixed.¹⁸ Private war was the most primitive, and equated to the right to use force in personal self-defence against an assailant who was threatening one’s life with arms.¹⁹ He divided public war into *formal*, fought on both sides by the supreme power in the state and accompanied by certain formalities, such as declaration, and *informal*, fought without those formalities, and against private persons, and by any official whatsoever.²⁰ He asserted that public war ought not to be waged except by the sovereign ruler of each state.²¹

As for just causes for war, Grotius confirmed that there were generally thought to be **three** justifiable causes of war: defence, recovery of property and punishment.²² He thought his position was in conformity with that of St

¹³ *De Jure Belli ac Pacis*, Book I, Chapter II, para I.1-1.2 (Kelsey F. transl.) *ibid* at 51.

¹⁴ *Ibid*, para I.4 at 52.

¹⁵ *Ibid*, para I.5 at 53. “It is not then, contrary to the nature of society to look out for oneself and advance one’s own interests, provided the rights of others are not infringed; and consequently the use of force which does not violate the rights of others is not unjust. (emphasis added): *ibid*, para I.6 at 54.

¹⁶ *Ibid*, para III at 55-56.

¹⁷ *Ibid*, para IV at 57.

¹⁸ “Public war is war waged by someone who has the lawful authority to do it. Private war is waged by one without that authority. A mixed war is that which on one side is public and on the other private.” *De Jure Belli ac Pacis*, Book I, Chapter III, para 1 (Loomis, L. transl.) *supra* n4 at 38-39.

¹⁹ *Ibid*, para 3 at 39.

²⁰ *Ibid* at 40.

²¹ The sovereign power was one that was not subject to the legal control of anyone else, and it was a power which could not be rescinded at the pleasure of another human will: *ibid*, para 7 at 43.

²² *De Jure Belli ac Pacis*, Book II, Chapter I, para 2, *supra* n13 at 72.

Augustine.²³ Grotius also confronted what he called the ‘much agitated’ question of whether a war could be just on both sides. He felt that the answer to the question depended on what was meant by ‘just’: if one was talking about the parties’ intentions, then it would be entirely possible for a war to be just on both sides, since each party to the war might have been acting in good faith, in much the same way that a lawsuit was just on both sides because both parties acted in good faith, believing themselves to be in the right. However, if by ‘just’ one was referring to the ‘special meaning of the word’ and ‘with regard to the act itself’ then it was clear that “a war cannot be just on both sides, any more than a lawsuit can be [because] there can be no moral sanction given us to do opposite things, such as acting and preventing action.”²⁴ In short, Grotius recognised the inherent difficulty of describing a war as ‘just’. By referring to the different meanings attributable to the word he acknowledged the limited benefit of such a term as ‘just war’.

Grotius had clear views on what he regarded as *unlawful* reasons for a nation to resort to force: fear and suspicion of a neighbouring state’s increasing power;²⁵ the desire to subjugate a people by force on the grounds that they deserved to be slaves;²⁶ a desire to change one’s habitation, perhaps in search of for more fertile land, or the event of discovery, even if the inhabitants of a discovered land were wicked or had ‘erroneous ideas of God’ or were “dull of wit.”²⁷ He departed from the early Christian scholars such as St Ambrose and St Augustine who felt that ‘holy’ wars could be waged for the sake of religion, and that they were an act of charity for the non-believers’ own good.²⁸ Grotius held the view that “neither moral nor religious virtue, nor perfect intelligence was required for the ownership of property.”²⁹ He left some room for argument when he wrote that if there are races totally destitute of reason, they could not exercise ownership; but no sooner

²³ Joachim von Elbe notes that Grotius adopted virtually unchanged the traditional doctrine of the just war that had been formulated by his predecessors: von Elbe, J “The Evolution of the Concept of the Just War in International Law” (1939) 33(4) *AJIL* 665 at 678. But see discussion *infra* at n104 and accompanying text. Grotius’ conception of the just war was arguably broader than St Augustine’s in that it probably allowed for the pre-emptive use of force.

²⁴ *De Jure Belli ac Pacis*, Book II, Chapter XXIII, para 13 (Loomis, L. transl.) *supra* n4 at 253.

²⁵ See also discussion below at 148ff regarding pre-emptive self-defence.

²⁶ *De Jure Belli ac Pacis*, Book II, Chapter XXII, para 12, (Loomis, L. transl.) *supra* n4 at 247.

²⁷ *Ibid*, para 9 at 246.

²⁸ See discussion in chapter 5 at 101ff.

²⁹ *De Jure Belli ac Pacis*, Book II, Chapter XXII, para 10, (Loomis, L. transl.) *supra* n4 at 246. He discussed at length the question of whether kings should make war on people who rejected Christianity, in Book II, Chapter XX entitled “Punishments”.

had he provided a loophole for potentially aggressive nations to march though than he closed it when he expressed his doubts that such peoples existed.³⁰

Grotius emphasised the peaceful settlement of disputes. He wrote that there are three methods by which disputes may be prevented from breaking out into war: holding a conference, agreeing to arbitration and drawing lots. In doubtful cases, even though both sides were bound to search for every means of avoiding war, nevertheless, it was the side that was ‘pressing its claim’ that was more bound to do so than the side in possession.³¹ Even if a man knew his cause was just but he did not have the documents to convince the possessor of the injustice of his position, he could not on that account legitimately go to war, because he lacked the right to compel the other to relinquish his possession.³² Furthermore, even when a right to go to war had been established, that did not mean that a nation ought to immediately act upon it, since “it is frequently more high-minded and noble to relinquish one’s right.”³³ He employed many historical examples to prove that even when one was convinced of the justice of one’s cause, one should not act upon the right to go to war but should carefully balance the good and the evil that would flow from the act of war.³⁴ The fundamental point was that war was cruel, thus all war, even lawful war, should be avoided (almost) at all costs, and that when the potentially warring party was Christian, the desire to avoid war should be felt with an ever more stronger conviction.³⁵

Christian Wolff’s³⁶ most important work for present purposes was his *Jus Gentium Methodo Scientifica Pertractatum* (The Law of Nations Treated According to a Scientific Method), published in 1749.³⁷ In the course of this work, Wolff demonstrated that although he followed Grotius in some respects, he

³⁰ “I have well-founded doubts if any people are to be found completely destitute of reason. It was wrong, therefore, of the Greeks to call the barbarians their natural enemies, because of a difference of customs, or perhaps what seemed like inferiority of intellect.”: *De Jure Belli ac Pacis*, Book II, Chapter XXII, para 10, supra n4.

³¹ *Ibid.*, para 11 at 253.

³² *Ibid.* This is relevant to the question of what evidence a state must provide if it wishes to use force, or has used force, against another: see discussion *infra* at chapters 10 and 11.

³³ *Ibid.*, Book II, Chapter XXIV, para 1 at 255.

³⁴ “Keep before your mind, along with your own resources, the power of chance and the widespread nature of war.”: *ibid.*, para 4 at 257, referring to Livy, *History* XXX, xxx, 20.

³⁵ *De Jure Belli ac Pacis*, Book II, Chapter XXIV para 10, supra n4 at 259.

³⁶ The name appears as Wolf and Wolff.

³⁷ He published another work on international law shortly thereafter, *Institutiones juris naturae et gentium* (Institutes of the Law of Nations) in 1750. He died in 1754. A list of his most important works can be found in *Jus Gentium Methodo Scientifica Pertractum* (Drake, J transl 1934) at xxiv-xxvii.

tended towards a clearer separation of natural from positive law.³⁸ Like Grotius, he divided war into three types: public, private and mixed³⁹ and he required war to be declared by the legitimate representative of the state.⁴⁰ Thus, private individuals could not declare war.

Wolff thought that a **just cause** for war between nations would arise:⁴¹

*... [O]nly when a **wrong has been done or is likely to be done**... Since there is no just cause of war save a wrong done or likely to be done, the war that is brought without precedent or threatened wrong is not a just war, consequently it is unjust. (emphasis added)*

The general rule was that the only *just* cause for war was a wrong done or likely to be done. Specific situations that could give rise to a just war included the refusal of passage without just cause⁴² and the restraining of another nation from free use, navigation or fishing in the open sea.⁴³ Wolff also discussed a number of potential causes of war which he considered to be *unjust*. Wars fought against a nation that professed atheism, or deism or was idolatrous were not just, nor were wars allowed against a nation “for the reason that it is very wicked, or violates dreadfully the law of nature or offends against God.”⁴⁴ There was no place for ‘holy war’ within Wolff’s definition of a ‘just war’. Other causes which he did not consider could give rise to a just war included wars of utility⁴⁵ or wars fought out of fear of a neighbouring power’s increasing strength.⁴⁶

For offensive war to be permitted, and therefore, just, it had to be the last resort.⁴⁷ Wolff warned nations against resorting to war on spurious grounds.⁴⁸ On the question of whether war could be just on both sides Wolff was absolutely certain it could not. For Wolff, there was no need for semantic argument about the meaning of ‘just’.⁴⁹ Applying his scientific approach to the problem, he argued that in natural law, only one side in a conflict could be on the side of justice.⁵⁰

³⁸ The full title to *Jus Gentium Methodo Scientifica Pertractum* reads: “The Law of Nations Treated According to a Scientific Method – In which the Natural Law of Nations is carefully distinguished from that which is voluntary, stipulative and customary” (the capitalization adopted here is Drake’s).

³⁹ *Jus Gentium Methodo Scientifica Pertractum* § 607, 608 and 609 (Drake, J transl) supra n37 at 311.

⁴⁰ *Ibid.*, § 614, at 313.

⁴¹ *Ibid.*, § 617, 618, at 314-315.

⁴² *Ibid.*, § 701-702, at 362-262. The only just cause for refusing passage was that it would not be harmless.

⁴³ *Ibid.*, § 123-125, at 70.

⁴⁴ *Ibid.*, § 637-8, at 326-7.

⁴⁵ *Ibid.*, § 645, at 331.

⁴⁶ *Ibid.*, § 640, at 328.

⁴⁷ *Ibid.*, § 630, at 322.

⁴⁸ *Ibid.*, commentary to § 630, at 322.

⁴⁹ *Ibid.*, commentary to § 634, at 325, referring to Grotius’ discussion on the meaning of ‘just’.

⁵⁰ *Ibid.*, § 633, at 324.

War cannot be just on both sides. For there is no just cause of war save a wrong done or likely to be done. Therefore, he alone has a just cause of war to whom a wrong has been done by the other party, or to whom the other party intends a wrong.

As in the case of those who argue as to the truth of a proposition, the truth could only be with one party, since it could not possibly happen that contrary or contradictory opinions could be at the same time true and false. Wolff concluded that “justice in war is, therefore, only on the side of the one who has the correct opinion.”⁵¹ He was unwilling to entertain the argument made by the Spanish scholars who had asserted that due to the subjective nature of conflict, both sides could consider themselves to be acting in good faith and therefore be fighting a ‘just war’. Rather, Wolff felt that “even if it should happen that each of the belligerents thinks he is favouring a just cause...the cause of only one party is just, and that of the other is unjust”.⁵²

In essence, Wolff thought that according to natural law, only one side could ever be said to be waging a ‘just war’, for natural law alone was concerned with justice. But since it was impossible for states to judge whether they were the party waging a just war, and since God does not indicate which party is in the right by according it victory, it was for each party to follow its own opinions.⁵³ Therefore, “by the voluntary law of nations, the war must be considered as just on either side, not indeed in itself, which forsooth it implies, but as regards the results of the war.”⁵⁴ Wolff’s succinct resolution of this long-debated issue was that “war is not a suitable method for deciding the controversies of nations.”⁵⁵

Wolff’s theory on the use of force resonated in Emmerich de Vattel’s writings. Indeed, Vattel himself acknowledged that his work was based on Wolff’s. Yet Vattel acquired considerably longer lasting fame in international law circles.⁵⁶ Vattel’s law of nations, like Wolff’s, was based on the concept that states existed with one another in a state of nature, adopting the Hobbesian doctrine that was popular in the eighteenth century.⁵⁷ Vattel’s main work of interest for present

⁵¹ Ibid, commentary to § 633, at 324.

⁵² Ibid, § 634, at 324. In the commentary he explained that even when each party acted in good faith, nevertheless, they did not each act *justly*, since he alone could act justly who *acted rightly*.

⁵³ Ibid, § 888, at 454.

⁵⁴ Ibid.

⁵⁵ Ibid, commentary to § 888, at 455.

⁵⁶ The main work of Vattel was read by the US’ founders and it “informed their understanding of the principles of law which became established in the Constitution of 1787”: Emerich de Vattel *Le Droit des gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, “The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns” (Chitty, J transl 1883), Preface to the 1999 Digital Edition.

⁵⁷ The influence of Hobbes is acknowledged by Vattel in the Preface to *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, ibid, Preface to 1758 edition.

purposes was *Le Droit des gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns), published in 1758.⁵⁸ The main source of Vattel's theory on war is found in Book III of *The Law of Nations*.

Vattel described war as "that state in which we prosecute our right by force."⁵⁹ He drew a distinction between public and private war, public war being "that which takes place between nations or sovereigns, and which is carried on in the name of the public power, and by its order."⁶⁰ By contrast, private war was "that which is carried on between private persons or individuals".⁶¹ He stated that he was only concerned with the former. In common with Grotius and Wolff, Vattel asserted that the sovereign power alone was possessed of authority to make war.⁶² The sovereign was 'the author of war' and it was carried on in his name, by his order.⁶³ Hence, war, by definition, was carried on by sovereigns, not by private individuals.⁶⁴

Vattel began his exposition on just war by stating that whoever entertained a true idea of war would readily agree that war should never be undertaken without the most cogent reasons.⁶⁵ He also subscribed to the notion that force was a last resort and that it only became necessary when every other mode proved ineffectual.⁶⁶ Vattel regarded a nation as having the right to employ force for its own defence and for the maintenance of its rights:⁶⁷

Let us say then in general, that the foundation, or cause of every just war is injury, either already done or threatened. The justificatory reasons for war show that an injury has been received, or so far threatened as to authorize a prevention of it by arms. (emphasis added)

For Vattel, a just war was one that was fought with the objective of avenging or preventing injury. There were three possible objects of a lawful war: first, to recover what belonged to or was due to a nation; secondly, to provide for its

⁵⁸ Vattel's work came just over a decade after Wolff's *Jus Gentium Methodo Scientifica Pertractum*, published in 1749.

⁵⁹ Vattel *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, Book III, Chapter I, § 1, *supra* n56.

⁶⁰ *Ibid.*, § 2.

⁶¹ *Ibid.*

⁶² *Ibid.*, § 4.

⁶³ *Ibid.*, Chapter II, § 6.

⁶⁴ There is a section on mercenary soldiers and on the lawfulness of this profession but it focuses on whether they may leave their country and fight for another. It does not address the question of how a sovereign should respond if its nation is attacked by fighters who are not aligned to a sovereign: *ibid.*, § 13.

⁶⁵ *Ibid.*, Chapter III, § 24.

⁶⁶ *Ibid.*, § 25 and § 37.

⁶⁷ *Ibid.*, § 26.

future safety by punishing the aggressor or offender; and thirdly, to defend the nation or to protect it from injury. The first two were objects of an offensive war, the third of a defensive war.⁶⁸

One interesting aspect of Vattel's theory was his requirement that a nation must have had both *justificatory reasons* and *proper motives* before it embarked upon war.⁶⁹ For example, a nation might have had justificatory reasons for waging war (such as in one of the above three situations) but the sovereign's motives for undertaking the war might have been improper. In such a case, Vattel would have said that although the ruler had a 'just cause' for war, he lacked proper and commendable motives and if he went to war, he would have been abusing his right. However, even though Vattel would have described such a ruler as abusing his right and as betraying a 'vicious disposition', he stopped short of denouncing such a war as unjust.⁷⁰ He would have said that such a ruler may still have possessed the right to wage war, but that he ought not to have exercised that right.

The contentious issue of whether war could be just on both sides, which some earlier scholars spent pages deliberating upon, was resolved by Vattel in a few sentences:⁷¹

War cannot be just on both sides. One party claims a right; the other party disputes it: the one complains of an injury: the other denies having done it. They may be considered as two individuals disputing the truth of a proposition; and it is impossible that two contrary sentiments should be true at the same time.

Like Wolff, he admitted that there would be occasions on which both parties were 'candid and sincere in their intentions'. That did not render their causes **just**; rather, it rendered them both **lawful**, 'until the decision of the cause.' However, other nations were still free to form their own opinions on the case and determine how they would act, and to assist that party which appeared to have right on its side.⁷²

The fourth and final scholar discussed in this chapter is the German writer, Samuel Pufendorf,⁷³ who published three important works on the law of nations:

⁶⁸ Ibid, § 28.

⁶⁹ Ibid, § 29.

⁷⁰ Ibid, § 31-33.

⁷¹ Ibid, § 39.

⁷² Ibid, § 40.

⁷³ His name also appears as Samuel von Pufendorf.

Elementa jurisprudentiae universalis libri duo (The Two Books of The Elements of Universal Jurisprudence) in 1660; *De Jure naturae et gentium libri octo* (Eight Books on the Law of Nations) in 1672 and, in 1675, a résumé of the latter, entitled *De officio hominis et civis juxta legem naturalem libri duo* (On the Duty of Man and Citizen According to Natural Law in Two Books) in which he summarised his just war theory.⁷⁴ His works display the influence of, *inter alia*, Groitius and Hobbes, but also his departure from them both.⁷⁵ He has been described as subscribing to ‘naturalist extremism’ because he completely denied the binding force of any voluntary or positive law of nations.⁷⁶

On the nature of man and the object of war, Pufendorf held the view that man’s natural state was one of peace, and that peace was “a state peculiar to man”,⁷⁷ which distinguished him from beasts. Even though it was man alone who understood the ‘genius of peace, nevertheless:⁷⁸

[W]ar is lawful and sometimes even necessary for man, when another with evil intent threatens me with injury, or withholds what is my due. For under such circumstances my care for my own safety gives me the power to maintain and defend myself and mine by any means at my disposal, even to the injury of my assailant...

Pufendorf, in company with the ancient and classical theorists, believed that nature permitted war “on the condition that he who wages it shall have as his end the establishment of peace.”⁷⁹ He divided war into two types: declared and undeclared, or formal and informal. As for the former, there were two necessary conditions, namely, it must have been waged by the authority of the sovereigns on both sides and it must have been preceded by a declaration. As for the latter, undeclared war was either war waged without formal declaration or war against private citizens, including civil wars.⁸⁰ Pufendorf held the universally accepted view, undoubtedly influenced by the political realities of his time, that “the right of initiating war lies with the sovereign.”⁸¹

⁷⁴ See Pufendorf *On the Duty of Man and Citizen According to Natural Law* Tully, J (ed), (Silverthorne, M transl 1991).

⁷⁵ In the sense that his conception of the law of nations was based entirely on natural law, which he considered was free from any divine connection and based on reason only (regarding Groitius) and in the sense that he felt that man’s natural state was one of peace, rather than war (regarding Hobbes).

⁷⁶ See Simons, W “Introduction”, in Pufendorf *De Jure Naturae et Gentium Libri Octo* (Oldfather, C and W transl) (The Classics of International Law, 1934).

⁷⁷ *De Jure Naturae et Gentium Libri Octo*, Vol 2, Book Eight, Chapter VI; see also Tully (ed), (Silverthorne, M transl.) supra n74 at Book II, Chapter 16, para 1.

⁷⁸ *De Jure Naturae et Gentium Libri Octo* (Oldfather transl.) Vol 2, Book Eight, Chapter VI, para 2, supra n76.

⁷⁹ Ibid.

⁸⁰ *On the Duty of Man and Citizen According to Natural Law* Book II, Chapter 16, para 7 (Silverthorne trans) supra n74.

⁸¹ Ibid, para 8.

As for just causes for war, Pufendorf reduced them to three heads. First, to preserve and protect individuals and their possessions against others who might attempt to injure them, or to take from them or destroy what they had. Secondly, to assert their claim to whatever others may owe by a perfect right, when the latter had refused to perform it of their own accord. Thirdly, to obtain reparation for losses which had been suffered by injuries, and to extort from those who did the injury guarantees that they would not so offend in the future.⁸² Even though war was permitted by nature, individuals should not have immediate recourse to arms. He warned against advancing rashly any vague claim or flying at once to arms, instead advising men that they should try one of three courses to prevent the affair from breaking out into open war: a conference between the parties concerned or their representatives, an appeal to arbitrators, or the use of the lot.⁸³ The claimant was particularly obliged to attempt one of those options.

Pufendorf cited Grotius with approval when he listed the types of unjust wars that could be fought.⁸⁴ He divided unjust wars into two kinds: those that were openly unjust, and those which had some plausible pretext, however weak. In the category of openly unjust wars, he cited wars of avarice and ambition, wars fought out of lust for wealth and lust for power, or “a craving to lord it over others and a burning desire to gather fame from the oppression of their fellows.”⁸⁵ As for unjust wars that were covered by some plausible pretext, Pufendorf observed that “men usually go to much labour to conceal” the aforementioned causes of unjust war. He listed pretexts for unjust war as including fear for the wealth and power of a neighbour, unjustified aggrandizement, desire for better territory, refusal of something which is simply and straightforwardly owed, stupidity on the part of a possessor, a desire to extinguish another’s legitimately acquired right which the aggressor finds rather inconvenient, and others of this kind.⁸⁶

The use of force in self-defence

All of the scholars surveyed in this epoch supported the state’s right to use force in self-defence, adopting similar methodology to one another. Grotius asserted that the right to use force in self-defence was derived from the principle of self-

⁸² *De Jure Naturae et Gentium Libri Octo* Vol 2, Book Eight, Chapter VI, para 3 (Oldfather transl), supra n76.

⁸³ *Ibid*, para 4.

⁸⁴ *Ibid*, citing Grotius’ *De Jure Belli ac Pacis*, Book II, chapter xxiv.

⁸⁵ *Ibid*, para 5.

⁸⁶ *Ibid*.

preservation, which nature gave to every living creature, and not from the injustice or misconduct of the aggressor.⁸⁷ However, even when it was used in self defence, force ought to be used only as a last resort;⁸⁸ it was better if he who was under attack could ‘repel or disable’ rather than kill the aggressor.⁸⁹ Furthermore, before force could be used in self-defence, the threat must have been immediate and “at the point of happening”.⁹⁰ He surmised that:⁹¹

[I]f my assailant seizes a weapon with an obvious intention of killing me, I admit too that I have a right to prevent the crime. For in the moral as well as in the natural realm, there is no point without some latitude.

However, this did not create a general right to use force whenever one felt fearful that another was about to use force. As discussed below,⁹² the requirement of an ‘immediate threat’ was intended by Grotius to ensure that force would be used only when necessary, and not upon grounds of mere fear or suspicion.

Wolff defined a defensive war as “one in which anyone defends himself against another who brings war against him.”⁹³ An offensive war was one which was brought against another “who was not thinking of bringing a war, or when any one assails another with arms.”⁹⁴ He applied this defensive/offensive distinction to both private and public war.⁹⁵

Vattel described the right to use force in self-defence as a right derived from nature: nature prescribed to nations as well as individuals the care of self-preservation and of advancing their own perfection and happiness. It would be anomalous if nature “does not give them [states and individuals] a right to preserve themselves from everything that might render this care ineffectual.”⁹⁶ Thus, Vattel subscribed to the ancient notion that nature allowed each to protect its own, a principle which he considered to be above argument.⁹⁷

⁸⁷ Therefore, a person would be entitled to use force in self-defence to repel an act of aggression and preserve oneself, even if the aggressor bore no guilt, for example, if a soldier in service mistook someone for another and acted aggressively towards them: Grotius, *De Jure Belli ac Pacis*, Book II, Chapter I, para 2 (Campbell, A. transl.) supra n6 at 76-77.

⁸⁸ *Ibid.*, para 4 at 77.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, para 5, at 73.

⁹¹ *Ibid.*

⁹² See discussion of Grotius on pre-emptive self-defence below at 147ff.

⁹³ *Jus Gentium Methodo Scientifica Pertractum* § 615 (Drake, J. transl) supra n37 at 314.

⁹⁴ *Ibid.*

⁹⁵ “Thus a defensive war arises if one defends himself against an aggressor or his property against robbery or his possessions against an invader; but an offensive war arises if one attempts by force to compel another either to restore what is his own, or to perform what is due to him, or attempts to force him to settlement of a controverted matter”: *ibid.*

⁹⁶ *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, Book II, Chapter IV, § 49, supra n 56.

⁹⁷ “This principle is generally acknowledged: reason demonstrates it; and nature herself has engraved it on the heart of man”: *ibid.*, Book III, Chapter I, §3.

Vattel also distinguished between offensive and defensive wars:⁹⁸

He who takes up arms to repel the attack of an enemy, carries on a defensive war. He who is foremost in taking up arms, and attacks a nation that lived in peace with him, wages offensive war.

The object of a **defensive** war was nothing other than **self-defence**. In an **offensive** war “there is as great a variety as in the multifarious concerns of nations” but in general, the object “relates either to the prosecution of some rights, or to safety.”⁹⁹ As to when a defensive war was also a *just* war, Vattel wrote:¹⁰⁰

Defensive war is just when made against an unjust aggressor. This requires no proof. Self-defence against unjust violence is not only the right, but the duty of a nation, and one of her most sacred duties.

Vattel reasoned that if the nation which engaged in offensive war had justice on its side, then there would be no right to oppose that use of force. If one *did* offer resistance, that would be an unjust defensive war. Thus, it became an act of injustice to oppose a just aggressor. This rather circuitous logic, also favoured by Wolff, demonstrated the increasingly limited value of the ‘just war’ doctrine in determining whether to wage war.

As with the aforementioned scholars, Pufendorf also thought that self-defence was one of the three just causes of war. He noted that sometimes one would be fighting a defensive war, even though one was the first to take up arms, such as when “a man is troubled time and time again with sudden border raids, the enemy always retiring on his approach.”¹⁰¹ This implies that Pufendorf may have envisaged the right of self-defence as encompassing a pre-emptive element, a suggestion that is addressed below.¹⁰²

Pre-emptive self-defence

For Grotius, a just cause of war included “an injury, which though not actually committed, threatens our persons or property with danger.”¹⁰³ Thus, he envisaged the possibility that force could be used in pre-emptive self-defence, but “The

⁹⁸ Ibid, § 5.

⁹⁹ Ibid.

¹⁰⁰ Ibid, Chapter III, § 35.

¹⁰¹ *De Jure Naturae et Gentium Libri Octo* Vol 2, Book Eight, Chapter VI, para 3, (Oldfather transl) supra n 76.

¹⁰² See discussion below under the heading ‘pre-emptive self-defence’ at 146ff.

¹⁰³ *De Jure Belli ac Pacis*, Book II, Chapter I, para 2 (Campbell A transl) supra n6 at 76. Grotius asserted that “St Augustine, in defining those to be just wars, had taken the word *avenge* in a general sense of removing and preventing, as well as punishing aggressions.” Grotius asserted that his definition was in harmony with St Augustine’s, but that may not be altogether correct given that St Augustine emphasised the direct link between the injury done and the avenging of it, as discussed in chapter 5, and did not seem to permit pre-emptive force.

danger must be **immediate**, and, as it were, at the point of happening.”¹⁰⁴ Furthermore, fear of a neighbour’s power was not a sufficient ground for war; one had to be certain of their intentions:¹⁰⁵

*For in order that a self-defence may be lawful, it **must be necessary**; and it is not necessary unless we are **certain**, not only regarding the **power** of our neighbour, but also regarding his **intention**. (emphasis added)*

Although Grotius permitted force to be used in self-defence if an attack was imminent he was opposed to the notion that one party could use force to prevent an attack from an aggressor from whom one merely *feared* an attack.¹⁰⁶ He opposed the notion that a nation could strike another first in order to prevent it one day acting aggressively towards it.¹⁰⁷ His opinion diverged from that held by other scholars, such as Gentili, who it will be recalled condoned the use of force against any nation that was increasing in power and was posing a threat to its neighbours merely by seeking or attaining such power.¹⁰⁸ Gentili permitted nations to oppose physically “powerful and ambitious chiefs” and called this war a resort to “expedient defence”.¹⁰⁹ Grotius acknowledged that some scholars had advanced a doctrine that the law of nations authorised one nation to commence hostilities against another, “whose increasing greatness awakens her alarms”, or, “to take up arms in order to weaken a rising power, which, if it grew too strong, might do us harm.”¹¹⁰ Grotius’ position was that although “...as a matter of **expediency** such a measure may be adopted...the principles of justice can never be advanced in its favour”.¹¹¹

Grotius maintained that protection against uncertainty and fear must not be sought in violence, but in “divine providence and harmless precautions.”¹¹² If a neighbour built a fortress in his own country or prepared some other military equipment which might at some time be damaging, the nation that felt fearful ought to have tried constructing counter-fortifications and other “similar

¹⁰⁴ *De Jure Belli ac Pacis*, Book II, Chapter I, Section V (Loomis, L transl) supra n4 at 73.

¹⁰⁵ *Ibid*, Chapter XXII, Section V, at 245.

¹⁰⁶ “...[P]ersons who regard any sort of fear as a just ground for the precautionary killing of another person are themselves greatly deceived and deceiving to others. Cicero truly says that...the root of most wrongs is fear, as when a person who thinks of hurting another is terrified of danger to himself unless he carries out his scheme”: *ibid*, Chapter I, para 5, at 73.

¹⁰⁷ *Ibid*, Chapter XXII para 5, at 245.

¹⁰⁸ See Chapter 5 at 116-17.

¹⁰⁹ Gentili *De Jure Belli Libri Tres* Volume II, Book I, Chapter XIV, para 102 (Rolfe J ed) (The Classics of International Law, 1933) at 64.

¹¹⁰ The two slightly different translations of Book II, Chapter I para 17 are those of Campbell supra n6 and Loomis supra n4, respectively.

¹¹¹ “The causes which entitle a war to the denomination of just are somewhat different from those of expediency alone. But to maintain that the *bare probability of some remote, or future annoyance* from a neighbouring state affords a just ground of hostile aggression, is a doctrine repugnant to every principle of equity” (emphasis added): *De Jure Belli ac Pacis*, Book II, Chapter I, para 17 (Campbell, A transl) supra n6 at 83.

¹¹² *Ibid*.

precautions” on their own territory but they could not resort to armed force. In essence, “expediency does not confer the same right as necessity.”¹¹³

Wolff did not specifically address the issue of pre-emptive war but it is arguably implied in his definition of the ‘just war’ that pre-emptive force was justifiable. On the aims of war, he wrote that:

*Since there is no just cause of war except a wrong done **or likely to be done**, every war ought to aim at repairing the wrong, if it can be repaired, or at satisfying the injured party for the wrong done, if it cannot be repaired, **or at preventing the doing of wrong**. (emphasis added).*

This excerpt seems to suggest that Wolff permitted war to *prevent* the doing of a wrong. Yet elsewhere in *Jus Gentium Methodo Scientifica Pertractum*, in the context of **offensive** war, he wrote that only “extreme necessity makes a place for this violent remedy”.¹¹⁴

*...The law of nature has given **the right of war for a wrong done**, but on condition that you may use it only when the wrong cannot be repaired otherwise or satisfaction cannot be given for **irreparable injury** in any other way. (emphasis added)*

This excerpt illustrates that even though offensive war was sometimes permissible, it was only so when a wrong had been done, and only if there was no other way of repairing the wrong. It may be deduced that Wolff did not favour pre-emptive war since the use of force would necessarily occur *before* a wrong had been done. That interpretation is supported by another passage regarding unjust causes of war where he wrote that fear of a neighbour’s increasing power was not a just cause for war:¹¹⁵

*...[T]o be sure he who is powerful can cause loss or can injure in some manner...and he may wish at some time to cause loss or to injure in some way: **nevertheless as long as he causes no loss in fact, nor injures in another way, and does not declare by any overt act an intention of doing anything else, no wrong has been done nor is it likely to be done**. (emphasis added)*

Wolff went further than Vitoria, but not as far as Gentili, on the issue of pre-emptive war but, on balance, the evidence suggests that he probably opposed pre-emptive war.

In contrast, Vattel’s definition of the ‘just war’ seemed to imply his outright support for pre-emptive war. He defined a just cause for war as “an injury [that]

¹¹³ *De Jure Belli ac Pacis*, Book II, Chapter XXII, para 5-6 (Loomis, L transl) supra n4 at 245-46.

¹¹⁴ *Jus Gentium Methodo Scientifica Pertractum*, commentary to § 630 (Drake, J transl) supra n37 at 322.

¹¹⁵ *Ibid*, § 640, supra n37 at 329.

has been received, or so far threatened as to authorize a prevention of it by arms.”¹¹⁶ Vattel discussed the point at which a ‘threat’ amounted to a justification in the context of considering whether it was ever permissible to use force against a neighbouring nation that was becoming increasingly powerful. Vattel acknowledged the irony of the problem: a sovereign who by any just and honourable means enlarged his dominion was fulfilling his duties and was doing no more than what was commendable.¹¹⁷ He posed the question:¹¹⁸

*How then should it be lawful to attack a state which, for its aggrandizement, makes use of only lawful means? We must either have actually suffered an injury or be **visibly threatened with one**, before we are authorized to take up arms.*

As to the point at which a powerful nation constituted a threat worthy of pre-emptive action, Vattel pondered:¹¹⁹

...Is the danger to be waited for? Is the storm, which might be dispersed at its rising to be permitted to increase? Will it be a time to defend ourselves when we are deprived of the means?

Vattel stated that prudence could never recommend the use of unlawful means for the attainment of a just and laudable end.¹²⁰ An increase of power alone could not give any one a right to take up arms because no injury had been received from that power. The power must have been accompanied by will and there must have been **proof** of that will, thus, if a state had “given proofs of injustice, rapacity, pride, ambition or an imperious thirst of rule”, then that nation became “an object of suspicion to her neighbours, whose duty it is to stand on their guard against her.”¹²¹ He did not specify when the threat would have become certain enough to warrant war, but he stated that “presumption becomes nearly equivalent to certainty, if the prince who is on the point of rising to an enormous power has already given proofs of imperious pride and insatiable ambition.”¹²² Vattel concluded that the threat could only be acted upon if the nation had previously given some indication that it might have aggressive intentions, that it had “insatiable ambition”.¹²³ Despite the inherent difficulties in determining when a

¹¹⁶ *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, Book III, Chapter III, § 26.

¹¹⁷ *Ibid.*, § 42.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ “For the interest therefore, and even the safety of nations, we ought to hold it as a sacred maxim, that the end does not sanctify the means.”: *ibid.*

¹²¹ *Ibid.*, § 44.

¹²² *Ibid.*

¹²³ Vattel also suggested that the less powerful sovereigns form confederacies in order to create a political equilibrium in order to check the power of an ambitious nation before it became a threat: *ibid.*, § 46-49.

nation's power and will combined sufficiently to present a threat worthy of pre-emptive attack, it is apparent that, at least in principle, Vattel supported the concept of pre-emptive war.

Pufendorf's views on pre-emptive war can be elicited from several passages which imply that he supported it. When discussing the difference between offensive and defensive wars, Pufendorf remarked that:¹²⁴

*...[S]ometimes the credit for defence stands with him who is the first to take up arms against another...if by a swift movement **he overcomes an enemy who is already bent upon attacking him, but is still engaged in his preparation.*** (emphasis added)

He did not elaborate further on what level of preparation would be necessary to trigger war, but it is apparent that he regarded the use of force in such circumstances as a just war of self-defence. When discussing the types of unjust war, he mentioned that wars which were fought out of fear of the strength and power of one's neighbour were unjust because:¹²⁵

*Fear alone does not suffice as a just cause for war, **unless it is established with moral and evident certitude that there is an intent to injure us.** For an uncertain suspicion of peril can, of course, persuade you to surround yourself in advance with defences, but it **cannot give you a right to be the first to force the other by violence to give a real guarantee,** as it is called, not to offend.* (emphasis added)

Although he accepted that a war could be fought in pre-emptive self-defence, he included the proviso that one would first have to be *certain* of the *intent to injure*, otherwise, the nation must content itself with making defensive preparations. He added that "so long as a man has not injured me, and *is not caught in open preparation to do so*"¹²⁶ then it should be presumed that he would perform his duty in the future, meaning, force could not be used against him. This line of reasoning was based upon, and sufficient for, the type of warfare of his day, which involved large-scale armies using traditional technology, from which the 'intent to injure' could readily be ascertained in advance.¹²⁷ It is difficult to determine exactly the point at which a state might have deserved to become the

¹²⁴ *De Jure Naturae et Gentium Libri Octo* Vol 2, Book Eight, Chapter VI, para 3 (Oldfather trans) supra n76.

¹²⁵ *Ibid*, para 5.

¹²⁶ *Ibid*.

¹²⁷ An 'uncertain suspicion of peril' was not enough to warrant pre-emptive force for Pufendorf, however, it would be interesting to speculate whether he would take a different view had he been aware of the nature and capacity for damage that modern weapons possess.

target of pre-emptive war but Pufendorf hinted that a just cause might have arisen when there had been “an unusual increase in a neighbour’s power.”¹²⁸

Reprisals

The fourth theme that is addressed in this chapter is the use of forcible measures short of war, namely, reprisals. Grotius mentioned the right of reprisals in several passages in *De Jure Belli ac Pacis* but in each instance, he appeared to be referring to an authorised practice of self-help, also known as ‘Letters of Marque’, whereby individuals were enabled to redress their own wrongs privately by receiving authority from the sovereign power to do so.¹²⁹ This practise arose out of a desire to avoid bringing about a state of war between princes, thus, letters of marque or reprisal were issued to private persons authorising them to recapture from foreigners goods that had been wrongfully taken by those foreigners.¹³⁰

Vattel wrote that “Reprisals are resorted to between Nation and Nation in order to obtain justice when it cannot otherwise be had.”¹³¹ Accordingly, if a nation had taken possession of what belonged to another, if it refused to pay a debt or repair an injury, or make due satisfaction, the latter was entitled to seize something belonging to that nation and it could turn that object to its own advantage to the extent of what was due to it, together with interest and damages, or it could hold the object as security.¹³² According to Vattel, the ‘Law of Nations’ permitted reprisals only when the case was ‘a manifestly just one’ or where the debt was definite and undeniable; and before being resorted to, justice must have been asked for in vain. He saw reprisals as a way of making one’s adversary ‘listen to the voice of justice’ without engaging in war. The reprisals which he had in mind were an “infinitely more pacific and less disastrous means of obtaining justice than war”¹³³ and he emphasised that they should never be made use of except as a last resort.

¹²⁸ *De Jure Naturae et Gentium Libri Octo* Vol 2, Book Eight, Chapter VI, para 5 (Oldfather transl) supra n76 at 1294. He cited Procopius’ *Gothic War* for the proposition that the use of force in such a situation may be just because “the extremely powerful are never at a loss for excuses upon which to bring war against their neighbours.”

¹²⁹ *De Jure Belli ac Pacis*, Book II, Chapter XXIII, para 13; Book III, Chapter II, para 4 and Book III, Chapter IV, para 6 (Campbell, A transl) supra n6 at 278, 311 and 327 respectively.

¹³⁰ For the etymology of ‘reprisal’ and ‘marque’, see Rubin, A *The Law of Piracy* (1998) at 31-32.

¹³¹ Vattel *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* Book II, Chapter XVIII, § 342-347 (Fenwick, C transl) (Classics of International Law) at 228-29.

¹³² *Ibid.*

¹³³ *Ibid* at 232.

Wolff defined reprisals as “the taking away of the goods of citizens of another nation or even of a ruler of a state in satisfaction of a right or by way of a pledge.”¹³⁴ Reprisals were allowable among nations by the law of nature but “only when another people does an injury to us or to our citizens, and, when asked, is unwilling to repair it...without delay.”¹³⁵ Wolff made it clear that the right of reprisal belonged only to nations and to their rulers, not to private individuals, and if individuals wished to exercise the right, they must first have obtained the consent of their ruler.¹³⁶ Not only property could be taken in reprisal, but also individual citizens. He drew a parallel with the ancient Greek practice of ‘androlepsy’.¹³⁷ Although Vattel viewed reprisals as a method of achieving justice short of war, Wolff considered reprisals to be a kind of private war.¹³⁸ Wolff concluded his discussion of reprisals and androlepsy by stating that they were a milder means than war by which to acquire a right which was being unlawfully denied.¹³⁹

Pufendorf had very little to say on the subject of reprisals. He viewed reprisals as “violent executions upon the persons or property of citizens of another commonwealth which refuses to do justice”¹⁴⁰ and he considered that they had already been adequately treated by Grotius. He only added that it would not be unjust for the individual subjects of a state to “contribute to the debt of the state”¹⁴¹ since whatever they contributed had to be made up to them by the state.

Thus, all the scholars of this epoch supported the notion of reprisals being used by one state against another, to achieve justice whether it was in relation to a debt or for some other injury, if the offending state was unwilling to settle the matter any other way. These scholars all viewed the use of reprisals as a method of dispute settlement, short of war, and did not seem to draw any distinction between the seizure of property or persons to avenge an injury. They were used as a sort of private warfare which, by confining the consequences of a dispute to a limited circle or persons, prevented the outbreak of a full-scale conflict.¹⁴²

¹³⁴ *Jus Gentium Methodo Scientifica Pertractum* §589 (Drake, J transl) supra n37 at 302.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*, §560, at 303.

¹³⁷ *Ibid.*, §591-593 *ibid.* ‘Androlepsy’ was defined therein as the taking, by way of pledge, the citizens of a state which denied justice to another state or to its citizens.

¹³⁸ *Ibid.*, §603, at 309.

¹³⁹ *Ibid.*, §606, at 310.

¹⁴⁰ *De Jure Naturae et Gentium Libri Octo* Book VIII, Chapter VI, para 13, (Oldfather transl) supra n76 at 1305.

¹⁴¹ *Ibid.*

¹⁴² Scupin, H-U “History of the Law of Nations: Ancient Times to 1648” in Bernhardt, R *Encyclopedia of International Law* (1984) at 155.

On terror and the use of force by non-state actors

Grotius made some passing remarks on the use of terror in warfare, noting that “wars, for the attainment of their objects...must employ force and terror as their most proper agents.”¹⁴³ He cited various ancient scholars and philosophers, including St Augustine, to support his proposition.

Grotius subscribed to the view that wars were fought against states, whereas judicial processes were employed against individuals.¹⁴⁴ As for the use of force against a particular kind of non-state actor, namely pirates, Grotius viewed this as being a question of defining one’s ‘enemies’. Citing Pomponius and Ulpian, he agreed that enemies were those who publicly declared war against a nation, or against whom war was publicly declared; all others were pirates or brigands.¹⁴⁵ Furthermore, citing Cicero, “an enemy is a person who has a state, a senate, a treasury, a united and agreed citizenry, and, if the occasion offers, a right to make peace and conclude an alliance.”¹⁴⁶ Pirates, who were either persons who had no nation, or who were but part of a nation, did not have the legal status of a sovereign state:¹⁴⁷

...[A] band of pirates or robbers is not a state, even though they may maintain some kind of order among themselves, without which no society can exist. For pirates and robbers band together to commit crime, whereas the citizens of a state, though not always free from wrongdoing, are associated to live by law and render justice to foreigners.

According to Grotius, a war was only legal if it was conducted between sovereign powers on both sides and if it was publicly declared, so as to constitute a notification of the event by one party to the other.¹⁴⁸ The requirement of proper and public declaration of war, which the law of nations deemed necessary to constitute a ‘just war’, was not “to keep the war-makers from doing something secretly or treacherously”. Rather, the intention was to:¹⁴⁹

[M]ake it known for certain that the war was not a private undertaking but was to be waged by the will of both peoples or the heads of both peoples. On this fact were based the special features which are not part of a war against pirates, or of one that a king wages against his subjects...

¹⁴³ *De Jure Belli ac Pacis*, Book III, Chapter I, para 6 (Campbell, A transl) supra n6 at 294.

¹⁴⁴ He concurred with Demosthenes’ who wrote that war was directed against those who could not be held in check by judicial processes, “for judgments are efficacious against those who feel that they are too weak to resist” but “against those who are equally strong, or think they are, wars are undertaken” : *De Jure Belli ac Pacis*, Prolegomena, para 25 (Kelsey transl), supra n6 at 18.

¹⁴⁵ *De Jure Belli ac Pacis*, Book III, Chapter I, para 1, (Loomis, L transl) supra n4 at 287.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid*, Chapter III, para 2, at 287-88.

¹⁴⁸ *Ibid*, para 5, at 289.

¹⁴⁹ *Ibid*, para 11, at 293.

It is explicitly stated in Wolff's theory of war that rulers on behalf of nations declared and fought wars, not private individuals.¹⁵⁰ A private individual could not use hostile force against enemies, or the property of enemies, without the mandate or permission of the sovereign power.¹⁵¹ However, he did not discuss what ought to happen if a private individual did use force against another nation without permission or mandate. Although he discussed mercenary soldiers in some depth, with regards to determining the source and extent of their obligation to fight,¹⁵² he did not discuss a scenario where mercenaries might band together and take up arms without first binding themselves to an existing state. He did not explicitly address the issue of using force in response to 'terrorism', as that term is understood in modern parlance. He mentioned terror in one section, however, that section concerned the killing of captives in order to inspire terror.¹⁵³ Likewise, the only mention in *Jus Gentium Methodo Scientifica Pertractum* of brigands did not define them or refer to the possibility of them taking up arms against a sovereign state.¹⁵⁴

Vattel was concerned with explaining the relationship between the sovereign and the actions of private individuals.¹⁵⁵ Six key points summarise his argument. First, he acknowledged that private persons who were members of one nation may offend and ill-treat the citizens, or the sovereign, of another. Such a person thereby declared himself an enemy of that state and exposed himself to be justly punished for it.¹⁵⁶ Second, the nation or the sovereign had a responsibility to prevent its citizens from injuring those of a foreign nation. Any sovereign who had allowed his subjects to violate the precepts of the law of nature did "no less injury to that nation than if he injured it himself."¹⁵⁷ The notion that a sovereign was responsible for keeping his subjects under control was an absolute necessity for the peace and harmony between all nations.¹⁵⁸ However, even under the rule

¹⁵⁰ *Jus Gentium Methodo Scientifica Pertractum* § 721 (Drake, J transl) supra n37 at 372-3.

¹⁵¹ Ibid, § 909, at 466.

¹⁵² Ibid, § 765, at 394.

¹⁵³ Ibid, § 802, at 414-15.

¹⁵⁴ Ibid, §799-800, at 413-14. The reference to brigands was in the context of stating that promises made to the enemy, including promises made to robbers and brigands, had to be observed.

¹⁵⁵ *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Chitty, J trans) Book II, Chapter IV, § 71-78, supra n56.

¹⁵⁶ "The sovereign of the latter [the state who's citizen has suffered injury] should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is, safety": ibid, § 71.

¹⁵⁷ Ibid, § 72.

¹⁵⁸ "If you let loose the reins to your subjects against foreign nations, these will behave in the same manner to you; and, instead of that friendly intercourse which nature has established between all men, we shall see nothing but one vast and dreadful scene of plunder between nation and nation.": ibid.

of the most vigilant and absolute sovereign, it was impossible to confine one's citizens "on every occasion to the most exact obedience", therefore:¹⁵⁹

...[I]t would be unjust to impute to the nation or the sovereign every fault committed by the citizens. We ought not, then, to say, in general, that we have received an injury from a nation because we have received it from one of its members.

Nevertheless, and this is the third point, the state was responsible for the actions of its subjects:¹⁶⁰

[I]f a nation or its chief approves or ratifies the act of the individual, it then becomes a public concern; and the injured party is to consider the nation as the real author of the injury, of which the citizen was perhaps only the instrument.

Fourth, if the offended state had in its power the individual who had done the injury, that state could bring him to justice and punish him. If he had escaped and returned to his own country, "she ought to apply to his sovereign to have justice done in the case."¹⁶¹ Then that sovereign ought to have compelled the transgressor to make reparation for the damage or injury, if possible, or to inflict on him exemplary punishment; or to deliver him up to the offended state, to be brought to justice:¹⁶²

This is pretty generally observed with respect to great crimes, which are equally contrary to the laws and safety of all nations. Assassins, incendiaries, and robbers, are seized everywhere, at the desire of the sovereign in whose territories the crimes were committed, and are delivered up to his justice.

A sovereign who refused to cause reparation to be made for the damage done by his subject, or to punish the offender, or to deliver him up, rendered himself in some measure an accomplice in the injury and became responsible for it. If the injured sovereign rejected the offer of delivery of the subject, and chose to exact their own revenge, then their actions became unjust and they were then open to the accusation that they were using the injury as a pretext or as a cover for their ambitious enterprises.¹⁶³

The sixth and final aspect to his argument is that there was one other case where a nation in general was guilty of the crimes of its members:¹⁶⁴

¹⁵⁹ Ibid, § 73.

¹⁶⁰ Ibid, § 74.

¹⁶¹ Ibid, § 75.

¹⁶² Ibid, § 76.

¹⁶³ Ibid, § 77. This section, entitled "If he refuses justice, he becomes a party in the fault and offence" refers to an example taken from Polybius in which King Demetrius delivered to the Romans those who had killed their ambassador, but the Roman Senate sent them back, resolving to reserve to themselves the liberty of punishing that crime, by avenging it on the king himself, or his dominions.

¹⁶⁴ Ibid, § 78.

That is, when, by its manners, and by the maxims of its government, it accustoms and authorize[s] its citizens indiscriminately to plunder and maltreat foreigners, to make inroads into the neighbouring countries...

Vattel indicated that governments may exist which allowed their citizens to commit indiscriminate acts of injury abroad. The parallel may be drawn with the modern failed state, where the ruling regime may not necessarily accept or ratify specific injurious acts carried out by its citizens, but its ‘manners’ and ‘maxims’ might enable the citizens to carry them out. The similarities between the challenges of Vattel’s day and the global security challenges faced by modern nations are apparent in the final paragraph of Book II, Chapter VI:¹⁶⁵

...[A]ll nations have a right to enter into a league against such people, to repress them, and to treat them as the common enemies of the human race. The Christian nations would be no less justifiable in forming a confederacy against the states of Barbary, in order to destroy those haunts of pirates, with whom the love of plunder, or the fear of just punishment, is the only rule of peace and war.

The fourth and final scholar whose work is being analysed in this epoch is Pufendorf, who made some observations on state responsibility for the actions of non-state actors, and on the use of terror in war. Regarding the former, he argued that in order for the ruler of a state to be held responsible for an individual’s injurious act:¹⁶⁶

*...[I]t is essential that the wrong pass in some way to the ruler. And in fact rulers of states do share in wrongs committed by their long-settled citizens or by those who have recently taken refuge with them, **if the rulers allowed the commission of the wrongs or provide refuge.** (emphasis added)*

For the ruler to be held culpable there must have been both knowledge of the crime and the ability to prevent it.¹⁶⁷ Pufendorf wrote that “rulers are presumed to be aware of the open and habitual actions of their citizens...[and there was] always a presumption of their ability to prevent them, unless there is obvious evidence of its absence.”¹⁶⁸ However, he argued that the right to make war upon a ruler who accepted and protected a delinquent, who was seeking refuge with him solely to escape punishment, “arises more from particular agreements between neighbours and allies than from any common obligation.”¹⁶⁹ The exception would have arisen “if the refugee while with us is planning hostilities against the state he

¹⁶⁵ Ibid.

¹⁶⁶ *On the Duty of Man and Citizen According to Natural Law* (Silverthorne, M trans) Book II, Chapter 16, para 9, supra n74.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

has left.”¹⁷⁰ In essence, Pufendorf was not able to find in *natural law* a right for a nation to attack another that was harbouring a ‘delinquent’. A right such as this would have to have been based in *positive law*, in the agreements between nations. On the other hand, he implied that if the refugee was planning attacks on the nation he had left, then perhaps the right may have arisen from somewhere other than positive law. Although Pufendorf did not explicitly state that he thought such a right definitely existed in natural law, that may implied from his use of the term ‘common obligation’.

As for the use of terror, Pufendorf stated that “the most proper forms of action in war are force and terror.”¹⁷¹ There is a passage on the distinction between formal and informal war in which Pufendorf mentioned two kinds of informal war: one which was usually called civil war, where one party had been accused of the crime of rebellion, and the other which he described as “a kind or incursion or freebooting expedition.”¹⁷² He implied that in the latter type of informal war, the party which had carried out the incursion or expedition could not call itself an enemy, as an enemy, quoting Cicero, has a republic, a senate-house, a treasury, harmonious and united citizens with whom there might be peace and treaties on settled principles.¹⁷³ That second kind of informal war is arguably comparable to the use of force by terrorist organisations against individual states. Perhaps Pufendorf would have said that that modern terrorist attacks are a kind of informal war, being an ‘incursion or freebooting expedition’ and that the party responsible could not call itself an ‘enemy’.

Conclusion

In this epoch of international law, the contributions of Grotius, Vattel, Wolff and Pufendorf, who espoused a law of nations based primarily on natural law, have been examined in the context of their respective views on various aspects of the recourse to force. Despite personal Christian beliefs, they turned away from scripture and towards reason for the foundations of their respective conceptions of a law of nations. There are similarities between these scholars in so far as they, *inter alia*, emphasised that the objective of war was peace, that war was a last

¹⁷⁰ Ibid.

¹⁷¹ Ibid, para 5, supra n74. Note that in the Oldfather translation of *De Jure Naturae et Gentium Libri Octo*, the word ‘intimidation’ is used instead of ‘terror’ so it would be a mistake to read too much into the use of the term ‘terror’ in Pufendorf’s work.

¹⁷² *De Jure Naturae et Gentium Libri Octo* Vol 2, Book Eight, Chapter VI, para 9 (Oldfather trans) supra n75.

¹⁷³ Quoting from Cicero *Philippics* XV (Ker, W trans.) (Loeb Classical Library) IV, vi, 14 at 249.

resort after peaceful methods of dispute settlement had failed and they all tended to divide war into public and private divisions, with defensive and offensive categories.

They also shared similar definitions of the 'just war'. Grotius stated that for a war to be 'just' it had to satisfy certain conditions, namely, that there be actual or imminent injury to the state. Wolff's definition of a 'just cause' ("a wrong done or likely to be done")¹⁷⁴ had much in common with those of scholars discussed in the previous chapter, such as St Augustine ("a just war is a war that avenges injuries or wrongs"), Spanish theorists such as Suárez ("the infliction of a grave injustice which cannot be avenged or repaired in any other way") and his immediate predecessor, Grotius. Although Wolff personally held Christian beliefs, his law of nations was not based on Christian theology, as was that of the scholars discussed in epoch II. Like Vattel, his successor, Wolff's conception of the *ius gentium* was based first and foremost on natural law and on the fundamental premise that states - like individuals - lived with one another in a 'state of nature'.¹⁷⁵ Thus, the foundation of justice between nations was based on the law of nature.¹⁷⁶ It was from natural law then (rather than, say, God's will) that all nations' right to war originated.¹⁷⁷

Vattel's work on the law of nations was based on Wolff's but Vattel moved beyond it in many respects and his writings marked a clear transition in the basis of the law of nations away from its earlier religious foundations, placing it firmly on a path towards its future in positive law. Vattel relegated the importance of just war doctrine to the realm of natural law, when he concluded that although only one side could ever be fighting a 'just' war, the more important consideration was that both sides would be fighting a 'lawful' war.¹⁷⁸ Since sovereigns could not act as the judge of one another, and since God did not make direct pronouncements on the justice of each cause, it was left for each nation to act according to its own reasoning. In essence, he thought that only the law of nature was interested in the question of the justice of war. By contrast, the voluntary law

¹⁷⁴ *Jus Gentium Methodo Scientifica Pertractum* § 617 (Drake, J transl) supra n37 at 314.

¹⁷⁵ *Ibid.*, § 613, at 313.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*: "[S]ince in their relations to each other [states] use nothing except natural law, or that belonging by nature to every man, the right of war belongs to nations."

¹⁷⁸ Vattel resolved a key problem with applying just war theory to warfare: warfare which would be illegal on one side and therefore outside the law would create chaotic conditions; furthermore, there would never be peace since the results of a war could always be challenged as illegally obtained and therefore not binding upon the other belligerent or third parties: see von Elbe, J supra n23 at 683.

of nations, that is, positive international law, did not inquire into the intrinsic justice of wars. Vattel thought that to hold otherwise would have invited chaos into inter-state relations. This line of reasoning was taken further by the positivist scholars discussed in the following chapter who eventually rejected the distinction between just and unjust wars altogether.

All of the scholars discussed here considered that self-defence was a lawful, and just, cause for war. Grotius, for instance, allowed force to be used in self-defence of persons or property, but he went to great effort to show that the threat must have been imminent, and not based on mere fear or suspicion, and that if danger could have been averted in any other way, then the use of force would no longer have been justified.¹⁷⁹ The analysis of these scholars' interpretations of the right of self-defence led into a discussion of their respective positions on the pre-emptive use of force. Most, with the possible exception of Wolff, favoured the existence of a right to use pre-emptive force, but struggled somewhat in determining its limits. Grotius emphasised that the danger must have been "immediate";¹⁸⁰ Vattel thought that there ought to have been proof of "insatiable ambition";¹⁸¹ and Pufendorf was concerned that the "intention to injure" must have first been ascertained, with "moral and evident certitude".¹⁸²

Reprisals, as forcible measures short of war, were considered acceptable by all of the scholars discussed here, and they were generally viewed as a means of dispute resolution that could help to avoid full-scale war between nations. They included not only the use of military force, but also the seizing of property and persons. Finally, each of the scholars mentioned the use of force in relation to non-state actors, such as brigands and pirates, who they generally regarded as being incapable of declaring war, a right that was reserved to the sovereign, and not worthy of the description of 'enemy'. Some scholars addressed the circumstances in which a state would have been responsible for the injurious actions of its citizens; Pufendorf emphasised that in order for responsibility to have passed to the ruler they must have had knowledge of the alleged crimes as well as the ability to prevent them.¹⁸³ He was also prepared to hold a state responsible for

¹⁷⁹ See *De Jure Belli ac Pacis* Book II, Chapter I, paras 1-5, (Loomis, L transl) *supra* n4 at 73.

¹⁸⁰ *Supra* at 148.

¹⁸¹ *Supra* at 152-53.

¹⁸² *Supra* at 153.

¹⁸³ *Supra* at 156-57.

harbouring ‘delinquents’ but was unable to find in *natural* law a basis for a right to attack a nation which harboured such ‘delinquents’.¹⁸⁴ The parallels between the non-state/state actor relationship of the seventeenth and eighteenth centuries, and those of modern times, became increasingly visible.

The next epoch of international law will follow the trend towards finding a positive law basis for the *ius gentium*. The same themes that were highlighted in this chapter will again create the impetus for a discussion in chapter 7 of the contributions of key theorists, namely, Zouche, Rachel, Textor, Bynkershoek, Moser and Wheaton.¹⁸⁵ The following chapter will also acknowledge the extent to which the political reality of the time, including the rise of the state system, had an effect on scholars’ perspectives on the law of nations. The demise of ‘just war’ doctrine will also be a key feature of epoch IV, as theorists and states alike came to increasingly regard nations’ rights and obligations as arising solely out of custom and agreement, and the use of force came to be seen as the prerogative of each independent state. In conclusion it may be observed that many aspects of modern just war theory originated in the writings of the scholars surveyed in this chapter.¹⁸⁶ Despite their differences, the overall objective of scholars in epoch III was simply to attempt to limit the recourse to force by states.

¹⁸⁴ Ibid.

¹⁸⁵ Although these scholars are separated here by ‘epochs’, it is acknowledged that their ideas and their influence on just war theory overlapped significantly. There are no firm borders between these theorists; rather there are malleable and fluid lines of interaction and cross-fertilisation of ideas.

¹⁸⁶ For a discussion of Grotius and Vattel’s just war theory and the parallels with modern scholarly thought see Karoubi, M *Just or Unjust War* (2004) especially at 73-77.

CHAPTER 7

Epoch IV: Positivism and the rise of the state system 1648 - 1919

Introduction

The fourth epoch of international law was marked by the rise and eventual dominance of positivism over naturalism, which coincided with the rise of the state system and the notion of state sovereignty. The chapter begins with a brief analysis of the political environment which formed the backdrop to this epoch and which influenced the opinions adopted by legal scholars. The contributions of Richard Zouche, Samuel Rachel, Johann Wolfgang Textor, Cornelius van Bynkershoek and Henry Wheaton, towards the development of the *ius ad bellum* will be summarised.¹ In keeping with the structure of previous chapters, a thematic approach is adopted, focusing on the use of force generally, the use of force in self-defence, pre-emptive self-defence, reprisals and the use of force in relation to non-state actors. In terms of parameters, this epoch is geographically constrained to developments which occurred in Europe and the US and temporally to the period from 1648 to 1919, which encompasses the first publication of the abovementioned scholars' works, as well as defining events, such as the signing of the Peace of Westphalia.

In the previous epoch the main influence on the development of the *ius ad bellum* came from the natural law theorists, who held that all law, including the law of nations, was part of an eternal and universally valid natural law (*ius naturale*) which applied to all men and states. Towards the end of the epoch, naturalism was surpassed by the trend towards positivism, which recognises only those laws which states consent to be legally bound by, either through custom or treaty (*ius positivum*). The bridge between epoch III and epoch IV was built by the 'eclectics', a small group of scholars who essentially had a 'foot in each camp'.² As a proponent of both naturalism and positivism, Zouche's writings are

¹ Biographical dates: Zouche (1590-1660); Rachel (1628-91); Textor (1638-1701); Bynkershoek (1673-1743) and Wheaton (1758-1848). These scholars have been selected as having contributed to most or all of the five themes being pursued here. Other scholars, such as Jacob Moser (1701-1785) and Georg Friedrich von Martens (1756-1821), could also have been included.

² 'Eclectics', sometimes referred to as 'Grotians', were those writers of the classical period in the theory of international law after Hugo Grotius who accepted both natural law and positive law as sources of the law of nations. They distinguished between the eternal and universal natural law and the voluntary law of nations or positive law, created by man through custom. The three key eclectic scholars were Christian Wolff, Emmerich de Vattel and Richard Zouche: Boczek, B *International Law: A Dictionary* (2005) 7, 17 and 36. As to whether Bynkershoek should be regarded as an eclectic or as a positivist, see Akashi, K *Cornelius van Bynkershoek: His Role in the History of International Law* (1998) 174-79.

discussed first under each thematic heading, followed by those theorists who subscribed to something closer to ‘pure’ positivism, namely Rachel, Textor, Bynkershoek and Wheaton. The declining influence of natural law contributed to the declining influence of just war theory; simultaneously, the political climate, with the rise in the power of kings and the establishment of the state system, cemented by the Peace of Westphalia in 1648, meant that states increasingly respected positive law alone as a source of their obligations in relation to one another. This ultimately meant the recognition of a ‘right to war’ as a right that was concurrent with the existence of state sovereignty.

Political backdrop to epoch IV

Developments in legal theory were dependent upon and closely connected with developments in political theory. Before discussing the individual contributions of international law scholars, the political events and important political theorists of this epoch are briefly acknowledged. Political theory was in turn both influencing, and influenced by, the political events of the day. The ideas espoused by scholars such as Jean Bodin, Thomas Hobbes and Emmanuel Kant, infiltrated the writings of the legal scholars discussed in this chapter, especially in terms of their emphasis on sovereignty and the rights of the state. Bodin’s ideas built upon the theories espoused by earlier scholars, such as John of Paris,³ Dante Alighieri⁴ and Niccolò Machiavelli.⁵ Bodin concluded that the essence of statehood, the quality that makes an association of human beings a state, was the unity of its government. He held that there had to be one, and only one, final source from which its laws proceed, namely, the monarch. The essential manifestation of sovereignty was the power to make the laws, and since the state made the laws, it obviously could not be bound by them. Although that power might enable a state to act irresponsibly, Bodin reasoned that although the state was the supreme maker of law, it also had to comply with a divine law, the law of nature or reason, a law that was common to all nations.

The English Civil War which broke out in 1642 influenced Hobbes’ *Leviathan*. Hobbes stated that men needed for their security “a common power to keep them

³ See Brown, B, Nardin, T and Renegger, N (eds) *International Relations in Political Thought* (2002) 191-197.

⁴ Ibid at 198-203.

⁵ Machiavelli is credited by some commentators as having made a contribution to the rise of the doctrine of sovereignty: see Nussbaum, *A Concise History of the Law of Nations* (1947) 76.

in awe and to direct their actions to the common benefit.”⁶ He conceived that this ‘common power’ could be a single person or an assembly of men. Either way, the ‘common power’ was the sovereign state, the ‘Leviathan’, to which all men submitted their wills. Three important conclusions followed from this concept of sovereignty. First, the ‘common power’, that is, the rulers of a state, had **sole authority** over their territory. Secondly, states were regarded to **all be equal with one another**. Thirdly, sovereignty meant that states were **subject to no higher law without their consent**.⁷ The Hobbesian conceptualisation of the sovereign state was an all-powerful entity, above the law for it made the law, and answerable to no higher authority.⁸

The Hobbesian concept of sovereignty was referred to by several of the legal scholars discussed below. Hobbes wrote that:⁹

To this war of every man against every man, this also is consequent: that nothing can be unjust. The notions of right and wrong, justice and injustice have there no place.

This sentiment was captured by several of the legal scholars of the previous epoch, such as Wolff and Vattel, and those of the current epoch, such as Bynkershoek and Wheaton, the latter of whom quoted Hobbes virtually verbatim in his 1836 work, *Elements of International Law*.¹⁰ Thus, the developments in political doctrine were an integral part of the developments in legal scholarly thought.

Another scholar whose ideas were influential in this epoch was Emmanuel Kant. In his essay of 1795, *To Perpetual Peace: A Philosophical Sketch*, he contended that:¹¹

[W]ar is but a sad necessity in the state of nature (where no tribunal empowered to make judgments supported by the power of law exists), one that maintains the rights of a nation by mere might, where neither party can be declared an unjust enemy (since this already presupposes a judgment of right) and the outcome of the conflict ...determines the side on which justice lies.

For Kant, the natural state among men living in close proximity was one of war. Since each state was in a state of war, they injured the other states simply by being in that state, even if they had not *actively* injured the others. Therefore, states had

⁶ Hobbes, T *Leviathan* (1651) chapter xvii.

⁷ Brierly, J, *The Law of Nations* Waldock, H (rev) Sixth ed (1963) 10-14.

⁸ Hobbes, *Leviathan*, chapter xx.

⁹ *Ibid*, chapter xiii.

¹⁰ Wheaton, H *Elements of International Law* (1836), Dana, R (ed) Eighth ed (Classics of International Law, 1866) at §63, 77.

¹¹ Kant, E *To Perpetual Peace: A Philosophical Sketch* Humphrey, T (Humphrey trans, 2003) at 347 (original) at 5.

to enter into a state of civil law and accept some civil constitution if perpetual peace was to be attained.¹² Kant showed equal disdain for legal scholars and rulers themselves, both of whom had championed the ‘rights’ of states which would inevitably end in perpetual war instead of perpetual peace. In the context of his analysis of the use of war to enforce a state’s rights, Kant expressed his disdain for the effectiveness of legal scholars’ opinions:¹³

For while, Hugo Grotius, Pufendorf, Vattel, and others whose philosophically and diplomatically formulated codes do not and cannot have the slightest legal force (since nations do not stand under any common external constraints), are always piously cited in justification of a war of aggression (and who therefore provide only cold comfort), no example can be given of a nation having forgone its intention [of going to war] based on the arguments provided by such important men.

For Kant, the only way for states to find perpetual peace would have been by giving up their freedom, just as individuals did, and by accommodating themselves to the constraints of common law, by establishing a league of peace. This federation of states would curb the natural tendency of nations to see the use of force or might as the means of expressing sovereignty.¹⁴

As in previous epochs, significant political events influenced the writings of political and legal scholars. The two treaties adopted in 1648, known collectively as the Peace of Westphalia,¹⁵ was one such event.¹⁶ It brought to an end the Thirty Years War, which had its origin in religious intolerance.¹⁷ The Peace of Westphalia was an important turning point for international relations, for international law, and for the use of force within international law.¹⁸ First, it ushered in a new international system based on a **plurality of independent, territorial states**. That is not to say that the major sovereign territorial states had not existed prior to 1648, but the Peace of Westphalia was significant because it officially recognised the status of approximately three hundred German members of the Holy Roman Empire and granted them authority to enter into alliances for their preservation and safety and wage war with foreign powers, provided that such alliances were not against the Emperor, the Empire, the public peace or the

¹² Ibid, at 349 (original), at 7 of Humphrey’s translation.

¹³ Ibid, at 355 (original), at 13 of Humphrey’s translation.

¹⁴ A ‘federation of states’ was achieved in 1919, see discussion in chapter 8 regarding the Covenant of the League of Nations and the limitations it attempted to place on the resort to force.

¹⁵ On the Peace of Westphalia generally, see Gross, L “The Peace of Westphalia 1648-1948” (1948) 42 *AJIL* 20; see Holsti, K *Peace and War: Armed Conflicts and International Order 1648-1949* (1991) and also Janis, *An Introduction to International Law* Second ed, 1 (1993) 153-55.

¹⁶ Gross referred to it as the ‘first great European or world charter’: *ibid* at 21.

¹⁷ Ibid. The war began in 1618 and though it started out as a struggle between Catholic and Protestant countries, it soon turned into an all-out struggle for military and political hegemony in Europe.

¹⁸ Texts on international law often begin from 1648: see Wheaton, *supra* n10; Cassese, A *International Law* (2001) 19.

Treaty itself.¹⁹ In addition, the Swiss Confederation and the United Provinces of the Netherlands were recognised as fully independent states.²⁰ Thus, the Peace of Westphalia legalised the existence of the European system of a plurality of independent states. Secondly, the Peace of Westphalia recognised **religious tolerance** in the sense that the prince or ruler of each territorial state was able to determine the religion of his subjects.²¹ This underlined the independence of each local ruler since the power to choose the religion of the people under his authority implied that he had a great degree of autonomy.²² Third, the Peace of Westphalia made detailed provision for the **peaceful settlement of disputes** via a system of collective security. It tried to restrict the resort to force by providing that if an individual state was the victim of a threat to its peace or any serious violation, it was not to resort to war, but should “exhort the offender not to come to any hostility, submitting the cause to a friendly composition or to the ordinary proceedings of justice”.²³ Furthermore, there was to be a cooling-off period, lasting up to three years, at the end of which a state was entitled to wage war if no settlement had been reached.²⁴

Hobbes’ ideas were interconnected with the concept of territorial state sovereignty encapsulated by the Peace of Westphalia.²⁵ Political theorists and political events in turn influenced the positivist legal scholars discussed in this chapter. For instance, Zouche’s *Juris et Iudicii Fecialis*, discussed below, which was published within two years of the peace treaties being signed, suggested that he was influenced by, or at least aware of, what the documents represented. He viewed war as a method of dispute resolution between states which had no judges, analogous to lawsuits between private individuals.²⁶ The theory of positivism and the doctrine of sovereignty combined had a profound influence on the development of norms relating to the use of force. Since states were sovereign, they had a sovereign right to go to war. The limitations on war that just war doctrine had attempted to impose were eroded by the positivists. In 1836,

¹⁹ The Avalon Project at Yale Law School, “Treaty of Westphalia, 24 October 1648, Peace Treaty between the Holy Roman Emperor and the King of France and their Respective Allies”: <<http://www.yale.edu/lawweb/avalon/westphal.htm>> (accessed 10 October 2006), Articles LXIV and LXV.

²⁰ Ibid.

²¹ The principle of *cujus regio, ejus religio* (he who reigns chooses the religion). Although this principle was an important element of the new international system it was not the first time that it had been guaranteed in a treaty. The Religious Peace of Augsburg (1555) secured to the Lutheran princes and cities full equality with the Catholic princes, including the right to determine, within their respective territories, the religion of the inhabitants: see Nussbaum, *supra* n5 at 61.

²² Treaty of Westphalia, *supra* n17, Article LXIV.

²³ Ibid, Article CXXIII.

²⁴ Ibid, Article CXXIV.

²⁵ See Janis, *supra* n13 at 155.

²⁶ See *infra* at 8, n32.

Wheaton wrote that “every State has a right to resort to force, as the only means of redress for injuries inflicted upon it by others”.²⁷ As legal scholars increasingly championed the rights of the sovereign state, the ‘just war’ doctrine’s importance was simultaneously reduced. At the beginning of the epoch, Zouche was interested in trying to define the meaning of ‘just’ but by the end of the epoch, the predominant view was rather more in line with Wheaton’s statement that “the voluntary or positive law of nations makes no distinction...between a just and an unjust war.”²⁸ By the close of the epoch, determining whether a war was **just** or not was no longer relevant and states asserted their sovereignty by going to war.²⁹

It would be difficult to understand why international law pertaining to the *ius ad bellum* developed in the way it did without taking into account the events that the writers would have been aware of. The scholars of this epoch, as with those of ancient Greece and Rome, and those of the Middle Ages, were not recording their theories in a vacuum: they were reacting to what they knew, what they had experienced and what they hoped they could change.

The use of force

Zouche’s main work of interest for present purposes was *Juris et Iudicii Fecialis, sive, Iuris Inter Gentes, et Quaestionum de Eodem Explicatio* (Explanation of the *Ius Feciale* or the Law among Nations and of the Questions Concerning It), published in 1650, which is the main source of his theory on war and peace.³⁰ It was the last in a series of seven monographs in which he dealt with various areas of law and it specifically addressed the body of rules which governed the relations between each sovereign state.³¹ Although the analysis below imputes to Zouche particular opinions, it is clear that Zouche was far more ambivalent on reaching clear conclusions.³²

²⁷ Wheaton, H *Elements of International Law* (8th ed) Dana, R (ed) (1866), Classics of International Law series, §290, at 390.

²⁸ *Ibid.*, §295, at 313.

²⁹ “[I]nternational law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose.”: Hall, W *International Law* (1880) 52; see also Brierly, *supra* n7 at 35.

³⁰ For biographical information see Zouche, R *Juris et Iudicii Fecialis, Sive, Iuris Inter Gentes, et Quaestionum de Eodem Explicatio*, Oxford (1650), Holland, T (ed), (Brierly, J trans) (Classics of International Law, 1911) Scott, J (ed). This translation is the only one cited herein. A list of Zouche’s writings can also be found in Holland’s introduction at vi – ix.

³¹ Holland noted that Zouche probably left this area of law until last, to give himself the opportunity to carefully read Grotius’ work, which had only recently been published at the time that the first volumes in the *Elementa Jurisprudentiae* were written: see Holland at xi.

³² In his note, ‘To the Reader’, Zouche wrote, referring to himself in the third person, that he had: “[R]efrained from deciding any point according to his own opinion, thinking it wiser to follow the practice of the Socratic Academy, which, after adducing cases and principles, and expounding the arguments on one side ad the other, left the judgment of the hearers free and unfettered.”

For Zouche, a ‘wrong’ was committed between those at peace when an injury was inflicted on persons, or when property was seized or carried off or regions or territories occupied, or when duties arising by law, or under a convention or treaty were not performed.³³ In addition, an injury was also inflicted when something was refused which should have been readily granted, such as safe passage through territory, or rights of commerce.³⁴ Just as law suits arose from wrongs and injuries between private persons, so wars arose between those who had no judge, that is, states. Zouche defined ‘war’ as:³⁵

...[A] lawful contention between different princes or peoples, and is either formal, that is, declared and waged by a state; or informal and reprisals, which are practised by private persons.

Formal war was waged by a state, “when the arms are the property of the state and all citizens are exposed to the dangers of war.”³⁶ *Informal* war is discussed below in the context of reprisals. Regarding ‘just war’, Zouche adopted the view, in common with Grotius, that both sides may have been fighting a ‘just’ war if they were both acting in good faith, but with regards to the act itself, war could only ever be just on one side. A just cause must have been *recent*; he condemned the waging of war when done on the pretext of historic wrongs, thus, he subscribed to a requirement of immediacy between the harm done and the force used in response.³⁷ That interpretation is supported by a later passage in which he disapproved of Alexander’s acts of vengeance against the Persians for past wrongs, on the basis that those who had wronged the Greeks had perished long ago.³⁸

The next two scholars discussed in this epoch are Samuel Rachel, a German jurist, diplomat and professor of moral philosophy whose main work of interest is *De Jure Naturae et Gentium Dissertationes* (Dissertations on the Law of Nature and the Law of Nations), first published in 1676,³⁹ and Johann Wolfgang Textor, a contemporary of Rachel’s whose main work of interest is *Synopsis Juris Gentium* (Synopsis of the Law of Nations) published in 1680. They both rallied against

³³ Zouche *Juris et Iudicii Feclialis* Part I, Section V.

³⁴ Ibid.

³⁵ Ibid, Section VI.

³⁶ Ibid.

³⁷ Ibid, Part II, Section VI, 4, on “Whether a war may be begun for a cause of long-standing”.

³⁸ Ibid, Section V.

³⁹ See von Bar, L “Introduction” in Rachel, S *De Jure Naturae et Gentium Dissertationes* (Dissertations on the Law of Nature and the Law of Nations), von Bar, L (ed), (Bate, J transl) (Classics of International Law, 1916) at 7a-11a.

their German compatriot, Samuel Pufendorf⁴⁰ and natural law theory; they espoused the view that the law of nations consisted of positive laws jointly enacted by sovereigns and expressed in treaties between them.⁴¹

Rachel's theory on just war may be summarised in four points. First, the justice of the cause had to be established, namely, "that some hurt has been done wrongfully to one of your interests...the hurt must be sufficiently serious...Nature will [not] allow the abnormal and extra-natural remedy of War, for any slight hurt."⁴² Secondly, "the underlying cause of a war must not only be just; it must also be necessary".⁴³ If satisfaction or reparation of the wrong was offered, or could have been obtained by any other peaceful means, then "this terrible remedy must not be resorted to".⁴⁴ He subscribed to Aristotle's view that the ultimate aim of war was peace and that war was always a last resort. Thirdly, for a war to have been lawful it must have been "undertaken on the authority and under the auspices of he who has...Sovereignty in the State".⁴⁵ If war was initiated by one who had 'supreme power', and it was waged against proper 'enemies' or '*hostes*' (to be contrasted with 'robbers and bandits') then the war would be 'public' and 'just'.⁴⁶ Fourthly, the war must have been publicly and solemnly declared by the 'sovereign' to the other party, in accordance with the prevailing custom.⁴⁷ This requirement was necessary so that the war was not fought "as a private exploit, but by the will of each people or its governors."⁴⁸ If a war complied with these conditions, Rachel would have considered it to be lawful.

As with Rachel's *Dissertationes*, Textor's *Synopsis Juris Gentium* (Synopsis of the Law of Nations), was a protest against the school of natural law in general, and Samuel Pufendorf in particular, however, Textor had much more to say about war, especially *just* war, than Rachel. Contrary to Grotius and others, Textor thought there was no such thing as 'private war' or 'mixed war' and that the only real war occurred between sovereigns or authorities of equal power. He stated that

⁴⁰ See discussion of Pufendorf in chapter 6.

⁴¹ Rachel and Textor were the leaders of the positivist school in the seventeenth century; in the eighteenth century, the leadership was assumed by Cornelius van Bynkershoek: Finch, G *The Sources of Modern International Law* (1937) 20; see also Akashi *supra* n2 at 10-15.

⁴² Rachel *De Jure Naturae et Gentium Dissertationes* §XL, at 183 of Bate's translation; also von Bar, L "Introduction", *supra* n39 at 7a.

⁴³ *Ibid.*, §XLI, at 183 of Bate's translation.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, §XLIV, at 184-85.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, §XLIV-XLV, at 185.

⁴⁸ *Ibid.*

“private persons are not, as a rule, allowed to wage war; and therefore private war is inadmissible as war.”⁴⁹ He ruled out all “single combats, duels and all private fighting”⁵⁰ from the scope of true war which he defined as “...a condition of lawful hostile offense existing for just cause between royal or quasi-royal powers, declared by public authority.”⁵¹

Within that definition of war are three distinct elements: first, there must have been a just cause “since it is not permissible to begin a war without a just cause”;⁵² secondly, war had to be fought between royal or quasi-royal powers, because “war-making belongs to Kings or those having like power and not to private persons”;⁵³ and thirdly, there must have been a proclamation by public authority.⁵⁴

As for the second element, Textor wrote at length on why a war could only be waged by those who possessed sovereign authority, or something akin to it. He disagreed with Grotius who had allowed some room for argument on this point, perhaps allowing magistrates or princes the right to wage war. Textor also stated that one could not describe as ‘war’ that force which was used in a civil war. He maintained that if a state was split into factions, then “there is no right of sovereignty in the antagonists, individually considered, such as there is in an undivided State.”⁵⁵ He concluded that civil war could not properly be called war at all.⁵⁶ As for the first element, that there be a just cause, Textor discussed this separately in the immediately following chapter in the *Synopsis* wherein he wrote that there were two prerequisites for a just cause of war:⁵⁷

(1) A serious grievance, suffered by the party making the war; (2) A refusal of redress by the other side. For recourse must not be had to war on any promiscuous ground or for a slight hurt.

⁴⁹ Textor, J *Synopsis Juris Gentium* (Synopsis of the Law of Nations), von Bar, L (ed) (Bate, J transl) (Classics of International Law, 1916) chapter XVI, para 1, at 159 of Bate’s translation.

⁵⁰ Ibid, para 2, at 160 of Bate’s translation.

⁵¹ Ibid, paras 6-8, at 160.

⁵² Ibid, paras 9-10 at 161.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Adopting Textor’s definition of ‘war’ it may be argued that there was no sovereign power in existence in Afghanistan at the time that the terrorist attacks occurred in September 2001: see discussion in chapter 10 where it is argued that there was no attack on the US by the state of Afghanistan or its sovereign (the ‘royal or quasi-royal’, to use Textor’s phrase) which could have amounted to an ‘armed attack’.

⁵⁶ Textor *Synopsis Juris Gentium*, chapter XVI, paras 25-26, at 165.

⁵⁷ Ibid, para 1 at 167.

Textor approved of St Augustine's definition of a 'just war' in so far as the latter required that the injured party must have sought redress, and redress was not forthcoming. Textor wrote that "whatever be the grievance, if the party causing it offers redress by amicable methods...the justice of the cause of war disappears."⁵⁸ A grievance could be addressed in two ways, either specifically or by an equivalent; the exact form of redress would differ according to the situation. In the factual circumstances which are at the heart of the current thesis, where the 'situation is no longer what it was' the redress may take the form of:⁵⁹

[A] pecuniary compensation, or it may be a penal award against the authors of the wrong or a surrender of them for punishment.

Textor was familiar with the ancient Greek and Roman authors, as well as with his closer contemporaries, and drew on many examples to show that there was a clear difference between *causes* of war and *pretexts* for war. He noted that "what is too often put forward in public is but a pretext of war, the true impelling cause of war being something different".⁶⁰

Textor divided war into offensive and defensive categories. As for offensive war, he wrote that there were potentially three just causes: injuries to the body, to the reputation, or to the property of the state, including its king, its ministers or its subjects.⁶¹ He also addressed the question of whether a war could be just on both sides, concluding that as regards the cause in itself, a war could not be just on both sides, but it may well be as regards the just belief of the belligerents in a doubtful case. In essence, he adopted Grotius' argument that the answer to this question depended on what one was referring to by 'just'. Textor used the terms 'material justice' and 'formal justice' to argue that a war could be materially just on only one side, but it could be formally just on both sides.⁶² But he then complicated matters by arguing that "under the Law of Nations there are degrees in the justice of causes of war" thereby rendering the question to a decision that was based partially on the 'real' justice of the cause, and partially on the belligerent's belief in the true justice of his cause; a confusing situation indeed.⁶³

⁵⁸ Ibid, para 3 at 168.

⁵⁹ Ibid.

⁶⁰ Ibid, paras 5-6 at 169.

⁶¹ Ibid, paras 10-14 at 170-171.

⁶² Ibid, paras 21-22, at 173-4.

⁶³ Ibid, paras 26, at 175.

Textor discussed particular examples of potential causes that he thought would **not** give rise to a just war. War could not be waged against a people because of “defects in their religion”.⁶⁴ Likewise, refusal to permit the passage of an army through one’s land could not justify war *per se*. He disagreed with many scholars, including St Augustine and Grotius, on this point and although refusal of passage could possibly give rise to a just war in a situation of extreme necessity, Textor thought that at least four conditions would first have to be met.⁶⁵ As for the issue of war against the Turks and Saracens to take back the Holy Land, Textor found that possession of the Holy Land could not in itself be a just cause for war. Moreover, he could not find any “absolute justification based on ancient Law for the Crusades...”.⁶⁶

Another leading scholar in the school of legal positivism was Cornelius Bynkershoek,⁶⁷ who wrote *Questionum Juris Publici Libri Duo* (Two Books on Questions of Public Law), first published in 1737, based on the Dutch state practice of his time.⁶⁸ Bynkerhsoek’s definition of war was probably the broadest offered by any of the scholars discussed in this, or in any of the preceding epochs. He attempted to embrace all the conditions of war when he wrote that:⁶⁹

War is a contest of independent persons carried on by force or fraud for the sake of asserting their rights

Elsewhere in *Questionum Juris Publici Libri Duo* he defined the act of war as:⁷⁰

...[N]othing else but to take forcibly from an unwilling prince or people what we think is due to us.

He did not feel compelled to define war by dividing it into spheres of public and private, or formal and informal, but it is clear that the ‘war’ to which he referred was war in the traditional sense, carried out by princes on behalf of their states.⁷¹

⁶⁴ Ibid, chapter XVII, para 30, at 176. The peoples he had in mind were the ‘Mahometan peoples or pagans and barbarians’.

⁶⁵ Ibid, paras 32-42, at 176-79. Some of the conditions were that security would have to be furnished against possible damage, that the army marching through is waging war against a third party and that war does not appear to be unjust and that the army passes through in bands or squadrons, rather than all at once.

⁶⁶ Ibid, paras 44-45, at 180.

⁶⁷ For critical discourse on Bynkershoek’s contribution to positivism, see Akashi *supra* n2.

⁶⁸ For biographical information see de Louter, J “Introduction” in van Bynkershoek, C *Questionum Juris Publici Libri Duo* (Two Books on Questions of Public Law), (Frank, T transl) (Classics of International Law, 1930).

⁶⁹ Bynkershoek *Questionum Juris Publici Libri Duo*, book I, chapter I, para 2.

⁷⁰ Ibid, chapter II, para 16.

⁷¹ He wrote that a war between private individuals could not be called a ‘private war’ since the term ‘private’ has no meaning except with reference to the term ‘public’, and this does not apply where there is no state. When individuals formed a state, they no longer acted as private individuals, thus war was only ever carried out between princes, on behalf of states: *ibid*. See also Akashi, *supra* n2 at 65-66. It is also clear from his discussion regarding who could make peace that it was princes who acted in this way, not private individuals.

Regarding the causes of war, he wrote that wars were fought “for the sake of asserting...rights”⁷² and the only correct ground for war “is the defence or the recovery of one’s own”.⁷³ Bynkershoek did not directly refer to the potential causes of a ‘just war’ but he wrote that ‘justice’ was indispensable in war.⁷⁴ It is difficult to ascertain his views on the doctrine of just war. Although he was aware of the issue of *bellum iustum* he did not discuss it in *Questionum Juris Publici Libri Duo*. A modern scholar who has attempted to discern Bynkershoek’s position has concluded that Bynkershoek’s references to just war are “somewhat confusing”⁷⁵ and that “only the equivocality of his attitude may be extracted”.⁷⁶

The fifth and final scholar discussed here is Henry Wheaton, an American diplomat whose writings reflected his personal experience and the importance which he placed on using actual state practice and treaties as the fundamental basis of the law of nations. His main work of interest is *Elements of International Law* first published in 1836, in which he set out, *inter alia*, his conception of the rights of sovereign states. Wheaton’s approach to the question of whether international law should be concerned with the justice of the cause of war was paradoxical. On the one hand, as a positivist, he thought that international law had no business inquiring into the justice of the cause of war.⁷⁷

The voluntary positive law of nations makes no distinction...between a just and unjust war. A war in form, or duly commenced, is to be considered, as to its effects, as just on both sides. Whatever is permitted by the laws of war to one of the belligerent parties is equally permitted to the other.

Yet the *Elements of International Law* is not totally bereft of references to just causes. For instance, when he discussed pre-emptive self-defence Wheaton referred to an enemy’s actions as giving “just ground for alarm”.⁷⁸ He also wrote that the internal development of a country’s resources or its acquisition of property had never been considered a “just motive for interference”⁷⁹ and he warned against the “injustice”⁸⁰ that would be caused if the right of pre-emptive self-defence was not carefully exercised.⁸¹ Despite relying on treaties and state

⁷² Bynkershoek *Questionum Juris Publici libri Duo*, book I, chapter I, para 3, at 15.

⁷³ Ibid.

⁷⁴ Ibid, chapter I, para 4, at 17.

⁷⁵ Akashi *supra* n2 at 94-95.

⁷⁶ Ibid.

⁷⁷ Wheaton, *Elements of International Law*, *supra* n10 at §295, 313.

⁷⁸ Ibid at §63, 77.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

practice as the basis for international law, he acknowledged “the performance of the duties of international law [are] compelled by moral sanctions only”.⁸² Furthermore, in his analysis of the causes of war by Christians to “secure the freedom of religious worship”⁸³ he seemed to imply that despite his positivist loyalties, he was concerned with establishing the just basis for the resort to force. Although he wanted to base his theory of international law solely on treaty and state practice, this approach ironically resulted in a recognition that there were various just (or ‘justifiable’) causes of war.⁸⁴

Self-defence

In *Juris et Iudicii Fecialis*, Zouche discussed various questions concerning war. As for whether any war was lawful, he quoted the ancient scholars who held the view that force could be repelled with force.⁸⁵

Textor wrote that in a defensive war, as with offensive war, discussed above, the “justice of the cause is required”:⁸⁶

Whenever the cause of war is obviously just on the side of the aggressor, as when some overwhelming loss has notoriously been caused by the other side and no fitting recompense has been given on demand, then there is no just cause in the defensive war. When, however, the offensive war is manifestly unjust or at any rate when the injustice of the cause is equally in doubt on both sides, then, on the contrary, the war is just on the side which is defending itself or warding off attack.

In essence, he repeated what other scholars had written, namely, that if the aggressor was just, then the defender was unjust, and vice versa. For Textor, the legality of the party that was waging war determined the legality of the other party’s use of force.⁸⁷

Bynkershoek did not devote a particular section to the use of force in self-defence but clearly he thought it was permissible, as is evident from his definition of

⁸² Ibid.

⁸³ Ibid at §69, 95-96; see also Stowell, E *Intervention in International Law* (1921) at 126-27; see Fenwick, C “Intervention: Individual and Collective” (1945) 39 *AJIL* 650, and Karoubi, M *Just or Unjust War? International Law and Unilateral Use of Armed Force by States at the Turn of the 20th Century* (2004) at 214-17.

⁸⁴ These two phrases are used in his discussion of Europe’s intervention on the side of Greece against the Turks in 1827, see Wheaton *Elements of International Law* at §69, 95-97. This conclusion seems surprising given Wheaton’s insistence that the voluntary or positive law of nations made no distinction between a just and an unjust war. Perhaps Wheaton was trying to focus on the legal repercussions of war and to avoid overtly addressing the *ius ad bellum*.

⁸⁵ Zouche *Juris et Iudicii Fecialis* Part II, Section VI, 1, supra n30, citing, *inter alia*, Livy and Florentius.

⁸⁶ Textor *Synopsis Juris Gentium* supra n49 at chapter XVII, para 48, at 181 of Bate’s translation.

⁸⁷ “[I]t is enough to make a defensive war just, that the defender is not clearly inferior as regards the merits of his cause...exactly as, in private disputes, the defendant is by the very fact taken to have good cause when the plaintiff does not rely on a stronger basis of Law and Equity.”: *ibid*.

war.⁸⁸ Elaborating upon his definition of war, he wrote that “the only correct ground for war is the **defence** or recovery of one’s own.”⁸⁹ Although he was willing to grant that before resort to force “we must demand satisfaction for the injuries sustained or complained of”,⁹⁰ even that requirement did not apply in the case of self-defence, since “all laws permit the repelling of force by force”.⁹¹

Wheaton was representative of his generation and his political environment insofar as he considered the right of war as a right which belonged to sovereign states. Drawing on the political theory of Hobbes and others, he held that each member of the great society of nations lived in a ‘state of nature’ in which they were “entirely independent of every other...acknowledging no common sovereign, arbiter, or judge.”⁹² He divided the rights which sovereign states enjoyed into two categories: primitive or absolute rights, and conditional or hypothetical. As for the former he stated that:⁹³

*Every State has certain sovereign rights, to which it is entitled as an independent moral being; in other words, because it is a State. These rights are called the **absolute** international rights of States, because they are not limited to particular circumstances.*

These so-called ‘absolute’ rights were to be contrasted with *conditional* rights, which were rights that sovereign states were entitled to under *particular* circumstances, and they ceased with the circumstances which gave rise to them. As an example of an *absolute* right, the right of self-preservation, “which lies at the foundation of all the rest”,⁹⁴ was one of the most essential and important. As for *conditional* rights, he thought that war, “which confers on belligerent or neutral states certain rights which cease with the existence of the war”,⁹⁵ was such a right. Among the absolute rights of self-preservation was the right of self-defence, which Wheaton thought involved:⁹⁶

...[T]he right to require the military service of all its people, to levy troops and maintain a naval force, to build fortifications, and to impose and collect taxes for all these purposes.

As to whom belonged the right of self-defence, Wheaton considered that absolute sovereign rights “can be controlled only by the equal correspondent rights of other

⁸⁸ See discussion *supra* at n70 and accompanying text.

⁸⁹ Bynkershoek *Questionum Juris Publici Libri Duo*, *supra* n67 at book I, chapter I, para 2, at 15.

⁹⁰ *Ibid.*, chapter II, para 6, at 18.

⁹¹ *Ibid.*

⁹² Wheaton *Elements of International Law* *supra* n10 at §63, 77.

⁹³ *Ibid.*, at §60, 75.

⁹⁴ *Ibid.*, at §61, 75.

⁹⁵ *Ibid.*, at §60, 75.

⁹⁶ *Ibid.*, at §62, 75.

States, or by special compacts freely entered into with others...⁹⁷ Moreover, in exercising the right of self-defence, no independent state could be restricted by any foreign power and each sovereign state was entitled to decide when to exercise the right, hence:⁹⁸

*The independent societies of men, called States, acknowledge no common arbiter or judge, except such as are constituted by special compact...Every State has therefore a right to resort to force, as the only means of redress for **injuries inflicted upon it by others**, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society. Each State is entitled to judge for itself, what are the nature and extent of the injuries which will justify such a means of redress. (emphasis added)*

Although Wheaton, as a positivist, was not concerned with establishing the just causes of war, and he did not include a specific section in *The Elements of International Law* on just war doctrine, it would appear that he required a war of self-defence to be preceded by an ‘injury’: a similar requirement to that put forward by the just war proponents discussed in earlier epochs.

The Caroline case

Towards the latter part of this epoch, theorists and politicians alike came to regard international law as being less concerned with the legality of resorting to war (the *ius ad bellum*) and more concerned with the legality of the conduct of war (the *ius in bello*). As Hall noted in his oft-quoted observation:⁹⁹

[I]nternational law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation.

In the midst of this climate, the *Caroline* incident occurred which exemplified the fact that international law was still concerned with the *ius ad bellum* and there existed some degree of consensus between states on when force could be used in self-defence. Jennings has noted that it was as a consequence of the *Caroline* case that self-defence was changed from a political excuse to a legal doctrine.¹⁰⁰ Jennings and Bowett have both described the *Caroline* case as the *locus classicus* of the right to self-defence.¹⁰¹

The incident between the US and the UK occurred on 28 December 1837 when British subjects, led by Captain Alexander McLeod, seized a vessel (the *Caroline*)

⁹⁷ Ibid.

⁹⁸ Ibid, at §290, 309.

⁹⁹ Hall, *W A Treatise on International Law* (1880) at 52.

¹⁰⁰ Jennings, R, *The Caroline and McLeod Cases* (1938) 32 AJIL 82.

¹⁰¹ Ibid at 92; see also Bowett, *Self-Defence in International Law* (1958) 58.

in an American port, then set the steamer on fire and set it adrift towards eventual destruction over the Niagara Falls.¹⁰² Two US citizens were killed in the process.¹⁰³ The British troops had taken such action because the *Caroline* was allegedly being used to supply groups of American insurgents with reinforcements of men and arms. The American insurgents had been conducting raids into Canadian territory, aimed at insurrection against British rule over Canada.¹⁰⁴

The US objected to the actions of the British forces in destroying the *Caroline* and in killing the US citizens, on the grounds that the British had violated American sovereignty. Great Britain considered that it had acted in legitimate self-defence.¹⁰⁵ The correspondence between US Secretary of State Webster and Lord Ashburton contains the classic statement of the proper limits for the plea of self-defence.¹⁰⁶ Secretary of State Webster called upon Britain to show the existence of a “necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation...”¹⁰⁷ Webster then went on to state that it was for Great Britain:¹⁰⁸

...[T]o show, also, that the local authorities of Canada...did nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it.

In these few sentences, Secretary of State Webster formulated the customary law principles that have, ever since, been applied to the resort to force in self-defence.¹⁰⁹ The first extract refers to the principles of **necessity and immediacy**

¹⁰² The *Caroline* was in the port at Schlosser in the State of New York at the time it was seized; see Bowett, *ibid*, at 58; see Jennings, *supra* n100 at 84.

¹⁰³ Amos Durfee, “whose body was found on the quay with a ball through his head, and a cabin boy known as ‘little Billy’, who was shot while attempting to leave the vessel. Two persons were taken prisoner in Canada...”: Jennings, *supra* n100 at 84.

¹⁰⁴ The *Caroline* incident occurred during the Mackenzie Rebellion of 1837 against the British rule in Upper Canada. The insurgents had taken over an island on the Canadian side of the Niagara River, Navy Island. The American population in the area sympathised with the cause of the rebellion and so the *Caroline* was used to ferry men and materials from the American bank of the Niagara River to the rebel-held island. Great Britain protested to the United States about its failure to stop the line of supplies and took the action against the *Caroline* when the American authorities failed to take effective action: *ibid* at 82-84; see also Brierly, *supra* n7 at 405-06; Shaw, *M International Law* (5th ed, 2003) 787-89; Cassese, *International Law* (2001) 231; Alexandrov, *S Self-Defence Against the Use of Force in International Law* (1996) 19-20; and Bowett, *supra* n101 at 58.

¹⁰⁵ In a letter dated 6 February 1838 from Mr Fox, the British Minister in Washington, the basis of the British position was stated as follows: “The piratical nature of the steam boat *Caroline* and the necessity of self-defence and self-preservation, under which Her Majesty’s subjects acted in destroying that vessel, would seem to be sufficiently established.”: Jennings *supra* n100 at 85. The British Foreign Office did not take a serious view of the situation until the arrest of Alexander McLeod in 1840, on a charge of murder and arson.

¹⁰⁶ The British and American statesmen agreed on the legal parameters of the right of self-defence but disagreed on the application to the facts. In Lord Ashburton’s reply, he attempted to explain how British actions came within Webster’s parameters: *ibid* at 90.

¹⁰⁷ Parliamentary Papers (1843), Vol LXI; British and Foreign State Papers, Vol XXX, p193, *ibid* at 85; see also Bowett, *supra* n 86 at p59; Alexandrov, *supra* n104 at 20; and Shaw, *supra* n104 at 787. Webster went on to say, in a passage that it not often quoted: “It must be shown that admonition or remonstrance to the persons on board the *Caroline* was impracticable, or would have been unavailing; it must be shown that daylight could not have been waited for; that there could be no attempt at discrimination between the innocent and the guilty...”: see Jennings, *supra* n100 at 89, quoting from Webster’s note to Lord Ashburton of 27 July 1842. These examples illustrate the degree of immediacy that the state employing force must be able to show.

¹⁰⁸ Jennings, *supra* n100 at 89; also Bowett, *supra* n101 at 59.

¹⁰⁹ Webster’s correspondence made history “despite the lack of evidence that Webster had in mind any means of self-defence other than extra-territorial law enforcement, and notwithstanding the time frame of the episode, which preceded the prohibition of the use of inter-State force.”: see Dinstein, *War, Aggression and Self-Defence* (3rd ed, 2001) at 219.

and the second contains the principle of **proportionality**. International tribunals, such as the International Military Tribunal at Nuremberg have subsequently endorsed Webster's formulation.¹¹⁰

The significance of the *Caroline* case was confirmed in subsequent years, especially once positive law framed the right of self-defence in such a way that it presumed the right had already been defined in customary international law. Perhaps the most important point to be taken from the *Caroline* case for present purposes is that despite the right of war being attributed to sovereign states, and despite legal scholars such as Wheaton effectively sidelining just war doctrine, state practice showed that states were concerned that their resort to force be seen as 'just'. The principles set out in Webster's letter captured the same sentiments as expressed by Grotius, Wolff, Vattel and Pufendorf from epoch III and the general ideas on war and self-defence discussed by Zouche, Bynkershoek and Wheaton from this epoch. Both the UK and the US attempted to establish, in their correspondence, that they understood the situations in which force could be used in self-defence, and the limits of using force. That in itself was an important point in an era in which the right to war had become synonymous with the sovereign state, and in an era in which Wheaton had said "the voluntary or positive law of nations makes no distinction...between a just and an unjust war."¹¹¹

Pre-emptive self-defence

On the pre-emptive use of force, Zouche acknowledged that:¹¹²

...[S]ome hold that by the Law of Nations arms rightly be taken up to check a growing power, which when grown too great may do injury. Grotius, however, says that it is utterly opposed to the principle of equity that the possibility of being attacked should give a right to attack; and therefore a remedy should be sought in counter fortifications at home and the like, nor in warlike violence.

Thus, if a neighbour's power was increasing, the only action which could be taken in response was to increase one's defences. Zouche denied that a nation had the right to use force to keep ambitious chiefs in check. However, he appeared to permit force to be used in pre-emptive self-defence if there were "clear

¹¹⁰ The exact form of Webster's words was cited with approval by the Nuremberg International Military Tribunal in 1946; see *Re Goering and Others* Annual Digest of Public International Law Cases 13 (1946), No 92: "It must be remembered that preventive action in foreign territory is justified only in case of an 'instant and overwhelming necessity for self-defence, leaving no choice of means and no moment for deliberation' (The *Caroline* Case).": see Bowett, *supra* n101 at 60.

¹¹¹ Wheaton, *Elements of International Law*, *supra* n10 at §295, 313.

¹¹² Zouche *Juris et Iudicii Feialis*, *supra* n30, at Part II, Section V, 6.

indications”¹¹³ that the increase in power was intended for offensive, rather than defensive purposes. In essence, Zouche was open to the concept of pre-emptive self-defence but was not able to provide much specific assistance in determining exactly when the circumstances would arise that would warrant a just use of force in such a case.

In the course of Textor’s discussion of offensive war he noted that a pre-emptive war borne out of the “uncertainty of fear”¹¹⁴ or a war of “expediency without necessity”¹¹⁵ out of a “covetousness of richer soil”¹¹⁶ or the “wish to govern others against their will”¹¹⁷ were all either false causes of war or insufficient pretexts for war.¹¹⁸

Wheaton adopted a cautious approach to the use force in pre-emptive self-defence, when he stated that:¹¹⁹

*The occasions on which the right of forcible interference has been exercised in order to **prevent the undue aggrandizement** of a particular State, by such innocent and lawful means as those mentioned above, are comparatively few, and cannot be justified in any case, except in that where excessive augmentation of its military and naval forces may give **just ground of alarm** to its neighbours. (emphasis added)*

The internal development of the resources of a country, or its acquisition of colonies and dependencies at a distance from Europe, “has never been considered a just motive for such interference.”¹²⁰ Whilst he recognised the right to use force in pre-emptive self-defence, he placed limitations on it, when he warned that:¹²¹

[T]he injustice and mischief of admitting that nations have a right to use force, for the express purpose of retarding the civilization and diminishing the prosperity of their inoffensive neighbours, are too revolting to allow such a right to be inserted in the international code.

As for the ramifications of allowing a right of pre-emptive self-defence, he observed that:

This preventative policy has been the pretext of the most bloody and destructive wars waged in modern times, some of which have certainly originated in well-founded apprehensions of peril..., but the greater part have been founded upon insufficient reasons, disguising the real motives by which princes and cabinets have been influenced.

¹¹³ Ibid, Part II, Section V, 6.

¹¹⁴ Textor *Synopsis Juris Gentium* supra n44 at chapter XVII, para 49, at 180.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Wheaton *Elements of International Law* supra n10 at §63, 76-77.

¹²⁰ Ibid, at §63, 77.

¹²¹ Ibid.

Thus, although the right to wage war in pre-emptive self-defence belonged to every sovereign state, that right could only be sparingly resorted to, since the particular circumstances of the situation would almost never warrant it.

Reprisals

As states came to realise that war was extremely destructive, and that limits had to be placed on the way that it was waged, states also came to develop uses of force that were alternatives to full-blown warfare. New procedural limitations on the right to resort to war, and on the repercussions for declaring war, meant that states began to make a self-serving distinction between war, on the one hand, and ‘other’ lesser uses of force.¹²² States began to rely upon age-old rights to justify the use of force that avoided the increasingly undesirable need to declare war.¹²³ States often considered that it was desirable to avoid the disruption and embarrassment of full-scale war in the legal sense and, instead, they began opting for restricted forms of coercion.¹²⁴ Both legal scholars and tribunals recognised a right of peacetime reprisal, which involved the use of force.¹²⁵

As noted above,¹²⁶ Zouche defined war in terms of formal and informal, the latter of which he divided it into two types. First, he referred to the ancient practice, dating back to the Greeks, of a ‘seizure of persons.’ For example, when a person had been murdered, the kinsmen of the victim seized persons belonging to the offending group, until either punishment had been inflicted for the murder or the murderers were given up.¹²⁷ Second, he referred to the act of ‘reprisals’ by private persons, for instance, when a right to seize goods was granted to private persons to secure the payment of a debt or if judgment could not be obtained against a guilty person.¹²⁸ However, he did not suggest a type of war – either

¹²² The limitation on the right to resort to war was embedded in treaties such as the Hague Convention for the Pacific Settlement of International Disputes of 1907: see McCoubrey, H and White, N *International Law and Armed Conflict* (1992) 19-20.

¹²³ “[R]ecourse to ‘war’ incurred a certain odium; ‘war’ was a term which had acquired a deep psychological and emotional significance. ‘War’ implied a full-scale combat which offended public sentiment and was wasteful of lives and a nation’s resources...The ‘state of war’ involved a termination of commercial intercourse between the contending states and the invalidation or suspension of treaties.”: see Brownlie, I *International Law and the Use of Force by States* (1963) 27.

¹²⁴ *Ibid* at 28.

¹²⁵ Contrast with the discussion in chapter 10 regarding non-forcible counter-measures.

¹²⁶ *Supra* at 166-67.

¹²⁷ The practice known as ‘androlepsy’ was discussed in chapter 6; see also Bederman, D *International Law in Antiquity* (2001) 122-23; see also Nussbaum, *supra* n5 at 8-9.

¹²⁸ The practice also known as ‘Letters of Marque’, discussed in chapter 6.

formal or informal – whereby private persons used force against another state or the ruler thereof.¹²⁹

Wheaton wrote that “reprisals are to be granted only in case of a clear and open denial of justice”¹³⁰ and the right of granting them was vested in the sovereign or the supreme power of the state. He emphasised that reprisals were used between nation and nation, “in order to do themselves justice when they cannot otherwise obtain it.”¹³¹ He discussed reprisals upon the persons and things of an offending nation as a “mode of terminating the differences between nations, by forcible means short of actual war.”¹³² Thus, at the time of writing *Elements of International Law*, reprisals – involving the use of force – by one nation against another were considered legitimate.

The Naulilaa dispute

The facts which gave rise to the classic case dealing with reprisals, the *Naulilaa* case¹³³ between Portugal and Germany, took place during this epoch.¹³⁴ The arbitration arose out of an incident that occurred in 1914 on the border between South-West Africa (a German colony) and Angola (a Portuguese colony).¹³⁵ Three German officials were shot dead on the border. In retaliation, the German forces attacked and destroyed a number of Portuguese installations in Angola over a period of several weeks.¹³⁶ Germany argued that its actions were a lawful reprisal. The Special Arbitral Tribunal instituted by Germany and Portugal found that there were three conditions which established the legitimacy of reprisals: first, there must have been a **previous violation of international law** by the other state; second, there must have been an **unsuccessful request for redress** of the wrong, “for the necessity of resorting to force cannot be established if the possibility of obtaining redress by other means is not even explored”.¹³⁷ Third,

¹²⁹ That conclusion is also supported by the examples he cited from Homer in which ‘informal war’ was practiced by private persons against private persons to force the return of animals or ships: see Zouche *Juris et Iudicii Feialis*, supra n30 at Part I, Section VI.

¹³⁰ Wheaton *Elements of International Law*, supra n10 at §291, 310.

¹³¹ *Ibid* at §292, 310.

¹³² *Ibid*, at §290, 309.

¹³³ Case XXVIIa: Responsabilité de l’Allemagne à raison des dommages causés dans les colonies Portugaises du Sud de l’Afrique (1928) 2 RIAA 1012.

¹³⁴ The facts that gave rise to the arbitration occurred in 1914; the arbitral award is from 1928.

¹³⁵ The incident took place at the Portuguese post of Naulilaa on the Angolan side of the border.

¹³⁶ This summary of the facts is taken from Dinstein, supra n109 at 197. See also Brierly, supra n7 at 400; Cassese, supra n104 at 232; and McCoubrey and White, supra n122 at 20.

¹³⁷ Brierly, supra n7 at 401.

the measures adopted **must not have been excessive**; they must have been in **proportion** to the provocation received.¹³⁸

On the facts, the tribunal found that Germany failed to meet all three conditions. First, Portugal had not committed an illegal act. It found that the killing of the three German soldiers was the result of a misunderstanding. Second, Germany had made no request for redress before resorting to force. Third, the force used by Germany was excessive and out of all proportion to the conduct of the Portuguese authorities.¹³⁹ In the course of its award, the tribunal effectively defined reprisals:

*Reprisals are acts of self-help by the injured State, **acts in retaliation for acts contrary to international law** on the part of the offending State, which have **remained undressed after a demand for amends**...They are illegal unless they are based upon a previous act contrary to international law. They seek to impose on the offending State **reparation** for the offence, **the return to legality and the avoidance of new offences**.*¹⁴⁰ (emphasis added)

Thus, reprisals were forcible measures, short of war, that were intended to either obtain reparation for a wrong or to prevent a future wrong.¹⁴¹ Wheaton wrote that “reprisals are to be granted only in case of a clear and open denial of justice”¹⁴² and that:¹⁴³

[A]cts of reprisal, or resort to forcible means of redress between nations, may assume the character of war in case adequate satisfaction is refused by the offending state.

Richard Henry Dana, an editor of Wheaton’s work, further explained their use as it stood in 1866. He wrote that reprisals could be granted for injuries to private citizens as well as to the state, and when done by private individuals as well as by public authority. He also stated that the right of making reprisals was not limited to property but also extended to persons.¹⁴⁴ In summary, it was during this particular epoch that reprisals involving the use of force came to be used with greater frequency and that the parameters of their use came to be more precisely defined. States increasingly relied upon reprisals, including the pacific blockade, as a method of dispute resolution of the self-help variety, although in practice,

¹³⁸ The *Naulilaa* case, supra n133. See also the discussion in chapter 10 concerning counter-measures.

¹³⁹ Ibid at 1026-28; see also Brierty, supra n7 at 400-01; Cassese, supra n104 at 232; Alexandrov, supra n104 at 16-17; Shaw, supra n104 at 786; and Dinstein supra n109 at 197-98.

¹⁴⁰ The *Naulilaa* case, supra n133 at 1026; also Brierty, supra n7 at 401 and Alexandrov, supra n104 at 17.

¹⁴¹ ‘Positive’ reprisals might have included the removal or retention of things or rights of the injured states or the arrest of persons of the same; ‘negative’ reprisals could have included the withholding or denial of rights or the failure to fulfill contractual obligations: see Grewe, *W Epochs of International Law* (1984), Byers, M (trans and rev, 2000) 525.

¹⁴² Wheaton, *Elements of International Law* supra n10 at §292, at 310.

¹⁴³ Ibid.

¹⁴⁴ Ibid at §292, 311, n151.

they were sometimes misused.¹⁴⁵ In subsequent epochs, the spirit of customary law reprisals was maintained in the form of counter-measures but, subsequent to Article 2(4) of the UN Charter, counter-measures were only permitted in so far as they did not involve the use of force.¹⁴⁶

On the use of force by non-state actors

Just as in previous epochs, scholars were aware that force could be used against a state by entities other than another sovereign state. A legal distinction was drawn between the use of force by a state and the use of force by rogue individuals. Zouche wrote that the term ‘enemy’ included traitors (for example, rebels and deserters) and robbers (for example, brigands and pirates). A parallel between his definition of ‘robbers’ and modern-day ‘international terrorists’ is apparent:¹⁴⁷

***Robbers** are those who go about in the manner of enemies without the authority of a state, as **brigands** on land, and **pirates** at sea. (emphasis in the original)*

The examples he cited from ancient Rome suggested that those types of “robbers” were so classified because they had “no leader of sufficient mark” and they were neither “notorious nor numerous enough in themselves to be called **enemies** of the Roman people.”¹⁴⁸ For Zouche, it was lawful to “offend and destroy utterly”¹⁴⁹ this type of enemy and the laws of war did not apply to them.

In contrast, ‘lawful enemies’ were those ‘to whom are due all the rights of war’ and he cited with approval Cicero’s statement that “an enemy is one who has a State, Senate, Treasury, citizens consenting and agreeing and some method of making peace or war, if occasion requires.”¹⁵⁰ It may be implied from his definition of lawful and unlawful enemies that for Zouche, non-state actors, who had no leader of sufficient mark, were not to be considered as lawful enemies against whom a state could declare war. This interpretation of Zouche’s theory is supported by a later passage in *Juris et Iudicii Fecialis* where he wrote that a prince was not always liable for the wicked actions of his subjects, for there was no state which did not sometimes contain some wicked citizens, but the ruler was

¹⁴⁵ For example, regarding the French and English blockade of Buenos Aires from 1845-1847, the English were well aware and privately admitted that “the French and English Blockade has been from first to last illegal”: Lord Palmerston, British Foreign Minister, to Lord Normanby, the British Ambassador in Paris, in Grewe, *supra* n141 at 528.

¹⁴⁶ See discussion in chapters 9 and 10 regarding the evolution of the use of reprisals.

¹⁴⁷ Zouche *Juris et Iudicii Fecialis* *supra* n30 at Part II, Section VII.

¹⁴⁸ *Ibid.*, para 5 of the commentary.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.* See also discussion of Cicero in chapter 4 of this thesis. Zouche also cited with approval Ulpian’s definition of lawful enemies: “Enemies are those against whom the Roman people has decreed war, or who have decreed war against the Roman people.”

only responsible if he *knew* that his subjects were offending and he had the *power* to stop them, but he did not do so. In such a situation, Zouche stated that the prince was just as liable for their actions as the citizens themselves.¹⁵¹

On the issue of non-state actors, Rachel made some comments on the criminal actions of individuals who were outside the injured state's jurisdiction. He wrote that it was part of the law of nature, and the law of nations, that:¹⁵²

[I]f, after the commission of a crime, the criminal escape[s] into another State, the State within which the crime was committed has no right to follow him with armed hand outside its own jurisdiction; and so the State in which the criminal is sheltering ought either to punish him itself, if applied to by the other State, or surrender him to the applicant to be dealt with at its discretion.

He did not suggest what rights would accrue to the injured state if the state in which the criminal was sheltering refused to either prosecute or extradite. But the inference is clear that the crimes of non-state actors were to be responded to via the process of prosecution within the jurisdiction, or through extradition to another jurisdiction. Notably, Rachel held the view that the state had no right to "follow him with armed hand outside its own jurisdiction",¹⁵³ a notion that may have some resonance in the context of the use of force in response to terrorism, as will be discussed at a later point in this thesis.

One of the most prevalent forms of violence committed by non-state actors on a trans-national scale in this epoch was the use of force by pirates. Bynkershoek wrote a chapter in *Questionum Juris Publici Libri Duo* regarding pirates and the status of the peoples of Barbary Africa. He distinguished between privateering and piracy when he defined pirates thus:¹⁵⁴

*Those who rob on land or sea without **the authorization of any sovereign**, we call pirates and brigands. Hence we punish as pirates those who sail out to plunder the enemy without a commission from the admiral...There are also various other persons who are punished as pirates **on account of the atrocity of their crimes, though they are not actually pirates**, as for instance those who sail too near the land, contrary to the prohibition of the sovereign...(emphasis added)*

Contrary to the views of Gentili and others, Bynkershoek did not consider the Barbary peoples of North Africa to be pirates.¹⁵⁵

¹⁵¹ Zouche *Juris et Iudicii Feccialis* supra n30 at Part II, Section V where he also cited Agapetus who wrote that, "to offend, and not to stop offenders, is the same thing."

¹⁵² Rachel *De Jure Naturae et Gentium Dissertationes* supra n39, §LII, at 188 of Bate's translation.

¹⁵³ See discussion in chapter 10 concerning the use of force by the US against the Taliban and members of al Qaeda.

¹⁵⁴ Bynkershoek *Questionum Juris Publici Libri Duo*, supra n67, book I, chapter XVII, para 122, at 98 of Frank's translation.

¹⁵⁵ *Ibid*, book I, chapter XVII, para 124 at 99.

The peoples of Algiers, Tripoli, Tunis and Salee are not pirates, but rather organized states, which have a fixed territory in which there is an established government, and with which, as with other nations, we are now at peace, now at war.

He cited Cicero's oft-quoted definition of a regular enemy and confirmed his assessment that the Barbary peoples satisfied all the elements of Cicero's definition, and further, since they had some respect for treaties they could not be called pirates. He distinguished 'pirates', who do not act under the authority of a sovereign, from 'privateers' who acted wholly under authority and did not sail out except under the commission of the admiral.¹⁵⁶ Once a pirate had been captured and tried through the courts, the punishment emphasised the criminal nature of the offending.¹⁵⁷

The usual punishment of pirates is the forfeiture of life and goods, as may be inferred from all the above-cited edicts dealing with those who are to be treated like pirates because of the atrocity of their crimes.

Bynkershoek's arguments were based primarily on the Dutch law and state practice which he had observed among the European states of his day.¹⁵⁸ The *prima facie* implication that may be drawn from the above extract is that individuals who acted without the authority of a sovereign, and inflicted harm against a sovereign state, were acting as criminals and their actions ought to have been responded to via domestic judicial processes.¹⁵⁹

The predominant view in England during the late 1700s confirmed Bynkershoek's interpretation that piracy was a crime against the law of nations. Coke¹⁶⁰ and Blackstone¹⁶¹ both referred to pirates as *hostes humani generis*, drawing on Cicero's distinction between lawful enemies of the state (against whom war was declared) and enemies of all mankind (who were criminals).¹⁶² Yet, as Rubin has pointed out, it was somewhat easier to categorise pirates as such than to determine strictly whether their actions should be considered acts of war or should result in criminal trial.¹⁶³ Throughout the works of these and other English legal scholars, the common thread in defining piracy hinged on the fact that pirates were acting

¹⁵⁶ Ibid, chapter XVIII, "Regarding Privateers" at 104-109.

¹⁵⁷ Ibid, chapter XVII, para 129-130, at 102-103.

¹⁵⁸ That observation holds for the work in its entirety, including the sections on pirates, in which he cited numerous examples from the interactions between the Dutch United Provinces, England, France, Spain and the North African Barbary peoples.

¹⁵⁹ See also discussion of Bynkershoek's position on piracy in Rubin, A *The Law of Piracy* (2nd ed, 1998) 73 and 120-24.

¹⁶⁰ Coke, E *Third Institute of the Laws of England* (1628) at 113 where he used the phrase "*pirata est hostis humani generis*". See discussion in Rubin, supra n159 at 17, n61.

¹⁶¹ Blackstone, W *Commentaries on the Laws of England* vol 4 (1769) 71-71; see also Rubin, supra n159 at 124-26.

¹⁶² See discussion of Cicero on pirates in chapter 4.

¹⁶³ See Rubin supra n159 at 125-26.

criminally, against the law of nations without the authority of any prince or state.¹⁶⁴

On the other side of the Atlantic, the same basic distinction was being drawn between the use of force by enemies who had the authority of the state, and private individuals who did not. Wheaton emphasised that war was a right which belonged to the sovereign state.¹⁶⁵ Although he recognised that there were different types of war¹⁶⁶ he did not find that there could be a class of war waged by private individuals against a foreign, sovereign state. Wheaton wrote that once a state of war had been lawfully declared to exist, all subjects of each belligerent power were in a state of mutual hostility. However, the citizens of a state could not lawfully engage in battle with the public enemy “without being regularly enrolled and taking the military oath.”¹⁶⁷ Relying on Cicero, he reasoned that:¹⁶⁸

The horrors of war would indeed be greatly aggravated, if every individual of the belligerent States was allowed to plunder and slay indiscriminately the enemy's subjects, without being in any manner accountable for his conduct. Hence it is that in land wars, irregular bands of marauders are liable to be treated as lawless banditti, not entitled to the protection of the mitigated usages of war as practised by civilized nations. (emphasis added)

The footnote to the above passage explains that in modern warfare, partisan and guerrilla bands were regarded as outlaws and could be punished by a belligerent as robbers and murderers. Those individuals who attacked a state without authority from their own state were to be regarded as common criminals and were not entitled to the protection of the laws of war. As for pirates *per se* Wheaton considered them to be “the common enemies of all mankind”¹⁶⁹ which meant that all nations had an equal interest in their apprehension and punishment. In terms of US legislation, from at least 1790, piracy was defined as a municipal crime,¹⁷⁰ and from 1798, ‘murder on the high seas’ was an offence which attracted universal jurisdiction.¹⁷¹ It was apparent throughout the epoch that ‘war’ was a right reserved for sovereign states, and the use of force against a state or its vessels by non-state actors, such as pirates, was considered criminal in nature.

¹⁶⁴ See also Wooddeson, R A *Systematical View of the Laws of England* (1794) Lecture XXXIV, “Of Captures at Sea”, 422.

¹⁶⁵ “The right of making war belongs to the supreme power of the State...”: Wheaton *Elements of International Law* supra n10 at §294, 313.

¹⁶⁶ *Ibid* at §295-296, 313-14.

¹⁶⁷ *Ibid* at §356, 379.

¹⁶⁸ *Ibid*.

¹⁶⁹ *Ibid* at §124-25, 162-164.

¹⁷⁰ See 1st Congress, 2nd Session, 1 Stat. 112, as cited in Rubin supra n159 at 139.

¹⁷¹ *Ibid* at 141.

Aside from piracy, the other significant threat posed by non-state actors during the later years of this epoch was from anarchists who had organised themselves into conspicuous and influential political movements, particularly across Europe and Russia, but also in Asia, and Latin and North America. Anarchists supported the notion of direct action and “propaganda by the deed”¹⁷² to achieve “peace for the workers and liberty for all”¹⁷³ by removal of the state. Some anarchists, such as Bakunin, advocated the use of violence against material goods, property and the state, to attain those goals.¹⁷⁴ Between 1881 and the end of the nineteenth century, a number of heads of state were either assassinated or targeted for assassination by members of the anarchist movement.¹⁷⁵ European governments, at first on a national level and then at an international level “struggled to forge weapons that might control and suppress what was then perceived as society’s *fiercest and most intractable enemy, anarchist terrorism.*”¹⁷⁶

Delegates from European states met at the highly secretive International Conference of Rome for the Social Defense Against Anarchists in 1898.¹⁷⁷ The Conference’s final protocol defined anarchism as, “any act that used violent means to destroy the organization of society.”¹⁷⁸ It also included a provision whereby states agreed to extradite persons who had attempted to kill or kidnap a sovereign or head of state. Prompted by the assassination of US President McKinley by an anarchist in 1901, a second anti-anarchist conference was held in St Petersburg in 1904. Ten countries adopted a Secret Protocol for the International War on Anarchism.¹⁷⁹ It provided for police co-operation and information exchange between the signatory states. Both the Rome and St Petersburg conferences conceived of anarchism as a strictly criminal matter, the enforcement of which was to be handled by police institutions.

¹⁷² Bakunin, M “The Program of the International Brotherhood” (1869) in *Bakunin on Anarchy* (Dolgoft, S. trans. and ed.) (1977).

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Between March 1892 and June 1894, eleven dynamite explosions occurred in Paris, killing nine people. Bombs were also exploded in Spain, France and Italy. President Carnot of France was stabbed to death in 1894; Spanish Prime Minister Canovas was assassinated by shooting in 1897; an attempt was made on King Humbert of Italy, and the Empress of Austria was assassinated in 1898: Jensen, R “The International Anti-Anarchist Conference of 1898 and the Origins of Interpol” (1981) 16 *Journal of Contemporary History* 323 at 324-25.

¹⁷⁶ Ibid at 323.

¹⁷⁷ The Rome Conference was attended by 54 delegates from 21 European countries: Deflem, M “International Police Cooperation – History of” in *Encyclopedia of Criminology* Wright, R and Miller, J (eds) (2005). On matters of practical policing, the Rome protocol included plans to encourage police to keep watch over anarchists, to establish in every participating country a specialised surveillance agency to achieve this goal, and to organise a system of information exchange among these national agencies.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

There are parallels between the threat posed by violent anarchism and modern terrorism. The fact that the anarchists' targets were often killed in cinemas, restaurants and religious celebrations meant that a "sense of alarm swept through the bourgeoisie"¹⁸⁰ and created a general sense of fear and anxiety. Secondly, the assassinations were generally carried out by individuals on the fringes of anarchism and there were estimated as being fewer than 5,000 violent anarchists in all of Europe.¹⁸¹ Thirdly, one of the difficulties experienced by delegates at the 1898 Rome conference was attaining agreement on the definition of anarchism.¹⁸² Finally, it is significant that violent anarchism was considered by the targeted states as being *criminal* in nature. Virtually all of the mechanisms suggested at the Rome conference by Baron de Rolland, which were eventually accepted, resonate with attempts to curb modern terrorism.¹⁸³ Success in the 'war on anarchism' was perceived as requiring trans-national cooperation through policing and intelligence exchange.

Conclusion

This epoch of international law began in 1648 with the signing of the Peace of Westphalia and ended in 1919, on the eve of the formation of the League of Nations. In between, a number of important developments occurred regarding the law pertaining to use of force.

First, with regards to just war theory, there was a notable shift in the importance attributed to this doctrine. At the beginning of the epoch, Zouche's *Juris et Iudicii Fecialis* still spoke of the meaning of 'just war'. Textor, to a greater extent than Rachel, was still concerned with the problem of defining 'just war'. Bynkershoek implicitly reduced the importance of just war doctrine by concentrating on the practical aspects of warfare, confining just war theory to the *ius in bello*, and virtually ignoring the question, which earlier scholars had been so interested in, as to how a state should determine whether it had a just cause for war. Later positivists, such as Wheaton, virtually ignored the issue as being essentially irrelevant. In *Elements of International Law*, Wheaton declared that positive international law had no concern with the justice of the causes of war.

¹⁸⁰ Jensen, *supra* n189 at 324-35.

¹⁸¹ *Ibid.*

¹⁸² *Ibid* at 327. See also discussion in chapter 3 of this thesis on the definition of terrorism.

¹⁸³ Baron de Rolland advocated the prohibition and punishment of the possession of explosives for illegitimate reasons, membership in anarchist associations, provocation to or support of anarchist acts, spreading anarchist propaganda, publicising anarchist trials and rendering assistance to anarchists (such as providing lodgings and instruments of crime): *ibid* at 327-38.

Yet, and this leads to the second point, despite legal scholars wanting to abandon just war doctrine, it still remained an important aspect of the *ius ad bellum*. Not only did Wheaton himself refer to ‘justice’, ‘injustice’ and ‘just causes’ in his work, but states continued to refer to the justness of their cause when declaring war. Even though international law was driven by positivist influences the treaties and declarations themselves kept the just war doctrine alive. Regardless of the profound changes in legal theory, states always tried to justify their wars with cogent reasons of law or equity.¹⁸⁴ Numerous declarations, treaties and manifestos from 1427 until the early twentieth century, from Russia, Europe and America, all used terms which attempted to justify the use of force by referring to the ‘justice of the cause’.¹⁸⁵ Thus, despite the movement from naturalism to positivism, and despite the attempts of Wheaton and others to refute the relevance of the justice of the causes of war, it remained an unassailable and undeniable fact that states were invariably concerned with justice (as they perceived it). The Positivist school never completely defeated the power of just war doctrine in establishing the need for just causes for war.¹⁸⁶

Thirdly, the use of force in pre-emptive self-defence was clarified and restricted by scholars and statesmen. Wheaton thought that it was possible for a state to use force in pre-emptive self-defence but he adopted a cautious stance, finding, based on his own experience as a diplomat, that it would only be justifiable in a few circumstances, such as “where excessive augmentation”¹⁸⁷ of an enemy’s military and naval forces “may give just ground of alarm to its neighbours.”¹⁸⁸ The *Caroline* case set a high threshold for its legitimate use.

Fourthly, with regard to the use of force by non-state actors, most of the scholars discussed here addressed the issue of how a state ought to respond. Zouche addressed the issue by defining who was an ‘enemy’ of the state and he thought that robbers, who went about in the manner of enemies without the authority of a

¹⁸⁴ See von Elbe, *J The Evolution of the Concept of the Just War in International Law* (1939) 33(4) *AJIL* 665 at 685-87.

¹⁸⁵ *Ibid.*, at 685, n157.

¹⁸⁶ Throughout this epoch, kings continued to refer to the justness of their cause when declaring war and ending war. For example, when the Emperor of Russia declared war against Turkey in 1828, 1853 and 1877, he referred explicitly to Russia’s ‘holy and just cause’. Likewise, when the King of England entered the war of 1812 against the United States, it was supposedly ‘under the favour of Providence, relying on the Justice of his Cause’: *ibid.* See also the discussion in chapter 10 regarding references to the ‘just cause’ of the US in speeches by President Bush before using force against Afghanistan.

¹⁸⁷ Wheaton, *Elements of International Law*, *supra* n10 at §63 at 76-77.

¹⁸⁸ *Ibid.*

state, including brigands on land and pirates at sea, did not qualify for the status of 'lawful enemy'; therefore it was lawful to "offend and utterly destroy" them.¹⁸⁹ Rachel took a similar view, as did Textor who wrote that war was fought between "royal and quasi-royal powers"¹⁹⁰ because "war-making belongs to kings or those having like power, and not to private persons."¹⁹¹ Bynkershoek wrote that "Those who rob on land or sea without **the authorisation of any sovereign**, we call pirates and brigands"¹⁹² and the proper method of dealing with them was to try them in a court and, if necessary, punish them accordingly. Wheaton also took the view that "irregular bands of marauders are liable to be treated as lawless banditti"¹⁹³ and were not entitled to the "mitigated usages of war as practiced by civilized nations".¹⁹⁴ The consequence of this approach was that a declaration of war was not considered the appropriate response for the criminal actions of non-state actors such as pirates and bandits. A parallel was also drawn between the use of force by anarchists in the late nineteenth century and early twentieth century and modern terrorists. One of the reasons why the international community struggled to combat anarchism was the fact that several states (including France, Great Britain and the US) did not sign the 1904 St Petersburg protocol, and agreement could not be reached on the establishment of a central anti-anarchist intelligence bureau for information exchange across various nations.¹⁹⁵

Fifthly, it has been observed that this period witnessed the rise of the concept of state sovereignty and the right of war. It was logical that with the quality of supreme, or absolute authority, came the supreme or absolute authority to wage war. Indeed, waging war became a mark, even the 'litmus test', of sovereignty.¹⁹⁶ War, and forcible measures short of war (such as reprisals) were not the *only* method of dispute resolution, but the use of force was undoubtedly perceived as an expression of sovereignty.¹⁹⁷ Wheaton made frequent reference to the 'right of

¹⁸⁹ Supra at 182.

¹⁹⁰ Supra at 169, n52 and accompanying text.

¹⁹¹ Ibid.

¹⁹² Bynkershoek, *Questionum Juris Publici Libri Duo*, supra n 69, Book I, chapter XVII, para 122, at 98 of Frank's translation.

¹⁹³ Wheaton *Elements of International Law*, supra n10 at §356, at 379.

¹⁹⁴ Ibid.

¹⁹⁵ See Deflem, supra n191. Implementing the international initiatives in domestic legislation was a problem experienced after both conferences; see Jensen supra n175.

¹⁹⁶ "When the statehood of a specific political entity was in doubt, the best litmus test was comprised of checking whether the prerogative of launching war at will was vested in it": see Virally, M *Panorama du Droit International Contemporain (Panorama of the Contemporary International Law)* (1983) 183 *Rec des Cours* 9, 99; see also Dinstein, supra n109 at 71.

¹⁹⁷ "Trends in state practice toward peaceful settlement of disputes provide a positive feature of the period but it was nevertheless dominated by the right to go to war as an attribute of the sovereign state": Brownlie, supra n123 at 49.

war', reflecting the political reality of his age.¹⁹⁸ Even though the latter part of this epoch witnessed many advances in the peaceful settlement of disputes, and especially in the employment of arbitration,¹⁹⁹ it was nevertheless an epoch in which the right of war became synonymous with the sovereign state.

At the end of the epoch a number of issues relating to the resort to force remained unresolved. A positive prohibition on the use of force by states was needed. Even conventions that attempted to regulate warfare, such as those concluded at the Hague Conferences, did not overtly discourage the resort to war.²⁰⁰ Despite progress in regulating warfare, and associated developments such as the establishment of a Permanent Court of Arbitration, there was no **presumption** against the use of force to solve disputes.²⁰¹ Such a presumption was necessary in order for the self-defence 'exception' to be elevated from a "mere political excuse for the use of force" into a legal concept.²⁰² In addition, the right to use force in self-defence was recognised, but remained undefined, and the question of whether it included a right to pre-emptive self-defence had not been resolved, despite the fact that the *Caroline* case provided some enduring guidelines as to when force would be justified. These issues continued to concern states and further attempts were made to address them in the following epoch of international law, from the League of Nations to the United Nations, from 1919 to 1945.

¹⁹⁸ "Every State has...a right to resort to force, as the only means of redress for injuries inflicted upon it by others...": Wheaton *Elements of International Law* supra n10 at §290, p309.

¹⁹⁹ In the period from 1815 to 1919, there was a 'rebirth of arbitration' under the influence of a broad peace movement which strongly influenced the intellectual evolution of the nineteenth century. Although the right of war existed, there was also a strong movement which emphasised the peaceful resolution of inter-state disputes: Grewe supra n141 at 517-24.

²⁰⁰ The Conventions produced at the Hague Conferences of 1899 and 1907 aimed at providing procedures for the pacific settlement of disputes and, in the event of their failure, the imposition of formal limitations on the manner with which war was waged. No reference was made (with one exception) to the legality of war as such. The one exception was the Second Hague Convention of 1907 regarding the Limitation of the Employment of Force for the Recovery of Contract Debts which provided, in article 1, that: "The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals": see Bowett, supra n101 at 120-21.

²⁰¹ The Permanent Court of Arbitration was established in 1899 as one of the acts of the First Hague Peace Conference.

²⁰² de Aréchaga, J "International Law in the Past Third of a Century" (1978) 159 *Rec des Cours* 1, 96, see also Alexandrov, supra n104 at 26.

CHAPTER 8

Epoch V: From the League of Nations to the United Nations - 1919-1944

Introduction

This epoch traverses the developments that occurred in relation to the *ius ad bellum* in the inter-war period, from the formation of the League of Nations in 1919 until 1944, immediately prior to the formation of the United Nations. A brief summary of the political climate during the transition from epoch IV to epoch V is provided below, followed by the recurring five-part analysis. The emphasis here is on the primary documents that evidenced developments in those five areas. There were two quite different normative orientations towards the use of force during this epoch. From 1919-1928 war was not outlawed: it was permitted but it was regulated via procedural limitations; from 1928-1945 war was expressly prohibited except in certain circumstances, that is, in the case of self-defence or with authorisation from the League. That progression from prevention to prohibition is evident during the course of the inter-war period.

The transition from epoch IV to epoch V

In the previous epoch, the eighteenth and nineteenth centuries witnessed the deterioration of the *bellum iustum* and the evolution of an unrestricted right of war.¹ That trend continued into the early twentieth century when “the majority of writers...following the positivist school, rejected the distinction between just and unjust wars”² and “considered war as an act entirely within the uncontrolled sovereignty of the individual State.”³ However, the right of war was increasingly confronted by a peace movement which focused on the use of arbitral settlement of disputes.⁴ Hague Conferences were held in 1899 and 1907 which highlighted the emergence of a trend towards limiting the right of war. The Hague Conferences resulted in the 1899⁵ and 1907⁶ Conventions for the Peaceful

¹ See chapter 7; see also Grewe, W *Epochs of International Law* (1984) Byers, M (trans and rev, 2000) 530-34; Alexandrov, S *Self-Defense Against the Use of Force in International Law* (1996) 9-11.

² Alexandrov, *supra* n1 at 10.

³ *Ibid.*

⁴ See Grewe *supra* n1 at 524-34.

⁵ International Convention for the Pacific Settlement of International Disputes (Hague I), signed at The Hague on 29 July 1899, entered into force 4 September 1900, UKTS 9 (1901), Cd.798; P. (1902) CXXX, 517; 91 BSP 970; 23 HCT 509; 1907 AJIL Supp 107; 26 Martens (IV) 920; 1 Bevens, 230; 187 CTS, 410.

Settlement of International Disputes. The right of war was also seriously challenged by the establishment of the Permanent Court of Arbitration in 1899 and the Central American Court of Justice in 1907. The establishment of these bodies, and a number of other bilateral arbitration conventions and agreements, such as the Bryan treaties, emphasised that war was increasingly perceived as a last resort, once all other options had been exhausted. That newly evolving attitude towards war was expressed in the 1907 Hague Convention for the Pacific Settlement of International Disputes which did not forbid states from using force but it did attempt to limit recourse to force.⁷

Both the 1899 and 1907 Hague Conventions encouraged states to have recourse, as far as circumstances allowed, to the good offices or mediation of one or more friendly powers. Arbitration had its limitations, the most significant of which was the fact that it was not used for settling *armed* disputes between states. The great political conflicts of the nineteenth century were excluded from arbitral settlement and the idea that arbitration could be used for political disputes of this nature did not arise until after 1919.⁸ Furthermore, Germany was one state that was suspicious of the British-American led arbitration movement. Some German scholars and statesmen regarded compulsory arbitration as being incompatible with sovereignty.⁹ In any case, after Germany's defeat in the First World War, it no longer posed an obstacle to the development of peaceful means of dispute settlement.

In the early 1900s, even before the Hague Conferences, limitations on the use of force by states to recover debt were evolving. The Venezuelan Arbitrations of 1903 laid the foundations for history's first conventional expression of a restriction on the right of states to resort to force.¹⁰ The Venezuelan Arbitrations became the basis of the Porter-Drago Convention, formally known as the Convention Respecting the Limitation of the Employment of Force for the

⁶ International Convention for the Pacific Settlement of International Disputes (Hague I), signed at The Hague on 18 October 1907, entered into force 26 January 1910, UKTS 6 (1971), Cd 4, 575; P (1970-71) XXVIII, 643; 100 BSP, 298; 1908 AJIL Supp, 43; 1 Bevens, 577; 205 CTS, 233.

⁷ "With a view to obviating as far as possible recourse to force in the relations between States, the Contracting Powers agree to use their best efforts to ensure the pacific settlement of international differences": Part I, Article I, the Hague Convention of 1907 for the Pacific Settlement of International Disputes, *ibid*.

⁸ The problems associated with the unification of Germany and Italy, the question of the Balkans, and the political decisions that led to the Crimean War, the Spanish-American War, the Boer War and the Russian-Japanese War could not be removed from the world stage by way of arbitration: Grewe *supra* n1 at 523.

⁹ Koskeniemi, M *The Gentle Civilizer of Nations – The Rise and Fall of International Law 1870-1960* (2002) 211-12.

¹⁰ Rossi, C "Jus ad Bellum in the Shadow of the 20th Century" (1994) 15 *N.Y.L. Sch. J. Int'l & Comp. L* 49 at 51.

Recovery of Contract Debts (Hague II), signed in 1907.¹¹ Although states retained the right to resort to war if the debtor-state failed to reply or submit to a request for arbitration, or perform a settlement, and thus the limitations were rather modest, nevertheless, these developments were important in qualifying an absolute right to war.¹²

The resort to force

Covenant of the League of Nations

The delegates at the Paris Peace Conference of 1919 were determined to implement measures that would prevent a war of such magnitude from occurring again.¹³ Thus, the main objective for which the League of Nations was created was the *prevention of war*.¹⁴ As expressed in the Covenant of the League of Nations, that objective was to be achieved via a tripartite approach: limiting the resort to war in principle, making any act or threat of war a matter of concern to the League and establishing a set of procedures for dealing with such threats. Those three aspects of the Covenant are discussed below.

As for the first element, the Covenant was not an attempt to **prohibit war**, but to provide **safeguards against war**.¹⁵ The Covenant stated that the contracting parties, “in order to promote international co-operation and to achieve international peace and security” would “accept obligations not to resort to war.”¹⁶ Whether war was ‘legal’ or ‘illegal’ therefore depended on whether the elaborate set of procedures for pacific settlement had been followed. The key articles regarding the recourse to force were Articles 10-16.¹⁷ There was no general prohibition on the resort to force and states were permitted to take such action as they considered necessary once the procedures in the Covenant designed to achieve a peaceful settlement had first been applied.¹⁸

¹¹ Convention for the Limitation of the Employment of Force for Recovery of Contract Debts (Hague II), signed at The Hague on 18 October 1907, 36 Stat. 2241, Treaty Series 537, text available online at: <http://www.yale.edu/lawweb/avalon/lawofwar/hague072.htm> (27 February 2006); also reprinted in Scott, J (ed.) *The Reports to the Hague Conferences of 1899 and 1907* (1917) 489.

¹² Rossi, *supra* n11 at 60.

¹³ Report of the Secretariat of the League of Nations, *Ten Years Of World Co-Operation* (1930) 19.

¹⁴ For a general history of the League of Nations see Walters, F *A History of the League of Nations* (1952); Dexter, B *The Years of Opportunity: The League of Nations 1920-1926* (1967); Nussbaum, A *Concise History of the Law of Nations* at 251-61. For a list of general studies of the Covenant, see Brownlie, I *International Law and the Use of Force by States* (1963) 473. For a record of the work done by the League during its first ten years of existence, see *Ten Years Of World Co-Operation* *supra* n14.

¹⁵ “The Members of the League did not believe that they could totally prevent war. They only wished to apply the principle ‘no one can administer justice to himself’”. Statement of Mr Rolin (Belgium), Records of the Second Assembly (1921), Meetings of Committees, Minutes of the First Committee, cited in Alexandrov *supra* n1 at 30.

¹⁶ *Covenant of the League of Nations*, as part of the *Treaty of Peace with Germany (Treaty of Versailles)*; signed 29 June 1919, entered into force 10 January 1920; 2 Bevans 48, 225 CTS 189. This objective is set out in the Preamble to the Covenant.

¹⁷ See Appendix 8 for the text of these articles.

¹⁸ *Ibid*, article 15.

The second feature of the Covenant which aimed to prevent war was the Article 11 provision, which made **war, or the threat of war, a matter of concern to the entire League.**¹⁹ The League had to “take any action that may be deemed wise and effectual to safeguard the peace of nations.”²⁰ This was a significant change because war was no longer “to have the aspect of a private duel” between states.²¹ A breach of the peace was seen to affect the whole community of nations.

The **third** significant element was the Covenant’s creation of a **system for the peaceful settlement of disputes.** If any dispute arose which was “likely to lead to a rupture”²² amongst the Members of the League, they would either submit the matter to arbitration or to inquiry by the League’s Council. The Members also agreed to a ‘cooling-off’ period and to hold back from resorting to war for three months.²³ Although the concept of a cooling off period was not new,²⁴ the overall procedure for seeking peaceful settlement of disputes was novel in its comprehensiveness.

Article 13 specified which disputes were ‘generally suitable’ for arbitration or judicial settlement. The Members agreed to carry out an award or judgment in good faith, and not to resort to war against a Member that complied with the award or decision. If disputes were not referred to arbitration or judicial settlement, they had to be referred to the Council, whose task it was “to endeavour to effect a settlement of the dispute.”²⁵ If the Council’s report was carried unanimously, Members agreed not to go to war with any party to the dispute that complied with its recommendations. However, if the Council failed to reach a unanimous report, excluding the parties to the dispute, Members had the right to take any action that they considered necessary for the maintenance of right and justice.²⁶

¹⁹ Covenant of the League of Nations, article 11. It was a significant change because war was no longer “to have the aspect of a private duel”, rather a breach of the peace was seen to affect the whole community: Brownlie *supra* n15 at 57.

²⁰ Covenant of the League of Nations, Article 11; see also Alexandrov *supra* n1 at 30-31.

²¹ “Any act or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League...”: Covenant of the League of Nations, Article 11.

²² Article 12.

²³ *Ibid.*

²⁴ The Treaties for the Advancement of Peace, concluded by the United States in 1913 and 1914 (generally known as the ‘Bryan Treaties’) provided for a cooling-off period of 12 months during which time an investigation of and a report on a dispute would occur. The parties agreed not to declare war or begin hostilities during the investigation and report.

²⁵ Covenant of the League of Nations, Article 15.

²⁶ *Ibid.*, paragraph 7.

The Covenant was a significant development in the use of international law to restrict states' resort to force. The League's first Secretary-General observed in 1929 that "the mere creation of the League and its continued existence...is one of those great facts which invariably stand out as landmarks in the history of the world."²⁷ By the time the League collapsed, more than 60 international disputes had been brought before it. During its first ten years, 30 disputes were brought before the League and of those, only eight disputants resorted to hostilities or war.²⁸ However, the Covenant ultimately failed to achieve its objective of preventing large-scale warfare. The failure may have been partly due to defects in its framing, such as its theoretical allowance for states to resort to war after the prescribed interval had been observed²⁹ or if the Council was unable to reach a unanimous decision,³⁰ or the fact that the Covenant did not apply to non-Members unless they agreed to be bound.³¹ Despite the presence of those 'gaps' or 'loopholes', in practice they did not have serious consequences and the major reason for the Covenant's failure was more likely due to political factors.³² The major hostilities of the period³³ occurred not because Members took advantage of the loopholes, but because the Members ignored the obligations in the Covenant altogether. Members had legal powers at their disposal which they opted not to employ, thus McCoubrey and White have observed that, "States did not exploit the loopholes, instead they simply knocked down the structure of the League."³⁴

Draft Treaty of Mutual Assistance

Following the League of Nations' Covenant, a number of treaties were drafted which attempted to increase security by further restricting the resort to force. Regardless of whether they eventually came into force or not, each treaty made its own attempt to close the loopholes that existed in the Covenant. The Draft Treaty of Mutual Assistance of 1923 declared, *inter alia*, that aggressive war was an international crime and imposed on the parties an obligation not to commit such a crime. Although the Treaty did not define an act of aggression it was forwarded

²⁷ Drummond, E "Foreword" in *Ten Years Of World Co-Operation* supra n14 at vi.

²⁸ United Nations Office at Geneva, Library/Archives:

<[http://www.unog.ch/80256EE60057D930/\(httpPages\)/C3CC141ADEC42C68C1256F32002E983B?OpenDocument](http://www.unog.ch/80256EE60057D930/(httpPages)/C3CC141ADEC42C68C1256F32002E983B?OpenDocument)> (accessed 17 October 2006).

²⁹ Covenant of the League of Nations, Article 15, paragraph 7.

³⁰ Ibid, Article 15(6).

³¹ Ibid, Article 17.

³² Brownlie, supra n15 at 60.

³³ Such as the Japanese conquest of Manchuria in 1931-32, the Italian conquest of Abyssinia in 1935-36 and perhaps also the Spanish Civil War from 1936-39.

³⁴ McCoubrey, H and White, N *International Law and Armed Conflict* (1992) 21.

to the Governments with a commentary which stated that although there was no definite technical criterion of aggression, that it might be advisable for the Council to fix a neutral zone which the parties would be forbidden to cross, a refusal to obey being considered a factor in deciding which was the aggressor.³⁵ The difficulty of determining which party was the aggressor was acknowledged by the League of Nations' Third Committee.³⁶

Under the conditions of modern warfare, it would seem impossible to decide even in theory what constitutes an act of aggression.

Ultimately, discretion was left to the Council to decide whether a specific act amounted to aggression. This approach was later adopted in the UN Charter.³⁷ The Draft Treaty of Mutual Assistance met with opposition from both within and outside the League. The US and the Soviet Union, non-Member States, both submitted replies pointing out their reasons for opposing it, whilst Great Britain, a Member State, also opposed it.³⁸ Other states pointed out that the determination of an aggressor was uncertain, both on account of the Council's unanimity rule and because of the absence of sufficient criteria.³⁹

Geneva Protocol

In the wake of the failure of the Draft Treaty, there was increasing support in the Assembly for the notion that a refusal to submit to arbitration could be the criterion for defining aggression. The 1924 Protocol for the Pacific Settlement of International Disputes, also known as the Geneva Protocol, represented the interconnectedness of the concepts of security, disarmament and arbitration.⁴⁰ Its main goal was to close the gaps left by Article 15(7) of the Covenant which, as mentioned above,⁴¹ allowed the Members, in the case of a non-unanimous report by the Council, to resort to force after an interval of three months.

The Protocol came close to arriving at a **general prohibition on aggressive war** in the preamble:⁴²

³⁵ *Ten Years Of World Co-Operation* supra n27 at 63

³⁶ *Commentary on the Definition of a Case of Aggression*, Records of the Fourth Assembly (1923), Meetings of Committees, Minutes of the Third Committee, April 16-23 1923, Annex 4.

³⁷ See discussion in Alexandrov supra n1 at 42. For analysis of attempts to define aggression in international law after the First World War, see Wright, W "The Concept of Aggression in International Law" (1935) *AJIL* 373.

³⁸ *Ten Years Of World Co-Operation* supra n27 at 65.

³⁹ *Ibid* at 64-65.

⁴⁰ *Ibid* at 67-68.

⁴¹ Supra n23 and accompanying text.

⁴² Protocol for the Pacific Settlement of International Disputes, 1924, Preamble:

Recognising the solidarity of the members of the international community: Asserting that a war of aggression constitutes a violation of this solidarity and an international crime.

Article 8 declared that the signatory states would undertake to “abstain from any act which might constitute a threat of aggression against another State.”⁴³ Arbitration was the cornerstone of the system set forth in the Protocol; it provided for the compulsory arbitration of all disputes.⁴⁴ Article 10 defined the aggressor as a state that was unwilling to submit its case to arbitration.⁴⁵ There was a presumption of aggression which would remain in place until evidence to the contrary was brought before the Council.⁴⁶

Although the Geneva Protocol was adopted by the Assembly of the League on 2 October 1924, it never came into force. It was signed by 19 nations and ratified by one.⁴⁷ However, Great Britain, among others, opposed its provisions for compulsory arbitration⁴⁸ and instead expressed a preference for the text of the Covenant as it stood, supplemented by “special arrangements in order to meet special needs.”⁴⁹

Although neither the Treaty for Mutual Assistance nor the Protocol came into force they are noteworthy for the spirit which they represented, to strengthen the Covenant and further restrict states’ resort to war. The debate that the Protocol provoked resulted in further negotiations between states which were concerned with concluding arbitration conventions and treaties of mutual security “in the spirit of the Covenant of the League of Nations and in harmony with the principles of the Protocol.”⁵⁰ The Locarno agreements were a direct result of that discussion.

Locarno Treaty

<http://www.worldcourts.com/pcij/eng/documents/1924.10.02_protocol.htm> (accessed 17 October 2006).

⁴³ Ibid, Article 8.

⁴⁴ Ibid, Article 4.

⁴⁵ Ibid, Article 10. This method of defining aggression was seen by the drafters as the solution to the earlier difficulties that had been encountered in the Draft Treaty of Mutual Assistance.

⁴⁶ Geneva Protocol, Article 10.

⁴⁷ The Protocol was signed by: Albania, Belgium, Brazil, Bulgaria, Czechoslovakia, Chile, Estonia, Finland, France, Greece, Haiti, Yugoslavia, Latvia, Paraguay, Poland, Portugal Spain and Uruguay; it was ratified by Czechoslovakia: League of Nations *Illustrated Album of the League of Nations* (1926) 41.

⁴⁸ Foreign and Commonwealth Office, *Official Documents, Historical and Research Papers: History of the FCO*: <<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029395798>> (accessed 17 October 2006).

⁴⁹ *Illustrated Album of the League of Nations* supra n47 at 42.

⁵⁰ This phrase is from the speech of the Spanish delegate, Mr Quiñones de León, in the Sixth Assembly: reproduced in *Ten Years Of World Co-Operation* supra n27 at 76-77.

Limitations on the resort to force by the major European powers were taken a step further in the Locarno Agreements, signed in October 1925, which were ratified and entered into force in 1926.⁵¹ Although they were negotiated outside of the League, they were a direct result of the ideas evolved during the previous years by the organs of the League. The parties to the Treaty of Mutual Guarantee (Germany, Belgium, France, Great Britain and Italy), usually referred to as the Locarno Treaty, were anxious to “satisfy the desire for security and protection which animates people upon whom fell the scourge of the war of 1914-1918.”⁵² The Locarno Treaty did not just refer to ‘war’ or ‘aggression’; it went further to include, at least between some of the parties, ‘attack’ and ‘invasion’.⁵³

Germany and Belgium, and also Germany and France, mutually undertake that they will in no case attack or invade each other or resort to war against each other.

That prohibition broadened the existing restrictions on war but it was subject to exceptions: legitimate self defence, action authorised by the League or if the League failed to reach a unanimous decision to settle the conflict.⁵⁴ The Locarno Treaty, and the various arbitration agreements that were entered into at the Locarno Conference, were evidence of a general desire to prevent states, as far as possible, from using force against one another to settle their disputes and to encourage states to use arbitral and judicial tribunals to settle their differences.

Pact of Paris

The failure of the Draft Treaty of Mutual Assistance and the Geneva Protocol to gain widespread support prompted some states to pursue a new, multilateral agreement. France was particularly interested in pursuing an agreement with the US and the negotiations between them eventually resulted in the signing of the General Pact for the Renunciation of War. The agreement, also known as the Kellogg-Briand Pact or the Pact of Paris, was initially signed by 11 states.⁵⁵ The major flaw in the Covenant of the League of Nations, namely, its failure to

⁵¹ Note that a number of agreements were signed at Locarno, the principal one of interest here is the Treaty of Mutual Guaranty (sic) Between Germany, Belgium, France, Great Britain and Italy, initialled at Locarno on 16 October 1925, signed at London on 1 December 1925; deposited with the Secretariat of the League of Nations on 14 December 1925; entered into force 14 December 1926: 54 LNTS 289.

⁵² Ibid, Preamble.

⁵³ Ibid, Article 2.

⁵⁴ Ibid, Article 2(1), 2(2) and 2(3) respectively.

⁵⁵ General Treaty Providing for the Renunciation of War as an Instrument of National Policy (Pact of Paris), signed 27 August 1928; entered into force on 24 July 1929; 94 LNTS 57 [Pact of Paris]. Eleven states initially signed: Australia, Canada, Czechoslovakia, Germany, India, the Irish Free State, Italy, New Zealand, South Africa, the United Kingdom and the United States. Four states added their support before it was proclaimed: Poland, Belgium, France and Japan. Sixty-two nations eventually signed the pact.

prohibit war as a means of solving inter-state disputes, was remedied in the Pact of Paris.⁵⁶

The Pact of Paris consisted of only three operative articles, the third being of a technical nature. In Article 1, the parties renounced war as a method of solving international controversies, and renounced it as an instrument of national policy in their relations with one another.⁵⁷ This was a significant development. It was the first time that a treaty had come into force that contained a general prohibition on the recourse to war.⁵⁸ By virtue of this article, the Pact of Paris was “an instrument of outstanding importance...[because it declared] in the most categorical terms the absolute illegality of war in pursuit of national policies.”⁵⁹

In Article 2, the parties agreed to submit all their disputes or conflicts to peaceful settlement.⁶⁰ This was not a novel concept, but it underlined the parties’ desire, as expressed in several earlier agreements, to resolve their disputes by peaceful means. The Pact of Paris thereby closed some of the procedural loopholes in the Covenant, by forbidding outright the use of war as a tool of national policy, not just until the parties had complied with the Covenant’s framework.

Although the Pact of Paris was regarded at the time of its signing as a major milestone, it did not achieve its aim of preventing war. One of the signatories noted that “its moral value is greater than its practical significance.”⁶¹ One of its major defects was that it provided no means of enforcement against parties that violated its provisions. In addition, it did not address the use of force in self-defence. The need to determine precisely what type of war was outlawed by the Pact of Paris became apparent at the trials of alleged war criminals subsequent to the conclusion of World War II. The Principles of the Nuremberg Tribunal stated that ‘crimes against the peace’ were punishable under international law, and that ‘crimes against the peace’ included the preparation, planning and initiation of wars of aggression.⁶² The Nuremberg Tribunal adopted the view that the Pact of

⁵⁶ Ibid.

⁵⁷ Ibid, Article 1; see Appendix 9 for the text of Articles 1 and 2.

⁵⁸ The Geneva Protocol of 1924 also contained such a provision but it never gained enough ratifications to enter into force.

⁵⁹ Brierly, J, *The Law of Nations*, Waldock, C (rev) Sixth ed (1963) at 408-09.

⁶⁰ Pact of Paris, *supra* n55, Article 2; see Appendix 9.

⁶¹ Dr Gustav Stresemann, Germany’s Minister of Foreign Affairs, quoted in Bendiner, E *A Time for Angels – The Tragicomic History of the League of Nations* (1975) 228.

⁶² Principles of the Nuremberg Tribunal, 1950, Principle VI (a).

Paris had outlawed *aggressive war*.⁶³ It found that wars of aggression were not only *illegal*, but by virtue of the Pact of Paris and other supporting treaties and declarations, they were also *criminal*. It found that “certain of the defendants planned and waged aggressive wars against 12 nations, and were therefore guilty of war crimes.”⁶⁴ The Nuremberg Judgment confirmed that by the time that World War II broke out, waging an aggressive war was illegal and criminal in international law.

Developments post-Pact of Paris: 1929-44

Subsequent to the Pact of Paris, a number of treaties were concluded which reaffirmed the obligation to refrain from aggressive war.⁶⁵ The Pact was often referred to in state practice and states made an effort to show that their use of force was permissible self-defence, rather than a violation of the Pact.⁶⁶ Statesmen considered the Pact as a source of legal obligations in their communications with one another.⁶⁷

In the post-Pact of Paris period, legal developments regarding the *ius ad bellum* moved in three directions. First, there was an attempt to extend the prohibition in the Pact beyond ‘war’ to include **armed force in general**. States were aware that not only resort to war needed to be controlled, but also resort to forcible measures short of war, such as reprisals.⁶⁸ **Second**, there was an attempt to include in the prohibition **threats** to resort to force. These two developments were incorporated in the Budapest Articles of Interpretation of the Pact of Paris.⁶⁹ Whether those Articles had any effect on the legal limitations on the recourse to force is open to

⁶³ Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30 September and 1st October 1946, “The Charter Provisions”, The Avalon Project at Yale Law School: <<http://www.yale.edu/lawweb/avalon/imt/proc/judlawch.htm>> (accessed 17 October 2006).

⁶⁴ Ibid. The defendants Goering, Hess, Ribbentrop, Keitel, Rosenberg, Raeder, Jodl and von Neurath were all indicted and found guilty on counts one and two which related to participation in a common plan or conspiracy for the accomplishment of crimes against peace (count one) and planning, initiating and waging wars of aggression (count two).

⁶⁵ For example, treaties of non-aggression were signed between Estonia and the USSR (4 May 1932); Poland and the USSR (25 July 1932); Germany, France, Great Britain and Italy (15 July 1933); Romania and Turkey (17 October 1933); Yugoslavia and Turkey (27 November 1933); Greece, Romania, Turkey, and Yugoslavia (9 February 1934): see Brownlie *supra* n15 at 76, n1 for a comprehensive list.

⁶⁶ For example, following hostilities between China and the USSR, the latter claimed that its forces were acting in self-defence and not in violation of the Pact. The same argument was made by Japan in relation to China in 1931. It was cited in the dispute between Peru and Colombia over the presence of Peruvian forces in Columbian territory in 1933. During the Italian-Ethiopian conflict, the obligations of the parties to the Pact were referred to in a report adopted by the Council of the League in 1935.

⁶⁷ For an account of the role that the Pact played in state practice from 1938-1942, see Brownlie *supra* n15 at 105.

⁶⁸ See discussion below under the heading ‘Forcible measures short of war’.

⁶⁹ Budapest Articles of Interpretation, approved by the International Law Association, 8 September 1934, Report of the 38th Conference (Budapest, 6-10 September 1934) at 66-70; see also Hudson, M “The Budapest Resolutions of 1934 on the Briand-Kellogg Pact of Paris” (1935) 29 *AJIL* 92.

debate.⁷⁰ It was not until the UN Charter that the term 'war' was abandoned, but the Budapest Articles evinced an increasing awareness that there were still significant gaps that required urgent attention.

Thirdly, developments occurred during the latter years of this epoch regarding the **definition of aggression**. There is a close relationship between defining aggression and self-defence. Kellogg described the search for a definition of aggression in relation to a definition of self-defence as the "identical question approached from the other side".⁷¹ In 1933, Conventions for the Definition of Aggression were signed which defined the aggressor as the first state to commit any of the following acts: (i) declaration of war; (ii) armed invasion, with or without a declaration of war; (iii) attack on another state's territory, navy or air-force; (iv) naval blockade; (v) aid to armed bands formed on its own territory and invading another state or refusal, despite demands, to take all possible measures to deprive the armed bands of aid and protection.⁷² This definition of aggression was also accepted in the Protocol-Annex of the Balkan Entente⁷³ and a similar definition was adopted in the Saadabad Pact of 1937.⁷⁴ Although the Conventions on the Definition of Aggression did not expressly reserve the right of self-defence, the right presumably arose whenever one of the above acts of aggression occurred.

Those Conventions sought to encompass a much wider range of aggressive activity than the Covenant or the Pact, which only condemned the recourse to 'war'. Although some of the abovementioned conventions were multi-lateral, they lacked the coverage that the Covenant and Pact had attracted.⁷⁵ Nevertheless, they indicated the direction in which the UN Charter would later move, towards expanding the prohibition of war, beyond declared war, to all uses of force.

⁷⁰ Lauterpacht doubts that they had any legal effect on the interpretation of the Pact because the parties to the Pact were aware of the limitations of the term 'war', and opted for it anyway: Lauterpacht, E "The Pact of Paris and the Budapest Articles of Interpretation" (1934) 20 *Transactions of the Grotius Society* 178 at 197-201. Viscount Sankey, in debate in the House of Lords on 20 February 1925, described the International Law Association as a 'purely private and unofficial conference' and denied that its views had any legal effect: see Bowett *Self-Defence in International Law* (1958) 136.

⁷¹ Note of 23 June 1928 in *Foreign Relations of the United States 1928-I* at 36-37.

⁷² Conventions for the Definition of Aggression, signed at London on 3, 4 and 5 July 1933; signed at London on 2 July 1922, ratified by Romania, Poland, Soviet Union, Afghanistan, Persia, Latvia, Estonia and Turkey, acceded to by Finland, 147 LNTS 67; 148 LNTS 79 and 148 LNTS 211, see Article 2; text available online at: <http://www.letton.ch/lvx_33da.htm> (accessed 17 October 2006). See also the discussion in Brownlie supra n15 at 247-48; and Alexandrov supra n1 at 72-73.

⁷³ Signed at Athens on 9 February 1934; 153 LNTS 156; Brownlie supra n15 at 248.

⁷⁴ Signed at Tehran, 8 July 1937, 190 LNTS 21. The Saadabad Pact did not include support for armed bands and naval blockades in its definition of aggression, but it did include aid and assistance to an aggressor.

⁷⁵ The Conventions for the Definition of Aggression entered into force in 1933 and 1934 between Afghanistan, Estonia, Finland, Latvia, Persia, Poland, Rumania, Turkey and the USSR.

Self-defence

Covenant of the League of Nations

The Covenant did not mention the right of states to use force in self-defence. As to why the Covenant failed to expressly reserve a right of self-defence, Bowett suggests that it was possibly because it was deemed unnecessary:⁷⁶

[P]ursuant to the Covenant...defensive war is never prohibited...the military defence of a country is not only a right but even a duty for a member state of the League.

Brownlie also supports the conclusion that members did not consider it necessary to explicitly reserve a right of self-defence: “it was universally agreed that the ‘right of legitimate defence’ was **impliedly reserved** by members.”⁷⁷ Some states regarded the right to self-defence as inherent and thus unaffected by the Covenant.⁷⁸ Whilst others, such as the US, were probably of the view that the use of force in self-defence was a purely political judgment, for individual states to make, and that positive law could not restrict it. That conclusion is drawn from the position taken by the US in relation to the Pact of Paris.⁷⁹

Draft Treaty of Mutual Assistance

The 1923 Draft Treaty of Mutual Assistance was the first treaty of this era to address seriously the question of the aggressive/defensive war distinction. As noted already, the Draft Treaty attempted to limit resort to force by declaring aggressive war an international crime. The issue then arose as to how ‘aggressive war’ should be defined. Although the Draft Treaty did not contain a definition of ‘aggression’ it was forwarded to governments with a commentary on this issue.⁸⁰ The old test of aggression, such as a military mobilisation or a violation of a frontier, had lost its value; instead, it was thought that the test ought to cover “all measures that give evidence to an *intention* to go to war...securing decisive advantages to the aggressor unless action be taken.”⁸¹

⁷⁶ See Bowett *supra* n70 at 124.

⁷⁷ Report to the Assembly by the First Commission, 1931, *LNOJ*, Spec. Supp. No 94; A. 1931 C.I. Annex 18, point 5 of the report; see Brownlie *supra* n15 at 61.

⁷⁸ In 1920, the delegate of the Serb-Croat-Slovene State opposed a proposal that certain territory should be demilitarised referring to the right of self-defence under the Covenant of the League: *Documents on British Foreign Policy, 1919-1939*, First Series, Vol II, No 67 at 821; see comments in Alexandrov *supra* n1 at 37.

⁷⁹ The US Secretary of State Kellogg wrote (with regard to the Kellogg-Briand Treaty) that every nation was free at all times and regardless of any treaty provisions to defend its territory from attack or invasion, and it alone was competent to decide whether circumstances required recourse to war in self-defence: see Note of June 23rd 1928, as quoted in Bowett *supra* n70 at 133.

⁸⁰ *Commentary on the Definition of a Case of Aggression*, Records of the Fourth Assembly (1923), Meetings of Committees, Minutes of the Third Committee at 206-208.

⁸¹ *Ibid.*

Geneva Protocol

The Draft Treaty was followed by the Geneva Protocol which almost provided a self-defence exception to the general prohibition on aggression:⁸²

*[The signatory states] agree in **no case to resort to war with one another** or against a state which, if the occasion arises, accepts all the obligations hereinafter set out, **except in case of resistance to acts of aggression** or when acting in agreement with the Council or the Assembly of the League of Nations in accordance with the provisions of the Covenant and of the present Protocol. (emphasis added)*

Whilst the above provision reserved the right to use force in case of “resistance to acts of aggression”,⁸³ it did not explicitly mention the right to use force in self-defence because the drafters did not think it was necessary to expressly include it. In a preliminary report, two of the national representative to the League of Nations, Mr Politis from Greece and Mr Benes from Czechoslovakia, stated:⁸⁴

The prohibition affects only aggressive war. It does not, of course, extend to defensive war. The right of legitimate self-defence continues, as it must, to be respected. The State attacked retains complete liberty to resist by all means in its power any acts of aggression of which it may be the victim. Without waiting for the assistance which it is entitled to receive from the international community, it may and should at once defend itself with its own force.

That was a clear endorsement that the right to use force in self-defence continued, unaffected by its lack of specific protection in the Protocol. It also underlined that the right to self-defence was triggered by ‘acts of aggression’, the meaning of which was alluded to in Article 10 of the Protocol. An ‘aggressor’ was defined there as a state which resorted to war in violation of the Covenant or the Protocol.⁸⁵ In the event of hostilities breaking out, any state would be presumed the aggressor until the Council had made a unanimous decision to the contrary.⁸⁶ Any state that was a victim of an act of aggression could expect to receive the support of all other member states in a system of collective security.⁸⁷ Thus, Article 2 of the Geneva Protocol came close to recognising the concept of legitimate self-defence in positive international law, and its formula foreshadowed the regime of the UN Charter, allowing the use of force only in self-defence or under the authority of an international organ.⁸⁸

⁸² Geneva Protocol, *supra* n42, Article 2.

⁸³ *Ibid.*

⁸⁴ Records of the Fifth Assembly (1924), Plenary Meetings, at 483; see also Alexandrov *supra* n1 at 43-44.

⁸⁵ Geneva Protocol, Article 10: “Every State which resorts to war in violation of the undertakings contained in the Covenant or in the present Protocol is an aggressor.”

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, Article 11.

⁸⁸ Similar observations made by Alexandrov *supra* n1 at 43; Brownlie *supra* n15 at 70; see also Bowett *supra* n70 at 126.

Locarno Treaty

The following year, the Locarno Treaty went a step further than the Geneva Protocol and expressly reserved the right of self-defence. The mutual undertaking by Germany, France, Great Britain, Belgium and Italy that they would not attack or invade each other or resort to war against each other was subject to the proviso that it would not apply in the case of the exercise of legitimate self-defence.⁸⁹ The assembling of forces in the demilitarised zone would constitute an unprovoked act of aggression, which would also trigger the right to use force in legitimate self-defence.⁹⁰

Pact of Paris

The 1928 Pact of Paris, possibly the most important treaty of the inter-war period, condemned the recourse to war for the settling of international controversies, but it did not mention the right of states to use force in self-defence. However, formal notes were exchanged between the signatories prior to the conclusion of the Pact, which indicated the respective states' positions on this issue.⁹¹ Briand wanted to specifically reserve the right to use force in self-defence⁹² but the US' position was that it was unnecessary to make an express reservation:⁹³

There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense. (emphasis added)

The comments of Germany, Great Britain and Japan revealed their agreement with the US' position.⁹⁴ Ultimately, the American version was the one adopted and the French concerns to have the right of self-defence incorporated in the text were ignored. Even though there was no express reservation of the right of self-defence, the parties agreed that it remained and was not restricted by the Pact. Secretary of State Kellogg's explanation regarding the existence of the right of self-defence, as set out in the Note of 23 June 1928, was circulated to 14

⁸⁹ Locarno Treaty, Article 2(1).

⁹⁰ Ibid.

⁹¹ On the negotiating history, see Shotwell, *J War as an Instrument of Public Policy* (1928); Bowett *supra* n70 at 132ff; Brownlie *supra* n15 at 74ff; and Alexandrov *supra* n1 at 52ff.

⁹² Article 1 of the revised French draft contained several reservations to the renunciation of war: legitimate self-defence, action under the Locarno Treaties and under the Covenant: French Draft, 20 April 1928 in *Foreign Relations of the United States, 1928-I* at 33; Alexandrov *supra* n1 at 54, n14.

⁹³ Note of 23 June 1928 *supra* n71; see also Brownlie *supra* n15 at 80-92 and Alexandrov *supra* n 1 at 54.

⁹⁴ For example see Miller, H *The Peace Pact of Paris: A Study of the Kellogg-Briand Treaty* (1928); also Bowett *supra* n70 at 133.

governments.⁹⁵ The recipients notified acceptance of the US' text and expressly accepted the interpretations put upon it by the US.⁹⁶ Thus, the reservations, if not the text of the Pact of Paris, reserved the right to resort to war in self-defence.⁹⁷

Meaning of self-defence in the Pact of Paris: les travaux préparatoires

To determine the meaning of the right of self-defence that the signatories reserved for themselves, recourse must be had to *les travaux préparatoires*. There was extensive diplomatic correspondence prior to the signing of the Pact that provides insights to the meaning of self-defence as it existed in international law at that time.⁹⁸ Although the notes received from various governments were unilateral statements, lacking the force of formal reservations, they are generally considered to be “an authentic and binding commentary on and interpretation of the text of the Treaty.”⁹⁹ However, it is difficult to determine what the term ‘right of legitimate self-defence’ meant, because each state gave different accounts of what ‘right’ they considered they were reserving.¹⁰⁰ That difficulty was noted by a US Senator at the time as a weakness in the treaty itself.¹⁰¹

The signatories agreed that the right of self-defence was an ‘**inherent**’ or ‘**inalienable**’ or ‘**natural right**’¹⁰² that remained untouched and unimpaired by the Pact,¹⁰³ and they agreed that the right to use force in self-defence could be exercised when a state was **attacked by another country** or **when it was subject**

⁹⁵ Australia, Belgium, Canada, Czechoslovakia, France, Germany, Great Britain, India, the Irish Free State, Italy, Japan, New Zealand, Poland and South Africa.

⁹⁶ For example, see the Czechoslovak Note of 20 July 1928, which noted the reservations and stated that the right of self-defence is in no way weakened or restricted by the proposed treaty and that ‘each power is entirely free to defend itself according to its will its necessities against attack and foreign invasion.’: see Brownlie supra n15 at 237.

⁹⁷ Brownlie claims the parties’ decision to keep the exception out of the text ‘was to deceive public opinion’: ibid at 90.

⁹⁸ Reference to the *travaux préparatoires* is essential to understand why the Pact does not refer to the right of self-defence. It would appear that the signatories did not believe that the prohibition on war applied to self-defence, therefore, no formal reservation of self-defence was necessary: see Report of the Senate Committee on Foreign Relations, *Congressional Record*, 70th Congress, 2nd Session, 15 January 1929 at 1730, as cited in Alexandrov supra n1 at 58.

⁹⁹ Miller, supra n94 at 111; see also Wright, Q “The Interpretation of Multilateral Treaties” (1929) 23 *AJIL* 94 at 104 and 106.

¹⁰⁰ Contrast the statement of Czechoslovakia, supra n100, with that of the Irish Free State: “the pact does not affect in any way the right of legitimate defense inherent in each State”; Japan, which simply reserved the “right of self-defence” and South Africa, which reserved the obligations of the Covenant and the “natural right of legitimate self-defence”: Brownlie supra n15 at 236-37; Alexandrov supra n1 at 52-62.

¹⁰¹ Senator Borah, Chairman of the US Senate Committee on Foreign Relations: “[W]e must admit that the fact that every nation had a right to determine for itself what constitutes self-defense, and how it should apply, is a weakness upon the part of the treaty”. *Congressional Record*, 70th Congress, 2d Session, 3 January 1929, at 1070 as cited in Alexandrov supra n1 at 60, n46.

¹⁰² See discussion in chapters 4, 5 and 6 regarding the natural law origins of the right of self-defence.

¹⁰³ See the United States’ position as set out in Kellogg’s Note of 23 June 1928, supra n83, in which he stated that “the right [of self-defence] is *inherent* in every sovereign state and is implicit in every treaty”; see also the reservation from South Africa which stated that the treaty was not intended to “deprive any party...of any of its *natural right* of legitimate self-defence”: Note of South Africa, 15 June 1928, in *Foreign Relations of the United States 1928-I* at 67; cited in Alexandrov supra n1 at 55, n18. The British position was that the right of self-defence was ‘inalienable’: British Note, 19 May 1928 in *Foreign Relations of the United States 1928-I* at 67. Poland’s position was that the Pact did not affect in any way the right of legitimate defence which was “inherent in each State”: Note of Poland, 17 July 1928, *Foreign Relations of the United States 1928-I* at 119. Similar statements were made in the reservations of Australia, Belgium, Germany and the Irish Free State.

to invasion.¹⁰⁴ Although the right to self-defence was not expressly mentioned in the Pact, and therefore it was not defined, there was some consensus among states as to what the right meant and when it could legitimately be used to justify recourse to war.

The diplomatic correspondence that preceded the signing of the Pact of Paris suggests that the right to wage war in self-defence was only available **when the state was under attack or invasion from another country**. This interpretation was confirmed by Secretary of State Kellogg in a speech that post-dated the abovementioned Notes¹⁰⁵ from individual states:¹⁰⁶

*The question was raised as to whether this treaty [the Pact of Paris] prevented a country from defending itself **in the event of attack**. It seemed to me incomprehensible that any nation should believe that a country should be deprived of its legitimate right of self-defence. No nation would sign a treaty expressly or clearly implying an obligation denying it the right to defend itself **if attacked by another country**. (emphasis added)*

States clearly were concerned that signing the Pact of Paris would impair the inherent right of self-defence. However, even at that time, international law had restricted the right to cases where there was a need to take defensive action occasioned by an attack or invasion from another country. It was *this* right that was deemed by states as being ‘inherent’.¹⁰⁷

The relevance of these points to the overall thesis is based on the observation that the Pact of Paris has a close relationship to the UN Charter. The Pact and the Charter stand together as the two major sources of the customary norm limiting resort to force by states. The Pact of Paris has been described as being:¹⁰⁸

...[P]arallel to and a complement of the Charter. It reinforces the obligations of the latter although in some ways the Charter improves on the Pact by being more explicit in references to “threat or use of force” and self-defence.

¹⁰⁴ The US noted that every state was ‘free to defend its territory from attack or invasion’: Note of the United States *supra* n83; France pointed out that each nation would always remain free to ‘defend its territory against attack or invasion’. Czechoslovakia noted ‘each power is entirely free to defend itself according to its will and its necessities against attack and foreign invasion’: Note of Czechoslovakia, *supra* n96.

¹⁰⁵ This statement was made in November 1929; the previously quoted excerpts from the Notes of France and Czechoslovakia were made in July 1928. Thus, Kellogg was reiterating that this was the correct interpretation of the right of self-defence.

¹⁰⁶ Speech of Secretary of State Kellogg of 11 November 1928, quoted in *Congressional Record*, 70th Congress, 2d Session, 3 January 1929 at 1063, as cited in Alexandrov *supra* n1 at 59-60 and n44.

¹⁰⁷ A number of US Senators admitted to voting for the ratification of the Pact even though they were of the view that it was a “worthless but perfectly harmless peace treaty” and that it would in no way restrict the US’ freedom of action”: *Congressional Record*, 70th Congress, 2d Session, 10 January 1929 at 1467 and 15 January 1929 at 1728. See statements from other US Senators expressing similar sentiments, as cited in Alexandrov *supra* n1 at 60-61. Edwin Borchard argued that as no modern nation had ever gone to war for any motive other than legitimate self-defence, the Pact could hardly ever be legally violated: Borchard, E. “The Multilateral Treaty for the Renunciation of War” (1929) 23 *AJIL* 116 at 117.

¹⁰⁸ Brownlie, *International Law and the Use of Force by States* *supra* n15 at 91..

That close relationship is troublesome in the sense that the UN Charter preserves an ‘inherent right of self-defence’ but that right was not even mentioned in the Pact of Paris, let alone defined. By failing to specifically refer to the right of self-defence, its definition remained open to speculation.

Pre-emptive self-defence

The phrase ‘pre-emptive self-defence’ was not used in any of the inter-war treaties but developments occurred during this epoch which may suggest that states were becoming increasingly concerned that they should be able to act before they became the victim of an act of war or aggression. In 1837, the *Caroline* case¹⁰⁹ provided guidelines as to when force could be used in self-defence. Although US Secretary of State Webster’s formula, that there must be a “necessity of self-defence...instant, overwhelming, leaving no choice of means and no moment for deliberation”¹¹⁰ was issued in the context of an incident that occurred prior to the present epoch, it was cited during this epoch by states that employed force in self-defence.¹¹¹ The *Caroline* case highlighted the fact that states would sometimes be justified in using force prior to an actual act of aggression, based on preparations that were being undertaken.

Covenant of the League of Nations

The 1919 League of Nations Covenant recognised that action could and should be taken against a state even if war had not yet broken out. A dispute could be referred to the League’s Council if there was actual aggression or “in case of **any threat or danger** of such aggression.”¹¹² Article 11 provided that any war or threat of war whether immediately affecting the members of the League or not, was a matter of concern to the whole League¹¹³ and “any circumstance whatever, affecting international relations which threatens to disturb international peace”¹¹⁴ could be brought to the attention of the Assembly or the Council. This implies that the Council could take action in relation to the actions of a state, even though there had not yet been any actual use of aggression by that state.

¹⁰⁹ See discussion of the *Caroline* case in chapter 7 at 175.

¹¹⁰ Parliamentary Papers (1843), Vol LXI; British & Foreign State Papers, Vol 30, 193.

¹¹¹ In relation to the hostilities arising out of Japanese forces in Manchuria in 1931, Japan described its action as “justifiable measures of self-protection on the standard principle laid down in the *Caroline* case”: see Brownlie, *supra* n15 at 242.

¹¹² League of Nations Covenant, Article 10. See Appendix 8 for the text of Article 10.

¹¹³ *Ibid*, Article 11.

¹¹⁴ *Ibid*.

Draft Treaty of Mutual Assistance

The concern amongst nations to reserve for themselves the power to act before they became a victim of aggression was also expressed in the 1923 Draft Treaty of Mutual Assistance. It was noted above¹¹⁵ that the Draft Treaty declared aggressive war to be an international crime which led states to wrestle with the meaning of ‘aggression’. The Commentary which was distributed to Governments with the Draft Treaty stated that the test of aggression should cover “all measures that give evidence to an *intention* to go to war”,¹¹⁶ thereby expanding upon the traditional understanding of aggression which was hitherto limited to *actual* mobilisation of forces or the violation of a frontier.

Geneva Protocol

By virtue of Article 8, the signatories to the Geneva Protocol undertook to:¹¹⁷

*[A]bstain from any act which might constitute a threat of aggression against another State. If one of the signatory States is of opinion that another State is **making preparations for war**, it shall have the right to bring the matter to the notice of the Council. The Council, if it ascertains that the facts are as alleged, shall proceed as provided in paragraphs 2, 4 and 5 of Article 7.*
(emphasis added)

Had it been ratified and entered into force, this Protocol would have given the League the power to investigate *threats* of aggression and impose a variety of measures on potential aggressors, including sanctions. The fact that a state could be brought before the Council for making *preparations for war* implies that collective action of a pre-emptive nature could conceivably have been taken against a state before it had committed an actual act of aggression. But the power to take such action was reserved for the Council, not for individual states.¹¹⁸

Locarno Treaty

The 1925 Locarno Treaty also supports the conclusion that states wanted to be able to take action against neighbours who were preparing for war. Assembly of armed force in the demilitarised zones between Germany and Belgium, and Germany and France, would have given rise to a right to seek assistance from the Council, and for the victim state to call for help from the other Contracting Party, even though an attack, invasion or declaration of war had not yet occurred.

¹¹⁵ Supra at 196; see also n80 and accompanying text.

¹¹⁶ *Commentary on the Definition of a Case of Aggression*, Records of the Fourth Assembly (1923), Meetings of Committees, Minutes of the Third Committee, at 206-208.

¹¹⁷ Geneva Protocol, supra n42, Article 8.

¹¹⁸ See discussion in chapters 9-10 on pre-emptive self-defence.

However, the victim state's options were limited by the requirement that it had to "bring the question at once before the Council of the League of Nations"¹¹⁹ which suggests that the concerned state could not use pre-emptive force without the Council's permission. Thus, the Council's involvement would have presumably prevented the resort to self-help, even in cases of armed attack and frontier incidents.¹²⁰

Pact of Paris

The 1928 Pact of Paris did not address the issue of self-defence nor, logically, pre-emptive self-defence. As discussed above,¹²¹ reference to *les travaux préparatoires* suggests that states nevertheless considered that they retained the right to use force in self-defence. The nature of that right, as defined by the various states, suggests they perceived they would only be entitled to use force to repel an *actual* armed attack, not the *threat* of an attack or the *preparations* for a future attack. The statements referred to above from France, the US and Czechoslovakia suggest that states would only invoke the right to use force in self-defence once they had come under actual attack or were subject to an invasion.¹²² It may be surmised that during the interwar period, although military mobilisation, violation of demilitarised zones and frontier incidents were regarded as serious and worthy of the League's attention, the states did not consider that such incidents would give rise to the right to use force in pre-emptive self-defence. Statesmen were concerned that states should not take matters into their own hands, except in the most flagrant of cases:¹²³

It was essential that such ideas should not take root in the minds of nations which were Members of the League, and become a kind of jurisprudence, for it would be extremely dangerous. Under the pretext of legitimate defence, disputes might arise which, though limited in extent, were extremely unfortunate owing to the damage they entailed. These disputes, once they had broken out, might assume such proportions that the Government, which started them under a feeling of legitimate defence, would no longer be able to control them.

Briand was commenting in the context of the Greek-Bulgarian conflict which broke out on 19 October 1925. Greece's invasion and occupation of Bulgarian territory, in response to the shooting of a Greek officer on the border, was found

¹¹⁹ Geneva Protocol, Article 4.

¹²⁰ Ibid. Alexandrov also interprets the provisions in this way; see Alexandrov, *supra* n1 at 46.

¹²¹ See above at 205-206.

¹²² Ibid, see especially the statement referred to *supra* at n104 and accompanying text.

¹²³ Statement of Mr Briand, President of the League Council, Minutes of the 36th (Extraordinary) Session of the Council, Meeting of 28 October 1925, *LNOJ* (1925) 1709.

to be a violation of the Covenant. Briand, on behalf of the League, took the position that states ought to resort to the Council rather than using force as a measure of self-help. There was a prevailing sense amongst many statesmen that they ought to use all means available to prevent states from using force as a measure of self-help, and to interpret 'self-defence' restrictively. If force was ever to be used pre-emptively, that right was almost certainly reserved for the Council.

Forcible measures short of war

Many of the treaties discussed above referred only to 'war' or 'aggression' which meant that other uses of force, such as reprisals, were excluded by the agreements and seemed to remain lawful.

Covenant of the League of Nations

A number of defects or loopholes were identified above that limited the effectiveness of the League of Nations' Covenant.¹²⁴ Perhaps the Covenant's most significant defect was not its so-called loopholes that left war open as an option to states, but the fact that the Covenant only applied to 'war' in the legal sense. The phrase 'resort to war' in Articles 12 to 16 meant that any uses of force short of declared war were 'under the radar' of the Covenant, and none of its elaborate provisions even applied.¹²⁵ This was evident, for example, in relation to the conflict that occurred between China and Japan between 1937 and 1941 where the victim, the aggressor and all other interested states "actively connived in maintaining the fiction that war did not exist."¹²⁶

As to why the drafters of the Covenant opted for the word 'war', rather than, say, 'recourse to force', no clear reason is discernible. Apparently, the phrase 'recourse to armed force' was used in previous drafts.¹²⁷ Some scholars suggest that the Covenant was modelled on the earlier Bryan Treaties and adopted the same restrictive use of the word 'war'.¹²⁸ On a literal reading of the Covenant's reference to 'resort to war', it would seem that reprisals were excluded. The lack

¹²⁴ Supra 194-96.

¹²⁵ See Appendix 8 for the full text of these articles.

¹²⁶ See Brownlie, supra n15 at 60.

¹²⁷ Miller, D *The Drafting of the Covenant* (1928) at 68, 213, 222 (Vol I) and at 14, 74, 82, 100, 101, 143, 267, 306, 311 (Vol II), as cited in Brownlie supra n15 at 60 and in Alexandrov supra n1 at 34, n33.

¹²⁸ See Brownlie supra n15 at 56-60; see also Bowett, supra n70 at 124; McCoubrey and White supra n34 at 22; and Alexandrov supra n1 at 34-35.

of clarity concerning uses of force short of war was amply illustrated in the 1923 incident between Greece and Italy over Corfu.¹²⁹ Italy bombarded and occupied Corfu as a measure of reprisal, without a declaration of war.¹³⁰ A Commission of Jurists was appointed by the Council to determine whether coercive measures, lacking the character of war, were inconsistent with the Covenant. The Commission's rather unhelpful finding was that:¹³¹

*[C]oercive measures which are not intended to constitute acts of war **may or may not be consistent** with the provisions of Articles 12 to 15 of the Covenant...*(emphasis added)

Although the Covenant did not expressly prohibit the use of armed reprisals, the general consensus amongst the Members of the League was that forcible reprisals and armed interventions were not permitted under the Covenant unless the peaceful settlement procedures had been exhausted.¹³²

Draft Treaty of Mutual Assistance, Geneva Protocol and the Locarno Treaty

By the 1930s, states had become accustomed to using force without a formal declaration of war, under the guise of 'self-defence' or 'reprisal'. The barriers erected by the Covenant, and later by the Pact of Paris, were undermined by the lack of formal declarations of war and the concept of reprisal "was thus deprived of its legal precision and became a caricature which contributed to the undermining of international law's authority."¹³³ The agreements that were drafted between the Covenant and the Pact of Paris, such as the Draft Treaty of Mutual Assistance, the Geneva Protocol and the Locarno Treaty, all attempted to limit the resort to force; but none of them defined 'war' or 'aggression' or mentioned the use of forcible measures short of war, such as reprisals. Thus, they did not assist in clarifying the legal position on the use of reprisals.¹³⁴

¹²⁹ The incident arose out of the murder in Greece of General Tellini, the Italian chairman of the Greek-Albanian boundary commission. Italy addressed an ultimatum to Greece, but Greece refused to pay compensation. In response, Italy bombarded and then occupied the Greek island of Corfu, killing a number of Greeks in the process: see Brierly, *supra* n59 at 411-12; Bowett, *supra* n70 at 124; and Alexandrov at *supra* n1 at 35.

¹³⁰ Italy claimed that since it had no intention of declaring war on Greece, the Council of the League of Nations had no right to deal with the question. Italy viewed its actions not as an act of war but as a temporary measure intended to maintain Italian prestige and to show Italy's resolve to enforce due reparation: for a full account of the incident, see Alexandrov *supra* n1 at 35.

¹³¹ Minutes of the Twenty-Eighth Session of the Council, Sixth Meeting, 13 March 1924, *LNOJ* (1924) 523-27.

¹³² Brierly, "International Law and Resort to Armed Force" (1932) *Camb. L.J.* 308; see also Brierly, *supra* n59 at 412 where he noted that: "the general opinion of jurists was that such armed reprisals taken without prior recourse to pacific settlement were a violation of the Covenant; for, even if not regarded as a recourse to 'war', they were quite inconsistent with the observance in good faith of the express obligations in the Covenant and the Pact [of Paris] to have recourse to pacific means for settling disputes likely to lead to a rupture." He also remarked that, "The Corfu incident and the reply of the jurists at least served as a warning to the draftsmen of the [United Nations] Charter...": see also Alexandrov *supra* n1 at 36-37.

¹³³ Grewe, *supra* n1 at 622.

¹³⁴ But note that the *Nautilaa* arbitration, concluded in 1928, provided guidelines on the use of reprisals: see chapter 7 at 180ff.

Pact of Paris

The Pact of Paris provided a prohibition on ‘**war**’ rather than on the ‘**recourse to force**’. The limitation of the Pact to the renunciation of ‘war’ led to the “disturbing implication”¹³⁵ that the use of force short of war was left to the discretion of each state. The ultimate failure of the Pact of Paris to prevent the use of force by states against one another was amply illustrated in 1931 with the Japanese invasion of Manchuria; in 1935 with the Italian invasion of Ethiopia; and in 1938 when Germany invaded and occupied Austria. In summary, whenever states chose to use force in undeclared wars, the various agreements that were in place to prevent war were inapplicable.¹³⁶

Convention for the Definition of Aggression

The Convention for the Definition of Aggression¹³⁷ represented an important development in limiting resort to forcible measures short of war. It defined the ‘aggressor’ as the first state to invade or attack “with or without a declaration of war”,¹³⁸ thereby preventing states from claiming the right to use force on the basis they were not technically at war. It also declared that a “naval blockade of the coasts or port of another state”¹³⁹ would constitute an act of aggression. Further, it declared that no act of aggression could be justified on the grounds of the internal condition of a state¹⁴⁰ or the international conduct of a state.¹⁴¹ Although it was only ratified by a few states, this document was a genuine attempt to prevent states from using force that fell short of the technical definition of war.¹⁴²

Non-state actors

During this epoch, states generally regarded war and aggression as threats that were posed by other *states*. Conversely, the right to use force in self-defence was a right conferred on states to repel force from other *states*.¹⁴³ But states *were*

¹³⁵ See Dinstein, Y *War, Aggression and Self-Defence* (3rd ed, 2001) 80; also Waldock, C “The Regulation of the Use of Force by Individual States in International Law” (1952) 81 *Rec. des Cours* 455, at 471-74.

¹³⁶ Fourteen years after the signing of the Pact of Paris which supposedly outlawed ‘war’, all of the signatories were belligerents in World War II.

¹³⁷ *Supra* n72

¹³⁸ *Ibid*, Articles 2(2) and (3).

¹³⁹ *Ibid*, Article 2(5).

¹⁴⁰ For example, its political, economic or social structure, alleged defects in its administration, or disturbances due to strikes, revolutions, counter-revolutions: *ibid*, Annex to Article III.

¹⁴¹ For example, the violation of the material or moral rights or interests of a foreign state: *ibid*.

¹⁴² A number of other non-aggression treaties were entered into in the inter-war period, including the Anti-War Treaty of Non-Aggression and Conciliation (Saavedra Lamas Treaty) signed on 10 October 1933 between the US and several South American states, which condemned wars of aggression and which underlined the parties’ commitments to settle territorial questions by methods other than ‘violence’.

¹⁴³ Kellogg: “No nation would sign a treaty expressly or clearly implying an obligation denying it the right to defend itself **if attacked by another country**.”: quoted *infra* at n104.

concerned with the actions of non-state actors and they were acutely aware that individuals' use of force was an issue that international law had to engage with. The 1933 Convention for the Definition of Aggression would have applied to a state which provided aid to armed bands formed on its own territory which invaded another state, as well as refusal, despite demands, to take all possible measures to deprive the armed bands of aid and protection.¹⁴⁴

The threats posed to the state by anarchism were outlined in the previous chapter.¹⁴⁵ Anarchist violence subsided in this epoch, due in part to the emergence of governments that advocated more flexible and progressive social policies.¹⁴⁶ Anarchists were still active in Italy, France and particularly Spain during the fight against General Franco in the Spanish Civil War, but their use of violence and terror tactics across the rest of Europe subsided during this epoch. The overlap between anarchism and terrorism is acknowledged.¹⁴⁷ However, terrorism in a more general sense, and piracy were the two dominant sources of violence from non-state actors during the inter-war period.

Terrorism

Following World War I, there was an upsurge in international activity which sought to control the recent increase in terrorist activity. Under the auspices of the International Conference for the Unification of Penal Law, a number of meetings were held in the late 1920s and early 1930s which focused attention on the problem of terrorism. The assassination on 9 October 1934 of King Alexander of Yugoslavia and Louis Barthou, the French Foreign Minister, led to a request to the Council of the League of Nations for an enquiry. The Council passed a resolution stating that:¹⁴⁸

[T]he rules of international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee efficiently international co-operation in this matter.

The Council decided to establish a committee of experts to consider the question, with a view to drawing up a preliminary draft of an international convention. The

¹⁴⁴ See discussion supra at 202, n71 and see Conventions for the Definition of Aggression, Article 2.

¹⁴⁵ See chapter 7 at 186-87.

¹⁴⁶ See Jensen, R "The International Anti-Anarchist Conference" (1981) 16 *Journal of Contemporary History* 323 at 340.

¹⁴⁷ A simple example of the interconnectedness of these two concepts arises out of events that occurred in 1964, when the anarchist, Stuart Christie, attempted to kill General Franco; he later wrote a book entitled *General Franco Made Me a Terrorist*. See also Bookchin, M *The Spanish Anarchists – The Heroic Years 1868-1936* (1977) especially at 114: "...The identification of Anarchism with terrorism was the result not merely of earlier bombings but of a new emphasis in libertarian circles on 'propaganda by the deed.'"

¹⁴⁸ *Proceedings of the International Conference on the Repression of Terrorism* League of Nations Doc C.94.M.47.1938.V (1938.V3) at 49-50.

culmination of the League's efforts was the 1937 Convention for the Prevention and Punishment of Terrorism.¹⁴⁹ This Convention, which was only ever ratified by one state (India), never entered into force.¹⁵⁰ The 1937 Convention was concerned with 'acts of terrorism' which it defined as criminal acts directed against a state intended or calculated to create a state of terror in the minds of particular persons, or a group of persons, or the general public.¹⁵¹ The Convention criminalised certain acts and sought to ensure that the individuals who committed those acts were dealt with appropriately, namely, via procedures of extradition and prosecution.

If a terrorist act ("a criminal act directed against a state")¹⁵² was committed, the Convention set out the procedure for dealing with the alleged criminals and the method by which they ought to be brought to justice. Even if the states involved disagreed over the way that the processes were being employed, they were not permitted to resort to force. In the wake of a terrorist attack, states would have been compelled to use all methods of peaceful dispute settlement including the option of bringing the matter before the Council of the League of Nations, if all else failed.¹⁵³ Thus, there were a number of peaceful dispute resolution mechanisms open to the dissatisfied party, but employing force was not an option.

Although the threat of terrorism had become significant enough to warrant an international conference and a Convention, it was not seen as a specific threat to aircraft.¹⁵⁴ That fact is evidenced by the adoption of the International Air Transportation Convention and Additional Protocol, concluded in 1929, which addressed a number of issues regarding the safety of air transport, but which did not mention terrorist acts in any of its articles.¹⁵⁵

Piracy

Between 1919 and 1944, a number of developments occurred, the most significant of which was the Draft Convention on Piracy with Comments, referred to here as

¹⁴⁹ Convention for the Prevention and Punishment of Terrorism, 19 LNOJ 23 (1938), League of Nations Doc. 546(I).M.383(I).1937.V (1938) (16 November 1937).

¹⁵⁰ See chapter 2 on the definition of terrorism; see also appendix 7.

¹⁵¹ Article 1(2); see Appendix 7.

¹⁵² Ibid.

¹⁵³ Article 20(3).

¹⁵⁴ Contrast with the following epoch in which numerous conventions were adopted which specifically addressed acts of terrorism on aircraft: see chapter 9.

¹⁵⁵ International Air Transportation Convention and Additional Protocol, concluded at Warsaw on 12 October 1929, 49 Stat. 3000 TS 876, reprinted in Alexander, Y (ed) *International Terrorism: Political and Legal Documents* (1992) 5.

the Harvard Draft Convention.¹⁵⁶ The Harvard Draft Convention was important because the Harvard researchers discussed every possible aspect of sea and air piracy which could conceivably have been raised in 1932, and because the laws on piracy that were eventually incorporated into the International Law Commission's draft articles and ultimately adopted in the 1958 Convention on the High Seas were based on the Harvard Draft Convention. The Harvard Group provided detailed analysis on issues such as the definition of piracy, the meaning and justification inherent in the views expressed by various scholars and in domestic laws that *piracy was a crime against the law of nations*, and whether universal jurisdiction existed in relation to acts of piracy.¹⁵⁷

As for the definition of piracy, the Harvard Group concluded that piracy was not a crime under international law, but that it was merely the basis of some extraordinary jurisdiction in every state to seize, prosecute and to punish persons.¹⁵⁸ How far that extraordinary jurisdiction was used would depend upon the municipal *law of the state*, not on *the law of nations*.¹⁵⁹ Piracy was defined in Article 3 by describing a series of acts.¹⁶⁰ The Harvard Group concluded that a pirate act was “any act of violence or depredation...”¹⁶¹ that was carried out “for **private** ends without bona fide purpose”,¹⁶² thereby excluding acts which were carried out for **political** ends. Notably, the Harvard Draft Convention omitted any reference to the resort to war, aggression, arbitration or sanctions. There was no suggestion in the Draft Convention on Piracy that states would resort to force against one another as a result of piratical acts, nor was there a suggestion that states would have to solve any disputes that might arise by arbitration, reference to the League Council or through any of the other mechanisms that were used at that time to resolve *inter-state* disputes. Acts of piracy were clearly regarded as criminal acts, carried out for private ends, on the high seas, and in response to which states could seize, prosecute and punish in accordance with their respective domestic laws.

¹⁵⁶ Harvard Research in International Law *Draft Convention on Piracy with Comments* (1932) 26 AJIL 749.

¹⁵⁷ See Hubner, B *The Law of International Sea Piracy* (1980) 37-102.

¹⁵⁸ For comments on the Harvard Researchers' findings see Rubin, A *The Law of Piracy*, Second ed (1998) 335-348.

¹⁵⁹ Harvard Draft Convention, 760.

¹⁶⁰ For the full text of the Harvard Draft Convention see Rubin, Appendix III.A.

¹⁶¹ Article 3(1) Harvard Draft Convention.

¹⁶² *Ibid.*

Conclusion

This epoch of international law has traced the developments pertaining to the resort to force, the use of force in self-defence, pre-emptive self-defence, reprisals and the use of force by non-state actors in the interwar period, from 1919-1944. This epoch witnessed a gradual progression from attempts at *preventing* war to *prohibiting* war outright, via binding, multi-lateral treaties as well as bi-lateral, arbitration and non-aggression agreements.

The League of Nations Covenant was a major development in the limitation of the resort to war by states. It had many flaws, but it also represented a genuine desire by members to avoid the use of war to solve disputes. It was a major turning point in the development of international law relating to the recourse to force because, by virtue of its procedures for the pacific settlement of disputes, it created a clear legal distinction between ‘legal’ and ‘illegal’ wars. ‘Legal’ wars were those that were waged once the rules in the Covenant had been complied with. ‘Illegal’ wars were those that had been waged without proper resort to the peaceful means of dispute resolution. However, the Covenant did not prohibit war, nor did it prohibit the recourse to force short of war. Armed reprisals and interventions were still permitted. Although the term ‘self-defence’ was not used in the Covenant, Members generally considered that the right continued to exist.¹⁶³

The foregoing analysis referred to a number of treaties concluded in the early 1920s that attempted to refine the *ius ad bellum*. Among them the most notable were the 1923 Draft Treaty on Mutual Assistance, the 1924 Geneva Protocol for the Pacific Settlement of Disputes and the 1925 Locarno Treaties. Each of these represented a step in the development of legal norms restricting the use of force. The culmination of these efforts was the 1928 General Treaty for the Renunciation of War/Kellogg-Briand Pact/Pact of Paris, which condemned the use of *war* for the settlement of international controversies and supposedly prohibited the use of force as an instrument of national policy.

¹⁶³ In a statement of the First Committee in its report to the Assembly in 1931, it was stated that: “One point appears beyond dispute – namely, that...in the Covenant of the League in its present form...the prohibition of recourse to war [does not] exclude the right of legitimate self-defence”: Report to the Assembly by the First Committee, *Records of the Twelfth Assembly* (1931), Meetings of Committees, minutes of the First Committee, Annex 18, point 5 at 146; see Alexandrov *supra* n1 at 37.

When these treaties are read in conjunction with resolutions of the League Assembly¹⁶⁴ they suggest that there was an evolving international consensus in favour of a broad prohibition on the resort to war as a means of resolving disputes between states, whilst simultaneously preserving the right of states to use force in legitimate self-defence (even though the latter right was implicitly, rather than explicitly, preserved). States assumed that the right to self-defence remained unaffected by the treaties that were entered into, and states remained free to determine the exact content of that right leading to a situation where there was an absence of consensus as to exactly what the right of self-defence meant. Nevertheless, there was general agreement that international law allowed force to be used in self-defence if a state was the subject of attack or invasion by *another state*.¹⁶⁵

Regarding pre-emptive self-defence, it was observed that the Council of the League of Nations could theoretically take action *before* a threat had materialised into aggressive action, but the parameters of when force could be used in pre-emptive self-defence were not defined. If the right existed, it was only to be exercised in response to an actual armed attack, not the threat of attack, and it vested in the Council, not in individual states.

The use of reprisals was also analysed here and it was noted that the use of the terms 'war' and 'aggression' employed by the drafters of treaties allowed states to employ force that was not technically prohibited. Reprisals, which are essentially punitive in nature, and which have been employed throughout the epochs of international law, continued to be used in this epoch not as a means of protection (thereby distinguishing it from self-defence) but as an apparently lawful means of exacting revenge for harm done to a state.

The fifth and final theme that was highlighted here was the evolution of the threat posed by non-state actors. It was noted that as the threat from anarchism receded, the threat from piracy remained and terrorism in a more general sense became a source of considerable concern. States looked increasingly to international law to

¹⁶⁴ For example, the Sixth Assembly adopted a resolution on 25 September 1925 which stated that a 'war of aggression' constituted 'an international crime': Resolutions of the Sixth Assembly, *Records of the Committees of the League of Nations Assembly*, p21, A. 1925; as discussed in Brownlie *supra* n15 at 71-72.

¹⁶⁵ *Supra* at 207, especially n106.

provide protection from the criminal actions of individuals. Important treaties were drafted in relation to both terrorism and piracy. Even though the 1937 Convention for the Prevention and Punishment of Terrorism did not enter into force, this and the Harvard Draft Convention on Piracy amounted to recognition by states that they were increasingly concerned with the threat posed to their security by non-state actors.

This chapter has summarised the law regarding the resort to force by states, as it stood immediately prior to the adoption of the UN Charter. In chapter 9 it will be observed that since Article 51 of the Charter reserves the ‘*inherent* right of self-defence’ there must have been a right that existed **prior** to the Charter. This chapter, together with the preceding four, has shown that a right to self-defence certainly *did* exist; the right was recognised in reservations by the state signatories to the Pact of Paris as already being in existence in 1928, but it was a vague concept and there was no consensus on its precise content.

CHAPTER 9

Epoch VI: From the United Nations Charter to the present (1945-2006)

Introduction

The sixth and final epoch in international law focuses on the developments that occurred between the signing of the UN Charter and the present. The analysis here is based primarily on international treaties, judgments of the International Court of Justice and resolutions of the General Assembly and the Security Council, with an acknowledgment of the importance of the *opinio juris* of states, and an analysis of the contributions made by academics on these controversial issues.

Limiting the resort to force

Dumbarton Oaks

The signing of the UN Charter on 26 June 1945 was the most important development in this epoch regarding limitations on the resort to force.¹ The Charter was based on the Dumbarton Oaks Proposals for a General International Organisation. The main purpose of the new organisation was to “maintain international peace and security”² and to “take effective collective measures for the prevention and removal of threats to the peace”.³ The Dumbarton Oaks Proposals encapsulated a desire to limit the opportunities for states to employ the use of force by moving beyond the earlier treaties’ restrictive references to ‘war’ or ‘aggression’ and include ‘threats to the peace’ or ‘other breaches of the peace.’ The primary responsibility for determining when such a threat to, or breach of, the peace had occurred was to be given to the Security Council⁴ which would have the power to “[D]etermine the existence of any threat to the peace, breach of the peace or act of aggression”.⁵ The Security Council was then supposed to make recommendations or decide upon the measures to be taken to maintain or restore peace and security.

¹ The UN Charter, signed on 26 June 1945, following final approval by the UN Conference on International Organization the previous day; see UNCIO, *Verbatim Minutes of the Ninth Plenary Session*, Doc 1210, 20.

² Dumbarton Oaks Proposal for a General International Organisation, Chapter 1, Article 1, as reproduced in Ferencz, B *Defining International Aggression* Vol 1 (1975) 285-306.

³ Ibid.

⁴ Ibid, Chapter 2, Section B, Article 1, as reproduced in Ferencz, *ibid* at 291-92.

⁵ Ibid, Article 2, as reproduced in Ferencz, at 297-98. This wording is very similar to that adopted in Article 1 of the UN Charter, reproduced in Appendix 11.

The Committee which had been assigned to make recommendations on this article realised that a definition of ‘aggression’ or ‘threat to the peace’ was required in order for the Security Council to carry out effectively its duties.⁶ The various suggestions by states regarding whether a definition was needed and what form it ought to take were indicative of the divide that existed.⁷ The four main powers responsible for drafting the original proposals (the US, the UK, the Soviet Union and China) did not support the call for a definition but they suggested an amendment which would have given the Security Council the power to call upon parties to comply with provisional measures and would have directed the Security Council to take due account of any state’s failure to comply.⁸

The definition of aggression was the subject of much discussion in the Ninth and Tenth Meetings of the Third Committee in May 1945. A number of states⁹ were in favour of including a specific definition in the Charter on the grounds that it should be known beforehand what acts would constitute aggression and, consequently, what acts would be subject to sanctions, but the majority, led by the US and the UK,¹⁰ opposed the inclusion of a definition on the grounds that “it would be impossible to enumerate all the acts that constitute aggression.”¹¹ They were also concerned that including a list of acts which would attract *automatic* Council action might bring about a “premature application of enforcement measures.”¹² The Rapporteur, Mr Paul-Boncour, confirmed that the majority of states did not support the amendment of the Dumbarton Oaks Proposals to include a definition of aggression.¹³ Those states were clearly in favour of leaving the

⁶ See Committee 3 of Commission III; see Russell, R A *History of the UN Charter – the Role of the United States 1940-1945* (1958).

⁷ Czechoslovakia did not favour a specific definition because “past experience has proved sufficiently that rigidity and over-elaborate definitions may not always produce the desired results”: UNCIO Doc 2 (English) G/14(b), 1 May 1945, as reproduced in Ferencz, *supra* n2 at 307-312. Bolivia considered that “a previous definition of typically aggressive acts is absolutely essential”; the Philippines also proposed that a definition of ‘aggression’ be written into the Charter: see Appendix 10. Iran and Egypt agreed that the Charter should include a clear and exact definition of the term ‘aggressor’ without offering a specific definition. Mexico considered that the General Assembly ought to have a say in determining which state was the aggressor. New Zealand wanted concurrence by majority vote of the Assembly before sanctions could be applied. Greece suggested that if the Security Council could not decide on which party was the aggressor, it could take a decision by a majority of 7: *UNCIO Amendments to Dumbarton Oaks Proposals Supplemented by the Texts Adopted at Yalta, Submitted by the Greek Delegation, 3 May 1945* Doc 2 (English) G/14 (i) 4 May 1945, Chapter VI Section C, Chapter VIII Section A, as reprinted in Ferencz, *supra* n2 at 328-30.

⁸ *UNCIO Amendments Proposed by the Governments of the United States, the United Kingdom, the Soviet Union and China* Doc 2 (English) G/29 5 May 1934, Chapter VII Section B, as reprinted in Ferencz, *ibid* at 331-37.

⁹ The delegates from Bolivia, Columbia, Egypt, Ethiopia, Guatemala, Honduras, Iran, Mexico, New Zealand and Uruguay felt that “the Council’s work would be facilitated if a definite list were written into the Charter”: *UNCIO Summary Report of Ninth Meetings of Committee III/3, 18 May 1945* Restricted Doc. 442 (English) III/3/20 19 May 1945, as reprinted in Ferencz, *ibid* at 345-346.

¹⁰ Supported by Czechoslovakia, the Netherlands, Norway, Paraguay and the Union of South Africa

¹¹ *UNCIO Summary Report of Ninth Meetings of Committee III/3, 18 May 1945* Restricted Doc. 442 (English) III/3/20, 19 May 1945.

¹² *UNCIO Report of Mr Paul-Boncour, Rapporteur, on Chapter VIII, Section B*, Restricted Doc. 881 (English) III/3/46 10 June 1945, as reprinted in Ferencz, *supra* n2 at 352.

¹³ “Although this proposition [the Bolivian proposition for a definition of aggression] evoked considerable support, it nevertheless became clear to a majority of the Committee that a preliminary definition of aggression went well beyond the possibilities of this Conference and

Security Council with the *absolute discretion* to decide when an act of aggression had occurred.¹⁴ The course of the debate suggests that in June 1945 there was a complete lack of consensus amongst states as to what acts would constitute ‘aggression’ and a lack of desire amongst the majority of states to attempt to define the term.¹⁵

As the records show, there seemed to be a considerable amount of self-interest involved in so far as the major powers (the proposed Permanent Members of the Security Council) wanted a document that would promote the ideals of peace and security, but they also wanted the discretion to judge when an act of aggression had occurred, without being hampered by a list of actions that would attract automatic Security Council action. It was argued that any act of aggression, even an “invasion by armed force of a foreign territory”¹⁶ could, in some circumstances, be justified as ‘legitimate self-defence.’ Therefore, the UN Charter represented not so much an advance on the *status quo*, as a confirmation of it, whereby states would retain the power to use force if it was deemed to be in legitimate self-defence and not an act of aggression. However, what would constitute an act of aggression remained unclear because the majority of states were absolutely opposed to defining the crucial term.

The UN Charter

The text ultimately adopted in Article 2(4),¹⁷ which created a general prohibition on the use of force, was similar to that of the Dumbarton Oaks Proposals.¹⁸ This provision not only proscribed the use of force, but the *threat* of force and its reference to *force* instead of ‘war’ or ‘aggression’ encompassed a much broader range of action.¹⁹ The Charter provided four possible exceptions to the general prohibition (only two of which are currently relevant): the use of force in individual or collective self-defence under Article 51 and enforcement actions

the purpose of the Charter. The progress of the technique of modern warfare renders very difficult the definition of all cases of aggression....the list of such cases being necessarily incomplete...”: *ibid.*

¹⁴ “The Committee therefore decided to adhere to the text drawn up at Dumbarton Oaks and to leave to the Council the entire decision as to what constitutes a threat to peace, a breach of the peace, or an act of aggression.”: *ibid.*

¹⁵ The discussion on the subject of including criteria for an act of “aggression” continued into the Tenth Meeting of the Third Committee, held on 21 May 1945: see UNCIO *Summary Report of Tenth Meeting of Committee III/3, May 21 1945* Restricted Doc. 502 (English) III/3/22 23 May 1945, as reprinted in Ferencz *supra* n2 at 347-48.

¹⁶ “There was no one kind of act, defined as an act of aggression, which in conceivable circumstances, might not be a legitimate act of self-defense.”: UNCIO *Summary Report of Ninth Meetings of Committee III/3, 18 May 1945* Restricted Doc. 442 (English) III/3/20 19 May 1945, as reprinted in Ferencz *supra* n2 at 346.

¹⁷ Reproduced in Appendix 11.

¹⁸ Article 2(4) was based on Chapter II, Article 4 of the Dumbarton Oaks Proposals and the wording is the same except for the Charter’s addition of the phrase “against the territorial integrity or political independence of any state”.

¹⁹ Including forcible measures short of war, see discussion below.

authorised by the Security Council under Chapter VII.²⁰ The general prohibition on the recourse to force in Article 2(4) was further strengthened by the requirement in Article 2(3) that members settle their differences by peaceful means, reaffirming a requirement that had been included in virtually all peace and non-aggression treaties discussed in the preceding epoch.²¹

Since its incorporation in Article 2(4), the prohibition on the recourse to force has been reaffirmed by the Security Council, the General Assembly and the ICJ. When adopting resolutions pertaining to actual or potential armed conflict, the Security Council has often referred explicitly or implicitly to the Article 2(4) principles.²² The General Assembly adopted the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty in 1965²³ and then the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, in 1970.²⁴ Both Declarations included articles that were virtually identical to Article 2(4).²⁵ The ICJ (and states that have made submissions to it) has also reaffirmed that the prohibition on the use of force is not only treaty law, but it also represents customary law.²⁶

Other legal instruments regarding limitations on the use of force

At the same time that the victorious states were meeting in San Francisco to discuss the Charter, the war crimes tribunals were faced with the practical problem of defining 'aggression' in order to facilitate prosecutions of alleged war criminals. The issue of whether 'aggression' should be defined and, if so, how, was just as contentious in the discussions prior to the adoption of the Charter for

²⁰ The other two theoretical exceptions (collective use of force before the Security Council is functional, pursuant to Article 106, and force against 'enemy' states pursuant to Articles 107 and 53,) are now considered to be largely irrelevant and unlikely to be relied upon by member states: see Arend, A and Beck, R *International Law and the Use of Force* (1993) 32-33; also Akehurst, M *A Modern Introduction to International Law* (5th ed, 1984) 225. Although the Charter originally provided for four explicit exceptions, only two are now considered extant (self-defence pursuant to Article 51 and action authorised by the Security Council pursuant to Chapter VII). Some scholars would argue that there are currently three exceptions to the prohibition on the resort to force, by dividing self-defence into individual and collective self-defence.

²¹ Article (3) is reproduced in Appendix 11. Article 2(3) employs the same wording used in the Dumbarton Oaks Proposals except for the Charter's addition of the phrase 'and justice'.

²² In relation to the 1980 Iran-Iraq conflict, explicit reference to Article 2(4) was made in SC Resolution 479 (1980); regarding the Ethiopia/Eritrea conflict, implicit reference to Article 2(4) was made in SC Resolution 1177 (1998).

²³ UNGA Resolution 2131 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, 1408th plenary meeting 21 December 1965.

²⁴ UNGA 2625 (XXV) Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, 1883rd plenary meeting, 24 October 1970.

²⁵ See the 1965 Non-Intervention Declaration, *supra* n25, second paragraph and the 1970 Declaration Concerning Friendly Relations, *supra* n26, the first principle.

²⁶ *Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Reports 14: <http://www.icj-cij.org/iccjwww/icasess/inus/inus_ijudgment/inus_ijudgment_19860627.pdf> (accessed 30 October 2006) at para 188.

the International Military Tribunals (IMT Charter) as it had been prior to the adoption of the UN Charter. The American delegation took the view that a detailed and precise definition, such as that used in the 1933 Convention on Aggression,²⁷ ought to be adopted, but it was ultimately defeated.²⁸ Although the parties to the IMT Charter were deeply divided over what 'aggression' meant, it did not prevent them from finding that the alleged war criminals were responsible for initiating aggressive wars.

In essence, the international community was unable and unwilling to define a 'war of aggression.' This lack of definition has implications for the meaning of self-defence since wars of aggression and wars of self-defence are opposite sides of the same coin. The international community continued to conclude treaties and conduct its relations on the basis of an assumption of the illegality of aggressive war, as evidenced by the Pact of the Arab League,²⁹ the Inter-American Treaty of Reciprocal Assistance,³⁰ the Charter of the Organisation of American States³¹ and the 'Five Principles of Peaceful Co-Existence'.³² Since the early years of this epoch the general illegality of the use of force as a means of self-help has been accepted by states. An international consensus has emerged that deems aggressive war illegal, regardless of motive. Treaties, state practice, and international bodies such as the General Assembly, the Security Council and the ICJ have continued to reiterate that basic norm. However, the difficulty of defining what amounts to aggressive war has not been overcome. As with the difficulties in defining 'terrorism',³³ states prefer to be left to decide matters on a case-by-case basis without being beholden to the limitations of an entrenched definition.

²⁷ The so-called 'Litvinoff' definition of aggression.

²⁸ *Revision of Definition of "Crimes", Submitted by American Delegation, July 31 1945.* Note that the International Military Tribunal for the Far East was modelled on the Nuremberg Tribunals and as such, virtually the same terminology was adopted. The Tribunal did not have a definition of 'aggressive war' but it assumed that in its present context it meant "unprovoked attacks, prompted by the desire to seize the possessions of these nations": *International Military Tribunal for the Far East, Judgment, Conclusions.*

²⁹ The Pact of the Arab League stated that "recourse to force for the settlement of disputes..." was prohibited: Article 5, Pact of the Arab League, signed 22 March 1945, translation in (1945) 39 AJIL Suppl. p266; 70 UNTS No 241. The original parties were Syria, Transjordan, Iraq, Saudi Arabia, Lebanon, Egypt and Yemen.

³⁰ The parties reaffirmed that they condemned war and they undertook "not to resort to the threat or use of force in any manner inconsistent with the provisions of the Charter of the UN or this Treaty": Inter-American Treaty of Reciprocal Assistance, Rio de Janeiro, 2 September 1947, came into force 3 December 1948, 21 UNTS no 334, Article 1.

³¹ Also known as the Bogotá Charter, it stated that the American States "condemn wars of aggression" and they bound themselves "not to have recourse to the use of force" except in the case of self-defence: The Charter of the Organisation of American States of 1948, 30 UNTS no 449.

³² They were originally contained within a treaty between India and China and became widely accepted by states as expressing principles similar to those of the Charter. The *Pancha Shila* or Five Principles, have been affirmed in a vast number of documents. Between 1954 and 1962, Brownlie lists 81 documents, including treaties, declarations and communiqués that mentioned the Five Principles: see Brownlie, *International Law and the Use of Force by States* (1963) Appendix I.

³³ As discussed in chapter 3.

Self defence

Article 51 of the Charter provides an exception to the general prohibition on the use of force.³⁴ This Article consists of various individual elements which must be satisfied prior, or subsequent, to force being employed by a state in self-defence. The five main elements of Article 51 are discussed in turn below.

- *Nothing...shall impair the **inherent** right of individual or collective self-defence...*

Article 51's reference to an *inherent* right of self-defence has been the subject of considerable debate. One interpretation is that Article 51 supplements a customary law right of self-defence that existed prior to the Charter and which continues to exist. This interpretation would not require a state to prove that it had suffered a prior 'armed attack' before resorting to force in self-defence (the so-called 'broad interpretation' of Article 51). The other possible interpretation is that the combined effect of Articles 2(3), 2(4) and 51 of the UN Charter extinguishes any other right to resort to force, otherwise than in accordance with the strict letter of the Charter (the so-called 'restrictive interpretation'). This interpretation suggests that any customary law right is subservient to the wording of Article 51. Both interpretations are supported by a body of scholarly opinion.³⁵

Proponents of the restrictive interpretation include Brownlie,³⁶ Henkin³⁷ and Kelsen³⁸ who consider that Article 51 contains the *only* right of self-defence permitted under the Charter.³⁹ More recently, other scholars who have reached the same conclusion include Kathryn Elliott,⁴⁰ Stanimir Alexandrov⁴¹ and Alex Conte.⁴² The restrictive interpretation of Article 51 is based in part on the

³⁴ Reproduced in Appendix 11.

³⁵ See McCormack, T *Self-Defense in International Law: The Israeli Raid on the Iraqi Nuclear Reactor* (1996) 122-148; Ross, A "The Military Response to Terrorism: Self-Defence and Reprisals in International Law", unpublished Honours thesis, University of Auckland (1989) Section III; and Dinstein *War Aggression and Self-Defence* Third ed (2001) Part III.

³⁶ Brownlie, *supra* n32 at 273.

³⁷ Henkin, L *How Nations Behave* (1968) 262.

³⁸ Kelsen, H *The Law of the United Nations* (1951) 792.

³⁹ Brownlie cited authorities dating back to 1948 such as Goodrich and Hambro, Kunz, Briggs, Jessup, Bebr, Nguyen Quoc Dinh, Wehberg, Sloan, Zourek, Nasim Hassan Shah, Skubiszewski, Schwarzenberger, Al Chalabi, Jiménez de Aréchaga, and see also the reports of the Sixth Committee's meetings cited in Brownlie, *supra* n32 at 271, fn 5.

⁴⁰ Elliott, K "The New World Order and the Right to Self-Defense in the United Nations Charter" (1991) 15 *Hastings Int'l & Comp. L. Rev* 67.

⁴¹ Alexandrov, S *Self-Defense Against the Use of Force in International Law* (1996) 93. "...the question has been asked whether *apart from the right of self-defense in Article 51, there was some other "inherent" right of self-defense, "unimpaired" by Article 2(4), which was not affected by the Charter.* The answer is clearly in the negative." (emphasis in original).

⁴² Conte, A *Security in the 21st Century* (2005) 102.

Charter's *travaux préparatoires*. The Dumbarton Oaks Proposals did not originally refer to self-defence but, as with the League of Nations' Covenant and the Pact of Paris (neither of which mentioned the right of self-defence), that was not interpreted as precluding the right to use force in self-defence.⁴³ States such as China and the US raised the issue of whether a specific right of self-defence should be mentioned but states chose not to specifically include a 'right of self-defence' on the basis that the issue would probably be raised at the Conference.⁴⁴ At the San Francisco Conference, the view of Committee I/1 was that the "use of arms in legitimate self-defense remains admitted and unimpaired."⁴⁵ In considering the prohibition on force in Article 2(4), some states thought it would be useful to include a provision justifying the use of force in self-defence in response to an attack by another state, but no amendment was adopted.⁴⁶

The provision on self-defence only made its way into the UN Charter because of a disagreement over regional security arrangements.⁴⁷ The Dumbarton Oaks Proposals would have allowed the Security Council to veto any action proposed by a regional organisation, a prospect which was unacceptable particularly for the Latin American states.⁴⁸ The various amendments that were put forward emphasised that self-defence action had to be preserved in case the Security Council was unsuccessful in preventing aggression or in the event that the Security Council failed to take the necessary measures to maintain or restore international security. Although states were willing to accept that the Security Council retained control over all uses of force, there had to be a mechanism to allow states to repel an attack by another state, if the Council was *unable* or *unwilling* to act. Eventually, the Russian delegation's suggestion of a phrase that started with the words, "nothing in this Charter impairs the inherent right of self-defence..." was adopted.⁴⁹

⁴³ When conducting a paragraph-by-paragraph study of the Dumbarton Oaks Proposals, the US delegation agreed that the right of self-defence was "an inherent right of sovereignty, not deniable by the projected Charter": see Russell supra n6 at 599.

⁴⁴ Ibid.

⁴⁵ Report of the Rapporteur of Committee I/1 to Commission I, *UNCIO Documents*, Vol 6, at 459.

⁴⁶ See Turkey's statement, *UNCIO Documents* Vol 4, at 675.

⁴⁷ See Chapter VIII, Section C "Regional Arrangements" in the Dumbarton Oaks Proposals for the Establishment of a General International Organization, reproduced in Russell, supra n7 at Appendix 1. The problematic provision was paragraph 2 which stated that no enforcement action should be taken under regional arrangements or by regional agencies without the authorisation of the Security Council.

⁴⁸ The Latin American countries had concluded a regional arrangement, the Act of Chapultepec, and were concerned that if the Proposals were not amended, actions in self-defence under regional agreements such as this one would be subject to the Security Council veto. They argued that to give European and Asian powers a veto over action within the Western Hemisphere would be a violation of the Monroe Doctrine: see Alexandrov supra n41 at 81-85; Russell, supra n6 at chapter XXVII. Arab states were also concerned with this issue after the formation of the League of Arab States on 22 March 1945.

⁴⁹ Note that the US's proposal used the phrase "Nothing in this Charter should invalidate the right of self-defense against armed attack": *Foreign Relations of the United States 1945* (1967) vol 1 at 691-98. The Russian delegation suggested the phrase "Nothing in this

The use of the word ‘inherent’ was not meant to preserve a wide-ranging right of action; it was inserted to recognise that states could still act in self-defence but that the Security Council was ultimately responsible for overseeing the use of force.⁵⁰ The fact that states were determined to restrict the right to use force unilaterally is evident from the insertion in Article 51 of the provisos ‘if an armed attack occurs’ and ‘until the Security Council has taken the necessary measures.’⁵¹ As Brownlie has noted, the whole purpose of the Charter was to render unilateral use of force, even in self-defence, subject to the control of the UN. But even if the Charter *had* preserved a right of customary self-defence, the customary right would probably only have entitled states to use force in response to an armed attack from another state, since that was the extent of the customary law right of self-defence at the time that the UN Charter was adopted.⁵²

Despite the arguments in favour of a restrictive interpretation of Article 51, a number of scholars support a broader interpretation. Bowett,⁵³ Waldock⁵⁴ and Moore⁵⁵ hold the view that a customary law right of self-defence existed prior to the UN Charter and it remains in existence. In the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits)* the US argued that the rules of customary international law had been ‘subsumed’ and ‘supervened’ by those of treaty law, and especially those of the UN Charter.⁵⁶ The ICJ attempted to clarify the issue when it held that in relation to the use of force by states, customary law and treaty law ‘do not exactly overlap’ and that:⁵⁷

...Article 51 of the Charter is only meaningful on the basis that there is a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.

Although this may seem like an endorsement of the broad interpretation, the ICJ’s references to customary law were confined to the context of defining the meaning of ‘armed attack’ and the requirement of ‘proportionality’. The ICJ did not

Charter impairs the inherent right of self-defence...” which was adopted, but the wording of the proviso, that self-defence measures could be taken “up to the time the necessary measures by the Security Council [were] being taken” was not adopted.

⁵⁰ The US Acting Secretary of State, Mr Grew, stated on 21 May 1945 that the new provision (Article 51) recognised the inherent right of self-defence but that it left unaffected the ultimate authority of the Security Council: *ibid* at 306.

⁵¹ Goodrich, L and Hambro, E *Charter of the United Nations: Commentary and Documents* (1946) 178.

⁵² See Brownlie *supra* n32 at 274. Many statements were made when the Pact of Paris was concluded in 1928 that confirmed the understanding that states considered they retained the right to use force to repel an attack or invasion from *another state*.

⁵³ Bowett, *Self-Defence in International Law* (1958) 185.

⁵⁴ Waldock, C “The Regulation of the Use of Force by Individual States in International Law” (1952) 81 *Rec. des Cours* 451 at 496-97.

⁵⁵ Moore, J *Law and the Indo-China War* (1972) 363.

⁵⁶ *Nicaragua case*, *supra* n26 at 93. This is somewhat ironic given that the US has recently been at the forefront of advocating a right of pre-emptive self-defence, which, if it exists, would have to be based in customary international law.

⁵⁷ *Nicaragua case*, *supra* n26 at 94.

suggest that there was an entirely *different* customary law right of self-defence; it acknowledged that as Article 51 did not define important elements of the right, recourse must be had to customary law. In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ appeared to endorse a restrictive interpretation, that the Charter alone contains the right to use force in self-defence, when it stated that:⁵⁸

...[T]he Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.

The inference that may be drawn from the foregoing analysis is that the right to use force in self-defence is a natural or inherent right of states which must be exercised in accordance with the limitations placed on that right by the Charter. In determining the extent of the right, but only in so far as Article 51 is silent, resort may be had to customary international law.

- *...if an armed attack occurs against a Member of the UN*

Article 51 provides that a state may act in individual or collective self-defence ‘if an armed attack occurs’. This phrase requires consideration of the meaning of ‘armed attack’ and whether this proviso means *if and only if* an armed attack occurs. The term ‘armed attack’ was not defined, perhaps because it was regarded as being sufficiently clear and self-evident,⁵⁹ but evidence suggests that the insertion of the ‘armed attack’ element was a deliberate attempt to limit the instances in which a state could resort to force. Alternatives, such as ‘direct attack’, and even omitting a reference to an attack, were both rejected.⁶⁰

Significantly, ‘armed attack’ was also used in the North Atlantic Treaty (NATO Treaty).⁶¹ Article 5 of the NATO Treaty states that if an armed attack occurs against any of the parties in Europe or North America, it will be considered as an armed attack against them all. As with the UN Charter, no definition of ‘armed attack’ was included. In 1949, the Foreign Relations Committee of the US’

⁵⁸ *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion [1996] ICJ Reports 226, at 263, para 96.

⁵⁹ Brownlie *supra* n32 at 278; Goodrich and Hambro *supra* n51 at 178.

⁶⁰ Alexandrov *supra* n41 at 97-98.

⁶¹ The NATO Treaty came into force on 24 August 1949. For an analysis of the relationship between the NATO Treaty and the Charter, see Beckett, W *The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations* (1950).

Senate commented on the meaning of ‘armed attack’ in Article 5 of the NATO Treaty:⁶²

Experience has shown that armed attack is ordinarily self-evident; there is rarely, if ever, any doubt as to whether it has occurred or by whom it was launched. In this connexion, it should be pointed out the words “armed attack” clearly do not mean an incident created by irresponsible groups or individuals, but rather an attack by one state upon another. (emphasis added)

Since Article 5 of the NATO Treaty uses exactly the same phrase as Article 51 of the UN Charter, and the NATO Treaty expressly purports to be based on Article 51, statements such as this are important in understanding the Charter signatories’ understanding of ‘armed attack’. The US understood that it involved an *actual* attack, which had *already occurred*, conducted by one *state*, against *another state*. That interpretation was also favoured by the UK.⁶³

In 1986, the ICJ commented on the meaning of ‘armed attack’:⁶⁴

...[I]t may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein.

The ICJ held that this interpretation of ‘armed attack’ reflected customary international law,⁶⁵ which prohibited the sending by a state of armed bands to the territory of another state, if such an operation, because of its scale and effects, would have been classified as an armed attack had it been carried out by regular armed forces.⁶⁶ However, merely providing logistical support would not suffice.⁶⁷

...[T]he Court does not believe that the concept of “armed attack” includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.

Such assistance may be regarded as a “threat or use of force, or amount to intervention in the internal or external affairs of other States”⁶⁸ but it would not be an ‘armed attack’.⁶⁹ Two points arise from the ICJ’s statements. First, a *threat* of force is not sufficient to satisfy the requirement in Article 51; self defence may be

⁶² US Senate, *Report of the Committee on Foreign Relations on the North Atlantic Treaty June 6, 1949*, Executive Report no 8, 13.

⁶³ Beckett, *supra* n61 at 13 and 27-29. As Sir Eric Beckett was the Legal Advisor to the British Foreign Office it may be implied that his interpretation of the phrase ‘armed attack’ in the Charter and the NATO Treaty was also that of the British Government.

⁶⁴ *Nicaragua case*, *supra* n26 at 103.

⁶⁵ *Ibid* at 93; see the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX) of 14 December 1974; 29 GAOR, Supp. No. 31, at 42; UN Doc. A/9631 (1974), reprinted in 69 AJIL 480 (1975), Article 3(g).

⁶⁶ *Nicaragua case*, *supra* n26 at 93.

⁶⁷ *Ibid* at 103-04.

⁶⁸ *Ibid*.

⁶⁹ *Ibid*.

resorted to by a state *if and only if* an armed attack *has occurred*. Secondly, attacks made by armed bands, irregulars or mercenaries can only be attributed to the state if the state sent them or had sufficient involvement therein; providing weapons or logistical support is insufficient.

The requirement that an ‘armed attack’ must originate from a *state* has subsequently been reaffirmed by the ICJ in its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁷⁰ Although this Advisory Opinion post-dates the events of 11 September 2001, it confirms the prevailing interpretation of ‘armed attack’ by the preeminent international judicial body. Adopting a cursory and perhaps unsatisfactory approach to the examination of Article 51 the ICJ held that:⁷¹

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign state.... (emphasis added).

Article 51 was found to have no relevance in that particular instance because the attacks in question were not alleged to have come from a state. The Court’s sparse reasoning that Article 51 only applies to armed attacks by *states* has been criticised.⁷² What is indisputable is that as recently as 2004, the ICJ has pronounced that Article 51 only applies when an ‘armed attack’ has been launched by a state (or by a state’s agents).

- ...**until** the Security Council has taken the measures necessary to maintain international peace and security

The right of self-defence has been described as **provisional** because it only exists until the Security Council has taken the measures necessary to maintain international peace and security.⁷³ A literal reading of Article 51 supports the notion that the exercise of self-defence must stop as soon as the Security Council takes the measures necessary to maintain peace and security.⁷⁴ This interpretation

⁷⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, 2004 ICJ Rep.; 43 (5) ILM 1009 (2004).

⁷¹ *Ibid.*

⁷² Murphy, S “Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Self-Defense and the Israeli Wall Advisory Opinion: An *Ipse Dixit* from the ICJ?” (2005) 99 *AJIL* 62.

⁷³ See Bowett *supra* n53 at 195; see Kelsen, H “Collective Security and Collective Self-Defence under the Charter of the United Nations” (1978) 42 *AJIL* 783 at 795. See also Lauterpacht, Tucker, Dinh and Greig as cited in Alexandrov, *supra* n41 at 104 n 121. See also Greig “Self-Defence and the Security Council: What Does Article 51 Require” (1991) 40 *ICLQ* 366 at 389.

⁷⁴ See Kelsen *supra* n38 at 792; see Beckett *supra* n61 at 14.

is also supported by the drafting history of the Charter.⁷⁵ Accordingly, any action by an individual member under Article 51 was envisaged to be a *temporary* measure and in no way a substitute for the collective action of the Organisation.⁷⁶

A difficulty arises in determining *when* the Security Council can be assessed as having “taken measures necessary to maintain international peace and security”.⁷⁷ The fact that the term ‘maintain’ was used in Article 51, rather than ‘restore’, may suggest a lower threshold for action.⁷⁸ As to who decides when the ‘measures’ have been taken, the Article itself provides no clear answers and scholars are divided.⁷⁹ It is probably for the Security Council to decide what measures it will take and whether those measures are sufficient to maintain international peace and security since the Charter gives the Security Council (not individual states) the primary responsibility for maintaining international peace and security. This is also consistent with the drafting history of Article 51 whereby the right of self-defence was perceived as an immediate, short-term response to an armed attack should the Security Council be unable or unwilling to act. Waldock asserts that the right to act in self-defence continues until the Security Council acts to bring any self-defence action to an end.⁸⁰ But that interpretation has been criticised as being politically naïve, ignoring the fact that the Security Council may fail to make any pronouncement because of political rivalries, and that there must be circumstances in which the right to act in self-defence comes to an end once the objective has been achieved, whatever the Security Council may or may not have done.⁸¹

Conte asserts that the right is limited not just “until the Security Council has taken measures”⁸² but also only for as long as the exercise of self-defence is necessary to prevent further attacks against the victim state. Citing the *Nicaragua* case,

⁷⁵ At the San Francisco Conference, the right of self-defence was seen as an interim measure of protection which should cease when the machinery of the centralised system operates as an effective protection of the individual members' rights: Bowett supra n53 at 195.

⁷⁶ Ibid; see also Beckett supra n61 at 13: “Even in the sunny San Francisco days of the summer of 1945, it was realised that there might be some delay in Security Council action, and that a State might be attacked and it must have full liberty to defend itself if it was.”

⁷⁷ Bowett, supra n53 at 195-96; also Greig supra n73 at 398ff.

⁷⁸ On the ‘maintain’ versus ‘restore’ issue, see Greig ibid at 389, n78.

⁷⁹ Goodrich and Hambro argue that it is for each defending state to decide both when and for how long conditions exist which justify the exercise of the right: supra n51 at 300. The same view is expressed by Beckett, supra n63 at 29. For the opposite perspective see Stone who regards the decision as being exclusively within the competence of the Security Council: see Stone *Legal Controls of International Conflict* (1954) at 244 and Waldock, supra n51 at 496.

⁸⁰ “...Thus, action in self-defence under Article 51 cannot be barred by the veto and cannot be terminated except by the unanimous decision of the Permanent Members”: Waldock, supra n51 at 496.

⁸¹ Greig, supra n73 at 391 n 85.

⁸² Conte, supra n42 at 65; see also *Nicaragua* case, supra n26 at 122-23: “[T]he reaction of the United States in the context of what it regarded as self-defence was continued long after the period in which any presumed attacks by Nicaragua [on El Salvador] could reasonably be contemplated”.

Conte argues that action taken in reliance on the right of self-defence is no longer legitimate once it is evident that the action is unnecessary to prevent further attacks.⁸³

Although disagreement exists as to what role the Security Council ought to play once a self-defence action has been undertaken, it cannot be denied that both Article 51 and the views of scholars support the notion that it is *ultimately* for the Security Council, not individual states, to determine when the Council has taken the necessary measures to “maintain international peace and security.”⁸⁴ The British Commentary on the Charter expresses the same view.⁸⁵ Assuming that this is correct, a significant problem arises: the veto (or threat of) could be used to protect a Permanent Member which has illegitimately resorted to force in self-defence, or which has continued to act in self-defence, even though the Security Council may well have “taken measures to maintain international peace and security.”⁸⁶ This is an argument that will be put forward in the next chapter regarding the US’ use of force against Afghanistan.⁸⁷

- *Measures taken...shall be **immediately reported** to the Security Council*

Article 51 requires states which have taken measures in the exercise of their right to self-defence to immediately report them to the Security Council. Bowett⁸⁸ and Dinstein⁸⁹ consider that it is a mandatory, legal obligation for states to report to the Security Council, whilst others argue that the reporting requirement is merely directory⁹⁰ or that it is only a procedural requirement.⁹¹ In *Nicaragua*, the ICJ found that non-reporting is an aspect of the conduct of a state which the Court is entitled to take into account as indicative of the state’s view of its own actions.⁹² However, reporting in conformity with Article 51 is not proof *per se* that the

⁸³ Conte, supra n42 at 65.

⁸⁴ Article 51 of the UN Charter.

⁸⁵ See Bowett, supra n53 at 196.

⁸⁶ Waldock has observed that this is a “very serious drawback” because acts of aggression are very commonly represented to be acts of self-defence: supra n54 at 496; also Alexandrov supra n41 at 105.

⁸⁷ It will be argued that SC Resolution 1373 (2001) included ‘measures to maintain international peace and security’ thereby ending the period within which the US could have employed force in self-defence: see chapter 10.

⁸⁸ Bowett, supra n53 at 197.

⁸⁹ Dinstein supra n35 at 190.

⁹⁰ Greig supra n73 at 384.

⁹¹ See Judge Schwebel in his Dissenting Opinion in the *Nicaragua* case, supra n26 at 376: “the term in question [the reporting requirement] is a procedural term; of itself it does not, and by the terms of Article 51, cannot, impair the substantive, inherent right of self-defence, individual or collective.”

⁹² In that case, the failure of the US to report its actions to the Security Council was criticised because it did not conform with the US’ claim that it believed it was acting in self-defence: *Nicaragua* case, supra n26 at 121. The US had previously stated that a state’s failure to report its self-defence actions to the Security Council contradicts its claim to be acting on the basis of self-defence: UN Doc S/PV.2187 as cited in *Nicaragua* supra n26 at 122.

state's actions are legitimate acts of self-defence.⁹³ Self-defence has often been pleaded by states whose actions are unlawful reprisals.⁹⁴ Many examples are cited below where force has been used purportedly in self-defence, and reporting in accordance with Article 51 has occurred, but the Security Council has rejected the claims.⁹⁵ States have shown a tendency to report their actions in purported self-defence to the Security Council, often in an attempt to lend legitimacy to their actions but reporting, in and of itself, is no proof that the use of force was lawful. The Security Council's members, the General Assembly and individual states have all expressed on occasion their rejection of formal claims of self-defence, despite strict adherence by states to the reporting requirement.⁹⁶

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

The fifth and final element of Article 51 reiterates the fact that the Security Council possesses the primary responsibility for maintaining international peace and security and that even if a state takes measures in self-defence, that does not detract from the authority and responsibility of the Council. Some scholars see this phrase as being "superfluous and without legal effect"⁹⁷ and that it does nothing more than illustrate the intended provisional nature of individual or collective action in self-defence. Others, such as Conte, have read something deeper into this phrase, claiming that it points to the existence of an obligation, even a *duty*, on the Security Council to monitor the conduct of self-defence actions.⁹⁸ The final phrase in Article 51 adds little to the power and responsibility already vested in the Security Council by Articles 24(1) and 39 which categorically state that the Security Council has the primary responsibility for the maintenance of international peace and security.⁹⁹ Any arguments which can be constructed, based on Article 51, in favour of a 'duty to monitor' seem to be

⁹³ "The dispatch of a report to the Security Council is only one of many factors bearing upon the legitimacy of a State's claim to self-defence. The instantaneous transmittal of a report is no guarantee that the Council will accept that claim": Dinstein *supra* n35 at 191.

⁹⁴ See discussion below under the heading 'Forcible measures short of war'.

⁹⁵ Examples include the British attacks on Yemen in 1964, the actions of Portugal against Senegal in 1969, the use of force by Israel against Lebanon, Syria and Jordan in the 1960s and 1970s including the Litani operation in 1978, as well as the use of force by Israel in 1985 against Tunis and the US' raids on Libya in 1986: see discussion below.

⁹⁶ The statesmen who drafted the Charter were well aware that states often made spurious claims to be acting in self-defence. Goodrich and Hambro observed in 1946 that states commonly justify the resort to the use of armed force on the ground of self-defence: *supra* n51 at 178.

⁹⁷ Bowett *supra* n53 at 198.

⁹⁸ Conte *supra* n42 at 66-69 for the 'duty to monitor' argument.

⁹⁹ Reproduced in Appendix 11.

overshadowed by the importance of Articles 24(1) and 39; the Article 51 phrase probably only restates the existing position – rather than creating any new obligation or duty on the Council.¹⁰⁰ In the context of the current inquiry, this aspect of Article 51 confirms that the Security Council’s authority remains paramount, regardless of action taken by individual states in self-defence.

The nature of the right of self-defence

If a state satisfies Article 51, it has the right to use force in self-defence, at which point resort must be had to customary international law to determine the scope and limits of that right.¹⁰¹ In *Nicaragua*, both parties agreed that whether a response to an armed attack is lawful depends on the observance of the criteria of *necessity* and *proportionality* regarding the measures taken in self-defence.¹⁰² The Court held that the US’ actions did not meet either criterion.¹⁰³ The Court also made a finding on *immediacy*, without referring to it as a separate element, when it stated that the US’ activities “continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated.”¹⁰⁴ In his Dissenting Opinion, Judge Schwebel agreed that necessity and proportionality were customary law principles that had to be applied to self-defence actions under the Charter but came to different conclusions based on different findings of fact.¹⁰⁵

Although the findings on necessity and proportionality were not strictly necessary in the *Nicaragua* case (the Court having already found that there was no ‘armed attack’) the ICJ’s findings show that the *Caroline* principles of necessity and proportionality¹⁰⁶ are still relevant in the post-Charter era. The *Caroline* formulation confined acts of self-defence to situations where the necessity of that self-defence is instant, overwhelming, leaving no choice of means, and no moment for deliberation. Furthermore, actions taken in self-defence must not be

¹⁰⁰ For Articles 24(1) and 39 see Appendix 11. Although Conte argues that there exists a ‘duty to monitor’ actions taken in self-defence, it seems more plausible that a ‘duty to act’ exists because of the words “until the Security Council has taken measures necessary to maintain international peace and security”. The phrasing adopted in Article 51 underlines the fact that any action in self-defence is provisional, available only until the Security Council acts, which implies that it *will* act to maintain international peace and security. Thus, there is arguably no ‘duty to monitor’ since it is subsumed within the ‘duty to act’ as implied in Article 51.

¹⁰¹ *Nicaragua* supra n26 at 94.

¹⁰² *Ibid* at 103.

¹⁰³ Regarding necessity, the US’ actions against Nicaragua occurred a considerable time after the armed opposition against the government of El Salvador had been completely repulsed so that “it was possible to eliminate the main danger to the Salvadorian Government without the United States embarking on activities in and against Nicaragua”. Regarding proportionality, the US’ actions in mining the Nicaraguan harbours and attacking oil and port installations were not proportional to the scale of aid received from the Salvadorian armed opposition from Nicaragua: *ibid* at 122.

¹⁰⁴ *Ibid* at 123.

¹⁰⁵ See Dissenting Opinion of Judge Schwebel especially at 362ff.

¹⁰⁶ See discussion of the *Caroline* case in chapter 7 at 175ff.

unreasonable or excessive “since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”¹⁰⁷ Although a literal interpretation of Article 51 does not require a state to adhere to the principles of necessity, proportionality and immediacy, the ICJ has ruled that these principles must be applied.¹⁰⁸

The element of *necessity* requires the state to show that it had no choice other than to resort to force in self-defence. Judge Ago has declared that in order to satisfy this element:¹⁰⁹

...[T]he State attacked... must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. In other words, had it been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition on the use of armed force.

This statement was cited with approval by Judge Schwebel in his Dissenting Opinion in the *Nicaragua* case and similar sentiments have been expressed by numerous scholars.¹¹⁰

The element of *proportionality* has been described as “of the essence of self-defence”.¹¹¹ In *Nicaragua*, the ICJ held that it was “a rule well established in customary international law”¹¹² that self-defence measures must be proportional to the armed attack. Acts done in self-defence must not exceed in manner or aim the necessity provoking them.¹¹³ A state that is subjected to isolated frontier attacks or naval incidents, generally limits itself to force proportionate to the attack: “it does not bomb cities or launch an invasion”.¹¹⁴ In many instances in which the Security Council has declared the use of force to be an illegal reprisal rather than legitimate self-defence, the Council has noted the disproportionate number of casualties resulting from the defence action when compared with the earlier

¹⁰⁷ Jennings, R “The Caroline and McLeod Cases” (1938) 32 *AJIL* at 82.

¹⁰⁸ In addition to the *Nicaragua* case, the ICJ also stated in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that “[t]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law” but this “dual condition applies equally to Article 51 of the Charter, whatever the means of force employed”: supra n58 at 245.

¹⁰⁹ Judge Ago’s Addendum to the Eighth Report on State Responsibility, *Yrbk. ILC* 1980, Vol II, Part 1, 69.

¹¹⁰ See Dissenting Opinion of Judge Schwebel in *Nicaragua* supra n26 at 363; see Schachter, O “The Right of States to Use Armed Force” (1984) 82 *Mich. Law Rev* 1620 at 1635: “force should not be considered necessary until peaceful measures have been found wanting or when they clearly would be futile”; also Rostow, E “Nicaragua and the Law of Self-Defence Revisited” 11 (1985-86) *Yale J. Int’l L.* 437 at 455; see also Dinstein supra n35 at 183-84.

¹¹¹ Brownlie supra n32 at 279, n2.

¹¹² *Nicaragua* supra n26 at 14, 94.

¹¹³ Schachter supra n110 at 1637.

¹¹⁴ *Ibid.*

attack.¹¹⁵ However, there has been an interpretation of ‘proportionality’ which does not compare the conduct constituting the armed attack with the opposing conduct, but rather the action taken in self-defence and the purpose of halting the attack.¹¹⁶

The element of *immediacy* means that self-defence action must occur in a timely fashion and there must not be a significant delay after the events which promoted the state to act.¹¹⁷ In the *Caroline* case, it was agreed that “the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”¹¹⁸ Webster also said that “it must be shown that daylight could not be waited for” and that “there was a necessity, present and inevitable.”¹¹⁹ There must not be an undue time-lag between the armed attack and the exercise of self-defence.¹²⁰ The requirement of immediacy conflicts in some respects with that of necessity in so far as a state may not use force in self-defence unless it is the last resort and peaceful means of settling the dispute have been exhausted. It takes time to explore peaceful alternatives, thus, in satisfying the element of necessity a state may theoretically fall foul of the principle of immediacy.¹²¹ Immediacy is a vital element of the customary law notion of self-defence: if the use of force purportedly required in self-defence is indeed legitimate, it must be in a situation where no other response would do because of the time constraints involved in responding to the ‘armed attack’. If there is time to negotiate at length, to enter into a “tedious process of diplomatic negotiations” to use Dinstein’s phrase, and explore other options to resolving the crisis, then that would suggest that a forcible response in self-defence is unnecessary.¹²² By definition, force in self-defence ought to be used almost without delay, on the basis that there are no other options available.

In conclusion, the Security Council, the ICJ and the international community of states and scholars have come to accept that the right of self-defence was both

¹¹⁵ Ibid; also Security Council resolutions regarding the Qibya incident in 1953; Lake Tiberias in 1955; Jordan incident in 1966; As-Samu incident in 1966; Karameh incident, Es-Salt raid and Beirut raid in 1968; and the invasion of Lebanon in 1970. In all of these instances, the Security Council *inter alia* condemned the *disproportionate* nature of Israel’s response.

¹¹⁶ “[T]he action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered.” Judge Ago’s Eighth Report on State Responsibility to the International Law Commission, *supra* n109 at 69.

¹¹⁷ Immediacy is not always discussed as a separate principle. Schachter, *supra* n110, only discusses the principles of proportionality and necessity; the ICJ in *Nicaragua*, *supra* n26, seemed to blend the notion of immediacy into the principle of proportionality.

¹¹⁸ Jennings, *supra* n107 at 85.

¹¹⁹ Ibid.

¹²⁰ Dinstein, *supra* n35 at 184.

¹²¹ Ibid.

¹²² Ibid.

preserved and restricted by Article 51, but its precise content, in so far as when and how the right is exercised, can only be understood by reference to customary principles of necessity, proportionality and immediacy, all of which must be considered when assessing whether a state has acted lawfully in self-defence. The use of force in self-defence must be tightly constrained simply because it is a rare exception to the general prohibition on the use of force in Article 2(4).

Pre-emptive self-defence

The question of whether a state may use force to pre-empt, anticipate or deter an attack has drawn considerably more attention in this epoch than in any of the previous.¹²³ The recent controversy is derived from Article 51 and particularly the phrase ‘armed attack’. It was noted earlier that some scholars have interpreted Article 51 to mean that force may be used in self-defence *if and only if* an armed attack has occurred (restrictive interpretation)¹²⁴ whilst others consider that an armed attack is only *one* instance which will justify the use of force in self-defence (broad interpretation).¹²⁵ Proponents of the latter school argue that a state retains an inherent right to use force in self-defence to *anticipate* or *prevent* an act of aggression.

The *Caroline* case demonstrated that pre-emptive force may only be used if the necessity is “instant, overwhelming, leaving no choice of means and no moment for deliberation.”¹²⁶ The *Caroline* test’s relevance in this epoch was confirmed by the Nuremberg Tribunal when considering Germany’s plea of self-defence regarding the latter’s invasion of Norway.¹²⁷ Judicial comment on pre-emptive self-defence has been sparse. In *Nicaragua*, the ICJ held that states do not have a right of collective ‘armed response’ to acts that do not constitute an ‘armed attack’¹²⁸ but it was not required to rule directly on the question of pre-emptive self-defence and did not express a view on that issue.¹²⁹ In his Dissenting Opinion, Judge Schwebel expressed his clear support in principle for anticipatory

¹²³ ‘Pre-emptive’ and ‘anticipatory’ self-defence are used interchangeably here and represent the concept of using force in self-defence before an actual armed attack has occurred, and/or to prevent an attack from taking place.

¹²⁴ See discussion *supra* at 225.

¹²⁵ *Ibid.* For a comprehensive analysis of the various scholars’ positions in respect of each ‘school’ on this issue, see McCormack *supra* n37 at Part III; Ross, *supra* n35; see Erickson, R *Legitimate Use of Military Force Against State Sponsored International Terrorism* (1987), chapter 4; Arend and Beck *supra* n20 at chapter 5.

¹²⁶ Jennings, *supra* n107 at 85.

¹²⁷ The Tribunal held that Germany had not acted in self-defence, when that concept was taken to mean that there is a threat in the *Caroline* sense, because Germany’s plans to attack Norway were drawn up to prevent an Allied occupation at some future date, not for forestalling an imminent Allied landing: *International Military Tribunal (Nuremberg), Judgments and Sentences* (1947) 41 AJIL 172, at 205-207.

¹²⁸ *Nicaragua* *supra* n26 at 103 and 110.

¹²⁹ *Ibid* at 103.

self-defence¹³⁰ and expressed the view that he would not want Article 51 to be interpreted as meaning “if and only if an armed attack occurs.”¹³¹

In 1949/50 the US and the UK perceived Article 51 as preserving a right of self-defence but not a right of *pre-emptive* self-defence.¹³² Many incidents have occurred since the signing of the Charter which confirm that the international community generally interprets Article 51 literally, as requiring an ‘armed attack’ to have *actually occurred*. The 1956 Suez crisis,¹³³ the 1962 Cuban missile crisis,¹³⁴ the 1967 Arab-Israeli war¹³⁵ and the 1981 Israeli strike on the Iraqi nuclear reactor¹³⁶ are all instances in which the international community roundly rejected the use of force in pre-emptive self-defence. The ‘Osirak’ incident was perhaps the most unambiguous demonstration of the Security Council’s rejection of the claim that Article 51 permits the use of force in pre-emptive self-defence.¹³⁷ The international community showed that it required strict adherence to the text of Article 51.

¹³⁰ Dissenting Opinion of Judge Schwebel, *Nicaragua*, supra n26, at 347: “...I do not agree that the terms or intent of Article 51 eliminate the right of self-defence under customary international law, or confine its entire scope to the express terms of Article 51.”

¹³¹ *Ibid.* He noted that his comments on anticipatory self-defence were offered *ex abundanti cautela*.

¹³² See statements from the US Senate Foreign Relations Committee and the Legal Advisor to the British Foreign Office in Beckett supra n63 and accompanying text.

¹³³ The majority of states rejected the self-defence arguments advanced by Israel, France and the UK. The use of force by Israel was considered unwarranted since there had been no armed attack and the use of force by the UK and France was regarded as a violation of the Charter and the Pact of Paris since they were using force as an instrument of national policy. Although the Security Council was unable to pass any resolutions due to the veto, the General Assembly voiced the concerns of the international community in producing a large majority vote in favour of a resolution which called for Israel, the UK and France to withdraw their forces: GA Res 997 (ES-I), 2 November 1956; GAOR ES-I, Supp Bo 1 at 2; UN Doc A/3354. For commentary on this incident see Wright, Q “Intervention, 1956” (1957) 51 *AJIL* 257 at 272-73; also Alexandrov supra n41 at 151-52. The General Assembly resolution, which called for a ceasefire and the withdrawal of Israeli, British and French forces, was voted for by 64 states, with five against (UK, Israel, France, Australia and New Zealand) and six abstentions. The US rejected the more permissive interpretation of Article 51 that was favoured by its traditional allies.

¹³⁴ The US did not attempt to justify its naval ‘quarantine’ of Cuba on the grounds of Article 51, instead, relying on Article 52 and the collective security provisions of the Rio Treaty (which covered a situation where there was a threat to the political integrity of an American state, but the aggression was *not* an armed attack.) The US implicitly accepted that since no armed attack had occurred it had to find other ways to justify its actions: see Wright, Q “The Cuban Quarantine” (1963) 57 *AJIL* 546 at 560-62; Alexandrov supra n41 at 154-59 and Franck, T *Recourse to Force: State Action Against Threats and Armed Attacks* (2002) at 99-101. US officials refused to rely on Article 51 because of concern that it would set a bad precedent and it would weaken the requirement that self-defence not be invoked except in cases of ‘armed attack’: Nydell “Tensions Between International Law and Strategic Security: Implications of Israel’s Preemptive Raid on Iraq’s Nuclear Reactor” (1984) 24 *Va. J. Int’l L.* 459 at 485.

¹³⁵ Israel justified its pre-emptive air strikes on Egypt, Jordan and Syria both on the grounds of actual self-defence (on the basis that the closure of the Straits of Tiran to Israeli vessels was an act of war) and on the basis of *anticipatory self-defence* (that it was pre-empting an imminent attack by its Arab neighbours). Although the Security Council neither apportioned blame for the outbreak of fighting nor did it condemn the exercise of self-defence by Israel, Alexandrov and Dinstein argue that the anticipatory self-defence claim found little support: see Alexandrov supra n41 at 154 and Dinstein supra n35 at 173. Compare with Shaw, M *International Law* Fifth ed, (2003) at 1029 and Franck supra n139 at 104-05.

¹³⁶ On 7 June 1981, the Israeli Air Force launched an attack against the Iraqi nuclear reactor, ‘Osirak’ (Tammuz-I) which was under construction. Israel relied *solely* on the grounds of *anticipatory self-defence*: Israel’s Permanent Representative to the UN, Yehuda Blum, claimed that Israel was exercising its inalienable right to self-defence under Article 51 of the Charter and that anticipatory self-defence was permissible under international law: Statement of Mr Blum, UN Doc S/PV 2280 12 June 1981 at 37 and 52-55. All members of the Security Council rejected Israel’s interpretation of Article 51. The Security Council unanimously adopted Resolution 487 in which it stated that it “strongly condemns the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct”: SC Resolution 487, 1981. For commentary on the ‘Osirak’ incident see *inter alia* Alexandrov supra n43 at 159-65; Franck supra n139 at 105-07; Dinstein supra n35 at 169; D’Amato, A “Israel’s Air Strike Upon the Iraqi Nuclear Reactor” (1983) 77 *AJIL* 584; Mallison, W and Mallison, S “The Israeli Aerial Attack of June 7 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defence?” (1982) 15 *Vand. J. Transnat’l L.* 417 and Nydell supra n134 at 459. For a comprehensive analysis of the incident see McCormack, supra n35.

¹³⁷ Spain and Mexico stated that Article 51 did not permit pre-emptive self-defence in any form and that force was only permissible in response to an actual armed attack: see speeches of the representatives of Spain and Mexico, 36 UN SCOR, (2282nd meeting) 7-8, UN Doc S/PV 2282, 15 June 1981 and 36 UN SCOR (2288th meeting) 10-12, UN Doc S/PV 2288, 19 June 1981, respectively. For discussion of the statements made prior to the adoption of the resolution see McCormack supra n34 at 31-33; Mallison and Mallison *ibid* at 434-40.

Further examples can be drawn from the later decades of the epoch. In 1985, the Israeli raid on Tunis¹³⁸ was condemned by the Security Council.¹³⁹ The 1986 US strikes against Libya were condemned by the General Assembly.¹⁴⁰ In 1993 the US attempted to justify its missile strikes against Baghdad as not only being a response to a planned but thwarted terrorist attack but also on the basis that it was acting to **prevent further attacks in the future**.¹⁴¹ Although no formal condemnation in the Security Council was sought, the states which expressed support for the US accepted that an ‘armed attack’ had occurred and that the US was reacting to it.¹⁴² None of those states endorsed the US’ use of force on the basis of pre-emptive self-defence.¹⁴³ In justifying its missile strikes against Iraq in 2001, the US stated that it was acting to **prevent possible future attacks** on its aircraft when patrolling the ‘no-fly’ zone. International reaction was almost universally negative: only the US, the UK and Israel accepted the legitimacy of the missile strikes. Three Permanent Members of the Security Council publicly questioned the use of force without Security Council authority.¹⁴⁴

Although the majority of states reject the notion of pre-emptive self-defence, the *opinio juris* of some states has evolved over time. For example, the alteration in the US’ stance on pre-emptive self-defence is apparent from its stance in 1981 (when it supported Security Council Resolution 487 against Israel’s pre-emptive attack on the Iraqi Osirak reactor) when compared with the position set forth in the 2002 National Security Strategy (2002 NSS).¹⁴⁵ In the 2002 NSS, the Bush administration set out its doctrine of pre-emptive self-defence in response to terrorism:¹⁴⁶

While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country... (emphasis added)

With regards to weapons of mass destruction, a similar theory was espoused:¹⁴⁷

¹³⁸ Israel justified its use of force both as a response to previous attacks and as a means of preventing *future* terrorist attacks.

¹³⁹ By a vote of 14-0.

¹⁴⁰ By a vote of 79-28. See discussion on the Libyan raid below at 249-51; see GA Res 41/38 (1986) and for the US actions in blocking a Security Council resolution see UN SCOR 41st Session (2682d meeting) at 43 UN Doc S/PV 2682 (1986).

¹⁴¹ Kritsiotis, D “The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law” (1996) 45 *ICLQ* 162. See discussion *infra* at n236 and accompanying text for reference to President Clinton’s justifications for the missile strikes.

¹⁴² An attempted assassination of former President George Bush.

¹⁴³ See discussion regarding the international reaction and the statements of the Permanent Members of the Security Council *infra* at 45-47.

¹⁴⁴ For the details of this incident, see discussion *infra* at 258-59.

¹⁴⁵ National Security Strategy of the United States, 2002: <<http://www.whitehouse.gov/nsc/nss.pdf>> (accessed 31 October 2006).

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

*We must be prepared to stop rogue states and their terrorist clients **before they are able to threaten or use weapons of mass destruction** against the United States and our allies and friends...we cannot let our enemies strike first...*

The *opinio juris* of the US is that using force in unilateral, pre-emptive self-defence is lawful (for the US). The Bush administration advanced its view that the concept of ‘imminent threat’ had to be redefined given the new types of threats facing it and it claimed that “to forestall or prevent hostile acts” the “US will, if necessary, act pre-emptively.”¹⁴⁸ This is a direct challenge to the traditional, essentially restrictive, interpretation of Article 51 which, at least as recently as 1981, was interpreted by the US and all other members of the Security Council as precluding unilateral, pre-emptive use of force. Not only is this a new interpretation of Article 51 but it goes further than even allowing force to be used to preclude an ‘imminent’ attack to allowing force to be used **before** an adversary is able to pose a threat. It is unclear from the NSS what level of danger would be required to be present before force could theoretically be employed, but the threshold for action in the 2002 NSS certainly falls short of requiring an ‘armed attack’ to have occurred.

Whilst several European states were ‘concerned’ about the new doctrine,¹⁴⁹ Australia was quick to endorse it. In June 2002, in a speech to the Australian Defence College, Defence Minister Robert Hill flagged Australia’s “in principle”¹⁵⁰ support for the doctrine of pre-emptive self-defence. Although the interpretation of self-defence adopted by the US and endorsed in principle by Australia appears to contradict Article 51, neither the Bush Administration nor the Howard Government considered that their newly adopted doctrine was in violation of international law.¹⁵¹ Hill stated that “Australia has a long and proud tradition of contributing to the development of international law” and that “any

¹⁴⁸ Ibid.

¹⁴⁹ Frankel, G “New US Doctrine Worries Europeans” *Washington Post*, 30 September 2002, A1.

¹⁵⁰ “The need to act swiftly and firmly **before threats become attacks** is perhaps the clearest lesson of 11 September, and is one that is clearly driving US policy and strategy. It is a position which we share, in principle.” (emphasis added): Minister for Defence, Sen Robert Hill, *Address to Defence and Strategic Studies Course “Beyond the White Paper: Strategic Directions for Defence”*, Australian Defence College, Canberra, 18 June 2002, available at: <http://www.minister.defence.gov.au/2002/180602.doc>; see also Nguyen, M “‘Just Cause’ or just callous? Australia’s justification for war in Iraq” January 2004, Uniya <http://www.uniya.org/talks/nguyen_iraq_jan04.html> (accessed 31 October 2006).

¹⁵¹ Howard: “I would always want to see Australia act in accordance with proper international practices. But that proper international practice has always recognised legitimate self-defence...that is really the essence of wanting to address the issue [of pre-emptive self-defence] within a proper legal framework and not go outside the existing legal framework”: Australian Broadcasting Corporation, *Lateline*, “Prime Minister takes cautious line in face of terrorist threat”, broadcast 29 November 2002, transcript at: <<http://www.abc.net.au/lateline/stories/s738064.htm>> (accessed 31 October 2006).

actions Australia takes will be consistent with international law”.¹⁵² He called for “a new and distinct doctrine of pre-emptive action to avert a threat” or a redefining of the meaning of self-defence.¹⁵³ Australian Prime Minister John Howard called for the UN Charter to be reviewed on the basis that it was written in a time when global security was threatened by state-versus-state conflicts and that the new threats to global security were from “random stateless terrorists” which meant that it was no longer “legitimate” to respond to the new threats under rules that were written when that kind of conduct was never contemplated.¹⁵⁴ Howard expressed the view that he wanted “international law, including the UN Charter, to reflect the new reality.”¹⁵⁵ Problematically, whilst calling for the Charter to be changed to “reflect the new reality”, Howard, Hill, and the Bush administration, were simultaneously advancing the view that pre-emptive strikes were already permitted and that they would use force in pre-emptive self-defence if necessary.¹⁵⁶

The proposition that Australia would contemplate using pre-emptive force provoked a negative reaction from Malaysia, Indonesia, the Philippines and Thailand.¹⁵⁷ Those states’ reactions suggested that they did not share the US-Australian interpretation of Article 51.¹⁵⁸ The New Zealand Prime Minister, Helen Clark, also expressed her view that the UN Charter does not permit force to be used in pre-emptive self-defence.¹⁵⁹ The UK Attorney-General, Lord Goldsmith, in legal advice provided to British Prime Minister Tony Blair in 2003,

¹⁵² Senator Robert Hill, John Bray Memorial Oration, University of Adelaide, 28 November 2002: <<http://www.defence.gov.au/minister/HillSpeech.html?CurrentId=2121>> (accessed 31 October 2006).

¹⁵³ “Some would argue that its time for a new and distinct doctrine of pre-emptive action to avert a threat. A better outcome might be for the international community and the international lawyers to seek an agreement on the ambit of the right to self-defence better suited to contemporary realities.”: *ibid*; see also ABC *Lateline*, “The issue now is how you define self-defence in an environment of unconventional conflict, non-state parties, weapons of mass destruction, global terrorism and whilst anticipatory self-defence has also been permissible, clearly this new environment requires a more liberal definition of self-defence to be meaningful: “Hill makes case for pre-emptive strikes” broadcast 27 November 2002, transcript at: <<http://www.abc.net.au/lateline/stories/s736373.htm>> (accessed 31 October 2006).

¹⁵⁴ ABC *Lateline* “Prime Minister takes cautious line in face of terrorist threat”, *supra* n151.

¹⁵⁵ *Ibid*.

¹⁵⁶ “But there’s nothing illegitimate, illegal, improper, provocative about somebody arguing that current international law has been overtaken by changed circumstances where individually-sponsored aggression and terror and not state-sponsored aggression and terror is now the greatest challenge the world has...if I were given clear evidence that this country were likely to suffer an attack -- and I had a capacity, as PM, to do something to prevent that attack occurring - I would be negligent to the people of Australia if I didn’t take that action”: *ibid*.

¹⁵⁷ The Acting Indonesian Ambassador described Howard’s comments as ‘unhelpful’ and the Malaysian High Commission released a statement saying that Australia could not operate in Malaysia without the Malaysian Government’s approval: Australian Government, Department of Foreign Affairs and Trade, interview between Minister of Foreign Affairs and Trade, Alexander Downer, and the ABC Radio, 2 December 2002: <http://www.dfat.gov.au/media/transcripts/2002/021202_fa_terprevent.html> (accessed 31 October 2006); see also Grattan, M “Words are bullets, Mr Howard”, *The Age*, 4 December 2002 <<http://www.theage.com.au/articles/2002/12/03/1038712935246.html>> (accessed 31 October 2006).

¹⁵⁸ Haidon, T “The Possibility of Australian Pre-emptive Military Action: Political and Legal Implications” 11 December 2002, *IslamOnline.net* <<http://www.islamonline.net/English/Views/2002/12/article04.shtml>> (accessed 31 October 2006).

¹⁵⁹ “It’s certainly not what is envisaged in the UN Charter...to move to a pre-emptive position is very significant....If the ground is being shifted from self-defence to pre-emption, then that is not what was contemplated when the UN Charter was being written”: Campbell, G “A Rock and a Hard Place”, *New Zealand Listener*, 1-7 March 2003, 18-21.

advised that international law does not permit force to be used in pre-emptive self-defence unless the attack which it aims to pre-empt is “imminent.”¹⁶⁰

In summary it is contended that in 2006, the *opinio juris* of the majority of states remains unchanged, that there is no right to use force in pre-emptive self-defence under current international law, except perhaps if the threat is imminent and the use of force is inevitable.¹⁶¹ Only three states (Israel, the US and Australia) have seriously advanced the concept of pre-emptive self-defence as having a basis in international law, and Australia’s assertions must be tempered with its simultaneous calls for a review of international law to permit pre-emptive strikes, a review that would logically be unnecessary if such a right already existed. It cannot be concluded that the Bush or Howard doctrines have become entrenched as the dominant interpretation of self-defence at this time.

Forcible measures short of war

The evolution of the use of forcible measures short of war, and specifically, reprisals,¹⁶² has been discussed throughout the past five chapters. The legal standing of forcible reprisals changed with the adoption of the UN Charter. Reprisals which involve the use or threat¹⁶³ of force were rendered unlawful by virtue of Article 2(4). That conclusion is supported by scholars,¹⁶⁴ case law¹⁶⁵ and pronouncements of the Security Council.¹⁶⁶ In the post-Charter era, if there is an ‘armed attack’ the victim state will have the right to use force in self-defence under Article 51, but if there is no prior ‘armed attack’, any use of force by a state (without the permission of the Security Council under Chapter VII) is generally considered to be unlawful.¹⁶⁷ The only type of reprisals which are still currently

¹⁶⁰ “Full-text: Iraq legal advice” *Guardian Unlimited*, 28 April 2005: <<http://www.guardian.co.uk/Iraq/Story/0,,1472450,00.html>> (accessed 31 October 2006).

¹⁶¹ That interpretation of Article 51 is further supported by the general consensus amongst international lawyers that the use of force against Iraq in 2003 (with the apparent objective of removing Iraq’s potential ability to acquire and use weapons of mass destruction) was unlawful.

¹⁶² Reprisals are acts which are in themselves illegal and have been adopted by one state in retaliation for the commission of an earlier illegal act by another state.

¹⁶³ The *threat* to use force is unlawful pursuant to Article 2(4), as confirmed by the UNGA in the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, GA Resolution 2131, *supra* n24, Article 1, and by the ICJ in *Legality of the Threat or Use of Nuclear Weapons*, *supra* n58 at para 49; see also White, N and Cryer, R “Unilateral Enforcement of Resolution 687: A Threat Too Far?” (1999) 29 *Cal. W. Int’l L.J.* 243.

¹⁶⁴ Brownlie *supra* n32 at 281 who cites, *inter alia*, Oppenheim, Jessup, Goodrich and Hambro, Bowett, Kotsche, Brierly and Guggenheim.

¹⁶⁵ The *US-France Air Services Agreement* case 54 ILR 306.

¹⁶⁶ SCR 188 (1964), UN Doc S/5650 regarding British strikes on Yemen: “The Security Council...condemns reprisals as being incompatible with the purposes and principles of the United Nations”.

¹⁶⁷ The difference between unlawful reprisals and lawful self-defence may lie in their objectives, the former being punitive in nature and the latter being protective: “Self-defence is permissible for the purpose of protecting the security of the state and the essential rights – in particular the rights of territorial integrity political independence – upon which that security depends” whereas reprisals are “...punitive in character: they seek to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial

permitted are those which *do not* involve the use of force, usually referred to as ‘counter-measures’, providing that they meet certain conditions.¹⁶⁸

The proposition that forcible reprisals were outlawed by Article 2(4) would appear unassailable. Yet, some states have demonstrated that they still consider themselves as possessing a right to use forcible reprisals. Israel is one state¹⁶⁹ that has repeatedly attempted to gain acceptance of its position that reprisals are “an integral element of action constituting self-defence against an ongoing threat.”¹⁷⁰ This has led to the suggestion that there may be a ‘credibility gap’ between the international law norm and the actual practice of states.¹⁷¹ By analysing some instances in which reprisals have come to the Security Council’s attention, a subtle trend is noticeable, from outright rejection in the early years of this epoch to conditional acceptance towards the latter years.

Security Council resolutions: 1950s-1960s

In 1955, in relation to a complaint by Syria regarding an Israeli attack in the area of Lake Tiberias, the Security Council was asked to pass a variety of measures in response to the actions of the Israeli military.¹⁷² In a unanimous resolution, the Security Council acknowledged that there had been interference by the Syrian authorities with Israeli activities on Lake Tiberias as alleged by Israel, but found that such interference in no way justified the Israeli action, even if it was undertaken by way of retaliation.¹⁷³ The Security Council condemned the attack by Israel as a “flagrant violation” of both the General Armistice Agreement and the UN Charter.¹⁷⁴ Some members expressly stated that forcible retaliation and reprisals were unlawful under the UN Charter and had been previously condemned by the Security Council.¹⁷⁵ The following year, the British Government’s Foreign Office issued a statement condemning a reprisal carried out by Israel against Jordanian positions, declaring that the British Government

illegal act, or to compel the delinquent state to abide by the law in the future. But, coming after the event and when the harm has already been inflicted, reprisals cannot be characterised as a means of protection”: Bowett, *supra* n53 at 3.

¹⁶⁸ Such as, they must be in response to a prior wrongful act, and taken in light of a refusal to remedy it: see *Gabčíkovo-Nagymaros Project* case (Hungary/Slovakia) (Judgment) ICJ Reports, 1997, 7 at 55-57; see also the ILC Draft Article Responsibility of States for Internationally Wrongful Acts, ILC: <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> (accessed 1 November 2006), Articles 49-53, especially Article 50(1)(a).

¹⁶⁹ Bowett examined 23 cases of reprisals considered by the Security Council between 1953 and 1970, of which 20 involved Israel: Bowett, D “Reprisals Involving Recourse to Armed Force” (1972) 66 *AJIL* 1.

¹⁷⁰ This comment is from O’Brien’s analysis, updating Bowett’s research: O’Brien, W, “Reprisals, Deterrence and Self-Defense in Counterterrorism Operations” (1990) 30 *Va. J. Intn’l L.* 421.

¹⁷¹ Bowett, “Reprisals”, *supra* n169.

¹⁷² S/3505, Official Records, 10th Year, *Suppl for Oct-Dec 1955*, 21.

¹⁷³ S/3538 Official Records, 11th Year, *Suppl for Jan-Mar, 1956*, 6-7.

¹⁷⁴ *Ibid.*

¹⁷⁵ Previous condemnations: 692nd Meeting, paras. 8, 9; 695th Meeting, para 11.

deplores *all* reprisals; that the Security Council had repeatedly condemned reprisal raids and that such raids did not come within the limits of legitimate self-defence.¹⁷⁶

In 1964, the UK attempted to justify its air attacks on Yemen on the basis that it was acting in self-defence, in response to a series of attacks and ongoing hostility. The UK acknowledged the distinction between unlawful reprisals and lawful self-defence, and argued that its actions fell within the latter. However, the Security Council rejected the British argument and condemned the actions as reprisals.¹⁷⁷ An ‘accumulation of events’ justification was also employed by the US in relation to the Gulf of Tonkin incident in 1964. The US claimed its missile strikes against North Vietnamese weapons and facilities were a legitimate response to a series of past attacks on US vessels and that they were a “limited and measured response fitted precisely to the attack that produced it.”¹⁷⁸ Although no resolution was adopted condemning the US’ response, the Soviet and Czechoslovak representatives rejected the US’ plea of self-defence, as did the Democratic Republic of Vietnam.¹⁷⁹ During the course of the debate it was noted that “recognition of the right of self-defence in Article 51 of the Charter *ipso jure* precluded the right of retaliation.”¹⁸⁰ Given the evidence which recently came to light concerning the Gulf of Tonkin incident, it appears likely that the international community was correct in refusing to condone the US’ use of force.¹⁸¹ The use of reprisals in response to a series of prior attacks was once again rejected by the Security Council in 1969 when it condemned Portugal for its use of force against the village of Samine in Senegal.¹⁸²

¹⁷⁶ Brownlie *supra* n32 at 282.

¹⁷⁷ UN Doc S/5649, adopted at the 1111th Meeting, 8 April 1964; SCR 188 (1964), UN Doc S/5650. The resolution was adopted by nine votes to zero with two abstentions (the UK and the US); see also the discussion in Bowett, “Reprisals”, *supra* n169 at 8 and Alexandrov *supra* n41 at 170-71.

¹⁷⁸ United Nations, “Chapter VII: Action with respect to threats to the peace”, at 266, extract available at: http://untreaty.un.org/cod/repertory/art51/english/rep_supp3_vol2-art51_e.pdf (accessed 1 November 2006).

¹⁷⁹ UNSCOR, 1140th Meeting, at 9, and 1141st Meeting, at 15; 1141st Meeting at 4 respectively; Letter from the USSR to the Secretary General, transmitting the views of the DRV, UN Doc S/5888, UNSCOR Suppl for July, August and September 1964, 170. See also the discussion in Bowett, “Reprisals”, *supra* n 169 at 8.

¹⁸⁰ Security Council 1140th Meeting: UK, para 78, US paras 33-42 and 44-46; 1141st Meeting, Czechoslovakia paras 30-31; and USSR paras 82-84; US paras 51 and 51; see also extract from UN “Chapter VII” at 266.

¹⁸¹ In October 2005, the *New York Times* reported that the NSA had deliberately distorted intelligence reports regarding the second of two alleged attacks on US destroyers by the North Vietnamese. It would appear that the incident which the US alleged occurred on 4 August 1964, which led to the approval of the Gulf of Tonkin Resolution by the US Congress, never actually occurred: Shane, S “Vietnam Study, Casting Doubts, Remains Secret” *New York Times*: <http://www.nytimes.com/2005/10/31/politics/31war.html?ex=1162443600&en=8849d65750c7410c&ei=5070> (accessed 1 November 2006). There has been substantial discussion on the parallels between the ‘lie’ which led to the Vietnam War and the intelligence distortions which led to the Iraq war in 2003.

¹⁸² Portugal attempted to justify the attacks on the grounds of self-defence based upon the allegation that there had been a whole series of past incursions into Portuguese territory by armed bands from Senegal. The Security Council reminded Portugal of its obligations to respect the territorial integrity and political independence of Senegal, condemned the Portuguese attacks and called on Portugal to desist immediately: SCR 273 (1969), 9 December 1969, adopted at the 1520th Meeting, by 13 votes to none, with two abstentions (the US and Spain).

Throughout the 1960s, the Security Council remained steadfast in its refusal to legitimise acts of reprisal, even when they were in response to alleged acts of terrorism. For example, with regards to the As-Samu incident,¹⁸³ the Karameh incident,¹⁸⁴ the Es-Salt Raid¹⁸⁵ and the Beirut Raid,¹⁸⁶ the Security Council consistently rejected Israel's justifications for its use of force and reiterated that forcible reprisals were unlawful.

The Security Council's justifications varied from references to the reprisals' "punitive", "disproportionate" and "premeditated" nature.¹⁸⁷ Nevertheless, the Council consistently agreed that reprisals were illegal and in violation of Article 2(4), whether or not they were in response to an isolated attack, a series of attacks or an attempt to prevent future attacks, and regardless of whether the attacks originated from another state or from non-state actors. Some reprisals escaped condemnation, perhaps because the Security Council lacked evidence of the details of the incident or because it felt that the reprisal was somehow 'reasonable' or 'proportionate'.¹⁸⁸ Those are certainly factors which some scholars argue were taken into account by the Security Council when pronouncing on a reprisal.¹⁸⁹ In any case, the evidence shows that even though reprisals were repeatedly condemned as being unlawful, and despite sometimes strong threats from the Council to take further steps if its resolutions were not adhered to, the practice of carrying out forcible reprisals continued.

¹⁸³ On 13 November 1966, Israel used jets and heavy artillery to attack villages south of Hebron, causing heavy civilian casualties. Israel claimed it had suffered an increase in terrorist and sabotage raids from Jordan and that villagers in As-Samu were harbouring terrorists from Syria. Israel's use of force was unanimously condemned: SC Resolution 228 (1966).

¹⁸⁴ On 18 March, 1968 an Israeli bus carrying schoolchildren on a trip from Tel Aviv to the Negev Desert was blown up when it hit a mine. Two adults were killed and 28 children injured. In retaliation, the Israeli military launched a large-scale attack using helicopters, tanks and aircraft on the village of Karameh resulting in the deaths of 150 guerrillas. Israel claimed that Karameh was harbouring Fatah 'terrorists' who it held responsible for the mine incident. The Security Council unanimously "condemned the military action launched by Israel in violation of the United Nations Charter and the cease-fire resolutions." It expressly referred to the Israeli action as a "military reprisal" and declared that such actions cannot be tolerated": SCR 248 (1968), 24 March 1968.

¹⁸⁵ In 1968, the Israeli military attacked a village in Jordan which it alleged was a base for terrorist activities. It claimed its actions were lawful on the grounds of self-defence. The Security Council found that the "massive air attacks by Israel on Jordanian territory were of a large-scale and carefully planned nature in violation of resolution 248 of 1968". The Security Council unanimously condemned Israel for its premeditated and repeated military attacks: SCR 256 (1968) 16 August 1968.

¹⁸⁶ In 1968 an Israeli El Al Boeing 707 was attacked at Athens airport (resulting in the death of one passenger) by two Arabs who were allegedly members of the Popular Front for the Liberation of Palestine and who had flown to Athens from Beirut, but who had otherwise no connection with Lebanon. Israel launched an attack on the Beirut Airport, destroying all 13 Arab-registered aircraft that were either on the runway or in hangars. It justified its actions on the grounds that Lebanon was 'assisting and abetting acts of warfare, violence and terror by irregular forces and organizations': UN Doc S/8946, Letter dated 29 December 1968 from Israel to the President of the Security Council. The Security Council unanimously (15 to zero) "condemned Israel for its premeditated military action in violation of its obligations under the Charter and the cease-fire resolutions". The Security Council was unconvinced that Lebanese responsibility had been established for the incident involving the El Al plane: UN Doc S/PV 1460, 28-30. For commentary on this incident see Falk, R "The Beirut Raid and the International Law of Retaliation" (1969) 63 *AJIL* 415.

¹⁸⁷ See discussion in Bowett "Reprisals", supra n169 at 7.

¹⁸⁸ For example, in relation to the Eilat incident in 1967, in which Egyptian aircraft fired upon and sunk an Israeli destroyer, in response to which Israel bombarded Suez oil refineries: the Security Council passed a neutral resolution condemning the 'violation of the ceasefire'.

¹⁸⁹ Bowett argues that the Security Council accepts 'reasonable' reprisals, taking into account factors such as: the proportionality of the reaction to the injury, the types of targets attacked, the degree of responsibility of states for irregulars operating within their jurisdiction and the putative legitimacy of the target State: see Bowett "Reprisals" supra n169 at 10-19; see also Falk's 12-point framework, supra n186.

Security Council resolutions: 1970s

Throughout the early 1970s, Israel, in particular, continued to use military reprisals in a fashion which suggested that it considered them to be acceptable. Although the Security Council generally maintained the position that reprisals were unlawful, there was a distinct softening of its attitude, most notably in the position adopted by the US. In relation to the Israeli invasion of Lebanese territory on 12 May 1970, when Israel attacked villages which it claimed were terrorist bases, the Security Council (with four abstentions) condemned Israel but chose not to call the attacks ‘reprisals’. Later that year, in relation to further Israeli attacks on Lebanese villages, the Security Council only called for Israel’s withdrawal of its armed forces, rather than condemning the attacks outright.¹⁹⁰

In February 1972, Israel reminded the Lebanese Government of its obligations to prevent its territory from being used as a base for armed attacks against Israel and that failure to do so would necessitate Israeli attacks.¹⁹¹ From 25-28 February 1972, Israeli forces attacked PLO bases in a number of south Lebanese villages, and claimed that they had destroyed many houses that were used by terrorist infiltrators and their supporters.¹⁹² The Security Council demanded that Israel immediately desist and refrain from any ground and air military action against Lebanon and to forthwith withdraw its military forces from Lebanese territory¹⁹³ but, again, the attacks were not characterised as ‘reprisals’. A few months later, Israel again attacked alleged PLO bases in Lebanon, in response to a continuation of attacks across the Israeli-Lebanese border. The Security Council condemned Israel’s repeated attacks on Lebanon in violation of the UN Charter but, again, it did not refer to them as ‘reprisals’ (the US abstained from the vote).¹⁹⁴

Also notable in 1972 was the Israeli response to the murder of eleven Israeli athletes at the Munich Olympic Games. Israel held Lebanon and Syria responsible for providing support and bases for PLO terrorists.¹⁹⁵ On 7 September 1972, Israel launched ground and air attacks against PLO targets in Lebanon and Syria. Israel justified its attacks not only on the grounds that they were a direct response to Munich, but also on the basis that they were “part of a

¹⁹⁰ SCR 285 (1970), 5 September 1970, passed by 14 votes in favour with one abstention (US).

¹⁹¹ “Israel Warns Lebanon After 2 Die in Border Ambush” *New York Times*, 25 February 1972, 3, col 3.

¹⁹² O’Brien, *supra* n170 at 427.

¹⁹³ SCR 313 (1972), 28 February 1972, adopted unanimously.

¹⁹⁴ SCR 316 (1972), 26 June 1972, adopted by 13 votes to none (Panama and US abstained).

¹⁹⁵ “Arab Guerrillas Warned by Israel” *New York Times*, 8 September 1972, 1, col 1.

continuous war.”¹⁹⁶ The US vetoed a Security Council resolution calling for an immediate cessation of military operations by Israel.¹⁹⁷

The gradual softening in the Security Council’s attitude towards reprisals continued in 1973¹⁹⁸ and 1974.¹⁹⁹ The underlying premise for Israel’s sustained practice of military reprisals against the PLO in Lebanon and Syria was self-defence. It claimed that its ‘self-defence measures’ were necessitated by the fact that Lebanon and Syria had failed, under the doctrine of state responsibility, to prevent their territory from being used as a base for attacks on another state, and that Lebanon and Syria had also provided support and cooperation to the PLO.²⁰⁰ The Security Council generally rejected those grounds and usually found that Israel’s use of force were reprisals, not self-defence and, therefore, Israel’s actions were unlawful.²⁰¹ Even if the Security Council resolutions did not always expressly refer to ‘unlawful reprisals’ the debates that preceded the resolutions often showed that this was indeed how state representatives viewed Israel’s actions.²⁰² The international community accepted that terrorist actions were unlawful, but insisted that this did not legitimise the use of reprisals.²⁰³

If we condemn terrorist activities, we must also condemn, and for the same reason, acts of reprisal. To try to justify one by the other must inevitably lead to the most deadly outbidding, to blind destruction of human lives, to constantly increasing dangers to international peace and security.

One further example from the 1970s is directly relevant to this thesis, due to the parallels in the justifications advanced and the proportionality of force used. The 1978 Litani Operation was the largest and longest counter-terror operation prior to

¹⁹⁶ “Top Israeli General Calls Raids Only ‘Part of a Continuous War’” *New York Times*, 11 September 1972, 12, col 2 and see discussion in O’Brien supra n170 at 428-29.

¹⁹⁷ 27 UN SCOR 1662nd Meeting at 7, UN Doc S/PV 1662 (1972), remarks by Ambassador Bush (US).

¹⁹⁸ In response to Israel’s covert raid on Beirut in 1973, in which a number of PLO leaders were killed, the Council condemned Israel’s ‘repeated military attacks’ against Lebanon and its violation of Lebanon’s territorial integrity and sovereignty but did not categorise Israel’s actions as ‘reprisals’: SCR 331 (1973), 20 April 1973; adopted by 11 votes to none (USSR, US, China and Guinea abstained).

¹⁹⁹ When the Security Council was asked to respond to a PLO attack on Kiryat Shemona and the Israeli response, it adopted a resolution condemning all acts of violence and Israel’s violation of Lebanese territorial integrity and sovereignty: SCR 347 (1974), 24 April 1974, adopted by 13 votes to none (China and Iraq did not participate in the voting).

²⁰⁰ For instance, see UN Doc S/PV 1644 (1972), statement by Doron that Lebanon had become a ‘sanctuary for terror’.

²⁰¹ In the debates in the Security Council, representatives described Israel’s military attacks as, *inter alia*, ‘intolerable reprisals’: see 27 UN SCOR 1643rd Meeting at 12, UN Doc S/PV 1643 (1972) statement by the French representative. Council members generally condemned them on the grounds that there were totally incompatible with the purposes, principles and prescriptions of the UN.

²⁰² For instance, in the debate on SCR 316 (1972), Belgium’s representative made a statement that “The Belgium Government has never ceased to repudiate energetically the military reprisals undertaken by Israel against Lebanon...”; Argentina’s representative stated that “punitive expeditions and preventive war are totally incompatible with the purposes, principles and prescriptions of the United Nations Charter” and the French representative stated that France disapproved of all acts of violence and it “condemned all reprisal operations, whatever the reasons for them”: 27 UN SCOR 1649th Meeting UN Doc S/PV 1649 (1972) and 27 UN SCOR 1650th Meeting UN Doc S/PV 1650 (1972).

²⁰³ 27 UN SCOR 1662nd Meeting at 4, UN Doc S/PV 1662 (1972). Similar remarks during the same debate were made by the representative of Argentina who said: “While we condemn acts of terrorism, we also condemn acts of reprisal, since they flout the Charter and they are contrary to the purposes on which this very Organization rests...”; see also O’Brien supra n170 at 436-37 especially n87.

the 1982 war in Lebanon.²⁰⁴ Israel's justification for the type and scale of its response was that Lebanon had lost control of part of its territory and that Israel had to act in self-defence to prevent future attacks and to clear the border area 'once and for all' of PLO terrorists.²⁰⁵ The Security Council rejected the claim of self-defence and several members reiterated their condemnation of reprisals.²⁰⁶ The Security Council called upon Israel to cease immediately its military action against Lebanese territorial integrity and to withdraw its forces from all Lebanese territory.²⁰⁷ Numerous representatives noted that Israel's actions were premeditated (implying that self-defence measures were, by definition, *not* premeditated).

Security Council Resolutions: 1980s

During the 1980s forcible reprisals continued to be employed. Two examples where reprisals were employed in response to acts of terrorism were the Israeli raid on Tunis and the US' attack on Libya.²⁰⁸

Israeli raid on Tunis - 1985

When members of the PLO were thought to be responsible for the murder of three Israelis in Cyprus,²⁰⁹ Israel initially responded with a raid on the Lebanese bases of PLO dissident Abu Musa. Then, on 1 October 1985, the Israeli Air Force attacked Yassir Arafat's headquarters in Hammam Plage, Tunis, killing or injuring more than one hundred persons, including women and children, many of

²⁰⁴ On 11 March 1978, 13 PLO members infiltrated Israel between Haifa and Tel Aviv, seized a bus and engaged in battle with security forces near Tel Aviv. Thirty-two civilians were killed in the course of the gun battle with the Israeli security forces. Al-Fatah claimed responsibility. In retaliation, beginning on the night of 14-15 March, Israel invaded Lebanon and attacked PLO camps; Israeli gunboats shelled PLO targets in Tyre and Said and the Israeli airforce hit PLO targets in those cities, as well as Beirut. The Israeli Defence Force ultimately advanced its occupation to the Litani River before proclaiming a ceasefire on 21 March 1978: O'Brien supra n176 at 445-50.

²⁰⁵ "[T]he prevailing situation in Southern Lebanon has been for several years...one in which the Government of Lebanon has lost control and, I dare say, sovereignty over a significant part of its own territory. In light of this situation....and in light of the PLO's declared intention to repeat atrocities like the one carried out in Israel last Saturday, the Government of Israel was left with no alternative. It acted in accordance with its legitimate national right of self-defense, the inherent right to defend its territory and population to ensure that no more barbaric attacks will be launched in the future...the aim of the Israeli Defence Force's operation was not revenge or retaliation....It was and is to clear the PLO once and for all from the area bordering on Israel, which it used mercilessly for repeated aggression against my country": UN SCOR 2071st Meeting at 6-7, UN Doc S/PV 2071 (1978).

²⁰⁶ Ambassador Husson of France: While it is clear France regards terrorist attacks as totally reprehensible, it is also clear that we have the same attitude towards acts of reprisal. Attempts to justify or explain one by the other necessarily lead to an unacceptable situation of constant escalation, causing much loss of human life and challenging and endangering international security": 33 UN SCOR 2072nd Meeting at 5, UN Doc S/PV 2072 (1978); see other states' similar statements in O'Brien supra n170 at 449, n133.

²⁰⁷ SCR 425 (1978), 19 March 1978, adopted at the 2074th Meeting, by 12 votes to none, (USSR and Czechoslovakia abstained; China did not participate in the voting).

²⁰⁸ It is not implied that that there were not other significant terrorist attacks during this decade. Other terrorist attacks, such as the Libyan agents' bombing of Pan Am flight 103 flying from London to New York which crashed in Lockerbie, Scotland in December 1988, occurred during this decade but there was no military reprisal in response. President Reagan apparently refrained from a military response because too many civilians would have been at risk. His successor, President Bush, opted for economic sanctions and a domestic judicial approach: see discussion in Reisman, M "International Legal Responses to Terrorism" (1999) 22 *Hous. J. Int'l L.* 3 at 35.

²⁰⁹ Rogg, M "3 Israelis Slain by Palestinians in Cyprus" *New York Times*, 26 September 1985, A3, col 4. The Palestinians stormed a private yacht moored in the port of Lamaca and killed three Israelis. The Palestinians had demanded the release of 20 Palestinian prisoners whom it said Israel had recently arrested.

whom were Tunisians.²¹⁰ Israeli Defence Minister, Yitzak Rabin, said that the bombing of the PLO headquarters in Tunis was in retaliation for the deaths of the three Israelis in Larnaca and that it was a warning to terrorists that they were not safe anywhere from Israeli punishment.²¹¹ The attack was condemned by Arab governments including Tunisia, Egypt, Jordan and Saudi Arabia, who called Israel's actions 'state terrorism' and 'a criminal act'.²¹²

The US initially justified the attack as a "legitimate response"²¹³ to terrorist attacks. However, a few days later it adopted a less supportive stance, stating that although "the Israeli raid was understandable as an expression of self-defence"²¹⁴ the bombing could not be condoned. Virtually all other states were unanimous in their condemnation of the attack.²¹⁵

Three days after the attack, the Security Council adopted resolution 573 which "condemned vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct."²¹⁶ It also demanded that Israel refrain from perpetrating such acts of aggression, urged member states to dissuade Israel from resorting to such acts and supported Tunisia's right to reparations.²¹⁷

The Israeli raid on Tunis suggests that virtually all states considered forcible reprisals to be unlawful as a violation of the Charter and international law. Israel regarded reprisals as a lawful expression of self-defence. The US position was similar.²¹⁸ Regarding states which harboured terrorists, Israel put forward the same proposition that it had unsuccessfully advanced in the 1970s in relation to Lebanon: it claimed that because Tunisia had permitted its territory to be used as

²¹⁰ Prial, F "Israeli Planes Attack PLO in Tunis, Killing at Least 30; Raid 'Legitimate' U.S. Says" *New York Times*, 2 October 1985 A1, col 6.

²¹¹ "Israel Calls Bombing a Warning to Terrorists" *New York Times*, 2 October 1985, A8, col 1.

²¹² Gwertzman, B "As U.S. Supports Attacks, Egypt and Jordan Vow to Press for Peace" *New York Times*, 2 October 1985, A1, col4.

²¹³ Prial, supra n210.

²¹⁴ Prial, F "Tunisia's Leader Bitter at the U.S." *New York Times*, 3 October 1985, A11, col 1.

²¹⁵ As the Security Council met to discuss a resolution, the General Assembly heard Israeli Foreign Minister, Yitzak Shamir, attempt to justify the attacks. All members of the 21-member Arab group (except Egypt) walked out of the Assembly and several other states also withdrew their entire delegations, or left only one junior delegate to hear Shamir's statement. The walk-out by Arab nations was joined by the representatives of Iran, Vietnam, Nicaragua, Afghanistan and some African nations such as Zimbabwe and Burkina Faso. East Germany also withdrew its representatives. All the other members of the Soviet bloc, including the USSR, only left one junior delegate behind: Sciolino, E "Security Council Debates Air Raid" *New York Times*, 3 October 1985, A12, col 1.

²¹⁶ SCR 573 (1985) adopted by 14 votes to none (the US abstained).

²¹⁷ Ibid.

²¹⁸ "We recognize and strongly support the principle that a state subjected to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks. This is an aspect of the inherent right of self-defence recognized in the United Nations Charter. We support this principle regardless of attacker, and regardless of victim.": US Ambassador Walters, UN SCOR (2615th Meeting) at 111-112, UN Doc S/PV 2615 (1985).

an extraterritorial base for terrorists, it had to accept the consequences of such actions.²¹⁹ It also claimed that the raid was in proportion to the damage suffered by Israel by terrorists, and the damage that would be prevented in the future.²²⁰ The arguments advanced by Israel and the US were rejected by virtually all other states, with several condemning Israel for having engaged in “state terrorism.”²²¹ The walk-out in the General Assembly and the 14-0 vote in the Security Council are evidence that, in 1985, the overwhelming majority of states opposed the Israeli-US doctrine that military reprisals were a legitimate act of self-defence in response to past acts of terrorism and as a preventative measure for future acts of terrorism.

US raid on Libya - 1986

During the 1970s and 1980s, tensions between Libya and the US were high. The US Navy had conducted freedom of navigation exercises in the Gulf of Sidra to challenge Colonel Gadhafi’s claim to sovereignty²²² and Libya was also blamed by the US for its support of various terrorist groups including the Palestinian Abu-Nidal group. Gadhafi had threatened terrorist attacks against the US on various occasions and it was thought that Libya was responsible for the bombing of two airline offices in Rome and Vienna.²²³ On 5 April 1986, a discothèque in West Berlin was bombed,²²⁴ resulting in the deaths of two US soldiers and a Turkish civilian. Gadhafi congratulated the terrorists and warned that the violence against American targets, civilian and non-civilian, throughout the world would escalate.²²⁵

Having what it believed was conclusive evidence of Libyan state responsibility, the US retaliated on 15 April 1986 by conducting air and naval attacks on targets

²¹⁹ Israeli Ambassador Netanyahu, UN SCOR (2615th Meeting) at 86-87, UN Doc S/PV 2615 (1985).

²²⁰ Ibid at 87.

²²¹ See remarks made by the representatives of Afghanistan, East Germany, Indonesia, Nicaragua and Saudi Arabia. The Soviet Union did not participate in the debate.

²²² Gadhafi claimed territorial rights in the Gulf of Sidra which most states considered to be international waters and which the US contested by regularly sending elements of the Sixth Fleet through the Gulf. This resulted in several confrontations with Libya. In 1981, a Libyan attack on US jets in the Gulf of Sidra resulted in the shooting down of two Libyan SU-22 fighter planes. Again, in 1986, US forces sunk two Libyan patrol boats and bombed a Soviet-built missile base on shore: see Ross *supra* n32 at 7-13; also Parks, W “Crossing the Line” (1986) 112 *US Naval Institute Proceedings* 40 at 45.

²²³ In December 1985, two Abu-Nidal members, using Libyan-supplied passports, simultaneously bombed airlines offices in Rome and Vienna, which resulted in the deaths of 20 civilians, including five Americans.

²²⁴ The level of Libyan state involvement was unclear at the time of the incident and the Libyan government denied it was responsible. However, in 2001, four people, including a Libyan diplomat and a Libyan embassy worker were convicted in a Berlin court on charges related to the bombing.

²²⁵ Parks, *supra* n222 at 45.

in and around Tripoli and Benghazi.²²⁶ Approximately 37 Libyans, including civilians, were killed and 93 were injured in the US raids. The US claimed its attacks were an act of self-defence intended to disrupt and deter a pattern of terrorist threats and aggressions against US nationals and US interests. The US argued that non-military measures aimed at dealing with Gadhafi's terrorist threats had been ineffective and that the raid was a counter-force operation, against targets that were directly related to terrorist operations. The UK supported the US' actions, and argued that the US had sufficient evidence to link Gadhafi to the Berlin bombing and many other past and projected terrorist actions.²²⁷ The UK agreed that the US' attacks on Libya were in self-defence.

The General Assembly considered the issue and declared that "the aerial and naval military attack perpetrated against the cities of Tripoli and Benghazi"²²⁸ were a "serious threat to peace and security in the Mediterranean region".²²⁹ It condemned the US' attacks and declared them to be a violation of the Charter of the United Nations and of international law. The General Assembly called upon the US to refrain from the threat or use of force against Libya and to resolve its disputes with Libya by peaceful means in accordance with the Charter. It also affirmed the right of Libya to receive appropriate compensation for the material and human losses inflicted upon it.

The Security Council took no action in response to the US attacks on Libya. The debate in the Security Council was characterised by a split between 'Third World' and Communist nations, which condemned the US' attacks as "acts of aggression"²³⁰ and the mainly Western nations which tried to justify the attacks on a broader interpretation of self-defence, taking into account past and present actions. A resolution condemning the US was defeated when negative votes were cast by Australia, Denmark, France, the UK and the US; Venezuela abstained.²³¹

²²⁶ The US operation, involving 150 aircraft, targeted the Bab al-Azizia army compound (Qadhafi's command centre and residence), the military part of Tripoli International airport, the Benghazi barracks, a commando training facility at the naval port of Sidi Bilal and the airbase for Libya's MiG-23 interceptors at Benina airfield: *ibid* at 47-48; also Ross *supra* n37 at 10-11; O'Brien, *supra* n170 at 463.

²²⁷ Statement by Sir John Thompson (UK), 41 UN SCOR (2679th Meeting).

²²⁸ GA Resolution A/Res/41/38, 20 November 1986, 78th plenary meeting, 41 UN GAOR Supp. (No 53) at 34, UN Doc A/41/53 (1986); passed by a vote of 79 to 28.

²²⁹ *Ibid*.

²³⁰ Qatar, Algeria, East Germany, the UAE, the USSR, India and Ghana took the position that the US' attacks could not be considered as lawful self-defence under Article 51 of the Charter because there had been no antecedent 'armed attack' by Libya. Some nations, such as India, also challenged the presumption that the Libyan Government had been proven to be responsible for the terrorist attack on the discothèque: see 41 UN SCOR (2673rd Meeting) at 5, UN Doc S/PV 2677 (1986); UN SCOR (2676th Meeting) at 4, UN Doc S/PV 2676 (1986) and 41 UN SCOR (2675th Meeting) at 6-7, UN Doc S/PV 2675 (1986) for the statement of India's representative arguing that it was doubtful that an armed attack within the meaning of Article 51 had occurred.

²³¹ 41 UN SCOR (2682nd Meeting) at 27, UN Doc S/PV 2682 (1986).

The General Assembly “noted with concern”²³² that the Security Council had been prevented from discharging its responsibilities owing to the negative votes of certain permanent members.

The US attacks on Libya and the international response gives rise to three observations. First, there was a strong feeling in the Security Council that the reprisals were justified on the grounds of self-defence, as evidenced by the fact that five members of the Security Council, including three permanent members, vetoed the resolution that would have condemned the US. This was a much broader show of support for reprisals than had existed in the 1950s, 1960s or 1970s. Secondly, although this was another instance of a military reprisal being apparently provoked by a series of alleged terrorist attacks, this incident is distinguishable from those discussed above because the connection between the terrorist acts and state involvement, and hence state responsibility, was much clearer here than in any previous instance. The Libyan leader had threatened the US with terrorism prior to the event and he had subsequently virtually claimed responsibility for it. Thirdly, although the traditional Israeli-US position on reprisals and self-defence gained some further supporters, notably the UK, it remained clear that the majority of nations maintained that reprisals were a violation of the Charter and international law, as evidenced by the General Assembly resolution.²³³

Security Council resolutions: 1990s

In the 1990s there were further acts and attempted acts of terrorism that prompted military reprisals by one sovereign state against another. The two reprisals that are the focus here are the US missile strikes on Iraq in 1993 and the US air strikes on Afghanistan and Libya in 1998.

US stikes on Iraq - 1993

On 26 June 1993, the US launched a cruise-missile attack against the Iraqi Intelligence Service (IIS) headquarters in Baghdad (*Operation Southern Watch*).²³⁴ The US attack was ordered by then President Clinton in retaliation for

²³² GA Resolution A/Res/41/38, 20 November 1986, 78th plenary meeting, 41 UN GAOR Supp. (No 53) at 34, UN Doc A/41/53 (1986).

²³³ Ibid; also Berlin, M “Raid on Libya Condemned by UN General Assembly” *Washington Post*, 21 November 1986, A30.

²³⁴ Twenty-three Tomahawk guided missiles, each loaded with a thousand pounds of explosives, were fired from American Navy warships in the Persian Gulf and the Red Sea at the headquarters of the Mukhabarat, the ISS, in downtown Baghdad: Hersh, S “A Case Not Closed” *The New Yorker*, 1 November 1993: <http://www.newyorker.com/archive/content/2020930fr_archive02> (accessed 1

an attempted assassination (allegedly instigated by the IIS) of former President Bush.²³⁵ Clinton claimed that the unsuccessful bomb plot was an attack by the Government of Iraq against the US and the missile strike was intended to deter further violence against the American people.²³⁶ The US' Permanent Representative to the UN, Ambassador Albright, reported the occurrence of the military strike to the UN Security Council.²³⁷ Albright alleged that the assassination plot was:²³⁸

[A] direct attack on the United States, an attack that required a direct United States response [and to which we] responded directly, as we are entitled to do under Article 51 of the United Nations Charter, which provides for the exercise of self-defence in such cases.

International reaction to the US missile attack was mixed. Iraq condemned it as “a totally unjustified act of aggression.”²³⁹ Egypt and Turkey opposed the missile attack, whilst Iran and Libya viewed it as an unmistakable act of aggression. The United Arab Emirates, Qatar, Bahrain, Oman and Saudi Arabia remained silent; Kuwait supported the strikes and noted that they were a natural result of Iraq's involvement in terrorist activities.²⁴⁰ The Arab League issued a statement in which it said that such force should only have been used if authorised by the Security Council and it expressed “extreme regret”²⁴¹ at the attack. The Western nations generally supported the US' missile strikes. German Chancellor Helmut Kohl called them a “justified reaction [to a] deplorable attempted act of terrorism”²⁴² whilst Austria stated that it was interested in all measures that were aimed at guaranteeing the functioning of the system of collective security.²⁴³

When the Security Council discussed the incident, a diverse group of states, including France, Japan, Brazil, Hungary, New Zealand and Spain, showed a willingness to *understand* and *accept* the US' actions, even if they did not

November 2006). For details of the US missile attack see Global Security.org: <http://www.globalsecurity.org/military/ops/strike_930626.htm> and <<http://www.globalsecurity.org/wmd/library/report/crs/94-049.htm>> (accessed 1 November 2006).

²³⁵ For further details about the investigations that the CIA conducted to ascertain Iraqi liability, see History News Network “How do We Know that Iraq Tried to Assassinate President George H W Bush?”: <<http://hnn.us/articles/1000.html>> (accessed 1 November 2006); and Hersh, supra n234.

²³⁶ US Responds to Attack by Iraqi Government – President Bill Clinton Speech, statement by Office of Press Secretary – Transcript <http://www.findarticles.com/p/articles/mi_m1584/is_n27_v4/ai_13238125> (accessed 1 November 2006).

²³⁷ UN Doc S/26003 (26 June 1993). Reporting of self-defence action is required pursuant to Article 51.

²³⁸ “Raid on Baghdad: Excerpts from UN Speech: The Case for Clinton's Strike” *New York Times*, 28 June 1993, A7, col 1.

²³⁹ UN Doc S/26004, 27 June 1993, 2.

²⁴⁰ See Kritsiotis supra n141 at 164.

²⁴¹ Ibid.

²⁴² Whitney “European Allies Are Giving Strong Backing to US Raid” *New York Times*, 28 June 1993, A5.

²⁴³ Ibid.

specifically *endorse* the legal justifications put forward by the US.²⁴⁴ Japan considered that the facts created an “unavoidable situation”²⁴⁵ for the US to take the action it did. By contrast, the Netherlands considered that although the US attack was “understandable”,²⁴⁶ it was not convinced by the American argument that an appeal could be made to the right of self-defence in accordance with Article 51 of the Charter. The Dutch Government’s position was based upon a narrow or restrictive interpretation of Article 51 whereby it found that “the criterion of self-defence in Article 51 had not been met.”²⁴⁷ The non-aligned countries urged restraint by all states and the avoidance of force in international relations, consistent with the spirit and letter of Charter law.²⁴⁸ China’s position was more equivocal than the Netherlands’ but indicated that it did not approve of the US’ actions.²⁴⁹

Ultimately, no resolutions were passed in relation to the US missile strike in either the Security Council or the General Assembly. It is significant that of the eight Security Council members which expressly supported the US’ attack on the IIS headquarters, only two (the UK and Russia) accepted that the US’ actions were justified on the grounds of self-defence.²⁵⁰

The fact that the US clothed its justifications in the language of self-defence and reported its action to the Security Council in accordance with Article 51, was itself insufficient to deem the attack a *lawful act of self-defence* rather than an *unlawful forcible reprisal*. The actions taken were clearly in retaliation for a past

²⁴⁴ UN Doc S/PV 3245 (1993): (France) “The French Government fully understands the reaction of the United States and the reasons for the unilateral action...” at 13; (Japan) “Given such circumstances, my government considers that there existed an unavoidable situation in which the United States Government could not help but take action” at 16; (Brazil) “...[W]e take note of the fact that the United States Government indicates that there is clear and compelling evidence of the involvement of the Government of Iraq in the assassination attempt, a violation of the most basic norms of international behaviour”; (Hungary) “The action taken by the United States yesterday in Baghdad was justified, according to the information available to us...” at 18; (New Zealand) “Any nations that seeks to assassinate the Head of State or a member of the senior political leadership of another State commits an act of aggression...” at 23; (Spain) “We understand the action the United States felt forced to take in the exceptional circumstances of this case...” at 24. See also Fletcher and MacIntyre “UN Accepts Clinton Evidence that Iraq Plotted to Kill Bush” *The Times*, 29 June 1993, 13.

²⁴⁵ UN Doc S/PV 3245 (1993), *ibid*.

²⁴⁶ UN Doc S/5657 (27 June 1993) (The Netherlands) and see Letter Addressed to Parliament from the Minister of Foreign Affairs, 29 June 1993 referred to at: <<http://www.ulb.ac.be/droit/cdi/fichiers/PEAV9.htm>> (accessed 1 November 2006).

²⁴⁷ *Ibid*. The Dutch Government stated that even if an incumbent President had been involved, that would not have made a difference because the criterion would not have been met.

²⁴⁸ UN Doc S/5657 (27 June 1993). This position was expressed by the representative of Cape Verde, speaking on behalf of Council members belonging to the group of non-aligned countries, namely, Cape Verde, Djibouti, Morocco, Pakistan and Venezuela. The Chinese representative took a similar view.

²⁴⁹ “China has always held that that disputes between or among countries should be settled through peaceful means of dialogue and consultation. We are opposed to any action that can contravene the Charter of the United Nations and norms of international relations”: UN Doc S/PV 3245 (27 June 1993) at 21.

²⁵⁰ *Ibid* at 22 and 23. The Russian representative stated: “...the actions of the United States are justified since they arise from the right of States to individual and collective self-defence, in accordance with Article 51 of the Charter”: *ibid* at 22. Prime Minister John Major: “Under UN Charter Article 51, I think it was entirely right of the United States to act in self-defence and they have my total support in doing so...If we just stand aside and accept that sort of behaviour, what is to stop that happening again, and again, and again?”: see Kritsiotis *supra* n141 at 165.

event, they were meant to ‘send a message’ to the Iraqi government about attempting such acts in the future and they would appear to be a classic case of an unlawful forcible reprisal.²⁵¹ The US’ attempt to bring its actions within the framework of self-defence was, if nothing else, evidence that forcible reprisals are indeed prohibited.

That the US’ actions were not condemned by the Security Council (but only two members accepted the self-defence justification)²⁵² is indicative of a trend towards a more flexible interpretation of ‘self-defence’ and a willingness to allow reprisals to occur in response to actual, or attempted, terrorist attacks. Scholars have tried to reconcile the wider implications of the US’ violation of the Charter prohibition on the use of force, with the apparent acceptance by most states that the US had no choice other than to do what it did.²⁵³

The fact that only the UK and Russia unambiguously accepted the US’ legal justification, but that several of the other Council members were nevertheless willing to accept the US’ action as “understandable”,²⁵⁴ is perplexing. It has been suggested that this was “an unhealthy development for international law generally because the enterprise of self-help - represented as an action in self-defence - reared its ugly head once again.”²⁵⁵ Kritsiotis observed in 1996 that unless the international community improves the mechanisms for satisfactorily settling disputes, such as the one that arose in this instance, then the right of self-defence “will continue to be a regular refuge in the practice of States.”²⁵⁶

US missile strikes on Sudan and Afghanistan - 1998

On 20 August 1998 the US fired Tomahawk missiles at sites in Afghanistan and Sudan. The strikes targeted the El Shifa Pharmaceutical Industries building in Khartoum (which the US alleged was assisting terrorists in the production of materials for chemical weapons) and alleged terrorist training facilities in Khost,

²⁵¹ “The retaliatory nature of the strike, and the context of the events in which it took place, strongly suggest that it was a de facto forcible reprisal which would ordinarily have no basis in international law. Yet the US neither defined nor justified the strike as such”: *ibid* at 175.

²⁵² UN Doc S/5657 (27 June 1993).

²⁵³ “[Does] the failure of the international system, coupled with fundamentally changed circumstances since the time when the relevant texts [such as the UN Charter] were agreed, make preferable unilateral action for the common good even if it is at variance with the norms articulated in the Charter and elsewhere.”: Higgins *Problems and Prospects: International Law and How We Use It* (1994) 252.

²⁵⁴ See discussion *supra* at n258 and accompanying text.

²⁵⁵ Kritsiotis, *supra* n141 at 177.

²⁵⁶ *Ibid*.

Kabul and Jalalabad in Afghanistan (which the US claimed were under the control of Osama bin Laden).²⁵⁷

The US' justifications for the strikes varied from retaliation for the 1998 embassy bombings to the protection of US citizens abroad to the prevention of future terrorist attacks. On the day of the US missile strikes, President Clinton was reported as saying, "Today we have struck back."²⁵⁸ The US President issued a statement setting out four reasons for the missile attack: first, because the US had convincing evidence that the groups targeted in the strikes had played a key role in the embassy bombings; second, because the groups had executed terrorist attacks against Americans in the past; third, because they had compelling information that they were planning additional terrorist attacks against US citizens and, fourth, because they were seeking to acquire chemical weapons and other dangerous weapons.²⁵⁹ Although there was no explicit reference in President Clinton's speech to self-defence under Article 51, US Defence Secretary William Cohen referred to the strikes as "an exercise of self-defence."²⁶⁰

Two observations arise from the US' justifications for the missile attacks. First, the strikes were clearly an act of *retaliation* for past terrorist attacks. The first two reasons advanced by President Clinton made it clear that the missile attacks were reprisals, intended as punishment for past events (the 1998 embassy attacks).²⁶¹ Second, the objective of preventing future terrorist attacks was based heavily on factual material that was speculative. Much of the 'compelling evidence' was disputed at the time and (especially with regards to the El Shifa pharmaceutical plant) was eventually proven, in some respects, to have been completely inaccurate.²⁶² As for the connection between bin Laden and the alleged terrorist training camps in Afghanistan, the US attacks were undertaken while the FBI

²⁵⁷ The US held bin Laden responsible for the 1998 bombings of US embassies in Nairobi and Dar-es-Salaam.

²⁵⁸ "US Strikes 'Terrorist' Targets in Afghanistan. Sudan", *CNN News*, 20 August 1998: <<http://www.cnn.com/US/9808/20/clinton.02/>> (accessed 1 November 2006).

²⁵⁹ Statement made by President Bill Clinton from Martha's Vineyard, Massachusetts; US Department of Defence, "US Strikes Against Terrorist Forces": <http://www.defenselink.mil/news/Aug1998/n08201998_9808201.html> (accessed 1 November 2006).

²⁶⁰ CNN.com, "Pentagon: Strikes sought to protect US citizens overseas" 21 August 1998: <<http://www.cnn.com/US/9808/20/pentagon.02/>> (accessed 1 November 2006).

²⁶¹ That point was also made clear in statements by Madeleine Albright: see CNN.com "US Missiles Pound Targets in Afghanistan, Sudan" 21 August 1998: <<http://www.cnn.com/US/9808/20/us.strikes.02/>> (accessed 1 November 2006).

²⁶² Lobel, J "The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan" (1999) 24 *Yale J. Int'l L.* 537 at 543-547. For media reports of the concerns that were raised about the Clinton administration's justifications for the missile attacks, see Weiner, T and Myers, S "After the Attacks: The Overview, Flaws in the US Account Raise Questions on Strike in Sudan" *New York Times*, 19 August 1998, A2; and Richter, P "Sudan Attacks Claim Faulty, US Admits" *Los Angeles Times*, 1 September 1998, A1.

investigation was still in its preliminary stage.²⁶³ The US Attorney-General, Janet Reno, noted that the FBI had come to 'no final conclusions' about who was responsible for the embassy bombings and she had urged the White House to delay the raids until further evidence could be gathered linking bin Laden to the embassy bombings.²⁶⁴ Reno warned the White House that the evidence tying bin Laden to the embassy bombings did not meet the Tripoli standard (a reference to the 1986 US missile strike on Libya), which is significant, because even though there was no Security Council resolution, the world reaction to the Libyan strikes was one of general condemnation, mainly because of a lack of clear and compelling evidence linking the Libyan government with the Berlin discothèque attack. The fact that the evidence presented in support of the 1998 US missile attacks was recognised by the Attorney-General as being even weaker than that presented in 1986 is further evidence that the 1998 attacks did not meet the required evidential standards regarding state responsibility and it is suggested that the US' attacks were nothing other than an unlawful forcible reprisal.

The Security Council did not meet publicly to discuss the US raids on Sudan and Afghanistan, as it had after the US raids on Libya in 1986 and Iraq in 1993. The Council adopted a resolution on 13 August 1998 (after the embassy bombings on 7 August but before the US retaliation on 20 August) in which it strongly condemned the terrorist bomb attacks in Nairobi and Dar-es-Salaam and commended the governments of the US, Kenya and Tanzania for their responses to the terrorist attacks.²⁶⁵ It did not pass any resolution after the US missiles strikes. Sudan tried to initiate a Security Council fact-finding mission to investigate the US claim that the El Shifa plant had produced a precursor of the lethal 'VX gas'. The draft resolution was supported by the Arab states and the OAU but was blocked by the US.²⁶⁶

Beyond the Security Council, the international response to the US' missile strikes was mixed. UN Secretary-General Kofi Annan was initially "concerned over the developments."²⁶⁷ In September 1998, he criticised "individual actions"²⁶⁸ against

²⁶³ "FBI chief visits Africa bomb sites" *CNN.com*, 20 August 1998: <<http://www.cnn.com/WORLD/africa/9808/20/africa.03/>> (accessed 1 November 2006).

²⁶⁴ "FBI Director Says Investigation into Bombings is Preliminary" *Baltimore Sun*, 22 August 1998 at 98; Lobel *supra* n252 at 548.

²⁶⁵ SC Resolution 1189 (1998).

²⁶⁶ Lobel *supra* n262 at 537-38.

²⁶⁷ "Muslims, Yeltsin Denounce Attack" *CNN.com*, 21 August 1998: <<http://www.cnn.com/WORLD/africa/9808/21/strikes.world.reax.02/>> (accessed 1 November 2006).

terrorism. Russian President, Boris Yeltsin, condemned the action; China initially neither condemned nor condoned the strikes but later criticised the US' actions;²⁶⁹ British Prime Minister Tony Blair said he strongly supported the US' actions and made a direct link between the missile strikes and the earlier US embassy bombings; Australia supported the US' actions and said the US was entitled to defend itself; and the Israeli Prime Minister, Benjamin Netanyahu, said he "welcomed the US decision to strike targets of terrorism in Sudan and Afghanistan."²⁷⁰ The non-aligned countries condemned the US attack as "unilateral and unwarranted."²⁷¹ Many predominantly Muslim nations, such as Indonesia, Pakistan and Libya, also condemned the US strikes as acts of aggression.²⁷² In summary, the US received support from its usual Western allies, and condemnation from the Arab and Muslim world, which was joined by Russia; China was equivocal. As Franck has observed, there was no effort in the UN to argue that such recourse to force was *ipso facto* illegal.²⁷³ The absence of unified international condemnation following the missile strikes could be interpreted as a further weakening of the international community's resolve to prevent forcible reprisals from being employed under the guise of self-defence in the wake of a terrorist attack.

The use of force by the US against Sudan and Afghanistan in 1998, coming as it did after the 1993 missile strikes against Iraq and the use of reprisals in the 1970s and 1980s, added another layer to an increasingly complex picture of the international law pertaining to the use of force and the supposed unlawfulness of forcible reprisals. The questions that were raised over whether the US produced a satisfactory evidentiary basis for its missile strikes proved that evidence of state responsibility is an important issue in the ongoing debate over the use of reprisals in response to terrorist attacks. The US' refusal to have the factual justifications for its use of force reviewed by the Security Council has been analysed elsewhere.²⁷⁴ Suffice to note that the 1998 incident indicated that there is an urgent need, not only for a reconsideration and clarification of the legal status of

²⁶⁸ "Annan Faults States' 'Individual Actions' Against Terrorism", *Agence France Presse*, 21 September 1998.

²⁶⁹ "Muslims, Yeltsin Denounce Attack" CNN News, *supra* n267; Ching, F "China Feels Let Down by US", *Far East Economic Review*, 24 September 1998 at 38.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² See "Pakistan to Lodge Complaint about US", *USA Today*, 25 August 1998, A4.

²⁷³ Franck, T *Recourse to Force: State Action Against Threats and Armed Attacks* (2003) 96.

²⁷⁴ Lobel *supra* n262 at 553-54; but see also Wedgwood, R "Responding to Terrorism: The Strikes Against bin Laden" (1999) 24 *Yale J. Int'l L.* 559 at 567-68.

reprisals as a form of self-defence, but also as to the standard and veracity of factual evidence that ought to be presented by a state before it can embark on retaliatory military action, even if it *can* be justified under the rubric of self-defence.

The main conclusion for the present analysis is that by the end of the 1990s, at least two states (Israel and the US) had exhibited a practice of carrying out forcible reprisals in response to actual or threatened terrorist attacks, both past and future, and that the international community and, increasingly, the Security Council, was prepared to allow such reprisals to occur, or at least acquiesce in their use, without formal censure.

Reprisals and the Security Council: 2000-2006

Two instances during the past five years in which reprisals were used was in the context of the enforcement of the Iraqi 'no-fly zones'. A northern 'no-fly zone', which imposed a ban on Iraqi fixed and rotary-wing aircraft above the 36th parallel, was established by the US, the UK and France in April 1991 as an integral part of the US military's 'Operation Provide Comfort'. The initial objectives of the northern 'no-fly zone' were to ensure the safety of Coalition aircraft providing humanitarian relief to Kurdish refugees, and later, to ensure the safety of Coalition ground troops.²⁷⁵ A southern 'no-fly zone' was proclaimed by the US, the UK and France in August 1992 over the area below the 32nd parallel.²⁷⁶ Neither of the so-called 'no-fly zones' were expressly authorised by the UN.²⁷⁷ Justifications for the 'no-fly zones' were offered by the US and the UK on the basis of humanitarian intervention and that the 'no-fly zones' were imposed in support of Security Council Resolution 688.²⁷⁸

US-British air strikes on Iraq – 2001

On 16 February 2001, the US led an air-strike on four targets south, and one north, of Baghdad. The US claimed that the Iraqi radar and command and control

²⁷⁵ See discussion in Malone, D *The international struggle over Iraq: politics in the UN Security Council 1980-2005* (2006).

²⁷⁶ Note that France pulled out of joint-enforcement in 1996; note also that the southern 'no-fly zone' was originally established from the 32nd parallel but it was extended by the US to the 33rd parallel in 1996.

²⁷⁷ Security Council Resolution 688 (1991) called upon Iraq to end the repression of its civilian population and to allow access to international humanitarian organisations but it did not authorise the use of force to assist either the Kurds in the north or the Shi'ites in the south.

²⁷⁸ See UKMIL 63 BYIL (1992) 825 for Secretary of State Douglas Hurd on the establishment of the southern zone: "...we are on strong legal as well as humanitarian ground in setting up this 'No-Fly' zone". For a discussion on the legality of the northern and southern 'no-fly zones', see Gray *International Law and the Use of Force* (2004) esp 34-35; Shaw *International Law* (2003) at 1046 and 1136-37; Mahajan, R *Full Spectrum Dominance – U.S. Power in Iraq and Beyond* (2003) 106-07; Malone, *ibid*.

installations threatened US jets patrolling Iraqi air space.²⁷⁹ The US justified its attack as ‘essentially a self-defense operation’; that it was ‘part of a strategy’ and that that it was a ‘routine strike’ the objective of which was to protect the safety of the pilots and aircraft patrolling the no-fly zone.²⁸⁰ The British Government referred to the strikes as a “targeted and measured response.”²⁸¹ The US claimed to have acted legitimately under the guise of self-defence but, as discussed above, self-defence requires an ‘armed attack’ to have occurred.²⁸² In this instance, the ‘armed attack’ was supposedly the potential threat posed to US and British aircraft and pilots flying above Iraqi airspace by missiles fired from the ground. Both the UK and the US held the view that they were under ‘armed attack’ and the missile strikes were launched as acts of self-defence.²⁸³

The international reaction was generally negative. Concerns were publicly raised not only by, predictably, Iraq but also by the US’ and the UK’s allies in NATO and in the Middle East. France said it wanted an explanation for the air-strike; several members of the German government criticised the US and the UK for the raid; Spain said that it and other European allies had not been informed of the strike; Turkey rebuked the US for failing to inform it before the strike was launched; the Arab League stated that the air-strikes had breached international law and public protest was voiced from within Egypt, Jordan and the Palestinian Occupied Territories. Only Israel gave its muted support for the air-strikes.²⁸⁴

Iraq called on the Security Council and the UN Secretary-General to condemn the military aggression and to take steps to prevent it from happening again. Three Permanent Members of the Security Council (Russia, France and China) made public statements expressing concern at the use of force without Security Council approval, condemning the attacks and implicitly denying the validity of the self-

²⁷⁹ In 2001, the US alleged that the British and American planes patrolling the southern ‘no-fly zone’ were at risk from the increasingly sophisticated Iraqi air defence facilities and, therefore, the US led an attack to destroy those facilities.

²⁸⁰ “Allies hit Iraq with ‘self-defense’ strike”, *CNN.com*, 16 February 2001:

<<http://archives.cnn.com/2001/WORLD/meast/02/16/iraq.airstrike.02/index.html>> (1 November 2006).

²⁸¹ Amanpour, C “The British Connection”, *CNN.com*, 16 February 2001:

<<http://archives.cnn.com/2001/WORLD/meast/02/16/amanpour.debrief/index.html>> (accessed 1 November 2006). Note that the targets of the missile attack were north of the 33rd parallel and therefore beyond the actual no-fly zone but the legitimacy or otherwise of the ‘no-fly zone’ is not at issue here.

²⁸² See discussion above regarding the “armed attack” requirement of Article 51, and the discussion on pre-emptive self-defence.

²⁸³ British Prime Minister Tony Blair: “Operations such as the one last night would not be needed if Saddam stopped attacking us...But as long as he does, I will continue to take the steps necessary to protect our forces and to prevent Saddam from once again wreaking havoc, suffering and death.”: Gordon, M “New Bush, Old Team, Ponder Saddam”, *New York Times*, 18 February 2001: <<http://www.globalpolicy.org/security/issues/iraq/2001/0218bomb.htm>> (accessed 1 November 2006).

²⁸⁴ “Iraqis March in Protest Against Western Air Raids” *Reuters*, 18 February 2001: <<http://www.globalpolicy.org/security/issues/iraq/2001/0218prst.htm>> (accessed 1 November 2006).

defence argument put forward by the US and the UK.²⁸⁵ However, the Security Council did not discuss the attacks and no resolution was adopted by it or by the General Assembly. That lack of formal condemnation in the Security Council could be explained by a sense of pragmatism amongst the US and UK's allies. There would have been no possibility of securing a Security Council resolution, given the US' and the UK's veto power. Lobel argued in 1999 that states must choose their battles over the US' use of unilateral force carefully. Just as the Sudanese missile strike would not have been a very appealing battle to wage, likewise Iraq in 2001 may well have been subject to reprisals that were technically unlawful, but no state was willing to argue the point.²⁸⁶

The current status of reprisals in international law

Scholars have observed the continued use by states of reprisals and have debated their status in international law. One school of thought advocates the formal acceptance of reprisals as a type of 'self-defence' measure. Proponents include Bowett,²⁸⁷ Falk,²⁸⁸ Blum,²⁸⁹ O'Brien,²⁹⁰ Dinstein²⁹¹ and Kelly,²⁹² who have argued for the adoption of various doctrines, such as "reasonable reprisals"²⁹³ or "defensive reprisals"²⁹⁴ in order for states to be able to resort to reprisals in limited circumstances without violating the Charter. They have set out various guidelines, frameworks²⁹⁵ and formulae that they consider ought to be used by states before launching a reprisal, with the objective of reconciling the resort to reprisals with the general prohibition on force in the Charter. An alternative perspective, advocated by Waldock,²⁹⁶ Shaw,²⁹⁷ Brownlie,²⁹⁸ Lobel,²⁹⁹ Ratner³⁰⁰

²⁸⁵ "Russia Leads Criticism of Iraqi Raids", *CNN.com*, 17 February 2006:

<http://archives.cnn.com/2001/WORLD/meast/02/17/iraq.reaction/> (accessed 1 November 2006).

²⁸⁶ Lobel *supra* n262 at 557 for the parallels between international reaction to the 1998 missile strikes on Sudan and Afghanistan and the 2001 missile strike on Iraq.

²⁸⁷ Bowett, D "Reprisals Involving Recourse to Armed Force" (1972) 66 *AJIL* 1.

²⁸⁸ Falk, R "The Beirut Raid and the International Law of Retaliation" (1969) 63 *AJIL* 415.

²⁸⁹ Blum, Y "The Beirut Raid and the International Double Standard: A Reply to Professor Richard A Falk" (1970) 64 *AJIL* 73.

²⁹⁰ O'Brien, W "Reprisals, Deterrence and Self-Defense in Counterterrorism Operations" (1990) 30 *Va. Jnl Int'l Law* 421.

²⁹¹ Dinstein, Y *War, Aggression and Self-Defence* 4th ed (2005) esp at 228.

²⁹² Kelly, M "Time warp to 1945 – Resurrection of the reprisal and anticipatory self-defense doctrines in international law" (2003) 13 *J. Trans. Law & Pol* 1.

²⁹³ For a framework of 'reasonable reprisals' see Bowett "Reprisals" *supra* n170.

²⁹⁴ For and analysis of 'defensive reprisals' see Dinstein, *supra* n35 where he argues that armed reprisals ought to be assimilated into the right of legitimate self-defence.

²⁹⁵ Falk *supra* n186 and Blum *supra* n289.

²⁹⁶ "Armed reprisals to obtain satisfaction for an injury or any armed intervention as an instrument of national policy otherwise than for self-defence is illegal under the Charter": Waldock, *supra* n54 at 493.

²⁹⁷ Shaw *supra* n135 at 786.

²⁹⁸ "[T]he provisions of the Charter relating to the peaceful settlement of disputes and non-resort to the use of force are universally regarded as prohibiting reprisals which involve the use of force": Brownlie *supra* n32 at 281.

²⁹⁹ "[T]he relaxation of Article 51 is both unnecessary and counterproductive in the fight against terrorism": Lobel *supra* n262 at 537.

³⁰⁰ Ratner, M and Lobel, J "An Alternative to the Use of US Military Force, 27 September 2001:

<http://jurist.law.pitt.edu/forum/forumnew32.htm> (accessed 1 November 2006): "A country is not permitted to use military force for purposes of retaliation, vengeance or punishment..."

and O'Connell³⁰¹ maintains that all forcible reprisals undertaken during peacetime are unlawful, unless they fall within the framework of self-defence. They argue against broadening the meaning of self-defence.

The divergence of views on the lawfulness of reprisals exhibits a lack of consensus amongst scholars on the interpretation of key articles of the Charter. As the foregoing analysis has shown, that lack of consensus has also been demonstrated by states taking an inconsistent and sometimes contradictory position on reprisals. The Security Council's lack of consistency is particularly difficult to reconcile with the apparent unlawfulness of forcible reprisals in international law. At the time of writing,³⁰² it would appear that if one considers 'hard' international law, the prohibition on the use of force in Article 2(4) is still in force and is generally considered to be *jus cogens*. Furthermore, the weight of opinion is that the UN Charter prohibits states from resorting to the unilateral employment of force, including forcible reprisals, unless they are authorised by the Security Council, or they satisfy the elements of the Article 51 right to self-defence (which requires an 'armed attack' to have occurred). This interpretation of the current position is supported by various Security Council resolutions, General Assembly resolutions and declarations, as well as pronouncements of the ICJ.³⁰³ In the *Nicaragua* case, the ICJ cited the adoption of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States (General Assembly Resolution 2625 XXV) as evidence of *opinio juris*. That Declaration provided that states have a duty to refrain from acts of reprisal involving the use of force.

The fact that some states (notably, the US, the UK and Israel) have employed forcible reprisals and have, on several occasions, done so without attracting condemnation from the Security Council, is problematic. Some would argue that this is evidence of the development of international law and that the apparent acceptance by many states of reprisals, once they have occurred, suggests that state practice has become a more influential indicator of the norms of customary

³⁰¹ O'Connell, M "Lawful Responses to Terrorism" 18 September 2001: <<http://jurist.law.pitt.edu/forum/forumnew30.htm>> (accessed 1 November 2006): "Reprisals are not considered measures of self-defence – they do not repel on-going armed attack or seek to dislodge an unlawful occupation..."

³⁰² July 2007.

³⁰³ Wary of a return to self-help and the unilateral enforcement of international law, the ICJ held in the *Corfu Channel* case in 1949 that modern law on the use of force, which impliedly includes self-defence, is not conditioned by the operational defects of the collective security system of the United Nations: see *Corfu Channel Case: United Kingdom v Albania* ICJ Reports 1949, 4 at 35.

international law than Security Council resolutions.³⁰⁴ The wider question of how much regard should be given to state practice, and how much weight can be accorded to Security Council resolutions, in the interpretation and formation of international law, is complex, with scholars such as Cassese claiming that “what matters more than scholarly views is the opinion of states.”³⁰⁵ The importance of looking at the *opinio juris* of states was also emphasised by the ICJ in the 1985 *Libya/Malta Continental Shelf Case*. In that case, the ICJ explained that the substance of customary international law should be sought, in the first instance, in the effective practice and *opinio juris* of states.³⁰⁶ Article 31 of the Statute of the ICJ emphasises that the Court must take into account international custom, as evidence of a general practice accepted as law.³⁰⁷

The issue of how one can determine the *opinio juris* of states is directly relevant to the question that is being examined here, namely, assessing the legal status of reprisals. General Assembly resolutions, such as Resolution 2625 (XXV) are relevant.³⁰⁸ Traditionally, international lawyers have presumed the existence of *opinio juris* when a state does nothing in the face of another state’s clear and concerted effort to change customary international law.³⁰⁹ Determining whether state *acquiescence* is evidence of state *acceptance* is an issue that has been addressed by scholars such as Stern, who argues that acquiescence on the part of relatively weak states is often a result of the dynamics of power rather than a freely given consent, and that *opinio juris* thus means different things for weak and powerful states.³¹⁰ Kritsiotis,³¹¹ White and Cryer have pointed out that lack of condemnation by states for a particular action is not indicative of those states’ acceptance of that action, or more importantly, the lawfulness of that action. White and Cryer have taken issue with those who ascribe legal significance to the refusal of states to reject publicly the unilateral use of force by the US:³¹²

It is true...that deficiency of condemnation is an unfortunate fact of international relations in the post-Charter era, but it is over-simplistic to equate this with a change in the law. For a new

³⁰⁴ For a discussion of how state practice and Security Council resolutions shape international law relating to the use of force in self-defence, see Byers, M “The Shifting Foundations of International Law: A Decade of Forceful Measures Against Iraq” *EJIL* 13 (2002) 21.

³⁰⁵ Cassese, A *International Law in a Divided World* (1986) 232.

³⁰⁶ (1985) ICJ Reports 29-30.

³⁰⁷ Article 38, para (b) of the Statute of the International Court of Justice.

³⁰⁸ See discussion supra n26; this Declaration declared reprisals to be unlawful.

³⁰⁹ Byers, supra n304.

³¹⁰ Stern, B “La coutume au Coeur du droit international” in *Mélanges offerts à Paul Reuter* (1981), (Byers, M and Denise, A, trans) “Custom at the Heart of International Law” (2001) 11 *Duke J. Comp. & Int’l L.* 89.

³¹¹ Kritsiotis, D “The Legality of the US Missile Strikes Against Iraq and the Right of Self-Defense in International Law” (1996) 45 *ICLQ* 162.

³¹² White and Cryer supra n163 at 246.

customary norm to have emerged, absence of condemnation itself is not enough. There must also be an intention for that failure to condemn to amount to an acceptance of the legality of the threat or an alteration of the pre-existing law, in other words, opinio juris. This has been conspicuous by its absence. Reluctant tolerance does not evidence opinio juris. (emphasis added)

Thus, merely because a few states choose to violate international norms by resorting to forcible reprisals does not mean that reprisals are thereby rendered lawful. States may not take a stand on the individual instances in which reprisals are employed, due to political, rather than legal, considerations.³¹³ But lack of formal criticism does not, *per se*, transform unlawful forcible reprisals into lawful acts of self-defence. It seems much more likely that forcible reprisals are still a breach of international law but states, for one reason or another, are sometimes motivated to ‘look the other way’ when a powerful state, which has veto power, wishes to use them for its own purposes.³¹⁴

Non-state actors

The sixth and final part of this chapter examines the evolution of international law regarding the use of force by non-state actors, and more specifically, by non-state actors who are engaged in acts of ‘international terrorism.’³¹⁵ Some general observations will be made on the relationship between ‘aggression’ and non-state actors followed by an analysis of how states may respond to the use of force by non-state actors and the way in which state responsibility may be established. During the course of this epoch, it has become apparent that states have exhibited an increasing willingness not only to use force against non-state actors, but to interpret the ‘armed attack’ requirement in Article 51 in a way which legitimises the use of force against both state and non-state actors.

The meaning of ‘aggression’ and the state versus non-state actor dichotomy

Whether states may use force in response to force employed by non-state actors is an issue that is linked to the debate surrounding the meaning of ‘aggression’. Historically, states wished to draw a line between the use of force by one state against another state and the use of ‘indirect force’ such as when a state was the

³¹³ See Lobel *supra* n262 at 557.

³¹⁴ The fact that at least five states supported the US’ missile strikes against Iraq in 1993, because they ‘understood’ the US reaction to the thwarted assassination plan, but they failed to refer to the self-defence justification put forward by the US as the basis for its actions, is perhaps evidence that they did not accept the reprisal as being within the letter of international law.

³¹⁵ The meaning of ‘terrorism’ and the efforts to construct an international legal framework to combat it were examined in chapter 3.

victim of “subversive or terroristic acts”³¹⁶ by non-state actors. The draft proposals discussed through the UN committees in the late 1960s showed that states wanted to restrict the right of self-defence to instances where there had been an “invasion or armed attack by the armed forces of *one State*, against the *territory of another State*”.³¹⁷ The Definition of Aggression adopted by the General Assembly via Resolution 3314 (XXIX)³¹⁸ also emphasised that ‘aggression’ meant the use of force by one **state** against the sovereignty, territorial integrity or political independence of another **state**.³¹⁹ The Definition of Aggression also provided it would be an act of aggression if one state placed its territory at the disposal of another state, to be used by that state for perpetrating an act of aggression against a third state.³²⁰ Finally, it included the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such magnitude as to amount to one of the listed acts of aggression, or its substantial involvement therein.³²¹ The definition of aggression adopted by the General Assembly shows that its members intended to restrict ‘aggression’ to instances where one state attacked another, or was **responsible** for armed bands, groups, irregulars or mercenaries that attacked another state.

The state versus non-state actor distinction is also evident in the law pertaining to piracy, which was the main threat posed by non-state actors prior to World War II.³²² In 1982, piracy was defined in the UN Convention on the Law of the Sea.³²³ Piracy consists of illegal acts of violence or detention committed for *private* ends by the crew or passengers of a *private* ship or aircraft.³²⁴ Thus, acts of piracy are criminal acts, carried out by non-state actors; they do not constitute an ‘armed

³¹⁶ “Draft Declaration on Aggression” submitted to the 1968 Special Committee on the Question of Defining Aggression, at the 14th Meeting, 25 June 1968, by Algeria, the Congo, Cyprus, Ghana, Guyana, Indonesia, Madagascar, the Sudan, Syria, Uganda, the UAE and Yugoslavia, A/AC. 134/L.3, as reproduced in Ferencz, supra n2 at Document 14, 285.

³¹⁷ “[W]hen a State is a victim in its own territory of subversive and/or terrorist acts by irregular, volunteer or armed bands organized by another State, it may take all reasonable and adequate steps to safeguard its existence and its institutions, **without having recourse to the right of individual or collective self-defence against the other State under Article 51 of the Charter**” (emphasis added): Draft Declaration on Aggression submitted to the 1968 Special Committee on the Question of Defining Aggression, at the 20th Meeting, 3 July 1968, by Columbia, the Congo, Cyprus, Ecuador, Ghana, Guyana, Indonesia, Iran, Mexico, Spain, Uganda, Uruguay and Yugoslavia, A/AC.134/L6, as reproduced in Ferencz supra n2 at 286.

³¹⁸ UNGA Resolution 3314 (XXIX), adopted at the 2319th plenary meeting on 14 December 1974.

³¹⁹ Ibid, Article 1. Seven types of acts, all of which would amount to aggression, are described in Article 3. All of them, except the last two, refer to the ‘armed forces of a state’.

³²⁰ Ibid, Article 3(f).

³²¹ Ibid, Article 3(g).

³²² See discussion in chapter 8. The parallels between piracy and terrorism have been touched upon in earlier chapters and elsewhere: see Rubin, A *The Law of Piracy* 2nd ed. (1998) 377-79; also Bolton, J “Maritime Order and the Development of the International Law of Piracy” (1983) 7(5) *International Relations* 2335.

³²³ The United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, UN Doc A/CONF.62/122, 7 October 1982, Article 101.

³²⁴ Ibid, Article 101.

attack' and do not trigger the right to use force in self-defence. Acts of piracy attract universal jurisdiction: any state may seize a pirate ship or aircraft, arrest the persons and seize the property, and the courts of that state may decide upon the penalties to be imposed.³²⁵ The parallels between piracy and terrorism are so close as to prompt one writer to suggest that the problems which the international community has experienced in defining terrorism could be resolved by adopting the same framework as was adopted for piracy: declare terrorists to be *hostis humani generis*, that is, enemies of all mankind, and ensure that they are legally classified as international criminals, subject to universal jurisdiction.³²⁶

States' responses to terrorism: law enforcement versus the use of armed force

Although the dominant interpretation of Article 51 is that 'armed attacks' means attacks by states and their representatives, several examples have been referred to above which illustrate that there are exceptions to this rule.³²⁷ Since the mid-1980s, the US and Israel have adopted the position that attacks by terrorists (state-sponsored or otherwise) may be considered as 'armed attacks' and can therefore trigger the Article 51 right to use force in self-defence.³²⁸ By the end of the 1990s, the predominant view was that terrorist attacks committed by private, non-state actors were a form of criminal activity to be combated through domestic and international criminal justice mechanisms.³²⁹

The examples referred to above from the 1970s and 1980s indicate the emergence of a conflict over which of two approaches should be used to respond to terrorism: the law enforcement approach or the use of armed force (conflict management) approach.³³⁰ The law enforcement model assumes that terrorist acts are criminal acts and can be addressed by civil/municipal government functions via the international and/or domestic criminal justice system: the police, prosecutors,

³²⁵ Ibid, Article 105.

³²⁶ Burgess Jr, D "The Dread Pirate bin Laden: How thinking of terrorists as pirates can help win the war on terror", *Legal Affairs*, July/Aug 2005: <http://www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp> (accessed 1 November 2006).

³²⁷ In 1985, Israel bombed Tunis and in 1986 the US attacked Libya, in response to alleged acts of terrorism by non-state actors, but both Israel and the US attempted to justify their actions under the rubric of self-defence: see discussion supra at 247-251. The Reagan administration justified the use of force against Nicaragua on notions of "armed attack" and self-defence, although that was rejected by the ICJ. In 1993, the US employed force against Iraq and in 1998 against Sudan and Afghanistan on the basis that it was acting in 'self-defence' in response to (arguably) non-state actors (namely, a thwarted assassination attempt by the IIS and the bombings of two US embassies in Africa, allegedly orchestrated by Osama bin Laden).

³²⁸ The international community has not always been sympathetic to that proposition, for example, see the international reaction to the use of force by Israel against Tunis in 1985, by the US against Libya in 1986, by the US in Nicaragua in 1986; the US against Iraq in 1993 and against Sudan and Afghanistan in 1998 and the US and the UK against Iraq in 2001: see also the examples discussed in Gray, C *International Law and the Use of Force* Second ed, (2004) at 108-34.

³²⁹ Garwood-Gowers, A "Self-Defence Against Terrorism in the Post-9/11 World" (2004) 13 *QUTLJ* 4, and Travalio, G and Altenburg, J "Terrorism, State Responsibility and the Use of Military Force" (2003) 30 *Chi. J. Int'l L.* 421.

³³⁰ Travalio and Altenburg, *ibid* at 98-99.

judges, juries and the corrections system, if necessary. Evidence that states preferred this approach can be gleaned from the approach adopted since the 1937 Convention on Terrorism was drafted, and subsequently, in the raft of conventions that were signed, and resolutions that were adopted, between 1963 and 1991 which made various terrorist acts criminal offences.³³¹ However, there was a growing voice within states such as Israel and the US which supported an alternative approach. Statements from within the US administration and the US military suggested that the armed force model was gaining favour there.³³²

Terrorism and ‘armed attack’

Whether ‘armed attack’ in Article 51 includes actions of non-state actors has been a contentious issue during this epoch. In the *Nicaragua* case the ICJ discussed the point at which attacks by non-state actors may be attributable to the state thereby entitling the targeted state to take action in self-defence under Article 51.³³³ The ICJ stated that military action by armed bands, groups, irregulars or mercenaries could constitute an armed attack *if* they were sent by or on behalf of a state (or the state had “substantial involvement therein”) and *if* they carried out acts of armed force which are of such gravity as to amount to an actual armed attack by the regular forces of a state. But the Court added that ‘armed attack’ does not include assistance to rebels in the form of the provision of weapons or logistical or other support. The ICJ theoretically drew a line between terrorists who are state-sponsored and those who are not: the actions of the former may meet the standard of ‘armed attack’ but the actions of the latter probably will not. The ICJ also distinguished between terrorists and those who harbour them and merely provide support to them. The question of whether ‘armed attack’ can include actions of non-state actors received further attention from the ICJ in 2004 in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*:³³⁴

³³¹ See Elagab, *O International Documents Relating to Terrorism* (1995) for a comprehensive list and text of these conventions and resolutions. The terrorism conventions have already been discussed in this thesis in chapter 3.

³³² For instance, see the statement made by Secretary of State George Shultz in 1986 when he asserted that it was “absurd to argue that international law prohibits us from...using force against states that support, train and harbour terrorists or guerillas”: Shultz, G “Low Intensity Warfare: The Challenge of Ambiguity” (1986) 25 *ILM* 204 at 206; see also Erickson, *supra* n125.

³³³ “[I]t may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” (inter alia) an actual armed attack conducted by regular forces, “or its substantial involvement therein”: *Nicaragua* *supra* n26, para 195, citing an extract from para (g) of the Definition of Aggression, *supra* n65 (punctuation and emphasis as in the original).

³³⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* n70, at para 139.

*Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of an **armed attack by one State against another State.** (emphasis added)*

The implication of the ICJ's latter statement is that 'armed attacks' in the context of Article 51 can *only* be made by one state against another state.³³⁵ Thus, a state can only invoke Article 51 if it has suffered an armed attack from another state. In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case, the ICJ was aware that the types of attacks from which Israel claimed to be defending itself were from non-state terrorist actors, yet it steadfastly maintained that Article 51 was not relevant.³³⁶

Aside from Article 51, Israel also relied in that instance upon Security Council Resolutions 1368 and 1373 (2001) which were passed after the events of 11 September 2001 and which referred to acts of international terrorism as a "threat to international peace and security"³³⁷ *without* ascribing those acts to any particular state. Judge Kooijmans argued that this was a "completely new element"³³⁸ and "an undeniably new approach to the concept of self-defence"³³⁹ which the Court had regrettably bypassed in referring only to actions of states. He implied that those two resolutions had placed a new interpretation on the meaning of Article 51 which meant that actions of non-state actors could henceforth be regarded as armed attacks, even if they did not come from another state, despite the fact that this had been the "generally accepted interpretation for more than 50 years."³⁴⁰ In essence, Judge Kooijmans was arguing that the Court had overlooked the importance of the Security Council resolutions in interpreting the meaning of 'armed attack' in Article 51. But despite some interesting and well-reasoned opposition, the majority of the ICJ held in 2004 that 'armed attack' in Article 51 meant an attack by one state against another state.³⁴¹ Although this

³³⁵ For analysis and comment on this issue, see Murphy, *supra* n72; Wedgwood, R "The ICJ Opinion on the Israeli Security Fence and the Limits of Self-Defence" (2005) 99 *AJIL* 57-59; and Orakhelashvili, A "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction" (2006) 11(1) *JCSL* 119.

³³⁶ Three of the judges objected to the narrowing of Article 51's application in that way. Judge Higgins argued that there is nothing in the text of Article 51 to narrow it to actions of the State: Advisory Opinion of July 9 2004, Separate Opinion of Judge Higgins, para 33. Judge Buergenthal argued that Article 51 does not make its exercise dependent on an armed attack by another **State**: Advisory Opinion of 9 July 2004, Declaration of Judge Buergenthal, para 6. Judge Kooijmans acknowledged the Court's statement that Article 51 recognises the inherent right of self-defence in the case of an armed attack by one State against another and noted that this was "undoubtedly correct" but in response to Israel's argument, this was 'beside the point' because Israel was relying on Security Council resolutions 1368 and 1373 (2001): Advisory Opinion, Separate Opinion of Judge Kooijmans, para 35.

³³⁷ SC Res 1368 (2001) and SC Res 1373 (2001) both refer to the 11 September 2001 acts of terrorism as threats to international peace and security.

³³⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *supra* n70, Separate Opinion of Judge Kooijmans.

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ The Court consisted of 19 judges: President Shi, Vice-President Ranjeva, Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma and Tomka. From the Bench, separate opinions

opinion was handed down in 2004, it is still relevant to the current inquiry in so far as it confirmed the existing interpretation of Article 51. The ICJ seemed to be simply restating the accepted interpretation of the ‘armed attack’ requirement.

State responsibility for non-state actors

What may be understood from the ICJ’s decisions in 1986 and 2004 is that Article 51 is, and always has been, restricted to only allowing force to be used unilaterally in self-defence in response to armed attacks from *states*. The only extension of that rule to non-state actors is if those non-state actors are sent “by or on behalf of”³⁴² the state or the state had “substantial involvement therein”.³⁴³ This raises the question of what level of state responsibility is necessary before the actions of private individuals may be attributed to the state. The test adopted in the *Nicaragua* case was one of *effective control*. The Court stated that in order for the *contras*’ conduct to give rise to legal responsibility, “it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations”.³⁴⁴ In an aspect of the judgment that was in the US’ favour, the Court set a high threshold for state responsibility:³⁴⁵

The Court has taken the view...that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. (emphasis added)

The effect of the ICJ judgement is that there must be more than a mere relationship of control and dependence involving the provision of logistical support or weapons in order for actions of non-state actors to be attributed to the state: there must be *effective control* by the state over the actions of those non-state actors.

The ‘effective control’ test also appears in Article 8 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts:³⁴⁶

were written by seven judges, namely, Koroma, Higgins, Kooijmans, Al-Khasawneh, Buergenthal, Elaraby and Owada. Out of those, only the opinions of three judges mentioned the Article 51 issue, namely, Higgins, Kooijmans and Buergenthal, as discussed above.

³⁴² *Nicaragua* supra n26, para 115.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

³⁴⁶ The text of the ILC Draft Articles was adopted by the International Law Commission in 2001 and submitted to the General Assembly as part of the Commission’s report: see Draft Articles on Responsibility of States for Intentionally Wrongful Acts, supra n168.

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

The general rule in international law is that the only conduct attributable to the state is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, that is, as agents of the state.³⁴⁷ As such, the conduct of private persons is not generally attributable to the state. However, even though a state may not have attributed to it the actions of individuals, it may still be responsible if it fails to take all necessary steps to prevent the effects of the conduct of private parties. For example, a state may not be responsible for the actions of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.³⁴⁸

Article 8 is important in the present context because it provides that a state is not responsible for the actions of private individuals unless they are acting on the instruction of, or under the direction or control of, organs of the state.³⁴⁹ The Commentary to the ILC Draft Articles states that “under the direction or control of a State”³⁵⁰ means that the state directed or controlled the *specific operation* and the conduct complained of was an integral part of that operation. The principle does *not* extend to conduct that was only incidentally or peripherally associated with an operation and that escaped from the state’s direction or control.³⁵¹ Moreover, a general situation of dependence and support is insufficient to justify attribution to the state.³⁵²

In *Prosecutor v Tadić*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia held that “The requirement of international law for the attribution to States of acts performed by private individuals is that the state must exercise *control* over the individuals.”³⁵³ The Appeals Chamber distinguished the situation where individuals might be acting on behalf of a State

³⁴⁷ See Commentary to the ILC Draft Articles: <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> at 23 (accessed 1 November 2006).

³⁴⁸ See *United States Diplomatic and Consular Staff in Tehran* ICJ Reports 1980, 3; see Commentary on ILC Draft Articles supra n347 at 24.

³⁴⁹ The Commentary to the ILC Draft Articles notes that the three terms used in Article 8, ‘instructions’, ‘direction’ and ‘control’ are disjunctive: it is sufficient to establish any one of them: supra n347 at 108, para (7).

³⁵⁰ See Commentary to the Draft Articles, supra n347, at 104 para (3).

³⁵¹ *Ibid.*

³⁵² *Ibid* at 106, para (4); *Nicaragua* supra n26.

³⁵³ *Prosecutor v Tadić*, Appeals Chamber, Case No IT-94-1-A, ICTY (15 July 1999) at 48 ; excerpted in (1999) 38 *ILM* 1518. For a detailed account of the *Tadić* case see Scharf, M *Balkan Justice – The Story Behind the First International War Crimes Trial Since Nuremberg* (1997); also Sharf, M “International Decision: Prosecutor v Tadić Case No. IT-94-1-T (1997) 91 *AJIL* 718.

without specific instructions, from the situation where there are individuals making up an organised and hierarchically structured group, such as a military unit or, in case of civil war or civil strife, armed bands of irregulars or rebels. The Appeals Chamber held that for the attribution to a State of acts of the latter groups, “it is sufficient to require that the group as a whole be under the overall control of the State.”³⁵⁴ Even though the degree of control may vary from case to case, the court held that “overall control, going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations”³⁵⁵ was required.

In addition to Article 8, Article 11 establishes that a state may be held responsible for acts that otherwise would not have been attributed to it “if and to the extent that the State acknowledges and adopts the act in question as its own.”³⁵⁶ If the state approves of the actions of the non-state actors, even though it did not initiate them, that can transform it into an act of the state.³⁵⁷ The Commentary to the Draft Articles notes that the phrase “acknowledges and adopts the conduct in question as its own”³⁵⁸ is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement:³⁵⁹

...[A]s a general matter, conduct will not be attributable to a State under Article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it...The language of “adoption”...carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct.

The legal ramifications for a state which has been found responsible for an intentionally wrongful act include a duty to cease and to provide reparations for injuries caused such as restitution, compensation and satisfaction, as per Articles 28-39. Notably, there is no reference to the right of an aggrieved state to resort to *force* in order to punish a transgressor state.

The International Law Commission considers that the Draft Articles represent current international law on state responsibility. In chapter 10, the question of

³⁵⁴ *Prosecutor v Tadić*, Appeals Chamber, Case No IT-94-1-A, ICTY (15 July 1999) at 49

³⁵⁵ *Ibid* at 55: “Judging from international case law and State practice, it would seem that for such control to come about, it is not sufficient for the group to be financially or even militarily assisted by a State” and at 56: “In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by co-ordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group; also see Commentary to the ILC Draft Articles, *supra* n352 at 106 para (5). On the facts, the Appeals Chamber held that the Bosnian Serbs were under the **overall control** of the Federal Republic of Yugoslavia.

³⁵⁶ Article 11, Draft Articles on Responsibility of States for Intentionally Wrongful Acts, *supra* n174

³⁵⁷ *United States Diplomatic and Consular Staff in Tehran* *supra* n348; see Commentary to the ILC Draft Articles, *supra* n347.

³⁵⁸ Commentary to the ILC Draft Articles, *supra* n347.

³⁵⁹ *Ibid*.

Afghanistan's responsibility for the actions of the 11 September hijackers will be assessed in light of this legal framework. The attribution of state responsibility by the US and its allies will be closely analysed to determine if the standard attribution test was met, or if it was effectively ignored, or if a lower threshold is now in place.³⁶⁰ The ultimate objective will be to determine if the acts of the non-state actors in that incident were properly attributed to the State of Afghanistan so as to justify the use of force in self-defence.

Conclusion

This chapter has traced the developments in international law since 1945 regarding five distinct but inter-related concepts: the use of force generally, self-defence, pre-emptive self-defence, reprisals and the use of force in response to non-state actors. The key points in the above analysis are summarised as follows. First, the adoption of the UN Charter stands out as the single most important event in this epoch in so far as it established a general prohibition on the use of force in Article 2(4) and it preserved an inherent right of self-defence in Article 51. However, a lack of consensus has prevailed as to the meaning of 'aggression', 'armed attack' and 'self-defence'. From Dumbarton Oaks until 2006, it has become evident that states disagree as to the circumstances under which they are entitled to resort to force in self-defence. Secondly, the apparently simple concept of self-defence as preserved in Article 51 has become the subject of significant controversy. State practice has shown that the concept of 'self-defence' has been stretched, especially in the later decades of this epoch, by states which wish to invoke it for any use of force which they hope to legitimise. The use of force in 'self-defence' by the US against Iraq in 1993, in response to a past, thwarted assassination attempt would perhaps be one of the most poorly argued instances of 'self-defence' in this epoch, given that there was no 'armed attack'. But that incident was indicative of a wider trend which has seen the boundaries of self-defence in Article 51 being constantly pushed outward.

Thirdly, the doctrine of pre-emptive self-defence has gained ground during this epoch. In the early years, it was only seriously advanced by Israel but by the latter stages of this epoch, the Bush Administration in the US, followed 'in principle' by

³⁶⁰ See, for example, the article by Garwood-Gowers who argues that the threshold for attribution is now 'significantly lower': *supra* n329 at 10; see also articles by Travalio and Altenburg, *supra* n329; and Stahn, C "International Law Under Fire: Terrorist Acts as 'Armed Attacks': The Right to Self-Defense, Article 51 (1/2) of the UN Charter and International Terrorism" (2003) 27 *Fletcher F. World Aff.* 35 especially at 42ff.

the Howard Government in Australia, advocated pre-emptive self-defence as being actual or potential national policy and both the US and Australia implied that using force in pre-emptive self-defence was consistent with international law. The fact that pre-emptive self-defence has gained support so quickly must be a cause for concern as it cannot be justified by any literal reading of Article 51 which clearly requires an 'armed attack' to have occurred before self-defence is an option for any state. Although Israel's pre-emptive strike on the Iraqi nuclear reactor was unanimously condemned by the Security Council in 1981, pre-emptive self-defence is now gaining legitimacy in the US and Australia's foreign/defence policies. It would seem that the defence policies adopted by some states are now firmly out of step with international law.

Fourthly, although the use of forcible reprisals was supposedly prohibited by the UN Charter, a few states have continued to employ them. The Security Council was initially unanimous in its condemnation of this practice (most notably in the 1960s and 1970s) but other states have of late joined Israel in seeking to use reprisals as a means of dealing with the threat of international terrorism. The US demonstrated in the 1980s and 1990s that it will also use reprisals to respond to actual or thwarted acts of international terrorism.

The fifth point relates to the use of force by non-state actors. Although states traditionally interpreted Article 51 as applying to armed attacks by states, there has been a movement towards including actions of non-state actors. A clear divide has emerged between international law - in the form of pronouncements of the ICJ in the *Nicaragua* and *Legality of the Construction of a Wall in Occupied Palestinian Territory* cases – and the practice of some states. The fact that the US used force in 1986, 1993 and 1998 in response to past or planned terrorist acts – and that throughout these episodes it attracted a decreasing amount of condemnation for its actions, is indicative of a significant trend throughout this epoch towards allowing states the option of using force in response to terrorist acts in some circumstances.

The final point is that there is an increasingly urgent need to grapple with the issue of the attribution of actions of non-state actors to the state. Although substantial effort has been put into developing international law in this area, particularly via

the ILC's Draft Articles on Responsibility of States for Intentionally Wrongful Acts, some states have appeared to employ force regardless of whether state responsibility has been properly established, and regardless of the suggested rules that ought to guide the international community. Even if the international community is able to enshrine the Draft Articles in law, it is doubtful that all states would adhere to them. For instance, the Draft Articles declare that a state is responsible for actions of individuals which it has directed, instructed or which it has control over. This does not sit comfortably with the position adopted by the US as set forth in the 2002 NSS which states that the US will "make no distinction between terrorists and those who knowingly harbour or provide aid to them."³⁶¹ The US policy is somewhat at odds with both the pronouncements of the ICJ and the Draft Articles on State Responsibility which require something more than dependence and control; they require *effective control*. Rather than breaching the law, a small group of states seems to be moving in the direction of simply ignoring it.

This epoch has been an era of remarkable achievement in limiting the resort to force, yet, especially towards the latter years, some states have demonstrated a reluctance to be constrained by the limits of international law. Decisions of the ICJ – when they have been sought – have often been ignored and the Charter itself has been challenged and been the subject of calls for review. The next chapter of this epoch will examine one recent episode of the use of force by drawing upon aspects of these five themes that have been pursued throughout the six epochs of international law. Chapter 11 will seek to determine the lawfulness of the use of force, purportedly in self-defence, against Afghanistan in 2001.

³⁶¹ US' 2002 National Security Strategy, *supra* n145 and accompanying text.

CHAPTER 10: The use of force against Afghanistan in 2001

This chapter examines the lawfulness of employing military force against Afghanistan in October 2001. The primary issue is whether or not the use of force was a legitimate exercise of the inherent right of self-defence pursuant to Article 51 of the United Nations Charter. The elements of Article 51 that were identified and discussed in the previous chapter are applied to the facts to determine whether those elements were satisfied in this instance. This chapter's main focus is on the self-defence justification since both the US and the UK stated that they were acting pursuant to Article 51. In addition, the alternative justifications of pre-emptive self-defence (to prevent future attacks from Al Qaeda), humanitarian intervention, Security Council authorisation, and intervention by invitation (from the Northern Alliance) are briefly examined. This chapter seeks to demonstrate that compelling arguments exist to support the proposition that the use of force against Afghanistan in 2001 was unlawful.

Part A: The events of 11 September 2001 and the initial response

The facts concerning what occurred on 11 September 2001 are well-known and widely documented.¹ The events that triggered the invasion of Afghanistan took place on Tuesday 11 September 2001 when it is alleged that 19 members of an organisation known as 'al Qaeda' took control of four domestic aircraft in the US.² American Airlines Flight 11 flying from Logan Airport in Boston, Massachusetts to Los Angeles was hijacked by five passengers.³ It was flown into the North Tower of the World Trade Centre at 8.46am.⁴ United Airlines Flight 175, also leaving from Logan Airport, was also hijacked by five passengers⁵ and flown into the South Tower of the World Trade Centre at 9.03am.⁶ Shortly after

¹ Numerous sources, including governmental, academic and media accounts are available in a plethora of texts, articles and internet sites. The most comprehensive source of factual evidence of what occurred on 11 September is probably *The 9/11 Commission Report*, based on the investigations undertaken by the National Commission on Terrorist Attacks Upon the United States: <<http://www.9-11commission.gov/report/index.htm>> (accessed 2 November 2006). For websites that provide more concise fact files see the US Department of State: <<http://www.state.gov/coalition/cr/fs/12701.htm>> (accessed 2 November 2006); for media archives see: <<http://www.september11news.com/SearchArchives.htm>> (accessed 2 November 2006).

² The term 'al Qaeda', which means 'the foundation' or 'the base', is spelt differently in various sources. In this thesis, the spelling 'al Qaeda' has been adopted as it seems to be the most widely recognised transliteration. In quotes from other sources, the spelling used by the original source is maintained.

³ Allegedly Mohammad Atta, Abdul Aziz al Omani, Satam al Suqami, Wali al Shehi and Waleed al Shehi: *The 9/11 Commission Report*, supra n1 at 1-2.

⁴ US Department of State, Fact Sheet, supra n1; see also Mattox, H *Chronology of World Terrorism* (2004) at 155-157; Maxwell, B *Terrorism: A Documentary History* (2003) at 351-353; and Sterba, J (ed) *Terrorism and International Justice* (2003) at 1-3.

⁵ Allegedly by Marwan al Shehhi, Fayed Banihammad, Mohand al Shehri, Ahmed al Ghamdi and Hamza al Ghamdi: *The 9/11 Commission Report*, supra n1 at 1-2.

⁶ It is estimated that 2,823 people were killed, including flight passengers, as well as people inside the buildings, and police and fire department rescuers on the ground, when those 2 planes collided with the World Trade Centre: US Department of State Fact Sheet, supra n1.

9.30am, American Airlines Flight 77, which had just departed from Washington's Dulles Airport headed for Los Angeles, was also hijacked.⁷ It crashed into the Pentagon at 9.38am. The fourth airplane was United Airlines Flight 93 which left Newark bound for San Francisco but was hijacked at approximately 9.28am.⁸ It was thought to have been the hijackers' objective to crash the plane into either the Capitol or the White House,⁹ but the hijackers' presumed objective was thwarted by the passengers and the plane crashed into a field in Pennsylvania at 10.10am. In total, the US State Department estimated that 2,948 people, from approximately 90 countries,¹⁰ died as a result of the four airplane hijackings on 11 September 2001.¹¹

The US' immediate reaction to the hijackings

The initial response to the hijackings focused on the scrambling of military aircraft to prevent further buildings being targeted and included a variety of domestic security measures such as the closure of US airspace,¹² the evacuation of government buildings¹³ and moving the US President, George W Bush, and Vice-President, Dick Cheney, to safe locations.¹⁴ The President was initially advised of the first aircraft's crash at approximately 8.55am and the second aircraft's demise at 9.05am.¹⁵ At 9.45am he called the Vice President and said: "Sounds like we have a minor war going on here, I heard about the Pentagon. We're at war...somebody's going to pay."¹⁶ Air Force One took to the air at about 9.54am and eventually landed at Barksdale Air Force Base where the President recorded a message to the nation and then re-boarded.¹⁷ In the late afternoon, the President ordered Air Force One back to Andrews Air Force Base and addressed the nation that evening at 8.30pm from the White House.¹⁸

⁷ Allegedly by Khalid al Mihdhar, Majed Moqed, Hani Hanjour, Nawaf al Hazmi and Salem al Hazmi: *The 9/11 Commission Report*, supra n1 at 2-3.

⁸ Allegedly by Saeed al Ghamdi, Ahmed al Nami, Ahmad al Haznawi and Ziad Jarrah: *ibid* at 10-14.

⁹ *Ibid* at 14.

¹⁰ US Department of State, Fact Sheet, supra n1. The UK's estimate in October 2001 was 80 countries: United Kingdom Parliament, International Affairs and Defence Section, House of Commons Library, Research Paper 01/72, 3 October 2001, "11 September 2001: the response", at 11: <<http://www.parliament.uk/commons/lib/research/rp2001/rp01-072.pdf>> (accessed 8 November 2006).

¹¹ US Department of State Fact Sheet, supra n1. That figure includes all the people on board the four aircraft, plus the people killed in the Pentagon and in the World Trade Centre buildings.

¹² *The 9/11 Commission Report*, supra n1 at 20ff.

¹³ The Pentagon was evacuated at 9.38am, the White house at 9.45am followed by the World Bank, US State and Justice Departments at 10.22a, and then all federal office buildings in Washington D.C.

¹⁴ UK Parliament Research Paper 01/72, supra n10 at 11.

¹⁵ *The 9/11 Commission Report*, supra n1 at 38-39.

¹⁶ *Ibid* at 39.

¹⁷ *Ibid* at 325.

¹⁸ *Ibid* at 326.

The US' initial political response

The statements that were issued on 11 and 12 September suggest that the White House considered the threat of immediate attack to be over by late afternoon on 11 September 2001, when the President returned from the Offutt Air Force Base to Washington DC.¹⁹ The first substantial political response was made via a statement to the nation by the President on the evening of 11 September in which he, *inter alia*, referred to the hijackings as criminal acts by describing them as “acts of mass murder”.²⁰ He also implied that the US would pursue a law enforcement response.²¹

The search is underway for those who are behind these evil acts. I've directed the full resources of our intelligence and law enforcement communities to find those responsible and bring them to justice.

There was no suggestion initially that a military response was imminent. Aside from the comment that “our military is powerful, and it’s prepared”²² the overall tenor of the President’s speech on 11 September was that the terrorist acts were being treated as *criminal* acts and that intelligence and law enforcement mechanisms would deliver justice.²³ However, the private discussions between the President and his advisors provide a different picture²⁴ and from 12 September onwards there were increasingly conspicuous references to a possible military response. There were aspects of revenge, retaliation and pre-emption in the President’s speeches on 14 September,²⁵ 15 September²⁶ and 16 September 2001²⁷ but the target was unspecified; the enemy was referred to in general terms as ‘terrorism’ or ‘evil-doers’.

¹⁹ White House Press core: “...[I]s it fair to assume that once he left Nebraska and head [sic] for Washington, that it was – that you were confident that the threat was over?”, Fleischer replied, “To leave Nebraska and head back to Washington? Yes...Following his meeting in Nebraska, the President made the determination to return [to Washington]. And obviously it was safe enough for him to do so.”. The White House, Press Briefing by Ari Fleischer, 12 September 2001: <<http://www.whitehouse.gov/news/releases/2001/09/20010912-8.html>> (accessed 8 November 2006).

²⁰ The White House, Press Release, 11 September 2001, 8.30pm EDT, “Statement by the President in his Address to the Nation”, <<http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html>> (accessed 8 November 2006).

²¹ Ibid.

²² Ibid.

²³ Ari Fleischer’s press briefings on 12 September 2001 confirm that there was no immediate resolve to engage in a military response: supra n19. When Fleischer was asked if the NATO statement indicated that a unified military response was likely, Fleischer responded that a unified response was likely, but refused on that occasion, and throughout the briefing, to suggest that a military response was likely.

²⁴ The President chaired a National Security Council meeting in the evening of 11 September 2001, with a group that he would later refer to as the ‘war council’, in which he remarked that it was a ‘time for self-defence’ and that the US would “punish not just the perpetrators of the attacks, but also those who harboured them.” He and his advisors also discussed which states might be targeted: *The 9/11 Commission Report*, supra n1 at 330.

²⁵ For instance, when addressing rescue workers in New York on 14 September, and in response to calls that the audience could not hear, President Bush replied: “I can hear you. (Applause). The rest of the world can hear you. (Applause). And the people who knocked these buildings down will hear all of us soon. (Applause)”: see The White House, “President Bush Salutes Heroes in New York” 14 September 2001: <<http://www.whitehouse.gov/news/releases/2001/09/20010914-9.html>> (accessed 31 May 2006).

²⁶ The White House, Radio Address of the President to the Nation, 15 September 2001: <<http://www.whitehouse.gov/news/releases/2001/09/20010915.html>> (accessed 31 May 2001).

²⁷ “I also have faith in our military. We have got a job to do...we will rid the world of evil-doers...” The White House, Remarks by the President Upon Arrival, 16 September 2001: <<http://www.whitehouse.gov/news/releases/2001/09/20010916-2.html>> (accessed 31 May 2006).

*The 'Authorisation for the Use of Military Force' resolution*²⁸

The first formal use of the term 'self-defence' by the US administration occurred in the US Congress' Joint Resolution adopted on 14 September 2001 in which Congress stated that the attacks of 11 September rendered it "both necessary and appropriate that the United States exercise its rights to self-defense."²⁹ The Use of Force resolution is significant because it authorised the US President to:³⁰

*[U]se all necessary and appropriate force against those nations, **organizations, or persons** he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, **in order to prevent any future acts of international terrorism against the United States** by such nations, organizations or persons. (emphasis added)*

The objective for authorising force was 'in order to prevent any future attacks', which implies that on 14 September 2001, the US Senate and Congress considered the immediate threat to be over. Any military force used pursuant to this resolution would not be in response to the imminent threat of an armed attack; it would be used to prevent possible *future* acts of international terrorism.³¹

Another notable feature of the Use of Force resolution was the authorisation to use force against 'organizations or persons'. In previous resolutions authorising the use of military force, Congress had referred to unnamed nations in specific regions of the world, but this was the first time that Congress had authorised force against unnamed 'organizations or persons.'³² The Use of Force resolution used the phrase "acts of treacherous violence"³³ to describe the hijackings: it did not refer to them as either acts of war or armed attacks.

*Address to a Joint Session of Congress and the American People*³⁴

The political reaction within the US quickly evolved into overwhelming support for the use of military force.³⁵ By the time of the President's Address to a Joint

²⁸ The 'Use of Force' resolution was passed in the Senate by a vote of 98-0 and in the Congress by 420-1. The sole dissenting vote was cast by Democrat Barbara Lee: see "Rep. Barbara Lee's speech opposing the post-9-11 Use of Force Act", 14 September 2001: <http://www.wagingpeace.org/articles/2001/09/14_lee-speech.htm> (accessed 1 November 2006).

²⁹ United States 107th Congress, 1st Session, SJ Res 23, Joint Resolution, passed by the Senate on 14 September 2001. This resolution was signed into law by the President on 18 September 2001. For media commentary see "Congress approves resolution authorizing use of force" *CNN.com*, 15 September 2001: <<http://archives.cnn.com/2001/US/09/14/congress.terrorism/>> (accessed 8 November 2006).

³⁰ *Ibid.*

³¹ See discussion below under the heading 'Pre-emptive self-defence.'

³² Grimmer, R, Congressional Research Service Report for Congress, "Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40), Legislative History, 4 January 2006: <<http://www.fas.org/sqp/crs/natsec/RS22357.pdf>> (accessed 8 November 2006).

³³ See *infra* at Part B regarding the evidence which supports a finding that this was not an 'armed attack'.

³⁴ The White House, President George W Bush, Address to a Joint Session of Congress and the American People, 20 September 2001: <<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>> (accessed on 1 August 2006). The full text of President Bush's address is reproduced at Appendix 16.

Session of Congress and the American People on 20 September, the hijackings were frequently being described as “acts of war.”³⁶ The Bush administration wanted a military response, which, although formally clothed in legal language as an action to prevent future attacks, was plainly accepted as an act of *retaliation*. In President Bush’s 20 September address, he admitted as much when he stated: “Our response involves far more than *instant retaliation* and isolated strikes.”³⁷ Later in the address, in the context of claiming that ‘the civilized world is rallying to America’s side’, he said the civilized world “understands that if this terror goes *unpunished*, their own cities, their own citizens may be next.”³⁸ It is apparent that the US’ military response to the hijackings of 11 September would be an act of ‘retaliation’ or ‘punishment’, even though those terms were not employed in the official justifications for the use of force provided to the UN Security Council.

In the 20 September 2001 address, President Bush made three other crucial sets of remarks. First, he outlined the US’ five-point ultimatum to the Taliban:³⁹

And tonight, the United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of al Qaeda who hide in your land. (Applause.) Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. (Applause.) Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.

These demands are not open to negotiation or discussion. (Applause.) The Taliban must act, and act immediately. They will hand over the terrorists, or they will share in their fate.

According to the Bush administration, the ultimatum was non-negotiable.⁴⁰ Yet it did not state that compliance by the Taliban would necessarily preclude military action against Afghanistan. Putting aside the question of whether the ultimatum itself was a violation of the UN Charter,⁴¹ the actual requirements of the ultimatum were impracticable: even if the Taliban had had control of the whole of Afghanistan, it seems unlikely that its leadership could have complied with such

³⁵ For dissenting political voices see for instance Barbara Lee and Jesse Jackson who both made statements urging the Bush Administration to consider other options rather than a retaliatory military strike.

³⁶ “On September the 11th, enemies of freedom committed an *act of war* against our country....Americans are asking: how will we fight and win this war?...this war will not be like the war against Iraq a decade ago...it will not look like the air war above Kosovo...” (emphasis added): Address to a Joint Session of Congress and the American People, *supra* n34.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ President Bush reportedly said: “When I said no negotiations, I meant no negotiations. We know he’s [bin Laden] guilty, turn him over”: Borger, J and Norton-Taylor, R “Pentagon Split over Battle Plan” *Guardian Weekly*, 18-24 October 2001.

⁴¹ Sybille Kapferer makes the point that this ultimatum, accompanied by the threat of military strikes, was “in itself, in principle...a violation of Article 2(4) of the U.N. Charter, which prohibits the use of force, or threat thereof, in international relations”: see Kapferer, S “Ends and Means in Politics: International Law as Framework for Political Decisionmaking” in Eden, P and O’Donnell, T (eds) *September 11, 2001: A Turning Point in International and Domestic Law?* (2005) at 39, n31. The same point is raised by Kenny, K “Ireland, the Security Council and Afghanistan: Promoting or undermining the international rule of law?” (2001) *Trócaire Dev. R.* 101 at 106.

wide-ranging demands as “protecting foreign journalists, diplomats and aid workers” and delivering to the US “all the leaders of Al Qaeda who hide in your land.”⁴² Indeed, the US State Department did not expect the Taliban to comply with the ultimatum and thus preparations for war were already underway at the time that it was issued.⁴³ Despite the US’ statements that its ultimatum was non-negotiable, the Taliban were apparently willing to negotiate.⁴⁴

Secondly, President Bush emphasised the new way in which the US had redefined its friends and enemies. He referred to his Administration’s intention to not only attack those who attack the US, but to attack those who harbour or assist terrorists:⁴⁵

And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. (Applause.) From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.

It is significant that the President’s address, which set out the framework for the US response, did not use the term ‘self-defence’ nor did it mention international law. The tenor of the 20 September 2001 address was that the US would do whatever it thought necessary, for as long as it thought necessary, against any nation that was not “with us”.⁴⁶ President Bush did not mention how the US’ new definition of its friends and enemies fitted within the context of international law and the limits of the right of self-defence.

Thirdly, the Bush Administration showed a desire to bring humanitarian issues to the fore. Even though the objective of the 20 September speech was to set out the reasons why the US had to respond militarily, and to outline its planned ‘war on terrorism’, President Bush referred to the US’ concern for human rights and the humanitarian situation within Afghanistan.⁴⁷ The connection between terrorism and human rights in Afghanistan is significant. Subsequent to the 20 September address, the international media also focused on the broader human rights/humanitarian situation there, in what could be interpreted as an attempt to

⁴² Gunaratna, R *Inside Al Qaeda – Global Network of Terror* (2002) 61-62.

⁴³ *The 9/11 Commission Report*, chapter 10, ‘Wartime’, supra n1.

⁴⁴ See discussion infra at 280-82 regarding ‘Afghanistan/The Taliban’s response’.

⁴⁵ Address to a Joint Session of Congress and the American People, supra n34.

⁴⁶ Ibid.

⁴⁷ Ibid. See also the references to human rights discussed infra at 324-26 wherein the relevant excerpts are cited.

bolster the Bush Administration's justifications for regime change in Afghanistan.⁴⁸

The UK's initial response

The UK's immediate response was to offer its condolences to the US and in practical terms, was limited to taking precautionary security measures.⁴⁹ The first considered statement from the Blair Government regarding its likely response was made in the House of Commons on 14 September 2001.⁵⁰ Prime Minister Tony Blair adopted a position that was subtly but crucially different to that adopted by the US. Blair referred to the events of 11 September as acts of terrorism that had resulted in the *murder* of British citizens, further emphasising the *criminal* aspect of the attacks when he said that "the murder of British people in New York is no different from their murder in the heart of Britain itself."⁵¹ He also said that "we must bring to justice those responsible"⁵² and he made references to the laws of extradition and prosecution. Blair did not formally categorise the hijackings as an act of war. Although the British Government was initially reluctant to provide details as to whether a military response was being planned, by 24 September it appeared that a military response of some kind was increasingly likely.⁵³

As in the US, a pattern emerged whereby governmental statements regarding possible military strikes against Afghanistan were usually presented alongside references to human rights and humanitarian concerns. Prime Minister Blair warned the Taliban that it would face military action unless it gave up Osama bin Laden, but he also asked the British public to:⁵⁴

Look for a moment at the Taliban regime. It is undemocratic, that goes without saying...no art or culture is permitted. All other faiths, all other interpretations of Islam are ruthlessly suppressed. Those who practice their faith are imprisoned. Women are treated in a way almost too revolting to be credible...

⁴⁸ See analysis *infra* at 324-26.

⁴⁹ Prime Minister Tony Blair statement in response to terrorist attacks in the United States, 11 September 2001: <<http://www.primeminister.gov.uk/output/Page1596.asp>> (accessed 6 June 2006).

⁵⁰ Prime Minister's statement to the House of Commons following the September 11 attacks, 14 September 2001: <<http://www.number10.gov.uk/output/Page1598.asp>> (accessed 6 June 2001). The full text is set out at Appendix 17.

⁵¹ *Ibid.*

⁵² "...[W]e need to look once more: nationally and internationally at extradition laws, and the mechanisms for international justice; at how these terrorist groups are financed and their money laundered: and the links between terror and crime, and we need to frame a response that will work, and hold internationally": *ibid.*

⁵³ UK Parliament, Research Paper 01/72, *supra* n10, at 23.

⁵⁴ "Blair Warns Taliban of Military Strikes" *Telegraph.co.uk*, 2 October 2001:

<<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2001/10/02/ublair.xml>> (accessed on 8 June 2006).

This explicit linking of human rights in Afghanistan to the use of force in self-defence mirrored the strategy adopted in the US.⁵⁵

Afghanistan/the Taliban's initial response⁵⁶

On 11 September 2001, the Taliban had received diplomatic recognition from only three states: the UAE, Saudi Arabia and Pakistan. On 22 September, the UAE and later Saudi Arabia withdrew their recognition. Evidence suggests that prior to 11 September 2001, the Taliban opposed a large-scale attack on the US, on various grounds.⁵⁷ The initial reaction from the Taliban leadership was to condemn unequivocally the hijackings. On 11 September 2001 the US media reported that Mullah Omar, the Taliban's spiritual leader, condemned the attacks and denied that Osama bin Laden was responsible. Mullah Abdul Salam Zaeef, the Taliban's ambassador to Pakistan, also expressed his sympathy.⁵⁸

The US' five-point ultimatum to the Taliban⁵⁹ was communicated to Mullah Omar by the Pakistani Chief of Intelligence, Mahmud Ahmed, on 17 or 18 September 2001.⁶⁰ Ahmed's report back to the US' Deputy Secretary of State, Richard Armitage, was that Omar's response to the ultimatum was "not negative on all these points."⁶¹ Nevertheless, according to The 9/11 Commission Report, the Bush Administration "knew that the Taliban was unlikely to turn over bin Laden."⁶²

The issuing of an ultimatum to the Taliban regarding, *inter alia*, the surrender of Osama bin Laden for trial, is an important aspect of the events that followed 9/11. Publicly, President Bush called upon the Taliban to immediately comply with the demands, or face the consequences.⁶³ There were several reports of offers from the Taliban to comply with various elements of the ultimatum. Mullah Omar

⁵⁵ Supra at 280 and see infra at Part G, 'Humanitarian intervention'.

⁵⁶ In 1997, the UN Credentials Committee received one set of credentials from the 'Islamic State of Afghanistan' and another set from the 'Islamic Emirate of Afghanistan.' A decision was deferred on which set to accept. The Permanent Representative of the former continued to represent Afghanistan at the UN. However, throughout this thesis, references to the State of Afghanistan refer to the Islamic Emirate of Afghanistan, over which members of the Taliban claimed to preside, since at the time of the 11 September terrorist attacks, the Taliban was believed to have control of approximately 90% of the territory in Afghanistan: see discussion infra n382.

⁵⁷ Members of the Taliban were reported to have openly opposed any al Qaeda attack on the US. Mullah Omar objected on ideological grounds, preferring an attack on Jews to Americans. Abu Hafs the Mauritanian wrote to bin Laden objecting to strikes on the US, basing his opposition on the Qur'an: *The 9/11 Commission Report* supra n1 at 251.

⁵⁸ "We want to tell the American children that Afghanistan feels your pain and we hope that the courts find justice": "Terror Attacks Hit US" *CNN.com*, 11 September 2001: <<http://archives.cnn.com/2001/US/09/11/worldtrade.crash/>> (accessed on 6 June 2006).

⁵⁹ See infra at n34 and accompanying text.

⁶⁰ The UK Parliament, Research Report 01/72, supra n10, at 55; *The 9/11 Commission Report* supra n1 at 333.

⁶¹ *The 9/11 Commission Report*, chapter 10, 'Wartime', supra n1.

⁶² Ibid.

⁶³ "These demands are not open to negotiation or discussion (Applause). The Taliban must act, and act immediately. They will hand over the terrorists, or they will share in their fate": Address to a Joint Session of Congress and the American People, supra n34.

announced that the issue of bin Laden's extradition would be decided by a grand Islamic council of around 800 clerics.⁶⁴ The council concluded that bin Laden should be asked to leave Afghanistan, a position endorsed by the Taliban leadership.⁶⁵ On 4 October 2001, the Taliban covertly offered to turn Osama bin Laden over to Pakistan for trial in an international tribunal that would operate according to Islamic Shari'a law.⁶⁶ In addition, the Taliban offered to release the eight foreign aid workers⁶⁷ who had been detained since early August.⁶⁸ There appears to have been no official statement from President Bush in response to that offer. An official from the Bush Administration said that the aid workers should be released unconditionally, stressing that "this was not a negotiation."⁶⁹

On 7 October 2001, the Taliban offered to detain bin Laden and try him in Afghanistan in an Islamic court, if the US made a formal request and presented the Taliban with evidence of bin Laden's involvement in the terrorist attacks. The Taliban's counter-offer was immediately rejected as insufficient. The US demanded that bin Laden be turned over unconditionally and reiterated that the terms of the US' ultimatum were non-negotiable.⁷⁰ No counter-offer was made by the US or the UK, even when further negotiations were requested by the Taliban's Deputy Prime Minister.⁷¹

The 9/11 Commission Report notes that the Bush Administration "knew"⁷² that the Taliban was unlikely to comply with its demands. It also notes that as of 11 September, the Administration took the position that the US would respond with force.⁷³ That decision is difficult to reconcile with the issuing of an ultimatum. According to then Secretary of Defense, Donald Rumsfeld, from 12 September 2001, the understanding between him and the President was that military force would be used and the only question to be determined was the most appropriate

⁶⁴ UK Parliament, Research Paper 01/72, *supra* n10, at 55.

⁶⁵ *Ibid.*

⁶⁶ See "The Smoking Gun" *Justice not Vengeance*, 8 October 2001: <http://www.j-n-v.org/AW_briefings/ARROW_briefing005.htm> (accessed on 12 June 2006); also "Taliban and bin Laden Agreed to Extradition", *Scoop*, 8 October 2001: <<http://www.scoop.co.nz/stories/WO0110/S00046.htm>> (accessed on 12 June 2006).

⁶⁷ Two Australians, four Germans and two Americans had been arrested, together with 16 Afghan employees of a Christian aid agency, in August 2001 and were accused of trying to convert Afghans to Christianity: "Red Cross can Visit Prisoners" *CNN.com*, 23 August 2001: <<http://archives.cnn.com/2001/WORLD/asiapcf/central/08/23/afghan.annanplea/index.html>> (accessed 2 November 2006).

⁶⁸ The Taliban's Foreign Minister, Wakil Ahmed Muttawakil, stated that if the US was ready to assure the Afghan people that their action was not against them, then the Taliban was ready to release the aid workers: "US Rejects Offer to Try bin Laden" *CNN.com*, 7 October 2001: <<http://archives.cnn.com/2001/US/10/07/ret.us.taliban/>> (accessed 2 November 2006).

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Kenny, *supra* n41 at 106, citing "Allies launch second week of bombing raids", *The Irish Times*, 15 October 2001.

⁷² *The 9/11 Commission Report* *supra* n1 at 334, n56.

⁷³ *Ibid.*; see also US Department of Defense, News Transcript, 9 January 2002:

<http://www.defenselink.mil/transcripts/2002/t02052002_t0109wp.html> (accessed on 12 June 2006).

targets. The US had apparently rejected the concept of having bin Laden tried in a third country, similar to the way in which the two Libyans accused of the Lockerbie bombing were tried.⁷⁴

Other international reactions

The international reaction to the events of 11 September 2001 was almost universally sympathetic towards the US.⁷⁵ Individual nations' leaders issued statements shortly after the attacks, condemning them, expressing solidarity and offering their support.⁷⁶ Many leaders stated that this was an attack not just on the US but on all humanity.⁷⁷ Despite the common tone, there were some notable differences: some leaders specifically referred to the hijackings as criminal acts rather than acts of war,⁷⁸ whilst others expressed their hopes that the attacks would not result in retaliation or acts of revenge.⁷⁹ Divisions emerged between states regarding the type of response they would support.⁸⁰

European Union's response

The EU issued a Declaration on 12 September 2001 in which it expressed its horror at the terrorist attacks, which it referred to as attacks not just on the US but on "humanity itself."⁸¹ It also called on Member States to "spare no efforts to help identify, bring to justice and punish those responsible."⁸² The EU then issued a Joint Declaration on 14 September 2001, in which it again condemned the attacks and expressed solidarity with the American people.⁸³ The Joint Declaration stressed a *law enforcement* approach. It called upon the EU to promote an international framework of security and prosperity for all countries, to strengthen intelligence efforts and to accelerate the implementation of a European

⁷⁴ UK Parliament, Research paper 01/72, supra n10 at 55.

⁷⁵ "Arafat Horrified by Attacks, but Thousands of Palestinians Celebrate; Rest of World Outraged" *Fox News*, 12 September 2001: <<http://www.foxnews.com/story/0,2933,34187,00.html>> (accessed 8 November 2006).

⁷⁶ See *September 11 News.com*: <<http://www.september11news.com/InternationalReaction.htm>> (accessed 8 November 2006).

⁷⁷ See statements from Ariel Sharon, Tony Blair, Vladimir Putin and Gerhard Schroeder: *ibid*.

⁷⁸ Mexican President Vicente Fox; *ibid*; see also the statement from French President Jacques Chirac who was reluctant to refer to the hijackings as acts of war: UK Parliament, Research Paper 01/72, supra n10 at 27.

⁷⁹ The Malaysian Prime Minister, Mahathir Mohamad, expressed the hope that the terrorist attacks would not result in the use of force in revenge: *ibid*.

⁸⁰ See the response of Mahathir Mohamad, *ibid* and see also, "Asia pledges cooperation in hunt for attackers" *CNN.com*, 13 September 2001 <<http://archives.cnn.com/2001/WORLD/asiapcf/east/09/12/asia.reaction/index.html>> (accessed 8 November 2006). China officially supported the US' stance but there were also comments from within China that the US shared some of the blame for the increase in terrorism: see comments of Qiao Liang, "Beijing pledges to join US to fight terrorism" *CNN.com*, 13 September 2001 <<http://archives.cnn.com/2001/WORLD/asiapcf/east/09/12/china.reaction/index.html>> (accessed 8 November 2006). For comments by European leaders see UK Parliament's Research Paper 01/72, supra n10 at 25-31.

⁸¹ Declaration by the European Union, "Terrorism in the US", CL01-052EN, 12 September 2001: <http://europa-eu-un.org/articles/en/article_168_en.htm> (accessed 8 November 2006).

⁸² *Ibid*.

⁸³ EU Joint Declaration: September 11 attacks in the US, CL01-054EN: <http://europa-eu-un.org/articles/en/article_46_en.htm> (accessed 8 November 2006).

judicial area which would entail the creation of a European warrant for arrest and extradition and the mutual recognition of legal decisions and verdicts.⁸⁴

The law enforcement approach was further emphasised when the European Commission announced on 19 September 2001 that Europe must have common legal instruments to tackle terrorism. The European Commission adopted two significant proposals: one regarding an agreement on the definition of terrorism and the other regarding the creation of a European arrest warrant.⁸⁵ The law enforcement approach was also emphasised by the President of the EU.⁸⁶

Nevertheless, the EU seemed to have considered it likely, and legitimate, that the US would resort to force:⁸⁷

*The European Council considered that, on the basis of SCR 1368, a **riposte** by the US is legitimate. It also decided that the Union will cooperate with the US to bring to justice and punish the perpetrators, sponsors and accomplices of such barbaric acts... (emphasis added)*

The EU thought that a 'riposte' by the US would be legitimate but it is unclear what was intended by 'riposte' since this is not a term of international law parlance.⁸⁸ It may be implied that the EU envisaged a short, sharp act of retaliation such as an isolated strike/strikes on selected targets.⁸⁹ De Ruyt also said that "the actions must be targeted and may also be directed against states abetting, supporting or harbouring terrorists."⁹⁰ That obviously provided a great deal of scope for the US and reiterated the US' position. The EU's support for the use of force was further clarified on 7 October 2001.⁹¹

⁸⁴ Ibid.

⁸⁵ European Commission, "Europe must have common instruments to tackle terrorism", IP/01/1284, 19 September 2001: <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1284&format=HTML&aged=1&language=EN&guiLanguage=en>> (accessed 8 November 2006).

⁸⁶ EU Presidency Statement, 15 October 2001, Statement by Mr Paul Rietjens on behalf of the European Union, PRES01/-262EN: <http://www.europa-eu-un.org/articles/en/article_391_en.htm> (accessed 8 November 2006).

⁸⁷ Ibid.

⁸⁸ 'Riposte' is not a term used in standard international law textbooks. In fencing it means "a sharp, swift thrust made after parrying an opponent's lunge": *Webster's New Twentieth Century Dictionary of the English Language* Second ed, (1975) at 564.

⁸⁹ Perhaps the EU envisaged a response similar to the limited airstrikes that were undertaken by the Clinton administration in 1998. Yet, even that interpretation is open to doubt, since forcible reprisals are unlawful: see discussion in chapter 9.

⁹⁰ EU Presidency Statement – September 11 attacks in the US, PRES01-235EN, 25 September 2001: <http://europa-eu-un.org/articles/en/article_68_en.htm> (accessed on 13 June 2006)

⁹¹ "[A]t this difficult, solemn and dramatic moment, all Europe stands steadfast with the United States and its coalition allies to pursue the fight against terrorism." Statement by European Commission President Romano Prodi on the military actions against terrorism, IP/01/1375, 7 October 2001:

<<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1375&format=HTML&aged=1&language=EN&guiLanguage=en>> (accessed 8 November 2006).

Council of Europe's response

The Council of Europe drafted a declaration on the fight against international terrorism on 12 September 2001.⁹² It called upon member states to ensure they had signed and ratified the European Convention on the Suppression of Terrorism and a number of other conventions regarding issues such as extradition. A more comprehensive response was provided via a debate in the Parliamentary Assembly of the Council of Europe (PACE) on 25-26 September 2001.⁹³ Resolution 1258 condemned the terrorist attacks as “barbaric”⁹⁴ and stated that they were a crime that violated the most fundamental human right, the right to life.⁹⁵ It called on the international community to provide the US Government with “all necessary support”⁹⁶ in dealing with the consequences of the attacks and “in bringing the perpetrators to justice in line with existing international anti-terrorist conventions and United Nations Security Council resolutions.”⁹⁷

The Council of Europe regarded the “new International Criminal Court as the appropriate institution to consider terrorist acts”⁹⁸ and its members agreed that terrorism “is an international problem to which international solutions must be found based on a global political approach.”⁹⁹ It simultaneously condemned the acts of the terrorists whilst also calling for a response within the bounds of international law:¹⁰⁰

*There can be no justification for terrorism. The Assembly considers these terrorist actions to be **crimes rather than acts of war**. Any actions, either by the United States acting alone or as part of a broader international coalition, must be in line with existing United Nations anti-terrorist conventions and Security Council resolutions and must focus on **bringing the perpetrators, organisers and sponsors of these crimes to justice, instead of inflicting a hasty revenge**. (emphasis added)*

The PACE called for an international convention to combat terrorism which would include a comprehensive definition of international terrorism as well as specific obligations for participating states to prevent acts of terrorism on a

⁹² PACE Draft Resolution, Doc. 9228 Rev, 24 September 2001, Appendix 1 “Fight against international terrorism, Committee of Ministers’ Declaration of 12 September 2001”:

<<http://assembly.coe.int/main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/doc01/edoc9228.htm#a5t>> (accessed 8 November 2006).

⁹³ PACE Draft Resolution, Report of the Political Affairs Committee, Rapporteur Mr Davis, 24 September 2001, Doc 9228 and see Opinion of the Committee on Legal Affairs and Human Rights, Rapporteur Mr Jansson, 25 September 2001, Doc 9232: *ibid*.

⁹⁴ PACE Resolution 1258 (2001), adopted on 26 September 2001, 28th Sitting: <<http://assembly.coe.int/main.asp?link=http://assembly.coe.int/Documents/AdoptedText/TA01/ERES1258.htm>> (accessed 8 November 2006).

⁹⁵ *Ibid*, paras 2 and 3.

⁹⁶ *Ibid*, para 4.

⁹⁷ *Ibid*.

⁹⁸ *Ibid*, para 7.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid*, para 8.

national and global scale and to punish their organisers and executors.¹⁰¹ If the US opted for a military response, “the international community must clearly define its objectives and should avoid targeting civilians.”¹⁰² It also stated that “any action should be taken in conformity with international law and with the agreement of the United Nations Security Council.”¹⁰³ It welcomed Security Council Resolution 1368 (2001) which it interpreted as an expression of the Security Council’s readiness to take all necessary steps to respond to the attacks of 11 September 2001 and to combat all forms of terrorism in accordance with its responsibilities under the UN Charter.¹⁰⁴ The PACE resolution called on the Council of Europe’s Member States to adopt ten measures, *none* of which suggested the use of force.¹⁰⁵ It also reaffirmed the Security Council as the ultimate authority for approving international military action.¹⁰⁶

*NATO’s response*¹⁰⁷

On 11 September 2001, NATO’s then Secretary-General Lord Robertson condemned the attacks in the “strongest possible terms.”¹⁰⁸ The North Atlantic Council (NAC)¹⁰⁹ issued a similar statement.¹¹⁰ NATO unanimously condemned the attacks and confirmed that the US could rely on the 18 NATO nations “for assistance and support.”¹¹¹ Initially, the NAC’s threat of possible action against the perpetrators was vague.¹¹² On 12 September, the NAC met again and within six hours took the unprecedented step of invoking Article 5 of the Washington Treaty.¹¹³ The Council stated that:¹¹⁴

*...[I]f it is determined that this attack **was directed from abroad** against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty which states that **an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.** (emphasis added)*

¹⁰¹ Ibid, para 10.

¹⁰² Ibid, para 12.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid, para 17 (i) - (x).

¹⁰⁶ Ibid, para 17 (x).

¹⁰⁷ For a comprehensive analysis NATO’s response to the events of 11 September 2001 see Lansford, T *All for One: Terrorism, NATO and the United States* (2002).

¹⁰⁸ Statement by the Secretary General of NATO Lord Robertson, Press Release PR/CP (2001)121, 11 September 2001: <<http://www.nato.int/docu/pr/2001/p01-121e.htm>> (accessed 8 November 2006).

¹⁰⁹ By virtue of Article 9 of the NATO Treaty, the North Atlantic Council was established as the political body which controls the NATO alliance.

¹¹⁰ Statement by the North Atlantic Council, PR/CP (2001)122, 11 September 2001: <<http://www.nato.int/docu/pr/2001/p01-122e.htm>> (accessed 9 November 2006).

¹¹¹ Ibid.

¹¹² “Our message to those who perpetrated these unspeakable crimes is equally clear: you will not get away with it.”: *ibid*.

¹¹³ The North Atlantic Treaty, also referred to as the Washington Treaty, was signed in Washington D.C. on 4 April 1949. The key article which contains the principle of collective defence, Article 5, is reproduced in Appendix 12.

¹¹⁴ Statement by the North Atlantic Council, PR (2001)124, 12 September 2001: <<http://www.nato.int/docu/pr/2001/p01-124e.htm>> (accessed 9 November 2006).

Article 5 of the Washington Treaty uses the term ‘armed attack’, the same phrase adopted in Article 51 of the UN Charter and, in common with the UN Charter, ‘armed attack’ is not defined.¹¹⁵ The NAC put a definitional gloss on it when it stated that the terrorist acts of 11 September would be considered an ‘armed attack’ if they were found to have been “directed from abroad.”¹¹⁶ NATO determined, on 2 October 2001, that the hijackings had been “directed from abroad;”¹¹⁷ the US-led strikes began on 7 October and the NAC expressed its full support for those “targeted actions”.¹¹⁸

The phrase “directed from abroad”¹¹⁹ presents an important interpretational issue. At the time the NATO Treaty was signed in 1949, the US and probably the UK, regarded the term ‘armed attack’ to mean *an attack by one state against another state*.¹²⁰ In 1949, the US Senate Foreign Relations Committee explicitly stated that the term ‘armed attack’ in Article 5 did not refer to “an incident created by irresponsible groups or individuals but rather an attack by one State upon another.”¹²¹ That interpretation seems to have been (at best) expanded upon or (at worst) abandoned by the NAC in its determination to, first, invoke Article 5 on 12 September 2001 in response to a terrorist attack, then to confirm that it was an attack ‘directed from abroad’ on 2 October and then lend its support to the US pursuant to that Article, on 8 October 2001. The NAC was satisfied that:¹²²

[T]he individuals who carried out these attacks were part of the world-wide terrorist network of al-Qaida, headed by Osama bin Laden and his lieutenants and protected by the Taliban.

That was the extent of the explanation given by the Council for its determination that this was an armed attack, directed from abroad, and therefore warranted the invocation of Article 5.

¹¹⁵ See chapter 9 and the discussion regarding the origin of Article 5 and its relation to Article 51 of the UN Charter.

¹¹⁶ See “What is Article 5?” *NATO Issues*, 20 September 2001: “Article 5 has thus been invoked, but no determination has yet been made whether the attack against the United States was directed from abroad.” See also Statement by NATO Secretary General Lord Robertson, PR (2001) 130, 21 September 2001: <<http://www.nato.int/docu/pr/2001/p01-130e.htm>> (accessed 9 November 2006): “NATO has declared that if the terrorist attacks on the United States are found to have been launched from abroad, this will be an attack against all Allied Countries under Article 5.”

¹¹⁷ Statement by NATO Secretary General Lord Robertson, 2 October 2001: <<http://www.nato.int/docu/speech/2001/s011002a.htm>> (accessed 9 November 2006).

¹¹⁸ Statement by NATO Secretary General, Lord Robertson, PR (2001) 138, 8 October 2001: <<http://www.nato.int/docu/pr/2001/p01-138e.htm>> (accessed 8 November 2006).

¹¹⁹ Statement by the North Atlantic Council, PR (2001) 124, 12 September 2001.

¹²⁰ See chapter 9.

¹²¹ US Senate Foreign Relations Committee, *Report of the Committee on Foreign Relations on the North Atlantic Treaty June 6, 1949*, Executive Report no 8, at 13, as cited in Beckett, W *The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations* (1950) 28. When interpreting Article 51 of the UN Charter, Beckett, who was the Legal Advisor to the UK Foreign Office in 1950, did not go so far as to say that there must be an armed attack by a State, instead noting that the phrase means “an armed attack by an aggressor” (his emphasis) and that it rules out “certain other activities which in various other definitions have also been included in aggression”.

¹²² See Statement by NATO Secretary General Lord Robertson, 2 October 2001, *supra* n117.

Questions were immediately raised over the legality of invoking Article 5.¹²³ A divide between the US and Europe as to how terrorism should be classified and what type of action ought to be taken in response to it had existed since at least 1999 when NATO formulated the Alliance's Strategic Concept.¹²⁴ After the invocation of Article 5, concerns were expressed by European diplomats that the US had given NATO a 'new role', that it had turned NATO into a counter-terrorist organisation and that "the legal experts were not asked to question the legality of that act."¹²⁵ Other diplomats felt that there had been little opportunity for debate over whether Article 5 should be invoked, claiming that "political solidarity with the US took precedence over legality."¹²⁶ Some NATO members subsequently expressed concern at the precedent that was thereby established and sought assurances that in the future they would be able to scrutinise interpretations of Article 5.¹²⁷ In light of the opposition that existed to the invocation of Article 5, the significance that should be attributed to that decision must be carefully weighed.

The Security Council's initial response

The Security Council's initial response was to adopt resolution 1368 on 12 September 2001¹²⁸ wherein it stated that it was "Determined to combat by all means threats to international peace and security caused by terrorist acts"¹²⁹ and that it "Recogniz[ed] the inherent right of individual or collective self-defence in accordance with the Charter."¹³⁰ The Security Council unequivocally condemned the terrorist attacks and stated that it regarded such acts, *like any act of international terrorism*, as a threat to international peace and security.¹³¹ The Council called on all states to "work together urgently to bring to justice the

¹²³ One senior NATO diplomat was reported as commenting that the invoking of Article 5 on 12 September 2001 amounted to Article 24 of the Alliance's Strategic Concept being 'slipped into' Article 5. He added: "The legal experts should have been consulted. But the allies knew such consultations would drag on for days. It was a *fait accompli*. There was no time for legal niceties": Dempsey, J "EU doubts grow over 'switch' in NATO role" *Financial Times*, 19 September 2001, 4.

¹²⁴ *The Alliance's Strategic Concept*, approved by the Heads of State and Government participating in the Meeting of the North Atlantic Council in Washington DC on 23rd and 24th April 1999; 24 April 1999, Press Release NAC-S(99)65: <<http://www.nato.int/docu/pr/1999/p99-065e.htm>> (accessed 9 November 2006). Article 24: "Any armed attack on the territory of the Allies, from whatever direction, would be covered by Articles 5 and 6 of the Washington Treaty..." In the negotiations that led up to the adoption of the Strategic Concept, the US had wanted to broaden the definition of Article 5 by giving NATO a counter-terrorism role and had wanted the definition of "attack" to include terrorism, sabotage and organised crime, regardless of its origins. The European members were unenthusiastic about expanding the scope of Article 5 and argued that the task of counter-terrorism was better performed by civil institutions such as the police and the judiciary: see UK Parliament's Research Paper 01/72, supra n10 at 103

¹²⁵ Dempsey, supra n123 at 4.

¹²⁶ Lord Robertson initiated the debate over Article 5 and the NATO ambassadors were apparently told to 'rubber-stamp' the proposal because the Europeans could not be seen to be wavering: *ibid*.

¹²⁷ The Benelux countries, Germany, Portugal and France have all since realised the implications of the decision to interpret Article 5 as covering acts of terrorism: *ibid*.

¹²⁸ S/Res/1368 (2001), 12 September 2001, reproduced in Appendix 13.

¹²⁹ *Ibid*, preambular paragraphs 2 and 3.

¹³⁰ *Ibid*.

¹³¹ *Ibid*, operative paragraph 1 (emphasis added).

perpetrators, organizers and sponsors of these terrorist attacks.”¹³² It also called on the international community to redouble their efforts to prevent and suppress terrorist acts and specifically mentioned the need for increased cooperation and full implementation of anti-terrorist conventions and Security Council resolutions.¹³³ It also indicated that it was ready “to take all necessary steps to respond to the attacks of 11 September 2001, and to combat all forms of terrorism”¹³⁴ and it decided to remain seized of the matter.

Three observations are offered regarding the Security Council’s initial response.¹³⁵ First, the Security Council advocated a law enforcement-type response to the events of 11 September. The use of phrases such as ‘bring to justice’ and ‘hold accountable’ supports that inference, as does the explicit references to anti-terrorist conventions and Security Council resolutions. Furthermore, the reference to resolution 1269 (1999)¹³⁶ is important because that resolution previously endorsed a law enforcement-type response to international terrorism.¹³⁷ The fact that the events of 11 September 2001 were repeatedly referred to by the Security Council as ‘terrorist attacks’ and ‘terrorist acts’ rather than ‘armed attacks’ in resolution 1368 (2001) is also significant.¹³⁸

Secondly, the Security Council’s initial response emphasised that this terrorist attack had to be seen in the context of other attacks. The Council unequivocally condemned these terrorist attacks and stated that it regarded such acts, **like any acts of international terrorism**, as a threat to international peace and security.¹³⁹ The Security Council may have intended to downplay any inference that this was an entirely different type of event warranting an entirely different type of response. As horrendous as this attack certainly was, it was still a terrorist attack. That inference is supported by a later paragraph in resolution 1368, wherein the Security Council stated that it was ready to respond to the attacks of 11

¹³² Ibid, operative paragraph 3.

¹³³ Ibid, operative paragraph 4.

¹³⁴ Ibid, operative paragraphs 5 and 6.

¹³⁵ The significance of the reference to “inherent right of individual or collective self-defence” in Security Council Resolution 1368 (2001) is not discussed here because it is discussed at length below at 300-302 in the context of determining whether or not an ‘armed attack’ had occurred.

¹³⁶ Ibid, in operative paragraph 4.

¹³⁷ S/Res/1269 (1999), 19 October 1999, called upon states to co-operate with each other through bi-lateral and multi-lateral agreements and arrangements to prevent and suppress terrorist acts; to prevent and suppress the financing of terrorism in each of their territories through all lawful means; **to deny safe haven to those who plan, finance or commit terrorist acts by ‘ensuring their apprehension, prosecution or extradition’**; to exchange information in accordance with international and domestic law and to cooperate on administrative and judicial matters in order to prevent the commission of terrorist acts.

¹³⁸ S/Res/1368 (2001): the phrase ‘terrorist attacks’ is used in operative paragraphs 1, 3 and 5; the term ‘terrorist acts’ is used in operative paragraph 4. The term ‘armed attack’ is not used.

¹³⁹ Ibid, operative paragraph 1.

September, “and to combat **all** forms of terrorism”, in accordance with the Charter.¹⁴⁰

Thirdly, the Security Council indicated that it intended to take further measures to respond to the terrorist attacks when it stated it was ready to “take all necessary steps”¹⁴¹ and that it would “remain seized of the matter”.¹⁴² There was no suggestion in resolution 1368 that this was the complete and full extent of the Council’s response, on the contrary, it appears to have been an interim response until the Council’s more substantive response was framed.¹⁴³

The response of the General Assembly, the OAS and the OAU

Before completing this section on the initial responses to the events of 11 September 2001, a brief mention is made regarding the response of other multi-lateral organisations.¹⁴⁴ On 12 September 2001, the UN General Assembly passed a resolution in which it strongly condemned the attacks; referred to them as heinous acts of terrorism; expressed its condolences and solidarity with the people and Government of the US; urgently called for international cooperation to bring to justice the perpetrators, organisers and sponsors of the outrages of 11 September 2001 and urgently called for international co-operation to prevent and eradicate acts of terrorism, stressing that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of such acts would be held accountable.¹⁴⁵ That initial response was subsequently followed by a comprehensive special session to discuss ways to eliminate international terrorism,¹⁴⁶ which resulted in the adoption of a resolution on 12 December 2001.¹⁴⁷ The latter resolution confirmed the stance taken on 12 September 2001.¹⁴⁸ The General Assembly regarded the events of 11 September as criminal acts¹⁴⁹ and impliedly supported a law enforcement response.¹⁵⁰ The General

¹⁴⁰ Ibid, operative paragraph 5.

¹⁴¹ Ibid.

¹⁴² Ibid, operative paragraph 6.

¹⁴³ The more substantive response being S/Res/1373 (2001) adopted on 28 September 2001, set out in Appendix 14 and discussed below.

¹⁴⁴ For analysis of international responses to 11 September 2001 see Walker, G “The Lawfulness of Operation Enduring Freedom’s Self-Defense Responses” (2003) 37 *Val. U.L. Rev.* 489 at 493-505.

¹⁴⁵ UNGA Resolution 56/1, A/56/PV.1, 56th session, 1st Plenary meeting, 12 September 2001.

¹⁴⁶ Held from 1-5 October 2001. For the themes and outcome of the Plenary Meetings on “Measures to Eliminate International Terrorism”, see Statement by General Assembly President H. E. Han-Seung-soo.

¹⁴⁷ UNGA Resolution 56/88, A/56/PV.85, 56th session, 85th Plenary meeting, 12 December 2001.

¹⁴⁸ See A/Res/56/88, *ibid*.

¹⁴⁹ “[The General Assembly] 1. Strongly condemns all acts, methods and practices of terrorism as **criminal** and unjustifiable...2. Reiterates that **criminal acts** intended or calculated to provoke a state of terror...”: *ibid*.

¹⁵⁰ See UNGA 56/1, *supra* n145, paragraphs 3 and 4; see UNGA 56/88, *supra* n147, especially paragraphs 3-11.

Assembly did not refer to the events of 11 September as ‘armed attacks’ in either resolution, nor did it mention the term ‘self-defence’.¹⁵¹

The Organisation of American States (OAS) adopted a resolution on 21 September 2001 in which the respective Ministers of Foreign Affairs, *inter alia*, recalled the inherent right of individual or collective self-defence and then resolved that the terrorist attacks against the US were attacks against all American States.¹⁵² The measures which the OAS advocated were all related to inter-state co-operation to bring to justice the perpetrators and to prevent further acts of terrorism. The OAS resolution did not advocate the use of force and did not recognise the *terrorist attacks* as being tantamount to *armed attacks*. Despite that, some scholars have drawn the conclusion that the OAS’ response constituted further evidence that the terrorist attacks *were* tantamount to ‘armed attacks’.¹⁵³

The Organisation of the African Union (OAU) adopted the Dakar Declaration on Terrorism on 17 October 2001 which strongly condemned the acts of terrorism but, similarly, did not contain any reference to the terrorist acts being ‘armed attacks’ nor did it endorse the use of force in response to them. On the contrary, it called upon OAU states to take legal, diplomatic, financial and other measures to fight terrorism.¹⁵⁴

Part B: Was the use of force an act of self-defence?

The US President officially approved military plans to attack Afghanistan in meetings held on 21 September and 2 October 2001.¹⁵⁵ *Operation Enduring Freedom* was to consist of four phases. In Phase One the US and its allies would move forces into the region and arrange to operate from or over neighbouring countries such as Uzbekistan and Pakistan: “this occurred in the weeks following

¹⁵¹ Note that A/Res/56/88, *supra* n147, was a comprehensive response from the General Assembly and it was passed on 12 December 2001, after the two Security Council resolutions relating to 11 September, which were passed on 12 September (S/Res/1368 (2001)) and 28 September 2001 (S/Res/1373 (2001)) and subsequent to the use of force against Afghanistan on 7 October 2001.

¹⁵² “Strengthening Hemispheric Cooperation to prevent, Combat and Eliminate Terrorism”, adopted at the First Plenary session of the Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser.F/II.24, RC.23/RES.1/01, 21 September 2001, Washington D.C.: <<http://www.oas.org/OASpage/crisis/RC.23e.htm>> (accessed 9 November 2006). This resolution is reproduced in Appendix 15.

¹⁵³ Maogoto J, “Walking an International Law Tightrope: Use of Military Force to Counter Terrorism—Willing the Ends” (2006) 31 *Brooklyn J. Int’l L* 405 at 450-451: he asserts that “the Security Council characterized the attacks as ‘armed attacks’” and that “This view was expressly affirmed by other international bodies including NATO and the OAS”. The OAS resolution does not mention the phrase ‘armed attack’.

¹⁵⁴ See Annex to the letter dated 24 October 2001 from the Permanent Representative of Senegal to the United Nations addressed to the Secretary General, “Dakar Declaration Against Terrorism”, 29 October 2001, UN Doc A/53/913 – S/2001/1021, General Assembly 56th Session, Agenda Item 166, Measures to Eliminate International Terrorism.

¹⁵⁵ The meetings were held in response to a request from the President to Secretary of Defense Rumsfeld made on 17 September 2001 to draw up a military campaign plan for Afghanistan: *The 9/11 Commission Report*, *supra* n1 at 337.

9/11, aided by overwhelming international sympathy for the United States.”¹⁵⁶ In Phase Two, air strikes and Special Operations attacks would hit key al Qaeda and Taliban targets. The Phase Two strikes and raids commenced on 7 October 2001.¹⁵⁷ In Phase Three the US would carry out ‘decisive operations’ using all elements of national power, including ground troops, “to topple the Taliban regime and eliminate al Qaeda’s sanctuary in Afghanistan.”¹⁵⁸ Phase Four was intended to involve civilian and military operations whose role was the “indefinite task”¹⁵⁹ of “security and stability operations.”¹⁶⁰

The justifications for the use of force and its objectives

On 7 October 2001 President Bush outlined the targets and the Operation’s objectives:¹⁶¹

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

Bush declared that the use of force was a direct consequence of the Taliban’s failure to meet the terms of the US’ ultimatum.¹⁶² Bush indicated that although the initial attack was on Afghanistan, the battle was broader.¹⁶³ He also noted that the US was engaged in a “just” mission.¹⁶⁴ However, he did not use the phrase ‘self-defence’ nor did he refer to Article 51 of the UN Charter.

The Bush Administration was aware of the need to justify *Operation Enduring Freedom* in legal terms.¹⁶⁵ In accordance with the requirement in Article 51, the US notified its use of force to the Security Council via a letter dated 7 October

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Mazar-e-Sharif fell to a coalition assault by Afghan and US forces on 9 November 2001. Four days later the Taliban had fled from Kabul. By early December, all major cities had fallen to the coalition. On 22 December, Harmid Karzai was installed as the chairman of Afghanistan’s interim administration: *ibid.*

¹⁵⁹ Ibid at 338.

¹⁶⁰ Ibid. On 5 October 2006, NATO-led International Security Assistance Force (ISAF) troops took over command from the US forces in the remaining regions of Afghanistan, thereby completing the handover of authority from US forces in *Operation Enduring Freedom* to NATO-led forces: McKeeby, D “NATO Commanding International Security Operations in Afghanistan”, *US International Information Programs*, 5 October 2006:

<<http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=October&x=20061005175423idybeekcm0.4493524>> (accessed 8 November 2006).

¹⁶¹ Presidential Address to the Nation, The White House, 7 October 2001:

<<http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html>> (accessed on 8 November 2006).

¹⁶² “More than two weeks ago I gave Taliban leaders a series of clear and specific demands: Close terrorist training camps; hand over leaders of the al Qaeda network; and return all foreign nationals, including American citizens unjustly detained in your country. None of these demands were met. And now the Taliban will pay a price”: *ibid.*

¹⁶³ “Today we focus on Afghanistan, but the battle is broader. Every nation has a choice to make. In this conflict there is no neutral ground...”: *ibid.*

¹⁶⁴ “To all the men and women in our military....I say this: Your mission is defined; your objectives are clear; your goal is just.”: *ibid.*

¹⁶⁵ Compare with Kritsiotis, D “The Legality of the US Missile Strikes Against Iraq and the Right of Self-Defense in International Law” (1996) 45 *ICLQ* 45, 162 at 166: “Underneath the strong torrent of legal rhetoric lay a careful legal opinion which made reference to both the customary and conventional principles which regulate the right of self-defence in modern international law”.

2001 from the Permanent Representative of the US to the President of the Security Council, wherein it put forth the legal justifications for using force against Afghanistan.¹⁶⁶ The UK also submitted a letter to the Security Council setting out its grounds for using force.¹⁶⁷ No other state submitted such notifications.¹⁶⁸

Three points will be discussed in turn below which arise out of the US-UK decision to resort to force: the significance of the US' reporting of its use of force; the expectation that existed prior to 7 October 2001 that a multi-lateral response was desirable; and the 'armed attack' requirement in Article 51 and whether it was met in this instance.

The significance of the notifications to the Security Council

In accordance with Article 51, "Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council."¹⁶⁹ Merely reporting the use of force to the Security Council is not proof *per se* that the use of force is legitimate self-defence.¹⁷⁰ The fact that the Security Council did not condemn the US-UK use of force may suggest that the Security Council implicitly agreed that this was a legitimate exercise of self-defence. However, it must be acknowledged that the Security Council, like the rest of the international community, was affected by what The 9/11 Commission Report called "overwhelming international sympathy"¹⁷¹ which may help to explain why, even if some members of the Security Council had reservations about the legality of the US' use of force in self-defence, they would not have publicly voiced them.

A parallel can be drawn between the Security Council's reaction (or lack of) in October 2001, and three other prior incidents: the US' reporting of its missile strikes against Libya in 1986, against the Iraqi Intelligence Service headquarters

¹⁶⁶ S/2001/946, Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council: <<http://www.un.int/usa/s-2001-946.htm>> (accessed on 26 June 2006). The letter is reproduced in Appendix 18.

¹⁶⁷ S/2001/947, Letter dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council. The letter is reproduced in Appendix 19.

¹⁶⁸ Interestingly, the US and UK letters are searchable in the UN Official Document System database by terms such as 'armed incidents' and 'terrorist attacks' – but not 'armed attack'.

¹⁶⁹ Article 51 of the UN Charter.

¹⁷⁰ See chapter 9 at 231-232. The use of force in purported self-defence was reported to the Council on several occasions but the claim was rejected, for instance, the British attacks on Yemen in 1964, Portugal against Senegal in 1969, Israel against Lebanon, Syria and Jordan in the 1960s and 1970s, Israel against Iraq in 1981 and against Tunisia in 1985; see also Dinstein, *Y War, Aggression and Self-Defence* Third ed (2001) 191.

¹⁷¹ *The 9/11 Commission Report*, supra n1 at 337.

in 1993 and against Sudan and Afghanistan in 1998.¹⁷² In those instances, the use of force in purported self-defence was duly reported without attracting Security Council condemnation, but reservations were voiced by some states.¹⁷³ As to why the Security Council failed to respond to the US claims of self-defence in 1998, Lobel surmised that:¹⁷⁴

[O]ther governments are reluctant to publicly accuse the United States of lying, even if they believe a mistake was made...any direct confrontation between the Security Council and the United States...is certain to fail, as the United States has made it clear that it will veto any resolution calling for an investigation into the attack.

Likewise, in the post-11 September climate, even if states had reservations about the strict legality of the use of military force, none would have dared criticise the US for its actions against Afghanistan. Any such criticism would have been viewed as anti-American rather than pro-international law, and may even have rendered them targets themselves.¹⁷⁵ Within the US, anti-war sentiment was not tolerated¹⁷⁶ and that was also the prevailing tone adopted by the US in its relations with the international community. The US' notification to the Security Council that it was acting in self-defence is not proof *per se* of the lawfulness of its actions, and the fact that the Security Council did not respond negatively is not overly significant given the climate of sympathy that existed and the fact that lack of condemnation, or even acquiescence, by the Council does not equate to an endorsement.

¹⁷² See chapter 9 at 249-259.

¹⁷³ In 1986, even though the Security Council could not agree on a resolution, the General Assembly rejected the claim of self-defence; in 1993, one member of the Security Council (the Netherlands) expressly rejected the self-defence justification on the basis that the US had not suffered an armed attack and only the UK and Russia accepted that this act of apparent retaliation was legitimate self-defence; in 1998, the Security Council acquiesced in the missile strikes against Sudan and Afghanistan even though the evidence was questionable, perhaps because of a "general distaste for the Sudanese Government coupled with a disinclination to directly confront the US": see Lobel, J "The Use of Force to Respond to Terrorist Attacks: the Bombing of Sudan and Afghanistan" (1999) 24 *Yale J. Int'l L* 537 at 556.

¹⁷⁴ *Ibid* at 557.

¹⁷⁵ In light of the US' stance that all states were "either with us or with the terrorists." Indeed, evidence has recently come to light that Pakistan was threatened with force by the US if it did not comply with the US' requests for assistance: "Armitage denies threatening Pakistan after 9/11" *MSNBC News*, 22 September 2006: <<http://www.msnbc.msn.com/id/14943975/>> (accessed 6 November 2006) and "Musharraf: In the Line of Fire" *CBSNews*, 24 September 2006: <<http://www.cbsnews.com/stories/2006/09/21/60minutes/main2030165.shtml>> (accessed 6 November 2006).

¹⁷⁶ Retribution was meted out to any commentators, journalists, academics or actors, who dared question the legitimacy or effectiveness of the impending war against Afghanistan: "...instead of engaging in serious debate concerning the appropriate response to terrorism, the U.S. broadcasting networks engaged in unrelenting focus on the tragedy of the World Trade Centre victims, the evil of the bin Laden network and the need for military retribution. Criticizing the Bush administration was taboo and would continue to be throughout the Afghanistan Terror War." Kellner, D *From 9/11 to Terror War – the Dangers of the Bush Legacy* (2003) 68-69. See also the comments of Bush that all states were either with the US or with the terrorists: *supra* n34.

The expectation of a multi-lateral response led by the Security Council

The statements that were delivered in the Security Council on 12 September 2001 divulge the type of response that the Council envisaged.¹⁷⁷ What is especially notable about those 16 statements¹⁷⁸ is the recurring references to the terrorist attacks being an attack not just on the US but on **all humanity**, and the calls for an **international, global, or multi-lateral response**. The UN Secretary General, Kofi Annan, referred to terrorism as an “international scourge”;¹⁷⁹ he said “a terrorist attack on one country is an attack on humanity as a whole”¹⁸⁰ and “all nations of the world must work together to identify the perpetrators and bring them to justice.”¹⁸¹ Mr Greenstock on behalf of the UK said, “we all have to understand that this is a global issue, an attack on the whole of modern civilization” and he called for states to respond “globally.”¹⁸² The statements from the representatives of Mauritius,¹⁸³ Ukraine,¹⁸⁴ Singapore,¹⁸⁵ Tunisia,¹⁸⁶ Ireland,¹⁸⁷ China,¹⁸⁸ Russia,¹⁸⁹ Jamaica,¹⁹⁰ Bangladesh,¹⁹¹ Norway¹⁹² Columbia¹⁹³ and France¹⁹⁴ expressed the same sentiments, as did the statements from non-Council members, which were annexed to the records of the meeting.¹⁹⁵ States

¹⁷⁷ SC Official Records S/PV.4370, 4370th Meeting, 12 September 2001, “Threats to international peace and security caused by terrorist acts”.

¹⁷⁸ All fifteen members of the Security Council plus the Secretary General of the UN made statements. The only statement not specifically mentioned here is the very brief speech delivered by Mr Keita of Mali. In his statement he condemned the attacks, offered condolences to the US and to the victims and he said that Mali would stand in solidarity with any decision taken by the Security Council: *ibid*.

¹⁷⁹ *Ibid* at 2.

¹⁸⁰ *Ibid*.

¹⁸¹ *Ibid*.

¹⁸² *Ibid* at 2-3.

¹⁸³ Mr Koonjul said Mauritius favoured a “framework of international cooperation” and he pledged his country’s support in finding the perpetrators and bringing them to justice: *ibid* at 3.

¹⁸⁴ Mr Kuchinsky said that this crime was “a direct challenge not only to the US but to the entire civilized world” and that the efforts of the entire international community would be needed: *ibid* at 3-4.

¹⁸⁵ Mr Mahbubani expressed his hope that the Security Council will come together and deliver a very effective response: *ibid* at 4.

¹⁸⁶ Mr Mejdoub called it an “unacceptable crime” and said “if we want to succeed we must act together. We will be stronger if we are all united...”: *ibid*.

¹⁸⁷ Mr Ryan said the attacks were “an attack on all humanity and the values of humanity” and called for “the entire international community” to work together to bring to justice those who committed the acts: *ibid* at 4-5.

¹⁸⁸ Mr Wang Yingfan said the attacks were “an open challenge to the international community as a whole” and said that the Security Council, “as the organ with the principal responsibility of maintaining international peace and security” should play a leading role in “bringing terrorist criminals to justice”: *ibid* at 5.

¹⁸⁹ Mr Lavrov said that the events were “a brazen challenge to all of humankind” and that the resolution they were about to adopt demonstrated the Council’s resolve to prevent and end terrorism: *ibid* at 5.

¹⁹⁰ Miss Durant said Jamaica believed “that the most effective response continues to be full cooperation at an international level, as terrorism poses a serious threat to the peace and stability of nations...”: *ibid* at 5-6.

¹⁹¹ Mr Ahsan called the attacks “an affront to all humanity” and that “we must collectively face this challenge...”: *ibid* at 6.

¹⁹² Mr Kolby said the attacks were not only directed against targets in the US “but against freedom and democracy itself...The attacks were therefore directed against us all.” He stressed that the Security Council was established to defend these values and that it must show that it is ready to support efforts to do just that: *ibid* at 6.

¹⁹³ Mr Valdivieso said the attacks were not only against the US but against the community of civilized peoples, the values of humanity and the future of peace: *ibid* at 6-7.

¹⁹⁴ Mr Levitte, President of the Security Council, called them “an attack on all humanity” and that it was “a time for unity and resolve”. He also said that the Security Council is the principal organ entrusted with peace and security and that it should work in a spirit of urgency: *ibid* at 7.

¹⁹⁵ S/2001/864, “Note by the President of the Security Council”, 13 September 2001. In accordance with an understanding reached at the 4370th meeting of the Security Council held on 12 September 2001, the statements of the representatives of Australia, Belgium (on behalf of the European Union), Brazil, Cuba, Israel, Japan, New Zealand, Romania, Slovenia and Yugoslavia to the United Nations were reproduced as annexes I-X of the note S/20001/864.

repeatedly emphasised the criminality of the attack, its effect on humanity as a whole and the global nature of the anticipated response. The US' statement was notably different. Mr Cunningham confirmed the other speakers' sentiments that "this was an assault not just on the United States, but on all of us who support peace and democracy and the values for which the United Nations stands."¹⁹⁶ However, he suggested a course of action that had not been endorsed by any of the previous speakers when he called upon "all those who stand for peace, justice and security in the world to stand together with the United States to win the war against terrorism."¹⁹⁷ The vote was then taken and the Security Council unanimously adopted resolution 1368 (2001).¹⁹⁸

What is apparent from the speeches and resolution 1368 itself, is that a discernable gap existed between the US and the other members of the Security Council (as well as several non-members) as to the appropriate type of response. Whereas virtually every member called for a **global response led by the Security Council**, the US introduced the novel phrase 'war on terrorism' and called all peace-loving states to stand with the US to win that 'war'. The introduction of the term 'war' by the last speaker seemed quite out of context as did his emphasis on a unilateral response.¹⁹⁹

Several representatives specifically referred to the Security Council as the organ that possessed the responsibility to shape the response.²⁰⁰ That was also confirmed by the text of the resolution subsequently adopted.²⁰¹ The Security Council's response was consistent with the sentiments that all of humanity, not just the US, had been targeted, and since terrorism was a threat to international peace and security, this was an issue squarely within the Security Council's realm of responsibility.

¹⁹⁶ S/PV.4370, supra n177 at 7, Mr Cunningham (United States).

¹⁹⁷ Ibid. None of the other fifteen statements mentioned the word 'war'. When read in context, this reference is jarring and appears to be out of step with the general tone of the other statements.

¹⁹⁸ The text of which is reproduced at Appendix 13.

¹⁹⁹ Note that the only other state representative to use the term 'war' in the speeches that preceded the adoption of resolution 1368 (2001) was Israel – not a member of the Security Council – in a speech by its Deputy Permanent Representative that was annexed to the debate the following day: see S/2001/864, "Note by the President of the Security Council", 13 September 2001, Annex V: Israel, Statement by Aaron Jacob, Deputy Permanent Representative. Mr Jacob said in his statement that the acts were "no less than an act of war on civilization itself."

²⁰⁰ S/PV.4370, supra n177, see Norway, Singapore, France and China in particular. Uniquely, the US did not refer to a global, multilateral response.

²⁰¹ S/Res/1368 (2001) especially operative paragraphs 5 and 6, reproduced in Appendix 13.

Scholars who share the view put forth here that the Security Council intended (and was expected) to shape the response, include Michael Byers, who observed in April 2002 that:²⁰²

...[I]n resolution 1368, the UN Security Council strongly condemned the terrorist attacks against the US but stopped short of authorising the use of force. Instead, the Council expressed "its readiness to take all necessary steps" thus implicitly encouraging the US to seek authorisation once its military plans were complete. (emphasis added)

Frederic Kirgis, writing on 1 October 2001, also took the view that the Security Council had indicated that it intended to remain in charge of any use of force when it expressed its determination to "take all necessary steps" in the last paragraph of resolution 1368. He noted that in resolution 1373, adopted on 28 September 2001, the Council did not authorise **states** to take all necessary steps, "instead it stands as a warning that the Council itself stands ready to take further steps."²⁰³

The Secretary-General underlined the international community's expectation for a multilateral response led by the UN. Although it was already apparent that the US intended to act without a specific mandate from the Security Council,²⁰⁴ Annan addressed the General Assembly on 24 September 2001 and emphasised that the attack was not just against the US but against the entire international community.²⁰⁵ He urged any response to be multilateral in nature and led by the UN:²⁰⁶

*On the very day after the onslaught, the Security Council rightly identified it as a threat to international peace and security. Let us therefore respond to it in a way that strengthens international peace and security, by cementing the ties among nations and not subjecting them to new strains. **This Organization is the natural forum in which to build such a universal coalition. It alone can give global legitimacy to the long-term struggle against terrorism.*** (emphasis added)

The Secretary-General's address to the General Assembly was perhaps a reaction to the growing realisation that the US was intending to respond unilaterally and

²⁰² Byers, M "Terrorism, the Use of Force and International Law after 11 September" (2002) *ICLQ* 51 at 401.

²⁰³ Kirgis, F *American Society of International Law (ASIL) Insights* "Addendum: Security Council Adopts Resolution on Combating International Terrorism", 1 October 2001: <<http://www.asil.org/insights/insigh77.htm#addendum7>> (accessed 9 November 2006).

²⁰⁴ That intention is particularly evident from the adoption of the "Use of Force" resolution on 14 September 2001, and from President's Bush's speech to the nation on 20 September 2001, discussed *infra* at n36 and accompanying text; see also *The 9/11 Commission Report* *supra* n1 at 336-37.

²⁰⁵ "In truth, **this was a blow, not against one city or one country, but against all of us.** It was an attack not only against our innocent fellow citizens – over 60 Member States were affected, including, I am sad to say, my own country – but on our shared values. It struck at everything this Organization stands for: peace, freedom tolerance, human rights and the very idea of a united human family. It struck at all our efforts to create a true international society, based on the rule of law." UN GAOR, A/56/PV.7, General Assembly 56th Session, 7th plenary session, 24 September 2001, Secretary-General at 1.

²⁰⁶ *Ibid.*

thereby sideline the Security Council.²⁰⁷ Rather than endorse the prospect of unilateral action, the Secretary-General made a pointed call for a return to multilateralism and virtually invited the US to seek the UN's sanction for its intended military response.²⁰⁸

Was there an 'armed attack'?

In the first paragraph of the US' letter to the Security Council, signed by the US' Permanent Representative to the UN, John Negroponte, the US stated that it was acting in individual and collective self-defence "**following the armed attacks** that were carried out against the US on 11 September 2001"²⁰⁹ (emphasis added). The US considered that it had been subjected to 'armed attacks' which, by virtue of Article 51 of the UN Charter, justified its use of force in self-defence. The US did not declare who it considered responsible for carrying out the 'armed attacks', asserting only that "al Qaeda had a *central role* in the attacks".²¹⁰ The US acknowledged in its letter to the Security Council that "there is still much we do not know" and that its inquiry was "in its early stages".²¹¹

Numerous arguments can be raised to support the US' claim that it was subjected to an 'armed attack':²¹² (1) NATO had already invoked Article 5 of the Washington Treaty; (2) the Security Council expressly referred to the inherent right of individual and collective self-defence;²¹³ (3) the Security Council did not subsequently condemn the US' use of force; and (4) non-state actors can sometimes be held responsible for carrying out 'armed attacks'.²¹⁴ These four arguments are often raised in support of the US' self-defence claim and are addressed in turn below.

²⁰⁷ President Bush approved military plans to attack Afghanistan in meetings held on 21 September and 2 October 2001. Phase One of Operation Enduring Freedom - which involved moving forces into the region and arranging to operate from neighbouring countries - was underway "in the weeks following 9/11": *The 9/11 Commission Report* supra n1 at 337.

²⁰⁸ As for possible reasons why the US and the UK acted without seeking Security Council authorisation, Penketh suggests it may have been because veto-wielding nations complicated efforts to obtain swift UN authorization for the 1999 NATO military campaign in Kosovo: Penketh, A "War on Terrorism: Annan - UN must have role in fight against terrorism" *The Independent*, 25 September 2001, at 5. Alternatively, the US may have been concerned that other members might seek to impose a time limit on the mandate or only authorise such force as was necessary to capture bin Laden: Byers supra n202 at 401.

²⁰⁹ S/2001/946, see Appendix 18.

²¹⁰ "My Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks. There is still much we do not know.": *ibid.*

²¹¹ *Ibid.*

²¹² These four arguments, which appear in the literature regarding the legality of the use of force against Afghanistan, are examined in turn over the following pages.

²¹³ S/Res/1368 (2001) and S/Res/1373 (2001).

²¹⁴ *Military Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Reports 14: <http://www.icj-cij.org/icjwww/icasess/inus/inus_ijudgment/inus_ijudgment_19860627.pdf> (accessed 9 November 2006) at para 195; see discussion in chapter 9 at 228.

(1) *NATO's invocation of Article 5*

It would not be convincing for the US to invoke Article 51, and claim that it had satisfied the 'armed attack' element therein, *purely* in reliance upon the invocation of Article 5 by NATO since serious concerns have been identified as to whether NATO ought to have invoked it.²¹⁵ In any case, the fact that NATO invoked Article 5 can not be interpreted as pan-European support for the proposition that there was an 'armed attack'. Unequivocal statements were made by other European bodies that the hijackings were "criminal acts not acts of war".²¹⁶ The Parliamentary Assembly of the Council of Europe stated that "the International Criminal Court was the appropriate institution to consider terrorist acts."²¹⁷ The Council of Europe also stated that if military action was part of the response, the action should be taken in accordance with international law and *with the agreement of the Security Council*.²¹⁸ Significantly, neither the Council of Europe nor the European Union referred to the hijackings as 'armed attacks'.²¹⁹

On the day after the attacks, when the NAC gathered to debate its response, the American delegation made it clear that it would seek the invocation of Article 5 if it could be proven that the attacks originated outside the US.²²⁰ NATO Secretary General, Lord Robertson, openly supported the invocation of Article 5. Robertson pointed out that dissension within NATO could lead the US to bypass the Alliance completely, which might result in the permanent marginalising of NATO.²²¹ Enormous pressure was placed on the European states which initially opposed the invocation of Article 5 to give their support to the American-led bloc's moves to invoke Article 5.²²² This *political pressure* – which was driven by a desire to retain NATO's security role, to underline NATO's solidarity with the US and to 'repay' a perceived historic debt to the US²²³ – was the real reason why the NAC invoked Article 5.²²⁴

²¹⁵ Supra n107 and accompanying text.

²¹⁶ PACE Resolution 1258 (2001), supra n99, Article 8: "The Assembly considers these terrorist actions to be crimes rather than acts of war."

²¹⁷ Ibid, Article 5.

²¹⁸ Ibid, Article 11

²¹⁹ Infra at 282-85.

²²⁰ Lansford, supra n107 at 73.

²²¹ Ibid at 74.

²²² Ibid. Lansford notes that France, Italy, Spain and the UK strongly supported the US whereas Germany, the Netherlands, Belgium and Norway were initially opposed to the invocation. Germany opposed invoking Article 5 because it was concerned about an American 'overreaction'. The Benelux states and Norway were concerned at the long-term consequences of NATO assuming a counter-terrorism function.

²²³ NATO's political and military support for the US after 11 September "demonstrated the broad utility of the Alliance to American security policy and served as partial repayment for America's underwriting of European security in the post-World War II era": ibid, 71.

²²⁴ "Throughout the Cold War and beyond, the United States had underwritten European security and now an opportunity had arisen whereby Western Europe could 'repay' its transatlantic partner": ibid.

The existence of an apparent ‘moral obligation’ owed to the US by the European states was pressed home by the US itself, with reports appearing in the international media in the days following 11 September 2001 by former members of the US National Security Council that “neutrality is not an option.”²²⁵ Even when the unanimity of the NAC was (somewhat reluctantly) secured, there was significant concern at the level of proof that would need to be made available before any actual commitments to military support were made. Thus, although the invocation by NATO of Article 5 may, *prima facie*, appear to bolster the US’ assertion that it had suffered an ‘armed attack’, NATO may have been mistaken to invoke it and in doing so, it may have been motivated by factors other than strict adherence to the terms of the NATO Treaty.²²⁶

The credibility of the US’ assertion that it suffered an ‘armed attack’ is further affected by the fact that its NATO partner, the UK, did not refer to the hijackings as ‘armed attacks’ in its letter to the Security Council. On the same day that the US submitted its letter to the Security Council claiming it had suffered an ‘armed attack’, the UK’s letter referred to the hijackings alternately as an “operation of terror” and “the terrorist outrage”.²²⁷ In contrast with the US’ letter, the technical term ‘armed attack’ did not appear in the UK’s letter. The difference in terminology, and the absence of any reference to there having been an ‘armed attack’ must be taken as deliberate, since the documents were submitted almost simultaneously and Article 51 was explicitly relied upon as the justification for the use of force in both letters.²²⁸ As an indication of the *opinio juris* of the UK, the terminology utilised by the UK would suggest that it was not convinced on 7 October 2001 that the terrorist attacks could satisfy the high legal threshold of the term ‘armed attack.’

(2) The Security Council’s references to the inherent right of self-defence

One of the reasons why many commentators assert that the US and the UK acted in lawful self-defence is because the Security Council expressly referred to the

²²⁵ Blinken, A and Gordon, P “NATO Is Ready to Play a Central Role” *International Herald Tribune*, 18 September 2001. Blinken and Gordon were former members of the Clinton Administration’s NSC.

²²⁶ The benefits in invoking Article 5 were mutual for NATO and the US: “For the Europeans, the attacks of 11 September provided an opportunity for NATO to demonstrate its utility to the United States and the organization’s ability to counter new security threats. For the Americans, NATO participation provided any military operations with an enhanced degree of legitimacy and reaffirmed the transatlantic link in the face of new competition from emerging security structures in Europe such as the ERRF [European Rapid Reaction Force]”: Lansford, *supra* n107 at 83.

²²⁷ S/2001/947, Letter from the UK to the Security Council: *supra* n166, Appendix 19.

²²⁸ Both letters were submitted on 7 October 2001 and they were allocated sequential numbering in the UN’s Official Document system, being S/2001/946 (the US letter) and S/2001/947 (the UK letter).

inherent right of self-defence in two post-9/11 resolutions. On 12 September 2001, the Security Council adopted resolution 1368 as its immediate response.²²⁹ The Council's more substantive response was in resolution 1373, adopted on 28 September 2001.²³⁰ There is a preambular paragraph in both resolutions in which the Security Council "recognised" and "reaffirmed" the inherent right of individual or collective self-defence: in Resolution 1368 (2001) the reference was made in the third preambular paragraph, and in Resolution 1373 (2001) it appeared in the fourth preambular paragraph. The line between *acknowledging* the existence of the inherent right of self-defence, and formally *categorising the terrorist attacks as 'armed attacks'* is one which many scholars have crossed without hesitation.²³¹ One scholar makes the connection in the following way:²³²

Passed by the Council the day after the attacks, Resolution 1368 condemned the attacks and recognized the 'inherent right of self-defence in accordance with the Charter. Resolution 1373, passed seventeen days later, reaffirmed the right of self-defence in the context of the September 11 attacks and went on to reaffirm 'the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts. Moreover, the Security Council's subsequent characterization of those acts as 'armed attacks' was echoed by other bodies. Thus, the US enjoyed strong support from the Security Council before it had to articulate the actual case for its actions in Afghanistan... (emphasis added)

The Security Council's references to self-defence (which were in *preambular* not *operative* paragraphs)²³³ are interpreted by some as an endorsement that the acts of terrorism were 'armed attacks'.²³⁴ There are some problems with that line of reasoning. First, the Security Council never described the 11 September terrorist acts as 'armed attacks' in either resolution 1368 or 1373.²³⁵ Secondly, neither the

²²⁹ S/Res/1368 (2001), adopted by the Security Council at its 4370th meeting on 12 September 2001, reproduced in Appendix 13.

²³⁰ S/Res/1373 (2001), adopted by the Security Council at its 4385th meeting on 28 September 2001, reproduced in Appendix 14.

²³¹ Rostow, N "Before and After: The Changed UN Response to Terrorism Since September 11th" (2001) 35 *Cornell Int'l L.J.* 475 at 481: "...[T]his affirmation was significant: it implied that the attacks triggered the right [of self-defence] even if, at the time of adoption, the UN Security Council knew almost nothing about who or what had launched them."; also Beard, J "Military Action Against Terrorists under International Law: America's New War on Terror: The Case for Self-Defense Under International Law" (2002) 25 *Harv. J.L. & Pub. Pol'y* 559 at 566: "The Council's unprecedented willingness to invoke and reaffirm self-defense under Article 51 in response to the September 11 terrorist attacks is an important act, and, for some states, helped legitimize the US military response"; see also Conte, A *Security in the 21st Century* (2005) 45; and Maogoto, J *Battling Terrorism – Legal Perspectives on the Use of Force and the War on Terror* (2005) 120.

²³² Maogoto, *ibid* at 120.

²³³ The fact that the references were in preambular paragraphs has been noted by, *inter alia*, Cassese and Stahn: see Cassese, A "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law" (2001) 12 *EJIL* 993; Stahn, C "Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say" *EJIL Discussion Forum* available at: <www.ejil.org/forum_WTC> (accessed 3 July 2007). The significance of the preamble in Security Council resolutions is discussed briefly by Michael Wood who states that: "The preambles to SCRs may assist in interpretation, by giving evidence as to their object and purpose, but they need to be treated with caution since they tend to be used as a dumping ground for proposals that are not acceptable in the operative paragraphs.": Wood, M "The Interpretation of Security Council Resolutions" (1998) 2 *Max Planck Yearbook of United Nations Law* 73 at 86-87.

²³⁴ See discussion regarding the debate that preceded the adoption of resolution 1368, and the positions taken by various scholars, *infra* at n189 and accompanying text.

²³⁵ This is a point that is made by Stahn, who notes that the Security Council avoided speaking of an 'armed attack' as required by Article 51 of the Charter, using instead the notion of 'terrorist attack', without expressly linking this notion to Article 51 of the Charter: Stahn, C "Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say" *supra* n247. It is also made by Cassese, who notes that in operative paragraph 1 of S/Res/1368 (2001), the Security Council defines the terrorist acts of 11 September as a 'threat to the peace', hence not as an 'armed attack' legitimising self-defence under Article 51 of the UN Charter.": Cassese, *supra* n233.

Secretary-General nor *any* of the Security Council members referred to the terrorist attacks as ‘armed attacks’ in the debate prior to the adoption of resolution 1368.²³⁶ Thirdly, the UK did not use the term ‘armed attack’ when it reported its use of force in purported self-defence to the Security Council.²³⁷

Comparing the text of resolutions 1368 and 1373 (2001) with previous Security Council resolutions lends support to the interpretation that is being advanced here.²³⁸ In 1950, in relation to the attack by North Korean forces on the Republic of Korea, the Security Council repeatedly called the actions an “armed attack.”²³⁹ In a further contrast to resolutions 1368 and 1373 (2001), the Security Council stated that the “armed attack” amounted to a “breach of the peace” which is stronger than the phrase used in 2001 (“a **threat** to international peace and security”).²⁴⁰ In 1950, the Security Council also set out its recommendations for a response to the “armed attack”: in resolution 83 (1950) the Council noted that “urgent military measures are necessary to restore international peace and security”²⁴¹ and in resolution 84 (1950) it “Recommend[ed] that Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.”²⁴²

A further comparison can be drawn between language employed by the Security Council in 1990 (regarding Iraq) and 1993 (regarding Bosnia and Herzegovina) and the post-11 September resolutions. On 2 August 1990, the Security Council adopted resolution 660 in which it responded to the “invasion of Kuwait ...by the military forces of Iraq.”²⁴³ The Council determined that there existed “a breach of international peace and security”.²⁴⁴ It explicitly stated that it was acting under Articles 39 and 40 of the UN Charter and it concluded by noting that it would meet again to consider further steps.²⁴⁵ Then on 6 August 1990, the Security Council passed resolution 661 which, *inter alia*, imposed sanctions on Iraq. In the

²³⁶ SCOR S/PV.4370, *supra* n177. Even the US statement did not refer to them as ‘armed attacks’: *supra* n177.

²³⁷ UK Letter to the Security Council, *supra* n167, reproduced at Appendix 19.

²³⁸ See also Orakhelashvili, A “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction” (2006) 11(1) JCSL 119 at 127.

²³⁹ S/Res/82 (1950) adopted on 25 June 1950, S/1501; S/Res/83 (1950) adopted on 27 June 1950, S/1511 in two separate paragraphs of the resolution; S/Res/84 (1950) adopted on 7 July 1950, S/1588 in three paragraphs; and in S/Res/85 (1950) adopted on 31 July 1950 the Council used the term ‘unlawful attack’.

²⁴⁰ The latter phrase was used in S/Res/1368 (2001) and S/Res/1373 (2001).

²⁴¹ S/Res/83 (1950).

²⁴² S/Res/84 (1950).

²⁴³ S/Res/660 (1990) adopted on 2 August 1990 at the 2932nd Meeting by 14 votes to none, Yemen did not participate in the vote.

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

sixth preambular paragraph of resolution 661 (1990), the Council agreed that it was:²⁴⁶

*Affirming the inherent right of individual or collective self-defence, **in response to the armed attack by Iraq against Kuwait**, in accordance with Article 51 of the Charter, (emphasis added)*

When the above paragraphs are compared to the equivalent paragraphs from resolutions 1368 and 1373 (2001), some obvious differences are apparent. The equivalent paragraph in resolution 1368 (2001) was phrased as follows:

***Recognizing** the inherent right of individual or collective self-defence in accordance with the Charter,*

Similarly, in resolution 1373 (2001) the Council stated it was:

***Reaffirming** the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),*

In September 2001 the Council did not take the opportunity, which clearly presented itself on two occasions, to refer to the hijackings as ‘armed attacks’ yet on two previous occasions, in 1950 and in 1990, it had chosen to use the specific term ‘armed attacks.’ Another important comparison is provided in relation to the use of force in Bosnia-Herzegovina in 1993 where the Security Council specifically mentioned that the right to act in self-defence included the right to use force.²⁴⁷

The comparison between the post-11 September resolutions and resolution 661 (1990) is especially important because in relation to Iraq, the Council had used the term ‘armed attack’ in the *same paragraph* in which it reaffirmed the inherent right of self-defence. Additionally, in 1990, the Security Council specifically mentioned Article 51, which it did *not* do in the post-11 September resolutions.

One further point of distinction is that in 1950, in resolutions 83 and 84, the Security Council referred to a “**breach** of international peace and security”,²⁴⁸ likewise, in 1990 in resolution 660 the Council stated that there had been a

²⁴⁶ S/Res/661 (1990) adopted on 6 August 1990 at the 2933rd Meeting by 13 votes to none, with two abstentions (Cuba and Yemen).

²⁴⁷ “[The Security Council] Authorises (UNPROFOR)...*acting in self-defence*, to take the necessary measures, *including the use of force*, in reply to bombardments against the safe areas...” (emphasis added): S/Res/836 (1993), adopted on 4 June 1993 at the 3228th Meeting, paragraph 9.

²⁴⁸ S/Res/83 and S/Res/84 (1950), *supra* n239.

“**breach** of international peace and security”.²⁴⁹ However, in 2001, the Council stated that this act, **like any act** of international terrorism was a **threat** to international peace and security. The difference is subtle but significant. The overall tenor of the Security Council’s resolutions in September 2001 is quite different from those resolutions adopted in 1950 and 1990 and the decision to employ less specific, and considerably weaker language, must be acknowledged. In summary, the Security Council demonstrated in 1950 and 1990 that when it is convinced that an ‘armed attack’ has occurred, it is prepared to use that specific term, with the ramifications that then exist for the victim state, and it is willing to call upon states to render military assistance to repel the attack, and to restore international peace and security if it has been found to have been *breached*. On this occasion, the Security Council did not use the term ‘armed attack’; it did not refer to Article 51; it did not find that there was a breach of international peace and security and, therefore, it cannot be presumed that it endorsed the subsequent use of force by the US and the UK.

*(3) The Security Council’s response to the use of force by the US and the UK*²⁵⁰

It was noted above that among the arguments which could be raised to support the legitimacy of the US-UK actions, was the Security Council’s reaction (or lack thereof) to the use of force.²⁵¹ It might be argued that if the Council had regarded the US and the UK’s use of force against Afghanistan as an act of unlawful aggression, it would have condemned it as such. Thus, it may be argued that the Council’s lack of response, and apparent acquiescence, should accordingly be interpreted as implied acceptance by the Council that the actions were indeed lawful acts of self-defence. The extract below is representative of a view expressed by a number of scholars.²⁵²

*The United States has relied on its right of self-defense in using military force to respond to the September 11 attacks. **Other governments have not challenged the right of the United States to do so, although some questions have been raised about U.S. tactics and targeting. Because customary international law is often developed through a process of official assertions and acquiescences, the absence of challenge to the US asserted right of self-defense could be taken to indicate acquiescence in an expansion of the right to include***

²⁴⁹ S/Res/660 (1990), supra n243.

²⁵⁰ The Security Council’s initial response to the terrorist attacks of 11 September 2001 has already been briefly touched upon. The analysis here focuses on the Security Council’s response to the use of force by the US and the UK.

²⁵¹ Supra n226 and accompanying text.

²⁵² Kirgis, F “Israel’s Intensified Military Campaign Against Terrorism” (2001) (ASIL) *Insights*: <<http://www.asil.org/insights/insigh78.htm>> (accessed 9 November 2006); see also Maogoto, supra n245 at 122; Miller, J “The Legal Implications of the Response to September 11, 2001: A Tribute to Paul Szasz” (2002) 35 *Cornell Int’l L.J.* 605 at 606; Paust, J “The Legal Implications of the Response to September 11, 2001: Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond” (2002) 35 *Cornell Int’l L.J.* 533 at 535; Beard supra n231 at 569.

Although the Security Council did not react immediately to the US and the UK's letters dated 7 October 2001 reporting their resort to force, the Security Council subsequently passed further resolutions regarding the situation in Afghanistan. The Council adopted resolutions 1377, 1378, 1383 and 1386 on 12 November, 14 November, 6 December and 20 December 2001, respectively. None of these latter resolutions mentioned the inherent right of self-defence, which had been referred to in the two earlier resolutions (1368 and 1373). None of these later resolutions explicitly endorsed the US and the UK's use of force. The closest that the Security Council came to condoning retrospectively the use of force was in resolution 1378, when it expressed its support for "international efforts to root out terrorism"²⁵³ but even that phrase could not be interpreted as an endorsement of the use of force *per se*.

The first resolution passed after the military campaign had begun simply reaffirmed the Security Council's view that a *global* response to terrorism was needed.²⁵⁴ Neither that resolution, nor any of the subsequent resolutions which dealt with terrorism as a threat to international peace and security, or Afghanistan in particular, authorised or endorsed the use of force.²⁵⁵ Therefore, it is not persuasive to argue that the Security Council impliedly accepted the lawfulness of the US and the UK's actions, simply because the Council did not retrospectively condemn the use of force. Even if some members of the Security Council had doubts about the legitimacy of the US and the UK's military response, it is most unlikely that they would have expressed them openly.²⁵⁶

Some scholars have criticised the Security Council for its failure to make a clear pronouncement:²⁵⁷

²⁵³ S/Res/1378 (2001) adopted on 14 November 2001.

²⁵⁴ "[The Security Council] Affirms that a sustained, comprehensive approach involving the active participation and collaboration of all Member States of the United Nations, and in accordance with the Charter of the United Nations and international law, is essential to combat the scourge of international terrorism." S/Res/ 1377 (2001) adopted on 12 November 2001, UNSCOR, 56th Session, 4413th Meeting, eighth preambular paragraph.

²⁵⁵ Scholars who have made this point include Stahn, C ASIL *Insights* "Addendum: Security Council resolution 1377 (2001) and 1378 (2001)" 1 December 2001: <http://www.asil.org/insights/insigh77.htm#_ednref7c> (accessed 9 November 2006); Kenny, *supra* n41; and Kapferer, *supra* n41 at 42-44.

²⁵⁶ See discussion in chapter 9 regarding the US use of force in 1986, 1993 and 1998 and the international reaction; also Lobel, *supra* n173 at 557.

²⁵⁷ Kapferer, *supra* n43 at 41.

It is difficult to avoid the impression that, by keeping matters deliberately vague, the Security Council has in fact evaded its responsibility under the UN Charter to determine whether the use of force by the US-led coalition was lawful.

Whether the Security Council kept matters *deliberately* vague is open to conjecture. The climate at that time was one of overwhelming sympathy for the US and underwhelming sympathy for Afghanistan.²⁵⁸ What is clear is that the Security Council had the primary responsibility for the maintenance of international peace and security.²⁵⁹ It was the Council's duty to determine if there was a threat to the peace, breach of the peace or act of aggression.²⁶⁰ On 12 September 2001 it made such a determination when it declared that the hijackings, like all acts of international terrorism, were a threat to international peace and security.²⁶¹ It then had the power and responsibility to take measures to maintain and restore international peace and security.²⁶² If the Security Council considered that the US and the UK were discharging that responsibility on its behalf, it could have *retrospectively* endorsed the use of force, as it has done on other occasions.²⁶³ Subsequent to the use of force by the US and the UK, the Council passed four resolutions regarding the threat posed by international terrorism to peace and security.²⁶⁴ None of those resolutions retrospectively authorised the use of force; in fact, there was no mention *whatsoever* of the use of military force by the US and the UK against Afghanistan.

When considering the Security Council's overall response to the use of force by two of its Permanent Members, it is significant that the Council did not note the validity of the US-UK actions, commend them or express appreciation for their efforts.²⁶⁵ The failure to even acknowledge that the US and the UK were

²⁵⁸ Supra n156 and accompanying text.

²⁵⁹ Article 24(1) of the UN Charter, see Appendix 11.

²⁶⁰ Ibid, Article 39.

²⁶¹ S/Res/1368 (2001). It reiterated that finding on 28 September in S/Res/1373 (2001).

²⁶² Article 42 of the UN Charter.

²⁶³ In 1950, in relation to Korea, the UN Security Council effectively authorised action in its name by the US and other national contingents in what became known as the 'coalition of the willing.' In 1990, the UN again authorized a 'coalition of the willing' to respond to Iraq's invasion of Kuwait. Those authorizations occurred *prior* to the use of force. However, in 1997 the Security Council *retrospectively* endorsed the use of force by the armed forces of the Economic Community of Western African States (ECOWAS), the Military Observer Group (ECOMOG) in Liberia and Sierra Leone. Regarding Liberia see S/Res/1116 (1997) adopted on 27 June 1997, UNSCOR 52nd Session, 3793rd Meeting, at 1, UN Doc S/Res/1116 (1997). Regarding Sierra Leone see S/Res/1162 (1998) adopted on 17 April 1998, UN SCOR 53rd Session, 3872nd Meeting, at 1, UN Doc S/Res/1162 (1998). See also Franck, T "When, if ever, may states deploy military force without prior Security Council authorisation?" (2001) 5 *Wash. U. J.L. & Pol'y* 51 at 53-37. When retrospectively authorising the use of force by ECOMOG in Sierra Leone, the Security Council stated that it *commended* ECOWAS and ECOMOG on "the important role they are playing in support of the objectives related to the restoration of peace and security set out in paragraph 1 above." Given these precedents, presumably the Security Council would have endorsed the use of force by the US and the UK if it had considered that those Member States were playing an important role in the restoration of peace and security in Afghanistan.

²⁶⁴ See S/Res/1377 adopted on 12 November 2001; S/Res/1378 adopted on 14 November 2001; S/Res/1383 (2001) adopted on 6 December 2001 and S/Res/1386 (2001) adopted on 20 December 2001.

²⁶⁵ Compare with the wording of the Security Council's endorsement of the ECOMOG forces in Liberia and Sierra Leone, discussed above at n275. Also compare with resolutions adopted in 2006 whereby the Council "expressed its appreciation" to the Presidents of Liberia and Nigeria for their assistance in facilitating the transfer of Charles Taylor.

employing force against Afghanistan is difficult to reconcile with the position adopted by some scholars that the international community supposedly endorsed the use of force. In summary, there was no resolution from the Security Council which either explicitly endorsed or condemned the use of force by the US and the UK. But even if there had been, it would not have been conclusive as to the legality of that use of force because it is ultimately for the ICJ, not the Security Council, to make determinative legal judgments.²⁶⁶ Thus, no definitive findings as to the legality of the US-UK use of force can be made, based solely upon the Security Council's reaction, or lack thereof.

(4) *Non-state actors and 'armed attack'*

The fourth and final argument which might support the inference that there was an 'armed attack' relates to the issue of non-state actors. At issue is whether an 'armed attack' must be carried out by a state, or whether it can be carried out by a non-state actor. Neither the US nor the UK asserted that the hijackings were carried out by a state or by state-directed individuals. The US was more prepared than the UK to place responsibility for the hijackings on al-Qaeda, but even the US did not go so far as to say that Osama bin Laden, al Qaeda or the Taliban actually carried out the attacks.²⁶⁷ The US said that al Qaeda had a *central role* in the attacks. It did not claim that the Taliban regime had a role in the attacks.²⁶⁸ The UK was even more careful in its choice of language. It focused on preventing further attacks from al Qaeda rather than asserting that al Qaeda was directly responsible for the 11 September attacks. The UK did not state who it considered was responsible for the 'terrorist outrage'.²⁶⁹

In the *Nicaragua* case, the ICJ held that 'armed attacks' can be carried out by non-state actors if they are sent by or on behalf of a state and if they carry out acts of

²⁶⁶ Article 92 of the UN Charter states that the International Court of Justice is the United Nations' principal judicial organ. See also discussion in McCormack, T *Self-Defense in International Law: The Israeli Raid on the Iraqi Nuclear Reactor* (1996) at 24: "The process of determining the legality of a particular actions would be simple for international lawyers if a unanimous resolution of the Security Council amounted to a determinative judgment in international law...However, international legal enquiry is not that simple, and unanimous resolutions of the Security Council condemning or supporting particular actions have never been accorded such status in international law... The Security Council is not a judicial body and does not make legal judgments in factual situations. Although the International Court of Justice does not have compulsory jurisdiction it is the UN body with the judicial capacity to establish the relevant facts and apply the appropriate legal principles in order to make a legal judgment."

²⁶⁷ Note that in an interview with Taysir Alluni recorded on 20 October 2001, and broadcast on 31 January 2002, Osama bin Laden praised the attacks and admitted inciting and rousing to action the young men who carried out the attacks, but he stopped short of admitting that he was directly responsible for organising them: Lawrence, B (ed) *Messages to the World – the Statements of Osama bin Laden* (2005) 107-113.

²⁶⁸ The US asserted that the Taliban regime allowed the parts of Afghanistan that it controlled to be used by al Qaeda as a base of operation.

²⁶⁹ The phrase 'terrorist outrage' is in inverted commas because this is the term used by the UK to describe the 9/11 hijackings – it did not refer to them as 'armed attacks'. See the UK's letter to the Security Council, reproduced in Appendix 19.

armed force of such gravity as to amount to an actual armed attack conducted by regular forces, or they have substantial involvement therein.²⁷⁰ Thus, acts of state-sponsored terrorism can amount to ‘armed attacks’ if they meet a two-part test: the *source* is the state, and the *gravity* is such that it would amount to an armed attack had it been carried out by the regular forces of a state. The ICJ in the *Nicaragua* case also held that assistance to rebels in the form of the provision of weapons or logistical or other support does *not* amount to an ‘armed attack’.²⁷¹

These legal pronouncements on the meaning of ‘armed attack’ are problematic for the US and the UK. There is no doubt that the second part of the *Nicaragua* test, the ‘gravity’ element, would be satisfied. The only issue is the first part of the *Nicaragua* test, the ‘source’ of the attacks. Neither the US nor the UK alleged in their letters to the Security Council that the hijackers were “sent by or on behalf of a state.”²⁷² Neither the US nor the UK identified the perpetrators, or their nationalities, or the evidence of their connection to the Taliban regime.

The US and the UK claimed that the Taliban regime was “supporting”²⁷³ al-Qaeda. However, applying the first part of the *Nicaragua* test, mere *support* is insufficient to amount to an armed attack. The ICJ held there that even the “provision of weapons or logistical or other support”²⁷⁴ is insufficient. Yet in October 2001, the US and the UK claimed only that there was “support” from the Taliban – without any specific claims of what form that support took, other than alleging that the Taliban allowed al Qaeda to use parts of Afghanistan which it controlled.²⁷⁵ It is submitted that the level of ‘support’ referred to by the US and the UK was insufficient, under international law as it stood in October 2001, to amount to an armed attack on the US by the Taliban regime.²⁷⁶

²⁷⁰ See chapter 9

²⁷¹ Ibid.

²⁷² See the *Nicaragua* case, supra n214 at para 115.

²⁷³ The UK: “...This military action...is directed against [O]sama Bin Laden’s Al Qaeda terrorist organization and the Taliban regime that is supporting it.” The US: “...the Al Qaeda Organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks”: see Appendix 19 and 18, respectively.

²⁷⁴ See the *Nicaragua* case, supra n214 at para 115.

²⁷⁵ See the US’ and the UK’s letters to the Security Council dated 7 October 2001, reproduced at Appendix 18 and 19, respectively.

²⁷⁶ Compare with the *Nicaragua* case where the majority held at para 115-116: “...United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary activities in Nicaragua...For this conduct to give rise to legal responsibility of the United States it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged [human rights] violations were committed” (emphasis added).

In *Nicaragua*, the ICJ placed considerable emphasis on the fact that the acts of the *contras* could have been carried out without the *control* of the US.²⁷⁷ In the case of Afghanistan, the incidents that occurred on 11 September 2001 could also have occurred without the control of the Taliban. The 9/11 Commission Report noted that senior members of the Taliban opposed al Qaeda's plans to attack the US, but they were powerless to prevent it. Thus, the US and the UK did not assert, nor could they have established, that the Taliban directed the 11 September hijackings, because the Taliban lacked a sufficient degree of control over al Qaeda.

In conclusion, there are serious doubts as to whether the US suffered an 'armed attack' on 11 September 2001. It was stated at the beginning of this section²⁷⁸ that four points are commonly relied upon to support the claim that there was an 'armed attack.' Those four points, and the evidence supporting them, have been analysed and found to be questionable. First, the support gleaned from NATO's invoking of Article 5 is generally overstated given that there was substantial opposition over the legal basis for its invocation. The decision to invoke Article 5 was likely to have been influenced by political rather than legal considerations. Secondly, the Security Council's references to the 'inherent right of self-defence' in resolutions 1368 and 1373 (2001) are often attributed more weight than they deserve, given that the Security Council never used the term 'armed attack', nor referred to Article 51 directly, nor found a *breach* of the international peace in any of the post-9/11 resolutions, despite precedents where it has made precisely such findings. Thirdly, although the Security Council never condemned the use of force by the US and the UK, it never condoned it either, despite precedents where it has retrospectively authorised the use of force. The first resolution passed after 7 October 2001²⁷⁹ continued to call for a global, multilateral, law-enforcement response. Finally, although the scale and magnitude of the 11 September hijackings would have rendered them an 'armed attack' had they been carried out by regular armed forces, there was no evidence provided to the Security Council - nor was the claim even made - that the hijackers were directed by or acting on

²⁷⁷ See *Nicaragua* supra n214 at para 115.

²⁷⁸ Supra n212.

²⁷⁹ S/Res/1377 (2001).

behalf of a foreign state. The definition of ‘armed attack’ provided by the ICJ in the *Nicaragua* case was not satisfied here.²⁸⁰

Since there must be an ‘armed attack’ before a state can use force in self-defence, the conclusion reached here that the ‘armed attack’ element of Article 51 was not satisfied would mean, *ipso facto*, that the US and the UK did not act in lawful self-defence when they employed military force against Afghanistan on 7 October 2001. On that basis, the argument about the lawfulness of the US and the UK’s actions might rest.

However, if one were to assume that the foregoing analysis is in error, and that the US *did* experience an ‘armed attack’, further questions then arise. First, the issue of how responsibility for the so-called ‘armed attack’ was attributed to the targets of the military response (al Qaeda, and the Taliban/Afghanistan.) Second, if the ‘armed attack’ requirement *was* satisfied, whether the customary law requirements such as immediacy, necessity and proportionality, were adhered to. Thirdly, whether the right to use force in self-defence, presuming it initially existed, had expired by 7 October 2001 when force was employed. Those three questions will be addressed in the following three parts of this chapter.

Part C: Attribution of responsibility for the ‘armed attacks’

Given the US and the UK’s employment of military force against Afghanistan, one might presume that the US and the UK were thereby asserting that the Islamic Emirate of Afghanistan, governed (largely) by the Taliban regime, was ultimately responsible for the so-called armed attacks. However, the letters from the US and the UK to the Security Council did not make such a claim. The letter from the US’ representative purported to attribute responsibility to the Taliban regime on the basis that:²⁸¹

*[T]he attacks of 11 September 2001 and the ongoing threat to the United States...have been made possible by the decision of the Taliban regime **to allow the parts of Afghanistan that it controls to be used by this organization** [al Qaeda] as a base of operation (emphasis added)*

²⁸⁰ The definition of ‘armed attack’ as requiring an attack from a *state*, was subsequently reaffirmed by the ICJ in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion. Obviously, that opinion was given after the events of 11 September 2001, however, it provides further proof of the way in which ‘armed attack’ has always been interpreted by the ICJ. In relation to the ICJ opinion in 2004, Alexander Orakhelashvili observes: “In view of the consistency of the established legal position and the insufficiency of the evidence to prove any change in that position, the court had no alternative but to hold that the right to self-defence operates under international law **only in relation to the attack originating from foreign states**.” (emphasis added), in Orakhelashvili, *supra* n238 at 128.

²⁸¹ S/2001/946, 7 October 2001, *supra* n166, reproduced in Appendix 18.

The UK claimed that its military action had been carefully planned and was directed against “[O]sama Bin Laden’s Al-Qaeda terrorist organization and **the Taliban regime that is supporting it.**”²⁸² (emphasis added). Neither the US nor the UK asserted that the individuals who had carried out the hijackings were directed by or were acting on behalf of Afghanistan. The attribution of responsibility to the Afghan state, or at least that part of it which was under the Taliban’s control, was on the basis that the Taliban regime had *allowed parts of Afghanistan to be used by al Qaeda as a base* (US version) or *the Taliban was supporting al Qaeda* (UK version).

In Chapter 9, and in Part B above, the ‘effective control’ test from the *Nicaragua* case was discussed. Applying the *Nicaragua* test to the Taliban regime in relation to Al Qaeda, it is apparent that the test would not be met by merely *allowing* parts of Afghan territory under its control to be used by al Qaeda (US allegation) or by *providing support* to al Qaeda (UK allegation).

One could counter that even though the *Nicaragua* test for the attribution of responsibility would not be satisfied here, that case was decided in 1986, before international terrorism became the threat that it is now, or alternatively, that it was decided on its own facts.²⁸³ Even if such an attempt to minimise the importance of the *Nicaragua* case were tenable, the credibility of such an objection is overshadowed by the 2001 Draft Articles on State Responsibility for Intentionally Wrongful Acts.²⁸⁴ In Chapter 9, it was noted that the ILC’s Draft Articles adopted a very similar test for the attribution of state responsibility to that adopted by the ICJ in the *Nicaragua* case.²⁸⁵ Article 8 states that the conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is **acting on the instructions of, or under the direction or control of that state in carrying out the conduct.**²⁸⁶ However, neither the US nor the UK alleged that the individuals who carried out the 11 September hijackings were acting on the instructions of, or under the direction or control of, the Taliban regime.

²⁸² S/2001/947, 7 October 2001, supra n167, reproduced in Appendix 19.

²⁸³ Travilio, G and Altenburg, J “State Responsibility for Sponsorship of terrorist and Insurgent Groups: Terrorism, State Responsibility and the Use of Military Force” 2003 4 *Chi. J of Int’l L.* 97 at 5-6.

²⁸⁴ Travilio and Altenburg dealt with the Draft Articles perfunctorily by stating that “international terrorism was not the focus of the Draft Articles” and that the Draft Articles cannot supersede the ‘inherent’ right of self-defence: *ibid* at 110-11.

²⁸⁵ See Chapter 9.

²⁸⁶ Article 8; *ibid*.

The phrase in Article 8, ‘under the direction or control of a State’, means that conduct will only be attributed to a state if it directed or controlled the **specific operation**.²⁸⁷ Neither the Bush nor the Blair administrations alleged that the Taliban directed the **specific operation** that occurred on 11 September 2001, nor did the Taliban have overall control of al Qaeda’s operations.²⁸⁸ Far from directing this specific operation, the evidence suggests that the Taliban in fact opposed in principle the concept of attacking the US.

The only other possible way in which the US and the UK may have succeeded in attributing responsibility to the Taliban would have been via an acceptance of responsibility from the Taliban after the event.²⁸⁹ However, neither the US nor the UK alleged that the Taliban had accepted responsibility. Furthermore, the Taliban leadership immediately and unequivocally condemned the hijackings.²⁹⁰ In 1998, and again in early October 2001, the Taliban leadership indicated they were willing to turn Osama bin Laden over for trial if evidence was provided as to his involvement in acts of terrorism.²⁹¹ The Taliban never adopted the events of 11 September as their own conduct, thus, responsibility could not have been attributed to the Taliban regime on the basis of Article 11 or the precedent set forth in the *Diplomatic and Consular Staff (Iran Hostages)* case.²⁹²

In light of the tests in both the *Nicaragua* case and in the ILC Draft Articles, the US and the UK failed to attribute responsibility to the Taliban regime for the acts which occurred on 11 September 2001 and which they claimed entitled them to use force in self-defence. Therefore, the US and the UK acted in violation of international law when they used military force against the Taliban regime on 7 October 2001.²⁹³ Scholarly support for this conclusion emphasises the distinction between targeting al Qaeda and the Taliban.²⁹⁴ Although the use of force against

²⁸⁷ See Commentary to the Draft Articles in chapter 9.

²⁸⁸ In *Prosecutor v Tadic*, the International Criminal Tribunal for the Former Yugoslavia indicated that a state does not have to issue specific instructions for the direction of every individual operation, nor does it have to select concrete targets, but it still has to be subject to the overall control of the state: *Prosecutor v Tadic* Judgment, ICTY Case No IT-94-A, Appeals Chamber 1999, 38 ILM 1518, 1545 (1999); see chapter 9.

²⁸⁹ Draft Articles, Article 11; see also the discussion in chapter 9 regarding the ILC Draft Articles. Article 11 provides that conduct which is not otherwise attributable to a state can nevertheless be considered an act of that state under international law if and to the extent that the state acknowledges and adopts the act in question as its own.

²⁹⁰ Supra at n60 and accompanying text.

²⁹¹ Regarding the 1998 arrangement, see Bodansky, *Y Bin Laden – The Man Who Declared War on America* (2001) 301-06.

²⁹² See discussion in chapter 9.

²⁹³ The US was clear in its intention to target the Taliban. In the US’ letter to the Security Council it stated that “These actions include measures against...military installations of the Taliban regime in Afghanistan”. See also n172 where the US stated that its use of force was aimed at attacking the military capability of the Taliban.

²⁹⁴ Paust : “the US attacks on the Taliban in 2001 and the arrest or detention of members of the Taliban armed forces, as opposed to bin Laden and al Qaeda [are] highly problematic...[it] raises serious concerns about future use of military force against states that merely

the Taliban was highly problematic, it has been argued elsewhere that the use of military force would have been permissible, had it been restricted to targeting Osama bin Laden and members of the al Qaeda network.²⁹⁵ Some scholars claim that if the US and the UK had restricted themselves to solely al Qaeda targets, they would have been well within their rights because al Qaeda members were responsible for, or complicit in, the 11 September attacks and previous armed attacks on US targets.²⁹⁶

That proposition is made more tenable given that bin Laden previously issued declarations of war against the US,²⁹⁷ including *fatwas* to kill Americans wherever they could be found;²⁹⁸ and there was some proof that although he initially denied responsibility for the attacks,²⁹⁹ he later acknowledged some degree of involvement.³⁰⁰ Those factors support the proposition that the non-state group, al Qaeda, was a more appropriate and, arguably, a lawful target. Nevertheless, it is still difficult to provide a legal basis for using force to target even al Qaeda in Afghanistan without a Security Council mandate. The UN Charter only permits force to be used in two situations (when authorised by the Security Council or in self-defence), neither of which would apply to the use of force by individual states against al Qaeda targets within Afghanistan. Furthermore, state practice suggests that the legitimacy of military reprisals against non-state groups in response to terrorist acts has historically been largely rejected by the international community. In the previous chapter, examples of forcible reprisals from the 1950s through to the 2000s were discussed. It was demonstrated there that the Security Council has frequently condemned the use of force, such as air strikes on alleged terrorist bases inside a foreign state, even when those air strikes were in response to

harbour or support or have known links with non-state terrorists or other international criminals" : Paust, J "Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond" (2002) 35 *Cornell Int'l L.J.* 533 at 542 and 547. Also see Conte, supra n231 at 49, who implies that responsibility was apportioned via a number of Security Council resolutions from 1999-2001, rather than through the ILC's Draft Articles.

²⁹⁵ Paust draws a distinction between the state entity (the Taliban) and the non-state organisation (al Qaeda) and argues that strikes against the former were probably unlawful, but against the latter were lawful: *ibid.*

²⁹⁶ For example, the attacks on the USS Cole and the US embassies in Nairobi and Dar-es-Salaam: *ibid.*

²⁹⁷ "Declaration of War Against the Americans Occupying the Land of the Two Holy Places: A Message from Usama bin Laden unto his Muslim brethren all over the world generally, and in the Arab Peninsula specifically" 23 August 1996, reprinted in Alexander, Y and Swetnam, M *Usama bin Laden's al-Qaida: Profile of a Terrorist Network* (2001) at Appendix 1. Although note that this was mainly directed at the US military forces stationed in the Persian Gulf.

²⁹⁸ In February 1998 bin Laden and al-Zawahiri endorsed a *fatwa* (legal ruling) stating that Muslims should kill Americans, including civilians, anywhere in the world where they could be found. It was published in the *Al-Quds al-Arabi* newspaper on 23 February 1998; transcript available at: <<http://www.ict.org.il/articles/fatwah.htm>> (accessed 8 November 2006).

²⁹⁹ "Bin Laden says he wasn't behind attacks" *CNN*, 17 September 2001: <<http://archives.cnn.com/2001/US/09/16/inv.binladen.denial/>> (accessed 9 November 2006).

³⁰⁰ See discussion above regarding the interview with Alluni on 20 October 2001; see also "Bin Laden Video Threatens America" *BBC News*, 30 October 2004: <http://news.bbc.co.uk/2/hi/middle_east/3966741.stm> (accessed 9 November 2006).

previous attacks by non-state actors emanating from the territory of that state.³⁰¹ The *opinio juris* of the majority of states does not support the use of military force against a sovereign state in retaliation for attacks by non-state actors.³⁰² In essence, even though it may be claimed that air strikes against targets within Afghanistan would have been legitimate, had they been confined to al Qaeda and excluded the Taliban, such a proposition is open to criticism on the twin bases that international law does not support the use of force in such situations and nor does state practice.

Part D: The customary law elements of the inherent right of self-defence

If the US and/or the UK had suffered an ‘armed attack’ by virtue of which they acquired the right to use force in self-defence against an entity directed by or acting on behalf of the State of Afghanistan, the question arises as to whether they exercised that right within the bounds of international law.

As noted in chapter 9, the ‘inherent right of individual or collective self-defence’ is not defined in Article 51 and recourse must be had to customary law to define the content of the right.³⁰³ A state using force in self-defence must do so out of **necessity**, it must respond in a way that is **proportionate** and there must be an element of **immediacy**.³⁰⁴ These three elements of self-defence, distilled from American Secretary of State Daniel Webster’s statement in the 1837 *Caroline* incident,³⁰⁵ whose modern relevance was reaffirmed in the *Nicaragua* case and whose applicability to both customary law and Article 51 was affirmed in the *Legality of the Threat or Use of Nuclear Weapons* case, are discussed in turn below.³⁰⁶

³⁰¹ See chapter 9: the Security Council condemned Portugal for its attacks on Senegal in 1969; it condemned Israel for its use of force against its neighbours in the 1960s in relation to As-Samu, Karameh, As-Salt and the Beirut Airport raid, all of which were justified on the grounds that Israel had suffered attacks from non-state actors in neighbouring states; several members condemned Israel for its invasion of Lebanon in 1982 which was justified on the grounds that Lebanon could not or would not meet its responsibilities to prevent armed attacks being launched from its territory, and the Council condemned Israel for its attack on Tunisia in 1985, even though Israel alleged that Tunisia had allowed its territory to be used as a base for terrorists.

³⁰² But note that there was a trend away from condemnation towards acquiescence.

³⁰³ Chapter 9; also the *Nicaragua* case *supra* n214 at 94, esp para 176.

³⁰⁴ See chapter 8 and the discussion of these elements from the *Caroline* case.

³⁰⁵ For a description of the details of that incident, see chapter 7. The US called upon Great Britain to show the existence of a “necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation ...also, that the local authorities of Canada...did nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it”.

³⁰⁶ *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion [1996] ICJ Reports 226 at 245. The ICJ held that the conditions of necessity and proportionality were not only a rule of customary international law but also applied equally to Article 51, whatever the means of force employed.

Necessity

The US and the UK must have been able to demonstrate the necessity of self-defence; the need to use force must have been instant, overwhelming, leaving no choice of means.³⁰⁷ In a modern context, it means that force should not have been considered, unless and until other peaceful measures had been found wanting or when they clearly would have been futile.³⁰⁸ If the US and the UK had been able to achieve their objectives by measures not involving the use of force, then they ought not to have contravened the general prohibition on the use of force.³⁰⁹

It is difficult to determine the precise objectives of the use of force against Afghanistan. The US' official objective was to "prevent and deter further attacks on the United States".³¹⁰ The UK's objective was similar.³¹¹ Those objectives were somewhat inconsistent with statements from the US Department of Defense.³¹² For instance, although the search for bin Laden was portrayed in the media as a key justification for the use of force, it was not put forth *formally* as a key objective.³¹³

It is apparent from the analysis earlier in this chapter that the threat of immediate attack against the US had subsided by the evening of 11 September 2001. Thus, force in self-defence was not employed to halt or avert an imminent armed attack. Nor was the US under a full-scale and continuing invasion – had it been so, there would be no question that the US would have been entitled to use force to repel the attack. Force was ultimately used in self-defence by the US and the UK to prevent *future* attacks.³¹⁴

Arguably, the US and the UK's objectives could have been achieved through other means. As for the purported aim of securing the arrest of bin Laden,³¹⁵ there

³⁰⁷ Paraphrasing Secretary of State Webster, see Jennings, R "The Caroline and McLeod Cases" (1938) 32 *AJIL* 82.

³⁰⁸ Schacter, O "The Right of States to Use Armed Force" (1984) 82 *Mich Law Rev* 1620 at 1635.

³⁰⁹ Paraphrasing Judge Ago, Addendum to the Eighth Report on State Responsibility, *Yrbk ILC ICJ Reports* [1996] 226; see chapter 9.

³¹⁰ US Letter to the President of the Security Council, *supra* n166, see Appendix 18.

³¹¹ The UK said it was employing its forces "to avert the continuing threat of attacks from the same source": UK Letter to the President of the Security Council, *supra* n167, see Appendix 19.

³¹² In statements from the US Secretary of Defence, Donald Rumsfeld and his British counterpart Geoff Hoon, both the US and the UK set out much more specific objectives. The US stated its objectives of its air campaign were to "make clear to the Taliban that harbouring terrorists carries a price; to acquire intelligence to facilitate future operations against al Qaeda and the Taliban; to develop useful relationships with groups in Afghanistan that oppose the Taliban...": see United States Department of Defense "Statement of the Secretary of Defense" No.560-01 (1 November 2001).

³¹³ The US President stated that the search was underway for those responsible and that they would be brought to justice. The search for bin Laden is not mentioned in the US and UK's letters to the Security Council.

³¹⁴ See discussion *infra* at Part F.

³¹⁵ 'Pseudo' because neither the US nor the UK referred to the arrest of bin Laden as a justification for using force when it reported to the Security Council on 7 October 2001.

were negotiations prior to 11 September, notably in 1998 and in the early months of 2001, to secure the surrender of bin Laden to Saudi Arabia for trial.³¹⁶ Those negotiations were revived by the Taliban's leader, Mullah Omar, after 11 September 2001. There were reports that Afghanistan's Islamic clerics had urged bin Laden to leave the country of his own accord³¹⁷ and Mullah Omar had offered to turn bin Laden over if certain conditions were met.³¹⁸ However, the US said that its ultimatum to the Taliban was not negotiable.³¹⁹ Pursuant to the condition of necessity, the US was obliged to, and could have, negotiated on the terms of its ultimatum including the possibility of bin Laden's extradition.³²⁰ The condition of necessity requires that any efforts to resolve the problem amicably be undertaken in good faith and not only as a matter of *ritual punctilio*.³²¹ The evidence suggests that the ultimatum was not a genuine attempt at negotiating a peaceful solution since a decision had already been taken in the US that force would be used.³²²

Returning to the official pretext for the necessity of using force in self-defence, which was to prevent and deter future attacks, the US and the UK could also arguably have achieved that objective by other means. Domestically, the Bush Administration could have, *inter alia*, strengthened the US' intelligence capabilities to detect terrorist activity, strengthened its immigration procedures to prevent potential terrorists from entering the US, undertook covert measures to arrest key al Qaeda figures³²³ and increased security measures, all of which were identified by The 9/11 Commission as factors which had in some way contributed to the ultimate success of the 9/11 hijackers' objectives, and which needed to be addressed in order to prevent future attacks.³²⁴ At an international level, the host

³¹⁶ See Bodansky, *supra* n291 at 301-06.

³¹⁷ "Taliban Won't Turn Over Bin Laden" *CBS News*, 21 September 2001: a two-day meeting of the Ulema, or council of religious leaders, urged bin Laden to leave but set no deadline for his departure.

³¹⁸ Such as the provision by the US of evidence that bin Laden was involved in the attacks and assurances that he would be tried under Islamic law.

³¹⁹ *Ibid.*

³²⁰ See also Kenny, *supra* n41 at 106 on the obligation to negotiate and the US' refusal to do so. The alliance that formed between al Qaeda and the Taliban in 2001 could have been disrupted "had the US given Pakistan more time to negotiate with the Islamic Emirate of Afghanistan to hand Osama over to Islamabad immediately after 9/11": Gunaratna, *supra* n42 at 227.

³²¹ Rostow, N "Nicaragua and the Law of Self-Defence Revisited" (1985-86) 11 *Yale J. Int'l L* 437 at 455.

³²² If bin Laden had been arrested and extradited he could have been prosecuted in New York under an indictment for the African embassy bombings, to which charges related to 11 September could have been added. Alternatively, a special military commission could have been employed; the Lockerbie model could have been used (for instance, using US judges and applying the law of New York but sitting in a neutral location). The International Criminal Court probably could not have been utilised because on 11 September 2001, the Rome Statue had 42 ratifications, short of the 60 required, so there would have been no prosecutor in place to investigate responsibility for this crime: Robertson, G "Fair Trials for International Terrorists" in Thakur, R and Malcontent, P (eds) *From Sovereign Impunity to International Accountability - The Search for Justice in a World of States* (2004) 224-32.

³²³ For a summary of the covert actions undertaken in relation to al Qaeda pre-2001, see *The 9/11 Commission Report*, *supra* n1 at 12ff.

³²⁴ *The 9/11 Commission Report* set out many recommendations, including, information sharing within and between agencies; the implementation of a 'layered security system' including increasing the ability of screening checkpoints at airports to detect explosives; and the establishment of a National Counter-Terrorism Centre.

of measures put forward by the Security Council on 28 September 2001 would also have helped prevent and deter further attacks.³²⁵ The Council of Europe, as discussed above, put forward a ten-point plan (which emphasised law enforcement measures) which it called upon its Member States to implement and which also would have helped to prevent future attacks.³²⁶

The US could also have increased the likelihood of achieving its goal of preventing and deterring future attacks if it had placed greater emphasis on diplomatic efforts to “drive a wedge”³²⁷ between the Taliban and al Qaeda. The US and Pakistan could have used diplomatic initiatives to support the moderate elements of the Taliban into relinquishing bin Laden in return for other benefits.³²⁸ The US failed to explore this option as a serious alternative to the use of force.³²⁹

It is debateable whether the necessity to use force in self-defence existed on 7 October 2001 since there was no ongoing or imminent attack. Other options existed which would have helped the US and the UK to prevent and deter future attacks. The fact that the attacks occurred on 11 September yet *Operation Enduring Freedom* did not commence until 7 October suggests that the necessity was not “overwhelming, leaving no choice of means.”³³⁰ Significantly, the US has previously chosen not to respond with force to a large-scale terrorist attack, thus the use of force in this instance ought not to have been a foregone conclusion.³³¹ The right of self-defence in Article 51 was only inserted to safeguard states until the Security Council could act;³³² on this occasion, there was ample opportunity between 11 September and 7 October for other options to have been explored, including seeking the Security Council’s authorisation.

³²⁵ S/Res/1373 (2001) which contained a range of increased anti-terrorism measures such as sharing intelligence, closing borders, considering refugee status of terrorists, a multitude of measures relating to the financing of terrorism and the strengthening of extradition measures.

³²⁶ See PACE Resolution 1258 (2001) *supra* n99. The Council of Europe regarded the terrorist acts as crimes not acts of war (para 8) and it recommended, *inter alia*, that a solution to international terrorism had to involve measures such as signing an international convention on terrorism, with a definition of that term (para 10), as well as making efforts towards “a proper understanding of its social, economic, political and religious roots and of the individuals’ capacity for hatred” (para 9). At para 17, a list of ten measures was set out which would have assisted in meeting the objective of preventing future attacks.

³²⁷ Gunaratna, *supra* n42 at 227.

³²⁸ Such as international recognition of the Islamic Emirate of Afghanistan, its seat at the UN and international aid: Burke, *J Al Qaeda – The True Story of Radical Islam* (2004) 192-97.

³²⁹ “Had the US intelligence community developed an accurate assessment of the numerical strengths of Al Qaeda and the Taliban, and understood the implications of unity between a relatively unpopular Al Qaeda and a relatively popular Taliban, it could have postponed the US strikes”: Gunaratna *supra* n42 at 227.

³³⁰ A phrase from Secretary of State Webster in the *Caroline* case, see Jennings, *supra* n307.

³³¹ In response to the bombing of Pan Am flight 103 over Lockerbie, Scotland, resulting in the deaths of 259 passengers, the US pressed for UN sanctions against Libya, instead of resorting to force. Political and economic pressure eventually resulted in two Libyans being extradited and prosecuted.

³³² See discussion in chapter 9.

Proportionality

The use of force in self-defence must be proportional to the armed attack which provoked it.³³³ Arguably, there must be a standard of *reasonableness* in the response.³³⁴ Reasonableness can be measured by assessing the scale of response and comparing it to the scale of attack³³⁵ or by comparing casualty rates.³³⁶ If Herold's³³⁷ figures of 3,767 verifiable civilian deaths between 7 October 2001 and 10 December 2001 are employed, one might argue that there has been a roughly proportionate casualty rate when compared with the 2,948 civilians killed on 11 September 2001.³³⁸ However, this sort of comparison is unsatisfactory for two reasons. First, because there is considerable disagreement over the exact number of civilian fatalities in Afghanistan. The number of civilians killed as a result of the US/UK invasion varies from study to study depending on whether deaths from direct military hostilities are counted or whether deaths from indirect causes (such as landmines, unexploded ordnances strikes and the long-term effects of warfare) are also included. Variations also occur depending on the length of time over which the count is taken and the sources which are consulted. Studies estimate that the number of Afghan civilian deaths could be between 1,000-1,300,³³⁹ or 3,700,³⁴⁰ or 5,576³⁴¹ or anywhere between 8,000-18,000.³⁴² Secondly, since force is still being employed in Afghanistan, the death rate is continuing to rise. Although the civilian casualties may have initially been roughly, arguably, 'proportionate', they become less so as the conflict continues and casualty numbers continue to increase. Due to these factors, drawing a comparison of the

³³³ Chapter 9.

³³⁴ See Dinstein, *supra* n170 at 184.

³³⁵ For instance, comparing the use of 3,000 bombs and missiles against 200 pre-planned target areas with four airplane hijackings: UK House of Commons Research Paper 01/81 "Operation *Enduring Freedom* and the Conflict in Afghanistan: An Update" 31 October 2001: <<http://www.parliament.uk/commons/lib/research/rp2001/rp01-081.pdf>> (accessed 9 November 2006) at 17.

³³⁶ The 11 September attacks resulted in the deaths of almost 3,000 individuals, compared with the deaths of between 1,000 and 8,000 Afghan civilians. Depending on the source and the time of the report, various media organizations have provided varying estimates of the civilian casualties: <<http://www.tandl.vt.edu/Foundations/mediaproject/mediaprojecthtml/afghan15.html>> (accessed 9 November 2006) for links to the sources of some estimates. A US economics professor, Mark Herold, estimated that between 7 October and 10 December 2001, there were 3,767 verifiable civilian deaths: Milne, S "The innocent dead in a coward's war" *The Guardian Unlimited*, 20 December 2001: <<http://www.guardian.co.uk/afghanistan/story/0,1284,622000,00.html>> (accessed 9 November 2006).

³³⁷ *Ibid.*

³³⁸ See discussion *supra* at n10 and accompanying text.

³³⁹ Shaw, M "Risk-Transfer Militarism, Small Massacres and the Historic Legitimacy of War" (2002) 16(3) *International Relations* 343 at 347. Shaw estimates that 1,000-1,300 civilians were "killed by the West" as a direct result of the 2001 invasion of Afghanistan.

³⁴⁰ Herold, M "Counting the Dead: Attempts to Hide the Number of Afghan Civilians Killed by US Bombs are an Affront to Justice" *The Guardian*, 8 August 2002. Herold based his figures on media reports and internet searches.

³⁴¹ Benini, A and Moulton, L "Civilian Victims in an Asymmetrical Conflict: Operation *Enduring Freedom*, Afghanistan" 2004 41 (4) *Journal of Peace Research* 403 at 417. Benini and Moulton based their figures on a survey of 600 affected communities in Afghanistan.

³⁴² The Project on Defense Alternatives has estimated that there were 1,000-1,300 civilian deaths from air strikes and an additional 8,000-18,000 deaths from indirect war effects: Conetta, C "Strange Victory: A Critical Appraisal of Operation *Enduring Freedom* and the Afghanistan War", Project on Defense Alternatives Research Monograph 6, 30 January 2002, available from Commonwealth Institute: <<http://www.comw.org/pda/0201strangevic.pdf>> (accessed 27 December 2006).

numbers of civilian dead on each side is a fairly inaccurate and ultimately unhelpful method of assessing the reasonableness of the response.³⁴³

At another level, reasonableness can be assessed by focusing on the objectives of the response. Although neither the US nor the UK formally advised the Security Council that they aimed to remove the Taliban regime from power, regime change was one of the key objectives.³⁴⁴ Yet, all members of the UN have agreed to refrain from the threat or use of force against the territorial integrity or political independence of any state.³⁴⁵ The obligation not to use force unless in self-defence or pursuant to authorisation by the Security Council goes to the core of nationhood – the right of survival as a sovereign entity.³⁴⁶

The question is whether regime change was a proportionate response, given the abovementioned limitations on intervention in sovereign states. In favour of the US and the UK, one could argue that this objective was legitimate because the removal of the Taliban regime was an integral part of its right to *restore the security* of the US after the ‘armed attack’.³⁴⁷ Against the US and the UK is the fact that self-defence actions are supposed to be aimed at, and restricted to, achieving the repulsion of an attack, the expulsion of an invader and the restoration of the territorial *status quo ante bellum*.³⁴⁸ A ‘change in leadership’ was not strictly necessary to repel the attack, to expel the invader or to restore the territorial *status quo ante bellum*.

It might be argued that once an action in self-defence has begun, the total defeat of the armed forces of the enemy may be necessary to achieve the legitimate end of restoring the security of the state.³⁴⁹ Yet examples also exist where states have acted in purported self-defence and in the course of which have effected a change

³⁴³ See also Dinstein, *supra* n170 at 210-12.

³⁴⁴ On 16 October 2001, British Foreign Secretary Jack Straw released a document which outlined a set of objectives: *Defeating international terrorism: campaign objectives*, Dep 01/1460, 16 October 2001. See also Geoffrey Hoon “Operation Veritas” Speech to the House of Commons, London (1 November 2001) where that objective was reiterated.

³⁴⁵ Article 2(4) of the UN Charter.

³⁴⁶ In the words of Louis Henkin, this obligation is the “principal norm of contemporary international law”: cited in Glennon, M *Limits of Law, Prerogatives of Power: Intervention After Kosovo* (2001) 3.

³⁴⁷ Gardam, J *Necessity, Proportionality and the Use of Force by States* (2004) 157, n89.

³⁴⁸ Higgins, R *Problems and Process: International Law and How We Use It* (2004) 232; McDougal, M and Feliciano, F *Law and Minimum World Public Order* (1962) at 222-24; Gardam, *ibid* at 156ff; Dissenting Opinions of Judge Higgins *Legality of the Threat or Use of Nuclear Weapons*, *supra* n306 at 583-4;

³⁴⁹ For example, the use of force to repel Iraq’s invasion of Kuwait and the UK’s use of force in the Falkland Islands. With respect to Iraq, Dinstein argues that Kuwait (and the international coalition) “could have chased the beaten Iraqi forces all the way to the last bunker in Baghdad”: Dinstein *supra* n170 at 211. Regarding the Falklands War, Greenwood argues that the UK had the right to use force not only to retake the Islands, “but also to guarantee their future security against further attack”: Greenwood, C “Command and the Laws of Armed Conflict” (1993) Strategic Combat Studies Institute *Occasional Paper No. 4* at 7-8. See discussion of this issue in Gardam, *supra* n347 at 162-67.

of leadership in the target state, thereby provoking widespread condemnation.³⁵⁰ It is contended that in the case of Afghanistan, the removal of the Taliban regime was not a proportionate response. That assessment is made on the basis of the existing norms of international law, which in 2001 did not permit the overthrow of a government as a legitimate aim of a self-defence action; on the basis of the principles contained in Article 2 of the UN Charter, and on the basis of the *opinio juris* of states as evidenced by numerous precedents.³⁵¹ Had the US and the UK limited themselves to al Qaeda targets, then they *may* have satisfied the requirement of proportionality. They could have argued that their use of force was analogous with previous instances where limited missile strikes in response to terrorist attacks have attracted little or no condemnation from the international community.³⁵² Regime change was a step too far.

It is submitted that neither the US nor the UK adequately established the legal basis for removing the Taliban regime.³⁵³ If the US-UK use of force was allowed to stand as a proportionate response, it would be difficult to deny that many other governments should not also be overthrown on the basis that they ‘support’ or ‘harbour’ suspected terrorists, or that they do not comply with US ultimatums to turn over suspected terrorists.³⁵⁴ To allow the principle of proportionality to be stretched to such an extent that it condones the overthrow of regimes by individual states would completely undermine its ability to limit the resort to force. It would also create a dangerous and unruly precedent.³⁵⁵

³⁵⁰ The examples of the US’ use of force in Grenada and Panama are relevant. In the case of Panama, the US’s invasion (*Operation Just Cause*) in December 1989 was specifically directed at, and resulted in, the overthrow of the de facto military leader, General Noriega. The justifications for his overthrow included his connections with drug trafficking. In the case of Grenada, the US’s invasion (*Operation Urgent Fury*) on 25 October 1983 resulted in the overthrow of the Soviet-backed regime led by Bernard Coard and the installation of what the US described as a “popular native government”: Cole, R *Operation Urgent Fury*, Office of the Chairman of the Joint Chiefs of Staff, 1997: <<http://www.dtic.mil/doctrine/jel/history/urgfury.pdf>> (accessed 9 November 2006).

³⁵¹ The limited use of force by states such as Israel and the US against targets in foreign states, in response to acts of terrorism, was largely condemned in the 1950s, 1960s and 1970s, but a change was evident in the 1980s and 1990s whereby states were much less inclined to condemn military strikes in those contexts, if they were limited in scope, carefully targeted and framed in the language of self-defence. However, neither Israel nor the US claimed that the terrorist threats they were facing entitled them to overthrow the governments of, *inter alia*, Jordan, Lebanon, Tunisia, Libya or Iraq. Furthermore, the US’ involvement in Grenada and Panama to effect leadership change was widely condemned suggesting that the majority of states do not consider this to be a legitimate objective when exercising the right of self-defence.

³⁵² For instance, the US missile strikes on the Iraqi Intelligence Service in 1993 attracted no formal condemnation; the missile strikes against Sudan and Afghanistan in 1998 were met with some condemnation but no formal censure by the Security Council. These examples could possibly have served the US and the UK with evidence that the *opinio juris* of states allowed limited, targeted missile strikes.

³⁵³ Gardam also concludes that “to target the military forces of the State and overthrow the government in such circumstances seems unlikely to constitute a proportionate response”: *supra* n347 at 183.

³⁵⁴ Israel or the US could argue that the government of Lebanon should be overthrown because it is either supporting or harbouring the leaders of Hizb-Allah, including Hassan Nasrallah; or that the government of the Syrian Arab Republic be overthrown because it either supports or harbours members of Hamas such as the exiled political leader, Khaled Meshaal. The ramifications for allowing the Afghanistan scenario to stand as an example of a ‘proportionate’ exercise of self-defence are considerable: see chapter 11.

³⁵⁵ See chapter 11 for discussion of the use of force against Lebanon in 2006.

Immediacy

The third element of the right of self-defence requires that there must not be an undue ‘time-lag’ between the armed attack and the exercise of self-defence.³⁵⁶ Discussion of this element is academic here since it is posited that even if there was an ‘armed attack’, the use of force was unlawful because the requirements of necessity and proportionality were not met. The question at issue here would be whether or not there was an undue ‘time-lag’ between 11 September and 7 October 2001, or, whether the employment of force in self-defence was “instant, overwhelming, leaving...**no moment for deliberation**”?³⁵⁷ Stressing that there must not be a significant delay, Cassese has observed that traditional or ‘classic’ self-defence must be an immediate reaction to aggression; if the victim state allows time to elapse, self-defence must be replaced by action under the authority of the Security Council.³⁵⁸

Article 51 preserves the right of states to use force and act in their own self-defence if they are attacked, until the Security Council can take over and implement measures to restore or maintain international peace and security. To allow a state to delay its response for three weeks is to acknowledge that there is no instant, overwhelming need to respond with unilateral force. In the case of Afghanistan, there was more than a moment for deliberation, there were in fact 26 days, and within that time, there was adequate opportunity for the US and the UK to seek other solutions to achieve its objectives, such as seeking Security Council authorisation for a UN-sanctioned multilateral response to the threat (which the Security Council had already identified) to international peace and security.³⁵⁹

It is not entirely clear what sort of timeframe would enable a state to satisfy the principle of ‘immediacy’ without breaching the principle of ‘necessity’. As noted by Dinstein, “a war of self-defence does not have to commence within a few minutes, or even a few days, from the original armed attack”.³⁶⁰ He notes that a state under attack “cannot be expected to shift gear from peace to war

³⁵⁶ Dinstein uses the term ‘time-lag’; supra n170 at 184. Other scholars refer to the need for a ‘temporal link’: Gardam, supra n347 at 152.

³⁵⁷ “States are traditionally allowed a leeway of time in which to initiate their defensive action”: Gardam, supra n347 at 150; “...[M]oving forward to a war of self-defence is a time-consuming process, especially in a democracy where the wheels of government move slowly.: Dinstein supra n70 at 212.

³⁵⁸ Cassese, A “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law” (2001) 12, 5 *EJIL* 993 at 997-98.

³⁵⁹ S/Res/1368 (2001) and S/Res/1373 (2001): in both resolutions the Security Council recognised that this act of terrorism, like all acts of international terrorism, constituted a threat to international peace and security.

³⁶⁰ Dinstein, *War, Aggression and Self-Defence* 4th ed (2005) 242.

instantaneously”. The argument being explored here is whether the 26-day delay between the terrorist attacks and the use of force against Afghanistan meant that force was not used ‘immediately’. ‘Immediacy’ is a relative concept; it must surely be measured in terms of the context of the situation. A justifiable delay could be caused by prolonged attempts at amicable negotiations or due to the fact that the sheer distance involved requires “lengthy preparations before the military machinery can function smoothly”.³⁶¹ The Falklands Islands War of 1982 is an instance of the latter and the 1990 Gulf War is an example of the former.³⁶²

In the past, the international community has settled on ‘cooling-off’ periods of three years,³⁶³ and, in other instances, of three months.³⁶⁴ One might argue that 26 days was a really a very short period when compared to other instances in which force has been used. For instance, in relation to Kosovo, the timeframe before force was employed was measured in months, rather than days. On 31 March 1998, the Security Council, acting under Chapter VII of the UN Charter, passed a resolution effectively threatening the Federal Republic of Yugoslavia with collective measures if it continued to repress its Kosovar minority.³⁶⁵ On 23 September 1998, another resolution was adopted, threatening military action against the Serbs unless they negotiated, a measure that was successful to some extent when it resulted in peace talks.³⁶⁶ One might argue that such a precedent tends to show that negotiations may occur over a duration of many months, thus, using force within a mere 26 days would indeed satisfy the element of ‘immediacy’. However, the use of force against the Federal Republic of Yugoslavia is distinguishable on several grounds, including the fact that force there was sanctioned by the UN Security Council – it was not an instance of a state being subjected to an ‘armed attack’ and then responding unilaterally with force in self-defence. Perhaps a more analagous situation could be drawn with the use of force by the US in 1998 against Sudan and Afghanistan. On 7 August 1998, terrorists attacked the US embassies in Nairobi, Kenya and Dar-es-Salaam,

³⁶¹ Ibid at 243.

³⁶² Ibid. With regards to the Falklands, Argentina argued that its use of force was justified on the basis that Great Britain had illegally seized the Falkland Islands in the 1830s and that it had, since that time, been in wrongful possession of Argentinean territory. For background to the dispute, see Shaw *International Law* 5th ed (2003) 452-23. Argentina ‘invaded’ the Falkland Islands on 2 April 1982. The British response to this act of aggression was swift: by 5 April 1982 there were a number of aircraft carriers, frigates, destroyers, tankers and supply ships steaming towards South America: Gibran, D *The Falklands War – Britain Versus the Past in the South Atlantic* (1998) 73-75.

³⁶³ The Peace of Westphalia, see discussion in chapter 7.

³⁶⁴ The Covenant of the League of Nations, see discussion in chapter 8.

³⁶⁵ S/Res/1160, adopted on 31 March 1998.

³⁶⁶ S/Res/1199, adopted on 23 September 1998.

Tanzania. On 21 August 1998, the US responded with missile attacks against targets in Sudan and Afghanistan.³⁶⁷ The use of force by the US was not condemned by the Security Council, and a number of states seemed to accept or at least understand the US' actions, even if they did not specifically endorse them on the pleaded grounds of 'self-defence'.³⁶⁸ Perhaps it could be argued that the 'delay' there, of 14 days, which seemed largely acceptable to the international community, is roughly equivalent to the delay in the case of Afghanistan. If the use of force in 1998 was indeed a legitimate use of force in self-defence (and it is arguable as to whether it was) then it would seem plausible to concede that the use of force in October 2001, after a delay of 26 days, would possibly have satisfied the requirement of 'immediacy'.

The proposition that has been argued in the foregoing paragraphs is that even if there had been an 'armed attack' against the US on 11 September 2001, the use of force against Afghanistan most likely did not meet the requirement of necessity and almost certainly did not meet the requirement of proportionality, however, arguments exist which may support a finding that the the requirement of immediacy would have been satisfied.

Part E: When did the right to use force in self-defence expire?

If there was an armed attack,³⁶⁹ and if it was adequately attributed to al Qaeda and the Taliban,³⁷⁰ and if the elements of necessity, proportionality and immediacy were met,³⁷¹ one remaining question is whether the right had 'expired' by the time that force was employed on 7 October 2001. Article 51 states that nothing in the Charter shall impair the inherent right of self-defence if an armed attack occurs, *until* the Security Council has taken measures necessary to maintain international peace and security.³⁷²

When the Security Council adopted resolution 1373 on 28 September 2001, it was "taking measures to maintain international peace and security."³⁷³ It stated that it was acting under Chapter VII of the Charter when it decided that *all states* should

³⁶⁷ See discussion of this incident in chapter 9.

³⁶⁸ *Ibid.*

³⁶⁹ *Supra* at Part B.

³⁷⁰ *Supra* at Part C.

³⁷¹ *Supra* at Part D.

³⁷² Article 51 of the Charter of the United Nations, reproduced in Appendix 11.

³⁷³ See text of S/Res/1373, reproduced in Appendix 14.

implement a list of 11 measures³⁷⁴ and when it called upon states to implement a further seven measures.³⁷⁵ In that resolution, the Security Council established provisions which obliged all states to, *inter alia*, criminalise assistance for terrorist activities, deny financial support and safe haven to terrorists and share information about groups planning terrorist attacks. In themselves, those were measures taken to maintain international peace and security. Since the Security Council had taken control of the response, and had decided on a range of measures, some of which were mandatory, it is contended that the right to exercise individual self-defence thereby expired. If the US and the UK still retained a right to use force on 7 October subsequent to that resolution's adoption on 28 September, logically that would imply that resolution 1373 (2001) did *not* contain measures to maintain international peace and security.³⁷⁶

In resolution 1373 (2001), the Security Council indicated that it was ready and willing to consider options, which conceivably could have included the authorisation of force. The final two paragraphs hint at future Security Council involvement and demonstrate that it intended to retain control of the response.³⁷⁷ Paragraph 8 indicates that the Council was willing to 'take all necessary steps' which could be seen as a veiled reference that it was not yet ready to authorise 'all necessary means' as it had done in relation to Iraq.³⁷⁸ Nevertheless, it could have authorised the use of force if that was necessary to implement the anti-terrorism measures in the resolution (including the measure which required states to deny safe haven to those who finance, plan, support or commit terrorist acts).³⁷⁹ From 28 September 2001, the onus was on the US and the UK to seek the Security Council's authorisation to use force, an authorisation that it may well have granted had the case been made that force was necessary to implement resolution 1373.

³⁷⁴ S/Res/1373 (2001), para 1(a)-(d) and 2(a)-(g): see Appendix 14.

³⁷⁵ *Ibid.*, paras 3(a)-(g).

³⁷⁶ The corollary is that if S/Res/1373 did *not* contain measures to maintain international peace and security, what was the purpose of those measures and why did the Security Council expressly state that in adopting them it was acting under Chapter VII of the Charter?

³⁷⁷ S/Res/1373 (2001) paragraphs 8 and 9.

³⁷⁸ S/Res/678 (1990), adopted on 20 November 1990, authorised member states to 'use all necessary means' to uphold and implement resolution 660 (1990) (which called for Iraq to withdraw from Kuwait) and all subsequent resolutions and to restore international peace and security in the area.

³⁷⁹ S/Res/1373 (2001), para 2(c). Paragraph 2(a)-(d) all contained provisions that might have applied to the State of Afghanistan. The argument could have been made that Afghanistan was not complying with those measures, therefore, the Security Council would have to authorise states to use 'all necessary means' to ensure their implementation. The parallels with the resolutions in 1990 and 1991 pertaining to Iraq are interesting. In Resolution 661 (1990), adopted in August 1990, the Security Council recognised the inherent right of self-defence under Article 51 and referred to the invasion as an armed attack. In a later resolution, 678 (1990), adopted in November, it then authorised the use of all necessary means to enforce the earlier resolutions. There was a clear precedent for states to go back to the Council to seek authorisation, *even* when the right of self-defence had been earlier acknowledged by the Council.

One last aspect of the duration of the right of self-defence should be addressed. It was noted in chapter 9 that once a self-defence action has begun, there is debate over when it should end, and especially as to whether it is for the individual state that is exercising the right, or the Security Council, to make that determination. Conte has argued that the right to exercise self-defence continues only “for as long as the exercise of self-help is *necessary* to prevent further attacks against the victim State” (his emphasis).³⁸⁰ He concludes that since the Taliban is no longer in power, it is “highly questionable whether Afghanistan remains...a base of al-Qaida operations” and therefore:³⁸¹

[I]t is difficult to see how the continued international conflict in Afghanistan could be necessary to avert threats against the US and, thus, how it could be lawful.

That conclusion is based on the premise that the use of force was initially lawful, but at some point, after the apparent defeat of the Taliban, it became unlawful. The premise that the use of force was *initially* lawful is in turn based on the presumption that self-defence aims to **prevent further attacks** against the victim State.³⁸² However, the widely accepted purpose of self-defence is *not* to prevent future attacks but to *repulse an existing attack*.³⁸³ Once the scope of self-defence is extended, beyond halting or repulsing attacks to preventing future attacks, the entire nature of the right is changed. A self-defence action then becomes a potential pretext for a long-term occupation, on the basis that the threat of future attacks still exists.³⁸⁴

The more compelling interpretation is that the right to self-defence is limited to a response that repels or halts an existing attack, or prevents an imminent attack. In the case of Afghanistan, the use of force was unlawful from the beginning because if there was an ‘armed attack’, the attack had ended 26 days before self-defence

³⁸⁰ Conte *supra* n231 at 65.

³⁸¹ *Ibid.*

³⁸² *Ibid.*: “Put simply, self-defence is an exercise of military self-help in response to an armed attack in order to prevent further attacks against the victim State.”

³⁸³ See the Dissenting opinion of Judge Higgins in the Legality of Nuclear Weapons case, *supra* n324 at 583-84; Judge Ago: “the action needed to halt and repulse the attack...” in Judge Ago’s Eighth Report on State Responsibility to the International Law Commission, *supra* n309 at 245.

³⁸⁴ If Conte’s interpretation of self-defence is correct, the US would be within its rights to argue that elements of the Taliban and/or elements of al Qaeda still remain active in Afghanistan, and until they are entirely removed, the threat of future attacks still exists. Media reports suggest that the leadership of al Qaeda remains in Afghanistan: see e-Ariana.com, Syed Saleem Shazad “Inside the anti-US resistance” 11 July 2006:

<<http://www.e-ariana.com/ariana/eariana.nsf/be77f8366cbd693387256b790077e1df/5964ed693d7b0534872571a8002a0590?OpenDocument>> (accessed 9 November 2006). That presence would then provide the US with the justification to keep its troops in Afghanistan, virtually indefinitely, on the justification that it is acting in self-defence to prevent further attacks.

action was taken.³⁸⁵ From the point at which the attack ended on 11 September, or at least from the point when the Security Council adopted resolution 1373 on 28 September, the authorisation of the Security Council was thereafter required to legitimise any use of force against Afghanistan.

Part F: Pre-emptive self-defence

In the previous six chapters of this thesis, the concept of anticipatory or pre-emptive self-defence has been discussed.³⁸⁶ In chapter 9 it was concluded that under existing international law, anticipatory self-defence is not permissible, or at least not until the attack is ‘imminent’ in the *Caroline* sense.³⁸⁷ Pre-emptive self-defence is relevant to this inquiry by virtue of the justifications put forth in the US and UK’s letters to the Security Council.³⁸⁸

The US’ intention to use force in pre-emptive self-defence was quite clear. The Authorization for the Use of Military Force resolution adopted by the US Congress on 14 September indicated the Congress’ willingness to permit force to be used against “nations, organizations or persons...[to]...prevent any future acts of international terrorism.”³⁸⁹ In its notification to the Security Council, the US stated that it was not only responding to the attacks of 11 September 2001 but it was responding to “the ongoing threat to the United States and its nationals...”³⁹⁰ The US’ armed forces initiated actions designed to prevent and deter further attacks on the US. The US also indicated that in the future, force might be employed against other states: “we may find that our self-defence requires further actions with respect to other organizations and other States.”³⁹¹

The UK’s letter to the Security Council was different in the sense that it did not justify the use of force as a direct response to the events of 11 September 2001 *per se*; instead, it stated that forces were deployed “to avert the continuing threat of

³⁸⁵ Alternatively, the right to self-defence ended on 28 September 2001 when the Security Council adopted resolution 1373 (2001), as argued above, since that was a demonstration of the Council taking measures to maintain international peace and security.

³⁸⁶ See Chapters 4-9.

³⁸⁷ See Chapter 9.

³⁸⁸ See Appendices 18 and 19 respectively for the US and UK Letters to the Security Council.

³⁸⁹ *Supra* at n28 and accompanying text.

³⁹⁰ S/2001/946: Letter dated 7 October 2001 from the Permanent Representative of the US to the UN, to the President of the Security Council, as reproduced in Appendix 18.

³⁹¹ *Ibid.* The same types of statements were made by President Bush in addresses to the nation and to Congress, such as the address on 20 September 2001 when he stated that “Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”: President Bush, “Address to Joint Session of Congress” 20 September 2001, *supra* n34 and see Appendix 16.

attacks from the same source.”³⁹² The UK made statements in other forums indicating that one of the key objectives of *Operation Enduring Freedom* was to effect a change in leadership in Afghanistan, “to ensure that Afghanistan’s links to international terrorism are broken”, which underlines the anticipatory nature of the action.³⁹³

The problem with the above statements is that they assume the right of self-defence permits force to be used in anticipation of future attacks, even though there is no apparent knowledge of when those attacks are likely to occur, where they are going to be launched from or what form they are likely to take. The US and the UK thereby indicated their intentions to use force in self-defence to prevent non-imminent future attacks from unspecified sources. It is submitted that this is a departure from the accepted, restrictive, interpretation of Article 51, which clearly states that force is permitted in self-defence *if* an armed attack occurs. The US and the UK appeared to be trying to extend the timeframe within which self-defence can be exercised, so that they would be entitled to use force indefinitely to prevent future attacks. This interpretation of Article 51 cannot be accepted and the evidence shows that states have, historically, not accepted it.³⁹⁴

The only compelling conclusion is that Article 51 confines states to exercising the right of self-defence *only* in response to an armed attack. If an armed attack is not yet on the horizon, a concerned state cannot launch an aggressive war in order to prevent future attacks before they are planned. However, a state which feels that future attacks may be launched against it does not have to stand idly by and wait for them as Dinstein has noted:³⁹⁵

*[W]hen a country feels menaced by the threat of an armed attack, all that it is free to do – in keeping with the Charter – is make the necessary military preparations for repulsing the hostile action should it materialize, as well as bring the matter forthwith to the attention of the Security Council (hoping that the latter will take collective security measures in the face of a threat to the peace)...**Regardless of the shortcomings of the system, the option of a pre-emptive use of force is excluded by Article 51.** (emphasis added)*

³⁹² S/Res/947 (2001): Letter dated 7 October 2001 from the representative of UK to the President of the Security Council, reproduced in Appendix 19.

³⁹³ Hoon, G “Operation Veritas” Speech to the House of Commons, London, 1 November 2001.

³⁹⁴ For instance, the use of force by Israel on the Osirak reactor in Iraq in 1981 stands out as an example of where the Security Council unanimously rejected the right of pre-emptive self-defence. See also the discussion in chapters 4-8 where it has been shown that throughout the evolution of international law, states have been allowed to use force to stop an attack which is about to be launched, but it has seldom been advanced that a state may go on the offensive to prevent future, non-imminent attacks.

³⁹⁵ Dinstein *supra* n170 at 167. Gardam also notes that “...to date, the fiction is generally maintained in practice that a right of anticipatory self-defence is not available to States”: *supra* n 347 at 147.

The pre-emptive doctrines advanced by the US and the UK in their respective letters to the Security Council (and confirmed in the US' 2002 NSS),³⁹⁶ are plainly inconsistent with the letter and spirit of Article 51.³⁹⁷ The interpretation of self-defence adopted by the US and the UK has only attracted support from a few other states, such as Israel³⁹⁸ and Australia.³⁹⁹

The conclusion reached here is that neither international law nor state practice allows force to be used in pre-emptive self-defence, unless the threat is imminent and there is no choice of means and no moment for deliberation. The US and the UK purported to exercise a right of pre-emptive self-defence in the case of Afghanistan and, as such, the legality of that use of force is questionable. It is often stated that 'hard cases make bad law.' In this case, the sympathy that existed for the US allowed it to use force, and allowed it to do so whilst advancing a wide-ranging doctrine of pre-emptive self-defence. If all states were permitted to act upon the doctrine espoused in the wake of 11 September, and employ force in 'self-defence' whenever they identify a source of future attacks, the list of potential targets could be endless. One could imagine that force might be employed against any of the states which possess nuclear weapons (and those states who have the future potential to manufacture or acquire them); any state that has alleged 'terrorists' within its borders⁴⁰⁰ and any state which could be assessed as constituting an 'ongoing threat' to any other state.

Part G: Other possible justifications for the use of force against Afghanistan

The above analysis has addressed whether or not the US and the UK were able to justify their use of force on the grounds of self-defence. That has been the focus of this chapter because that was the justification relied upon when those states notified their use of force to the Security Council. However, to round out the analysis, a brief reference is made to three other possible grounds which the US and the UK might have relied upon: humanitarian intervention, Security Council authorisation and intervention by invitation.

³⁹⁶ See chapter 9.

³⁹⁷ See discussion of the 2002 NSS in chapter 9.

³⁹⁸ As demonstrated by its long-standing conflict with its neighbours and particularly in relation to the attack on the Osirak reactor in 1981: see discussion in chapter 9.

³⁹⁹ See chapter 9 regarding Australia's support 'in principle' for the doctrine of pre-emptive self-defence.

⁴⁰⁰ On 20 September 2001 President Bush alleged that al Qaeda is linked to many organisations such as the Egyptian Islamic Jihad and the Islamic Movement of Uzbekistan. He also claimed that "there are thousands of these terrorists in more than 60 countries": President Bush, Address to a Joint Session of Congress and the American People, *supra* n34, reproduced in Appendix 16. All of those states could potentially be the target of a US military intervention, if the Afghanistan precedent is followed.

Humanitarian intervention

Most scholars who discuss the legitimacy of the use of force against Afghanistan do not discuss the issue of humanitarian intervention.⁴⁰¹ That is understandable given that in their respective notifications to the Security Council the US and the UK justified the use of force squarely on the grounds of self-defence.⁴⁰² However, shortly after the terrorist attacks, there were frequent references by both President Bush and Prime Minister Blair to the Taliban's human rights record and to the humanitarian situation in Afghanistan. In his Address to a Joint Session of Congress and the American People, President Bush stated the case against al Qaeda and the Taliban. Between explaining that al Qaeda was responsible for the attacks and immediately prior to issuing an ultimatum to the Taliban, President Bush said:⁴⁰³

Afghanistan's people have been brutalized -- many are starving and many have fled. Women are not allowed to attend school. You can be jailed for owning a television. Religion can be practiced only as their leaders dictate. A man can be jailed in Afghanistan if his beard is not long enough.

The United States respects the people of Afghanistan -- after all, we are currently its largest source of humanitarian aid -- but we condemn the Taliban regime. (Applause.) It is not only repressing its own people, it is threatening people everywhere by sponsoring and sheltering and supplying terrorists. By aiding and abetting murder, the Taliban regime is committing murder.

And tonight, the United States of America makes the following demands on the Taliban...

The placement of the assertions regarding human rights and the humanitarian situation is important when seen in the context of the entire Presidential statement: the above extract is a crucial passage which links the paragraphs regarding al Qaeda to the ultimatum issued to the Taliban.⁴⁰⁴ In its letter to the Security Council, the US stated that it would provide the people of Afghanistan with "food, medicine and supplies".⁴⁰⁵ Similar statements were made by the British Prime Minister who said that the operation in Afghanistan consisted of three parts, one of which was humanitarian.⁴⁰⁶ Prime Minister Blair said that the UK was

⁴⁰¹ For instance, Conte supra n231 at 6: "Humanitarian intervention is not considered, however, since it is beyond the scope of the relied upon or even arguable grounds of intervention in Afghanistan and Iraq."

⁴⁰² Conversely, the literature on humanitarian intervention seldom deals long on the use of force against Afghanistan: see Chesterman, S "Humanitarian Intervention and Afghanistan" in Welsh, J *Humanitarian Intervention and International Relations* (2004) at 163: "...the military action was presented-and broadly accepted- as an exercise of the right of self-defence. Such an intervention seems ill-suited to discussion in a volume on humanitarian intervention."

⁴⁰³ President Bush, Address to a Joint Session of Congress and the American People, supra n34. The address is reproduced in full in Appendix 16.

⁴⁰⁴ Ibid.

⁴⁰⁵ Letter dated 7 October 2001 from the Permanent Representative of the US to the UN Addressed to the President of the Security Council, UN Doc S/2001/946 (2001), reproduced in Appendix 18.

⁴⁰⁶ The other two parts being 'military' and 'diplomatic'.

“assembling a coalition of support for refugees in and outside Afghanistan.”⁴⁰⁷

After 11 September 2001, there was a great deal of attention, in both the US and the UK, regarding the Taliban’s human rights record, particularly focusing on women’s dress codes, the lack of religious freedoms and the restrictions on educational opportunities for girls and women. A plethora of media articles about these issues sprung up simultaneously.⁴⁰⁸

For the international lawyer searching for the justifications for the use of force against Afghanistan, references to the Taliban’s human rights record are irrelevant in one sense – since infringements of anything but the most serious human rights abuses arguably provides no basis for military intervention⁴⁰⁹ – but relevant in another, as these references suggest that the Bush Administration and the Blair Government needed an extra ground upon which to legitimize (if not legalise) their use of force against Afghanistan, especially the objective of regime change. The frequent and overt references to humanitarian concerns may also have been an attempt to “win the hearts and minds of the Afghans themselves, as well as to hold together an increasingly shaky international coalition.”⁴¹⁰

Whether or not international law permits a right of unilateral humanitarian intervention is a moot point. There is now a voluminous body of literature in this area which addresses the fraught issue of whether or not a right exists for states – individually or collectively – to intervene in the internal affairs of other states, on humanitarian grounds.⁴¹¹ It is beyond the scope of the present thesis to determine whether a right of humanitarian intervention currently exists under international law; even some of the texts which are entirely devoted to this issue do not seek to

⁴⁰⁷ Statement by Prime Minister Tony Blair, 10 Downing Street, 7 October 2001, cited in House of Commons Library, Research Paper 01/81, supra n355.

⁴⁰⁸ See for example US Statement of Defense, Craner, L “Human Rights and the Taliban” 6 November 2001: <<http://www.state.gov/g/drl/rls/rm/2001/6339.htm>> (accessed 9 November 2006). Newspapers and magazines, such as *Time*, were very concerned about the plight of women, children and non-bearded men in Afghanistan under the Taliban.

⁴⁰⁹ One could argue that human rights violations do provide a basis for intervention based on the Kosovo precedent but the human rights abuses that Bush referred to in his address were not akin to the nature or scale of those in Kosovo. It was argued that NATO had used military force in 1999 “to prevent an overwhelming humanitarian catastrophe”: UN Doc, S/PV.3988 (1999) 12.

⁴¹⁰ Chesterman, S “Humanitarian Intervention and Afghanistan” in Welsh, J (ed) *Humanitarian Intervention and International Relations* (2004) 163-75.

⁴¹¹ For instance, see Rodley, N (ed) *To Loose the Bands of Wickedness – International Intervention in Defence of Human Rights* (1992); Scheffer, D “Toward a Modern Doctrine of Humanitarian Intervention” (1992) 23 *University of Toledo LR* 253; Heiberg, M *Subduing Sovereignty – Sovereignty and the Right to Intervene* (1994); Tesson, F *Humanitarian Intervention: An Inquiry into Law and Morality* 2nd ed (1997); Abiew, F *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (1999); Glennon (2001) supra n368; Lepard, B *Rethinking Humanitarian Intervention – a fresh legal approach based on fundamental ethical principles in international law and world religions* (2002); Zolo, D, Poole, F and G (trans) *Invoking Humanity – War, Law and Global Order* (2002); Wheeler, N *Saving Strangers – Humanitarian Intervention in International Society* (2002); Holzgrefe J and Keohane, R (ed) *Humanitarian Intervention – Ethical, Legal, and Political Dilemmas* (2003); Orford, A *Reading Humanitarian Intervention – Human Rights and the Use of Force in International Law* (2003); Jokic, A (ed) *Humanitarian Intervention – Moral and Philosophical Issues* (2003); Welsh, J (ed) *Humanitarian Intervention and International Relations* (2004); Breau, S *Humanitarian Intervention: The United Nations & Collective Responsibility* (2005); Nardin, T and Williams, M (ed) *Humanitarian Intervention* (2006).

resolve the debate.⁴¹² It can at least be said that the UK explicitly claimed the existence of such a right when justifying its actions in northern Iraq in 1991 and Kosovo in 1999.⁴¹³ However, neither the US nor the UK made such an explicit claim in 2001, perhaps because there was an anxiety about creating a precedent, perhaps because invoking humanitarian intervention would have limited the US' ability to use force, or perhaps because it was simply implausible.⁴¹⁴

Although humanitarian intervention was not put forward as a justification *per se*, it was nevertheless referred to repeatedly by both administrations. It is submitted that this was neither accidental nor incidental.⁴¹⁵ The foregoing analysis has shown that although the US and UK might arguably have had legal grounds to launch limited strikes against al Qaeda targets,⁴¹⁶ their targeting of the Taliban was "highly problematic."⁴¹⁷ It was far more difficult to attribute responsibility to the Islamic State of Afghanistan than al Qaeda. The frequent and timely references to the human rights record of the Taliban, and the humanitarian situation in Afghanistan, could be interpreted as an attempt to legitimise the inclusion of the Taliban regime's removal as an objective of the US-UK military operations.⁴¹⁸ This proposition is supported by the fact that in key addresses by both President Bush and Prime Minister Blair, they both repeatedly referred to human rights under the Taliban and the humanitarian situation in Afghanistan when outlining their intentions to use force in self-defence.⁴¹⁹ Their respective legal advisors would have been aware that such issues are entirely irrelevant if a state has been the subject of an 'armed attack.'

⁴¹² Rodley, *ibid*, at 14

⁴¹³ Aust, A, Legal Counsellor, Foreign and Commonwealth Office, statement before the House of Commons Foreign Affairs Committee, 2 December 1992, *Parliamentary Papers* 1992-1993, House of Commons, Paper 235-iii, 85, reproduced in (1992) 63 *BYIL* 827; see also Greenstock, J, UK Permanent Representative to the United Nations, statement to the Security Council on 24 March 1999, UN Doc S/PV.3988 (1999).

⁴¹⁴ Byers *supra* n202 at 405: "[T]he apparent incongruity of invoking a humanitarian argument in response to terrorist acts probably precluded this justification from the outset." See also Chesterman, S "Humanitarian Intervention and Afghanistan" *supra* n410.

⁴¹⁵ Chesterman argues that the invocation of humanitarian concerns "were, at best, coincidental to other motives". He writes, "The attribution of humanitarian objectives begs the question of why nothing had been done for the Afghan population *before* 11 September 2001": Chesterman, S "Humanitarian Intervention and Afghanistan" *supra* n410 at 163.

⁴¹⁶ Possibly based on the *opinio juris* of states as demonstrated by, *inter alia*, the international reaction to the US' bombing of Libya in 1986, the bombing of Baghdad in 1993 and Sudan and Afghanistan in 1998.

⁴¹⁷ Paust, *supra* 252.

⁴¹⁸ The frequent references to the opium trade was another example of how both administrations attempted to bolster their case against the Taliban by linking the latter to criminal activity. This was somewhat disingenuous given that the Taliban had acted to ban the opium trade.

⁴¹⁹ President Bush, Address to a Joint Session of Congress and the American People, *supra* n34; see also 10 Downing Street, Prime Minister's Statement to Parliament on the September 11 attacks, 4 October 2001: <<http://www.numberten.gov.uk/output/Page1606.asp>> (accessed 9 November 2006); Prime Minister's Statement at 10 Downing Street, 25 November 2001 <<http://www.primeminister.gov.uk/output/Page1604.asp>> (accessed 9 November 2006); see also Prime Minister's Statement on Action in Afghanistan, 7 October 2001: <<http://www.primeminister.gov.uk/output/Page1615.asp>> (accessed 9 November 2006). In a clear statement of the connection being made, Prime Minister Blair said on 13 November 2001: "The Taliban regime are not yet fully dislodged from oppressing the people of Afghanistan and shielding Al- Qu'eda [sic]": see Transcript of the Prime Minister's Statement on Afghanistan, 13 November 2001: <<http://www.primeminister.gov.uk/output/Page1664.asp>> (accessed 9 November 2006).

Security Council authorisation

The US did not argue that it was justified in using force on the basis of explicit Security Council authorisation, but at least one commentator has suggested that it *could* have made such a claim.⁴²⁰ Byers argues that in resolution 1373, when the Security Council decided that all states “shall...**take the necessary steps** to prevent the commission of terrorist acts...”, it could have been interpreted as authorising the use of force. Byers concedes that the language used in resolution 1373 differed from previous authorisation clauses (such as “all necessary means”) but he maintains that it “*could* have provide[d] the US with an at-least-tenable argument...that force is necessary to ‘prevent the commission of terrorist acts.’”⁴²¹

The fact that the US did not rely on this phrase, buried in the midst of a list of anti-terrorism measures, was due to the realisation that other states, such as China and Russia, could also rely upon it in the future.⁴²² To those examples, one might also add states such as Ethiopia (potentially against Somalia or Eritrea), Turkey (potentially against the Kurdish forces in Iraq), Iran (potentially against the Kurdish forces in Iraq and Iran), India or Pakistan (potentially against nationals from the other), Japan (potentially against missile bases in North Korea)⁴²³ or almost any other state facing what is might deem ‘terrorist acts.’ The US did not rely on that phrase in resolution 1373, most likely because it was simply not an authorisation to use force, but also because to have relied upon it would have amounted to a ceding of authority to the Security Council. The US chose to rely on its own inherent right of self-defence and therefore had no need to argue that it was authorised to use force by the Security Council. If it had attempted to rely on the phrase ‘take all necessary steps’ it would most likely have failed since other authorisations of force have historically used much stronger terminology.⁴²⁴

⁴²⁰ Byers, *supra* n202 at 401-03.

⁴²¹ *Ibid.*

⁴²² *Ibid.*

⁴²³ Feffer, J “The Axis of Intervention” *Foreign Policy in Focus*, 27 July 2006: <<http://www.fpif.org/fpifxt/3389>> (accessed 9 November 2006).

⁴²⁴ Compare with the Security Council's resolution which authorised force against Iraq in 1990: the phrase ‘all necessary means’ was used and it was placed in a prominent position within the resolution: see S/Res/678 (1990).

Intervention by invitation

The third and final possibility could have been based on an invitation to intervene from the Northern Alliance.⁴²⁵ The US could perhaps have argued that the Taliban was not the legitimate government of Afghanistan; that it was a rebel group that was only recognised by three other states; and that the legitimate representative of Afghanistan was the Northern Alliance. The seat at the UN was held, throughout the Taliban's reign, by a member of the Northern Alliance. It was by no means clear as to which faction was the most appropriate one to represent Afghanistan in the UN General Assembly.⁴²⁶ Intervention by invitation was never seriously advanced by the US and the UK, probably because the 'intervention by invitation' and self-defence arguments were mutually exclusive justifications for resorting to force.⁴²⁷ The US opted for self-defence as the easiest of the two to establish on the facts.

Part H: Conclusion

This chapter has traversed all aspects of the US and the UK's justifications for using force against Afghanistan in 2001. It has deliberately focused on the official justifications for using force, as set out in their respective notifications to the Security Council on 7 October 2001. But it has also taken account of the 'unofficial' attempts to bolster the case for using force.⁴²⁸ The evidence suggests that what occurred on 11 September 2001 was an act of terrorism, a criminal act, a terrorist attack, but it was not an 'armed attack'.⁴²⁹ The proper and legitimate response to those acts of terrorism, as with all acts of terrorism, ought to have been based on the law enforcement model and ought to have involved the arrest, extradition and prosecution of suspects. If this act of terrorism was indeed a 'crime against humanity' as was asserted on numerous occasions,⁴³⁰ it would have attracted universal jurisdiction and any state would have had an obligation to

⁴²⁵ See Article 20 of the ILC's Draft Articles: Valid consent by a state to the commission of a given act by another state precludes the wrongfulness of that act in relation to the former state to the extent that the act remains within the limits of that consent."

⁴²⁶ In 1997, two sets of credentials were presented: one from Burhan-u-ddin Rabbani and the other from Alhaj Mullah Mohammed Rabbani. The Credentials Committee decided to defer a decision on the understanding that the current representative would continue in the meantime: see *Credentials of Representatives to the Fifty-Second Session of the General Assembly* "Report of the Credentials Committee", 11 December 1999, UN Doc A/52/719: <<http://www.un.org/ga/52/credcomm/reporscr.htm>> (accessed 9 November 2006).

⁴²⁷ When asserting the right of self-defence, the US had to maintain that the Taliban regime was in power in Afghanistan, in order to attribute the actions of al Qaeda to it and hence be able to target the Taliban and its military installations. The US could not have simultaneously argued that it was invited to intervene at the behest of the Northern Alliance since that would necessarily have required recognition that the Taliban was not representing the state, creating further problems for attributing responsibility to the Taliban; see also Byers *supra* n202 at 404.

⁴²⁸ 'Unofficial' because the US and the UK did not refer to the human rights/humanitarian intervention aspect in their notifications to the Security Council, yet this ground was repeatedly referred to by both President Bush and Prime Minister Blair in public statements.

⁴²⁹ See statements from EU bodies; statements from the members of the Security Council and statements from Prime Minister Blair above that "the murder of British citizens in New York is not different to the murder of British citizens in the heart of Britain itself".

⁴³⁰ Virtually every member of the Security Council who spoke on 12 September called the attacks an attack not just on the US but on all humanity: *supra* n177 and accompanying text.

prosecute or extradite suspects.⁴³¹ The US' legitimate objective to prevent further attacks from occurring ought to have been achieved not through stretching the concept of self-defence to pre-empt future acts of terrorism, but through the implementation of the Security Council's anti-terrorism measures (set out in resolution 1373 (2001)) as well as through a range of other domestic measures involving immigration, intelligence⁴³² and domestic security arrangements.⁴³³

That is not to say that force was a completely inappropriate response to the events of 11 September. Military force may well have had a role to play in maintaining international peace and security. However, it was for the *Security Council* to make that determination because it is the Security Council that is charged with determining whether there has been a threat or breach of international peace and security and with recommending measures to counter such a threat. On 12 September and again on 28 September 2001 the Security Council determined that there was a threat to international peace and security and it showed that it was ready and willing to do what was necessary not only to respond to the 11 September attacks, but to prevent future attacks.⁴³⁴ Furthermore, when it passed a raft of anti-terrorism measures on 28 September 2001, it not only showed that it was in control of the response, but it had indeed 'taken measures to maintain international peace and security' which henceforth precluded the US and the UK from using force in self-defence.⁴³⁵ The evidence cited above, including statements from members of the Security Council and the UN Secretary-General, support the inference that the events of 11 September were widely perceived as acts which required a global response, by all humanity, under the auspices of the UN Security Council.

This chapter has applied the international law pertaining to self-defence that was set out in chapter 9, to the use of force against Afghanistan. The following conclusions have been reached. First, no 'armed attack' occurred, as that term is understood in Article 51 of the UN Charter. Second, if there was an 'armed

⁴³¹ See Kenny *supra* n41 at 106 who pointed out that the UN High Commissioner for Human Rights also considered that what occurred on 11 September 2001 amounted to 'crimes against humanity' which meant that 'the individuals responsible would have nowhere to hide if intelligence services identify their whereabouts and if evidence as to their guilt is made available.'

⁴³² Note that the alleged mastermind of 9/11, Khalid Sheikh Mohammad, was arrested in Pakistan due to intelligence from the Emir of Qatar – not due to the use of force against Afghanistan: Suskind, R *The One Percent Doctrine – Deep Inside America's Pursuit of its Enemies Since 9/11* (2006).

⁴³³ The failures in all these areas were highlighted in *The 9/11 Commission Report* *supra* n1.

⁴³⁴ Therefore, stretching the concept of self-defence to encompass pre-emptive self-defence was also unnecessary.

⁴³⁵ Article 51 of the UN Charter. The right to self-defence does not continue indefinitely; only until the Security Council takes measures to maintain international peace and security.

attack', it had ended by the evening of 11 September 2001, 26 days before force was employed. Even if those propositions are rejected, responsibility for the so-called 'armed attacks' was not adequately attributed to the state of Afghanistan and hence the attacks on the Taliban and its removal from power were unlawful. Third, even if there had been an armed attack which was adequately attributed to Afghanistan, the reaction from the US and the UK breached the customary law principles of necessity, proportionality and possibly immediacy: it was not absolutely *necessary* to use force in self-defence on 7 October 2001 as it was not the last resort open to the US and the UK; it was not *proportionate* in the sense that it included regime change in Afghanistan as one of its key objectives, and the use of force was possibly not *immediate*, there being a 26-day delay between the end of the attack and the use of force in response. Finally, even if there was an armed attack that gave rise to an initial right to use force in self-defence, the right had expired as of 28 September 2001 when the Security Council took measures to restore international peace and security.

If the use of force was *not* a legitimate exercise of self-defence, the only possible conclusion is that it was an unlawful use of force. It is apparent from the evidence presented in this chapter that there was a significant element of revenge and retaliation in the desire by the US to use force against Afghanistan. That was evident from President Bush's first reaction on 11 September 2001 when he stated that "somebody's going to pay."⁴³⁶ It was reiterated in his speeches to the American people and in remarks made at the National Security Council Meeting on 11 September.⁴³⁷ He spoke of the US response being more than just "instant retaliation."⁴³⁸ He also warned the civilised world against allowing this act to go "unpunished."⁴³⁹ It was also recognised in statements from the Parliamentary Assembly of the Council of Europe and some world leaders who urged the US to respond in a way that did not merely seek revenge.⁴⁴⁰

Whilst a desire for revenge, punishment and retaliation are understandable, the use of force in self-defence is not supposed to have punitive elements. This is well

⁴³⁶ Supra n15.

⁴³⁷ President George W Bush said the US would "**punish** not just the perpetrators of the attacks, but also those who harboured them", supra n24. President Bush also said to an audience in New York: "I can hear you. (Applause). The rest of the world can hear you. (Applause). And the people who knocked these buildings down will hear all of us soon. (Applause)", supra n25.

⁴³⁸ President Bush, Address to a Joint Session of Congress and the American People, supra n34, reproduced in Appendix 16.

⁴³⁹ Ibid.

⁴⁴⁰ For instance, see PACE resolution 1258 (2001) Article 8 where the Council of Europe warned against using force to exact "hasty revenge", supra n94.

understood and a time-honoured notion.⁴⁴¹ The apparent motivation to punish the perpetrators of the attacks supports the conclusion reached in this chapter, namely, that this was not a genuine example of self-defence; it was more akin to an unlawful reprisal. As discussed in chapter 9, forcible reprisals were prohibited by virtue of Article 2(4) of the Charter. The use of force against Afghanistan bears striking similarities to past examples of forcible reprisals that have been condemned by the international community and/or the Security Council.⁴⁴² The only difference is that in the present case, the US and the UK not only used missile strikes to respond to an act of terrorism,⁴⁴³ they also invaded a sovereign state, removed the governing regime and occupied the country for at least five years thereafter.⁴⁴⁴

In the aftermath of 11 September, one might assume that everything has changed – that the Rubicon has been crossed.⁴⁴⁵ But *has* everything changed? Terrorist acts occurred before 11 September and since 11 September. Terrorist acts were called ‘a threat to international peace and security’ before and after 11 September. States resorted to force unilaterally under the guise of ‘self-defence’ before and after 11 September. There are compelling reasons why self-defence is so tightly constrained in Article 51 and those states which seek to challenge the constraints by simply ignoring them do not change the law, they just violate it.

⁴⁴¹ See Judge Ago who cautioned against any suggestion that self-defence has a punitive character: see Gardam, *supra* n347 at 157.

⁴⁴² Compare with the use of force by Israel against Syria in 1955; the use of force by the UK against Yemen in 1964; the use of force by the US against North Vietnam in 1964; the use of force by Israel against As-Samu, Karamah, Es-Salt and the Beirut Airport in the 1960s; the use of force by Israel against Lebanon during the 1970s; the raid by Israel on Tunis in 1985; the missile attacks by the US on Libya in 1986 and, to a lesser extent, the use of force by the US against Iraq in 1993, the US missile strikes against Sudan and Afghanistan in 1998 and the US strikes against Iraq in 2001, all of which were discussed in chapter 9.

⁴⁴³ As in, for instance, the use of missile attacks by Israel on Tunis in 1985 or by the US against Libya in 1986.

⁴⁴⁴ ‘Operation Enduring Freedom’ began on 7 October 2001 and the last handover of power from US-led forces to NATO-led ISAF forces occurred on 5 October 2006. However, at least 12,000 US soldiers are still operating in Afghanistan, under NATO command, at the time of writing (December 2006).

⁴⁴⁵ Maogoto *supra* n231 at 115-19; also Lansford *supra* n107 at 78-70.

CHAPTER 11: Conclusion

This thesis has sought to show that the use of military force against Afghanistan, beginning on 7 October 2001, was unlawful. It was unlawful because there are currently only two circumstances in which a state may resort to force – in self-defence (individual or collective) or pursuant to a mandate from the Security Council – and this use of force was neither legitimate self-defence nor was it authorised by the Security Council. As for the latter, although the opportunity existed, neither the US nor the UK sought the Security Council's authorisation to employ force against Afghanistan. Even though the Security Council declared that the acts of terrorism which occurred on 11 September 2001 were a threat to international peace and security, it did not authorise force as a response. As for the former, this was not an instance of legitimate self-defence, even though the US and the UK both claimed that they were acting pursuant to Article 51 of the Charter and even though they duly reported their actions to the Security Council.¹

The justifications for using force against Afghanistan have been examined from several angles. In chapter 2, the changing nature of conflict was analysed and it was found that despite acts of terrorism such as the one that occurred on 11 September 2001, the world is not operating in an entirely new security paradigm. What was evident from the analysis in chapter 2 is that since the UN Charter was written, conflict has changed quantitatively and qualitatively. In the latter half of the twentieth century, the number and severity of inter-state conflicts have declined sharply and the threat which they pose to international security has been superseded by the threats posed by intra-state conflicts. Chapter 2 showed that the asymmetric threats posed by non-state actors have risen throughout the post-1945 period. However, acts of terrorism have declined in the post-Cold War era. Indeed it was noted that if the 11 September attacks – which were unusual in type and gravity – were taken out of the 2001 statistics, that year would have experienced some of the lowest casualty statistics for terrorism in the post-Cold War era. Chapter 2 showed that the al Qaeda form of terrorism is a new type of terrorism in some ways, since it is characterised by fewer attacks with greater civilian casualties per attack. But the chapter also showed that whatever the death toll might be from such terrorist attacks, they cannot compare to the large-scale

¹ See the respective letters to the Security Council, reproduced at Appendix 18 and 19.

losses of civilian and military lives which were a feature of the large-scale inter-state wars so prevalent prior to 1945, and in comparatively fewer instances post-1945. Thus it may be said that conflict has changed in the latter half of the twentieth century, but now that some time has elapsed since 2001, it is becoming clear that it has not changed so much that the landscape of international peace and security is unrecognisable. What is different is that the trans-national threats posed by non-state actors require trans-national solutions more than ever before. What has become clear is that no single state can secure security for itself, by itself:²

[E]nhancing security for one group in the world at the expense of another, or without the others, has always been inherently discriminatory and unfair. Now it is starting to look more like a contradiction in terms.

The statistics presented in chapter 2 showed that since 9/11, the US has not been greatly affected by terrorism, relatively speaking. In 2005, there were approximately 14,500 fatalities worldwide caused by terrorism.³ Of that number, only 56, or 0.4%, were American citizens.⁴ That figure was a decrease on the previous year, where Americans made up 1% of casualties. Since, 2005, the percentage has fallen further still. The latest data from the US' National Counterterrorism Centre shows that in 2006, there were more fatalities worldwide, but fewer American fatalities.⁵ The US' statistics show that in 2006, there were more than 20,000 fatalities worldwide of which 28, or 0.14%, were Americans.⁶ It is noteworthy that those 28 American citizens were mainly killed in Iraq, a conflict that was initiated by the US amidst dubious claims of legitimacy.⁷ The US statistics clearly show that it is one of the least-affected states in the world.

In terms of regions, the region that was the worst affected by terrorism in 2005 was the Near East,⁸ both in terms of number of attacks and number of fatalities.⁹ Colombia was the only state in the Western hemisphere to be included in the list

² Bailes, A "Introduction: Global security governance: a world of change and challenge" in *SIPRI Yearbook 2005 – Armaments, Disarmament and International Security* (2005) at 1.

³ National Counterterrorism Centre, "Report on Incidents of Terrorism 2005", 11 April 2006, Chart 8, p17.

⁴ Ibid.

⁵ National Counterterrorism Centre, "Report on Incidents of Terrorism 2006", 30 April 2007, 9-12. It is interesting to note that the 2006 report repeats the same statistical charts and diagrams as were used in the 2005 report, except that the pie-graphs used in 2005 to demonstrate US fatalities as a percentage of the world-wide total are omitted from the 2006 report. One possible explanation is that it is simply too difficult to show, in diagrammatic form, a percentage as insignificant as 0.14%.

⁶ Ibid at 12.

⁷ Ibid at 12: According to the US Department of State, there were 28 US fatalities as a result of terrorist attacks in 2006. Incidents in Iraq took the lives of 22 individuals, and another three died from incidents in Afghanistan. Three other incidents (one each in Israel, Pakistan and Thailand) claimed the lives of the remaining three victims.

⁸ This region encompasses North Africa, the Arabian Peninsula, the Levant, Iraq and Iran.

⁹ NCTC, "Report on Incidents of Terrorism 2005", supra n3, 1, Chart 10.

of the 15 worst-affected countries.¹⁰ That trend continued in 2006: last year, the worst-affected region by far was again the Near East,¹¹ followed by South Asia.¹² Once again, the list of the 15 worst-affected countries was dominated by states in the Near East, South East Asia and Africa.¹³ The pattern that has emerged over the past few years is that terrorism is a phenomenon that clearly affects some regions, countries and citizens more than others. It is submitted that it would be unacceptable, morally and legally, if a state, such as the US, which is statistically one of the least-affected by terrorism were to be given the freedom to change international law to such an extent that the right of self-defence is reinterpreted to suit its current perception of its immediate security needs. Rather than accepting that international terrorism is a new and unusual threat to global peace and security, and particularly the US' security, international lawyers ought to be at the forefront of the debate in maintaining the authority of the UN Charter and the Security Council to constrain the resort to force.

In chapter 3, the nature of 'terrorism' was explored from historical, political and legal perspectives. Terrorism is a term that has continued to defy definition. That is because it is frequently used as a byword for 'enemy' and thus it has become at once self-fulfilling and meaningless. The importance of examining the meaning of 'terrorism' was underscored by the justifications put forward by the US and the UK. Their resort to force against a sovereign state in purported self-defence was undertaken as a response to terrorism, which was seemingly portrayed as an entirely new type of threat. Chapter 3 provided evidence that terrorism is *not* a new threat. It has existed since antiquity and nations and states have lived for millennia with the challenges that this method of asymmetric warfare presents. The difficulty of distinguishing between the method of combat chosen by the pirate/anarchist/terrorist and that chosen by states was noted by scholars from Cicero to St Augustine.¹⁴ Chapter 3 discussed the ways in which modern states

¹⁰ In terms of fatalities, the 15 worst affected countries in 2005 (fatalities are indicated in brackets) were: Iraq (8,262), India (1,361), Colombia (813), Afghanistan (684), Thailand (498), Nepal (485), Pakistan (338), Russia (238), Sudan (157), Democratic Republic of the Congo (154), Philippines (144), Algeria (132), Sri Lanka (130), Chad (109) and Uganda (109): NCTC, "Report on Incidents of Terrorism 2006", *supra* n5, 24.

¹¹ In 2006, attacks across this region increased by 83% on the previous year, rising to nearly 7,800 as compared with 4,222 in 2005. Fatalities rose by 57%, from about 8,700 in 2005 to nearly 13,700 in 2006. The number of injured in this region doubled from 13,534 in 2005 to over 25,800 in 2006: *ibid*, 42.

¹² In 2006, there were slightly fewer incidents than in 2005 (3,654 compared with 4,000) but there were 19% more fatalities (3,600 compared with the previous total of 3,000): *ibid*, 15 and 76.

¹³ In terms of fatalities, the 15 worst-affected countries in 2006 (fatalities are indicated in brackets) were: Iraq (13,340), India (1,256), Afghanistan (1,042), Sudan (716), Sri Lanka (627), Colombia (533), Thailand (520), Chad (518), Pakistan (387), Philippines (291), Nepal (261), Russia (115), Algeria (112), Nigeria (97) and Israel (83): *ibid*, 25.

¹⁴ See chapter 4 recalling an exchange between a pirate and Alexander of Macedon; see also chapter 5 for St Augustine's repetition of that passage from Cicero.

have attempted to meet the challenge posed by non-state actors, which has largely been through legal and judicial mechanisms, on the understanding that acts of terrorism are criminal acts, not acts of war. The chapter analysed the different ways in which terrorism has been defined by various jurisdictions and it found that every one of those jurisdictions, and even jurisdictions within a single state (the US), have different perceptions of what ‘terrorism’ is. That chapter showed that although there is some agreement on a few core elements of the notion of terrorism, there is a great deal of disagreement on the detail.

Although an internationally acceptable definition would possibly assist in combating terrorism, one of the major obstacles to reaching consensus is the long-recognised right of people to use force against occupiers of their territory. In the past, many international agreements specifically protected that right and expressly excluded from the definition of terrorism the use of force when exercising that right. However, more recently there has been a shift towards condemning all acts of terrorism, regardless of motive. Another aspect of the definition which has created division is whether or not acts of the state (such as acts undertaken by members of the military during armed conflict) should be included in the definition of terrorism. It is submitted that the current trend which favours excluding acts of the military from the proposed comprehensive international draft convention is unwise in the sense that it will enforce the perception that states are immune when they carry out acts that otherwise satisfy the definition of ‘terrorism’. Arguably, continuing to uphold that distinction will create a feeling of resentment from those who are subjected to acts of ‘terrorism’ by states and their armed forces. It is submitted that scholars such as Ganor and Wardlaw¹⁵ who do not exclude state actors are correctly interpreting the definition. Terrorism should be defined by the act, the target and the objective – not the perpetrator.

Chapters 4-9 attempted to place the use of force against Afghanistan in a historical context. Since President Bush clothed his justifications for using force in phrases that echoed the just war doctrine,¹⁶ the historical basis of that doctrine was examined from antiquity through to the present. That was undertaken in the

¹⁵ See chapter 3, Ganor’s definition and (Wardlaw’s definition).

¹⁶ President Bush: “To all the men and women in our military – every sailor, every soldier.....I say this: Your mission is defined, your objectives are clear, **your goal is just**”: Presidential Address to the Nation, 7 October 2001: <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html> (accessed 11 November 2006), emphasis added.

context of a wider examination of the legal attempts to limit the recourse to force by various civilizations. By tracing the evolution of limitations on the resort to force, on the use of force in self-defence, pre-emptive self-defence, on the use of reprisals and on the use of force in response to non-state actors, what became evident is that states have never agreed on when and why they may employ force. Even when the majority of nations seemed to have reached agreement and adopted the UN Charter which prohibited the resort to force, the reservation of the inherent right of self-defence, which was left undefined in Article 51, has allowed states to continue to interpret that right as they see fit. The ‘inherent’ right to self-defence is limited – first and foremost – by the wording of the Charter, as that has been interpreted by the International Court of Justice and applied by states.

Resort to force: undoing the constraints

Some key points arose out of the historical inquiry undertaken in this thesis. First, recent events suggest that the international community is on the brink of returning to a situation which existed prior to the UN Charter, and probably even prior to the Covenant of the League of Nations, when states used force freely against their enemies, sometimes under false pretexts.¹⁷ Many of the classical scholars, whose work was referred to in chapters 4-7, wrote of the need to constrain the resort to force because, too often, states use force and attempt to justify it in the language of self-defence, when really it is nothing more than aggression. Cicero wrote that the only just wars were for revenge or punishment¹⁸ and even though those objectives are in theory no longer acceptable reasons for resorting to force, recent trends would suggest that force is sometimes acceptable when the objective is quite plainly stated to be revenge and punishment for ‘evil-doers’. Drawing parallels between the current scenario and that of the Roman Empire is not indulgent hyperbole. It was discussed in chapter 4 that during the height of the Roman Empire, military commanders enjoyed flexibility in deciding when force was employed, even when philosophers and scholars were attempting to restrict the resort to force.¹⁹ Parallels with the current security climate are visible in the sense that the strict letter of the UN charter still purports to uphold the virtues of peaceful dispute settlement and it strictly limits the resort to force, whilst powerful states seem able to resort to force whenever they feel threatened.

¹⁷ See, for instance, Pufendorf in chapter 6. He observed that “men usually go to much labour to conceal” unjust wars.

¹⁸ Cicero, chapter 4.

¹⁹ See discussion in chapter 4.

Secondly, we are currently at risk of returning to a pre-UN Charter situation where forcible reprisals are permitted. Although Article 2(4) of the UN Charter outlawed the use of forcible reprisals, the practice of a few militarily powerful states, if left unchallenged, may lead us to a situation where force is routinely resorted to by states, in contravention of the UN Charter, as a method of dispute settlement, to achieve ‘justice’ or pursuant to the state’s perceived security interests. Forcible reprisals were acceptable when Wheaton wrote the *Elements of International Law* in 1836²⁰ and the *Naulilaa* dispute set out the conditions which established the legitimacy of reprisals.²¹ The three conditions set forth by the Special Arbitral Tribunal in 1928 would appear to have been adhered to the Bush Administration before resorting to force against Afghanistan in 2001. Recall that for a reprisal to be legitimate there had to have been a previous violation of international law by a state, an unsuccessful request for redress of the wrong and the measures adopted were not to have been excessive.²² When one applies those conditions to the facts pertaining to the use of force in October 2001, the inescapable conclusion is that the use of force on the latter occasion was an attempt, conscious or otherwise, to revive the doctrine of reprisals as a form of self-help for injured states. This is unfortunate, for a revival of the doctrine of reprisals is plainly inconsistent with Article 2(3) of the UN Charter, which requires states to settle their international disputes by peaceful means, and Article 2(4), which prohibits the threat or use of force against another state.²³ Although a few scholars may argue in favour of a resurrection of the reprisal doctrine,²⁴ there has not been a groundswell of support for that notion, nor has state practice demonstrated that a change has occurred in favour of the lawfulness of reprisals. Although the return of the reprisal doctrine in the context of responding to terrorist attacks may have “found a mooring”²⁵ in the current Bush Administration, the fact remains that the majority of other states have not

²⁰ Wheaton: “reprisals are to be granted only in case of a clear and open denial of justice”: *Elements of International Law* (1836) §291, 310; see discussion in chapter 7.

²¹ See chapter 7.

²² *Ibid.*

²³ That the UN Charter prohibits reprisals involving the use of force is universally accepted by scholars of international law. For example, see Brownlie, *International Law and the Use of Force by States* (1963) 281; Bowett, “Reprisals Involving Recourse to Armed Force” (1972) 66 *AJIL* 1 at 1; Kwakwa *The International Law of Armed Conflict* (1992) 132; Arend and Beck *International Law and the Use of Force* (1993) 42-43; Gray *International Law and the Use of Force* (2004) 163;

²⁴ For instance, see O’Brien, W “Reprisals, Deterrence and Self-Defense in Counterterrorism Operations” (1990) 30 *Va. Jnl Int’l Law* 421 at 475 where he argues that it would be sensible to assimilate armed reprisals into the right of legitimate self-defence. See also Seymour, A “The Legitimacy of Peacetime Reprisal as a Tool Against State-Sponsored Terrorism” (1990) 39 *Naval L. Rev* 221 at 224.

²⁵ This argument is made by Kelly who asserts that the ultimatum issued by President Bush to the Taliban encompassed all the criteria that Afghanistan had to meet in order to avoid a military reprisal: see Kelly, M “Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law” (2003) 13(1) *J. Transnational Law and Policy* 1 at 21.

followed suit. As at the date of writing, armed/forcible reprisals remain unlawful.²⁶

Thirdly, the historical inquiry has shown that states have always faced threats from non-state actors, whether pirates, anarchists or terrorists.²⁷ The parallels between piracy and terrorism and between anarchy and terrorism have been referred to above. In looking for solutions to the threat posed by terrorism, the international community ought to reflect on the ways in which anarchism and piracy were subdued. For instance, success in the ‘war on anarchy’ was perceived in the late 1800s to require trans-national co-operation through policing and intelligence exchange.²⁸ Piracy was brought under control by a variety of measures, including the categorisation of pirates as *hostes humani generis*, criminals whose acts attracted universal jurisdiction.²⁹ Resort to force was not an option for states that were the victims of the criminal acts of piracy and anarchy.³⁰

It is somewhat disingenuous to argue that international terrorism is a ‘new’ threat to global peace and security, which ought to entitle states to disregard the Charter. The arguments made by statesmen such as US President George W Bush and Australian Prime Minister John Howard, to the effect that we are living in a new age which requires a new interpretation of the Charter, overstate the differences between the present and the past.³¹ In light of the material that was canvassed in chapters 4-9, it would appear that international terrorism in the modern sense is not so far from the threats which states have always faced from non-state actors. Just as scholars considered pirates to be the common foe of all mankind (*communis hostis omnium*)³² entitling states to arrest and prosecute pirates where ever they were found, so should modern states consider international terrorists to be criminals whose actions attract universal jurisdiction.

²⁶ See discussion below, “Unlawful reprisal rather than lawful self-defence”.

²⁷ See discussion on non-state actors in chapters 4-9. Pirates existed in ancient Greece and Rome; they are referred to throughout the works of the classical scholars. Anarchists were a particular threat during the late 1800s and early 1900s: see discussion in chapter 7 at 185-187.

²⁸ See discussion in chapter 7 especially at 186.

²⁹ See discussion of pirates in chapter 4 at 95-96; chapter 5 at 117-120; chapter 6, chapter 7 and chapter 8.

³⁰ See, for example, the provisions discussed in chapter 8.

³¹ See chapter 10.

³² Cicero in *De Officiis*, see chapter 4.

Only states are capable of waging war

In discussing the historical evolution of limitations on the resort to force, it became apparent that the classical scholars all agreed that wars were fought by states, between sovereigns or princes – not between states and individuals. Plato referred to war as being a natural and inevitable condition, for *states*.³³ Cicero wrote that war was undertaken by states, which he famously defined as having a senate, a treasury, unanimity and concord amongst their citizens.³⁴ All others he deemed brigands or pirates. The early Christian scholars such as St Augustine assumed that war was fought between states.³⁵ St Thomas Aquinas' definition of the 'just war' required that war be fought under the authority of a ruler or 'prince'.³⁶ Similarly, Vitoria³⁷ and Suárez wrote that war is carried on between states and that it must be waged by a 'legitimate power',³⁸ as did Gentili who emphasised that there must be sovereigns on both sides.³⁹ Vattel, too, confirmed that the sovereign alone has the authority to make war,⁴⁰ as did Grotius.⁴¹ The same view was expressed by Zouche, who defined war as "a lawful contention between different peoples or princes"⁴² and Rachel.⁴³ Indeed, the requirement that war be fought between sovereigns or princes, between those who possessed 'royal or quasi-royal power',⁴⁴ was consistently held to be an integral element in defining 'just' wars. Textor pointed out that "war-making belongs to Kings or those having like power."⁴⁵

The historical analysis provides the important context for the contemporary debate regarding how states have, and should continue to, respond to the use of force by private individuals. The analysis in chapters 4-9 showed that states and scholars have always regarded private individuals as being incapable of declaring war on a sovereign state and that any use of force by individuals should be treated as a criminal matter. The rationale for demanding that war be fought only between sovereigns can be traced back to Demosthenes' statement that war is made against those who cannot be controlled by the laws, but judicial decisions are rendered in

³³ See discussion in chapter 4.

³⁴ See chapter 4.

³⁵ See discussion in chapter 5.

³⁶ This was the first of St Augustine's three conditions for waging 'just war', the principle of *auctoritas principis*, see chapter 5.

³⁷ *Ibid* at 108.

³⁸ *Ibid* at 111, especially n90 and accompanying text.

³⁹ *Ibid* at 113, especially n108.

⁴⁰ See chapter 6, 155-157.

⁴¹ *Ibid* at 154.

⁴² *Ibid* at 168, especially n35.

⁴³ *Ibid* at 169, especially n45 and accompanying text.

⁴⁴ *Ibid* at 170.

⁴⁵ *Ibid* at 170, especially n53.

the case of private citizens. Private individuals can be restrained by laws – whether domestic or international – whereas states, which are above the law for they make the law,⁴⁶ can only be constrained by force.

Another important rationale underlies the need to treat individuals differently than states and to require wars to be fought between sovereigns. As noted by Grotius in *De Jure Belli ac Pacis*, declaring war on behalf of a state “makes it known for certain that the war was not a private undertaking but was to be waged by the will of both peoples or the heads of both peoples.”⁴⁷ Textor also noted that since ‘war’ can only be fought between those possessing ‘royal or quasi-royal powers’,⁴⁸ it could not be fought against a state which was split into factions because, in such a case “there is no right of sovereignty in the antagonists, individually considered, such as there is in an undivided State”.⁴⁹ This is one of the reasons why it has been argued here that the US could not declare war against the state of Afghanistan in retaliation for acts of terrorism that were carried out by individuals, none of whom were representing the state of Afghanistan. In October 2001, Afghanistan was what Textor might have described as a state that was split into factions, therefore, there was no sovereign with whom to wage ‘war’. When states such as the US and the UK declare war, or more precisely, engage in an armed conflict, with a state such as Afghanistan,⁵⁰ in response to actions carried out by individuals who were not acting on that state’s behalf or even within its control, they are surely ignoring a fundamental and historically-accepted aspect of international relations concerning the attribution of acts of private individuals to the state.

Moreover, as Gentili noted, it would not be ‘just’ if the ‘delinquency’ of private citizens brought harm upon the entire body of citizens “since the wrongdoers do not seek the welfare of all.”⁵¹ In other words, it is unjust for the wrongdoing of the individuals who flew the planes on 11 September 2001 to bring harm upon the entire body of citizens in Afghanistan. The members of al Qaeda who are thought

⁴⁶ See discussion of the political theorists ideas, especially Bodin and Kant, discussed in chapter 7.

⁴⁷ See chapter 6.

⁴⁸ See chapter 7.

⁴⁹ Ibid.

⁵⁰ In response to a question about “the precise legal basis of the campaign” against Afghanistan, the Parliamentary Under-Secretary of State of the UK’s Foreign and Commonwealth Office stated that “The military coalition in [sic] engaged in an armed conflict in self-defence against those who perpetrated the terrorist attack of 11 September and those who harbour and sustain them.” However, “No formal declaration of war has been made by HMG”: *BYIL* LXXII (2002) 697.

⁵¹ Gentili, *ibid* at 121, n160.

to have carried out the acts of terrorism were not “seeking the welfare of all” in Afghanistan. Gentili required that war be fought by regular soldiers and undertaken by a regular army: the individuals who carried out these particular terrorist attacks are neither regular soldiers nor part of a regular army.⁵² The nexus between those individuals and the state was not established, simply because it did not exist.

The use of force against Afghanistan

Having surveyed the historical development of limitations on the resort to force and having attained some clarity on the evolution and current state of the *ius ad bellum*, chapter 10 focused specifically on the legality of the use of force against Afghanistan. It was argued there that the use of force was unlawful, for at least five reasons, which are summarised in turn below.

First and foremost, the US did not suffer an ‘armed attack’ as required by Article 51 of the UN Charter. The term ‘armed attack’, in both the UN Charter and the Washington Treaty, has always been understood to refer to attacks *by states, upon states*. That has been repeatedly confirmed by states, by the ICJ as recently as 2004 and by the Security Council, as demonstrated by its general stance of condemning the use of force in response to terrorism on most occasions. Providing territory for training camps of alleged terrorists or “safe-haven”, if that is what the Taliban could have been held responsible for, is not and has never been accepted as being legally equivalent to carrying out an “armed attack”.

In terms of determining whether there was an ‘armed attack’, the significance of NATO’s invocation of Article 5 of the NATO Treaty - which was heavily relied upon by the US to bolster its claim of self-defence⁵³ - was discussed at length and found to be minimal. It has been argued here that Article 5 probably ought not to have been invoked. Doubts were expressed at the time by diplomats as to whether there had been an ‘armed attack’ warranting the invocation of Article 5. Proof that invocation of Article 5 was sought by the US essentially for cosmetic reasons is bolstered by the fact that after it was invoked, NATO officials awaited requests

⁵² Chapter 5. Indeed, that assertion has been a key element in the Bush Administration’s assertions that the individuals arrested in Afghanistan should not be accorded “prisoner of war” status and are instead “enemy combatants”, an issue that is beyond the scope of this thesis.

⁵³ President Bush: “Perhaps the NATO Charter reflects best the attitude of the world: An attack on one is an attack on all.”: Address to a Joint Session of Congress and the American People, 20 September 2001, reproduced in Appendix 16.

for specific assets but it was evident that the US intended to remain in full control of the military operations.⁵⁴

It is noteworthy that during the debates which took place in both the Security Council and General Assembly immediately after 11 September, there was no mention of the phrase ‘armed attack’ by *any state* in references to the events of 9/11, not even by the US’ representative.⁵⁵ Furthermore, neither the Security Council nor the General Assembly ever referred to the 11 September hijackings as ‘armed attacks’ in their post-11 September resolutions.⁵⁶ The US Congress, when it authorised the use of force, did not call the hijackings ‘armed attacks’.⁵⁷ Neither the Council of Europe nor the OAU used the term ‘armed attacks’ either.⁵⁸ Perhaps most significantly, the UK’s letter to the Security Council, which purportedly justified the use of force on the grounds of self-defence, omitted reference to the term ‘armed attack’.⁵⁹

Secondly, the use of force against Afghanistan was unlawful because even if it could be established that the US suffered an ‘armed attack’, the attack was over by the time force was employed. There was simply no need - no *necessity* - to use force on 7 October 2001 to halt an attack, or to prevent an imminent attack from occurring. The attack was indeed over by the evening of 11 September, evidenced by statements from the White House that it was safe for the President to return to Washington D.C. because the administration regarded the threat of attack as having ended.⁶⁰ From that point onwards, any use of force was designed to prevent a future unknown and apparently non-imminent attack – a right that is *not* presently recognised in international law.

Thirdly, even if there was an armed attack, the US and the UK failed to adequately attribute responsibility for it to the Islamic State of Afghanistan. The US even admitted in its letter to the Security Council on 7 October 2001 that its inquiry was in its “early stages” and that there was “still much we do not know”.⁶¹

⁵⁴ See Lansford, T *All for One: Terrorism, NATO and the United States* (2002) 79; see also chapter 10.

⁵⁵ See chapter 10.

⁵⁶ *Ibid.* at 290-91.

⁵⁷ *Ibid.* at 278, n30.

⁵⁸ *Ibid.* at 284 and 291-292.

⁵⁹ *Ibid.* at 301 and Appendix 19.

⁶⁰ See chapter 10.

⁶¹ UN Doc. S/2001/946, reproduced in Appendix 18.

The US merely alleged that “al Qaeda had a central role in the attacks”.⁶² The US provided no evidence in its letter to the Security Council to link the individuals who hijacked the planes to al Qaeda, and in turn to the Taliban and the state of Afghanistan. Before using force against Afghanistan, the US and the UK ought to have provided specific evidence to the Security Council connecting the individuals who carried out the attacks to the Taliban regime. Under the principles of state responsibility, which have been enunciated by the ICJ, the ICTY and are encapsulated in the ILC’s Draft Articles, the Taliban had to have had control over the specific operation, or at least “overall control, going beyond the mere financing and equipping of forces”⁶³ to be held responsible. However, neither the Bush Administration nor the Blair government argued that the Taliban directed or controlled the acts of terrorism that occurred on 11 September 2001.

Fourthly, the use of force failed to meet the customary law requirements of necessity, immediacy and proportionality. The classical scholars discussed in the earlier chapters always referred to force being ‘just’ if it was, *inter alia*, the last resort and that there were no other options available to the state under attack.⁶⁴ Here, there were other options available to the US and the UK, such as the measures adopted by the Security Council on 28 September 2001, the use of diplomacy, the use of intelligence and the use of arrest and extradition procedures. The opportunity to negotiate also clearly existed; the evidence shows that it was the US, rather than the Taliban, that was unwilling to negotiate.⁶⁵ The US openly said that its ultimatum was *not* open to negotiation,⁶⁶ and *The 9/11 Commission Report* concluded that even as it issued the ultimatum, the Bush Administration “knew” the Taliban would not comply.⁶⁷ Since the option of negotiation had not been properly exhausted as a means of resolving the crisis, force was not the last resort, thus, force was not strictly *necessary* at the time that it was employed on 7 October 2001.⁶⁸ Furthermore, the resort to force was arguably not *immediate*; it was delayed by 26 days after the so-called ‘armed attack’ had ended, and the need to employ force could not be said to have been “instant, overwhelming, leaving no

⁶² Ibid.

⁶³ See *Prosecutor v Tadic* in chapter 9.

⁶⁴ See chapters 4-9.

⁶⁵ See chapter 10.

⁶⁶ See chapter 10.

⁶⁷ Ibid, 282 at n62.

⁶⁸ Ibid at 316-19.

choice of means and no moment for deliberation”.⁶⁹ As for *proportionality*, it has been argued here that the objective of using force to remove the Taliban regime from power was a disproportionate response. As noted in chapter 9, proportionality may be measured in various ways.⁷⁰ It was acknowledged there that some might argue that a roughly ‘proportionate’ number of civilians died in Afghanistan in the months following the American/UK invasion when compared to the number of civilians who died on 11 September 2001.⁷¹ However, that type of rudimentary comparison is unsatisfactory because, firstly, there have been an ever-increasing number of civilian fatalities since the commencement of the military campaign on 7 October 2001. Estimates of civilian deaths vary, with some studies suggesting that perhaps between 8,000-18,000 civilians may have been killed in Afghanistan as a direct and indirect result of the decision to use force in ‘self-defence’ by the US and the UK.⁷² In addition, comparing figures of civilian fatalities may not be the most effective way of measuring ‘proportionality’. To determine whether a response is ‘proportionate’ regard ought to be had to the *objectives* of using force. Here, the declared objectives, as evidenced in documents from both the US and the UK, were not, or perhaps not *just*, to achieve the arrest of Osama bin Laden and to destroy alleged terrorist training camps within Taliban-controlled territory. The wider objective was to completely remove the Taliban from any form of power in Afghanistan.⁷³ That objective was made more palatable by frequent media references to the supposedly poor human rights record of the Taliban regime.⁷⁴ However unsatisfactory the Taliban’s record on human rights may have been, it would never, on its own, have justified an invasion of Afghanistan and the removal of the Taliban from power. Examples were discussed in chapter 10 which suggest that no state has ever been able to invade another sovereign state and remove the existing regime, thereafter replacing it with a more ‘acceptable’ regime, and been condoned.⁷⁵ It is submitted that including the goal of regime change in the US

⁶⁹ The *Caroline* case, as discussed in chapter 7, 8 and 9. Although it was conceded that arguments could be made that the delay was within the bounds of acceptability if other prior uses of force, such as the use of force by the US against Sudan and Afghanistan in 1998, were used as a point of comparison.

⁷⁰ See chapter 9.

⁷¹ See chapter 10.

⁷² See discussion in chapter 10 regarding the different estimates of civilian deaths in Afghanistan. The figure of 8,000-18,000 is from a study by Conetta in 2002, see chapter 10.

⁷³ Regime change was clearly enunciated as an objective of the use of force: see Hoon, G *Operation Veritas* referred to in chapter 10.

⁷⁴ See discussion in chapter 10 regarding the frequent references to human rights under the Taliban regime and the humanitarian situation in Afghanistan.

⁷⁵ See discussion of the use of force by the US against Grenada and Panama in chapter 10.

and the UK's stated objectives rendered what may, arguably, have been a lawful act of self-defence into an unlawful act of aggression.⁷⁶

Fifthly, it is submitted that even if the right to use force in self-defence initially existed, the right had expired by the time that the US and the UK acted on 7 October 2001. This line of argument assumes that the US suffered an 'armed attack' on 11 September 2001 which allowed it to respond with force in self-defence. When the Security Council adopted resolution 1373 on 28 September 2001, it set forth a comprehensive array of measures to maintain international peace and security, some of which were compulsory for all states. Since those measures can only be interpreted as 'measures to maintain international peace and security', Article 51 dictates that the right to use force in self-defence thereby ceased to exist. That interpretation is in keeping with the purpose for which Article 51 was first introduced. Reference was made earlier in the thesis to the *les travaux préparatoires*, to demonstrate that Article 51 was only ever intended to be an emergency measure, to allow states to act until the Security Council could take over, or in case the Security Council was unable or unwilling to act.⁷⁷ It was never intended to create an indefinite right of self-defence such as that advanced by the US in its letter to the Security Council, when the US said that "we may find that our self-defence requires further actions with respect to other organizations and other States."⁷⁸ That interpretation of its alleged right is in contradiction with both the letter and spirit of Article 51.

Unlawful reprisal v lawful self-defence

Reaching the somewhat controversial conclusion that the use of force against Afghanistan was *not* lawful self-defence begs the question: how should this use of force be understood in terms of international law? This thesis has shown that the use of force by the US and the UK was either an act of revenge and retaliation, which, in the pre-Charter era would have been called a 'reprisal', or it was an act of anticipatory self-defence.⁷⁹ Reprisals, which were punitive by nature, were

⁷⁶ Cassese, writing soon after 9/11, observed that if military force was employed, it would have to be proportionate and that, "Force may not be used to wipe out the Afghan leadership or destroy Afghan military installations and other military objectives that have nothing to do with the terrorist organisations, unless the Afghan central authorities show by words or deeds that they approve and endorse the action of terrorist organisations": Cassese, A "Terrorism is Also Disrupting Some Crucial Categories of International Law" (2001) 12 *EJIL* 993.

⁷⁷ See chapter 9.

⁷⁸ Letter dated 7 October 2001 from the US to the President of the Security Council, as discussed in chapter 10 and reproduced in Appendix 18.

⁷⁹ See discussion below regarding the use of force against Afghanistan as anticipatory self-defence.

outlawed by the Charter. By contrast, self-defence is not an action that is meant to punish or avenge. It is meant to protect the state in a moment when it is subject to armed attack. In the days following the terrorist attacks, President Bush spoke openly and frequently of the need to retaliate and to punish the perpetrators.⁸⁰ In President Bush's Address to a Joint Session of Congress and the American People, he stated that the US' response "involves far more than instant retaliation and isolated strikes."⁸¹ This telling admission overlooks the fact that individual states surrendered the right to retaliate and exact revenge when they signed the UN Charter. That has been confirmed by both the Security Council and the ICJ.

Although analogies from domestic law are not always helpful, one can probably be drawn between the right of self-defence in international law and the right that is preserved in domestic criminal laws. An individual usually has a defence to the use of force against another citizen, which would otherwise be considered to be assault, if they are acting in defence of themselves or another, and they use reasonable force. However, no jurisdiction would permit the defence to be made out if force was used in revenge or retaliation.⁸² Individuals entrust the state, in the form of its police forces and its justice and correction systems to perform those roles, in accordance with the rule of law. At the global level, states have entrusted the Security Council with the role of maintaining international peace and security and states must seek the mandate of the Security Council if they wish to use force once an actual attack has ended. That surrendering of the individual will of each state was what Kant referred to in 1795 when he surmised that the only way for states to find perpetual peace would be by giving up their freedom and by accommodating themselves to the constraints of common law, by establishing what he called "a league of peace".⁸³

The assertion made herein that the use of force against Afghanistan was an unlawful reprisal rather than a lawful act of self-defence is further strengthened by the historical analysis in chapters 4-9. The historical evolution of forcible measures short of war suggests that there are strong parallels between what were previously called 'reprisals' and the use of force against Afghanistan. Prior to the

⁸⁰ See chapter 10.

⁸¹ This Address is reproduced in Appendix 16.

⁸² In New Zealand criminal law it is accepted that "actions by way of retaliation or out of revenge cannot be justified as self-defence": Robertson, B (ed) *Adams on Criminal Law* (1992) Brookers Online at CA48.07.

⁸³ See chapter 7.

UN Charter, reprisals were considered lawful. States were allowed to use force against other states to resolve issues in dispute, without declaring war and thereby bringing the international law on the resort to force into effect. Examples were provided from antiquity through to the present which showed that states have often solved their differences by resorting to force, even if that force was not technically 'war'. The *Nauliaa* case set out the rules for engaging in reprisals, such as the existence of a wrong by a state, a request for redress from the victim state, and the subsequent refusal by that state to offer redress. If the terrorist attacks which occurred on 11 September 2001 could have been adequately attributed to the Islamic State of Afghanistan, governed ostensibly by the Taliban regime, then the response to them appears to meet all the elements of a classic reprisal. There was a prior wrongful act (allowing the territory of Afghanistan to be used for training purposes by terrorist groups); there was a demand for redress (the ultimatum issued to the Taliban by the US) and there was an alleged refusal to grant such redress.⁸⁴ When an adequate response to the ultimatum was not forthcoming, the US resorted to force. Thus, as noted above, it is submitted herein that the US' use of force was a reprisal against the State of Afghanistan.⁸⁵

If the facts seem to fit the classic formulation of reprisals,⁸⁶ then the ramifications are somewhat troubling since forcible reprisals were outlawed by the UN Charter. States are supposed to resolve their differences, whatever they may be, by peaceful means. It was acknowledged in chapters 9 and 10 that although forcible reprisals are unlawful, some states have continued to use them and some scholars have argued that some form of 'reasonable' reprisal should be recognised in international law. The instances whereby reprisals have been used by states were reviewed in chapter 9. The analysis there showed that although reprisals may be strictly unlawful, the Security Council has taken a softer stance on them in recent years when compared to its consistent condemnation of them during the 1950s, 1960s and to a lesser extent, the 1970s. Some of the examples of reprisals from the 1970s and 1980s bear remarkable similarities with the use of force against Afghanistan in 2001. For example, a parallel can be drawn between the Israeli attacks on Lebanon during the 1970s and the use of force against Afghanistan in 2001 in so far as Israel often justified its attacks on Lebanon on the grounds that it

⁸⁴ See discussion of the ultimatum in chapter 10.

⁸⁵ See discussion above where it is noted that some scholars, such as Kelly, have observed that the ultimatum to the Taliban appeared to be an attempt to meet the pre-Charter criteria for lawful forcible reprisals.

⁸⁶ Ibid, especially see Kelly, *supra* n25.

was a base for terrorists. Israel attempted to justify the use of force in the Litani Raid on the grounds of 'self-defence' and Israel frequently used force to punish its neighbours for allowing terrorists to operate from those territories. The Security Council usually condemned the use of force by Israel on those grounds as unlawful reprisals.

The use of force against Afghanistan in 2001 has been compared in this thesis to the use of force in the 1990s, in particular, when the US used force against Iraq (1993) and against Sudan and Afghanistan (1998). In both of those instances, the use of force was unpopular and even though there was no formal condemnation by the Security Council, the general consensus was that those were not legitimate cases of self-defence as permitted under Article 51. Further examples from the decade of 2000-2006 were discussed in chapter 9 where it was demonstrated that states are sometimes unwilling to publicly oppose the use of force, even though it is technically an unlawful reprisal rather than a lawful act of self-defence. The use of force in 2001 demonstrates that this pattern seems set to continue. It is contended that the use of force by the US and the UK against Afghanistan, beginning on 7 October 2001, was perhaps the most significant example of an unlawful forcible reprisal in recent years. It was a use of force that was plainly understood as an act of revenge and retaliation⁸⁷ and it bore all the hallmarks of an armed reprisal.⁸⁸

Although there might have been considerable sympathy within the international community for a short, sharp response by the US, as suggested in the EU's references to a 'riposte',⁸⁹ the international community should not, and it is argued here, *did* not, sanction the use of force in either the manner or the scale in which it was eventually employed. It was noted in chapter 9 that during the 1970s and 1980s, when the Security Council was frequently asked to respond to reprisals, the Council took the position that just as terrorism had to be condemned, so did reprisals in response to terrorism. In a Security Council debate in 1972, the Council stated that:⁹⁰

⁸⁷ See discussion in chapter 10 at n24, n25 and n34 regarding President Bush's statements.

⁸⁸ See Kelly, *supra* n25 at 21: "President Bush's ultimatum to the Taliban...encompassed all the criteria that Afghanistan had to meet in **order to avoid a military reprisal**" (emphasis added).

⁸⁹ Chapter 10.

⁹⁰ UN SCOR 1662nd Meeting at 4, UN Doc S/PV/1662 (1872). See discussion in chapter 9.

While we condemn acts of terrorism, we also condemn acts of reprisal since they flout the Charter and they are contrary to the purposes on which this Organization rests.

It was reasoned in 1972 that reprisals were equally worthy of condemnation as acts of terrorism. To try to justify one by the other would inevitably lead “to the most deadly outbidding, to blind destruction of lives, to constantly increasing dangers to international peace and security.”⁹¹ The wisdom that was demonstrated by the Council’s members in 1972 seemed to have been conspicuously absent in the aftermath of the events of 11 September 2001, and in the debate, or rather lack thereof, as to the lawfulness of the use of force by the US and the UK.

The question as to where reprisals currently stand in international law is integrally linked to the question of the lawfulness of the use of force against Afghanistan. If one can establish that reprisals, in some form or another, are once again lawful, then it does not matter whether the use of force against Afghanistan was a reprisal. But if one comes to the conclusion that reprisals were ‘outlawed’ by the UN Charter, and they remain unlawful, then, if the use force in 2001 can be classified as a reprisal, it will be held to be unlawful. Some scholars have addressed this issue by arguing that the doctrine of reprisals has been resurrected, at least in some circumstances. Kelly has argued that President Bush’s linkage of states to the terrorists they harbour, in an almost legal agency relationship, is not a resurrection of the reprisal doctrine against states *a priori*.⁹² He argues that “states are only on the receiving end of reprisals *through* the terrorists, who are the actual targets of the reprisals.” That is a distinction without a difference.⁹³ The military reprisals by the US and the UK against the state and territory of Afghanistan were aimed not only at the alleged terrorists: they were aimed at the Taliban regime. As the evidence presented in earlier chapters has attested to,⁹⁴ the US and the UK intended to direct the reprisals at the Taliban regime and to effect regime change in Afghanistan. Thus, this was an instance in which reprisals were aimed at a state (not merely non-state actors), and this is the basis for the submission made herein, that the use of force was therefore unlawful.

⁹¹ Ibid.

⁹² Kelly, *supra* n25 at 21-22.

⁹³ Kelly concedes that the argument he is exploring, that reprisals are only aimed at the terrorists and not the state itself, is a “distinction without a difference”: *ibid* at 22.

⁹⁴ See discussion in chapter 10 regarding the justifications put forward by the US and the UK for the use of force. The military installations of the Taliban, and not merely al Qaeda, were clear targets for the use of force, as was regime change a stated objective. Even in 2007, the NATO-led forces are not only targeting al Qaeda – they are also targeting the Taliban forces.

One final point to note regarding the current status of reprisals in international law is that despite the occasional use of reprisals by states, and hence, breaches of international law by those states, the law itself may have been challenged but it has remained unchanged. An interesting demonstration of this fact is that international law texts that have been written, or at least updated, post-11 September 2001, do not suggest that the law on reprisals has changed as a result of the use of force against Afghanistan.⁹⁵ The conclusion which must be drawn from the foregoing is that forceful measures by way of reprisal are still unlawful under Article 2(4) of the UN Charter. Any state that engages in them is breaching international law.

Anticipatory self-defence and the use of force against Afghanistan

It was noted earlier in this chapter that the use of force against Afghanistan could be characterised as either an act of revenge and retaliation, that is, a reprisal, or as an act of anticipatory self-defence.⁹⁶ As has been discussed in chapter 10, the US and the UK explicitly justified their resort to force against Afghanistan on the basis that it was aimed at preventing *future* attacks of the kind experienced on 11 September 2001.⁹⁷ Because of those justifications, the standing of anticipatory self-defence in international law has been discussed and its evolution charted, from antiquity through to the present. In drawing the analysis on this point to a close, two key facts are important to bear in mind.

First, the notion of using force in anticipatory self-defence has always been, and continues to be, restricted by the wording of Article 51 itself, which only permits

⁹⁵ For example, see Shaw, M *International Law* 5th ed (2003) 1023-24: "Those general rules [on reprisals] are still applicable but have now to be interpreted in the light of the prohibition on the use of force posited by Article 2(4) of the United Nations Charter. Thus, reprisals short of force may still be undertaken legitimately, while reprisals involving armed force may be lawful if resorted to in conformity with the right of self-defence" (footnotes in original omitted). A leading text on public international law from an Australian perspective is also informative on this point. The section on "reprisals" which was published in the first edition, in 1997, is repeated word-for-word in the updated second edition, in 2005: see Blay, S, Piotrowicz, R and Tsamenyi, M (ed) *Public International Law – An Australian Perspective* (1997) 255-56 and compare with Blay, S, Piotrowicz, R and Tsamenyi, M (ed) *Public International Law – An Australian Perspective* 2nd ed (2005) 238-39.

⁹⁶ It is noted that throughout this thesis, the terms "anticipatory self-defence" and "preemptive self-defence" have been used interchangeably. This is consistent with the usage adopted by other scholars such as: Shaw *International Law* supra n98 at 1028; Gray *International Law and the Use of Force* supra n24 at 95; Cassese, A *International Law* (2001) at 307; Malanczuk, P *Akehurst's Modern Introduction to International Law* (1997) at 311-12; Kelly, supra n25 at 22-24. It is acknowledged that some scholars perceive clear differences between "anticipatory" and "pre-emptive" self-defence: see Shah, N "Self-Defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism" (2007) 12(1) *JCSL* 95 at 111 and also O'Connell, M "The Myth of Preemptive Self-Defence" *ASIL Task Force on Terrorism* (2002) 1-22 esp n10, available at: <http://www.asil.org/taskforce/oconnell.pdf> (accessed 20 June 2007). As discussed in chapters 1, 9 and 10, this thesis has adopted the view that it matters little whether one refers to "anticipatory" self-defence or "pre-emptive" self-defence; the main point of distinction is how imminent the threat is that is to be averted. However, the author has acknowledged in chapter 1 that there is a difference between "anticipatory" self-defence/pre-emptive self defence on the one hand, and the Bush doctrine of pre-emption on the other. The latter division seems, to this author, to be the more important distinction to make.

⁹⁷ See the US and UK's letters to the Security Council of 7 October 2001, reproduced in Appendices 18 and 19 respectively. The US' letter, signed by John Negroponte, states that "United States armed forces have initiated actions designed to prevent and deter further attacks on the United States". The UK's letter, signed by Stewart Eldon, states that its forces were employed "to avert the continuing threat of attacks from the same source."

force to be used in self-defence “if an armed attack occurs”.⁹⁸ Academic arguments have long been raised in support of expanding the plain, literal meaning of Article 51,⁹⁹ and there has been a particular increase in the amount of scholarly debate on this issue since 11 September.¹⁰⁰ The range of views on this issue span a spectrum from, at the one end, those who would allow force to be used in self-defence to prevent terrorist capability before it is employed, and even before it is acquired,¹⁰¹ to, at the other end of the spectrum, those who argue that no state can lawfully engage in pre-emptive self-defence under international law as it currently stands.¹⁰² Despite the continuing debate amongst academics, it is fair to conclude that the majority of academics and the majority of states remain balanced in favour of an interpretation that force may not be used, and should not be used, in anticipation or pre-emption of an armed attack, unless the attack is imminent.¹⁰³ This author agrees with the conclusion reached by Shah, that “the arguments for pre-emptive self-defence are not persuasive and the notion seems too broad and fraught with risks to be accepted as a norm of international law.”¹⁰⁴ The author also agrees with the prescient observation of Bothe, that:¹⁰⁵

[I]f we want to maintain international law as a restraint on the use of military force, we should very carefully watch any attempt on the part of opinion leaders to argue that

⁹⁸ See Article 51 of the UN Charter, reproduced in Appendix 11.

⁹⁹ See discussion in chapters 9 and 10 regarding the interpretation of “armed attack” and the use of force in anticipatory or pre-emptive self-defence; for arguments in favour of a liberal or ‘counter-restrictionist’ interpretation of Article 51, see especially Bowett, O’Brien and McDougal discussed therein.

¹⁰⁰ A significant number of articles on this issue have recently been published in, *inter alia*, the Journal of Conflict and Security Law, the American Journal of International Law, the European Journal of International Law, the Washington University Journal of Law and Policy and the Cornell International Law Journal. There is a plethora of articles and comments on various aspects of the use of force against Afghanistan, on the European Journal of International Law’s Discussion Forum, The Attack on the World Trade Centre: Legal Responses, available at: http://www.ejil.org/forum_WTC/index.html (accessed 2 July 2007).

¹⁰¹ For example, see Wedgwood, R “The Fall of Saddam Hussein: Security Council Mandates and Pre-emptive Self-defence” (2003) 97 *AJIL* 576; Yoo, J “Using Force” (2004) 71(3) *Univ. of Chicago L Rev* 729.

¹⁰² For example, see Paust, J “Post-9/11 Overreaction and Fallacies Regarding War and Defence, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention and Due Process in Military Commissions” (2004) 79 *Notre Dame Law Rev* 1335 at 1343: “...there is nothing preemptive about nipping an armed attack in the bud. The point is that you need a bud. Self-defence cannot be exercised merely on the ground of expectations, anticipations, and fear. You have to prove that the other side is already embarked on an inevitable course of action.” See also Glennon, M “The Fog of Law: Self-Defence, Inherence and Incoherence in Article 51 of the United Nations Charter” (2003) 22 *Harv Jnl Law & Pub Poly* 16 at 20; Gross, E “Thwarting Terrorist Acts by Attacking the Perpetrators or their Commanders as an Act of Self-Defence: Human Rights Versus the State’s Duty to Protect its Citizens” (2001) 15 *Temple Int’l & Comp Law Jnl* 195 at 213; Greenwood, C “The Legality of Using Force Against Iraq” Memorandum to the UK Government on 12 October 2002, available at: www.publications.parliament.uk/pa/cm200203/cmselect/cmfa/196/2102406.htm (access 22 July 2007).

¹⁰³ See Arend and Beck *International Law and the Use of Force* supra n24 at 138-173 and compare with, *inter alia*, Shaw *International Law* supra n98 at 1028-30; Cassese *International Law* supra n99 at 307-11: “In the case of anticipatory self-defence, it is more judicious to consider such action as *legally prohibited*, while admittedly knowing that there may be cases where breaches of the prohibition may be justified on moral and political grounds and the community will eventually condone them or mete out lenient condemnation”; Gray *International Law and the Use of Force by States*, supra n23 at 130: “It is only where no conceivable case can be made that there has been an armed attack that they resort to anticipatory self-defence. This reluctance expressly to invoke anticipatory self-defence is in itself a clear indication of the doubtful status of this justification for the use of force.” See also Paust, Glennon, Greenwood, Gross, *ibid*. See also Bothe, M “Terrorism and the Legality of Pre-emptive Force” (2003) 14(2) *EJIL* 227 at 238-239: “a change in the law to the effect of opening up broader possibilities for anticipatory self-defence is not desirable.” See also the legal opinion of Attorney-General Lord Goldsmith to Prime Minister Blair: “Force may be used in self-defence if there is an actual attack or imminent threat of an armed attack...The concept of what is imminent may depend on the circumstances...However, in my opinion there must be some degree of imminence”: Goldsmith, L “Iraq: Resolution 1441” Secret Memo to the Prime Minister, 7 March 2002, available at: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/annex_a_-_attorney_general's_advice_070303.pdf (accessed 22 June 2007).

¹⁰⁴ Shah, N “Self-Defence, Anticipatory Self-Defence and Pre-emption: International Law’s Response to Terrorism” (2007) 12(1) *JCSL* 95 at 117.

¹⁰⁵ Bothe “Terrorism and the Legality of Pre-emptive Force” supra n103.

military force is anything other than an evil that has to be avoided. The lessons of history are telling. If we revert to such broad concepts...to justify military force, we are stepping on a slippery slope, one which would make us slide back into the nineteenth century when war was not illegal."

The second fact is that, as other scholars have also quite rightly observed,¹⁰⁶ the US and the UK both purported to use force against Afghanistan to prevent and deter future, unknown and unplanned attacks.¹⁰⁷ As discussed above and in chapter 10, international law does not, at present, allow the use of force to prevent future, non-imminent attacks. Therefore, the use of force, if indeed it was employed on the basis of anticipatory self-defence as asserted here and elsewhere, was unlawful on this ground as well. Thus, whether the use of force is characterised as a reprisal or as an exercise of anticipatory self-defence, the same conclusion is reached.

Repercussions and ramifications

The ramifications of the use of force against Afghanistan in 2001 for international law, and for international peace and security, can be summed up as follows. This was an instance of an unlawful use of force in response to a criminal act, whether it is classified as an unlawful reprisal or as an instance where force was used in anticipatory self-defence where the future threat was not imminent. There should be no doubt that acts of terrorism are *criminal acts* – the evidence is overwhelmingly in favour of that conclusion. All multilateral and regional conventions, as well as domestic legislation, treat acts of terrorism as criminal acts – not acts of war. Since antiquity, states have regarded pirates, anarchists and terrorists as individuals who ought to be dealt with through criminal processes. Scholars have long understood that the sins of private individuals cannot be visited on the entire population, unless the state expressly accepts responsibility for those individuals' actions.¹⁰⁸ After 11 September, the Council of Europe was one organisation which was prepared to state that this act of international terrorism was a criminal act, and a matter for a body such as the International Criminal Court. The fact that both the US and the UK repeatedly called for 'justice', whilst simultaneously preparing for the use of military force, would tend

¹⁰⁶ For example, see McCormack, T "The Use of Force" in Blay, S, Piotrowicz, R and Tsamenyi, M (ed) *Public International Law – An Australian Perspective* supra n95 at 230: "However, once the attacks of 11 September 2001 had occurred, it was no longer possible for the USA to respond in self-defence to those specific attacks. The deployment of military force in Afghanistan...was clearly undertaken to defend the USA against future attacks...The aerial bombardment of Afghanistan...was an anticipatory action based on the likelihood of future attacks" (emphasis added). See also Bothe, supra n103; Cassese "Terrorism is Also Disturbing Some Crucial Categories of International Law" supra n76.

¹⁰⁷ See the US' and UK's letters to the Security Council, reproduced in Appendices 18 and 19 respectively.

¹⁰⁸ See, for instance, Vattel, chapter 6; Gentili, chapter 5 and Pufendorf, chapter 6.

to suggest that ‘justice’ can be attained by bombing 200 pre-selected targets from the air, followed by a full-scale land invasion and occupation which has so far lasted nearly six years and shows no signs of ending in the near future. The observation made by Cicero in *De Re Publica* comes to mind, when he wrote: “Remove justice and what are kingdoms but gangs of criminals on a large scale?”¹⁰⁹

The position being advocated in this thesis is that ‘justice’ can only be attained by following the recognised course of response to criminal acts of terrorism, namely, providing the evidence to pursue the processes of arrest, extradition and, if warranted, prosecution and ultimately punishment. Cassese suggested, rather optimistically, in late 2001 that there was “much merit”¹¹⁰ in the proposal that the alleged perpetrators be handed over to the Hague International Criminal Tribunal for trial, after promptly revising its Statute. He noted that “an international trial would dispel any doubt about a possible bias (if such trials were held in, say, New York) and in addition, “an international trial would give greater resonance to the prosecution and punishment of the crimes allegedly committed by the accused”.¹¹¹

It is timely to observe that no such international trials ever took place and that many individuals who were arrested in Afghanistan subsequent to the US-UK invasion, who then became detainees at Guantanamo Bay, have recently been released without being charged with any offence. It is also significant that several individuals who have been tried for terrorist offences in US courts have been acquitted. If some semblance of delayed ‘justice’ has been achieved in those cases, at least in so far as they now have been released or acquitted, no such ‘justice’ was offered for the several thousand Afghan civilians who died, and continue to die, as a direct or indirect result of the US-UK decision to employ force. It would be an unfortunate development for international peace and security if any state were permitted to use force against any other state, after the occurrence of a terrorist attack, in order to achieve ‘justice’. The use of force in this instance by essentially two states, makes a mockery of the many statements that were delivered in the Security Council and in the General Assembly that this was *not* an attack just on the US, but an attack on more than 60 nations, and an

¹⁰⁹ Cicero, *De Re Publica*, Book III, XIV 24, also cited by St Augustine in *De Civitate Dei*, Book IV, chapter 4: for the full text of that extract see chapter 5.

¹¹⁰ Cassese “Terrorism is Also Disrupting Some Crucial Categories of International Law” *supra* n 76.

¹¹¹ *Ibid.*

attack on all of humanity. If those statements had been acted upon, the response would have been sanctioned by the only organisation that represents ‘all of humanity’.

The second significant repercussion relates to the fact that the international community (except the US, Israel and perhaps recently the UK) had never previously sanctioned the unilateral and unconditional use of force by individual states against another state, including regime change, in response to an act of terrorism. This thesis has shown that there is some precedent in state practice for isolated military strikes in response to an act of terrorism,¹¹² but there is no precedent which would suggest that the international community is willing to support the unlimited invasion and destruction of another state in response to acts of terrorism allegedly committed by individuals who were not acting for or on behalf of that state.¹¹³ This particular use of force was unusual and unlawful and it is contended that if it is allowed to stand as an example of a lawful act of self-defence the repercussions for each state’s sovereignty, and for international peace and security, are grave.

Moreover, the international community, and the Security Council in particular, failed to challenge the US’ claim that it may, in the future, use force against other organisations and other states.¹¹⁴ The wisdom of allowing such a claim to stand unchallenged was amply demonstrated by the ease with which the US was able to move from its use of force against Afghanistan in 2001 to its use of force against Iraq in 2003. It is submitted that the latter could not have been achieved without the former, and the former was achieved because the international community did not question the legitimacy of using force in self-defence in those undoubtedly tragic circumstances, due in large part to an overwhelming feeling of sympathy for the US within the international community.

¹¹² For example, the US’ use of force against Baghdad in 1993 and the missile strikes against Sudan and Afghanistan in 1998, as discussed in chapter 9.

¹¹³ One might argue that there is a precedent, namely, the invasion of Algeria by France in 1830. The use of force by France was justified on numerous grounds, including the elimination of piracy. Parallels have been drawn throughout the historical analysis between piracy and terrorism. However, the elimination of piracy as a ground for invasion in that instance was only declared later and it was not the main reason for France’s conquest and occupation. The main reasons why France decided to invade Algeria were related to the restoration of French honour following a personal insult upon the French consul in Algiers (the ‘fly-whisk’ incident), the redress of trade-related grievances, the protection of French property and in pursuit of the ideals of French imperialism. The elimination of piracy and the abolition of Christian slavery were not relevant considerations prior to 1830: see Falls, N, *The Conquest of Algiers* (2005) 55(10) *History Today* 44. Other scholars have also noted that it would not be persuasive to argue that the invasion and conquest of Algiers was motivated simply, or even mainly, by a desire to repress acts of piracy; French imperialism was seemingly a much more important factor in the expansionist policies pursued in 1830 and thereafter: see de Tocqueville, *A Writings on Empire and Slavery* (Pitts, J. trans) (2000).

¹¹⁴ See Appendix 18.

It is submitted that the proper response for the US and the UK in 2001 would have been to bring the issue before the Security Council; to discuss within the Council the objectives of identifying the suspected individuals and the options available for bringing them to justice through the normal means. If the Security Council had found that limited missile strikes were necessary, perhaps targeting al Qaeda strongholds, it could have authorised them. It was never given the opportunity to do so. Furthermore, the Security Council has, on previous occasions, acted pursuant to Chapter VII and authorised the use of military force against regimes which it considers to be a 'threat to the peace'.¹¹⁵ It could, had it thought it justified, authorised the use of 'all necessary means' including the use of force against the Taliban regime in 2001. Again, it was not given the opportunity to exercise its authority.

It is clear that the international community was overcome with a sense of sympathy for the US after 11 September 2001. But it ought not to have allowed that sense of sympathy to overtake the responsibilities of ensuring that states, even the most militarily powerful states, act within the bounds of international law. By refusing to submit its will to that of the Security Council, the US demonstrated that it can use force when and where it wants, regardless of its legality. The danger in standing by and keeping silent was amply demonstrated in 2003. The use of force against Afghanistan, which was virtually unchallenged in 2001, paved the way for an even more conspicuous breach of international law in 2003.

The lawfulness of the use of force against Iraq in 2003 is not the topic of the current thesis.¹¹⁶ However, it is arguable that the use of force in Afghanistan eased the way for the use of force against Iraq in an indirect sense, by preparing public and international opinion for further uses of force, and in a direct sense by means of the statement made by the US in its letter to the Security Council on 7 October 2001 when it indicated that, "we may find that our self-defence requires further actions with respect to other organizations and other states."¹¹⁷ It was

¹¹⁵ In 1994, military enforcement measures were authorised to reverse the military coup against the democratically elected government of Haiti: S/Res/940, 31 July 1994. See also the discussion in Franck, *Recourse to Force* (2003) at 42-44 where he notes that the UN has deployed military and/or police force in Congo, Somalia, Haiti, East Timor, Namibia, Cambodia and Mozambique to neutralise or disarm factions.

¹¹⁶ For a discussion of the legal basis for the use of force against Iraq, see, *inter alia*, Maogoto, *J Battling Terrorism* (2005) esp 111-124; McGoldrick, *D From '9-11' to the Iraq War 2003 – International Law in an Age of Complexity* (2004); Kelly, *supra* n25; Conte *Security in the 21st Century* (2005) esp at 139-161; McCormack "The Use of Force" in Blay, Piotrowicz and Tsamenyi (ed) *Public International Law* (2005) *supra* n95; Wall, A "The Legal Case for Invading Iraq and Toppling Hussein" (2002) 32 *IYHR* 165.

¹¹⁷ UN Doc S/2001/946, Letter dated 7 October 2001 from the Permanent Representative of the US to the UN addressed to the President of the Security Council, reproduced in Appendix 18.

discussed above and in chapter 10, that anticipatory self-defence was a key plank in the US and the UK's justifications for the use of force against Afghanistan. Again, anticipatory self-defence was put forward as one of the key justifications for the use of military force against Iraq in 2003.¹¹⁸ In March 2003, when the US reported to the Security Council on the legal justifications for using force against Iraq, there was once again a reference to using military force in order to pre-empt future threats.¹¹⁹ It is argued that such a contentious claim was able to be made and acted upon in 2003 by virtue of the fact that it had been put forward and acted upon in 2001 without any, or any significant, objection from the international community or, in particular, from the Security Council.

The ramifications of allowing the 2001 precedent to stand were further demonstrated in July 2006 when Israel invaded Lebanon, again on the pretext of 'self-defence.'¹²⁰ The use of force by Israel in 2006 is particularly alarming in terms of providing an insight into how the Afghanistan intervention may be used in the future. Israel alleged that it was acting in self-defence when it used military force against southern Lebanon. The Israeli Prime Minister, Ehud Olmert, said Israel was using "the basic elementary right of self-defence"¹²¹ when it launched its military offensive. It referred to the "barrage of heavy artillery and rockets into Israel" and the alleged kidnapping of two Israeli soldiers by non-state actors from Hezbollah as a "belligerent act of war".¹²² Israel alleged that responsibility lay with the Government of Lebanon, "from whose territory these acts have been launched", and also with the Islamic Republic of Iran and the Syrian Arab Republic, "which support and embrace those who carried out this attack."¹²³ Israel described those governments as "an Axis of Terror"¹²⁴ and alleged that they had "opened another chapter in their war of terror."¹²⁵ Israel claimed that its response was an act of self-defence in accordance with Article 51 of the UN

¹¹⁸ Anticipatory self-defence was not the *only* justification put forward. It was alleged that Iraq was in material breach of its disarmament obligations under resolution 1441 (2002) and it was also alleged that the military action was authorised by earlier UN Security Council resolutions, namely, resolution 678 (1990) and 687 (1991): *ibid*, see also Goldsmith, L "Iraq: Resolution 1441' Secret Memo to the Prime Minister, 7 March 2002, available at:

<http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/annex_a_-_attorney_general's_advice_070303.pdf> (accessed 22 June 2007)

¹¹⁹ UN Doc S/2003/351, Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (21 March 2003). The letter, signed by John Negroponte, asserts that "The actions that coalition forces are undertaking are an appropriate response. They are necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area."

¹²⁰ See Identical Letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, signed by Dan Gillerman, reproduced in Appendix 20.

¹²¹ Reuters, Associated Press, Telegraph Group Ltd, "Self defence is our right" *The New Zealand Herald* 26 July 2006, B1.

¹²² Identical Letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations, reproduced in Appendix 20.

¹²³ *Ibid*.

¹²⁴ *Ibid*.

¹²⁵ *Ibid*.

Charter and it alleged that it was entitled to “exercise its right of self-defence when an armed attack is launched against a Member of the United Nations.”¹²⁶

Israel’s justification for using force against Lebanon seems to have been inspired by President Bush’s National Security Strategy of 2002, discussed in chapters 9 and 10, which itself was the policy underpinning the use of force against Afghanistan.¹²⁷ The parallels between Afghanistan in 2001 and Lebanon in 2006 are evident in the sense that in both cases, isolated terrorist attacks were alleged to have been ‘armed attacks’, and governments whose territory was allegedly used by the terrorists were themselves directly implicated as being legitimate targets for military reprisal. One scholar who has directly connected President Bush’s National Security Strategy to Israel’s use of force against Lebanon, Anthony D’Amato, argues that:¹²⁸

The community of nations quickly reached consensus as to the validity of this strategy under international law. Hardly any nation has voiced an objection. We may safely say that the Bush Doctrine is Israel’s legal justification for the bombardment it is inflicting upon Lebanon.

Whether D’Amato is correct when he asserts that the Bush doctrine of pre-emption is considered a valid strategy in international law is open to debate. What is clear is that Israel essentially relied upon the justifications for the use of force which the US and the UK relied upon when they invaded Afghanistan in 2001. Had Israel been mindful of the precedent set by the US and the UK in relation to Afghanistan, Israel could arguably have legitimately targeted the governments of Lebanon, and potentially also Syria and Iran. It is contended that Israel could have relied upon the invasion of Afghanistan as a precedent for a military invasion of those sovereign states, had it had the desire and the means to do so, since those states allegedly had terrorists operating from within their borders just as the Taliban had ‘allowed’ terrorists to operate from the territory that it controlled prior to 11 September 2001, and according to Israel they had “supported” or “embraced” those alleged terrorists, as had the Taliban regime.

Allowing the use of force against Afghanistan to stand as an example of the legitimate exercise of self-defence is unfortunate for international law, for the enduring role of the United Nations and especially the Security Council, and for

¹²⁶ Ibid.

¹²⁷ See discussion of the US’ National Security Strategy in chapter 10.

¹²⁸ D’Amato, A “International Law Aspects of the Mideast ‘War’” JURIST – Forum 18 July 2006, available at: <<http://jurist.law.pitt.edu/forumy/2006/07/international-law-aspects-of-mideast.php>> (accessed 21 June 2007).

civilians who happen to live within states whose territory - or part thereof - might be used for training purposes by private individuals who later commit acts of international terrorism. More than anything, this use of force, if left unchallenged, would seriously undermine international peace and security and the UN Charter's ability to prevent states from unilaterally resorting to force. If President Bush was correct when he claimed that there are "thousands of these terrorists in more than 60 countries"¹²⁹ and that al Qaeda is "linked to many other organisations including the Egyptian Islamic Jihad in Egypt and the Islamic Movement of Uzbekistan",¹³⁰ the virtually unlimited potential for the unilateral resort to force under the pretext of 'self-defence' is as equally significant as it is disconcerting. The potentially unlimited nature of the use of force in self-defence following the use of force against Afghanistan was reiterated by President Bush when he stated that the "war on terror...will not end until every terrorist group of global reach has been found, stopped and defeated."¹³¹ Thus, the US has indicated its intention to exercise a virtually unlimited right to self-defence. In this context, the Security Council must engage itself actively to maintain peace and security.¹³² As other scholars have observed, "inaction by the Security Council will lead to further erosion of its regulation of the use of force."¹³³

As discussed earlier, the use of force has been held up by some publicists, such as Michael Kelly, as an example of the resurrection of the reprisal doctrine. In the interests of enhancing global peace and security, the international community must reiterate that all uses of force which are undertaken outside of the parameters of the Charter are unacceptable and unlawful: acts of terrorism must be condemned but so also must acts of reprisal in revenge. The use of force in anticipatory self-defence, when the attack is non-imminent, must likewise be consistently condemned as unlawful.

One of the recurring themes throughout this thesis has been the need to be both aware of, and to learn from, the past. This is not a novel idea¹³⁴ but its importance deserves reiteration. Recently, calls have emanated from Israel that it is

¹²⁹ President George W Bush, Address to a Joint Session of Congress and the American People, 20 September 2001, available at: <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (accessed 1 July 2007), reproduced at Appendix 16.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² See Myjer, E and White, N "The Twin Towers Attack: An Unlimited Right to Self-Defence?" (2002) 7(1) *JCSL* 5 at 16.

¹³³ Ibid.

¹³⁴ See, for instance, Ago, R "The First International Communities in the Mediterranean World" (1982) 53 *BYIL* 213, cited in chapter 1. See also Bothe, *supra* n103 at 238; Kelly, *supra* n25.

considering a pre-emptive strike against Iran within the next two years in order to remove its nuclear weapons capability.¹³⁵ Israel's pre-emptive strike against the Iraqi nuclear reactor, 'Osirak', in 1981, was discussed in chapter 9. It was universally condemned by the international community as an unlawful use of force. Given that the Security Council has demonstrated an increasingly permissive attitude towards the use of force by states since that time, it is difficult to determine whether the international community would act to prevent another unlawful use of force by Israel, or whether, in the event of history repeating itself, the Security Council would again react to unanimously condemn any such resort to force. Given the precedent set in Afghanistan, which paved the way for the use of force against Iraq in 2003 and against Lebanon in 2006, it is submitted that the international community must address the unlawful and unilateral use, or threat, of force by states which consider that their security is threatened.

It seems clear to this author, and to others, that the Security Council has failed to "engage itself actively to maintain peace and security".¹³⁶ Thus, although the Security Council's authority and the rule of law are no doubt under threat from militarily powerful states, the Council itself must shoulder some of the responsibility for neglecting its primary duty which is to restore and maintain peace and security.¹³⁷ The Security Council must reassert its power by taking a clear position on the use of force by states in purported self-defence. As Myjer and White have observed, the current trend is towards a simultaneous erosion of the Security Council authority under chapter VII and a purported widening of the exceptions to the prohibition on the use of force embodied in Article 2(4) of the Charter.¹³⁸ These two developments are a real and present danger not only to the future role and authority of the Security Council but also to global peace and security.

This thesis has focused mainly upon the legality of the use of force against Afghanistan. It has been argued throughout that this was an unlawful use of force which breached existing rules of international law, rather than an instance in which a new development in international law was instantly forged. Although it

¹³⁵ See comments of Dr Zvi Shtauber, director of Tel Aviv University's Institute for National Security Studies. Shtauber was quoted as saying that "You don't have to attack all the sites...you can attack a couple of them": Silver, E "Analyst fuels talk of pre-emptive strike" *The New Zealand Herald*, 9 January 2007, B2.

¹³⁶ Myjer and White, *supra* n132 at 16.

¹³⁷ *Ibid.* Myjer and White argue that, "Erosion of Security Council authority to deal with situations that fall within chapter VII appears to have become, either by accident or design, part of the policy of powerful states, particularly the United States."

¹³⁸ *Ibid.*

is perhaps still too early to conclude definitively whether 2001 will mark the beginning of a new era in international law, the current signs are that it will not. Since 2001, there have been several other significant terrorist attacks which have come to the attention of the Security Council.¹³⁹ In each instance, the Security Council has condemned such acts of terrorism as a threat to peace and security, and, where appropriate, *international* peace and security, just as it did post-9/11.¹⁴⁰ It is significant that in not one of those resolutions since 2001 has the Security Council referred to the “inherent right of self-defence”, the phrase to which so much significance was attached in the context of justifying the use of force against Afghanistan.¹⁴¹ This may be interpreted as a sign that the Security Council does not consider that a state which has been affected by an act of terrorism has a right to use force in self-defence, as a matter of course.¹⁴² It may also be interpreted as a deliberate attempt to soften the perception that in September 2001 new international law was instantly created whereby any state that suffers a terrorist attack is entitled to retaliate by using force in exercising its ‘inherent right of individual or collective self-defence’. This series of post-9/11 resolutions underlines the point which has been made throughout this thesis: that the use of force against Afghanistan in purported self-defence was not a legitimate exercise of that right, nor was it an instance in which new customary law was created, despite the “recognition” and “reaffirmation” by the Security Council that the right to self-defence exists. The Security Council’s resolutions confirm that there is no new right to use unilateral force in response to a terrorist attack, be it international or otherwise, and furthermore, states have not exercised such a right in the intervening years. On the contrary, the Security Council resolutions which have been passed since September 2001 regarding the threat posed by terrorism confirm that this is a threat to international peace and security, that states ought to

¹³⁹ For instance, the bomb attacks in Bali, Indonesia on 12 October 2002; the hostage-taking in Moscow on 23 October 2002; the bomb attack in Kikambala, Kenya and the attempted missile strike on Arkia Israeli Airlines flight 582 departing Mombassa, Kenya on 28 November 2002; the bomb attack in Bogota, Colombia on 7 February 2003; bomb attacks in Istanbul, Turkey on 15 and 20 November 2003; bomb attacks perpetrated by ETA in Madrid, Spain on 11 March 2004; the terrorist attacks in London on 7 July 2005; and terrorist attacks in Iraq during 2005.

¹⁴⁰ For instance, see UN Doc S/Res/1438 (2002), condemning the Bali bombings; UN Doc S/Res/1440 (2002), condemning the Moscow hostage-taking; UN Doc S/Res/1450 (2002) condemning the incidents in Kenya; UN Doc S/Res/1465 (2003) condemning the Colombia bombings; UN Doc S/Res/1516 (2003), condemning the attacks in Turkey; UN Doc S/Res/1530 (2004), condemning the attacks in Spain; UN Doc S/Res/1611 (2005) condemning the London bombings; and UN Doc S/Res/1618 (2005) regarding the attacks in Iraq. Compare those resolutions with the wording of UN Doc S/Res/1368 (2001) and UN Doc S/Res/1373 (2001): in each of the latter resolutions, there was a preambular paragraph respectively “recognising” and “reaffirming” the inherent right to self-defence.

¹⁴¹ Recall the argument canvassed in chapter 10 where it was discussed that many scholars consider the references to the inherent right of self-defence in S/Res/1368 (2001) and S/Res/1373 (2001) as proof that the US and the UK were entitled to use force against Afghanistan.

¹⁴² Gray has observed that “This failure to refer to self-defence...seems significant. It may be an indication that the right to use force in self-defence against past terrorist acts may remain exceptional, perhaps available only in cases of attacks on territory rather than on nationals abroad.”: Gray, C “A New War for a New Century?” in Eden, P and O’Connell, T (ed) *September 11, 2001 – A Turning Point in International and Domestic Law* (New York: Transnational Publishers, 2005) 113.

find and bring to justice the perpetrators, organisers and sponsors of such attacks¹⁴³ and that the primary responsibility for maintaining international peace and security lies with the Security Council.¹⁴⁴

In conclusion, this thesis has sought to demonstrate through a comprehensive historical analysis that the UN Charter is the culmination of hundreds, or more accurately, thousands, of years of evolution and development in inter-state relations. For thousands of years, at least since the time of the ancient Greeks, states have used force for a variety of reasons but have shown an enduring desire to justify the resort to force, to make it seem ‘just’. Tribes, ethnic and religious groups, and states have long-recognised that peace is the ultimate objective for mankind, but they have struggled over the way in which force must still remain an option, reserved for use in limited circumstances. It has been acknowledged that even at the height of positivism, when morality and ‘just war’ doctrine was supposedly rendered irrelevant, both scholars and statesmen continued to refer to the ‘justness’ of their causes. President Bush, operating under a different paradigm to statesmen of the past, nevertheless showed a desire to be on the side of ‘justice’ when he expressed the US’ intended response to the terrorist attacks of 11 September 2001.¹⁴⁵

This thesis has also acknowledged that the use of force is more tightly constrained as a result of the UN Charter than it ever was previously. The Charter represents the most recent embodiment of that historical desire to restrain the resort to force. However, the use of force against Afghanistan, and the justifications which were put forward by the US and the UK to support that use of force, challenges the basic tenets of the Charter. The hard-won gains that limit the resort to force essentially to two situations (when sanctioned by the Security Council or in self-defence) are being directly challenged. If the Charter’s prohibitions on the resort to force *are* outdated as alleged, somewhat unconvincingly, by some statesmen,¹⁴⁶ then there ought to be an open debate on proposed amendments to the Charter. As it stands, the use of force against Afghanistan, followed closely by the use of force

¹⁴³ See UN Doc S/Res/1438 (2002); UN Doc S/Res/1440 (2002); UN Doc S/Res/1450 (2002); UN Doc S/Res/1465 (2003); UN Doc S/Res/1516 (2003); UN Doc S/Res/1530 (2004); UN Doc S/Res/1611 (2005); and UN Doc S/Res/1618 (2005).

¹⁴⁴ For instance, see UN Doc S/Res/1624 (2005), third preambular paragraph; UN Doc S/Res/1735 (2006), second preambular paragraph.

¹⁴⁵ “Freedom and fear, justice and cruelty, have always been at war, and we know that God is not neutral between them...Fellow citizens, we’ll meet violence with patient justice – assured of the rightness of our cause, and confident of the victories to come.”: President George W Bush, Address to a Joint Session of Congress and the American People, *supra* n129.

¹⁴⁶ See chapter 9.

against Iraq and then Lebanon, suggests that Athenian imperialism may not have been consigned to history after all. We may be entering a new age when once again “the strong do all they can and the weak suffer what they must.”¹⁴⁷

¹⁴⁷ Thucydides, *The History of the Peloponnesian War*, Book V, Chapter XVII; see chapter 1, n1.

Appendix 1

NEW ZEALAND LEGISLATION

New Zealand Security Intelligence Act 1969, s 2

2. "**Terrorism**" means planning, threatening, using, or attempting to use violence to coerce, deter, or intimidate—
- (a) The lawful authority of the State in New Zealand; or
 - (b) The community throughout New Zealand or in any area in New Zealand for the purpose of furthering any political aim.'

Immigration Act 1987, s 2

2 Interpretation

(1) In this Act, unless the context otherwise requires,—

Act of terrorism means—

- (a) Any act that involves the taking of human life, or threatening to take human life, or the wilful or reckless endangering of human life, carried out for the purpose of furthering an ideological aim; or
- (b) Any act involving any explosive or incendiary device causing or likely to cause the destruction of, or serious damage to, any premises, building, installation, vehicle, or property of a kind referred to in any of sections 298 to 304, except subsection (3) of section 298, of the Crimes Act 1961, carried out for the purpose of furthering an ideological aim; or
- (c) Any act that constitutes, or that would, if committed in New Zealand, constitute, a crime against section 79 of the Crimes Act 1961, carried out for the purpose of furthering an ideological aim; or
- (d) Any act that constitutes, or that would, if committed in New Zealand, constitute, an offence against any of the provisions of the Aviation Crimes Act 1972 or the Crimes (Internationally Protected Persons and Hostages) Act 1980 [or the Maritime Crimes Act 1999 or against section 7(1) or [[section 8(1) or (2A)]] of the Terrorism Suppression Act 2002];— and includes the planning of any such act:

Terrorism Suppression Act 2002

4. Interpretation

terrorist act in armed conflict means an act—

- (a) that occurs in a situation of armed conflict; and
- (b) the purpose of which, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act; and
- (c) that is intended to cause death or serious bodily injury to a civilian or other person not taking an active part in the hostilities in that situation; and
- (d) that is not excluded from the application of the Financing Convention by article 3 of that Convention

terrorist bombing means an offence against section 7(1)

5. Terrorist act defined -

- (1) An act is a "terrorist act" for the purposes of this Act if
 - (a) the act falls within subsection (2); or
 - (b) the act is an act against a specified terrorism convention (as defined in section 4(1)); or
 - (c) the act is a terrorist act in armed conflict (as defined in section 4(1)).
- (2) An act falls within this subsection if it is intended to cause, in any 1 or more countries, 1 or more of the outcomes specified in subsection (3), and is carried out for the purpose of advancing an ideological, political, or religious cause, and with the following intention:
 - (a) to induce terror in a civilian population; or
 - (b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act.

- (3) The outcomes referred to in subsection (2) are-
 - (a) the death of, or serious bodily injury to, 1 or more persons (other than a person carrying out the act);
 - (b) a serious risk to the health or safety of a population;
 - (c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d);
 - (d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life;
 - (e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.
- (4) However, an act does not fall within subsection (2) if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.
- (5) To avoid doubt, the fact that a person engages in protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that the person-
 - (a) is carrying out an act for a purpose, or with an intention, specified in subsection (2); or
 - (b) intends to carry out an outcome specified in subsection (3).

7. Terrorist bombing

- (1) A person commits an offence who, intentionally and without lawful justification or excuse, delivers, places, discharges, or detonates an explosive or other lethal device in, into, or against a relevant place, facility, or system, with the intent to cause—
 - (a) death or serious bodily injury; or
 - (b) extensive destruction—
 - (i) of the relevant place, facility, or system; and
 - (ii) that results, or is likely to result, in major economic loss.
- (2) In subsection (1), **relevant place, facility, or system** means—
 - (a) a place of public use;
 - (b) a State or government facility;
 - (c) a public transportation system;
 - (d) an infrastructure facility.
- (3) A person who commits terrorist bombing is liable on conviction on indictment to imprisonment for life or a lesser term.

Appendix 2

AUSTRALIAN LEGISLATION

Criminal Code Act 1995 – Schedule

Division 72 — International terrorist activities using explosive or lethal devices

72.1 Purpose

The purpose of this Division is to create offences relating to international terrorist activities using explosive or lethal devices and give effect to the International Convention for the Suppression of Terrorist Bombings, done at New York on 15 December 1997.

72.2 ADF members not liable for prosecution

Nothing in this Division makes a member of the Australian Defence Force acting in connection with the defence or security of Australia liable to be prosecuted for an offence.

72.3 Offences

(1) A person commits an offence if:

- (a) the person intentionally delivers, places, discharges or detonates a device; and
- (b) the device is an explosive or other lethal device and the person is reckless as to that fact; and
- (c) the device is delivered, placed, discharged, or detonated, to, in, into or against:
 - (i) a place of public use; or
 - (ii) a government facility; or
 - (iii) a public transportation system; or
 - (iv) an infrastructure facility; and
- (d) the person intends to cause death or serious harm.

Criminal Code Act 1995 - Schedule

Part 5.3 — Terrorism

Division 100 — Preliminary

100.1 Definitions

(1) In this Part:

...

terrorist act means an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (3); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.

...

(2) Action falls within this subsection if it:

- (a) causes serious harm that is physical harm to a person; or
- (b) causes serious damage to property; or
- (c) causes a person's death; or
- (d) endangers a person's life, other than the life of the person taking the action; or
- (e) creates a serious risk to the health or safety of the public or a section of the public; or
- (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or
 - (ii) a telecommunications system; or
 - (iii) a financial system; or
 - (iv) a system used for the delivery of essential government services; or
 - (v) a system used for, or by, an essential public utility; or
 - (vi) a system used for, or by, a transport system.

(3) Action falls within this subsection if it:

- (a) is advocacy, protest, dissent or industrial action; and
- (b) is not intended:
 - (i) to cause serious harm that is physical harm to a person; or
 - (ii) to cause a person's death; or
 - (iii) to endanger the life of a person, other than the person taking the action; or
 - (iv) to create a serious risk to the health or safety of the public or a section of the public.

(4) In this Division:

- (a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and
- (b) a reference to the public includes a reference to the public of a country other than Australia.

Appendix 3

UNITED KINGDOM LEGISLATION

Terrorism Act 2000

Part 1

- (1) In this Act "terrorism" means the use or threat of action where-
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- (2) Action falls within this subsection if it-
 - (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person's life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
- (4) In this section-
 - (a) "action" includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
 - (d) "the government" means the government of the United Kingdom, or a Part of the United Kingdom or of a country other than the United Kingdom.

Appendix 4

CANADIAN LEGISLATION

Criminal Code 1985

2. In this Act,

“terrorism offence” means

- (a) an offence under any of sections 83.02 to 83.04 or 83.18 to 83.23,
- (b) an indictable offence under this or any other Act of Parliament committed for the benefit of, at the direction of or in association with a terrorist group,
- (c) an indictable offence under this or any other Act of Parliament where the act or omission constituting the offence also constitutes a terrorist activity, or
- (d) a conspiracy or an attempt to commit, or being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a), (b) or (c);

“terrorist activity” has the same meaning as in subsection 83.01(1);

“terrorist group” has the same meaning as in subsection 83.01(1);

83.01 (1) The following definitions apply in this Part.

“terrorist activity” means

- (a) an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences:
 - (i) the offences referred to in subsection 7(2) that implement the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970,
 - (ii) the offences referred to in subsection 7(2) that implement the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971,
 - (iii) the offences referred to in subsection 7(3) that implement the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on December 14, 1973,
 - (iv) the offences referred to in subsection 7(3.1) that implement the International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17, 1979,
 - (v) the offences referred to in subsection 7(3.4) or (3.6) that implement the Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on March 3, 1980,
 - (vi) the offences referred to in subsection 7(2) that implement the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on February 24, 1988,
 - (vii) the offences referred to in subsection 7(2.1) that implement the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988,

- (viii) the offences referred to in subsection 7(2.1) or (2.2) that implement the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on March 10, 1988,
 - (ix) the offences referred to in subsection 7(3.72) that implement the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997, and
 - (x) the offences referred to in subsection 7(3.73) that implement the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on December 9, 1999, or
- (b) an act or omission, in or outside Canada,
- (i) that is committed
 - (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and
 - (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and
 - (ii) that intentionally
 - (A) causes death or serious bodily harm to a person by the use of violence,
 - (B) endangers a person's life,
 - (C) causes a serious risk to the health or safety of the public or any segment of the public,
 - (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or
 - (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

“terrorist group” means

- (a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or
- (b) a listed entity,

and includes an association of such entities

- (1.1) For greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition “terrorist activity” in

subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph

- (2) For the purposes of this Part, facilitation shall be construed in accordance with subsection 83.19(2).

Appendix 5A

UNITED STATES OF AMERICA (FEDERAL)

United States Code, Title 18,

Section 2331. Definitions

As used in this chapter –

- (1) the term "international terrorism" means activities that -
 - (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
 - (B) appear to be intended -
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
 - (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;
- (2) the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act;
- (3) the term "person" means any individual or entity capable of holding a legal or beneficial interest in property;
- (4) the term "act of war" means any act occurring in the course of -
 - (A) declared war;
 - (B) armed conflict, whether or not war has been declared, between two or more nations; or
 - (C) armed conflict between military forces of any origin; and
- (5) the term "domestic terrorism" means activities that -
 - (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
 - (B) appear to be intended -
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
 - (C) occur primarily within the territorial jurisdiction of the United States.

Appendix 5B

UNITED STATES OF AMERICA (STATE)

Massachusetts

Annotated Laws of Massachusetts, GL ch 258C, §1 (2006):

"The definition of a "crime" includes...acts of "terrorism, as defined in 18 USC 2331, occurring outside the United States or territories against a resident of the commonwealth."

Washington

Revised Code of Washington, §7.68.020(2) (2006):

"'Criminal act' means...an act of terrorism as defined in 18 U.S.C. Sec 2331...committed outside of the United States against a resident of the state of Washington..."

California

Cal Gov Code § 8549.2 (2006)

"**Act of terrorism**" means any unlawful harm, attempted harm, or threat to do harm to, any state employee, state property, or the person or property of any person on the premises of any state-occupied building or other property leased or owned by the state.

Cal Gov Code § 13951 (2006)

(2) "Crime" includes an **act of terrorism**, as defined in Section 2331 of Title 18 of the United States Code, committed against a resident of the state, whether or not the act occurs within the state.

Illinois

§ 720 ILCS 5/29D-10 (2006)

(l) "Terrorist act" or "**act of terrorism**" means:

- (1) any act that is intended to cause or create a risk and does cause or create a risk of death or great bodily harm to one or more persons;
- (2) any act that disables or destroys the usefulness or operation of any communications system;
- (3) any act or any series of 2 or more acts committed in furtherance of a single intention, scheme, or design that disables or destroys the usefulness or operation of a computer network, computers, computer programs, or data used by any industry, by any class of business, or by 5 or more businesses or by the federal government, State government, any unit of local government, a public utility, a manufacturer of pharmaceuticals, a national defense contractor, or a manufacturer of chemical or biological products used in or in connection with agricultural production;
- (4) any act that disables or causes substantial damage to or destruction of any structure or facility used in or used in connection with ground, air, or water transportation; the production or distribution of electricity, gas, oil, or other fuel (except for acts that occur inadvertently and as the result of operation of the facility that produces or distributes electricity, gas, oil, or other fuel); the treatment of sewage or the treatment or distribution of water; or controlling the flow of any body of water;
- (5) any act that causes substantial damage to or destruction of livestock or to crops or a series of 2 or more acts committed in furtherance of a single intention, scheme, or design which, in the aggregate, causes substantial damage to or destruction of livestock or crops;
- (6) any act that causes substantial damage to or destruction of any hospital or any building or facility used by the federal government, State government, any unit of local government or by a national defense contractor or by a public utility, a manufacturer of pharmaceuticals, a manufacturer of chemical or biological products used in or in connection with agricultural production or the storage or processing of agricultural products or the preparation of agricultural products for food or food products intended for resale or for feed for livestock;
- (7) any act that causes substantial damage to any building containing 5 or more businesses of any type or to any building in which 10 or more people reside;

- (8) endangering the food supply; or
- (9) endangering the water supply.

(m) "Terrorist" and "terrorist organization" means any person who engages or is about to engage in a terrorist act with the intent to intimidate or coerce a significant portion of a civilian population.

Michigan

Mich Penal Code § 750.543b.

Sec. 543b. As used in this chapter:

- (a) "Act of terrorism" means a willful and deliberate act that is all of the following:
 - (i) An act that would be a violent felony under the laws of this state, whether or not committed in this state.
 - (ii) An act that the person knows or has reason to know is dangerous to human life.
 - (iii) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.
- (b) "Dangerous to human life" means that which causes a substantial likelihood of death or serious injury ...
- ...
- (e) "Person" means an individual, agent, association, charitable organization, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee, trustee in bankruptcy, unincorporated organization, or any other legal or commercial entity.
- ...
- (g) "Terrorist" means any person who engages or is about to engage in an act of terrorism.

New Jersey

N.J. Stat. § 2C:38-2 (2006) New Jersey Code of Criminal Justice

§ 2C:38-2. Crime of terrorism;

- a. A person is guilty of the **crime of terrorism** if he commits or attempts, conspires or threatens to commit any crime enumerated in subsection c. of this section with the purpose:
 - (1) to promote an act of terror; or
 - (2) to terrorize five or more persons; or
 - (3) to influence the policy or affect the conduct of government by terror; or
 - (4) to cause by an act of terror the impairment or interruption of public communications, public transportation, public or private buildings, common carriers, public utilities or other public services.
- c. The crimes encompassed by this section are: murder...; aggravated manslaughter...; vehicular homicide...; aggravated assault...; disarming a law enforcement officer...; kidnapping...; criminal restraint...; robbery...; carjacking...; aggravated arson...; causing or risking widespread injury or damage...; damage to nuclear plant with the purpose to cause or threat to cause release of radiation...; damage to nuclear plant resulting in death by radiation...; damage to nuclear plant resulting in injury by radiation...; producing or possessing chemical weapons, biological agents or nuclear or radiological devices...; burglary...; possession of prohibited weapons and devices...; possession of weapons for unlawful purposes...; unlawful possession of weapons...; weapons training for illegal activities...; racketeering...; and any other crime involving a risk of death or serious bodily injury to any person.
- d. Definitions. For the purposes of this section
- ...
- "Terror" means the menace or fear of death or serious bodily injury.
- "Terrorize" means to convey the menace or fear of death or serious bodily injury by words or actions

New York

NY CLS Penal § 490.25 (2006)

§ 490.25 Crime of terrorism

- 1. A person is guilty of a crime of terrorism when, with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she commits a specified offense.

NY CLS Exec § 621 (2006) Executive Law, Article 22, Crime Victims Board

§ 621. Definitions

For the purposes of this article:

- 3. "Crime" shall mean

...

(c) an **act of terrorism**, as defined in section 2331 of title 18, United States Code, committed outside of the United States against a resident of New York state

Ohio

ORC Ann. 2909.21 (2006)

§ 2909.21. Definitions

(A) "Act of terrorism" means an act that is committed within or outside the territorial jurisdiction of this state or the United States, that constitutes a specified offense if committed in this state or constitutes an offense in any jurisdiction within or outside the territorial jurisdiction of the United States containing all of the essential elements of a specified offense, and that is intended to do one or more of the following:

- (1) Intimidate or coerce a civilian population;
- (2) Influence the policy of any government by intimidation or coercion;
- (3) Affect the conduct of any government by the act that constitutes the offense.

Oklahoma

21 Okl. St. § 142.3 (2005)

5. c. "Criminally injurious conduct" shall include an **act of terrorism**, as defined in Section 2331 of Title 18, United States Code, committed outside the United States;

25 Okl. St. § 307 (2005)

§ 307. Executive sessions...

B. Executive sessions of public bodies will be permitted only for the purpose of:

...

9. Discussing the following:

- a. the investigation of a plan or scheme to commit an **act of terrorism**,

...

For the purposes of this subsection, the term "terrorism" means any act encompassed by the definitions set forth in [Section 1268.1 of Title 21 of the Oklahoma Statutes](#).

21 Okl. St. § 1268.1 (2005)

As used in this act:

...

2. "Terrorism" means an act of violence resulting in damage to property or personal injury perpetrated to coerce a civilian population or government into granting illegal political or economic demands; or conduct intended to incite violence in order to create apprehension of bodily injury or damage to property in order to coerce a civilian population or government into granting illegal political or economic demands. Peaceful picketing or boycotts and other nonviolent action shall not be considered terrorism;

...

5. "Terrorist activity" means to plan, aid or abet an act of terrorism or aid or abet any person who plans or commits an act of terrorism.

Virginia

Va. Code Ann. § 18.2-46.4 (2006)

"Act of terrorism" means an act of violence as defined in clause (i) of subdivision A of [§ 19.2-297.1](#) committed with the intent to (i) intimidate the civilian population at large; or (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation.

Va. Code Ann. § 19.2-297.1 (2006)

A... "act of violence" means (i) any one of the following...

- a. First and second degree murder and voluntary manslaughter...
- b. Mob-related felonies...
- c. Any kidnapping or abduction felony...
- d. Any malicious felonious assault or malicious bodily wounding...
- e. Robbery...and carjacking...
- f. ...criminal sexual assault...or
- g. Arson...when the structure burned was occupied...

Appendix 6

INTERNATIONAL CONVENTIONS

MULTILATERAL

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973, entry into force 20 February 1977, UNTS vol 1035, No I-15410.

International Convention Against the Taking of Hostages, New York, 17 December 1979, entry into force 3 June 1983, UNTS I-21931.

International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997, UNTS I-37517.

International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, UNTS I-38349.

Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September 1963, entered into force 4 December 1969, UNTS vol 704, No I-10106.

Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970, UNTS I-12325.

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal, 23 September 1971, UNTS I-14118.

Convention on the Physical Protection of Nuclear Material, Vienna, 3 March 1980 and New York, 3 March 1980, UNTS I-24631.

Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal, 24 February 1988.

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, 10 March 1988 (Maritime Safety Convention).

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 10 March 1988 (Fixed Platforms Protocol).

Convention on the marking of Plastic Explosives for the Purpose of Detection, Montreal, 1 March 1991 (Plastic Explosives Convention).

REGIONAL

Organization of American States (OAS) Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, Washington D.C., 2 February 1971, entered into force on 16 October 1973, UNTS No 24381, vol 1438.

European Convention on the Suppression of Terrorism, Strasbourg, 27 January 1977, UNTS vol 1137, No I-17828.

South-Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism, 1987 (Secretary-General of the SAARC).

Arab Convention on the Suppression of Terrorism, 1998 (League of Arab States).

Convention of the Organization of the Islamic Conference on Combating Terrorism, 1999 (Organization of the Islamic Conference).

Treaty on Cooperation among States members of the Commonwealth of Independent States in Combating Terrorism, 1999 (Secretariat of the CIS).

Organization of African Unity Convention on the Prevention and Combating of Terrorism, 1999 (General Secretariat of the OAU).

Inter-American Convention against Terrorism, 2002.

Protocol Amending the European Convention on the Suppression of Terrorism, 2003.

Appendix 7

DRAFT COMPREHENSIVE CONVENTION ON INTERNATIONAL TERRORISM (EXTRACTS)

Article 2(1)

Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, does an act intended to cause:

- (a) Death or serious bodily injury to any person; or
- (b) Serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility with the intent to cause extensive destruction of such a place, facility or system, or where such destruction results or is likely to result in major economic loss;
when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

Article 18

1. *Nothing in this Convention shall affect other rights, obligations, and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.*
2. The activities of armed forces during an armed conflict, as those terms are understood under international law, which are governed by that law, are not governed by this Convention, and the activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

Appendix 8

THE COVENANT OF THE LEAGUE OF NATIONS (EXTRACTS)

THE HIGH CONTRACTING PARTIES,

In order to promote international co-operation and to achieve international peace and security

by the acceptance of obligations not to resort to war,
by the prescription of open, just and honourable relations between nations,
by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and
by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another,

Agree to this Covenant of the League of Nations.

...

ARTICLE 10

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

ARTICLE 11

Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council.

It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

ARTICLE 12

The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.

ARTICLE 13

The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or judicial settlement and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement.

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement.

For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with [Article 14](#), or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.

The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto.

ARTICLE 14

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

ARTICLE 15

If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary General, who will make all necessary arrangements for a full investigation and consideration thereof.

For this purpose the parties to the dispute will communicate to the Secretary General, as promptly as possible, statements of their case with all the relevant facts and papers, and the Council may forthwith direct the publication thereof.

The Council shall endeavour to effect a settlement of the dispute, and if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

Any Member of the League represented on the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

If a report by the Council is unanimously agreed to by the members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

The Council may in any case under this Article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute, provided that such request be made within fourteen days after the submission of the dispute to the Council.

In any case referred to the Assembly, all the provisions of this Article and of [Article 12](#) relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that a report made by the Assembly, if concurred in by the Representatives of those Members of the League represented on the

Council and of a majority of the other Members of the League, exclusive in each case of the Representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the members thereof other than the Representatives of one or more of the parties to the dispute.

ARTICLE 16

Should any Member of the League resort to war in disregard of its covenants under [Articles 12, 13 or 15](#), it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

Appendix 9

GENERAL PACT FOR THE RENUNCIATION OF WAR (also known as the Pact of Paris and the Kellogg-Briand Pact) Signed at Paris, 27 August 1928

The President of the German Reich, the President of the United States of America, His Majesty the King of the Belgians, the President of the French Republic, His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Poland, the President of the Czechoslovak Republic

Deeply sensible of their solemn duty to promote the welfare of mankind;

Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated

Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process and that any signatory power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty

Hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavor and by adhering to the present treaty as soon as it comes into force bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy;

Have decided to conclude a treaty and for that purpose have appointed as their respective plenipotentiaries:

...

ARTICLE 1

The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

ARTICLE 2

The high Contracting parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

ARTICLE 3

...

Appendix 10

UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION (EXTRACTS)

Bolivia's suggestion for definition of an act of aggression:

- a) Invasion by armed force of a foreign territory.*
- b) Declaration of war.*
- c) An attack by land, sea or air forces.*
- d) Aid lent to armed bands for the purposes of invasion.*
- e) The intervention of a state in the internal or external policy of another.*
- f) Refusal to submit the cause of belligerence to the procedures of peaceful solution.*
- g) Refusal to comply with a decision pronounced by a court of international justice.*

Philippines' proposal for a definition of aggression:

Any nation should be considered as threatening the peace or as an aggressor, if it should be the first party to commit any of the following acts: (1) To declare war against another nation; (2) To invade or attack, with or without declaration of war, the territory, public vessel, or public aircraft of another nation; (3) To subject another nation to a naval, land or air blockade; and (4) To interfere with the internal affairs of another nation by supplying arms, ammunition, money or other forms of aid to any armed band, faction or group, or by establishing agencies in that nation to conduct propaganda subversive of the institutions of that nation.

United Nations Conference on International Organization, *Proposed Amendments to the Dumbarton Oaks Proposals Submitted by the Philippine Delegation* Doc 2 (English) G/14 (k) 5 may 1945, as reprinted in Ferencz at 322-327.

Appendix 11

CHARTER OF THE UNITED NATIONS (EXTRACTS)

Article 1(1)

The Purposes of the United Nations are:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Article 2(3)

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Article 2(4)

All members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any manner inconsistent with the Purposes of the United Nations.

Article 24(1)

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security...

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 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 the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Appendix 12

NATO TREATY (EXTRACT)

Article 5

The Parties agree that **an armed attack against one or more of them in Europe or North America shall be considered an attack against them all** and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security. (emphasis added)

Appendix 13

SECURITY COUNCIL RESOLUTION 1368 (2001)

**Adopted by the Security Council at its 4370th meeting, on
12 September 2001**

The Security Council,

Reaffirming the principles and purposes of the Charter of the United Nations,

Determined to combat by all means threats to international peace and security caused by terrorist acts,

Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,

1. *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security;

2. *Expresses* its deepest sympathy and condolences to the victims and their families and to the people and Government of the United States of America;

3. *Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;

4. *Calls also* on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999) of 19 October 1999;

5. *Expresses* its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations;

6. *Decides* to remain seized of the matter.

Appendix 14

SECURITY COUNCIL RESOLUTION 1373 (2001)

**Adopted by the Security Council at its 4385th meeting, on
28 September 2001**

The Security Council,

Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001,

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that all States shall:

(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or

generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. *Decides also* that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

3. *Calls upon* all States to:

(a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;

(b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;

(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

4. *Notes* with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard *emphasizes* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

5. *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

7. *Directs* the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General;

8. *Expresses* its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;

9. *Decides* to remain seized of this matter.

MEETING OF CONSULTATION OF MINISTERS OF FOREIGN AFFAIRS

THE ORGANIZATION OF AMERICAN STATES

TWENTY-THIRD MEETING OF CONSULTATION OEA
OF MINISTERS OF FOREIGN AFFAIRS
/Ser.F/II.23
RC.23/RES.1/01
September 21, 2001
Washington, D.C. Original: Spanish

**STRENGTHENING HEMISPHERIC COOPERATION TO PREVENT, COMBAT, AND ELIMINATE
TERRORISM**

(Resolution adopted at the first plenary session, held on September 21, 2001)

THE MEETING OF CONSULTATION OF THE MINISTERS OF FOREIGN AFFAIRS OF THE MEMBER
STATES OF THE ORGANIZATION OF AMERICAN STATES,

DEEPLY REGRETTING the terrorist attacks perpetrated against innocent persons from many nations that
took place in the territory of the United States of America on September 11, 2001;

REAFFIRMING the principles and provisions contained in the Charter of the Organization of American States
and the Charter of the United Nations.

RECALLING the resolutions adopted within the framework of the inter-American system for hemispheric
security and combating terrorism;

TAKING INTO ACCOUNT the resolutions of the General Assembly and the Security Council A/RES/56/1 and
S/RES/1368 (2001), of September 12, 2001, through which the United Nations strongly condemned the
terrorist attacks on the United States of America and called on all states to work together urgently to bring to
justice the perpetrators, organizers, and sponsors of these acts and to redouble their efforts to prevent and
suppress terrorist acts, as well as all the resolutions of the General Assembly and Security Council on the
means to prevent, combat, and eliminate international terrorism;

CONSIDERING the statement approved on September 11, 2001, by the twenty-eighth special session of the
General Assembly of the Organization of American States, which condemned in the strongest terms the
terrorist acts that occurred in the United States, which demonstrated the need to strengthen hemispheric
cooperation to combat this scourge and its full solidarity with the people and the Government of the United
States of America;

TAKING INTO ACCOUNT FURTHER that the Secretary General of the United Nations stated on September
12, 2001, that all nations of the world must be united in their solidarity with the victims of terrorism, and in
their determination to take action - both against the terrorists themselves and against all those who give them
any kind of shelter, assistance or encouragement;

BEARING IN MIND the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes
against Persons and Related Extortion That Are of International Significance;

RECALLING the Declaration of Principles of the Summits of the Americas of Miami, Santiago, and Quebec
City;

TAKING INTO ACCOUNT the Declaration of Lima to Prevent, Combat, and Eliminate Terrorism, as well as
the Plan of Action on Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism, adopted within
the framework of the First Inter-American Specialized Conference on Terrorism, in Lima, Peru, in April 1996;
as well as the Commitment of Mar del Plata, adopted by the Second Inter-American Specialized Conference
on Terrorism, which proposed to establish the Inter-American Committee against Terrorism, CICTE., and

provided "Guidelines for Inter-American Cooperation regarding Terrorist Acts and Activities" and "Measures to Eliminate Terrorist Fundraising";

BEARING IN MIND that the General Assembly, through its resolution AG/RES. 1650 (XXIX-O/99), "Hemispheric Cooperation to Prevent, Combat and Eliminate Terrorism", created CICTE.

REAFFIRMING the absolute rejection by the people and governments of the Americas of terrorist acts and activities, which endanger democracy and the security of the states of the Hemisphere;

RECOGNIZING the inherent right of individual and collective self-defense in accordance with the Charters of the Organization of American States and the United Nations;

CONVINCED that the response of the member states to the present situation requires the application or adoption, in accordance with their national law, of urgent measures at the national and international levels, to combat threats to peace, democracy and hemispheric security resulting from terrorist acts, and to bring to justice the perpetrators, organizers and sponsors of these acts, as well as those who aid, abet, or harbor them;

CONSIDERING ALSO that the Inter-American Democratic Charter, adopted at the twenty-eighth special session of the General Assembly on September 11, 2001, recognizes the commitment of the governments of the member states to promote and defend democracy, and that no democratic state can be indifferent to the clear threat that terrorism poses to democratic institutions and freedoms;

RECOGNIZING further that terrorist acts, and the climate of insecurity they generate, have highly damaging effects on international trade, the tourism industry, and investment capital flows, and therefore also represent a threat to the economic and financial stability, progress, and freedom from social unrest in the countries of our Hemisphere;

CONSCIOUS that the new threats to hemispheric security should be considered by the OAS, in a manner consistent with the decisions adopted by the United Nations, especially Resolution 1368 of the Security Council and Resolution A/RES/56/1 of the General Assembly of the United Nations; and

TAKING INTO ACCOUNT the responsibility of all states to cooperate in identifying, prosecuting, and punishing all those responsible for terrorist acts, which constitute crimes of the most serious nature, and the imperative need to expedite the extradition process, in applicable cases,

RESOLVES:

1. To condemn vigorously the terrorist attacks perpetrated within the territory of the United States of America on September 11, 2001.
2. To express its deepest condolences to and solidarity with the people and the Government of the United States of America and, in particular, with the families of the victims of this heinous crime.
3. To call upon all member states and the entire international community to take effective measures to deny terrorist groups the ability to operate within their territories, noting that those responsible for aiding, supporting, or harboring the perpetrators, organizers, and sponsors of these acts are equally complicit in these acts.
4. To call upon all member states to strengthen cooperation, at the regional and international levels, to pursue, capture, prosecute, and punish and, as appropriate, to expedite the extradition of the perpetrators, organizers, and sponsors of these terrorist acts, strengthen mutual legal assistance, and exchange information in a timely manner.
5. To reaffirm that actions to combat terrorism must be undertaken with full respect for the law, human rights, and democratic institutions in order to preserve the rule of law, liberties, and democratic values in the Hemisphere;
6. To call upon all member states to promote widespread tolerance and social harmony within their societies in recognition of the racial, cultural, ethnic and religious diversity of the communities that make up our Hemisphere and whose fundamental rights and freedoms were reaffirmed most recently in the Inter-American Democratic Charter.
7. To urge those states that have not done so, to sign or ratify, as appropriate, the International Convention for the Suppression of Financing Terrorism, adopted on December 9, 1999 in New York.

8. To instruct the Permanent Council to convoke, as soon as possible, a meeting of the Inter-American Committee Against Terrorism so that it may identify urgent actions aimed at strengthening inter-American cooperation to prevent, combat, and eliminate terrorism in the Hemisphere.
9. To entrust the Permanent Council with preparing a draft Inter-American Convention Against Terrorism with a view to presenting it to the next session of the OAS General Assembly. Also, to urge the states to study the international legal repercussions of the conduct of government authorities who provide financial support to, protect, or harbor terrorist individuals or groups.
10. To instruct the Committee on Hemispheric Security to expedite preparations for the Special Conference on Security, taking into account the contributions of CICTE, and to make specific recommendations to the Permanent Council.
11. To instruct the Secretary General to provide the necessary support for CICTE activities, in keeping with resolution AG/RES. 1650 (XXIX-O/99).
12. To invite the Inter-American Defense Board to provide the necessary advisory services to the Committee on Hemispheric Security, pursuant to resolution AG/RES. 1240 (XXIII-O/93) and when the Committee so requests.

ADDRESS TO A JOINT SESSION OF CONGRESS AND THE AMERICAN PEOPLE

20 September 2001

United States Capitol
Washington, D.C.

THE PRESIDENT: Mr. Speaker, Mr. President Pro Tempore, members of Congress, and fellow Americans:

In the normal course of events, Presidents come to this chamber to report on the state of the Union. Tonight, no such report is needed. It has already been delivered by the American people.

We have seen it in the courage of passengers, who rushed terrorists to save others on the ground -- passengers like an exceptional man named Todd Beamer. And would you please help me to welcome his wife, Lisa Beamer, here tonight. (Applause.)

We have seen the state of our Union in the endurance of rescuers, working past exhaustion. We have seen the unfurling of flags, the lighting of candles, the giving of blood, the saying of prayers -- in English, Hebrew, and Arabic. We have seen the decency of a loving and giving people who have made the grief of strangers their own.

My fellow citizens, for the last nine days, the entire world has seen for itself the state of our Union -- and it is strong. (Applause.)

Tonight we are a country awakened to danger and called to defend freedom. Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done. (Applause.)

I thank the Congress for its leadership at such an important time. All of America was touched on the evening of the tragedy to see Republicans and Democrats joined together on the steps of this Capitol, singing "God Bless America." And you did more than sing; you acted, by delivering \$40 billion to rebuild our communities and meet the needs of our military.

Speaker Hastert, Minority Leader Gephardt, Majority Leader Daschle and Senator Lott, I thank you for your friendship, for your leadership and for your service to our country. (Applause.)

And on behalf of the American people, I thank the world for its outpouring of support. America will never forget the sounds of our National Anthem playing at Buckingham Palace, on the streets of Paris, and at Berlin's Brandenburg Gate.

We will not forget South Korean children gathering to pray outside our embassy in Seoul, or the prayers of sympathy offered at a mosque in Cairo. We will not forget moments of silence and days of mourning in Australia and Africa and Latin America.

Nor will we forget the citizens of 80 other nations who died with our own: dozens of Pakistanis; more than 130 Israelis; more than 250 citizens of India; men and women from El Salvador, Iran, Mexico and Japan; and hundreds of British citizens. America has no truer friend than Great Britain. (Applause.) Once again, we are joined together in a great cause -- so honored the British Prime Minister has crossed an ocean to show his unity of purpose with America. Thank you for coming, friend. (Applause.)

On September the 11th, enemies of freedom committed an act of war against our country. Americans have known wars -- but for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war -- but not at the center of a great city on a peaceful morning. Americans have known surprise attacks -- but never before on thousands of civilians. All of this was brought upon us in a single day -- and night fell on a different world, a world where freedom itself is under attack.

Americans have many questions tonight. Americans are asking: Who attacked our country? The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al Qaeda. They are the same murderers indicted for bombing American embassies in Tanzania and Kenya, and responsible for bombing the USS Cole.

Al Qaeda is to terror what the mafia is to crime. But its goal is not making money; its goal is remaking the world -- and imposing its radical beliefs on people everywhere.

The terrorists practice a fringe form of Islamic extremism that has been rejected by Muslim scholars and the vast majority of Muslim clerics -- a fringe movement that perverts the peaceful teachings of Islam. The terrorists' directive commands them to kill Christians and Jews, to kill all Americans, and make no distinction among military and civilians, including women and children.

This group and its leader -- a person named Osama bin Laden -- are linked to many other organizations in different countries, including the Egyptian Islamic Jihad and the Islamic Movement of Uzbekistan. There are thousands of these terrorists in more than 60 countries. They are recruited from their own nations and neighborhoods and brought to camps in places like Afghanistan, where they are trained in the tactics of terror. They are sent back to their homes or sent to hide in countries around the world to plot evil and destruction.

The leadership of al Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of that country. In Afghanistan, we see al Qaeda's vision for the world.

Afghanistan's people have been brutalized -- many are starving and many have fled. Women are not allowed to attend school. You can be jailed for owning a television. Religion can be practiced only as their leaders dictate. A man can be jailed in Afghanistan if his beard is not long enough.

The United States respects the people of Afghanistan -- after all, we are currently its largest source of humanitarian aid -- but we condemn the Taliban regime. (Applause.) It is not only repressing its own people, it is threatening people everywhere by sponsoring and sheltering and supplying terrorists. By aiding and abetting murder, the Taliban regime is committing murder.

And tonight, the United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of al Qaeda who hide in your land. (Applause.) Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. (Applause.) Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.

These demands are not open to negotiation or discussion. (Applause.) The Taliban must act, and act immediately. They will hand over the terrorists, or they will share in their fate.

I also want to speak tonight directly to Muslims throughout the world. We respect your faith. It's practiced freely by many millions of Americans, and by millions more in countries that America counts as friends. Its teachings are good and peaceful, and those who commit evil in the name of Allah blaspheme the name of Allah. (Applause.) The terrorists are traitors to their own faith, trying, in effect, to hijack Islam itself. The enemy of America is not our many Muslim friends; it is not our many Arab friends. Our enemy is a radical network of terrorists, and every government that supports them. (Applause.)

Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated. (Applause.)

Americans are asking, why do they hate us? They hate what we see right here in this chamber -- a democratically elected government. Their leaders are self-appointed. They hate our freedoms -- our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other.

They want to overthrow existing governments in many Muslim countries, such as Egypt, Saudi Arabia, and Jordan. They want to drive Israel out of the Middle East. They want to drive Christians and Jews out of vast regions of Asia and Africa.

These terrorists kill not merely to end lives, but to disrupt and end a way of life. With every atrocity, they hope that America grows fearful, retreating from the world and forsaking our friends. They stand against us, because we stand in their way.

We are not deceived by their pretenses to piety. We have seen their kind before. They are the heirs of all the murderous ideologies of the 20th century. By sacrificing human life to serve their radical visions -- by abandoning every value except the will to power -- they follow in the path of fascism, and Nazism, and totalitarianism. And they will follow that path all the way, to where it ends: in history's unmarked grave of discarded lies. (Applause.)

Americans are asking: How will we fight and win this war? We will direct every resource at our command -- every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war -- to the disruption and to the defeat of the global terror network.

This war will not be like the war against Iraq a decade ago, with a decisive liberation of territory and a swift conclusion. It will not look like the air war above Kosovo two years ago, where no ground troops were used and not a single American was lost in combat.

Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. (Applause.) From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.

Our nation has been put on notice: We are not immune from attack. We will take defensive measures against terrorism to protect Americans. Today, dozens of federal departments and agencies, as well as state and local governments, have responsibilities affecting homeland security. These efforts must be coordinated at the highest level. So tonight I announce the creation of a Cabinet-level position reporting directly to me -- the Office of Homeland Security.

And tonight I also announce a distinguished American to lead this effort, to strengthen American security: a military veteran, an effective governor, a true patriot, a trusted friend -- Pennsylvania's Tom Ridge. (Applause.) He will lead, oversee and coordinate a comprehensive national strategy to safeguard our country against terrorism, and respond to any attacks that may come.

These measures are essential. But the only way to defeat terrorism as a threat to our way of life is to stop it, eliminate it, and destroy it where it grows. (Applause.)

Many will be involved in this effort, from FBI agents to intelligence operatives to the reservists we have called to active duty. All deserve our thanks, and all have our prayers. And tonight, a few miles from the damaged Pentagon, I have a message for our military: Be ready. I've called the Armed Forces to alert, and there is a reason. The hour is coming when America will act, and you will make us proud. (Applause.)

This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom.

We ask every nation to join us. We will ask, and we will need, the help of police forces, intelligence services, and banking systems around the world. The United States is grateful that many nations and many international organizations have already responded -- with sympathy and with support. Nations from Latin America, to Asia, to Africa, to Europe, to the Islamic world. Perhaps the NATO Charter reflects best the attitude of the world: An attack on one is an attack on all.

The civilized world is rallying to America's side. They understand that if this terror goes unpunished, their own cities, their own citizens may be next. Terror, unanswered, can not only bring down buildings, it can threaten the stability of legitimate governments. And you know what -- we're not going to allow it. (Applause.)

Americans are asking: What is expected of us? I ask you to live your lives, and hug your children. I know many citizens have fears tonight, and I ask you to be calm and resolute, even in the face of a continuing threat.

I ask you to uphold the values of America, and remember why so many have come here. We are in a fight for our principles, and our first responsibility is to live by them. No one should be singled out for unfair treatment or unkind words because of their ethnic background or religious faith. (Applause.)

I ask you to continue to support the victims of this tragedy with your contributions. Those who want to give can go to a central source of information, libertyunites.org, to find the names of groups providing direct help in New York, Pennsylvania, and Virginia.

The thousands of FBI agents who are now at work in this investigation may need your cooperation, and I ask you to give it.

I ask for your patience, with the delays and inconveniences that may accompany tighter security; and for your patience in what will be a long struggle.

I ask your continued participation and confidence in the American economy. Terrorists attacked a symbol of American prosperity. They did not touch its source. America is successful because of the hard work, and creativity, and enterprise of our people. These were the true strengths of our economy before September 11th, and they are our strengths today. (Applause.)

And, finally, please continue praying for the victims of terror and their families, for those in uniform, and for our great country. Prayer has comforted us in sorrow, and will help strengthen us for the journey ahead.

Tonight I thank my fellow Americans for what you have already done and for what you will do. And ladies and gentlemen of the Congress, I thank you, their representatives, for what you have already done and for what we will do together.

Tonight, we face new and sudden national challenges. We will come together to improve air safety, to dramatically expand the number of air marshals on domestic flights, and take new measures to prevent hijacking. We will come together to promote stability and keep our airlines flying, with direct assistance during this emergency. (Applause.)

We will come together to give law enforcement the additional tools it needs to track down terror here at home. (Applause.) We will come together to strengthen our intelligence capabilities to know the plans of terrorists before they act, and find them before they strike. (Applause.)

We will come together to take active steps that strengthen America's economy, and put our people back to work.

Tonight we welcome two leaders who embody the extraordinary spirit of all New Yorkers: Governor George Pataki, and Mayor Rudolph Giuliani. (Applause.) As a symbol of America's resolve, my administration will work with Congress, and these two leaders, to show the world that we will rebuild New York City. (Applause.)

After all that has just passed -- all the lives taken, and all the possibilities and hopes that died with them -- it is natural to wonder if America's future is one of fear. Some speak of an age of terror. I know there are struggles ahead, and dangers to face. But this country will define our times, not be defined by them. As long as the United States of America is determined and strong, this will not be an age of terror; this will be an age of liberty, here and across the world. (Applause.)

Great harm has been done to us. We have suffered great loss. And in our grief and anger we have found our mission and our moment. Freedom and fear are at war. The advance of human freedom -- the great achievement of our time, and the great hope of every time -- now depends on us. Our nation -- this generation -- will lift a dark threat of violence from our people and our future. We will rally the world to this cause by our efforts, by our courage. We will not tire, we will not falter, and we will not fail. (Applause.)

It is my hope that in the months and years ahead, life will return almost to normal. We'll go back to our lives and routines, and that is good. Even grief recedes with time and grace. But our resolve must not pass. Each of us will remember what happened that day, and to whom it happened. We'll remember the moment the news came -- where we were and what we were doing. Some will remember an image of a fire, or a story of rescue. Some will carry memories of a face and a voice gone forever.

And I will carry this: It is the police shield of a man named George Howard, who died at the World Trade Center trying to save others. It was given to me by his mom, Arlene, as a proud memorial to her son. This is my reminder of lives that ended, and a task that does not end. (Applause.)

I will not forget this wound to our country or those who inflicted it. I will not yield; I will not rest; I will not relent in waging this struggle for freedom and security for the American people.

The course of this conflict is not known, yet its outcome is certain. Freedom and fear, justice and cruelty, have always been at war, and we know that God is not neutral between them. (Applause.)

Fellow citizens, we'll meet violence with patient justice -- assured of the rightness of our cause, and confident of the victories to come. In all that lies before us, may God grant us wisdom, and may He watch over the United States of America.

Thank you. (Applause.)

END 9:41 P.M. EDT

<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>

**BRITISH PRIME MINISTER, TONY BLAIR'S STATEMENT TO THE HOUSE OF COMMONS
FOLLOWING THE SEPTEMBER 11 ATTACKS**

14 September 2001

Mr Speaker, I am grateful that you agreed to the recall of Parliament to debate the hideous and foul events in New York, Washington and Pennsylvania that took place on Tuesday 11 September.

I thought it particularly important in view of the fact that these attacks were not just attacks upon people and buildings; nor even merely upon the USA; these were attacks on the basic democratic values in which we all believe so passionately and on the civilised world. It is therefore right that Parliament, the fount of our own democracy, makes its democratic voice heard.

There will be different shades of opinion heard today. That again is as it should be.

But let us unite in agreeing this: what happened in the United States on Tuesday was an act of wickedness for which there can never be justification. Whatever the cause, whatever the perversion of religious feeling, whatever the political belief, to inflict such terror on the world; to take the lives of so many innocent and defenceless men, women, and children, can never ever be justified.

Let us unite too, with the vast majority of decent people throughout the world, in sending our condolences to the government and the people of America. They are our friends and allies. We the British are a people that stand by our friends in time of need, trial and tragedy, and we do so without hesitation now.

The events are now sickeningly familiar to us. Starting at 08.45 US time, two hijacked planes were flown straight into the twin towers of the World Trade Centre in New York. Shortly afterwards at 09.43, another hijacked plane was flown into the Pentagon in Washington.

At 10.05 the first tower collapsed; at 10.28 the second; later another building at the World Trade Center. The heart of New York's financial district was devastated, carnage, death and injury everywhere.

Around 10.30 we heard reports that a fourth hijacked aircraft had crashed south of Pittsburgh.

I would like on behalf of the British people to express our admiration for the selfless bravery of the New York and American emergency services, many of whom lost their lives.

As we speak, the total death toll is still unclear, but it amounts to several thousands.

Because the World Trade Center was the home of many big financial firms, and because many of their employees are British, whoever committed these acts of terrorism will have murdered at least a hundred British citizens, maybe many more. Murder of British people in New York is no different in nature from their murder in the heart of Britain itself. In the most direct sense, therefore, we have not just an interest but an obligation to bring those responsible to account.

To underline the scale of the loss we are talking about we can think back to some of the appalling tragedies this House has spoken of in the recent past. We can recall the grief aroused by the tragedy at Lockerbie, in which 270 people were killed, 44 of them British. In Omagh, the last terrorist incident to lead to a recall of Parliament, 29 people lost their lives. Each life lost a tragedy. Each one of these events a nightmare for our country. But the death toll we are confronting here is of a different order.

In the Falklands War 255 British Service men perished. During the Gulf War we lost 47.

In this case, we are talking here about a tragedy of epoch making proportions.

And as the scale of this calamity becomes clearer, I fear that there will be many a community in our country where heart-broken families are grieving the loss of a loved one. I have asked the Secretary of State to ensure that everything they need by way of practical support for them is being done.

Here in Britain, we have instituted certain precautionary measures of security. We have tightened security measures at all British airports, and ensured that no plane can take off unless their security is assured. We have temporarily redirected air traffic so that planes do not fly over central London. City Airport is reopening this morning.

We have also been conscious of the possibility of economic disruption. Some sectors like the airlines and insurance industry will be badly affected. But financial markets have quickly stabilised. The oil producers have helped keep the oil price steady. Business is proceeding as far as possible, as normal.

There are three things we must now take forward urgently.

First, we must bring to justice those responsible. Rightly, President Bush and the US Government have proceeded with care. They did not lash out. They did not strike first and think afterwards. Their very deliberation is a measure of the seriousness of their intent.

They, together with allies, will want to identify, with care, those responsible. This is a judgement that must and will be based on hard evidence.

Once that judgement is made, the appropriate action can be taken. It will be determined, it will take time, it will continue over time until this menace is properly dealt with and its machinery of terror destroyed.

But one thing should be very clear. By their acts, these terrorists and those behind them have made themselves the enemies of the civilised world.

The objective will be to bring to account those who have organised, aided, abetted and incited this act of infamy; and those that harbour or help them have a choice: either to cease their protection of our enemies; or be treated as an enemy themselves.

Secondly, this is a moment when every difference between nations, every divergence of interest, every irritant in our relations, are put to one side in one common endeavour. The world should stand together against this outrage.

NATO has already, for the first time since it was founded in 1949, invoked Article 5 and determined that this attack in America will be considered as an attack against the Alliance as a whole.

The UN Security Council on Wednesday passed a resolution which set out its readiness to take all necessary steps to combat terrorism.

From Russia, China, the EU, from Arab states, from Asia and the Americas, from every continent of the world has come united condemnation. This solidarity should be maintained and translated into support for action.

We do not yet know the exact origin of this evil. But, if, as appears likely, it is so-called Islamic fundamentalists, we know they do not speak or act for the vast majority of decent law-abiding Muslims throughout the world. I say to our Arab and Muslim friends: neither you nor Islam is responsible for this; on the contrary, we know you share our shock at this terrorism; and we ask you as friends to make common cause with us in defeating this barbarism that is totally foreign to the true spirit and teachings of Islam.

And I would add that, now more than ever, we have reason not to let the Middle East Peace Process slip still further but if at all possible to reinvigorate it and move it forward.

Thirdly, whatever the nature of the immediate response to these terrible events in

America, we need to re-think dramatically the scale and nature of the action the world takes to combat terrorism.

We know a good deal about many of these terror groups. But as a world we have not been effective at dealing with them.

And of course it is difficult. We are democratic. They are not. We have respect for human life. They do not. We hold essentially liberal values. They do not. As we look into these issues it is important that we never lose sight of our basic values. But we have to understand the nature of the enemy and act accordingly.

Civil liberties are a vital part of our country, and of our world. But the most basic liberty of all is the right of the ordinary citizen to go about their business free from fear or terror. That liberty has been denied, in the cruellest way imaginable, to the passengers aboard the hijacked planes, to those who perished in the trade towers and the Pentagon, to the hundreds of rescue workers killed as they tried to help.

So we need to look once more: nationally and internationally at extradition laws, and the mechanisms for international justice; at how these terrorist groups are financed and their money laundered; and the links between terror and crime and we need to frame a response that will work, and hold internationally.

For this form of terror knows no mercy; no pity, and it knows no boundaries.

And let us make this reflection. A week ago, anyone suggesting terrorists would kill thousands of innocent people in downtown New York would have been dismissed as alarmist. It happened. We know that these groups are fanatics, capable of killing without discrimination. The limits on the numbers they kill and their methods of killing are not governed by morality. The limits are only practical or technical. We know, that they would, if they could, go further and use chemical or biological or even nuclear weapons of mass destruction. We know, also, that there are groups or people, occasionally states, who trade the technology and capability for such weapons.

It is time this trade was exposed, disrupted, and stamped out. We have been warned by the events of 11 September. We should act on the warning.

So there is a great deal to do and many details to be filled in, much careful work to be undertaken over the coming days, weeks and months.

We need to mourn the dead; and then act to protect the living.

Terrorism has taken on a new and frightening aspect.

The people perpetrating it wear the ultimate badge of the fanatic: they are prepared to commit suicide in pursuit of their beliefs.

Our beliefs are the very opposite of the fanatics. We believe in reason, democracy and tolerance.

These beliefs are the foundation of our civilised world. They are enduring, they have served us well and as history has shown we have been prepared to fight, when necessary to defend them. But the fanatics should know: we hold these beliefs every bit as strongly as they hold theirs.

Now is the time to show it.

Appendix 18

S/2001/946

LETTER DATED 7 OCTOBER 2001 FROM THE PERMANENT REPRESENTATIVE OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.

On 11 September 2001, the United States was the victim of massive and brutal attacks in the states of New York, Pennsylvania and Virginia. These attacks were specifically designed to maximize the loss of life; they resulted in the death of more than 5,000 persons, including nationals of 81 countries, as well as the destruction of four civilian aircraft, the World Trade Center towers and a section of the Pentagon. Since 11 September, my Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks. There is still much we do not know. Our inquiry is in its early stages. We may find that our self-defence requires further actions with respect to other organizations and other States.

The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.

In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. In carrying out these actions, the United States is committed to minimizing civilian casualties and damage to civilian property. In addition, the United States will continue its humanitarian efforts to alleviate the suffering of the people of Afghanistan. We are providing them with food, medicine and supplies.

I ask that you circulate the text of the present letter as a document of the Security Council.

(Signed) John D. Negroponte

Appendix 19

S/2001/947

**LETTER DATED 7 OCTOBER 2001 FROM THE CHARGÉ
D'AFFAIRES A.I. OF THE PERMANENT MISSION OF THE UNITED
KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND TO
THE UNITED NATIONS ADDRESSED TO THE PRESIDENT OF
THE SECURITY COUNCIL**

In accordance with Article 51 of the Charter of the United Nations, I wish on behalf of my Government to report that the United Kingdom of Great Britain and Northern Ireland has military assets engaged in operations against targets that we know to be involved in the operation of terror against the United States of America, the United Kingdom and other countries around the world, as part of a wider international effort.

These forces have now been employed in exercise of the inherent right of individual and collective self-defence, recognized in Article 51, following the terrorist outrage of 11 September, to avert the continuing threat of attacks from the same source. My Government presented information to the United Kingdom Parliament on 4 October which showed that Usama Bin Laden and his Al-Qaeda terrorist organization have the capability to execute major terrorist attacks, claimed credit for past attacks on United States targets, and have been engaged in a concerted campaign against the United States and its allies. One of their stated aims is the murder of United States citizens and attacks on the allies of the United States.

This military action has been carefully planned, and is directed against Usama Bin Laden's Al-Qaeda terrorist organization and the Taliban regime that is supporting it. Targets have been selected with extreme care to minimize the risk to civilians.

It is important to underline that these operations are not directed against the Afghan population, or against Islam. The United Kingdom is proud to be a multicultural, multiracial country, and Prime Minister Blair has made clear the anger of the United Kingdom, and the anger of the vast majority of Muslims, to hear Usama Bin Laden and his associates described as "Islamic" terrorists. They are not: they are just ordinary terrorists.

I ask that you circulate the text of the present letter as a document of the Security Council.

(Signed) Stewart Eldon
Chargé d'affaires a.i.

Appendix 20

A/60/937
S/2006/515
12 JULY 2006

IDENTICAL LETTERS DATED 12 JULY 2006 FROM THE PERMANENT REPRESENTATIVE OF ISRAEL TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL AND THE PRESIDENT OF THE SECURITY COUNCIL

It is with a great sense of urgency and grave concern that I write you this letter of strong protest about the grave events occurring today on Israel's northern border with Lebanon. This morning, Hezbollah terrorists unleashed a barrage of heavy artillery and rockets into Israel, causing a number of deaths. In the midst of this horrific and unprovoked act, the terrorists infiltrated Israel and kidnapped two Israeli soldiers, taking them into Lebanon.

Responsibility for this belligerent act of war lies with the Government of Lebanon, from whose territory these acts have been launched into Israel. Responsibility also lies with the Government of the Islamic Republic of Iran and the Syrian Arab Republic, which support and embrace those who carried out this attack.

These acts pose a grave threat not just to Israel's northern border, but also to the region and the entire world. The ineptitude and inaction of the Government of Lebanon has led to a situation in which it has not exercised jurisdiction over its own territory for many years. The Security Council has addressed this situation time and time again in its debates and resolutions. Let me remind you also that Israel has repeatedly warned the international community about this dangerous and potentially volatile situation. In this vacuum festers the Axis of Terror: Hezbollah and the terrorist States of Iran and Syria, which have today opened another chapter in their war of terror.

Today's act is a clear declaration of war, and is in blatant violation of the Blue Line, Security Council resolutions 425 (1978), 1559 (2004) and 1680 (2006) and all other relevant resolutions of the United Nations since Israel withdrew from southern Lebanon in May 2000.

Israel thus reserves the right to act in accordance with Article 51 of the Charter of the United Nations and exercise its right of self-defence when an armed attack is launched against a Member of the United Nations. The State of Israel will take the appropriate actions to secure the release of the kidnapped soldiers and bring an end to the shelling that terrorizes our citizens.

I would be grateful if you would arrange to have the text of the present letter circulated as a document of the sixtieth session of the General Assembly, under agenda items 14 and 108, and of the Security Council.

(Signed) Dan Gillerman
Ambassador
Permanent Representative

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