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The Adequacy of the Ex Post Armed Attack Framework of
the Jus Ad Bellum in Relation to the Evolving Means and
Methods of Warfare

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Abstract

*Jus ad bellum*, the international law on the use of force, comprises rules that, by and large, predate many game-changing milestones in the evolution of warfare. The drafters of the 1945 United Nations Charter, the quintessential text of this body of law, could not have foreseen the advent of the matchlessly destructive nuclear arms, the creation of the fifth domain of warfare (cyberspace) or, for that matter, the precipitous surge in the incidence and gravity of asymmetric conflicts. That being the case, states and scholars have long been locked in a disagreement over how, if at all, to adjust the relevant norms to the changes on the battlefield. The present thesis offers a critical perspective on the adaptive shortcomings of the *jus ad bellum*, focusing specifically on the *ex post* armed attack framework of the right to self-defence, i.e. the precepts that regulate the use of force against ongoing and concluded offensives. The said framework separates lawful self-defence from the unequivocally unlawful armed reprisals. While deceptively straightforward on the surface, the self-defence/reprisal dichotomy is confounded by the lack of academic consensus on the distinguishing markers of the two doctrines. Cognizant of the ambiguity at play, this project poses a two-pronged research question: what are the contemporary parameters of the *ex post* armed attack framework, and do they adequately accommodate the post-1945 means and methods of warfare?

To answer the first half of the query, the present study composes a comprehensive picture of the post-1945 state practice and *opinio juris*, thereby revealing the ever-elusive line between self-defence and armed reprisals. The resulting output is a unique three-step methodology for the identification of armed reprisals, a tool that is then used as a benchmark for the second contribution to the scholarship, that is, the assessment of whether the legal *status quo* is reconcilable with modern threats and challenges. The conclusion reached is that, whilst reprisals continue to be illegal, some of their historically exclusive features have, owing to the unprecedented innovation in warfare, been transposed into the doctrine of self-defence. As regards the law’s effectiveness at keeping up with the practical realities, the present thesis finds that, although the *jus ad bellum* has come a long way in adapting to its operational environment, there remain significant deficiencies in its regulation of, most notably, cyber-attacks and safe havens for non-state aggressors.
Lay Summary

The present thesis assesses whether the *jus ad bellum*, the international law on the resort to armed force, has managed to stand the test of time. The key concern is that, despite warfare changing drastically since the Second World War, most of the relevant rules originated either from the 1945 United Nations Charter or from before its adoption, with some going as far back as 1837. Not helping matters is that much of the *jus ad bellum* is shrouded in uncertainty, which, when coupled with the importance of maintaining international peace and security, lends itself to potentially catastrophic consequences. Particularly nebulous is the temporal dimension of this body of law, that is, the different legal standards that apply before, during and after the occurrence of an armed attack. The present research project hones in on the norms that govern the use of force against ongoing/concluded offensives, the principal aim of which is to discern lawful self-defence from unlawful reprisals. The line between the two has proven difficult to pinpoint, not least because the academic literature contains mutually incompatible approaches to its demarcation. On top of bringing much-needed clarity to the self-defence/reprisal dichotomy, this study identifies shortcomings in the law’s treatment of certain post-1945 phenomena, namely the tactics employed by non-state actors as well as the unique attributes of cyber-attacks. The conclusions reached facilitate the *jus ad bellum*’s adaptation to modern threats and challenges, thereby fostering the effective discharging of its functions.
Acknowledgements

When reflecting on my PhD journey, and recalling the many challenges and obstacles along the way, my thoughts turn to those who made its completion possible. Words cannot express how grateful I am to my supervisors, Dr Kasey McCall-Smith and Prof Nehal Bhuta, for their invaluable insights, prudent advice and academic wisdom. It was their guidance that kept me on the right track throughout this research project, not least when I proposed alterations to its structure and the scope of inquiry. I would also be remiss if I did not thank my family, especially my parents, Daniel and Stella, for their unconditional support and unyielding belief in my abilities. Last but not least, I feel indebted to the friends whose understanding and encouragement helped pull me through the difficult times, of which there was no shortage.
Declaration

I, the undersigned, declare that this thesis has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous application for a degree. Except where states otherwise by reference or acknowledgment, the work presented is entirely my own.

Jerguš Pella

Edinburgh, 24/07/2023
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1. Introduction

1.1. Contextualising the Present Research: Legal Certainty and Effectiveness as the Cornerstones of a Sustainable Law on the Use of Force

The present thesis is set against the backdrop of the events of 1945, when, in a rare moment of universal solidarity, the international community came together to establish a one-of-a-kind organisation – the United Nations (UN). By transferring to a collective supranational body (the Security Council – UNSC) what was once the absolute right of states to wage war,¹ the organisation’s constitution, the UN Charter, completely overhauled the international law on the use of force (or, as it is also known, the *jus ad bellum*). Article 2(4) of the Charter outlawed all inter-state use of force, subject only to the exceptions laid down in Articles 42 (authorisation by the UNSC) and 51 (right to self-defence against an armed attack).² To truly understand this remarkable milestone, one must situate it within its historical context, that is, the immediate aftermath of the most devastating armed conflict the world has ever witnessed. The Charter’s *travaux preparatoires* detail how, in their resolve to prevent the recurrence of the tragedies of war, the UN’s founders sought to restrict lawful force to the furthest extent possible.³ The exigency to snuff out the scourge of war reverberates throughout the Charter’s text, with the Preamble and Article 1(1) setting the maintenance of international peace and security as the UN’s principal purpose.⁴ Thus, the resulting *jus ad bellum* was a functional antidote to the force-permissive, abuse-prone systems that preceded it.

However, being a product of its time, the UN Charter was designed with conventional combat in mind and, as such, could not have accounted for the post-1945 evolution of the means and methods of warfare. As regards the evolving means, i.e. the ever-expanding arsenal of weaponry, it is useful to differentiate between, on the one hand, the qualitative and quantitative upgrades to pre-existing armaments and, on the other hand, the types of force that emerged only after the Charter was adopted. The former novelty encapsulates advancements in the firepower, range, speed and accuracy of the more orthodox instruments of war.⁵ These enhancements allow for speedier and longer-distance initiation and termination of attacks, which in turn lessens the need for a direct confrontation between the armed forces of adversaries. Particularly significant was the 1957 invention of intercontinental ballistic missiles, a class of rockets that can presently hit virtually any spot on earth.⁶

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¹ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, Articles 24(1) & 42.
² UN Charter (n1) Articles 2(4), 42 & 51.
⁴ UN Charter (n1), Preamble & Article 1(1).
⁶ Walker, Bernstein and Lang (n5) 19-24; Anand (n5) 139.
While no doubt game-changing, such vicissitudes pale in comparison with the discovery of historically unforeseeable weapons, namely nuclear and cyber force, whose unique attributes upend the most fundamental assumptions about the *jus ad bellum*.

The conclusion of the San Francisco Conference, the international gathering that spawned the UN Charter, antedated the world’s introduction to the unprecedented potency of nuclear arms. Dulles, a participant in the Charter-drafting conference, reflects on this reality:  

> When we were in San Francisco in the spring of 1945, none of us knew of the atomic bomb which was to fall on Hiroshima on August 6, 1945. The Charter is thus a preatomb age Charter. In this sense it was obsolete before it actually came into force...if the delegates there had known that the mysterious and immeasurable power of the atom would be available as a means of mass destruction, the provisions of the Charter...would have been far more emphatic and realistic.

The unparalleled destructiveness of nuclear energy has since impelled the adoption of the Non-Proliferation Treaty, whose 191 parties have committed themselves to halting the development of nuclear weapons technology as well as to achieving, eventually, full nuclear disarmament. Moreover, the UN General Assembly (UNGA) declared that the use of nuclear force is contrary to the Charter’s purposes, a categorical stance the International Court of Justice (ICJ) stopped short of taking. On top of all that, this thesis offers countless examples of states and academics who, in appraising the *jus ad bellum’s* continued adequacy, accorded special consideration to the subject of nuclear weapons.

Another alteration of the Charter’s operational environment, and one that is perhaps the most radical of them all, came with the emergence of the fifth domain of warfare – cyberspace. The internet was invented nearly four decades after the Charter’s enactment and did not become a publicly available resource until the mid-1990s. In spite of its relative recency, and yet-to-be-revealed potential, the uniqueness of the cyber phenomenon has stimulated various initiatives aimed at its reconciliation with the existing international law. Chief among them are the Tallinn Manual and the work of the

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10 Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161, Article VI.
UN Group of Governmental Experts,\textsuperscript{15} the UN Open-Ended Working Group,\textsuperscript{16} as well as the Organization of American States’ Inter-American Juridical Committee.\textsuperscript{17} Owing to the idiosyncrasies of cyberspace, cyber operations are uniquely predisposed to challenge the employment of restrictive, one-size-fits-all standards for the use of force. Past research has flagged multiple problematic properties of cyber-attacks, seven of which are of interest to the present project: first, their course and effects are extremely difficult to predict, inasmuch as, once within the target cyber infrastructure, malware typically enjoys a degree of autonomy from the attacker’s control.\textsuperscript{18} The world’s first computer worm exemplified the sheer scale of unintended consequences a self-replicating malicious software may yield: ‘The Morris worm, as a result of a coding design error, replicated far more quickly than intended and produced...[an] attack against the entire Internet (which also resulted in an estimated $10 million to $100 million in damage).’\textsuperscript{19}

Second, since state-of-the-art satellite imagery makes it well-nigh impossible to disguise kinetic attacks, whether that be the launch of a missile strike or an impending invasion by ground troops, hostilities delivered through cyberspace are considerably more arduous to detect.\textsuperscript{20} As the Tallinn Manual states: ‘[T]he fact that a cyber armed attack has occurred or is occurring may not be apparent for some time. This could be so because the cause of the damage or injury has not been identified.’\textsuperscript{21} Third, the anonymising features of cyberspace impede the unmasking of the perpetrator,\textsuperscript{22} which, as


\textsuperscript{19} Nguyen (n18) 1102.


\textsuperscript{21} Tallinn Manual 2.0 (n14) 354.

the following chapter clarifies, is a precondition for self-defence under the law on state responsibility (a body of rules that governs the ramifications of committing internationally wrongful acts20). There
are several ways in which cyberspace cultivates a climate of anonymity. Free and open-access software (such as the Tor browser) act as portals to the so-called Dark Web, a haven for illicit behaviour, wherein activity is nearly untraceable and cannot be accessed by conventional search engines.24 The transgressor may also tap into ‘spoofing’, an umbrella term for the sundry techniques of feigning the source of a cyber operation. These include IP address forging (generation of fake IP packet headers) and the use of botnets (the mass controlling of third-party computers [bots] via malware).25

Fourth, whilst cyberspace is the ground zero of each and every cyber-attack, the primary harm inflicted upon the target cyber infrastructure may, either directly or indirectly, immediately or at a later time, produce secondary consequences in the physical world.26 The optional contingency of the physical corollaries on the transpiration of the digital ones further adds to the unpredictability of cyber operations, in that their precise proportions may not reveal themselves until several weeks (or months) down the line.27 Whereas a nuclear explosion may obliterate hundreds of thousands of people in a single instant, cyber-attacks could, as some experts postulate, end up wreaking a comparable level of havoc in a more long-term, incremental manner.28 Fifth, no other kind of force can match the lightning speed of cyber operations.29 As Schmitt observes: ‘[T]he lapse of time between the decision to conduct a cyber armed attack, its execution, and the manifestation of its consequences may be measured in milliseconds.’30


24 Dederer and Singer (n22) 438.


26 Dykstra, Inglis and Walcott (n18) 117-118; Grosswald (n18) 1173-1174; Nguyen (n18) 1104-1106; Tallinn Manual 2.0 (n14) 334.

27 Todd (n22) 68.

28 Todd, Inglis and Walcott (n18) 117-118.


Sixth, while the realisation of kinetic onslaughts is subject to geographical limitations, cyber-attacks can normally be mounted without any physical proximity to the victim state. Thirty Seventh, thanks to the omnipresence of digital technology, and mankind’s ever-increasing reliance thereon, cyber force is one of the - if not the - most readily available tools of warfare, requiring (at minimum) only a skilled individual with internet access. As Chakkaravarthy et al. point out: ‘Cyber-attacks are ubiquitous in the sense that they could be launched by anyone, at any place and at any time.’ When combined with a dual-use disposition (the quality of having both peaceful and military applications), the ubiquity of information and communications technology also makes it the most unexpected of weapons. Although nuclear energy can likewise be harnessed for both benign and nefarious purposes, the production of nuclear arms is, when compared to that of its cyber counterparts, near-impossible to conceal (but note that small-scale possession of biological or chemical weapons, which comprise dual-use toxins, is also notoriously tricky to verify).

Before continuing, two caveats are in order: first, even though not all of the above-listed attributes are exclusive to cyber operations, they are ‘unique’ in the sense that they undermine the *jus ad bellum* to a greater extent than the analogous properties of other weaponry. Second, considering that, as the next chapter demonstrates, the great majority of cyber-attacks do not - at present - amount to ‘force’ within the meaning of Article 2(4) of the UN Charter, the assessment of their reconcilability with the law is largely an *a priori* one. Among the most cited non-forcible cyber strikes are the 2007 and 2008 distributed denial-of-service attacks (operations that crash the targeted cyber infrastructure by flooding it with traffic) against Estonia and Georgia respectively, both of which were alleged to have been perpetrated by Russia. Still, if we factor in perpetual technological progress, as mirrored by the exponentially rising dependence on cyber systems, an increase in physically destructive cyber operations seems all but inevitable.

Much like the weapons employed, the methods of war-waging have undergone a sweeping transformation. As an enterprise precipitated by two world wars, the UN Charter was drafted in the image of conventional conflicts, which saw the armed forces of two or more states collide in large-
scale, face-to-face confrontations by land, sea and air. As Surchin recounts: ‘Because the U.N. Charter is based upon the state system, traditional forms of state-to-state violence were the drafters’ major concerns. The Charter did not comprehend the forms of violence which characterize modern terrorism. Though the phenomena of terrorism and guerrilla warfare are not novel per se (counterterrorist undertakings like the 1937 Convention for the Prevention and Punishment of Terrorism predated the installation of the UN regime), their frequency and gravity skyrocketed in the 1960s-1970s. Gradually but inevitably, the overt inter-state clashes lost their predominance to the more indirect and covert assaults by non-state actors. As put into perspective by Lobel: ‘The rise of internal conflict and of private non-state actors in post-World War II conflict raises questions not only about the legal definitions of armed attack and self-defense, but also the factual premises such warfare involves.’ The menace of terrorism would, in the 21st century, mature into an even more intractable foe. The digitality and interconnectedness of the new millennium is propitious to the clandestine activities of terrorist groups, a handful of which have, through international reach and control of large swathes of territory, come to rival the might of a state.

Yet, the pertinent provisions of the UN Charter have, despite the blindsiding metamorphosis of the environment of their operation, hitherto remained unchanged. One thus cannot help but wonder whether the purposefully stringent law on the use of force, most of which was conceived nearly eight decades ago (with some of its norms dating as far back as the 19th century), has managed to retain its viability amidst the complex, multifaceted realities of the 21st-century state practice. Should the jus ad bellum fail to accommodate the evolving means and methods of warfare, the disconnect between the letter of the law and its practical application would continue to grow and, if left unchecked, could reduce the UN Charter to an anachronistic instrument of lip service. Needless to say, any prolonged

40 Surchin (n39) 481.
44 Lobel (n39) 539.
46 See Chapters Two and Three for the impact of the 1837 Caroline affair on the development of the right to self-defence.
ineffectiveness of rules tasked with something as paramount as the preservation of peace could have catastrophic repercussions for the global community.

The evaluation of the adequacy of the *jus ad bellum* presupposes knowledge of its contours. Put differently, if one is to competently gauge the suitability of a given law, he/she must have a comprehensive understanding of its finer points. Lamentably, much of the law on the use of force has been, and continues to be, shrouded in mystery.47 The ambiguity that obfuscates the *jus ad bellum* enlarges the wiggle room states have for justifying their resort to force, which in turn exposes the relevant norms to a higher prospect of abuse. By striving to map out the legal *status quo*, endeavours such as the present thesis help diminish the legal uncertainty that permeates this field of law, thereby enabling it to be fine-tuned to the demands of the contemporary world. In the academic discourse, the issue of the modification of the law on the use of force, insofar as it relates to the preservation of its legitimacy, is guided by two schools of thought: restrictionism and expansionism.48 The former subscribes to the same sentiment that galvanised the international community into adopting the UN Charter; it seeks to decrease the incidence of armed hostilities by restricting lawful force to the hilt. Restrictionists posit that the more narrowly construed the grounds for recourse to arms are, the lower the odds of the law being utilised as a medium for vindicating aggression. On the flip side, expansionists caution that, due to the above-discussed post-1945 developments, a dogmatic insistence on restrictionism obsolesces the *jus ad bellum*, turning its once viable framework into an illusory batch of guarantees. They believe that, in the long run, the only way to safeguard the efficacy of the apposite rules is to increase their flexibility. Predictably, the pitfalls of expansionism lie in the danger of ‘over-legalisation’, that is, the regularisation of certain force-permissive doctrines that undercut the conflict-averse foundation of the UN Charter.

Whilst the schools of thought at hand are referenced mostly in relation to the legality of anticipatory self-defence (the use of force against a temporally proximate armed attack), the two clashing security interests they represent – the minimisation of the potential for abuse versus the securing of the continued effectiveness of the law - underpin every contentious component of the *jus ad bellum*. The striking of a balance between the aforesaid variables, though no doubt normatively desirable, is tremendously onerous in practice. Generally speaking, it would seem preferable to err on the side of restrictionism, seeing as the expansionist theory could, if taken too far (if exceptions to the prohibition of the use of force become too numerous and open-ended), effect a *de facto* regression to the pre-1945 versions of the law on the use of force. Nonetheless, as the subsequent chapters showcase, while


a blanket restrictionist approach may have been expedient with respect to the conventional conflicts that informed the UN’s architects, its application in the modern times is liable to create infeasible – if not absurd - expectations. This actuality, rather than disproving the utility of restrictionism per se, calls into question its uncompromising maintenance in the face of ground-breaking military and technological innovation.

1.2. Setting Up the Research Question

1.2.1. The Problem of Temporality Unravelled

As important as the *jus ad bellum*’s responsiveness to change is, it leaves unaddressed why, instead of focusing on the totality of the said body of law, the present study zooms in on the temporal dynamics. What is it about temporality that warrants special attention? The answer is twofold: not only does the *ratione temporis* dimension of the law on the use of force constitute one of the most nebulous and underdeveloped aspects thereof, but the temporal stage of an armed attack - the prerequisite for the invocation of Article 51 of the UN Charter - carries decisive weight in the determination of the lawfulness of any forcible reaction thereto. Depending on whether the underlying offensive is imminent, in progress or concluded, the application of the general requirements for self-defence may produce diametrically opposed results. Therefore, in order to dispel the cloud of uncertainty that surrounds the *jus ad bellum*, and thereby facilitate its long-term sustainability, it is imperative that its parameters are delimited in relation to the temporal context.

Accordingly, a dichotomy is drawn between the rules that regulate self-defence before the commencement of an armed attack (*ex ante* armed attack framework – standard of imminence) and those that apply during or after its occurrence (*ex post* armed attack framework – standard of immediacy). As is detailed throughout this thesis, the temporal norms - much like the bulk of the law

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49 Green, ‘The Ratione Temporis Elements of Self-Defence’ (n47) 97-98.


on the use of force - were tailor-made to suit conventional warfare and, as such, are intrinsically rigid in nature. Given that, in the scholarly literature, the legality of the modalities of self-defence on the *ex-ante* side of the temporal spectrum - anticipatory and preventive action (the use of force against imminent\(^53\) and non-imminent\(^54\) threats respectively) – has already been examined *ad nauseam*,\(^55\) the present thesis puts the spotlight on the comparatively underexplored *ex post* armed attack framework.

Even if to a considerably lesser extent, the *ex ante* armed attack context is still engaged with for two reasons: first, since the admissibility of self-defence is tied to the phase of the corresponding armed attack, one must be familiar with both temporal frameworks, lest he/she misidentify the applicable law and arrive at an incorrect conclusion on the response’s compatibility with the *jus ad bellum*. In fact, as is documented by this research project, it has become increasingly common for states and scholars to blur the clear-cut line between the *ex ante* and *ex post* armed attack contexts. The conflation of the vastly different tests of imminence and immediacy makes it so that studying one in isolation from the other would prove futile. Second, a comparative analysis between the two sets of temporal rules helps uncover the strengths and weaknesses of the existing *ex post* armed attack framework.

1.2.2. Contribution to the Closure of the Literature Gap on the Ex Post Armed Attack Framework

Whereas the validity of anticipatory self-defence has long bedevilled states and jurists alike, the *ex post* armed attack framework presents no such readily apparent dilemmas. After all, Article 51 of the UN Charter grants states the right to defend themselves ‘if an armed attack occurs.’\(^56\) The rightfulness of self-defence against a launched offensive is thus beyond contestation, and the only unilateral alternative thereto, the doctrine of armed reprisals, is practically synonymous with unlawful force. As Bowett famously remarked: ‘Few propositions about international law have enjoyed more support than the proposition that, under the Charter of the United Nations, the use of force by way of reprisals


\(^56\) UN Charter (n1) Article 51.
is illegal.\textsuperscript{57} Despite being uttered fifty years ago, the forecited statement is as valid today as it was back then; the UNGA,\textsuperscript{58} the UNSC,\textsuperscript{59} the ICJ,\textsuperscript{60} the International Law Commission (ILC)\textsuperscript{61} as well as states\textsuperscript{62} have all consonantly denounced reprisals as inconsistent with the \textit{jus ad bellum}. Ergo, whatever the conundrums that plague the \textit{ex post} armed attack framework, they have less to do with the legal status of either self-defence or armed reprisals and more to do with the difficulty of their differentiation from one another. Precisely therein lies the gap in the literature that the present study aims to fill.

The academic conversation on the interrelationship between the doctrines of self-defence and armed reprisals suffers from three deficiencies: first, there is a distinct lack of consensus on how to distinguish these two forms of self-help. Several methods have amassed enough popularity to cut through the cacophony of scholarly discord. These standout perspectives employ the criteria of temporality,\textsuperscript{63}

\textsuperscript{57} Bowett (n42) 1.
\textsuperscript{60} \textit{Legality of the Threat or Use of Nuclear Weapons} (n12) 46; \textit{Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v the United States)} (merits) [1986] ICJ Rep 14, para. 249.
\textsuperscript{61} ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (ARSIWA) (10 August 2001) UN Doc A/56/10, Article 50(1) (a); ILC, Eighth Report of Special Rapporteur Ago on State Responsibility (29 February, 10 & 19 June 1980) UN Doc A/CN.4/318/Add.5-7, paras. 91 & 94; A/CN.4/440 and Add.1 (n42) 97.
\textsuperscript{62} UNSC Verbatim Record (12 January 1956) UN Doc S/PV.711, paras. 37 & 64; UNSC Verbatim Record (9 April 1964) UN Doc S/PV.1111, para. 12; UNSC Verbatim Record (6 April 1964) UN Doc S/PV.1108, para. 98; UNSC Verbatim Record (8 April 1964) UN Doc S/PV.1110, paras. 21-22; UNSC Verbatim Record (29 December 1968) UN Doc S/PV.1460, paras. 89 & 138; UNSC Verbatim Record (30 December 1968) UN Doc S/PV.1461, paras. 62-63 & 139; UNSC Verbatim Record (31 December 1968) UN Doc S/PV.1462, para. 49; UNSC Verbatim Record (14 August 1969) UN Doc S/PV.1499, paras. 52-53; UNSC Verbatim Record (13 May 1970) UN Doc S/PV.1539, para. 39; UNSC Verbatim Record (24 June 1972) UN Doc S/PV.1649, para. 134; UNSC Verbatim Record (16 April 1974) UN Doc S/PV.1767, paras. 51 & 81; UNSC Verbatim Record (3 October 1985) UN Doc S/PV.2613, para. 127; UNSC Verbatim Record (28 March 1969) UN Doc S/PV.1468, para. 43; UNSC Verbatim Record (28 March 1969) UN Doc S/PV.1469, para. 73; UNSC Verbatim Record (16 November 1966) UN Doc S/PV.1321, paras. 12-14; UNSC Verbatim Record (17 November 1966) UN Doc S/PV.1322, para. 5; UNSC Verbatim Record (18 November 1966) UN Doc S/PV.1323, para. 9; UNSC Verbatim Record (21 November 1966) UN Doc S/PV.1324, para. 72.

intent,\textsuperscript{64} necessity and proportionality.\textsuperscript{65} When looking at temporality, note is to be taken of the temporal distance between an attack and the riposte, the active/inactive state of the former and the reactivity/proactivity of the latter. Intent, a trait immensely hard to pin down, is thought to be an emanation of a doctrine’s purpose, in that the actor’s mindset is expected to be aligned with whatever objective the said doctrine sets for its exercise. Considerations of necessity and proportionality, albeit endemic to many sectors of international law, are of appreciable importance to the law on the use of force, whereunder they act as the determinants of the permissibility of self-defence. None of the above-described markers have, as far as the extant scholarship is concerned, managed to gain a clear edge over the others, and, as the later chapters show, the methodologies incorporating them are mutually incompatible with each other.

Second, the preponderance of the academic commentary on armed reprisals does not probe beyond their unlawfulness.\textsuperscript{66} Yet, as this thesis demonstrates, the juxtaposition between the incontrovertible lawfulness of reactive self-defence and the unequivocal illegality of reprisals is but a surface-level representation of the status quo, one that does not pay heed to the doctrinal commingling spurred by the post-1945 evolution of the ex post armed attack framework. Granted, the negative connotation of the word ‘reprisal’, as acquired through unanimous international condemnation, effectively forecloses the revival of any doctrine bearing that denomination. Nevertheless, the paradigm-shifting state practice of the recent decades ended up surreptitiously transposing into Article 51 what was classically the actus reus of reprisals. In other words, underneath the trappings of the contemporary notion of self-defence now lie attributes traditionally assigned to reprisals. As a result, the overlap between the lawful and the unlawful is now greater than ever before, which, as per the discussion in Section 1.1., represents a grave threat to legal certainty as well as the effectiveness of the jus ad bellum.


\textsuperscript{65} Cohan (n50) 337-338; Schachter (n64) 1637-1638; Y. Beer, ‘Regulating Armed Reprisals: Revisiting the Scope of Lawful Self-Defense’ (2020) 59 Columbia Journal of Transnational Law 117, 159 & 167; Green, ‘Self-Defence: A State of Mind for States?’ (n64) 196-201.

Third, while much has been written on the purported irreconcilability of the unique facets of certain arms - mainly cyber operations\textsuperscript{67} and nuclear weapons\textsuperscript{68} – with the \textit{ex ante} armed attack framework, comparably little has been said on their interoperability with the \textit{ex post} armed attack framework. As is illustrated throughout the present thesis, the distinctive properties of cyber offensives, in particular, are such that it is difficult to fathom how a forcible response thereto could ever take the form of anything other than an unlawful reprisal. Though some authors, like Grimal and Sundaram,\textsuperscript{69} have touched upon the above-stated predicament, there remains a dearth of dedicated and exhaustive research on the feasibility of the standard of immediacy \textit{vis-à-vis} cyber armed attacks.

In light of the above, the present study sets out to entertain the following question: what are the existing parameters of the \textit{ex post} armed attack framework, and do they adequately accommodate the current-day conditions of the environment of their operation? The aforesaid research query yields a three-pronged original contribution to the current body of knowledge: first, this thesis provides an in-depth account of the relevant state practice, covering every forcible act the international community designated as a reprisal, as well as those with hallmarks analogous thereto, with an eye to determining which of the approaches to the differentiation of the \textit{ex post} armed attack doctrines, if any, is reflective of the law on the use of force. Second, the findings from the foregoing case analysis are used to devise a unique three-step methodology for the present-day identification of armed reprisals. Third, taking the resulting methodology as its frame of reference, the thesis assesses whether the \textit{ex post} armed attack framework, as it currently stands, is reconcilable with the post-1945 means and methods of warfare. By highlighting any outdated features the said framework might have, this project does its part to bring more clarity to the uncertainty-stricken \textit{jus ad bellum} as well as to foster the maintenance of its long-term efficacy. Researchers may use the conclusions reached as a benchmark for proposing reforms tailored to the specific inadequacies of the law on the use of force.

1.3. On Methodology, Sources and Structure

Having presented the research question and made the case for its originality, we may now direct our attention to the methodology adopted and the sources consulted. Because, as underlined in Section 1.1., the appraisal of a framework’s suitability must logically be preceded by the establishment of its contours, the present study opted to follow a doctrinal methodology, which, in the field of international law, entails the examination of the primary sources enumerated in Article 38(1) of the ICJ’s Statute: international agreements and customary international law.\textsuperscript{70} The former, commonly referred to as treaties, are written inter-state contracts, whose binding effect extends only to those

\textsuperscript{67} Hayward (n29) 413-434; Gill and Ducheine (n20) 452-471; Deweese (n29) 84-92; Grimal and Sundaram (n20) 331-332; Hadji-Janev and Aleksosi (n29) 121; Radziwill (n29) 152-154; Tallinn Manual 2.0 (n14) 350-353.
\textsuperscript{69} Grimal and Sundaram (n20) 330.
\textsuperscript{70} Statute of the International Court of Justice, as annexed to the Charter of the United Nations, Article 38(1).
that ratify them.\textsuperscript{71} With 193 state parties and the capacity to override conflicting treaty obligations,\textsuperscript{72} the UN Charter is the quintessential text on the law on the use of force. By contrast, customary law is unwritten and binds all states\textsuperscript{73} (there is, however, an ongoing academic debate as to whether states can, through persistent objection, avoid becoming bound by an emerging customary norm\textsuperscript{74}). Since this thesis is predicated on the essentiality of the \textit{jus ad bellum}'s up-to-dateness, due regard must be paid to the evolutionary capabilities of its sources. Lauterpacht cogently reminds us that the absence of a ‘world legislature’ impairs international law’s adaptability to the realities of tomorrow.\textsuperscript{75} Be that as it may, one would be mistaken to think of the international legal order as a static system of rules, seeing that both treaty and customary law contain elements of fluidity.

The key to comprehending the dynamism of the former source lies in its well-established hermeneutics,\textsuperscript{76} which is codified in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT).\textsuperscript{77} In accordance therewith, the meaning of the terms of an international agreement is to be distilled from its text, context as well as object and purpose, failing which the interpreter may avail himself/herself of the supplementary means of interpretation, namely the agreement’s preparatory works. In spite of the constancy of their wording, treaties are generally conceptualised as ‘living instruments’ whose interpretation can develop over time.\textsuperscript{78} This process, known as dynamic treaty interpretation, may be effected either through the subsequent practice of the parties (an interpretative vehicle contained in Article 31[3] [b] of the VCLT)\textsuperscript{79} or evolutionary reinterpretation (by finding evidence of a treaty’s living nature in its text, context or object and purpose).\textsuperscript{80} Particularly

\textsuperscript{72} UN Charter (n1) Article 103.
\textsuperscript{73} \textit{North Sea Continental Shelf (Germany v Denmark/Germany v the Netherlands)} (merits) [1969] ICJ Rep 3, paras. 37 & 70; H.W.A. Thirlway, \textit{The Sources of International Law} (Oxford University Press, 2019) 61; T. Treves, ‘Customary International Law’ in R. Wolfrum (ed), \textit{Max Planck Encyclopedia of Public International Law} (Oxford University Press, online edn, 2006) paras. 5-6.
\textsuperscript{77} VCLT (n71), Articles 31-33.
\textsuperscript{79} VCLT (n71) Article 31(3) (b).
\textsuperscript{80} VCLT (n71) Article 31(1); \textit{Award in the Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway (Belgium v the Netherlands)} (award) [2005] XXVII RIAA 35, paras. 79-84; C. Djefal, \textit{Static and Evolutive Treaty Interpretation: A Functional Reconstruction} (Cambridge University Press, 2015) 160-162.
susceptible to the second contingency are agreements of indefinite duration, especially if worded in
too general or vague a manner.81 Bearing in mind the permanence of the UN apparatus, it is no
surprise that the UN Charter, a document characterised by concise articles and a manifest lack of
essential definitions, is regarded by many as the paragon of living instruments.82 As explained in
Section 1.1., if the Charter is to be kept effective, it must be able to retroactively account for any game-
changing phenomena that postdate its adoption. According to the ILC, should a particular provision
be open to multiple interpretations, then, as per the principle of good faith, priority must be given to
whichever option best enables the execution of the treaty’s object and purpose.83 Whilst a teleological
construction of this sort may very well depart from what the drafters originally intended, it can only
go as far as to reinterpret – not contradict – the text of the provision under scrutiny.84

Although customary law is free from such constraints, the quality of being unwritten is a double-edged
sword that magnifies the difficulty of the validation of its contents. Since the custom-creating process
is mired in controversies85 that transcend the scope of the present research project, relied on are only
those points of consensus that have been confirmed by the ICJ and the ILC. The forenamed authorities
concur that custom arises when state practice (objective element) is believed

to be representative of
the law (opinio juris - subjective element).86 The ICJ initially espoused the view that only ‘extensive
and virtually uniform’ practice can beget a customary norm.87 Over the years, the Court came to
concede that, for a rule to attain customary status, affirmative practice need not be ‘absolutely
rigorous’ so long as it is consistent, that is, coherent to the extent that deviations therefrom are
perceived as breaches of the law, rather than as an emergence of a new norm.88 The ILC likewise
rejected the standard of uniformity, holding that the crystallisation of customary law requires
generality of the underlying practice, i.e. ‘sufficiently widespread’ and ‘consistent’ state backing.89 As

81 Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua) (merits) [2009] ICJ Rep 213, paras. 64, 66-67 & 71; Herdegen (n76) 15.
of the United Nations’ (2016) 10 Max Planck Yearbook of United Nations Law 1, 2 & 6; Grimal and Sundaram (n20) 325; Radziwill (n29) 126.
84 Draft Articles on the Law of Treaties with commentaries (n83) 219(6).
Customary International Law’ (2000) 3-4; Shaw (n43) 54; S. Talmon, ‘Determining Customary International
Law: The ICJ’s Methodology between Induction, Deduction and Assertion’ (2015) 26 European Journal of
International Law 417, 418-419; R. Kolb, ‘Selected Problems in the Theory of Customary International Law’
Kammerhofer, ‘Uncertainty in the Formal Sources of International Law: Customary International Law and Some
86 ICJ Statute (n70) Article 38(1) (b); A/73/10 (n74) Conclusions 2 & 3.
87 North Sea Continental Shelf (n73) 74.
88 Nicaragua case (n60) 186.
89 A/73/10 (n74) Conclusion 8.
enlightening as this qualification is, it leaves unanswered what kinds of acts make up the elements of customary law.

Traditionally, a rigid distinction was drawn between state practice and *opinio juris*, with the former being limited to physical activity (what states actually do) and the latter encompassing only verbal actions (what states say they do). Nowadays, such a strict separation of the elements finds little footing in the literature. As observed by the ILC, aside from physical conduct, certain forms of verbal communication (e.g. diplomatic protest) are now broadly accepted as proof of state practice. Evidence of the subjective element can be inferred from, among other things, ‘public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions.’ Behaviour associated with the passing of UN resolutions may, as the ILC and the ILA aver, amount to both state practice and *opinio juris*. Because what states do or consider the law to be changes over time, customary law is naturally disposed to adapt to historically unanticipated circumstances, allowing obsolete norms to be filtered out by desuétude.

Inasmuch as the UN Charter offers but a superficial insight into the *ratione temporis* dimension of the *jus ad bellum*, the answer to the main research question must lie predominantly in customary law. That being so, in order to set apart the doctrines of self-defence and reprisals, the present study undertook to investigate every putative instance of the latter’s practice and sift through the corresponding expressions of *opinio juris* (official press releases by states, transcripts of the UNSC and UNGA sessions, etc.). Insofar as they aid the discovery of the existing customary rules, emphasis was also placed on the subsidiary sources of international law, i.e. judicial decisions and teachings of the most highly qualified publicists. The jurisprudence reviewed included primarily the case law of the ICJ as well as select arbitral awards. As for the apposite scholarly literature, recourse was had to books, journals and expert reports of the ILC, the ILA, the Institute of International Law, the International Group of Experts (the committee behind the Tallinn Manual), the Chatham House, etc. The controversial but widely cited Bethlehem Principles, the synthesis of Sir Daniel Bethlehem’s years-long consultations with state representatives on self-defence against non-state actors, are also given careful coverage. The same goes for the Leiden Policy Recommendations on Counter-terrorism and International Law, a concerted endeavour by roughly thirty academics and legal professionals from

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90 A.A. D’Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971) 88; Rauter (n85) 94-95 & 103; Kammerhofer (n85) 525-530; Thirlway (n73) 51; A/73/10 (n74) 133(2).
92 A/73/10 (n74) Conclusion 6(1), 133(2).
93 A/73/10 (n74) Conclusion 10(2).
94 A/73/10 (n74) Conclusion 6(2) & 10(2).
96 ICJ Statute (n70) Article 38(1) (d); A/73/10 (n74) Conclusions 13(1) and 14.
around the globe, who, with the blessing of the Dutch government, sought to tackle some of the more topical quandaries of the law on the use of force.98

With the methodology and the pertinent legal sources laid out, next to be specified is the structure of this thesis. Excluding the present chapter and the conclusion, the thesis is divided into five parts. Chapter Two provides an overview of the prohibition of the use of force and the right to self-defence. One must be well-versed in the lex generalis if he/she is to competently analyse the temporal standards of self-defence, which, rather than operating as independent considerations, are variables that critically influence the application of the general requirements under Article 51 of the UN Charter. Chapter Three hones in on the ex ante armed attack framework, focusing specifically on anticipatory self-defence and the corresponding test of imminence. It dissects the disparate approaches to the interpretation of imminence and ruminates on their practicability in relation to the evolving means and methods of warfare. Chapter Four expounds the origins and the pre-1945 developmental stages of the doctrine of armed reprisals. In doing so, it demarcates the line between self-defence and reprisals as it existed on the cusp of the UN era. Taking the reader through 1945 and beyond, Chapter Five surveys the relevant state practice and opinio juris with a view to establishing the present-day parameters of the two doctrines. In synthesising the findings, Chapter Six constructs an original methodology for the identification of reprisals, which is then used to evaluate the adequacy of the ex post armed attack framework’s treatment of new-age threats and challenges.

1.4. Clarification of the Relevant Terminology

Seeing as the doctrines on both sides of the temporal spectrum go by a variety of names, the first order of business must be to straighten out the terminology at play. In the ex post armed attack context, several terms of art are used in lieu of ‘reprisal’, whether that be in a synonymous or substitutable manner. Even though the UN Charter outlawed armed reprisals, their non-forcible variant, ‘countermeasures’, continues to be accepted as a circumstance precluding wrongfulness under the law on state responsibility.99 Hence, the now unlawful armed reprisals are occasionally termed ‘forcible countermeasures’.100 It is submitted here that ‘retaliation’, too, serves as an alternative nomenclature for armed reprisals, a point argued on the basis of linguistics and usage in state practice. When it comes to the lexical argument, authoritative dictionaries list retaliation as a

99 ARSIWA (n61) Articles 22 & 49; Nicaragua case (n60) 249; S. Darcy, ‘Retaliation and Reprisal’ in M. Weller (ed), The Oxford Handbook of the Use of Force in International Law (Oxford University Press, 2015) 889-890; Neff (n66) 318; S/PV.1111 (n62) 11-12.
synonym for reprisal.\textsuperscript{101} ‘Retribution’, ‘revenge’ and ‘punishment’ are also indexed as synonyms, and like retaliation, they are often used to denominate the forcible conduct in question.\textsuperscript{102}

Though retaliation and reprisal may have historically been distinct concepts,\textsuperscript{103} the post-1945 practice witnessed states utilise both terms in reference to the same act (e.g. Australia,\textsuperscript{104} Belgium,\textsuperscript{105} Bulgaria,\textsuperscript{106} Canada,\textsuperscript{107} China,\textsuperscript{108} Czechoslovakia,\textsuperscript{109} Egypt,\textsuperscript{110} France,\textsuperscript{111} Iraq,\textsuperscript{112} Italy,\textsuperscript{113} Ivory Coast,\textsuperscript{114} Japan,\textsuperscript{115} Jordan,\textsuperscript{116} the Netherlands,\textsuperscript{117} Pakistan,\textsuperscript{118} the Soviet Union,\textsuperscript{119} Syria,\textsuperscript{120} the UK,\textsuperscript{121} Uruguay,\textsuperscript{122} the US\textsuperscript{123} and Yugoslavia\textsuperscript{124}), thereby conveying their tantamount nature. Moreover, as is chronicled throughout Chapter Five, measures classified as reprisals are habitually construed as pursuing retaliatory aims. Finally, reprisals must not be confused with retorsion. Unlike countermeasures,


\textsuperscript{104} UNSC Verbatim Record (18 April 1974) UN Doc S/PV.1768, paras. 50, 56 & 59.

\textsuperscript{105} UNSC Verbatim Record (29 March 1955) UN Doc S/PV.695, paras. 63-64.

\textsuperscript{106} UNSC Verbatim Record (21 November 1966) UN Doc S/PV.1325, paras. 5-7.

\textsuperscript{107} S/PV.1461 (n62) 34 & 37.

\textsuperscript{108} UNSC Verbatim Record (1 August 1966) UN Doc S/PV.1293, paras. 61 & 63; S/PV.1323 (n62) 15-17; UNSC Verbatim Record (21 March 1968) UN Doc S/PV.1403, para. 66; S/PV.1461 (n62) 62-63.

\textsuperscript{109} S/PV.1110 (n62) 21-22; UNSC Verbatim Record (7 August 1964) UN Doc S/PV.1141, paras. 29-32.

\textsuperscript{110} UNSC Verbatim Record (6 August 1968) UN Doc S/PV.1435, para. 22; UNSC Verbatim Record (8 December 1969) UN Doc S/PV.1518, para. 55.

\textsuperscript{111} UNSC Verbatim Record (24 November 1953) UN Doc S/PV.642, paras. 100-101; S/PV.695 (n105) 20-23.

\textsuperscript{112} UNSC Verbatim Record (22 March 1968) UN Doc S/PV.1404, para. 55; UNSC Verbatim Record (5 August 1968) UN Doc S/PV.1434, paras. 137-138 & 246.

\textsuperscript{113} UNSC Verbatim Record (26 June 1972) UN Doc S/PV.1650, para. 99.

\textsuperscript{114} S/PV.1110 (n62) 51; S/PV.1108 (n62) para. 54.

\textsuperscript{115} UNSC Verbatim Record (10 September 1972) UN Doc S/PV.1662, paras. 56 & 62.

\textsuperscript{116} S/PV.2613 (n62) 139 & 143.

\textsuperscript{117} S/PV.1323 (n62) 4-9.

\textsuperscript{118} S/PV.1499 (n62) 52.

\textsuperscript{119} UNSC Verbatim Record (12 January 1956) UN Doc S/PV.710, paras. 91 & 93-94; S/PV.1141 (n109) 78-79 & 82-83; S/PV.1167 (n100) 54-55; UNSC Verbatim Record (25 July 1966) UN Doc S/PV.1288, paras. 198-200 & 212; S/PV.1293 (n108) 95-96; S/PV.1461 (n62) 138-140; S/PV.1539 (n62) 39; S/PV.1662 (n115) 114-115; S/PV.1767 (n62) 13.

\textsuperscript{120} S/PV.1108 (n62) 7-13; S/PV.1288 (n119) 92 & 104.


\textsuperscript{122} S/PV.1293 (n108) 38 & 47.

\textsuperscript{123} UNSC Verbatim Record (4 March 1955) UN Doc S/PV.692, para. 8; UNSC Verbatim Record (16 August 1968) UN Doc S/PV.1440, paras. 9 & 11; S/PV.1460 (n62) 72-75; UNSC Verbatim Record (24 April 1974) UN Doc S/PV.1769, paras. 66 & 70-71.

\textsuperscript{124} S/PV.711 (n62) 4 & 7-8.
whose lawfulness is - or, in the case of their forcible form, used to be - the product of the illegality of the wrongful act they seek to redress\textsuperscript{125} (akin to how the permissibility of self-defence hinges on the perpetration of an armed attack), hostile deeds falling under the category of retorsion, though analogous in purpose, are compatible with international law \textit{ab initio} (e.g. severance of diplomatic ties).\textsuperscript{126}

While having a multitude of expressions denote armed reprisals may cause confusion, it is far less detrimental to legal certainty than the irregular and misleading parlance of the \textit{ex ante} armed attack framework.\textsuperscript{127} As elucidated earlier, the two modalities of \textit{ex ante} armed attack self-defence, anticipatory and preventive action, entail the use of force against imminent and non-imminent threats respectively. Chapter Three illustrates that, although most authorities agree that only concrete and objectively verifiable offensives – those that have already begun to take shape – can satisfy the standard of imminence,\textsuperscript{128} there exists disagreement as to which juncture marks the earliest possible instance for anticipatory self-defence. Still, whatever view one subscribes to, the following scenario is typically conceptualised as the epitome of an anticipatory measure: imagine that state A, having decided to invade state B, deploys its armed forces to the latter’s border; but before A can set its onslaught in motion, B launches an assault on the massing enemy troops, thereby crippling A’s ability to carry out the invasion plans.\textsuperscript{129} Preventive self-defence, on the other hand, envisions the forcible elimination of latent threats (prospects of attacks that may or may not materialise in the future)\textsuperscript{130} and, as such, does not abide by the requirement of imminence. The condition of imminence thus functions as a cut-off point between anticipation and prevention.

Regrettably, the waters are muddied by the popular use of ‘pre-emptive self-defence’ as a synonym for either anticipatory\textsuperscript{131} or preventive action,\textsuperscript{132} a blending of doctrines that, on top of being

\begin{itemize}
\item \textsuperscript{125} ARSIWA (n61) Article 22; W.E. Hall, \textit{A Treatise on International Law} (Clarendon Press, 1890) 364; Kelly (n64) 7; Shaw (n43) 859.
\item \textsuperscript{127} Hamid (n55) 443; P.C.R. Terry and K.S. Openshaw, ‘Nuclear Non-Proliferation and "Preventive Self-Defence": Why Attacking Iran Would Be Illegal’ (2013) 51 Canadian Yearbook of International Law 165, 182; Ruys, ‘\textit{Armed Attack’} (n50) 251-252.
\item \textsuperscript{129} Warren and Bode (n54) 29-26; Weise (n9) 1334; Hayward (n29) 414; Van Steenberghe (n48) 52-54; Arend, ‘International Law and the Preemptive Use of Military Force’ (n7) 96; Levy (n53) 90-91; Sadoff (n48) 530-531; Rockefeller (n51) 139; UNGA Summary Record (9 October 1974) UN Doc A/C.6/SR.1472, para. 32; UNGA ‘Draft resolution on the definition of aggression / Paraguay’ (28 October 1954) UN Doc A/C.6/L.334/Rev.1, para. 2(b); Tallinn Manual 2.0 (n14) 351.
\item \textsuperscript{130} Warren and Bode (n54) 24-25; Delacato (n53) 17; Luban (n54) 213; O’Meara (n54) 6; Salvarian (n54) 256.
\item \textsuperscript{132} Lubell, \textit{Extraterritorial Use of Force Against Non-State Actors} (n52) 55; Elshtain (n55) 17; B.M.J. Szewczyk, ‘Pre-Emption, Deterrence, and Self-Defence: A Legal and Historical Assessment’ (2005) 18 Cambridge Review
\end{itemize}
incontrovertibly distinct, embody varying levels of (in)compatibility with the *jus ad bellum* (refer to Chapter Three’s inquiry into their respective legal statuses). The root of this terminological ambivalence is, as some believe, traceable to the US National Security Strategy of 2002, which, by equalising pre-emptive self-defence to preventive action,\(^{133}\) contravened the former’s then-predominant usage as an alternative nomenclature for anticipatory self-defence.\(^{134}\) As influential as the said document was in shaping the discourse on the *jus ad bellum*, it was not unheard of, before 2002, for states to equate pre-emptive self-defence to preventive operations (see, for example, Iran’s statement\(^ {135}\)). The academic literature contains even more unorthodox approaches to the taxonomy of *ex ante* armed attack self-defence. For instance, Kumar’s\(^ {136}\) and O’Meara’s\(^ {137}\) conception of anticipatory self-defence is inclusive of both imminent and non-imminent threats. Others, like Arend, treat pre-emptive self-defence as a catch-all phrase for any response undertaken prior to the commencement of an armed attack.\(^ {138}\) Needless to say, having a single denomination stand for doctrinally irreconcilable concepts is sure to breed misinterpretation. Since most commentators deem pre-emptive self-defence a tautological collocation, whether it be in relation to anticipatory or preventive self-defence, this thesis avoids misunderstanding by adopting only the latter two terms. With the relevant terminology demystified, we may now proceed to Chapter Two’s exposition of the central pillar of the *jus ad bellum*, the general prohibition of the use of force, and the sole unilateral exception thereto, the right to self-defence.

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134 Terry and Openshaw (n127) 183-184; Hamid (n55) 444; UNGA Verbatim Record (27 November 1989) UN Doc A/C.1/44/PV.47, 50.
135 *Oil Platforms (Iran v United States of America) (Memorial submitted by the Islamic Republic of Iran) [1993]*, 151-155.
137 O’Meara (n54) 5-6.
138 Arend, ‘International Law and the Preemptive Use of Military Force’ (n7) 90.
2. A Primer on the Law on the Use of Force

Insofar as they stem from the *raison d’être* of the UN Charter, that is, the avoidance of gratuitous armed conflict, the basic premises of the contemporary *jus ad bellum* (the default state of international relations being the prohibition, as opposed to permission, of the use of force; the exercisability of self-defence resting on the existence of an armed attack, etc.) generate little to no controversy. However, a closer inspection reveals that, aside from being hazy, their particularities appear to be in a state of constant flux, oscillating between the poles of restrictionism and expansionism. Accordingly, by homing in on rules that apply across the entire temporal spectrum, and mapping out their areas of consensus and contention, this chapter sets the scene for the assessment of norms specific to a particular stage of an armed attack. The spotlight is first put on Article 2(4) of the UN Charter, which obliges all parties to abstain from employing ‘force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.’

Attention is zeroed in on the historical development of the above-cited proscription, the meaning of the term ‘force’ and the breadth of Article 2(4)’s scope. Then, in shifting the focus to self-defence, the present thesis scrutinises the right’s origins in the interwar period, before moving on to deconstruct its parameters under treaty and customary law, foremost among which are the requirements for its exercise (occurrence of an armed attack, the said attack’s attribution to the responsible party, necessity and proportionality of the forcible response).

2.1. Article 2(4) of the UN Charter - The Bedrock of the Post-1945 Jus Ad Bellum

2.1.1. The Winding Road to Prohibition

The first major limitations on recourse to force between different peoples stretch as far back as the end of antiquity. The just war theory, a Judeo-Christian doctrine formulated by Augustine of Hippo (4th-5th century) and subsequently consolidated by, most notably, Thomas Aquinas (13th century), conditioned the resort to force on the presence of a just cause. This primordial incarnation of the *jus ad bellum* differed greatly from the framework in place today, seeing that, if viewed through the latter’s prism, the former sanctioned forcible acts of an offensive disposition. After all, the just war

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4 Neff (n2) 59-60.
canon was used to authorise far-reaching military ventures, such as the Crusades, whose expeditionary nature runs counter to the very essence of the UN Charter. In the 16th and 17th centuries, the just war theory resurfaced in the works of, *inter alia*, the Hugo Grotius, the father of modern international law. Despite being phrased in defensive language, Grotius’s rendition of the doctrine continued to permit what we presently regard as offensive force.

The emergence of sovereign states, which is generally dated back to the 1648 Peace of Westphalia, induced the decline of natural law thinking, i.e. the belief that international law is composed of universal moral axioms of mandatory observance. The downfall of natural law gave way to the rise of positivism, that is, the idea that binding international norms are created through treaties and custom, rather than derived from a higher authority (e.g. schools of philosophy or religion). States were thus well on track to assuming the role of the exclusive makers of international law. By the time the 18th century drew to an end, nationalistic and imperialist undercurrents had completely eroded the expediency of stringent restrictions on the forcible settlement of disputes. Gardam describes the catalysts for the Age of Imperialism as follows:

> It was inevitable that, with the demise of the just war and the growth of the modern system of nation States, with sovereignty as its basic ordering principle, there would be a gap for a time until States saw it as being in their interests to develop a new system to regulate the resort to force.

The resultant international milieu helped consummate the positivist overhaul of the law on the use of force, vesting each and every state with an absolute right to wage war.

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5 Y. Stouraitis, “Just War” and ‘Holy War’ in the Middle Ages. Rethinking Theory through the Byzantine Case-Study’ (2013) 62 Jahrbuch der Österreichischen Byzantinistik 227, 231-235; O’Connell (n2) 335-336.


7 Neff (n2) 97 & 126-128; Linn (n2) 634.


10 Oppenheim, *Volume I* (n6) 54 & 60; Brownlie (n3) 14; Neff (n2) 167-169; Hassan (n8) 786.

11 Hassan (n8) 778; Araujo (n9) 1751-1752; Oppenheim, *Volume I* (n6) 91-92.

12 J. Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004) 31; Brownlie (n3) 16; Neff (n2) 167.

13 Gardam (n12) 31.

As goes without saying, there is little stability in a legal order that permits states to duel up to the point of total annihilation. Yet, some degree of transparency was needed to give conflicting parties sufficient time to prepare for war or, in the event of the inexpediency of rupture, devote themselves to diplomacy. Consequently, in spite of becoming a free-for-all enterprise, war was envisaged as a last-ditch measure whose initiation had to be formally declared (or stipulated as a consequence of the rejection of an ultimatum). Even so, in practice, the failure to declare war did not forestall the institution of the legal state of belligerence, nor did it vitiate the lawfulness of possible outcomes (e.g. conquest). Inasmuch as it coexisted with the unconditional right to employ force, the above-mentioned procedural safeguard is best conceived of as a good-faith guideline that injected a modicum of predictability into the haphazard, force-permissive international relations of the 18th-19th century. A similar purpose was served by the well-observed tendency of states to justify the use of force, perhaps instilled in them by the surviving legacy of the just war theory.

The absoluteness of the right to war began to wane at the onset of the 20th century. With the establishment of the Permanent Court of Arbitration in 1899 and the Central American Court of Justice in 1907, alternative dispute settlement became a considerably more prominent means of alleviating inter-state friction. The 1907 Hague Convention II and the 1913-1914 Bryan Treaties were among the earliest inter-governmental agreements to impose constraints on the forcible resolution of conflicts. In 1920, the international community, bent on preventing the repeat of the Great War that ravaged the world, set up the first global collective security organisation – the League of Nations. Since, back then, a proposal for the complete abolition of war would have been too idealistic, the League’s constitution (the Covenant of the League of Nations) was designed around the more

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15 Gardam (n12) 30 & 39-40; Brownlie (n3) 49-50.


18 Neff (n2) 175 & 183; Meng, ‘War’ (n2) 286-287; Hall (n16) 374; Oppenheim, Volume II (n17) 121-127; S. Maccoby, ‘Reprisals as a Measure of Redress Short of War’ (1924) 2 The Cambridge Law Journal 60, 69-70.

19 Brownlie (n3) 20-21.


23 List of the Treaties for the Advancement of General Peace, retrieved from: <https://history.state.gov/historicaldocuments/frus1915> on 02/01/2021.

feasible goal of lowering the likelihood of rupture. Correspondingly, states wishing to wage war lawfully had to first overcome the procedural hurdles laid down in Articles 12, 13 and 15 (compulsory recourse to adjudication, arbitration or enquiry by the Council of the League of Nations, followed by a three-month-long moratorium).  

Though revolutionary for its time, the League of Nations would prove to be an anaemic forerunner to the United Nations, doomed to collapse for failing to categorically proscribe the use of force. As is further explored in Chapter Four, the League’s preoccupation with war made it possible for measures short thereof to evade the Covenant’s purview. Nevertheless, as a necessary stepping-stone between the force-permissiveness of the 19th century and the force-restrictiveness of the post-1945 era, the League of Nations was instrumental in propelling forward the development of the *jus ad bellum*. The innovative features of the League’s regime, specifically its advocacy for respect for the territorial integrity and political independence of the states, its denouncement of aggression, as well as its conceptualisation of war as a matter of concern to the entire global community (as opposed to a private affair of the duelling parties), would go on to become the cornerstones of the UN system of collective security. 

Backed by those disgruntled with the Covenant’s leniency, the first instruments to interdict all war-like acts, save for actions taken either in resistance against aggression or pursuant to the recommendations of the Council (or the Assembly) of the League of Nations, were the 1924 Geneva Protocol and the 1926 Locarno Pact. However, considering that the former never entered into force and the latter was ratified by only five states, neither had any profound influence on the evolution of customary law. Still, these smaller initiatives helped pave the way for the most significant milestone of the interwar years – the 1928 Kellogg-Briand Pact. The fornamed treaty saw a total of sixty-three parties renounce war as a sovereign right – making it unlawful regardless of adherence to the Covenant’s procedural requirements - and agree to resolve disagreements through peaceful means. The same restrictions, albeit expressed in more precise terms, were incorporated into the 1933 Conventions for the Definition of Aggression and the 1938 Saadabad Pact, suggesting that the general interdiction of force was well into formation before being solidified by the UN Charter.

25 Covenant of the League of Nations (n24) Articles 12, 13 & 15.
26 Covenant of the League of Nations (n24) Article 10.
27 Covenant of the League of Nations (n24) Article 10.
28 Covenant of the League of Nations (n24) Article 11.
29 Protocol for the Pacific Settlement of Disputes (adopted 2 October 1924, did not enter into force) retrieved from: <https://www.refworld.org/docid/40421a204.html> on 03/01/2021, Articles 2 & 8.
30 Treaty of Mutual Guarantee (Locarno Pact) (adopted 1 December 1925, entered into force 14 December 1926) 54 LNTS 289, Article 2(1-3).
32 Kellogg-Briand Pact (adopted on 27 August 1928, entered into force on 24 July 1929) 94 LNTS 57.
33 Gardam (n12) 44.
34 Kellogg-Briand Pact (n32) Article I.
35 Kellogg-Briand Pact (n32) Article II.
36 Conventions for the Definition of Aggression (adopted 3-5 July 1933, entered into force 17 February 1934) 147 LNTS 67, 148 LNTS 79 & 211.
Therefore, it came as no surprise when, in *Military and Paramilitary Activities in and Against Nicaragua* (hereinafter the ‘Nicaragua case’), the ICJ held that Article 2(4) of the Charter is emblematic of customary law.\(^3^8\) The case at hand concerned the legality of the US subversion of the Sandinista government of Nicaragua, a communist faction that came to power in 1979.\(^3^9\) The relevant US measures comprised, but were not limited to, the training, organising and supplying (with arms and other necessities) of anti-Sandinista insurgents, direct naval attacks on Nicaraguan ports as well as the laying of mines in the country’s territorial waters.\(^4^0\) Since the applicability of the UN Charter was precluded by the US’s reservation to the Court’s jurisdiction, the dispute had to be decided primarily on the basis of customary law.\(^4^1\)

In establishing the customary nature of Article 2(4), the ICJ seemingly conflated the element of state practice with evidence of its acceptance as law, deeming the former fulfilled on account of the fact that, generally speaking, the use of force is perceived as contrary to international law.\(^4^2\) The approach chosen by the Court is best explained by the negative character of the obligation under consideration. A rule that enjoins states to refrain from acting, rather than to act in a certain way, cannot attain customary status through physical action. As recognised by the ILC Draft Conclusions on Identification of Customary International Law, the absence of practice may, depending on the properties of the norm in question, constitute proof for the purposes of the objective element.\(^4^3\) Accordingly, the Commission gathered that inaction must have played a pivotal role in the crystallisation of the customary proscription of force.\(^4^4\) In any event, the paucity of physical conduct is made up for by pertinent verbal expressions, which, as relayed in Chapter One, are now commonly accepted as evidence of both state practice and *opinio juris*. Turning to the subjective element, the ICJ believed it satisfied by reason of states’ continuing commitment to Article 2(4) of the UN Charter,\(^4^5\) as induced from their individual statements as well as the UNGA Friendly Relations Declaration.\(^4^6\) The *Nicaragua* case touched on a range of other salient issues, many of which are delved into in the upcoming sections of this chapter.

### 2.1.2. The Meaning Behind ‘Force’

Having determined that the forcible resolution of conflicts is barred by both treaty and customary law, we may now zoom in on the rule’s specifics, which, as Chapter One pointed out, are only scarcely addressed in the definitionally deficient UN Charter. Though the Charter neither defines ‘force’ nor

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\(^3^9\) *Nicaragua case* (n38) 18.

\(^4^0\) *Nicaragua case* (n38) 80, 86 & 108.

\(^4^1\) *Nicaragua case* (n38) 56.

\(^4^2\) *Nicaragua case* (n38) 186.

\(^4^3\) ILC, ‘Draft Conclusions on Identification of Customary International Law, with commentaries’ (17 May 2018) UN Doc A/73/10, Conclusion 3(1), 128(4).

\(^4^4\) ILC, Third Report of Special Rapporteur Wood on Identification of Customary International Law (27 March 2015) UN Doc A/CN.4/682, 9-10(20); A/73/10 (n74) Conclusion 6(1), 133(3).

\(^4^5\) *Nicaragua case* (n38) 190 & 193.


illuminates any of its quantitative or qualitative aspects, the agreement’s preparatory works shed some light on the concept’s delimitation. By rejecting Brazil’s proposal for the inclusion of economic pressure within the scope of Article 2(4),47 the participants of the San Francisco Conference effectively narrowed ‘force’ down to military application. Such is the understanding of the ICJ,48 the ILC,49 the UNGA,50 the Chatham House,51 the International Group of Experts,52 the ILA,53 scholars54 and states.55 Before proceeding further, it is important to note that a state may breach Article 2(4) without itself using force, provided that it facilitates, through the provision of training and/or matériel, the execution of another actor’s forcible operations.56 While, in the Nicaragua case, the actions of the Nicaraguan contras were not attributable to the US government (more on this in Section 2.2.3.), the Court nonetheless considered that, by rendering vital assistance to a group involved in a foreign country’s civil strife, the US violated the prohibition of the use of force.57

Coming back to the meaning behind ‘force’, what remains to be unpacked is whether it encapsulates all armed force with a transboundary dimension or only instances with certain additional attributes. The post-1945 discourse on the foregoing conundrum is dominated by two approaches: the instrument-based theory and the effects-based theory. Whereas the former makes an attack’s ability

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48 Nicaragua case (n38) 205.
50 A/RES/2625(XXV) (n46).
56 A/RES/2625(XXV) (n46); Tallinn Manual 2.0 (n52) 331-332.
57 Nicaragua case (n38) 228; but note that the mere financing of such activity did not infringe Article 2(4).
to amount to force conditional on the type of weapon used by the aggressor, the latter disregards the means employed in lieu of a purely consequence-oriented outlook, enclosing within the ambit of Article 2(4) any offensive that inflicts physical destruction/injury or loss of human life. Given that, as elaborated in Chapter One, the drafting of the UN Charter was tailored to conventional warfare, the then-prevalent view was that only kinetic armaments – heat and shockwave-producing projectiles (bullets, missiles, grenades, etc.) – could trigger the application of the *jus ad bellum*. The exclusion of certain especially devastating weaponry, mainly chemical and biological arms, caused the instrument-based model to gradually lose its predominance to the effects-based alternative, a development the ICI’s jurisprudence would set the seal on.

The succeeding hegemony of the effects-based theory is a conspicuous example of how international law secures its timelessness through adaptation. Any attempt at clinging to the instrument-based approach would, owing to the incessancy of military and technological innovation, have become increasingly impractical with time. At the end of the day, had the instrument-based construction of force been retained, the force-constituting capacity of novel weapons (e.g. cyber operations) would have had to be individually ascertained through state practice and *opinio juris*, an oftentimes lengthy and inconclusive process. By contrast, the viability of a consequence-oriented model springs from its, so to speak, automatic accommodation of the emerging means of warfare, whereby instruments capable of physical damage are, by that very token, intrinsically predisposed to engage Article 2(4).

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58 Tsagourias, ‘Chapter 2: The Tallinn Manual’ (n54) 22; Buchan (n54) 217; Couzigou (n54) 6-7.
59 ILA (n53) 5 & 25; Tsagourias, ‘Chapter 2: The Tallinn Manual’ (n54) 22; Buchan (n54) 217; Nguyen (n54) 1122; The President of Estonia on international law and cyberspace (n55); German Ambassador Riedel on international law and cyberspace (n55); New Zealand’s official position on international law and cyberspace (2020) retrieved from: <https://dpmc.govt.nz/sites/default/files/2020-12/The%20Application%20of%20International%20Law%20to%20State%20Activity%20in%20Cyberspace.pdf> on 21/03/2021, para. 7; Finland’s official position on international law and cyberspace (2020) retrieved from: <https://um.fi/documents/35732/0/The%20Application%20of%20International%20Law%20to%20State%20Activity%20in%20Cyberspace.pdf> on 21/07/2022, para. 45.
60 F. Grimal and J. Sundaram, ‘Cyber Warfare and Autonomous Self-Defence’ (2017) 4 Journal on the Use of Force and International Law 312, 324; Brownlie (n3) 362-363; Nguyen (n54) 1083; Buchan (n54) 217; Couzigou (n54) 6-7.
That being so, the advent of cyber force has, as attested to by several states (Australia, Boliva, Brazil, Canada, Chile, Estonia, Finland, France, Germany, Guatemala, Iran, Israel, Japan, the Netherlands, New Zealand, Peru, Romania, Singapore, Switzerland, the UK, and the US), served to confirm the superiority of the effects-based formula.

While the year 2010 has borne witness to a cybernetically engineered explosion at an Iranian nuclear facility (for an analysis thereof, refer to Chapter Six), the great majority of cyber-attacks do not wreak havoc in the material world. It is here that we are confronted with the potential disadvantages of the effects-based theory. What is of particular significance to the present research project is how the law may, through insistence on the element of physical destruction, neglect to appreciate the severity of an attack. Many have voiced the concern that, by paralysing a critical state infrastructure (e.g. electricity grids, power plants, internet and telecommunications networks, food and water supply, emergency services, transportation, financial institutions, etc.), a cyber onslaught could affect the lives

66 Canada on ‘International Law applicable in cyberspace’ (n59) 45.
67 CJI/doc. 615/20 rev.1 (n64) 18-19.
68 The President of Estonia on international law and cyberspace (n55).
69 Finland’s official position on international law and cyberspace (n59) 6.
71 Germany’s official position on international law and cyberspace (2021) retrieved from: <https://www.germany.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf> on 31/08/2022, 6.
72 CJI/doc. 615/20 rev.1 (n64) 17.
76 The Netherlands on ‘International Law in Cyberspace’ (n61) 3.
77 New Zealand’s official position on international law and cyberspace (n59) 7.
78 CJI/doc. 615/20 rev.1 (n64) 19.
82 The UK Attorney General Wright, ‘Cyber and International Law in the 21st Century’ (n55).
of millions without meting out any property or bodily harm. Even though the extensiveness of the impact of such cyber operations would far exceed that of, for instance, a minor border skirmish, only the latter qualifies as force under the effects-based model. Regardless of how undesirable that may be from a normative standpoint, the aforementioned cyber phenomenon cannot, without the requisite state practice and *opinio juris*, be exempted from the customary requirement of physical damage. Thus far, only a handful of states have weighed in on cyber-attacks that seriously compromise vital public services; France, Guatemala and Singapore argued in support of their incorporation into the notion of force, whilst Chile, Finland, Israel and the Netherlands stay cautiously open to that possibility.

Be that as it may, it is worth noting that certain hostile acts, of the non-cyber variety, are regarded as violations of Article 2(4) irrespective of whether actual violence ensues. To give an illustration, although the maintenance of a naval blockade may be casualty-free, its imposition is, in and of itself, widely conceived as inconsistent with Article 2(4). Comparably, it would be preposterous to suggest that the conduct of an invader, which manages to conquer territory without firing a single shot, does not impinge on the victim’s territorial integrity and political independence. Consequently, whether of the restrictionist or the expansionist persuasion, academics largely agree that, if unauthorised, a foreign brigade’s entry into sovereign land is, *per se*, an unlawful use of force. Such is also the perception of states (as evidenced by the stances of these proponents of restrictionism: Belarus.

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85 France’s official position on international law and cyberspace (n70) 9.

86 IJI/doc. 615/20 rev.1 (n64) 19.

87 Singapore’s official position on international law in cyberspace (n80).

88 CJI/doc. 615/20 rev.1 (n64) 18-19.

89 Finland’s official position on international law and cyberspace (n59) 6.

90 Israel’s Deputy Attorney General Schöndorf, ‘Disruptive Technologies and International Law’ (n74).

91 The Netherlands on ‘International Law in Cyberspace’ (n61) 8-9.


94 UNGA Summary Record (29 October 1954) UN Doc A/C.6/411, para. 15.
Bulgaria,95 Czechoslovakia,96 the Soviet Union97 and Syria98) and the UNGA, whose Resolution 3314 (XXIX) lists as forms of aggression the mere act of invasion99 as well as any presence of external armies that the host state had not consented to.100 A not-so-dated example is encountered in Chapter Six, which details how a zero-casualty takeover of disputed territory, the 1982 Argentinian invasion of the Falklands, was treated as a use of force by both the measure’s supporters and opponents, with the former group considering it justified on the basis of Article 51 of the UN Charter.

What the above-stated scenarios - naval blockades and territorial invasions - seem to have in common is the high probability, if not inevitability, of conflagration. This actuality sets them apart from the above-discussed cyber-attacks, in whose case an expectation of physical harm would, more often than not, be misplaced. Ultimately, though more state practice and opinio juris is needed to settle the classification of certain non-destructive cyber-attacks, the solution thereto may end up entailing the reconstruction of the meaning of force, much like how, in the wake of the adoption of the UN Charter, the interest of the jus ad bellum’s effectiveness demanded that non-kinetic arms be integrated into Article 2(4). After all, the prospect of cyber disruption to essential infrastructure has ceased being a figment of science fiction; it is a reality lawmakers will have to contend with in the not-so-distant future. With the concept of force appraised, we may now tackle the problem of the scope of Article 2(4), that is, the question of whether every action covered by the effects-based theory (not counting those sanctioned by Articles 42 and 51) is automatically at variance with the jus ad bellum.

2.1.3. The Scope of the Prohibition of the Use of Force: All-Inclusive or Qualified?

A particularly vexed aspect of the unabating clash between the restrictionist and expansionist schools of thought is the extent to which Article 2(4) of the UN Charter prohibits the resort to force. The plain text of the provision under scrutiny, as quoted at the outset of Chapter Two, gives rise to two antithetical interpretations – restrictive and permissive.101 The former takes an absolute view of the prohibition, holding that force cannot be lawful without either constituting self-defence or being authorised by the UNSC. Conversely, as per the latter, conduct not justifiable under the aforesaid exceptions is permitted if, one, it is not directed against the territorial integrity and/or political independence of a state, and, two, its objective is in harmony with the purposes of the UN. Because, as the argument goes, such conduct is textually compatible with Article 2(4), its lawfulness need not be additionally validated by affirmative state practice and opinio juris. The subscribers to the permissive approach believe that, if not all, some of the following doctrines are lawful bases for

96 UNGA Summary Record (3 November 1954) UN Doc A/C.6/SR.413, para. 10.
97 UNGA Summary Record (16 January 1952) UN Doc A/C.6/SR.288, paras. 21 & 34.
98 A/C.6/SR.517 (n92) 14.
99 A/RES/3314(XXIX) (n92) Article 3(a).
100 A/RES/3314(XXIX) (n92) Article 3(e).
recourse to force: humanitarian intervention\textsuperscript{102} (operations aimed at halting egregious mass infringements of the human rights of a civilian population, typically non-nationals of the intervener), protection of nationals abroad\textsuperscript{103} (extraterritorial rescue of the actor’s nationals), and consent\textsuperscript{104} (invitation to intervene in the host’s territory).

On the surface, the interpretational dilemma before us looks to have a fairly straightforward answer. As substantiated in Chapter One, the Charter’s \textit{travaux preparatoires} make clear the drafters’ intention to impose a blanket ban on force, a sentiment that echoes throughout the instrument’s Preamble and Article 1(1). For this reason, the ICJ,\textsuperscript{105} ILA,\textsuperscript{106} the ILC,\textsuperscript{107} the International Group of Experts\textsuperscript{108} and the UNGA\textsuperscript{109} have all subscribed to the restrictive take on Article 2(4). Nevertheless, there are other, less apparent variables at play, be it the Charter’s living nature or the fact that Article 2(4) is, in some shape or form, reflective of \textit{jus cogens}\textsuperscript{110} (also known as peremptory norms - universally recognised, non-derogable customary rules of the highest order).\textsuperscript{111} As regards the first of the aforementioned factors, Chapter One established that a treaty’s interpretation may, either through evolutionary reinterpretation or the subsequent practice of the parties, stray from what was originally envisioned in its preparatory works. There is nothing in the wording of Article 2(4) that would foreclose the global community from discarding the restrictive construction, should its permissive


\textsuperscript{103} S.D. Murphy, \textit{Humanitarian Intervention: The United Nations in an Evolving World Order} (University of Pennsylvania Press, 1996) 359-362; Randelzhofer (n54) 273; Moir (n54) 7-8; ILA (n53) 17-19; UNSC Verbatim Record (27 October 1983) UN Doc S/PV.2491, paras. 53 & 65-68; UNSC Verbatim Record (14 July 1976) UN Doc S/PV.1943, para. 45.


\textsuperscript{105} Nicaragua case (n38) 190-193.

\textsuperscript{106} ILA (n53) 4-5 & 21.

\textsuperscript{107} ILC, Eighth Report of Special Rapporteur A gio on State Responsibility (29 February, 10 & 19 June 1980) UN Doc A/CN.4/318/Add.5-7, para. 58.

\textsuperscript{108} Tallinn Manual 2.0 (n52) 329.

\textsuperscript{109} A/RES/2625(XV) (n46).


counterpart prove more conducive to the fulfillment of the Charter’s object and purpose. Obviously, any such monumental interpretive shift would have to be manifested in corresponding post-1945 state practice and *opinio juris*, that is, in resolute support for the controversial doctrines countenanced by the permissive approach. And on that front, there is little evidence of states wishing to disavow the restrictionist philosophy that underpinned the Charter’s adoption.

Leaving aside a vocal minority of dissenters,¹¹² most jurists agree that, on top of being highly abuse-prone and subversive *vis-à-vis* the conflict-averse foundation of the UN regime, the use of force by way of humanitarian intervention has mustered only minuscule state backing.¹¹³ Although some of the doctrine’s instantiations – most markedly the 1999 NATO intervention in Kosovo - elicited considerable approval from the international community, nearly all of that endorsement was couched in non-legal terms (appeals to morality and security, as opposed to legality).¹¹⁴ Such statements do not indicate *opinio juris*, given that, as the subjective element’s designation implies, only the legal views of states can contribute to the development of customary law.¹¹⁵ As of today, only a few states have conceivably accepted the lawfulness of humanitarian intervention: Belgium,¹¹⁶ Denmark,¹¹⁷

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¹¹⁴ UNGA Verbatim Record (22 September 1999) UN Doc A/54/PV.8, 12(Germany), 19(Italy); UNSC Verbatim Record (24 March 1999) UN Doc S/PV.3988, 4-5(the US), 5-6(Canada), 7(the Gambia), 8(Bosnia and Herzegovina), 8(the Netherlands), 8-9(France), 9-10(Malaysia), 10-11(Argentina), 17(the EU), 18(Albania), 19(Slovenia); BBC, ‘Nato Air Strikes – the World Reacts’ (25 March 1999) retrieved from: <http://news.bbc.co.uk/1/hi/303446.stm> on 15/02/2021 (Australia, Japan); R. Dannreuther, ‘Perceptions in the Middle East’ in M. Buckley and S. Cummings (eds), *Kosovo: Perceptions of War and Its Aftermath* (A&C Black, 2001) 206-208(Egypt, Israel, Jordan, Saudi Arabia, Turkey & the UAE); N. Krisch, ‘Unilateral Enforcement of the Collective Will: Kosovo, Iraq and the Security Council’ (1999) 3 Max Planck Yearbook of United Nations Law 59, 83(New Zealand & Switzerland).

¹¹⁵ Asylum (Colombia v Peru) (merits) [1950] ICI Rep 266, 277; A/73/10 (n74) 139(3) & 148(6); Kolb, ‘Selected Problems in the Theory of Customary International Law’ (n110) 138; Sadoff (n14) 533.

¹¹⁶ *Legality of Use of Force* (n102) 6.

France\textsuperscript{118} (but note France’s more recent reluctance to vindicate, on this ground, its purportedly altruistic campaigns\textsuperscript{119}), the UK\textsuperscript{120} and, more ambiguously, Cyprus\textsuperscript{121} and Sierra Leone.\textsuperscript{122}

While the legal status of cross-border rescue missions is, at best, unsettled,\textsuperscript{123} what bearing that has on the breadth of Article 2(4)’s scope is, owing to the opaqueness of their relationship to self-defence, difficult to say. Those who champion these operations tend to equate the use of force against nationals abroad to an attack against the state of their nationality (especially when the persons concerned are targeted because of their citizenship) and, \textit{ipso facto}, transplant the said operations into Article 51 of the UN Charter.\textsuperscript{124} Described by many as a textbook trans-frontier rescue mission,\textsuperscript{125} the 1976 Entebbe incident – Israel’s successful extraction of hostages held in eastern Uganda, with official complicity, by German-Palestinian terrorists\textsuperscript{126} - was itself defended under Article 51.\textsuperscript{127} Moreover, as we shall discover in Chapter Five, there were multiple other instances, in the 1960s-1980s, of states responding with force to extraterritorial harm suffered by their citizens, all of which were labelled as either reprisals or self-defence, rather than as the exercise of a standalone doctrine of the protection of nationals abroad. Even assuming that the use of force against a state’s citizens does not (without also encroaching on its territorial integrity) activate the right to self-defence, there are no textual obstacles that would block Article 51 from being reinterpreted to that effect. Since the legality of transboundary rescue operations is contemplated under Article 51 (i.e. the \textit{lex specialis}), their

\textsuperscript{118} UNSC Verbatim Record (14 July 1960) UN Doc S/PV.873, para. 144.


\textsuperscript{120} S/PV.3988 (n114) 12; UNSC Verbatim Record (14 April 2018) UN Doc S/PV.8233, 2; The UK Attorney General Wright, ‘Cyber and International Law in the 21st Century’ (n55).


\textsuperscript{122} UNSC Verbatim Record (19 November 1992) UN Doc S/PV.3138, 51.


\textsuperscript{125} D.J. Gordon, ‘Use of the Protection for Nationals Abroad: The Entebbe Incident (1977) 9 Case Western Reserve Journal of International Law 117, 117-118; Charney (n102) 836; Kolb, ‘The Belgian Intervention in the Congo’ (n14) 83; Randelzhofer (n54) 273; Shaw (n113) 870; Beyerlin (n101) 214.


\textsuperscript{127} UNSC ‘Letter dated 76/07/04 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General’ (5 July 1976) UN Doc S/12123; UNSC Verbatim Record (9 July 1976) UN Doc S/PV.1939, paras. 101 & 115; UNSC Verbatim Record (12 July 1976) UN Doc S/PV.1941, para. 77.
permissibility would not, as a matter of course, invalidate the restrictionist interpretation of the *lex generalis* Article 2(4).

The picture becomes even more intricate when we look at consent, which, in spite of its omission from the Charter’s text, constitutes a generally accepted justification for resorting to force\textsuperscript{128} (see the positions of the ICJ,\textsuperscript{129} the ILA,\textsuperscript{130} the UNGA,\textsuperscript{131} the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,\textsuperscript{132} the Bethlehem Principles\textsuperscript{133} and the Leiden Policy Recommendations\textsuperscript{134}). In recognising consent’s capacity to pre-empt the wrongfulness of certain acts,\textsuperscript{135} the ILC offered several applied examples that envisage the employment of force (e.g. a state authorising the presence of foreign troops in its territory).\textsuperscript{136} As will be expounded in Chapter Five, in addition to being mostly uncontested, the use of force by consent has enormous practical value, inasmuch as it is frequently applied examples that envisage the employment of force (e.g. a state authorising the presence of foreign troops in its territory).\textsuperscript{136} As will be expounded in Chapter Five, in addition to being mostly uncontested, the use of force by consent has enormous practical value, inasmuch as it is frequently the only – albeit far from perfect – viable remedy for transnational incursions by non-state actors. Cognizant of this actuality, Deeks avers: ‘If international law fails to take consent seriously, it undercuts sovereign decision-making, reduces valuable cooperation between states, and possibly renders it harder to end conflicts.’\textsuperscript{137}

All that being the case, one cannot but wonder whether states have, by embracing the admissibility of interventions by invitation, essentially negated the restrictive reading of Article 2(4). According to one viewpoint, because consent sees states waive, subject to pre-agreed conditions, the inviolability of their territorial integrity, consensual force does not step into the purview of Article 2(4), leaving intact the absoluteness of the prohibition contained therein.\textsuperscript{138} The advocates of this perspective claim that, whereas force anchored in consent is non-wrongful *ab initio*, actions justified under Article 51 are *prima facie* violations of Article 2(4). This may, however, be an arbitrary distinction to draw, seeing


\textsuperscript{129} *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) (merits) [2005] ICJ Rep 168, paras. 51-52.

\textsuperscript{130} ILA (n53) 18.

\textsuperscript{131} A/RES/3314(XXIX) (n92) Article 3(e).


\textsuperscript{133} D. Bethlehem, ‘Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors’ (2012) 106 American Journal of International Law 770, 776 (principle 10).


\textsuperscript{135} ARSIWA (n110) Article 20.

\textsuperscript{136} ARSIWA (n110) 73-74(8-9) & 85(6).

\textsuperscript{137} Deeks (n128) 20.

\textsuperscript{138} Corten (n128) 252-254; Helmersen (n128) 176-178; ILA (n53) 18; Byrne (n128) 99-100.
as the occurrence of an armed attack could be said to pre-emptively expunge the wrongfulness of the forcible response. In that vein, the ILC held that ‘a State exercising its inherent right of self-defence…is not, even potentially, in breach of Article 2, paragraph 4.’139 Hence, some scholars treat consent analogously to self-defence, deeming consent-based operations as compatible with, rather than inapplicable to, the interdiction of the use of force.140

In the final analysis, the juxtaposition between the Charter’s silence on interventions by invitation, on the one side, and the international community’s general acceptance of consensual force, on the other, appears to rule out the restrictive approach to Article 2(4). Nonetheless, it is propounded here that whichever of the above-stated standpoints one takes (suspension of or conformity with the jus ad bellum), the paradox of consent need not undermine the all-encompassing character of Article 2(4). The crux of the present argument rests on the non-derogability of peremptory norms, a quality that yields critical implications for the malleability of Article 2(4)’s scope. If a particular customary obligation (A) forbids conduct B and C, and assuming that only the ban on B belongs to jus cogens, then C, albeit unlawful, could still, through state practice and opinio juris, crystallise into an exception to A. By contrast, considering that peremptory norms can only be modified by rules of the same status,141 the legalisation of B would require a near-total absence of dissenting states, a far more demanding standard than the one set for the formation of customary law. Needless to say, in as contentious a field as the jus ad bellum, legal bases other than self-defence and UNSC authorisation are unlikely to find international unanimity.

What remains to be unravelled is whether the peremptory aspect of Article 2(4) – the non-derogable element – corresponds to the restrictive interpretation, i.e. whether it covers every instance of ‘force’ within the provision’s meaning, excluding only those sanctioned by Articles 42 and 51. That not all infringements of Article 2(4) are accorded the same treatment is evinced by the existence of the concept of aggression,142 which the UNGA Resolution 3314 (XXIX) defines as ‘the most serious and dangerous form’ of unlawful force143 (see also opinio juris from the making of the said resolution144). Similarly, the International Criminal Court’s Statute prescribes a de minimis threshold for the crime of aggression, employing the criteria of ‘gravity and scale’ to discern it from minor impingements on a state’s territorial integrity.145 Mindful of the non-derogability of jus cogens, as well as the extreme difficulty of achieving universal consensus on points of law, the ILC stressed that peremptory norms must be defined narrowly; ergo, it opted to cite the prohibition of aggression - instead of the use of force as such – as an epitome of jus cogens.146 Ago, one of the ILC’s special rapporteurs on state responsibility, reckoned that, thanks to their limited duration, purpose and effects, certain unlawful uses of force evade the peremptory domain of aggression.147 In retaining Ago’s bifurcation of the

139 ARSIWA (n110) 74(1) & 75(6).
140 Ruys, ‘The Meaning of "Force"’ (n4) 164-165.
141 VCLT (n111) Article 53.
142 UN Charter (n1) Article 39.
143 A/RES/3314(XXIX) (n92) Preamble & Article 2.
144 UNGA Summary Record (30 July – 14 August 1970) UN Doc A/AC.134/1_SR.67-78, 23; UNGA Summary Record (25 August - 30 May 1973) UN Doc A/AC.134/1_SR.100-109, 16, 29 & 49-50; UNGA Summary Record (22 October 1974) UN Doc A/C.6/1_SR.1482, para. 48; UNGA Summary Record (18 October 1974) UN Doc A/C.6/1_SR.1480, para. 3; UNGA Summary Record (9 October 1974) UN Doc A/C.6/1_SR.1472, paras. 7-8; A/CN.4/318/Add.5-7 (n107) 58; Ruys, ‘The Meaning of "Force”’ (n54) 164-165.
146 ARSIWA (n110) 85(4-5).
147 A/CN.4/318/Add.5-7 (n107) 56-59.
violations of Article 2(4), his successor, Special Rapporteur Riphagen, distinguished between acts of ‘intervention’ (smaller transgressions) and the non-derogable category of ‘aggression’ (force ‘directed against the territorial integrity and political independence’ of a state).\textsuperscript{148} The final special rapporteur on state responsibility, Crawford, likewise wagered that ‘limited’ breaches of Article 2(4) (e.g. humanitarian intervention) may fall short of aggression and, by extension, avoid coming into conflict with peremptory norms.\textsuperscript{149}

It is highly improbable that, as a narrowly framed construct, \textit{jus cogens} comprises every action within the ‘catch-all’ ambit of the restrictive take on Article 2(4). At the end of the day, even though virtually all states have, through ratification of the UN Charter, unequivocally denounced aggression, UN membership does not preclude states from espousing the permissive notion of Article 2(4). There is no universal agreement – i.e. that which is needed for a precept’s ascension to \textit{jus cogens} – on the breadth of Article 2(4)’s proscription, which, as illustrated in this section, has been a hot-button issue ever since the Charter’s adoption. While the majority of states and academics have put their weight behind the restrictive conceptualisation of Article 2(4), a dissident contingent continues to stand its ground. It follows that, under the pre-eminent restrictive approach, doctrines that stay clear of the non-derogable element of Article 2(4) - those not directed against the territorial integrity and political independence of a state (namely consent, extraterritorial rescue operations of nationals and, to a lesser degree, humanitarian intervention) – may become exceptions to the prohibition enshrined therein, provided that they gain sufficient support via state practice and \textit{opinio juris}. The present thesis surmises that, as insinuated earlier, this was the legal trajectory of interventions by invitations.

The fluidity of Article 2(4)’s scope does not in any way lend credibility to the permissive interpretation, which regards the above-enumerated doctrines as lawful by default, as opposed to lawful if, and only if, embedded in customary law. What it does do is accentuate the living character of the UN Charter, that is, the capability of its terms to evolve over time, subject only to textual limitations and the boundaries erected by \textit{jus cogens}. Put differently, the normative dynamism in question challenges not the restrictive reading of Article 2(4) - which is doubtless well established - but the immutability thereof. Still, as the subsequent chapters demonstrate, there are certain forcible measures, both in the \textit{ex ante} and the \textit{ex post} armed attack context, whose legalisation is barred by the forenamed restrictions on the Charter’s dynamic interpretation. Having examined the central tenet of the law on the use of force, we may now hone in on what is, at present, the only unilateral deviation therefrom – the right to self-defence.


2.2. Article 51 of the UN Charter – The Inherent Right of Self-Defence

2.2.1. The Genesis of the Modern Doctrine of Self-Defence

Though just as important to our comprehension of the legal status quo, the developmental arc of the right to self-defence is substantially shorter than that of the proscription of the use of force. The medieval just war theory, a doctrine that sanctioned what we currently judge as offensive force, left no room for the more restrictively construed right to self-defence. That being said, the contemporary natural law did recognise the entitlement of individuals - rather than empires - to ward off immediate harm,\(^{150}\) a right functionally analogous to the one presently found in Article 51 of the UN Charter. This private prerogative was conceived as a self-help remedy against attacks in progress and, as such, did not license any preventive action or after-the-fact retaliation.\(^{151}\) As explained in Section 2.1.1., the supersession of the just war canon by the positivist reconceptualisation of international law, which began taking root by the eve of the 18th century, engendered the absolute right of states to wage war. Now that states were legally permitted to vanquish one another, there was no place for rules that confine lawful force to defensive reactions. Quigley shrewdly points out: ’If there was no prohibition, there was no logic to an exception for self-defense.’\(^{152}\)

Yet, throughout the 19th century, the expression ‘self-defence’ was used as a synonym for the doctrine of necessity (not to be confused with the principle of necessity, i.e. one of the prerequisites for Article 51 of the UN Charter), which was, at the time, thought to be intertwined with the right of self-preservation.\(^{153}\) The plea of necessity/self-preservation enabled states to override international law in the event of a sudden and overwhelming emergency,\(^{154}\) and, unlike the modern right to self-defence, their invocation was not conditioned on a prior wrongdoing.\(^{155}\) Owing to the force-permissiveness of the 19th-century jus ad bellum, the great bulk of states’ appeals to necessity involved the trumping of the law of neutrality,\(^{156}\) that is, the protections of third parties vis-à-vis a particular armed conflict. The 1837 Caroline affair is by far the most pertinent instance of state practice from

\(^{150}\) Neff (n2) 60-61.

\(^{151}\) Neff (n2) 60-61.


\(^{155}\) A. Ross, A Textbook of International Law (Longmans, Green, 1947) 247-248; A/CN.4/318/Add.5-7 (n107) 4; Neff (n2) 239.

this time period. During the 1837-1838 uprisings in the then-British colony of Canada, the British troops entered neutral US territory with the view of destroying the Caroline, a civilian steamboat transporting arms and other supplies to the Canadian insurgents. The ship’s destruction, and the resulting death of one crew member, spurred several rounds of diplomatic correspondence between the US and British governments, with both sides using the terms ‘necessity’, ‘self-preservation’ and ‘self-defence’ interchangeably. The most cited of these exchanges is the US Secretary of State Webster’s letter to Lord Ashburton of Great Britain, specifically the passage where the former asserts that the latter bore the onus to ‘show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.’ Because self-defence as we know it today could not have formed part of the war-sanctioning jus ad bellum of the 19th century, the ILC, along with many like-minded scholars, classified the assault on the Caroline as an exemplar of the plea of necessity.

However, during the interwar years of the 20th century, influential commentators succeeded in retrospectively reconceiving the above-cited dictum – the so-called ‘Webster formula’ – as the customary basis for the modern doctrine of self-defence (more precisely its anticipatory modality), swaying the International Military Tribunal and the International Military Tribunal for the Far East into interpreting it as such. In shedding some insight on the ex post facto misconception of the Caroline affair’s precedential value, Jennings theorises:

[T]he expression "self-defence," whether inadvertently or by design, crept into the [Caroline] correspondence. In using that phrase the diplomats were almost certainly

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158 Letter from the British Ambassador Henry Fox to the US Secretary of State John Forsyth (6 February 1838) (reproduced in Brownlie [n3] 42); Jones (n156) 29; W.R. Manning, Diplomatic Correspondence of the United States: Canadian Relations 1784–1860, Vol. III (Carnegie Endowment for International Peace, 1943) 449-456; Letter from Lord Ashburton to the US Secretary of State Daniel Webster (28 July 1842) retrieved from: <https://avalon.law.yale.edu/19th_century/br-1842d.asp#intro> on 02/12/2019; Letter from the US Secretary of State Daniel Webster to Lord Ashburton (27 July 1842) extract of an earlier note of 24 April 1841, retrieved from: <https://avalon.law.yale.edu/19th_century/br-1842d.asp#intro> on 02/12/2019.

159 Letter from the US Secretary of State Daniel Webster to Lord Ashburton (n158).

160 ARSIWA (n110) 81(5); A/CONF.4/318/Add.5–7 (n107) 57.


163 Judgment of the International Military Tribunal (1 October 1946) 1 IMT 1, 207.

not consciously attempting to introduce a new concept into the law. But once the phrase had been introduced, it was possible for lawyers of a later day to give it a legal content.\textsuperscript{165}

Thus, notwithstanding that the Caroline incident could not have, at the moment of its happening, set a valid precedent for the present-day right of self-defence, the fulfilment of the subjective element of customary law hinges on states believing certain conduct to be representative of the law, regardless of whether their persuasion was initially born out of a misconception. And, as is expanded on in Chapter Three, the Webster formula remains the most frequently adduced standard for \textit{ex ante} armed attack action.\textsuperscript{166}

Inasmuch as its inception was preconditioned on some form of a prohibition of the use of force, the right to self-defence did not emerge until after the League of Nations qualifiedly outlawed war.\textsuperscript{167} The first treaties to explicitly acknowledge the doctrine under scrutiny were the 1924 Geneva Protocol\textsuperscript{168} and the 1926 Locarno Pact.\textsuperscript{169} Though no such express reference appears in the watershed 1928 Kellogg-Briand Pact, its signatories attested to the instrument with the understanding that the absolute ban on war did not extend to acts of self-defence (as evidenced by the statements of, \textit{inter alia}, France,\textsuperscript{170} Germany,\textsuperscript{171} and the US\textsuperscript{172}). According to the US Secretary of State Kellogg, one of the Pact’s co-authors, the agreement was not intended to impugn the lawfulness of self-defence; rather, the right was purposely omitted for fears of its open-ended and underdeveloped nature inviting spurious interpretations of the countervailing concept of aggression.\textsuperscript{173} Indeed, taking into account the impact of the repurposed legacy of the Caroline affair, and seeing that the requirement of armed attack was not yet fleshed out, the interwar notion of self-defence was broad enough to authorise the use of force against mere threats.\textsuperscript{174} The right’s eventual codification in Article 51 of the UN Charter

\textsuperscript{165} R.Y. Jennings, ‘The Caroline and McLeod Cases’ (1938) 32 American Journal of International Law 82, 92.

\textsuperscript{166} K.T. Szabó, \textit{Anticipatory Action in Self-Defence, Essence and Limits under International Law} (T.M.C. Asser Press, 2011) 91; C. O’Meara, ‘Reconceptualising the Right of Self-Defence Against ‘Imminent’ Armed Attacks’ (2022) Journal on the Law on the Use of Force, published online: <https://www.tandfonline.com/doi/full/10.1080/20531702.2022.2097618?src=> 1, 8; Radziwill (n84) 150-152; Arend, ‘International Law and the Preemptive Use of Military Force’ (n157) 90-91; Gill and Ducheine (n61) 448; R. Weise, ‘How Nuclear Weapons Change the Doctrine of Self-Defense’ (2012) 44 New York University Journal of International Law and Politics 1331, 1342; Cohan (n92) 328-329; Meng, ‘Caroline’ (n157) 81; Australian Australian Attorney-General Brandis on anticipatory self-defence (n128); \textit{Oil Platforms (Iran v United States of America)} (Counter-Memorial and Counter-claim submitted by the United States of America) [1997], 147; Tallinn Manual 2.0 (n52) 350-351.


\textsuperscript{168} Geneva Protocol (n29) Articles 2 & 8.

\textsuperscript{169} Locarno Pact (n30) Article 2(1-3).


\textsuperscript{171} Amendment of the Covenant of the League of Nations (n170) 369.


was prefaced by a substantial corpus of affirmative *opinio juris* (see how, in the 1920s-1930s, the lawfulness of self-defence was upheld by France, Germany, Greece, Italy, Japan, Peru the Soviet Union and the US).

Despite raising more questions than it answers, the succinct wording of Article 51 conveys a number of unequivocal points: first, it subjects the exercise of self-defence to the occurrence of an ‘armed attack’, a term it fails to either define or relate to ‘force’ from Article 2(4). Second, Article 51 envisions both an individual and a collective variant of self-defence, the latter of which allows the attacked state to procure military aid from third-party allies. Third, self-defence must be reported to the UNSC without delay and has to cease once the Council takes charge of the situation. Nevertheless, jurists disagree on whether the right to self-defence is extinguishable by just about any UNSC resolution or only those yielding a reasonable prospect of the restoration of peaceful relations. The former alternative, albeit more consistent with the Charter’s prioritisation of collective security over unilateral action (the UNSC being the bearer of the ‘primary responsibility’ for maintaining international peace and security), could, in certain cases, enjoin the defending state to accept a *fait accompli* as devastating as territorial annexation or regime change. The contention at stake is but one of countless examples of the seemingly impossible conflict between the restrictionist and expansionist perspectives on self-defence.

It was not until the already discussed 1986 *Nicaragua* judgment that the ICJ provided much-needed clarification on some of the controversies surrounding self-defence. The US justified its use of force against Nicaragua on the basis of the collective self-defence of El Salvador, whose rebel forces were alleged to have been armed by the Nicaraguan government, as well as Costa Rica and Honduras, whose territories were repeatedly raided by the Sandinista People's Army. The Court held that reliance on the doctrine’s collective modality presupposes an official request for assistance by the targeted state(s). While one of the above-mentioned states - El Salvador – declared itself a victim of an armed attack and called upon the US to come to its defence, it did so only after the latter had

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1 ‘International Law and the Recourse to Force: A Shift in Paradigms’ (1990) 27 Stanford Journal of International Law 1, 29; Gardam (n12) 45; Brownlie (n3) 231-232, 241 & 250.
2 Amendment of the Covenant of the League of Nations (n170) 375.
3 Amendment of the Covenant of the League of Nations (n170) 369.
7 Williamson (n21) 81.
9 The US, *Hearings, Reports and Prints of the Senate Committee on Government Operations* (n172) 37; Amendment of the Covenant of the League of Nations (n170) 366.
11 UN Charter (n1) Article 24(1).
12 Nicaragua case (n38) 126-130.
13 Nicaragua case (n38) 232.
resorted to force against Nicaragua.\textsuperscript{187} This is without prejudice to the fact that, as is laid bare in Sections 2.2.2.-2.2.4., the US did not satisfy any of the general conditions for the exercise of self-defence.

But for now, let us step back and unpack the ICJ’s assertion that, just like the prohibition of the use of force, the right to self-defence is rooted in both treaty and customary law.\textsuperscript{188} In substantiating the doctrine’s customary status, the Court referred solely to Article 51 and the UNGA Resolution 2625 (XXV), neglecting to appraise any state practice entailing the actual use of force.\textsuperscript{189} That is not to cast doubt on the existence of the customary right of self-defence, which, as illustrated earlier, was generally recognised long before it found its way into the universally esteemed UN Charter. What the ICJ’s methodology does indicate is that to expect self-defence - an exception to a peremptory negative obligation - to produce an abundance of physical state practice (i.e. forcible conduct) would be to require a mass deviation from the (at least partly) non-derogable interdiction of the use of force. Consequently, the doctrine’s disposition is such that, when it comes to the ascertainment of its customary character, greater weight must be accorded to the element of \textit{opinio juris} as well as to the verbal manifestations of its objective counterpart.

The co-governance of self-defence by treaty and customary law, sources that are hierarchically on the same plane, suggests that the right’s scope thereunder could be identical. In debunking that assumption, the Court posited that there is no customary equivalent to the defender’s commitment to report to the UNSC.\textsuperscript{190} Although, due to the Council’s non-existence prior to 1945, the said imperative could not have been reflective of the pre-Charter customary law, this actuality is rendered moot by the near-universal membership of the UN. In any event, it has been more than three decades since the ICJ handed down the present judgment, during which time the reporting duty may have crystallised into a customary norm. Having said that, certain well-established tenets of the customary right to self-defence, namely the principles of necessity and proportionality, appear to have been left out of Article 51. Despite not being named, their continued validity is, as the Court argued, confirmed by the drafters’ decision to designate self-defence as an ‘inherent right’.\textsuperscript{191} The Institute of International Law also took the stance that customary law supplements Article 51.\textsuperscript{192} This is a logical conclusion to reach, insofar as the Charter’s superficial coverage of self-defence barely scratches the surface of what is a highly sophisticated doctrine. While the Charter was never meant to wipe out the entirety of the pre-existing \textit{jus ad bellum}, it is unclear which pre-1945 customary rules, aside from the conspicuous candidates enumerated above, now lurk under the umbrella of the term ‘inherent’. As will be revealed in Chapter Three, expansionists postulate that one such surviving norm is the anticipatory modality of self-defence. However, before venturing into the \textit{ex ante} armed attack context, attention must first be paid to the requisites that regulate all acts of self-defence, irrespective of temporal orientation.

\textsuperscript{187} Nicaragua case (n38) 233.
\textsuperscript{188} Nicaragua case (n38) 178-179.
\textsuperscript{189} Nicaragua case (n38) 193.
\textsuperscript{190} Nicaragua case (n38) 235.
\textsuperscript{191} Nicaragua case (n38) 176 and 193; \textit{Legality of the Threat or Use of Nuclear Weapons} (n62) 41; \textit{Oil Platforms (Iran v the United States of America)} (merits) [2003] ICJ Rep 161, paras. 74 & 76-77.
2.2.2. Armed Attack – The Sine Qua Non of Self-Defence

The contingency of self-defence on the happening of an armed attack begs the obvious question: which uses of force possess the capacity to trigger Article 51? Here, two factors are of essence: the gravity and the modality of an offensive. Starting with the former criterion, we once again turn to the Nicaragua case, where the ICJ proclaimed that only the gravest breaches of Article 2(4) amount to an armed attack.193 The US was unable to show that Nicaragua’s actions rose to the requisite grade of intensity. Even supposing that the flow of arms from Nicaragua to El Salvador were imputable to the Nicaraguan government, the Court underscored that such indirect violations of Article 2(4) cannot activate Article 51.194 Though the ICJ did find Nicaragua responsible for a number of incursions into the territories of Costa Rica and Honduras, the limited information thereon did not allow for a conclusive determination of their severity.195

The satisfaction of Article 51’s threshold of gravity boils down to the scale and effects of the transgressive measure(s);196 the decisive consideration is the extent of the harm caused, not the type of instrument wielded by the offending state. In the Court’s view, unlikely to attain the prescribed level of seriousness are isolated frontier clashes,197 which, as the Eritrea-Ethiopia Claims Commission weighed in, may even involve the loss of life.198 The EU,199 ILA,200 ILC,201 the Institute of International Law202 and the Tallinn Manual203 have all affirmed the distinction in magnitude between Article 2(4)’s ‘force’ and Article 51’s ‘armed attack’. The gap betwixt the two notions inadvertently tips the odds in the attacker’s favour, whose forcible actions, if short of an armed attack, can only be responded to with non-forcible countermeasures. For this reason, the idea of certain uses of force failing to engage Article 51, albeit fairly undisputed,204 is not without dissent. The opposition thereto is spearheaded by the US, which equalises all infringements of Article 2(4) with an armed attack,205 a position also espoused by the Chatham House.206 Other authorities, such as the International Group of Experts,207 highlight the disconcerting lack of clarity as to the destructiveness that makes an armed attack. The

193 Nicaragua case (n38) 191 & 195.
194 Nicaragua case (n38) 195 & 230.
195 Nicaragua case (n38) 231.
196 Nicaragua case (n38) 195; Legality of the Threat or Use of Nuclear Weapons (n62) 39.
197 Nicaragua case (n38) 195.
199 Independent International Fact-Finding Mission on the Conflict in Georgia (n92) 245.
200 ILA (n53) 6.
201 A/CN.4/440 and Add.1 (n49) 99.
202 Institute of International Law (n192) 5.
203 Tallinn Manual 2.0 (n52) 337.
204 Moir (n54) 22 & 24; Randelzhofer (n54) 271; Ruys, ‘The Meaning of "Force"' (n54) 162; Couzigou (n54) 9-10; France’s official position on international law and cyberspace (n70) 9; Finland’s official position on international law and cyberspace (n59) 7.
205 Legal Advisor to the US Department of State Koh on international law in cyberspace (n83); Y. Beer, ‘Regulating Armed Reprisals: Revisiting the Scope of Lawful Self-Defense’ (2020) 59 Columbia Journal of Transnational Law 117, 127-128.
206 Chatham House (n51) 6.
207 Tallinn Manual 2.0 (n52) 341-342.
ILA suspects that the quantitative difference between lesser force and an armed attack is relatively tenuous in practice.\textsuperscript{208}

Even though the proverbial line that separates the two concepts is blurred, the ICJ’s \textit{Oil Platforms case}\textsuperscript{209} offers a useful frame of reference for the assessment of the severity of forcible operations. The events of the dispute transpired in the context of the 1980-1988 Iran-Iraq War, when several third-party ships encountered a barrage of mines and missiles whilst sailing through the Persian Gulf.\textsuperscript{210} On 16 October 1987, Sea Isle City, a Kuwaiti oil tanker flying the US flag, was hit with a missile alleged to have been fired by Iran,\textsuperscript{211} injuring seventeen of the crew on board.\textsuperscript{212} Three days later, the Reagan administration invoked Article 51 and ordered the annihilation of the Iranian Reshadat oil platforms,\textsuperscript{213} the execution of which also damaged the adjacent Resalat installation.\textsuperscript{214} Fast-forward to 14 April 1988, the US warship U.S.S. Samuel B. Roberts struck a mine and suffered extensive damage,\textsuperscript{215} prompting a response far bigger in scope than the one that preceded it. On 18 April 1988, the US, having once again assigned blame to Iran, instigated Operation Praying Mantis, decimating two more Iranian oil platforms - Nasr and Salman – as well as legions of Iranian aircraft and vessels.\textsuperscript{216}

Notwithstanding that, as is laid out in Section 2.2.3., the non-attribution of the attacks to Iran forfeited the right to self-defence thereagainst, the Court hypothesised that the explosion sustained by U.S.S. Samuel B. Roberts might have been, in and of itself, sufficiently severe to set off Article 51.\textsuperscript{217} This reference point signals that, as imprecisely delimited as it is, the gap between, on the one hand, a lesser violation of the prohibition of the use of force and, on the other hand, a self-defence-triggering armed attack, is quite narrow. In addition to being imbued with uncertainty, Article 51’s standard of gravity suffers from the same drawbacks that beset the analogous effects-based conceptualisation of Article 2(4). By having physical devastation dictate an act’s qualification as an armed attack, the contemporary \textit{jus ad bellum} leaves unaccounted for certain especially dangerous emerging threats. As elucidated in Section 2.1.2., infrastructure-paralysing cyber-attacks possess the capability to affect millions of lives without wreaking havoc in the conventional sense, a radius of impact that far exceeds that of, for instance, the mining of a single ship. Yet, under the legal \textit{status quo}, only the latter can come within the purview of the law on the use of force and, by the same token, take the shape of an armed attack. As counterintuitive as it seems that the application of a magnitude-based metric would produce such an outcome, only time will tell the extent to which, if any, the said metric must be rethought to conform to the yet-to-be-revealed properties of cyber warfare.

Before moving onto the factor of modality, due regard must be had to the interrelationship between the expressions ‘armed attack’ and ‘aggression’, which, as spelled out in Sections 2.1.3. and 2.2.2.

\textsuperscript{208}ILA (n53) 6.
\textsuperscript{209}Oil Platforms (n191).
\textsuperscript{210}Oil Platforms (n191) 23-24.
\textsuperscript{211}Oil Platforms (n191) 25.
\textsuperscript{213}UNSC ‘Letter dated 87/10/19 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council’ (19 October 1987) UN Doc S/19219; Oil Platforms (n191) 25.
\textsuperscript{214}Oil Platforms (n191) 47.
\textsuperscript{215}Oil Platforms (n191) 25 & 77.
\textsuperscript{216}Oil Platforms (n191) 66-68.
\textsuperscript{217}Oil Platforms (n191) 72.
respectively, each denote the most serious of breaches of Article 2(4). Accordingly, some authors are of the persuasion that the two notions are tautological, a perspective lent credence to by evidence of their interchangeable usage by states as well as the French version of Article 51, which features the collocation ‘agression armée’ (‘armed aggression’ in English) in lieu of ‘attaque armée’ (the French equivalent of ‘armed attack’). As per Article 33(1) of the VCLT, the Charter’s English and French texts are ‘equally authoritative’. Others claim that every armed attack is aggression but not vice versa. Ostensibly less common is the inverse belief, i.e. the idea that a particular undertaking could pass as an armed attack without simultaneously assuming the character of aggression.

As detailed in Section 2.1.1.’s and 2.2.1.’s overview of the jus ad bellum of the 1920s-1930s, aggression, the then go-to nomenclature for that which gives rise to self-defence, certainly encompassed a wider range of measures than what is presently envisioned by Article 51. Still, owing to the monumentality of the 1945 overhaul of the law on the use of force, one cannot simply presume that the broadness of the interwar conception of aggression had carried over to the UN era. Ultimately, even though the exact relationship between an armed attack and aggression remains opaque, there does appear to be a variance in the way the two terms are perceived. The analysis conducted thus far gives the impression that, whereas the phrase ‘armed attack’ denotes acts whose exceptional gravity is determined by a purely objective calculation of effects, the word ‘agression’ additionally implies a certain kind of aspirations vis-à-vis the territorial integrity and/or political independence of the target state. That implicit element of malevolence could explain why, of the two designations, only aggression is used in association with jus cogens. Even so, it is hard to say whether this discrepancy transcends semantics.

As will be showcased throughout Chapters Five and Six, the manner in which an armed attack is executed - a one-off strike, a series of interrelated offensives, or a territorial occupation - has tremendous influence on the legality of forcible actions in the ex post armed attack context. Not only does it factor into the ascertainment of an armed attack’s occurrence, but it also significantly alters the interpretation of the principles of necessity and proportionality. It is, by contrast, of little practical


220 VCLT (n111) Article 33(1).


222 Ruys, ‘Armed Attack’ (n92) 139.

relevance in the ex ante armed attack context, for therein the modality of a prospective threat is yet to manifest itself. This is subject to the caveat that, as will be elaborated in Chapter Six, a soaring number of states and scholars exhibit what is, in the opinion of the present thesis, an erroneous tendency to classify responses to repeated breaches of Article 2(4) as anticipatory/preventive measures. Most discussions of the requirement of armed attack envisage a single event with a fixed beginning and end, whose intensity is high enough to validate self-defence. Matters become more complex where, instead of a one-off onslaught, the aggressor chooses to initiate a coordinated sequence of periodic assaults. Assuming that at least one incident in the said streak of violence reaches the necessary degree of severity, the victim state would be allowed to respond with force, so long, of course, as all other requisites for self-defence are met. Be that as it may, one would be remiss to dismiss as irrelevant the quantity and frequency of preceding raids, given that, as demonstrated by Chapter Five and Six’s exposition of state practice and opinio juris in the ex post armed attack context, the attacker’s track record may play an instrumental role in the evaluation of the reaction’s indispensability, timeliness and commensurateness.

Even more complicated is the scenario in which none of the successive assaults are, if considered in isolation, sufficiently grave to take the form of an armed attack. Though some rule out the prospect of self-defence in such a situation, the so-called accumulation of events theory holds that, even if individually deficient in gravity, interlinked incursions can still trigger Article 51 through their cumulative effect. Despite being premised on the nexus between individual forcible acts and a larger pattern of hostilities, the theory at issue offers precious little guidance on the identification of that link. Therefore, in order to establish which forcible measures are to be treated as a unitary whole, jurists have to turn to common sense and review indicators such as the timing (the greater the temporal distance between the studied incidents, the weaker the connection between them) and the purpose (actions with a shared goal are more likely to form part of the same campaign) of the use of force. Seeing as it is integral to the reprisal/self-defence duality, the legal status of the accumulation of events theory is dealt with in Chapters Five and Six. Also explored in the later chapters is the third modality, territorial occupation, which differs from a one-time strike by its potentially indefinite duration, i.e. its termination hinging on some sort of an intervention by the target state or the international community. At any rate, the transpiration of an adequately severe attack does not, per se, create an enforceable claim of self-defence. The armed attack must first be legally attributed to the responsible actor.

226 O’Meara, Necessity and Proportionality and the Right of Self-Defence (n223) 99; Gill (n223) 741-742.
227 Jain (n225) 62; Gill (n223) 742-743; Ruys, ‘Armed Attack’ (n92) 168; ILA (n53) 7.
228 Bethlehem (n133) 775 (principles 5-6); Ruys, ‘Armed Attack’ (n92) 168.
2.2.3. Attribution – The Due Process of Establishing Responsibility for an Armed Attack

The basic premise of the obligation of attribution is uncontested; any state wishing to engage in self-defence must first identify the perpetrator of the instigating armed attack, that is, the internationally wrongful act upon which rests the doctrine’s exercise. However, the deeper one digs, the more apparent it becomes that the practicalities of attribution are not any less nebulous than those of the other conditions for Article 51. Although the process of assigning blame to the violators of the *jus ad bellum* is plagued by many problems, the following three hot topics are of particular interest to the present study: the question of which forcible acts are imputable to states, the exercisability of self-defence against independent non-state actors, and the stringency of the defending party’s burden of proof. Kicking off with the first of these pressing quandaries, it must be understood, right from the start, that state responsibility can arise either automatically or conditionally. Automatic liability is dependent on which entity performs the action under review. As stipulated by the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), the most comprehensive codification of the law on state responsibility to date, states are strictly liable for the conduct of their respective government institutions, which include not only *de jure* organs but also *de facto* ones (persons/bodies completely dependent on a state).

Conversely, attribution of the acts of private actors is entirely situational, and while different standards have been proposed to that effect, the most prevalent among them is the ‘effective control test’. Developed by the ICI in the 1986 *Nicaragua* judgment, the above-named test ascribes to a state only those actions which a non-state actor carries out under the former’s instructions, direction or control. The rule at hand is concerned not with the relationship between the said state and non-state actor but with the decisiveness of the former’s influence over the actual

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230 ARSIWA (n110) Article 4.


233 Tallinn Manual 2.0 (n52) 94; Tams and Devaney (n229) 93; Dederer and Singer (n229) 436; S. Stryjkowska, ‘The International Legal Issue of Attribution of Conduct to a State – The Case Law of the International Courts and Tribunals’ (2018) 8 Adam Mickiewicz University Law Review 143, 152; The Netherlands on ‘International Law in Cyberspace’ (n61) 6; Legal Advisor to the US Department of State Koh on international law in cyberspace (n83).

234 *Nicaragua case* (n38) 115.

235 ARSIWA (n110) Article 8.
perpetration of internationally wrongful acts. Consequently, in the *Nicaragua case*, the Court found that the US’s training and arming of the Nicaraguan contras, though indicative of considerable power over the group, did not, by itself, constitute evidence of critical control over the logistics of the insurgents’ armed operations.236 This is not discounting that, as relayed in Sections 2.1.2. and 2.2.2., such a facilitation of foreign military ventures is nonetheless contrary to Article 2(4). The Tallinn Manual gives a more detailed account – albeit in the context of cyberspace - of the kind of sway the controlling state must exert if it is to be held responsible, directly rather than indirectly, for the acts of a non-state actor:

A State is in ‘effective control’ of a particular cyber operation by a non-State actor whenever it is the State that determines the execution and course of the specific operation...Effective control includes both the ability to cause constituent activities of the operation to occur, as well as the ability to order the cessation of those that are underway.237

Thus, it is hardly surprising that the effective control test is widely criticised for being exceedingly rigorous.238 In fact, so exacting is the standard it sets that the jurisprudence of its pioneer – the ICJ – does not contain a single example of its satisfaction.239 That being so, one has to wonder, can the victim state circumvent the rule in question by restricting its self-defence to the non-state aggressor? For the purposes of this section, the permissibility of self-defence against private actors is contemplated in the abstract, i.e. notwithstanding that, as is illuminated in Chapter Five, such a use of force would nevertheless (absent consent) impinge on the territorial integrity of whichever state the targeted entity resides in. Most authorities agree that, during the second half of the 20th century, international law did not countenance self-defence against attacks unattributable to a state.240 But in a twist of events, the last two decades have, as is catalogued throughout the remainder of this thesis, beheld a holistic shift towards expansionism, one facet of which is support for the extension of Article 51’s applicability to self-dependent non-state actors.241

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236 *Nicaragua case (n38) 115.
237 Tallinn Manual 2.0 (n52) 96.
239 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n231) 413; *Armed Activities on the Territory of the Congo* (n129) 126-130, 146 & 157-160; *Nicaragua case (n38)* 230-231.
The expansionist notion of the right’s *ratione personae* dimension was reaffirmed by the Bethlehem Principles, the Chatham House, the Institute of International Law, the majority of the International Group of Experts, the Leiden Policy Recommendations as well as the UNSC. Furthermore, such an interpretation is, as its proponents frequently emphasise, compatible with the wording of Article 51, which contains no specification as to who the attacker must be. Others protest that the opposition, even if in decline, is still sizeable enough to forestall the law’s development on this point. One indication thereof came when, in 2004, the ICJ confined self-defence to the scenario ‘of armed attack by one State against another State’, much to the dismay of some of the judges on the bench, who felt as though the Court disregarded the seismic change in the international community’s position. Despite having had the opportunity to do so, the Court has since avoided making further pronouncements on the matter. Jumping ahead to 2018, the ILA opined that, if not already in force, self-defence against autonomous groups was on the verge of emerging under customary law; either way, the Association deemed the expansion of the right’s personal scope desirable, for ‘[t]he source of attack does not change the fact that the State must be able to stop it from causing harm.’ In aligning itself with the ILA’s stance, Chapter Five approximates

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Bethlehem (n133) 775 (principle 1).

Chatham House (n51) 11-12.

Institute of International Law (n192) 10(ii).

Tallinn Manual 2.0 (n52) 345.

Leiden Policy Recommendations (n134) 541.


Separate Opinion of Judge Kooijmans in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n240) 35; Declaration of Judge Buergenthal in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n248) 6.

ILA (n53) 14-17.
the kind of circumstances that precipitate the *de facto* necessity of using force against non-state actors, chief among which are cross-border raids from the territories of states unwilling or unable to intercept them.

Perhaps the most elusive aspect of the obligation of attribution is the strictness of the defending state’s burden of proof, that is, the minimum strength of evidence needed to hold the suspected wrongdoer responsible. The law on state responsibility does not fix a universal evidentiary standard for the attribution of internationally wrongful acts; the required level of proof is thought to correspond to the seriousness of the underlying infraction. Because only the most severe breaches of Article 2(4) are capable of triggering Article 51, and considering that misattribution yields the prospect of an innocent third party becoming the object of self-defence, one cannot but conclude that the attribution of an armed attack must be supported by particularly strong evidence. Still, hardly any states have commented on just how conclusive such proof ought to be; among the few that have are the Netherlands and the US, the latter of which has consistently conditioned self-defence claims on ‘clear’, ‘convincing’ and ‘compelling’ evidence. The Dutch government had the following to say on the subject: ‘The burden of proof for justifiable self-defence against an armed attack is a heavy one...States may...use force in self-defence only if the origin of the attack and the identity of those responsible are sufficiently certain.’

The academic literature offers a wide range of evidentiary standards to this end, and though some are more demanding or concrete than others, virtually all set a threshold higher than a mere preponderance of evidence (i.e. the burden of proof used in civil disputes across many domestic jurisdictions). In other words, most academics seem to believe that, as far as the exercisability of self-defence is concerned, it is insufficient to show that the purported offender was more likely than not to have seriously violated Article 2(4). The jurisprudence of the ICJ does not provide any definitive answers either. The Court’s understanding is ‘that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive’; yet, seemingly lower standards, varying from ‘a degree of certainty’ to ‘convincing evidence’, were applied in cases concerning the use of force. Especially insightful in this regard is the *Oil Platforms case*. Therein, the

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256 The Netherlands on ‘International Law in Cyberspace’ (n61) 9.


258 Schmitt, ‘Cyber Operations and the Jus Ad Bellum Revisited’ (n257) 595.


260 *Corfu Channel (United Kingdom v Albania)* (merits) [1949] ICJ Rep 4, 17.

261 Nicaragua case (n38) 29; the same standard seems to have been employed in *Armed Activities on the Territory of the Congo* (n129) 72.
onus was on the US to prove that its vessels were struck by Iran, rather than by the latter’s warring adversary, Iraq, whose attacks on neutral ships in the Persian Gulf bore the same hallmarks.\textsuperscript{262} This predicament thwarted the US’s ability to verify that the damage suffered by Sea Isle City and U.S.S. Samuel B. Roberts, in particular, was inflicted by Iran.\textsuperscript{263} The US was, however, able to retrieve mines of Iranian manufacture from the area of the incident involving U.S.S. Samuel B. Roberts.\textsuperscript{264} According to the Court, such evidence, albeit ‘highly suggestive’, was inadequate, inasmuch as it did not confirm that Iran also laid the mine that damaged the forenamed warship.\textsuperscript{265} Ergo, the fact that the likelihood of Iran’s culpability was higher than that of Iraq’s did not suffice to establish the former’s responsibility.\textsuperscript{266}

All in all, the language inconsistency in the ICJ’s case law, as compounded by the dearth of relevant \textit{opinio juris}, obfuscates the level of proof needed for the assignment of responsibility for an armed attack. The prevailing viewpoint, to the extent that it can be discerned, suggests that the applicable evidentiary standard goes beyond the balance of probabilities but leaves room for a modicum of doubt. Such a threshold is, for the most part, strict enough to substantially reduce the odds of misattribution, whether induced by spurious pretexts or a genuine mistake, without impairing the effectiveness of the doctrine of self-defence. Even so, as is contended in Chapter Six, the contemporary take on the obligation of attribution has not managed to withstand all of the challenges of post-1945 warfare. Having cleared up the three hot topics of state responsibility, we may now proceed to analyse the remaining two conditions for self-defence – the principles of necessity and proportionality.

**2.2.4. Principles of Necessity and Proportionality**

Although the modern right to self-defence did not surface until the 1920s, considerations of necessity and proportionality have, in some shape or form, informed all of the previous iterations of the \textit{jus ad bellum}, going as far back as the medieval just war theory.\textsuperscript{267} In spite of not being explicitly mentioned in the UN Charter, the principles of necessity and proportionality constitute universally accepted indicators of the lawfulness of self-defence operations\textsuperscript{268} and have been embraced as such by the

\textsuperscript{262} \textit{Oil Platforms} (n191) 23 & 71.
\textsuperscript{263} \textit{Oil Platforms} (n191) 58-61 & 71-72.
\textsuperscript{264} \textit{Oil Platforms} (n191) 71.
\textsuperscript{265} \textit{Oil Platforms} (n191) 71.
\textsuperscript{266} \textit{Oil Platforms} (n191) 57 & 71.
\textsuperscript{267} Gardam (n12) 28; Neff (n2) 51; Alder (n61) 18-19; Forge (n3) 25-26; The President of Estonia on international law and cyberspace (n55); The UK Attorney General Wright, ‘Cyber and International Law in the 21st Century’ (n55).
\textsuperscript{268} Tams and Devaney (n229) 91; Y. Beer, \textit{Military Professionalism and Humanitarian Law: The Struggle to Reduce the Hazards of War} (Oxford University Press, 2018) 70-71; V. Upeniece, ‘Conditions for the Lawful Exercise of the Right of Self-Defence in International Law’ (2018) 40 SHS Web of Conferences 01008, 2-3; Green, ‘Questioning the Peremptory Status of the Prohibition of the Use of Force’ (n110) 234; Grimal and Sundaram (n60) 327; Radziwill (n84) 145; Moir (n54) 11.
ICJ, 269 the ILC, 270 the EU, 271 the Bethlehem Principles, 272 the Chatham House, 273 the International Group of Experts, 274 the ILA, 275 the Institute of International Law 276 as well as the Leiden Policy Recommendations. 277 Whilst their customary status is scarcely ever contested, the specifics of their application are remarkably hazy. In the most fundamental sense, the principle of necessity restricts the exercise of self-defence to situations where an armed attack cannot be resisted by non-violent means. 278 Under the historically predominant restrictionist view, only an active offensive – and the concomitant need to halt and repel it - can give rise to an absence of peaceful alternatives, 279 which ipso facto excludes from the ambit of self-defence any counterblow that either precedes or follows the said offensive.

The effect of the principle of necessity is such that non-defensive measures (actions not limited to the protection of the actor’s territorial integrity/political independence) can never qualify as self-defence, a truism we shall return to in Chapters Four and Five’s deconstruction of the self-defence/reprisal dichotomy. Since egregious violations of Article 2(4) often call for an urgent reaction, the rule under scrutiny should not be misconstrued as requiring the exhaustion of all available pacific remedies; the defending state is not expected to pursue avenues that are unlikely to succeed. 280 Equally as important to the assessment of necessity is the defender’s choice of target. In Oil Platforms, the US claimed that the objects it targeted in self-defence were used by Iran as a staging ground for the assaults on Sea Isle City and U.S.S. Samuel B. Roberts. 281 Besides there being no evidence of any significant military

269 Legality of the Threat or Use of Nuclear Weapons (n62) 41; Oil Platforms (n191) 74 & 76-77; Nicaragua case (n38) 194; Armed Activities on the Territory of the Congo (n129) 147.
270 A/ CN.4/318/Add.5-7 (n107) 119.
271 Independent International Fact-Finding Mission on the Conflict in Georgia (n92) 248-249.
272 Bethlehem (n133) 775 (principle 4).
273 Chatham House (n51) 7-8 & 10.
274 Tallinn Manual 2.0 (n52) 348-350.
275 ILA (n53) 11-12.
276 Institute of International Law (n192) 2.
277 Leiden Policy Recommendations (n134) 542.
presence at the Reshadat, Nasr and Salman complexes, the US did not, at any point, complain to the Iranian government about the structures’ supposed illicit character.\(^{283}\) This, in the Court’s mind, indicated that the oil platforms were a ‘target of opportunity’, facilities whose obliteration could not have served a defensive purpose.\(^{283}\) The *Nicaragua case* provides another illustration of the failure to observe the principle of necessity, albeit one grounded in a different rationale. Notwithstanding that, as evinced in Section 2.2.2., the alleged arms flow from Nicaragua to El Salvador did not amount to an armed attack, the ICJ gathered that, by and large, the Salvadorian insurgency had been quelled months before the US began using force against the Sandinista regime.\(^{284}\) The Court hence concluded that, coming long after the fact, the US’s resort to force was devoid of necessity.\(^{285}\)

The *Nicaragua* judgment’s subsumption of temporality under the principle of necessity warrants a closer look at the rule’s relationship with the temporal standards that govern the *ex ante* and *ex post* armed attack contexts. Though, as is par for the course, states rarely chime in on such technicalities of the *jus ad bellum*, jurists tend to treat the tests of imminence\(^{286}\) and immediacy\(^{287}\) as components of the principle of necessity, rather than as discrete norms. That said, some pundits do regard them as standalone requirements, which would mean they have to be fulfilled independently of the principle of necessity.\(^{288}\) In any event, the foregoing disagreement is largely semantic, seeing that regardless of whether the temporal and non-temporal elements comprise a single rule, their interpretation may evolve in unison to accord priority to certain factors over others. For instance, states could come to tolerate a greater temporal distance between an offensive and the response, all the while placing a heavier emphasis on the substantiation of the practical necessity of recourse to force. A normative configuration of this sort could - through state practice and *opinio juris* - become reflective of the law irrespective of whether necessity and imminence/immediacy are conceptually separate. As Chapters Three, Five and Six showcase, the flexibility of states’ and scholars’ attitude towards temporality has been increasing exponentially with the ongoing diversification of the means and methods of warfare. Also chronicled in the later chapters is how the changing realities of state practice moved the modality of an armed attack, a traditionally immaterial attribute, to the forefront of the determination of the necessity of self-defence.

\(^{282}\) *Oil Platforms* (n191) 76.

\(^{283}\) *Oil Platforms* (n191) 76.

\(^{284}\) *Nicaragua* case (n38) 237.

\(^{285}\) *Nicaragua* case (n38) 237.


Whereas the principle of necessity addresses the question of whether a state is entitled to use force in the first place, the principle of proportionality regulates the actual enforcement of a valid claim of self-defence. Its basic function is to act as a safety net against excessive force, that is, to ensure that the defending party does not cross the line between defence and offence.\(^{289}\) There are two main approaches as to what the defensive operation’s effects should be weighed against: the equivalence (also referred to as tit-for-tat)\(^ {290}\) and the means-end standard. The former prescribes a quantitative symmetry between the action and the reaction, conceiving as proportionate only measures that produce either less or equivalent damage to that inflicted by the original attack.\(^ {291}\) Such was the methodology followed in *Oil Platforms*, where the ICJ quantified the havoc wreaked by the 1988 Operation Praying Mantis - the destructive reach of which extended far beyond the Nasr and Salman complexes - and found it to be massively out of proportion to the triggering incident (the mining of a single battleship).\(^ {292}\) At the same time, the Court estimated that, had there been an attributable armed attack to begin with, the principle of proportionality might have been met by the more measured 1987 counterattack for the missile strike on Sea Isle City.\(^ {293}\) The 1986 *Nicaragua* judgment contains a more superficial application of the equivalence approach, with the ICJ merely noting that the US subversion of the Sandinistas eclipsed the magnitude of the putative *matériels* supply to the Salvadoran rebels.\(^ {294}\)

As per the means-end take on proportionality, the level of responsive force is circumscribed by the purpose of self-defence, which, if viewed through the restrictionist lens, sanctions only the halting and repelling of an attack in motion.\(^ {295}\) As a consequence, the maximum permissible degree of force could very well, depending on the circumstances of each case, be higher or lower than what the equivalence standard would set. A minority of authors reckon that the condition of proportionality incorporates both tests in a cumulative fashion, instructing the defending state to neither cause more destruction than the aggressor nor overshoot the objective of self-defence.\(^ {296}\) However, whether coalesced with another metric or not, insistence on the parity between the initial assault and the riposte might jeopardise even the most restrained of self-defence operations, i.e. those striving only to stop an active onslaught in its tracks. There may be situations where the opening attack is less damaging than the kind of force needed to terminate it, in which case the target state would be presented with a hopeless dilemma: it could avoid surpassing the equivalence threshold by sacrificing its ability to effectively defend itself or, alternatively, achieve the aim of self-defence at the cost of violating the *jus ad bellum*.

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\(^ {290}\) As regards terminology, this thesis expresses preference for ‘equivalence’, inasmuch as it better captures the nature of the proposed test; nevertheless, the ‘tit-for-tat’ designation is used to reinforce arguments of its incompatibility, specifically of its retaliatory undertones, with the defensive purpose of Article 51.


\(^ {292}\) *Oil Platforms* (n191) 77.

\(^ {293}\) *Oil Platforms* (n191) 77.

\(^ {294}\) *Nicaragua* case (n38) 237.

\(^ {295}\) A/CN.4/318/Add.5-7 (n107) 121; Gardam (n12) 156; Pert (n290) 66; Y. Beer, ‘Revisiting Ad Bellum Proportionality’ (n290) 1508-1510.

\(^ {296}\) Bryde, ‘Self-Defence’ (n3) 213-214; Hamid (n14) 461.
Standing on its own, the equivalence interpretation may also veer towards undue leniency. So long as the intensity of the forcible response is kept below that of the inaugural transgression, there is nothing preventing measures of a purely offensive character from satisfying the equivalence standard. Naturally, offensive force can never pass the test of necessity, which goes to show how inconsistent the tit-for-tat understanding of proportionality is, not just with the other tenets of self-defence but also with the force-averse inclination of the UN system of collective security. As is elucidated in Chapter Four, this incongruence may be put down to the fact that, for the longest of time, the tit-for-tat notion of proportionality was associated with the now unlawful armed reprisals, a doctrine that enables the offensive use of force. Therefore, it is submitted here that, due to its intrinsically retaliatory undertones, the tit-for-tat idea of proportionality should be completely dissociated from the right to self-defence. That the UN Charter is teleologically more in tune with the means-end standard is further evidenced by the scholarly literature’s clear preference therefor.297

One issue that arises, if we go by the means-end approach, is whether the modality of an armed attack dictates the goal against which proportionality is measured. A state afflicted by a string of interlinked incursions – as opposed to a one-off strike – may have a legitimate security interest in precluding their recurrence; yet, any action seeking to end the entire campaign of hostilities would no doubt exceed the traditional aim of self-defence, which only allows for the repulsion of whichever instant of the said campaign is in progress at the time. Given that the termination of a single attack may do no more than mask the symptoms of a deeper problem, one ought to ask whether, in such cases, proportionality could be judged against the broader objective of deterring future assaults. That potentiality is discussed later in this thesis, specifically in Chapters Five and Six, which probe the post-1945 practice for signs of a more contextual conceptualisation of the principle under consideration.

2.3. Concluding Remarks

The present chapter set out to expound the general contours of the right to self-defence, as well as those of the underlying prohibition of the use of force, so as to lay the groundwork for the examination of the doctrine’s context-specific temporal standards. As clarified from the outset, the ratione temporis norms complement the requirements of self-defence – armed attack, necessity and proportionality - by steering their application towards certain outcomes, and, that being the case, neither can be studied in isolation of the other. Of course, because the law does not operate in a vacuum, the transforming realities of state practice have, as is documented in the ensuing chapters, shaped the extent to which temporality influences the legality of the use of force. In keeping with the theme of the law’s adequacy vis-à-vis the emerging means and methods of warfare, Chapter Two demonstrated that, aside from the UN Charter’s textual barriers and the narrowly delineated realm of jus cogens, there is little that stands in the way of the jus ad bellum’s evolution. Most of the key aspects of this body of law, such as the content of the terms ‘force’ and ‘armed attack’, the breadth of the scope of Article 2(4), the exercisability of self-defence against independent non-state actors, the evidentiary standard for the verification of the attacker’s identity, as well as the interpretation of the

297 Badr (n279) 27; Tams and Devaney (n229) 102; Trapp (n241) 146; Sadoff (n14) 526-527; Gardam (n12) 156; Etezazian (n289) 267; Beer, ‘Revisiting Ad Bellum Proportionality’ (n290) 1509-1510; ILA (n53) 12; A/CN.4/318/Add.5-7 (n107) 121; Leiden Policy Recommendations (n134) 542.
principles of necessity and proportionality, have either already undergone transformation or are bound to do so in the future. When it comes to the second alternative, of particular concern to the long-term sustainability of the status quo are the extraordinary dynamics of the cyber phenomenon, some of which were highlighted in this chapter. With the fundamentals of the law on the use of force laid out, the scene is set for the exploration of the ex a ante armed attack side of the temporal spectrum.

Recognising how weighty a role temporality plays in the operation of the general requisites for self-defence, and paying heed to the growing propensity – in the academic sphere and in state practice - to conflate temporal norms of varying strictness and context-dependence, the present study must, if it is to prove fruitful, ensure that the parameters of the ex post armed attack framework are demarcated relative to those of its ex ante counterpart. The accomplishment of the task at hand requires that the bigger picture be kept in mind; whereas self-defence against a prior offensive is, at its core, a legally incontestable right, the validity of the entire ex ante armed attack framework is intensely debated, with some commentators going as far as to categorically reject the permissibility of any reaction that precedes the commencement of the triggering act. That is not to say that the doctrines endemic to the ex ante armed attack context – anticipatory and preventive self-defence – are equally controversial. As established at the onset of this thesis, whilst the condition of the imminence of a prospective attack leaves only a brief window for anticipatory action, preventive self-defence is concerned not with temporal proximity but with the perceived nature of the hypothetical threat it seeks to counter, whether that be the acquisition of nuclear weapons by a rogue regime1 or the perpetual peril of terrorism2 (the US Bush doctrine, the quintessential policy of prevention, is predicated on both of these menaces3). The lack of hard restrictions on ex ante armed attack self-defence would give states too great an agency in deciding when to unilaterally employ force, a disposition that puts the concept of prevention at odds with the UNSC-centric model of global security.

Consequently, Chapter Three begins its appraisal of the ex ante armed attack framework by narrowing its focus down to measures capable, at least hypothetically, of meeting the requirements for self-defence. Doing so necessitates that the domain of anticipatory self-defence be marked off from that of the preventive variant, which, as borne out below, is manifestly irreconcilable with the contemporary law on the use of force. The present chapter then zooms in on the legality of the use of force against imminent threats, contemplating whether the wording of Article 51 of the UN Charter could – if not allowed by default – evolve to permit anticipatory action, before moving on to assess


the existing level of state support therefor. Insofar as its preoccupation is with the ex post armed attack framework, this research project does not endeavour to break down every purported instance of the exercise of anticipatory self-defence; instead, it undertakes to capture how, over time, the international community came to espouse a more favourable stance on the doctrine. Accordingly, recourse is mostly had to the verbal expressions of states, inasmuch as they are instrumental to appraising the customary status of exceptions to negative peremptory obligations. This is because, as argued in Chapter Two, such rules are, when compared with discrete positive duties, inherently predisposed to generate less physical practice.

Of all the modalities of self-defence, anticipatory action is sure to be the rarest, in that, logistically, it is easier to execute a counterstrike to an ongoing (or concluded) attack than it is to react, within a very specific time frame, to a threat whose materialisation must be supported by credible and often difficult-to-obtain proof. Though bona fide examples of anticipatory self-defence are sparse, claims thereof are anything but. As elaborated in Chapter Six, however, invocations of the aforementioned doctrine are, more often than not, causally linked to antecedent offensives and, as such, cannot be objectively classified as ex ante armed attack measures. Still, regardless of any misalignment with the objective reality, states that explicitly justify their use of force as anticipatory self-defence are, ipso facto, conveying their belief in the doctrine’s lawfulness. As the ICJ held in the Nicaragua case:

If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.4

The final portion of this chapter hones in on the test of imminence, the cornerstone of the ex ante armed attack framework. Therein, a division is drawn between the classical temporal approach to imminence, as derived from the Webster formula (quoted in Section 2.2.1.’s summary of the 1837 Caroline affair), and the 21st-century substitutes that prioritise non-temporal factors. The aforesaid standards are surveyed with an eye to gauging their capacity to accommodate the whole gamut of present-day warfare.

### 3.1. The Baseless Doctrine of Prevention

There is no denying that much of the advocacy for preventive self-defence stems from genuine grievances as to the jus ad bellum’s handling of major security challenges. Owing to the political rivalries that bedevil its veto-wielding permanent members (the P5: China, France, Russia, the UK and the US), the UNSC seldom ever authorises the use of force,5 which, when coupled with the stringency

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of the condition of imminence, may engender situations where those facing certain types of impending attacks are left with less-than-satisfactory legal avenues. Suppose that state A, an international pariah with close ties to a permanent representative of the Council, state B, has openly and consistently advertised that it would, upon completion of its nuclear weapons programme, wipe its arch-nemesis, state C, off the map. B vetoes all attempts at staving off A’s attainment of nuclear arms, leaving the UNSC powerless to stop the looming danger from materialising. Were we to assume A’s willingness to consummate its plan, the resulting emergency would speak not only to the senselessness of blanket restrictionism, which would have C desist till it is struck with potentially state-erasing force, but also to the inopportune context-insensitivity of the doctrine of anticipatory self-defence, which, as specified in Section 3.3.1., would oblige C to withhold its response until the brink of a nuclear catastrophe.

There are two pathways that could conceivably ameliorate this predicament without exceeding the boundaries set by the UN Charter. First, as onerous as it is to amend the Charter, the UNSC’s proneness to deadlock can be alleviated through reform of its composition and voting procedure. Some such changes have already been implemented, not only via Article 108 (e.g. enlargement of the Council’s non-permanent membership from six to ten) but also by way of the subsequent practice of the UN member states (e.g. abstention from voting being counted as a ‘concurring vote’ within the meaning of Article 27). Being as how the veto holders are unlikely to voluntarily relinquish their prerogative, the UNSC’s capability to act under Article 42 should be facilitated through more feasible proposals, which include, but are not limited to, the incorporation of a preliminary round of indicative voting and the blocking of a resolution becoming conditional on two – as opposed to just one – negative votes by the P5. Second, the test of imminence can be recalibrated to conform to the unique attributes of the notoriously intractable means and methods of warfare. Though far more contentious than the first option, the adoption of a malleable standard of imminence is, as the present thesis asserts in Section 3.3.1., indispensable for the continued efficacy of not just the ex ante armed attack framework, but of the jus ad bellum as a whole.

By favouring practically unconstrained self-help over the above-mentioned two solutions, the theory of prevention lends itself to gargantuan abuse by states eager to camouflage aggression as self-defence. Thus, it is rather unsurprising that preventive action cannot be read into Article 51 of the UN Charter. The provision under discussion conditions self-defence on the occurrence of an actual armed attack, which, when at the preventive stage, has not even begun to take shape, nor might it ever do so. Such an abstract risk is yet to develop definitive - or near-definitive - scale and effects, that is, the frame of reference needed to ascertain whether a particular offensive is severe enough to activate Article 51. Moreover, insomuch as they are measured against the aim of halting and repelling of an

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9 Hosli and Dörfler (n5) 46.
10 A/59/565 (n5) 257.
11 Wouters and Ruys (n7) 22.
armed attack, i.e. against the repulsion of something that, in the context of prevention, has yet to pop into existence, the principles of necessity and proportionality, too, are unfulfillable by preventive strikes.\textsuperscript{12} Even supposing that one could accurately guesstimate the extent of damage a latent threat would cause upon realisation, it is highly implausible that the use of force would, at the date of that calculation, represent the only viable remedy.

It has been advanced that, albeit at variance with the text of Article 51, the prevention of nuclear attacks is concordant with the permissive interpretation of Article 2(4), given that, as enunciated in Chapter One, efforts towards the non-proliferation of nuclear weaponry - a commitment shared by the entire international community - further the purposes of the UN.\textsuperscript{13} This line of reasoning is hardly convincing, as, notwithstanding that most authorities subscribe to the restrictive take on the breadth of Article 2(4)'s proscription, what the permissive approach deems lawful is force that is neither ideologically incongruous with the UN's mission nor directed against the territorial integrity and political independence of a state. Unlike certain measures protective of individuals in distress (rescue of nationals abroad, or, more controversially, humanitarian interventions), preventive self-defence is clearly meant to harm the targeted state and, as such, cannot be squared with the permissive reading of Article 2(4). As a matter of fact, a multitude of states designated the most well-known preventive operations as acts of aggression,\textsuperscript{14} which, as per Chapter Two's findings, are interdicted by the non-derogable \textit{jus cogens}. Due to its liability to conflict with a peremptory rule, the legalisation of preventive self-defence may be dependent on it itself ascending to \textit{jus cogens} status, i.e. garnering near-universal acceptance by states.

In reality, the international reaction to preventive force has been that of near-uniform condemnation, as evinced by, \textit{inter alia}, the reception of the first textbook instance of the doctrine's practice – the 1981 Israeli air raid on the Osirak facility. On 7 June 1981, the Israeli air force penetrated Iraq's airspace and, at the cost of eleven casualties, successfully destroyed Osirak, an unfinished nuclear reactor.\textsuperscript{15} The Israeli government suspected that, once in operation, Osirak was to be used for the manufacture a nuclear bomb.\textsuperscript{16} In recounting Iraq's purportedly unyielding resolve to utilise nuclear arms against it,\textsuperscript{17} Israel maintained that, had the plant in question not been obliterated, its construction would have reached a critical juncture in around a month's time.\textsuperscript{18} Even though Osirak was, by most accounts, a likely vehicle for the production of weapons of mass destruction, one can only speculate as to which


\textsuperscript{13} Weise (n1) 1335-1336 & 1368-1369.


\textsuperscript{15} S. Polakow-Suransky, \textit{The Unspoken Alliance: Israel's Secret Relationship with Apartheid South Africa} (Pantheon, 2010) 145.

\textsuperscript{16} UNSC Verbatim Record (12 June 1981) UN Doc S/PV.2280, para. 80.

\textsuperscript{17} S/PV.2280 (n16) 59.

\textsuperscript{18} S/PV.2280 (n16) 102.
state, if any, would have found itself on the receiving end of their fury.\textsuperscript{19} Opinions vary, but it is improbable that Iraq would have been able to build nuclear weaponry in less than a year,\textsuperscript{20} meaning, on top of being purely conjecture, the prospective attack on Israel was also fairly distant. The non-imminence of the supposed danger was, as a number of states pointed out (Iraq,\textsuperscript{21} Niger,\textsuperscript{22} Oman,\textsuperscript{23} Sierra Leone,\textsuperscript{24} UAE,\textsuperscript{25} Uganda\textsuperscript{26} and the UK\textsuperscript{27}), transgressive of the limits of permissible ex ante armed attack self-defence. Israel, while conceding that it exceeded the momentary time frame envisaged by the doctrine of anticipatory self-defence, thought it absurd to apply a 19\textsuperscript{th}-century touchstone – the Webster formula - to the then-unfathomable might of nuclear force.\textsuperscript{28} Remarkably, not only did no state believe the Israeli airstrike to be lawful, but the move was also strongly denounced by both the UNSC (unanimously) and the UNGA (by 109 affirmative votes), with the latter labelling it ‘aggression’.\textsuperscript{29}

Going forward, the united international front against preventive self-defence, as ignited by the Osirak incident, quashes any realistic chance of the doctrine transforming into a peremptory norm, and with it, the prospect of its compatibility with the current system of the law on the use of force. Up to the present moment, only two states – Israel and the US – can be said to have unequivocally accepted the lawfulness of preventive acts. Even so, their recent affirmation of the standard of imminence (see Sections 3.2.2. and 3.3.1.) has confounded whether they still, at least in select circumstances, reserve the right to strike preventively. One more state, Russia, has co-opted the rationale of prevention less expressly, with self-defence against ostensibly speculative threats\textsuperscript{30} (expansion of NATO\textsuperscript{31} and the alleged Ukrainian development of biological arms)\textsuperscript{32} featuring among the cluster of justifications President Putin put forth for the 2022 war with Ukraine.\textsuperscript{33}

Whilst a couple of other governments, primarily those of India, Iran and North Korea, have flirted with the concept of prevention,\textsuperscript{34} their embrace thereof is difficult to distil from political declamation and

\textsuperscript{21} UNSC Verbatim Record (19 June 1981) UN Doc S/PV.2288, paras. 199-201.
\textsuperscript{22} UNSC Verbatim Record (16 June 1981) UN Doc S/PV.2284, para. 11.
\textsuperscript{23} UNGA Verbatim Record (12 November 1981) UN Doc A/36/PV.55, para. 39-40.
\textsuperscript{24} UNSC Verbatim Record (15 June 1981) UN Doc S/PV.2283, para. 147.
\textsuperscript{25} A/36/PV.55 (n23) 27.
\textsuperscript{26} UNSC Verbatim Record (15 June 1981) UN Doc S/PV.2282, paras. 14-16.
\textsuperscript{27} S/PV.2282 (n26) 106.
\textsuperscript{28} S/PV.2288 (n21) 80.
\textsuperscript{31} Official statement by the Russian President (24 February 2022) retrieved from: <http://en.kremlin.ru/events/president/transcripts/67843> on 03/09/2022.
\textsuperscript{32} UNSC Verbatim Record (11 March 2022) UN Doc S/PV.8991, 4-7.
\textsuperscript{33} Another major justification being the protection of nationals from ill-treatment by the Ukrainian authorities in the Donbas region: official statement by the Russian President (n31).
\textsuperscript{34} W.M. Reisman and A. Armstrong, ‘The Past and Future of the Claim of Preemptive Self-Defense (Centennial Essays: In Honor of the 100th Anniversary of the American Journal of International Law and the American
muscle-flexing. Additionally, India’s latest practice and opinio juris, as relayed in Section 3.2.2., have unquestionably confined self-defence to imminent attacks. The UK, on the contrary, did partake in what most would describe as archetypal preventive self-defence,\textsuperscript{35} when, in 2003, it invaded Iraq pursuant to flawed intelligence on the presence therein of nuclear armaments.\textsuperscript{36} However, the UK government has since gone on record - multiple times - stipulating that ex ante armed attack operations must adhere to the requirement of imminence.\textsuperscript{37} In 2017, the UK Attorney-General stressed that his country was

>a very long way from supporting any notion of a doctrine of pre-emptive strikes against threats that are more remote and even further from seeking to diminish the importance of a rules-based international order...It is absolutely not the position of the UK Government that armed force may be used to prevent a threat from materialising in the first place.\textsuperscript{38}

Australia, despite initially aligning itself with the Bush doctrine,\textsuperscript{39} has since spurned preventive self-defence in lieu of a more flexible spin on anticipatory action.\textsuperscript{40}
Expectedly, the preponderance of the academic literature finds preventive self-defence to be unlawful, a sentiment reiterated by the EU, the IJC, the UN Secretary-General, the Chatham House, the International Group of Experts, the ILA, the Institute of International Law as well as the Leiden Policy Recommendations. Such was also the 2004 verdict of the UN High-Level Panel on Threats, Challenges and Change, a committee of sixteen states (Australia, Brazil, China, Egypt, France, Ghana, India, Japan, Norway, Pakistan, Russia, Tanzania, Thailand, the UK, Uruguay and the US) commissioned to tackle an array of issues concerning the maintenance of international peace and security. Ultimately, seeing as the UN Charter patently disallows preventive measures, and the probability of their integration into the existing jus ad bellum is close to none, we may henceforth fix our sights on the anticipatory form of self-defence.

3.2. The Legality of Anticipatory Self-Defence

As illuminated in Chapter One, the legality of anticipatory self-defence has long been at the centre of the rhetorical battle between restrictionists and expansionists. Paradoxically, to prove their respective points, both camps rely on the wording of Article 51 of the UN Charter. Whereas restrictionists aver that the phrase ‘if an armed attack occurs’ excludes the use of force against imminent threats, expansionists posit that, by qualifying self-defence as an ‘inherent right’, the provision extrapolates


50 A/59/565 (n5) 189-191.

51 A/59/565 (n5) Note by the Secretary-General, para. 2.

into the UN era the doctrine’s pre-existing anticipatory modality.\textsuperscript{53} Lending credibility to the restrictionist view is the fact that, in a bid to minimise the exploitability of the then-nascent legal order, the UN’s architects intended to leave only the narrowest of openings for lawful force. Anticipatory self-defence had undoubtedly had a hand in the bad-faith conduct the Charter’s drafters sought to repress. In the 1920-1945 period, the doctrine was repeatedly invoked as a pretext for acts of aggression, be it those of the Axis Powers during the Second World War (hereinafter ‘WWII’)\textsuperscript{54} or the 1931 Japanese takeover of Manchuria,\textsuperscript{55} one of the events credited for the eventual collapse of the League of Nations.\textsuperscript{56} What is more, at the time of the 1945 San Francisco Conference, the means and methods of warfare were plausibly such that an across-the-board restrictionism was sustainable.

Still, as made plain by the records of the San Francisco Conference, the participants did not wish to modify the content of the pre-1945 right to self-defence,\textsuperscript{57} which was, as related in Chapter Two, born from the repurposed Caroline precedent on anticipatory action. Consequently, expansionists contend that, insofar as it does not state ‘if, and only if, an armed attack occurs’, Article 51 discloses only one of several admissible scenarios of self-defence.\textsuperscript{58} Such speculations aside, it ought to be remembered that, so long as regard is had to the relevant textual barriers, the Charter’s interpretation may come to deviate from what the UN’s founders originally envisioned. This thesis submits that, even if not per se favourable to anticipatory self-defence, the text of Article 51 does not completely foreclose an expansionist reading thereof. It is theoretically possible to interpret ‘if an armed attack occurs’ as including future offensives that have already materialised to the point of constituting specific and objectively demonstrable threats. Put differently, the word ‘occurs’ could be reinterpreted as requiring the attack’s existence (imminent, ongoing or concluded), rather than its initiation. This is the fundamental assumption of the upcoming commentary on the standard of imminence, as scrutinised in Section 3.3., as well as that of immediacy, as explored in Chapters Five and Six.

Furthermore, often overlooked is the equally authoritative French version of Article 51, whereunder the exercise of self-defence is subject not to the occurrence of an armed attack but to the defending

\footnotesize{\textsuperscript{53} Van den Hole (n52) 82-84; Hamid (n52) 450-453; T. Remus, ‘Cyber-Attacks and International Law of Armed Conflicts; a "Jus Ad Bellum" Perspective’ (2013) 8 Journal of International Commercial Law and Technology 179, 186; Arend (n1) 92; Sadoff (n41) 553-556; R. Van Steenbergh, ‘The Law of Self-Defence and the New Argumentative Landscape on the Expansionists' Side' (2016) 29 Leiden Journal of International Law 43, 50-54; Henderson (n35) 277-278.}  
\footnotesize{\textsuperscript{54} Judgment of the International Military Tribunal (1 October 1946) 1 IMT 1, 205-207; B.V.A. Röling and C.F. Ruter, The Tokyo judgment: The International Military Tribunal for the Far East, 29 April 1946–12 November 1948 (APA-University Press, 1977) 380-381.}  
\footnotesize{\textsuperscript{55} Official statement of Japan on its invasion of Manchuria in 1931 (reproduced in S. Alexandrov, Self-Defense Against the Use of Force in International Law [Martinus Nijhoff Publishers, 1996] 68-69); Sadoff (n41) 539.}  
state becoming the object of aggression (‘dans le cas où un Membre Des Nations Unies est l’objet d’une agression armée’). Needless to say, in comparison with its English equivalent, the French variant provides wider leeway for the inclusion of anticipatory measures.\(^{59}\) According to Article 33(4) of the VCLT, any apparent discrepancy between the two shall be resolved through teleological interpretation.\(^{60}\) To this end, due attention must be paid to the \textit{reductio ad absurdum} arguments for anticipatory self-defence, that is, the idea that an outright ban on the doctrine would defeat the purpose of Article 51.\(^{61}\) It would be extraordinarily myopic to suggest that none of the potential permutations of an imminent attack (variations in the magnitude of the force threatened, the type of instrument chosen by the attacker, etc.) could render the effectiveness of self-defence contingent on the target state delivering the first blow.

Without detracting from its practicability as a general rule of thumb, the restrictionist take on Article 51 can scarcely be reconciled with certain post-1945 phenomena, the accommodation of which may, as is showcased in Section 3.3.1., even demand the relaxation of the test of imminence. As propounded in Chapter One, the principal security interest of the restrictionist philosophy – the reduction of abuse-prone loopholes in the law on the use of force – must not be pursued at the expense of states’ ability to effectively defend themselves, lest the UN Charter lose authority in the eyes of its subjects. Only through a carefully struck balance between the prudent considerations of restrictionism and expansionism can the \textit{jus ad bellum}’s sustainability be guaranteed. Although the formulation of Article 51 can be construed as licensing the aversion of imminent threats, whether or not it actually does so hinges on the perception of states. In order to adequately depict the evolution of the global community’s attitude towards anticipatory self-defence, the present study divides its review of the apposite state practice and \textit{opinio juris} into two temporal blocks: the restrictionism-dominated second half of the 20\textsuperscript{th} century and the expansionism-oriented 21\textsuperscript{st} century.

3.2.1. The Reign of Restrictionism (1945-2000)

It was inevitable that the installation of the UN regime, the most force-restrictive framework to ever be put in place, would cause approval of anticipatory self-defence to dwindle. The drafting process of key UNGA resolutions, namely the 1970 Friendly Relations Declaration\(^{62}\) and the 1974 Definition of Aggression,\(^{63}\) furnished states with ample opportunity to communicate their positions on the


In this setting, the staunchly restrictionist Soviet Union coined the so-called principle of priority, as per which the aggressor is always the first state to resort to force.\(^6\) The decades that followed saw a bevy of states (Afghanistan, \(^6\) Algeria, \(^6\) Barbados, \(^6\) Belarus, \(^6\) Brazil, \(^7\) Bulgaria, \(^7\) Burundi, \(^7\) Chile, \(^7\) Republic of the Congo, \(^7\) Cuba, \(^7\) Cyprus, \(^7\) Czechoslovakia, \(^7\) Ecuador, \(^7\) Egypt, \(^7\) France, \(^8\) Gabon, \(^8\) Guinea, \(^8\) Guyana, \(^8\) Hungary, \(^8\) India, \(^8\) Indonesia, \(^8\) Kenya, \(^8\) Lebanon, \(^8\) Mexico, \(^8\) \(\ldots\))

\(^5\) UNGA ‘Draft resolution on the definition of aggression / Union of Soviet Socialist Republics’ (4 November 1950) UN Doc A/C.1/608; UNGA Summary Record (3 November 1954) UN Doc A/C.6/SR.414, para. 37; UNGA Summary Record (16 January 1952) UN Doc A/C.6/SR.288, para. 34; but note that, in the view of the Soviet delegation, a declaration of war was tantamount to the commencement of an armed attack (as opposed to evidence of its imminence), a contention some expansionist and restrictionist states disagreed with: see, e.g. UNGA Summary Record (30 July – 14 August 1970) UN Doc A/AC.134/SR.67-78, 60-61.
\(^6\) UNGA Summary Record (26 October 1970) UN Doc A/C.6/SR.1206, para. 48.
\(^7\) UNGA Summary Record (1 February – 5 March 1971) UN Doc A/AC.134/SR.79-91, 55-56.
\(^8\) UNGA Summary Record (27 October 1970) UN Doc A/C.6/SR.1207, paras. 3-4.
\(^10\) UNGA Summary Record (12 November 1980) UN Doc A/C.6/35/SR.47, para. 24; in contrast with the view it expressed before: UNSC Verbatim Record (16 August 1951) UN Doc S/PV.592, para. 58.
\(^12\) UNGA Summary Record (22 October 1974) UN Doc A/C.6/SR.1482, para. 8.
\(^13\) UNGA Verbatim Record (13 November 1981) UN Doc A/36/PV.56, para. 80; UNGA Summary Record (9 January 1952) UN Doc A/C.6/SR.281, para. 28.
\(^14\) UNGA Summary Record (3 December 1969) UN Doc A/C.6/SR.1169, para. 84.
\(^15\) UNGA Summary Record (3 November 1972) UN Doc A/C.6/SR.1349, para. 28.
\(^16\) A/AC.134/SR.79-91 (n67) 82; UNGA Summary Record (29 November 1963) UN Doc A/C.6/SR.822, para. 7; UNGA Verbatim Record (29 June 1967) UN Doc A/PV.1541, paras. 71-72.
\(^17\) UNGA Summary Record (4 December 1968) UN Doc A/C.6/SR.1086, para. 30; UNGA Summary Record (3 November 1954) UN Doc A/C.6/SR.413, para. 10.
\(^18\) UNGA Summary Record (22 November 1968) UN Doc A/C.6/SR.1078, para. 36.
\(^19\) UNGA Summary Record (23 October 1974) UN Doc A/C.6/SR.1483, paras. 28 & 31.
\(^20\) UNGA Summary Record (2 December 1969) UN Doc A/C.6/SR.1166, para. 3.
\(^21\) UNGA Summary Record (22 October 1970) UN Doc A/C.6/SR.1205, para. 36.
\(^22\) UNGA Summary Record (27 October 1970) UN Doc A/C.6/SR.1208, para. 46.
\(^23\) UNSC Verbatim Record (17 June 1981) UN Doc S/PV.2286, para. 15; A/AC.134/SR.25-51 (n71) 54-55.
\(^24\) UNGA Summary Record (3 November 1971) UN Doc A/C.6/SR.1275, para. 40.
\(^25\) UNGA Verbatim Record (21 June 1967) UN Doc A/PV.1530, paras. 153-155; but note that, at one point, Guyana did acknowledge that the principle of priority was not an infallible tool for identifying the aggressor: A/AC.134/SR.79-91 (n67) 26.
\(^26\) UNGA Verbatim Record (19 November 1968) UN Doc A/41/PV.77, 42; UNGA Summary Record (12 November 1963) UN Doc A/C.6/SR.809, para. 8; but note that, at one point, Indonesia did concede that the principle of priority should not be applied categorically: A/AC.134/SR.25-51 (n71) 150.
\(^27\) UNGA Summary Record (3 November 1972) UN Doc A/C.6/SR.1350, para. 32.
\(^28\) UNGA Summary Record (30 October 1970) UN Doc A/C.6/SR.1212, para. 28.
\(^29\) S/PV.2288 (n21) 115; UNGA Summary Record (2 December 1969) UN Doc A/C.6/SR.1165, para. 35; but note that, at one point, Mexico conceded that the principle of priority was not always a reliable means of designating the aggressor: A/AC.134/SR.52-66 (n71) 87.
Mongolia,90 Nicaragua,91 Nigeria,92 the Philippines,93 Poland,94 Portugal,95 Qatar,96 Romania,97 Spain,98 Sri Lanka99 Sudan,100 Syria,101 Trinidad and Tobago,102 Tunisia,103 Ukraine,104 Uruguay,105 West Germany106 and Yugoslavia107 put their weight behind this policy.

Though the champions of anticipatory self-defence have found themselves in the minority, they were by no means hard to come by (Australia,108 Austria,109 Belgium,110 China,111 Greece,112 Guatemala,113 Iraq,114 Israel,115 Madagascar,116 the Netherlands,117 Niger,118 Oman,119 Panama,120 Peru,121 South Korea,122 Uganda,123 the UAE,124 the UK125 and the US126), with some going as far as to proffer the

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90 UNGA Summary Record (3 November 1971) UN Doc A/C.6/SR.1274, para. 37.
91 UNGA Summary Record (6 November 1972) UN Doc A/C.6/SR.1352, para. 5.
92 UNGA Summary Record (6 November 1972) UN Doc A/C.6/SR.1351, para. 20.
93 UNGA Summary Record (2 December 1963) UN Doc A/C.6/SR.823, para. 4.
95 UNSC Verbatim Record (13 January 1979) UN Doc S/PV.2110, para. 29.
96 UNSC Verbatim Record (16 April 1986) UN Doc S/PV.2677, 6-7.
97 A/C.6/SR.1349 (n75) 50 & 52.
99 UNGA Summary Record (16 October 1974) UN Doc A/C.6/SR.1478, para. 56.
100 A/AC.134/SR.25-51 (n71) 203; A/PV.1530 (n85) 37 & 56-58.
101 S/PV.2284 (n22) 65; UNGA Summary Record (14 October 1957) UN Doc A/C.6/SR.517, para. 12.
103 A/C.6/SR.1482 (n72) 23.
105 A/AC.134/SR.67-78 (n65) 112.
106 UNGA Verbatim Record (27 November 1989) UN Doc A/C.1/44/PV.47, 50.
107 A/AC.134/SR.25-51 (n71) 142.
108 A/C.6/SR.817 (n61) 23.
109 UNGA Summary Record (9 October 1974) UN Doc A/C.6/SR.1472, para. 32.
111 UNGA Summary Record (28 November 1952) UN Doc A/C.6/SR.337, paras. 42-43.
112 A/C.6/SR.1208 (n82) 6; UNGA Summary Record (7 January 1952) UN Doc A/C.6/SR.279, para. 10.
114 S/PV.2288 (n21) 199-201; but note that Iraq had previously espoused the restrictionist view: A/AC.134/SR.67-78 (n65) 7-8; and UNGA Summary Record (2 November 1972) UN Doc A/C.6/SR.1348, para. 12.
116 A/C.6/SR.1274 (n90) 46.
118 S/PV.2284 (n22) 11.
119 A/36/PV.55 (n23) 39.
120 UNGA Summary Record (14 October 1954) UN Doc A/C.6/SR.403, para. 25; nearly a decade later, Panama rejected ‘the new and dangerous idea of preventive self-defence’ whilst maintaining that its attitude towards the definition of aggression had remained the same: UNGA Summary Record (2 December 1963) UN Doc A/C.6/SR.824, para. 8.
121 A/C.6/SR.528 (n69) 23.
122 UNGA Summary Record (3 November 1999) UN Doc A/C.6/54/SR.25, para. 91.
123 S/PV.2282 (n26) 14-16.
124 A/36/PV.55 (n23) 27.
125 S/PV.2282 (n26) 106.
126 Oil Platforms (Iran v United States of America) (Counter-Memorial and Counter-claim submitted by the United States of America) [1997], 147; A. Chayes, The Cuban Missile Crisis: International Crises and the Role of Law (Oxford University Press, 1974) 63.
doctrine as a ground for their forcible acts (Argentina, 127 Iraq128 and Israel129). Particularly interesting is the case of Libya, which, in spite of having formerly dismissed anticipatory action,130 deemed itself entitled to self-defence against an impending US airstrike, an offensive Malta131 and Oman132 characterised as ‘imminent’. As the Libyan government avowed in its letter to the UN Secretary-General:

United States aircraft-carriers and other United States naval units are now proceeding towards the Libyan coast for the purpose of staging military aggression against the Socialist People’s Libyan Arab Jamahiriya...[Libya] considers itself, as of this moment, in a state of legitimate self-defence under Article 51 of the United Nations Charter.133

The US operation that took place two days later - the 1986 retaliation for the terrorist bombing of a Berlin discotheque - is dealt with more fully in Chapter Five. Also worth mentioning is how Pakistan, an advocate of restrictionism,134 proposed that anticipatory measures be prohibited in all situations but those entailing nuclear threats135 (see Section 3.3.1. for more on the desirability of differential temporal treatment of certain categories of arms).

A handful of states (Burma,136 Cameroon,137 CAR,138 Costa Rica,139 El Salvador,140 Finland,141 Kuwait,142 Malaysia,143 Sweden,144 Togo,145 Turkey146 and Zambia147) feared that the principle of priority was not an infallible identifier of the wrongdoer, and for that reason, many of them deferred to the UNSC to determine whether, in any given instance, the first use of force amounts to aggression. Whilst some voiced these worries in connection with the unsettled status of anticipatory self-defence (Canada,148

127 UNSC Verbatim Record (1 April 1982) UN Doc S/PV.2345, paras. 65-68.
131 UNSC ‘Letter dated 86/04/12 from the Chargé d'affaires a.i. of the Permanent Mission of Malta to the United Nations addressed to the President of the Security Council’ (12 April 1986) UN Doc S/17982.
132 UNSC Verbatim Record (15 April 1986) UN Doc S/PV.2675, paras. 22-23.
133 UNSC ‘Letter dated 86/04/12 from the Chargé d'affaires a.i. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary-General’ (12 April 1986) UN Doc S/17983, 2.
134 UNGA Summary Record (1 November 1972) UN Doc A/C.6/SR.1347, para. 6.
135 UNGA Summary Record (25 November 1968) UN Doc A/C.6/SR.1080, para. 70.
137 A/C.6/SR.1483 (n79) 11.
138 A/C.6/SR.1208 (n82) 16-17.
139 UNGA Summary Record (4 November 1971) UN Doc A/C.6/SR.1276, paras. 4-6.
140 UNGA Summary Record (2 November 1971) UN Doc A/C.6/SR.1272, para. 32.
141 A/AC.134/SR.79-91 (n67) 80.
142 A/C.6/SR.1207 (n68) 58.
143 A/C.6/SR.1274 (n90) 8-10.
144 A/C.6/SR.1472 (n109) 7-8.
146 A/AC.134/SR.1-24 (n98) 211.
147 A/C.6/SR.1276 (n139) 26; but note that Zambia’s earlier view seemed to be strictly restrictionist: UNGA Verbatim Record (27 June 1967) UN Doc A/PV.1538, para. 84.
148 A/AC.134/SR.52-66 (n71) 26-27.
Colombia, 149 Iran, 150 Jamaica, 151 Japan, 152 Italy, 153 Norway 154 and Yemen 155), others may have been motivated by the principle’s non-temporal failings (e.g. the initial forcible act might not be sufficiently grave). On the whole, the verification of states’ perspectives on anticipatory force is muddled by vague comments as well as terminological ambivalence, which, as explained in Chapter One, represents a daunting impediment to legal certainty in the ex ante armed attack context. While a few governments (Brazil, 156 China, 157 the Netherlands, 158 Iran 159 and the Republic of Congo 160) transparently distinguished anticipation from prevention, and affirmed either the former or neither, others made space for ambiguity. States that simply condemned ‘preventive’ action (Dahomey [now Benin], 161 Ghana, 162 Jordan, 163 and Mali 164) may or may not have also been opposed to the use of force against imminent attacks, and those utilising the ambivalent descriptor ‘pre-emptive’ (Thailand 165) unwittingly obscured the self-defence modality they were referring to. A year after acknowledging states’ right to ward off imminent threats, 166 Sierra Leone rebuffed what it called ‘the theory of anticipatory or preventive aggression’ in the same breath as it upheld the Caroline standard for self-defence. 167 Even more confounding was the stance of Zaire, which insinuated that the first use of force might simultaneously be both aggression and self-defence. 168

A glance at the institutional level reveals that, throughout the entire second half of the 20th century, the UN dared not entertain the highly sensitive and politised question of anticipatory self-defence. In declining to comment thereon, the ILC figured that the unenviable task of settling the doctrine’s legality should be left to the UNSC and the UNGA; 169 however, neither organ would make any real headway on the matter. Had both the restrictionist and the expansionist states not been appeased, the Assembly’s decades-long struggle to define aggression would, in all likelihood, never have come

150 UNGA Summary Record (20 October 1970) UN Doc A/C.6/SR.1203, para. 46; Oil Platforms (Iran v United States of America) (Memorial submitted by the Islamic Republic of Iran) [1993], 151-152; but note that Iran had previously espoused strict restrictionism: A/AC.134/SR.25 (n71) 135.
152 A/AC.134/SR.79-91 (n67) 33.
153 A/AC.134/SR.67-78 (n65) 60-61.
154 A/C.6/S.R.1208 (n82) 41-43.
155 A/C.6/S.R.1276 (n139) 45.
156 A/C.6/S.R.410 (n117) 43.
158 A/C.6/S.R.410 (n117) 43.
159 UNGA Summary Record (18 October 1954) UN Doc A/C.6/SR.405, paras. 3 & 5.
160 A/C.6/S.R.1169 (n74) 84.
161 UNGA Summary Record (20 November 1968) UN Doc A/C.6/SR.1075, para. 33.
162 A/C.6/S.R.1169 (n74) 48 & 52; but note that, in an earlier instance, Ghana cited the Webster formula and seemed open to the permissibility of self-defence against genuinely imminent attacks: UNSC Verbatim Record (24 October 1962) UN Doc S/PV.1024, para. 110.
164 A/C.6/S.R.1207 (n68) 62-63; Mali deemed the principle of priority an ‘important’ consideration, but perhaps not always decisive.
165 UNSC Verbatim Record (21 April 1986) UN Doc S/PV.2682, 41.
166 S/PV.2283 (n24) 147-148.
167 UNSC Verbatim Record (16 December 1982) UN Doc S/PV.2408, paras. 76-77.
169 ILC, Eighth Report of Special Rapporteur Ago on State Responsibility (29 February, 10 & 19 June 1980) UN Doc A/CN.4/318/Add.5-7, paras. 115-116 & 120.
to fruition. As a result, the middle-ground definition contained in Resolution 3314 (XXIX) does no more than create a rebuttable presumption as to the aggressive character of the first use of force.\(^{170}\) The UN’s highest judicial body, the ICJ, exhibited similar reticence in grappling with the \textit{ex ante} armed attack framework. In the \textit{Nicaragua case}, the Court held itself precluded from discussing anticipatory self-defence, for the doctrine had not been raised by the parties to the dispute (the \textit{non ultra petita} rule).\(^{171}\) Even so, the ICJ’s jurisprudence is filled with \textit{obiter dicta} (\textit{remarks non-essential to rendering a decision}),\(^{172}\) and the \textit{Nicaragua} judgment itself features such superfluous clarifications on points of law (e.g. the non-existence of an armed attack by Nicaragua – the prerequisite for self-defence – removed any need for the examination of the principles of necessity and proportionality). This implies that the Court, too, was apprehensive about ruling on as polarising a topic as anticipatory force.

All things considered, although the 1945-2000 era unmistakably instated the hegemony of the restrictionist construction of Article 51, resistance thereto remained hefty enough to obstruct the settlement of this long-standing quarrel. Of the ninety-two national positions that the present thesis was able to gather, forty-three restricted the exercise of self-defence to commenced offensives, whereas twenty-two extended it to imminent ones. Twenty-seven states were either undecided or expressed their standpoints in a way that does not allow for the extraction of \textit{opinio juris}.

\subsection*{3.2.2. The 21\textsuperscript{st} Century’s Great Shift Towards Expansionism}

As Chapter Two highlighted, and concretised with reference to the surging acceptance of self-defence against autonomous non-state actors, the 21\textsuperscript{st} century is witnessing a multi-frontal shift towards expansionism. The \textit{ratione temporis} dimension of the law on the use of force lies at the heart of this attitudinal change, an actuality corroborated by Sections 3.2.-3.3. (with respect to the \textit{ex ante} armed attack framework) as well as Chapters Five and Six (in relation to the \textit{ex post} armed attack framework).

Though much of the said attitude-changing was incited by forcible responses to prior attacks (see Chapter Five’s appraisal of, \textit{inter alia}, the 2001 US invasion of Afghanistan and the still ongoing counter-terrorist strikes in Syria), the underlying security concerns hail from the unprecedented metamorphosis of warfare and, as such, are not exclusive to the \textit{ex post} armed attack context. Notwithstanding the relative shortness of the period under scrutiny, the start of the new millennium

\footnotesize
\begin{itemize}
\item \(^{170}\) A/RES/3314(XXIX) (n63) Article 2.
\item \(^{171}\) Nicaragua case (n4) 194.
\end{itemize}
ushered in greater assent to anticipatory self-defence (Australia, Austria, Bolivia, Brazil, Denmark, Estonia, France, Georgia, Germany, India, Israel, Japan, Liechtenstein, Lithuania, Morocco, the Netherlands, New Zealand, Singapore, South Africa, South Korea, Turkey, the UK, Uganda and the US) than that observed in the preceding five

173 S/2021/247 (n58) 12-13; Australian Attorney-General Brandis on anticipatory self-defence (n40).
177 American Society of International Law (n37) 48-49 (agreeing with the UK’s and the US’s positions).
178 S/2021/247 (n58) 32.


180 Independent International Fact-Finding Mission on the Conflict in Georgia (n42) 186.
181 Germany’s official position on international law and cyberspace (2021) retrieved from: <https://www.auswaertiges-amt.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf> on 31/08/2022, 16.
182 S/2021/247 (n58) 38-39; but note that India still held the restrictionist view at the onset of the new millennium: UNGA Verbatim Record (8 April 2005) UN Doc A/59/PV.90, 24.
185 S/2021/247 (n58) 47; UNSC Verbatim Record (9 January 2020) UN Doc S/PV.8699, para. 37.
186 Official statement by the Lithuanian Foreign Minister Linkevičius (3 January 2020) retrieved from: <https://twitter.com/LinkeviciusL/status/1213125016465891328> on 03/07/2020.
187 Official statement of the permanent UN representative of Morocco (31 January 2005) (reproduced in Corten (n64) 429).
188 S/2021/247 (n58) 54.
191 S/PV.8699 (n185) 11.
192 UNGA 59th session, informal meeting on the findings of the UN Secretary-General’s report ‘In Larger Freedom: Towards Development, Security and Human Rights for All’ (21 April 2005); Corten (n64) 429; Ruys (n64) 333.
193 S/2021/247 (n58) 80; but note that, at the start of the 21st century, Turkey was still wary of the doctrine: UNGA 59th session, informal meeting on the findings of the UN Secretary-General’s report ‘In Larger Freedom: Towards Development, Security and Human Rights for All’ (22 April 2005); Ruys (n64) 339.
194 The UK Attorney General Wright, ‘Cyber and International Law in the 21st Century’ (n37); The UK Joint Committee on Human Rights (n37) 3.21 & 3.24; S/2021/247 (n58) 62-63; American Society of International Law (n37) 48.
195 UNGA 59th session, informal meeting on the findings of the UN Secretary-General’s report ‘In Larger Freedom: Towards Development, Security and Human Rights for All’ (1 July 2005); Corten (n64) 429.
decades. On top of that, the doctrine was offered as a justification for the military operations of India,\(^{197}\) Russia,\(^{198}\) Turkey,\(^{199}\) the UK\(^{200}\) and the US.\(^{201}\) By contrast, the number of states that have endorsed the restrictionist approach in the 21st century (Algeria,\(^{202}\) Azerbaijan,\(^{203}\) Bangladesh,\(^{204}\) Belarus,\(^{205}\) China,\(^{206}\) Cuba,\(^{207}\) Costa Rica,\(^{208}\) Egypt,\(^{209}\) Indonesia,\(^{210}\) Lebanon,\(^{211}\) Malaysia,\(^{212}\) Mexico,\(^{213}\) Switzerland\(^{214}\) and Vietnam\(^{215}\)) is three times lower than it was between the years 1945 and 2000. This is, of course, without prejudice to the possibility that some of the now-silent states have retained their pre-2000 beliefs. Other states issued ambiguous and/or less conclusive statements. Chile’s\(^{216}\) and Syria’s\(^{217}\) disavowal of ‘preventive’ action did not, per se, rule out the use of force against imminent threats. Argentina surmised that the legal status of anticipatory self-defence was undergoing ‘strong discussion’,\(^{218}\) and Poland opined that, owing to the nature of the modern realities of state practice, an expansionist reinterpretation of Article 51 may be all but unavoidable.\(^{219}\) In reasserting its championship of the restrictionist take on self-defence,\(^{220}\) Pakistan neglected to clarify whether it still subscribes to the one exception it countenanced in the past, i.e. the warding off of a looming nuclear onslaught. Iran’s relationship with anticipatory self-defence has been rather convoluted, to say the least. After having gone back and forth in the early

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198 Independent International Fact-Finding Mission on the Conflict in Georgia (n42) 46 & 222.
199 UNSC ‘Identical letters dated 22 February 2015 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council’ (23 February 2015) UN Doc S/2015/127.
202 UNGA Verbatim Record (6 April 2005) UN Doc A/59/PV.86, 9.
203 S/2001/247 (n58) 16.
204 UNGA informal meeting of 21 April 2005 (n192); Ruys (n64) 340.
205 UNGA informal meeting of 22 April 2005 (n193); Ruys (n64) 340.
206 UNGA informal meeting of 22 April 2005 (n193); Corten (n64) 431-432; C. Jiang, ‘Decoding China’s Perspectives on Cyber Warfare’ (2021) 20 Chinese Journal of International Law 257, 300, 304 & 310.
207 UNGA Verbatim Record (8 April 2005) UN Doc A/59/PV.89, 14.
208 UNGA 59th session, informal meeting on the findings of the UN Secretary-General’s report ‘In Larger Freedom: Towards Development, Security and Human Rights for All’ (31 January 2005); Corten (n64) 431.
209 A/59/PV.86 (n202) 12.
210 UNGA 59th session, informal meeting on the findings of the UN Secretary-General’s report ‘In Larger Freedom: Towards Development, Security and Human Rights for All’ (30 June 2005); Ruys (n64) 340-341.
211 S/PV.4726 (n14) 35.
212 UNGA informal meeting of 22 April 2005 (n193); Ruys (n64) 340.
213 UNGA informal meeting of 22 April 2005 (n193); Corten (n64) 431-432.
215 A/59/PV.89 (n207) 22.
216 A/59/PV.86 (n202) 20.
217 A/59/PV.90 (n182) 19.
218 UNGA informal meeting of 22 April 2005 (n193); Ruys (n64) 339.
219 A/59/PV.89 (n207) 4.
220 A/59/PV.86 (n202) 5.
2000s,221 the Iranian government moved to recognise the doctrine’s lawfulness in 2019,222 only to - once again - muddy the waters in 2021.223

In a radical departure from the reservedness that historically marked the UN’s dealings with anticipatory self-defence, international organisations and expert bodies have, in the 21st century, displayed resolute eagerness to confront the subject head-on. The UN High-Level Panel,224 the UN Secretary-General,225 NATO,226 the Bethlehem Principles,227 the Chatham House,228 the International Group of Experts,229 the Institute of International Law230 and the Leiden Policy Recommendations231 have all concluded that the jus ad bellum sanctions anticipatory measures. Inasmuch as NATO’s 2020 Allied Joint Doctrine for Cyberspace Operations – the document that encapsulates the Alliance’s espousal of anticipatory self-defence – was enacted with the concurrence of every member state, one can no longer presume that Bulgaria, Hungary, Portugal, Romania, Spain, Czechia and Slovakia (then Czechoslovakia) have continued to cling onto their 20th-century restrictionist convictions. The EU232 and the ILA233 took a more cautious posture, noting that states have yet to reach consensus on this thorny issue.

Such is the only conclusion that can be deduced from the above-examined sample of state practice and opinio juris, which betrays that support for anticipatory self-defence is neither general nor consistent enough to beget a customary norm. Be that as it may, the development of the law on the use of force has, as attested to by the following four indicators, taken a turn toward expansionism: first, a perusal of the unambiguous opinio juris from Sections 3.2.1. and 3.2.2. divulges that, whilst the total figure of expansionist states is rising (from twenty-two to thirty-six), their restrictionist counterparts are on the decline (from forty-three to thirty-six). Some of the world’s most powerful and regionally influential actors (Australia, Brazil, France, Germany, India, Japan, Russia, South Africa, South Korea, Turkey, UAE, the UK and the US), including all but one permanent representative of the UNSC, are now among the ranks of the doctrine’s supporters. Second, the fact that, in the 21st century, the majority of the affirmations of restrictionism were articulated before 2010, and most of those of expansionism after 2010, further substantiates that the latter school of thought is on an upward trajectory.

Third, while this study documents five cases of restrictionist states turning expansionist in the wake of the new millennium (Brazil, France, Germany, India and Russia), it records no authentic instances of the reverse switch. At first sight, China appears to be one such example; however, its endorsement

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221 S/PV.4726 (n14) 33; A/59/PV.87 (n196) 16-17.
223 S/2021/247 (n58) 41-42.
224 A/59/565 (n5) 188.
225 A/59/2005 (n44) 124.
228 Chatham House (n45) 4.
229 Tallinn Manual 2.0 (n46) 350-353.
230 Institute of International Law (n48) 3.
231 Leiden Policy Recommendations (n49) 543.
232 Independent International Fact-Finding Mission on the Conflict in Georgia (n42) 255.
233 ILA (n47) 13-14.
of the doctrine in the 1950s was effected by a deposed government whose ideological orientation was antithetical to that of the succeeding communist administration (the People’s Republic of China). Therefore, the latter’s *opinio juris* is not a product of an organic evolution from the former’s legal views. Fourth, the surge of expansionism goes hand in hand with the unwavering technological and military advancements, which, as Section 3.3.1. illustrates, many states blame for their disenchantment with the restrictive reading of Article 51. The above-stated four trends signal that, albeit still riddled with controversy, anticipatory self-defence may be in the incipient phase of its emergence under the post-1945 customary law. With the complexities of the doctrine’s legality covered, we may now concentrate on its central precept, the standard of imminence, and on how the disparate variants thereof fare against the idiosyncrasies of evolving warfare.

### 3.3. Deconstructing Imminence: No Self-Defence Until Zero Hour?

As indicated at the beginning of this chapter, the requisite of imminence is generally conceptualised in one of two ways. The traditional temporal understanding, as embodied in the 19th-century Webster-Ashburton correspondence, envisages an ‘instant’ and ‘overwhelming’ threat that leaves neither a ‘choice of means’ nor a ‘moment for deliberation’,235 painting a picture of urgency that, as per the predominant interpretation, uniformly limits anticipatory action to offensives on the cusp of commencement.236 Alternatively, imminence can be conceived as a more context-dependent criterion, one that, as is expanded on in Section 3.3.1., tailors the time frame for anticipatory self-defence to the particularities of each situation. Being as how it is a much older legal tradition, the first viewpoint has accrued larger state backing, with numerous governments having either cited the Webster formula (e.g. Ghana,237 Iraq,238 Israel,239 Iran,240 Jamaica241 and Sierra Leone242) or tendered

234 Although the People’s Republic of China was created in 1949, its predecessor, the Republic of China, continued to represent the country’s permanent UN delegation until 1971: UNGA Res 2758(XVII) (25 October 1971) UN Doc A/RES/2758(XVII).

235 Letter from the US Secretary of State Daniel Webster to Lord Ashburton (27 July 1842) extract of an earlier note of 24 April 1841, retrieved from: <https://avalon.law.yale.edu/19th_century/br-1842d.asp#intro> on 02/12/2019.


237 S/PV.1024 (n162) 110.

238 S/PV.2250 (n128) 40.

239 S/PV.2288 (n21) 80-81; S/PV.2280 (n16) 98-101; but note that, despite recognising the Caroline precedent, Israel deemed it unviable in the context of nuclear threats.

240 *Oil Platforms*, Memorial submitted by the Islamic Republic of Iran (n150) 151-152.


242 S/PV.2283 (n24) 147-148.
an equally stringent test (e.g. the Netherlands\textsuperscript{243}). Others, like Austria\textsuperscript{244} and Paraguay,\textsuperscript{245} conveyed their conception of imminence by evoking the paradigmatic scenario of an attack about to happen, i.e. the massing of invasion forces at the target state’s border.

By virtue of its exceeding strictness, the classical standard of imminence has, debatably, only been fulfilled on one occasion – the 1967 Six-Day War. The forenamed armed conflict was sparked on 5 June 1967, when, amidst heightening tensions with the adjacent Arab countries, Israel mounted a sequence of airstrikes on Egypt, prompting Jordan and Syria to intervene on the latter’s side.\textsuperscript{246} Interestingly enough, when the time came to address the UNSC and the UNGA, Israel – perhaps wary of the shakiness of the legal basis for anticipatory action – purported that it had engaged in \textit{ex post} armed attack self-defence, that is, in a counter-offensive to the first use of force by the Egyptian troops.\textsuperscript{247} It was only years later that the Israeli government admitted to having acted in anticipation of an armed attack by Egypt.\textsuperscript{248} Insomuch as, during the UNSC and UNGA meetings on the Six-Day War, the circumstances concerning the outbreak of hostilities were still murky,\textsuperscript{249} few delegations brought up anticipatory self-defence, and those that did were all of the restrictionist persuasion (Cyprus,\textsuperscript{250} India,\textsuperscript{251} Iraq,\textsuperscript{252} Sudan,\textsuperscript{253} Yugoslavia\textsuperscript{254} and Zambia\textsuperscript{255}). Consequently, the failure of either organ to rebuke Israel\textsuperscript{256} should not be misinterpreted as acquiescence to any one concept of imminence, let alone the permissibility of anticipatory measures.

At the end of the day, whether or not Israel satisfied the Webster formula depends on how close, if at all, Egypt came to resorting to force. Through its conduct leading up to the eruption of fighting, the Egyptian government telegraphed all manner of tell-tale signs of a would-be aggressor; the closure of the Straits of Tiran to Israeli shipping, the expulsion of UN peacekeepers from Egyptian territory, the forging of a defence pact with Jordan, and the intensifying deployment of soldiers to the Israeli frontier,\textsuperscript{257} all alluded to Egypt’s readiness to march on its neighbour. To add to the brewing sense of

\textsuperscript{243} A/C.6/SR.410 (n117) 43.
\textsuperscript{244} A/C.6/SR.1472 (n109) 32.
\textsuperscript{245} UNGA ‘Draft resolution on the definition of aggression / Paraguay’ (28 October 1954) UN Doc A/C.6/L.334/Rev.1, 2(b).
\textsuperscript{247} UNSC Verbatim Record (5 June 1967) UN Doc S/PV.1347, paras. 4 & 30-32; UNSC Verbatim Record (6 June 1967) UN Doc S/PV.1348, para. 155; UNGA Verbatim Record (19 June 1967) UN Doc A/PV.1526, para. 142.
\textsuperscript{248} BBC, ‘The Panorama Middle East Archives: Six-Day War’ (n129).
\textsuperscript{249} UNGA Verbatim Record (27 June 1967) UN Doc A/PV.1537, paras. 111-112; UNGA Verbatim Record (21 June 1967) UN Doc A/PV.1529, para. 74; UNGA Verbatim Record (28 June 1967) UN Doc A/PV.1539, paras. 13-14; UNGA Verbatim Record (28 June 1967) UN Doc A/PV.1540, paras. 24 & 44.
\textsuperscript{250} A/PV.1541 (n76) 71-72.
\textsuperscript{251} A/PV.1530 (n85) 153-155.
\textsuperscript{252} A/PV.1537 (n249) 40.
\textsuperscript{253} A/PV.1530 (n85) 37 & 56-58.
\textsuperscript{254} A/PV.1529 (n249) 93.
\textsuperscript{255} A/PV.1538 (n147) 84.
\textsuperscript{256} The resolutions passed did not condemn Israel: UNSC Res 233 (6 June 1967) UN Doc S/RES/233; UNSC Res 234 (7 June 1967) UN Doc S/RES/234; condemnatory resolutions were proposed but failed to garner sufficient support, see UNSC ‘Revised draft resolution / Union of Soviet Socialist Republics’ (13 June 1967) UN Doc S/7951/Rev.2; UNGA ‘Letter dated 67/06/13 from the Minister for Foreign Affairs of the Union of Soviet Socialist Republics (A/6717)’ (26 June 1967) UN Doc A/L.521.
\textsuperscript{257} M.N. Shaw, \textit{International Law} (Cambridge University Press, 2017) 866; Ruys (n64) 272-273; Sadoff (n41) 566.
crisis, several Egyptian officials declared, in the clearest terms possible, their country’s intent to wage war on Israel.258 It is because of these precursory events that droves of scholars adduce the Israeli response as the epitome of anticipatory action.259 Unconvinced, some commentators protest that all was not as it seemed, that Egypt’s provocatory acts and bellicose rhetoric were nothing more than political posturing.260 Wherever the truth lies, the Six-Day War serves as a reminder that, even when faced with ordinary warfare, the Webster formula is exceptionally challenging to meet.

This demandingness, far from being incidental, purposefully mitigates the prospect of states misusing self-defence as a guise for aggression, a policy consideration that is no less pertinent today than it was at the incipience of the UN era.261 Having said that, the current-day landscape of the jus ad bellum is worlds apart from the practicalities that informed the US Secretary of State Webster in 1837, or, for that matter, those that guided the drafting of the UN Charter in 1945. A one-size-fits-all test, which obligates states to refrain from using force until zero hour, may be infeasible, if not unfulfillable, when up against the one-of-a-kind attributes of certain post-1945 phenomena. As cautioned in Chapter One, the excessive rigidity of dated rules must not be preserved at the cost of sacrificing the effectiveness of the right to self-defence, for thereon rests the Charter’s enduring legitimacy. But before proceeding to expose the drawbacks that beset the Webster formula in the modern age, and ruminate on their rectification by the 21st-century reappraisals of imminence, it is imperative that the scope of this inquiry is delimited first.

There can be no doubt that the clandestine tactics employed in terrorism and guerrilla warfare, which, as elucidated in Chapter One, rose to prominence in the aftermath of the Charter’s enactment, impair states’ capability to estimate the temporal nearness of an attack.262 Nevertheless, the challenge the methods of warfare pose to the historical notion of imminence is nowhere near as pointed as that presented by the attacker’s selection of weapons. The distinctive properties of nuclear and cyber force have warped the international playing field to such an extent that they, so to speak, make or break any interpretation of imminence. Moreover, since the methods of warfare are pivotal to unpacking the centrepiece of this thesis, i.e. the adequacy of the ex post armed attack framework, the interest of non-repetition dictates that they be dissected in Chapters Five and Six. Hence, in evaluating the workability of the divergent approaches to anticipatory self-defence, the present study focuses on their capacity to attune to the multifariousness of problematic weaponry.

258 S/PV.1348 (n247) 150-151; S/PV.1347 (n247) 31; A/PV.1526 (n247) 99 & 120-123.
261 Chatham House (n45) 8; Tallinn Manual 2.0 (n46) 352-353; Popa (n12) 34; Rockefeller (n236) 145; O’Meara (n1) 35.
262 Lubell, ‘The Problem of Imminence in an Uncertain World’ (n236) 706-708; Henderson (n35) 301; O’Meara (n1) 42; Rockefeller (n236) 140; M.N. Schmitt, ‘Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law’ (2013) 52 Columbia Journal of Transnational Law 77, 88-89; Arend (n1) 98; Glennon (n1) 26; Australian Attorney-General Brandis on anticipatory self-defence (n40).
3.3.1. Webster Formula Under Fire: Can a Malleable Standard of Imminence Accommodate the Modern Realities of Warfare?

It stands to reason that, as the instruments of war become faster, more destructive, accurate and long-range, the ability to meet the Webster formula decreases. Although this axiom applies to even the most conventional of arms, a number of their less orthodox substitutes, chiefly nuclear and cyber force, are deemed so game-changing that they carry special weight in the discourse on the adaptation of the temporal dimension of self-defence. Nuclear weapons have long figured in states’ pleas for a more expansive construction of Article 51 of the UN Charter (see, most explicitly, assertions by Australia, Brazil, Israel, the Netherlands and the US). The differential regard for nuclear threats can also be found in the restrictionist camp. As evidenced by the Pakistani stance outlined in Section 3.2.1., some of the opponents of anticipatory self-defence reluctantly concede that nuclear arms, and they alone, undermine the restrictive take on Article 51. In 1971, the then-restrictionist India warned that, in order to factor in the nuclear spectre, the definition of self-defence would have to be reconceived: ‘The Charter belonged to the pre-atomic age, and no legal concept would be adequate if it could not evolve. Science had outrun law.’ To top it all off, just two years after the Hiroshima/Nagasaki bombings, the UN Atomic Energy Commission, a committee entrusted with the duty of harmonising the post-1945 international law with the dual-use technology at issue, proclaimed that a serious breach of a nuclear non-proliferation regime could trigger Article 51.

The normative disquiet surrounding the nuclear menace springs from three of its seemingly unmanageable aspects, each of which vitiates not only unconditional restrictionism but also rigid expansionism. First, nuclear attacks are far too devastating for the victim to remain idle until the offender is set to press the proverbial red button. Seeing as, at that point, the former may lack the tools and resources needed to avert the latter’s assault, state extinction could very well be the price to pay for observing the Webster formula. Second, adherence thereto could also amplify the odds of the defender falling back on its own nuclear arsenal. After all, once the aggressor is about to unleash a nuclear blast, and there is concrete and empirically verifiable evidence to that effect, the target state may, in a last-ditch bid to secure its survival, feel compelled to respond in kind. If, on the other hand, the prospective offensive was to be neutralised well in advance, the likelihood of either party using nuclear armaments would be significantly reduced. While, as the ICJ intimated in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, self-preservation may not necessarily be incongruent with Article 51, such an action would, from environmental, humanitarian and global security standpoints, constitute the most menacing and unwelcome of escalations. Third, the closer a nuclear attack is to launch, the higher the probability of self-defence

263 A/C.6/SR.817 (n61) 23.
264 A/C.6/SR.410 (n117) 43.
265 S/PV.2288 (n21) 80.
266 A/C.6/SR.337 (n111) 6.
268 UNGA Summary Record (22 October 1957) UN Doc A/C.6/SR.520, paras. 48-50.
involving targets prone to radiation leakage (e.g. an active reactor). Such was Israel’s line of thinking in 1981, when, as detailed in Section 3.1., it chose to destroy Osirak before it became operational. Thus, insofar as they lessen the chances of radioactive fallout, early, denuclearisation-focused strikes have the theoretical advantage of substantially lowering collateral damage.

In light of all of the above, it is not surprising that, as demonstrated at the start of this chapter, those expansionists who favour the complete removal of the requirement of imminence tend to base their proposals on its perceived inadequacy vis-à-vis nuclear arms. In further accentuating the sui generis character of nuclear force, a contingent of authors have come to treat the threat thereof as the only eventuality that could ever validate preventive action. Nonetheless, even if ill-equipped to contend with the unrivalled might of nuclear weaponry, the Webster formula can by no means be supplanted by preventive self-defence, which, as established in Section 3.1., is fundamentally incompatible with the UN Charter; the solution, whatever it may be, must be located within the realm of legality. As we shall get into later in this section, when it comes to the potential fixes, the present thesis keeps its gaze on imminence, and on whether it can be remodelled to rectify its defects.

As damning as the nuclear problem is for the existing ex ante armed attack framework, there is arguably no greater foil to the traditional standard of imminence than cyber operations, the peculiar features of which can, as is spelled out below, render compliance with the rule downright inconceivable. In fact, so extraordinary are cyber-attacks that, despite their hitherto almost exclusive non-destructiveness, scores of states have, in the last dozen years, spontaneously promulgated their positions on the jus ad bellum’s application in cyberspace (Australia, Bolivia, Brazil, Canada).

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272 S/PV.2280 (n16) 102-103.

273 Weise (n1) 1335; Roberts (n1) 517-518; Schloss (n1) 578-582 (but note that the author distances herself from the doctrine of preventive self-defence, even though her policy proposal entails the use of force against non-imminent attacks).


275 CJI/doc. 615/20 rev.1 (n175) 17.

276 CJI/doc. 671/22 rev.2 (n176) 18 & 24.

Chile, Estonia, Finland, France, Germany, Guatemala, Iran, Israel, Japan, the Netherlands, New Zealand, Peru, Romania, Singapore, Switzerland, the UK and the US, all in hopes of pre-emptively resolving the expected demands of the fifth domain of warfare. Save for Switzerland, those states that broached the temporality of self-defence all embraced the anticipatory form thereof. Harkening back to Chapter One’s dissection of the distinctiveness of cyber offensives, the seven hallmarks enumerated in Section 1.1. each push the envelope of the law on the use of force, and, as one would imagine, they are extra onerous to regulate in the ex ante armed attack context. As crippling as the anonymity-facilitating cyberspace is to the attribution of cyber operations, other facets are of a more immediate concern to the exercisability of anticipatory self-defence, for they virtually foreclose such action even before attributability enters the picture. Conversely, the question of state responsibility does, as we shall find in Chapter Six, take the centre stage in ex post armed attack context, wherein the aforesaid other facets are of comparatively lesser significance.

Ergo, leaving attribution aside for now, the following three properties of cyber force can thwart any attempt at abiding by the classical interpretation of imminence: first, the exercise of anticipatory self-defence presupposes not only a forthcoming attack but also the victim’s knowledge thereof, which, as underlined in Chapter One, is most difficult to acquire in cyberspace, no less within the narrowest of time slots. Inasmuch as they do not yield any physical markers of imminence (e.g. readily monitorable movements of soldiery and weaponry), some cyber assaults may be undetectable, especially considering how arduous it is to intercept certain internet communications (particularly those on the Dark Web). Second, the defending state must, in addition to detecting an imminent threat, work out whether its scale and effects would, if realised, be sufficiently grievous to activate Article 51. Due to its uncontrollable volatility and potentially long-delayed after-effects, the course of

278 CJI/doc. 615/20 rev.1 (n175) 16-19.
281 France’s official position on international law and cyberspace (n179) 7-10.
282 Germany’s official position on international law and cyberspace (n181) 6 & 15-16.
283 CJI/doc. 615/20 rev.1 (n175) 17-20.
285 Israel’s Deputy Attorney General Schöndorf, ‘Disruptive Technologies and International Law’ (n183).
288 New Zealand’s official position on international law and cyberspace (n189) 6-8.
289 CJI/doc. 615/20 rev.1 (n175) 16-20.
291 Singapore’s official position on international law in cyberspace (n190).
292 Switzerland’s official position on international law in cyberspace (n214).
293 The UK Attorney General Wright, ‘Cyber and International Law in the 21st Century’ (n37).
294 Legal Advisor to the US Department of State Koh on international law in cyberspace (n196).
a cyber offensive is, even in the ex post armed attack context, extremely hard to predict. Still, once a cyber strike occurs, the initial blow provides at least some frame of reference for the estimation of the ramifications to follow, a benchmark whose absence severely hampers ex-ante calculability of harm.295 Radziwill, for one, takes a supremely pessimistic view of this predicament, believing it ‘impossible’ to correctly calculate the consequences of an imminent cyber-attack.296

Third, given that cyber operations can accomplish their goals in a split second, the leap from the imminent to the ongoing could be instantaneous, ipso facto closing the window of opportunity the Webster formula sets for anticipatory self-defence. On this account, the speed with which cyber-attacks can hit their mark has, in the opinion of many pundits, driven the final nail into the coffin of the Caroline conception of imminence.297 A handful of states, like the Netherlands298 and the US,299 have also voiced their apprehension at the speedy execution of cyber assaults. In noting that cyber offensives can be initiated in a blink of an eye, Australia soberly remarked: ‘On a strict temporal approach to imminence, then, the State would have no right to take action, notwithstanding the clear threat to human life.’300

During the past two decades, a mounting group of scholars have, by dint of the Webster formula’s inability to assuage the quandaries of modern warfare, begun conceptualising imminence in a more situational manner.301 As stressed by the Chatham House: ‘In the context of contemporary threats imminence cannot be construed by reference to a temporal criterion only, but must reflect the wider circumstances of the threat.’302 The Bethlehem Principles,303 the Leiden Policy Recommendations304 and the Tallinn Manual,305 too, have rejected a purely time-based conceptualisation of the requisite

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296 Radziwill (n41) 154.


298 The Netherlands on ‘International Law in Cyberspace’ (n287) 1.

299 Legal Advisor to the US Department of State Koh on international law in cyberspace (n196).

300 Australian Attorney-General Brandis on anticipatory self-defence (n40).

301 Rockefeller (n236) 139-140; O’Meara (n1) 19-21; D. Akande and T. Liefländer, ‘Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense’ (2013) 107 American Journal of International Law 563, 564-565; Schmidt and Trenta (n3) 217; Hofmeister (n12) 188-189; Van Steenberghhe (n53) 53-54; Henderson (n35) 297; Milanovic, ‘The Soleimani Strike and Self-Defence Against an Imminent Armed Attack’ (n236); Schmitt, ‘Preemptive Strategies in International Law’ (n2) 533-535.

302 Chatham House (n45) 8.

303 Bethlehem (n227) 775-776 (principle 8).

304 Leiden Policy Recommendations (n49) 543.

305 Tallinn Manual 2.0 (n46) 351.
at hand, and, so far, three states (Australia, the UK and the US) have followed suit. Instead of confining anticipatory self-defence to a single immovable milestone (i.e. the verge of the commencement of an armed attack), the 21st-century alternatives to the Webster formula subject the doctrine’s exercise to the context-specific ‘last window of opportunity’, a juncture past which an impending offensive ceases to be effectively avertible. In other words, these new-age renditions of imminence share, as their common denominator, the idea that a state can act anticipatorily as soon as any further deferment would deprive it of the capacity to successfully defend itself, a tipping point which may or may not coincide with that envisioned by the Webster formula.

To pinpoint exactly where in the ex-ante timeline that final opportunity lies, the above-cited authorities rely on different sets of criteria. Because, as is shown below, the said criteria include ratione temporis considerations (albeit in a less decisive role), the standards under scrutiny are hereinafter denominated as ‘contextual’, rather than ‘non-temporal’. By conducting a meta-analysis of the contextual approaches to imminence, the present study is able to tease out five salient factors (credibility of evidence, the attack’s parameters, its temporal proximity, aggressor’s disposition, and geographical limitations), all of which are, as we will see shortly, determinative of the timing of anticipatory self-defence. First, unlike its preventive counterpart, anticipatory self-defence can only be exercised against a specific and objectively verifiable threat, which, absent any proactive forcible measures by the defending party, is reasonably certain to fully materialise. Proof to that effect is, therefore, the sine qua non for the invocation of the doctrine. That said, the degree of specificity and verifiability of such evidence may, in interaction with the other variables, either accelerate or delay the invocability of Article 51 of the UN Charter.

Second, the time needed to repel a particular threat is approximated by its nature (the means and methods the transgressor plans on utilising) and gravity (the anticipated scale and effects). In theory, these cues allow the contextual models of imminence to succeed where the Webster formula fails, that is, to fine-tune the exercisability of anticipatory self-defence to the intractabilities of present-day warfare, whether engendered by the unique dynamics of certain weapons or the unpredictable and secretive modus operandi of non-state actors. As regards the latter, the covertness of terrorism handicaps one’s ability to find out the precise time and place of an upcoming terrorist act.

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306 Australian Attorney-General Brandis on anticipatory self-defence (n40).
307 The UK Attorney General Wright, ‘The Modern Law of Self-Defence’ (n38); The UK Joint Committee on Human Rights (n37) 3.31-36; House of Lords debate (n37).
308 The US Department of Justice White Paper, ‘Lawful Use of a Lethal Operation Directed against a US Citizen Who is a Senior Operational Leader of Al-Qa’ida or an Associated Force’ (8 November 2011) 7.
309 Tallinn Manual 2.0 (n46) 351-352; Chatham House (n45) 8-9; Bethlehem (n227) 775-776 (principle 8); Leiden Policy Recommendations (n49) 543; Australian Attorney-General Brandis on anticipatory self-defence (n40); O’Meara (n1) 20; Van Steenberghe (n53) 53-54; Schmidt and Trenta (n3) 217; Schmitt, ‘Preemptive Strategies in International Law’ (n2) 534-535.
310 The scholars who opted to go with ‘contextual’ include Henderson (n35) 297; and O’Meara (n1) 19.
311 Chatham House (n45) 8-9; Tallinn Manual 2.0 (n46) 352; Bethlehem (n227) 775-776 (principle 8); Leiden Policy Recommendations (n49) 543; Akande and Liefländer (n301) 564-565; O’Meara (n1) 19-21; Rockefeller (n236) 144-145; Hofmeister (n12) 192-195; Van Steenberghe (n53) 53-54.
312 Chatham House (n45) 8-9; Bethlehem (n227) 775 (principle 8); Leiden Policy Recommendations (n49) 543; O’Meara (n1) 19-21; Akande and Liefländer (n301) 564; Rockefeller (n236) 144-145; Van Steenberghe (n53) 53-54; Henderson (n35) 301; Schmidt and Trenta (n3) 217.
313 Chatham House (n45) 8; Bethlehem (n227) 775 (principle 8); Leiden Policy Recommendations (n49) 543; O’Meara (n1) 19-21; Akande and Liefländer (n301) 564-565; Rockefeller (n236) 144-145; Van Steenberghe (n53) 53; Henderson (n35) 301-302.
and, as such, may warrant some concessions under the above-discussed evidential element. In any event, the bottom line is: only actual threats on track to full materialisation - as opposed to mere hypothetical ones - can come within the doctrine’s purview.

Third, as already hinted at, most of the proponents of contextual imminence pay due heed to the temporal closeness of an attack. As goes without saying, the more remote a materialising threat is, the more likely there are to be viable options for a pacific settlement, the non-pursuit of which would, as illuminated by Chapter Two’s exposition of the principle of necessity, forfeit the victim’s right to self-defence. Furthermore, should the test of imminence authorise anticipatory action sooner than absolutely necessary, it would risk foregoing non-forcible remedies that might have emerged had self-defence not been exercised. Hence, there is, from a policy perspective, desirability in keeping narrow the gap between the predicted opening of an offensive and the anticipatory operation. Even so, the function of temporality is subsidiary to those of the preceding two tenets, in that, so long as a given threat has started to take shape, and any further inactivity by the defending state would preclude the successful neutralisation of the said threat, its temporal remoteness would not, in and of itself, bar recourse to self-defence.

Fourth, the attacker must be both capable and willing to go through with its plans. It has to have the equipment required to execute the threatened strike, which, as underscored in Chapter One, is easier to ascertain when dealing with nuclear capabilities than with something as ubiquitous as information and communications technology. Insomuch as a state may, in certain situations, take steps in preparation of an attack without being totally committed to seeing it through, it is important that note is also taken of signs of willingness to use force, as inferable from official statements (e.g. declaration of hostile intent) and objective conduct (e.g. prior track record). Some works, like the Bethlehem Principles, incorporate into this assessment any recurring incursions of which the prospective offensive is a continuation, however, as is delved into in Chapter Six, the victim’s response to such an ongoing campaign of hostilities would fall under the ex post armed attack framework, whose condition of immediacy is not to be conflated with that governing anticipatory measures.

Fifth, although it is rarely talked about, geography is almost always part of the equation. Being as how most instruments of war have limited range and velocity, the geographical location of the conflicting states impacts how long the defender can afford to wait before making its move. As mentioned in Chapter One, by reason of travelling through the virtual world, cyber assaults may be wholly unconstrained by physical distance from the target state. The caveat here is that some malware, like the worm that ravaged the Iranian nuclear programme in 2010 (an incident investigated in Chapter Six), need to be manually inserted into the destination infrastructure via a USB port.

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314 Tallinn Manual 2.0 (n46) 352; Bethlehem (n227) 775 (principle 8); Leiden Policy Recommendations (n49) 543; O’Meara (n1) 17-21; Akande and Liefländer (n301) 564-565; Schmidt and Trenta (n3) 217; Henderson (n35) 299-300.
315 Chatham House (n45) 8-9; Hofmeister (n12) 193-194; Van Steenberghe (n53) 53-54.
316 Chatham House (n45) 9; Tallinn Manual (n46) 351; Rockefeller (n236) 144; Hofmeister (n12) 193; Van Steenberghe (n53) 53-54; Henderson (n35) 302-303.
317 Bethlehem (n227) 775 (principle 8); Rockefeller (n236) 144-145.
318 Chatham House (n45) 9.
in all, only through a cumulative evaluation of the above-enumerated determinants can one arrive at the appropriate time frame for anticipatory self-defence.

Having broken down the workings of contextual imminence, we may, at last, contemplate its suitability as a potential replacement for the Webster formula. At its core, the debate on the interpretation of anticipatory self-defence revolves around two cardinal security concerns: the problem of states weaponising Article 51 as a cover for aggression and the need to adapt the *jus ad bellum* to the formerly unforeseeable realities of state practice. An ideal construction of imminence would render self-defence impervious to abuse whilst guaranteeing the right’s effectiveness against attacks of all shapes and sizes. Though historically strong on both counts, the Webster formula has, owing to its restrictive phrasing and the consequent unresponsiveness to change, been turned near-unfulfillable by certain post-1945 phenomena, a vicissitude that, as reasoned in Chapter One, represents a substantial risk to the long-term sustainability of the law on the use of force. *A contrario*, too liberal a standard would invite both genuine miscalculation and deliberate manipulation, thereby blurring the line between the anticipatory and preventive modalities of self-defence. As a middle-ground compromise, contextual imminence has the potential to secure states’ resistibility against all types of threats without giving in to the trigger-happiness of the doctrine of prevention, which it keeps at bay with a rigorous evidentiary bar.

Nevertheless, the adoption of a more circumstantial understanding of imminence should not be romanticised as a wholesale solution to the deficiencies of the Webster formula. While an earlier window for the aversion of nuclear attacks would, under the principles of necessity and proportionality, rule out the use of the defender’s own nuclear arsenal, the success of such advance defensive operations could still rest on the destruction of objects liable to create radioactive fallout. That worrisome potentiality is, in all likelihood, irremovable by anything short of the manifestly illegal preventive self-defence. In much the same vein, the reinterpretation of imminence cannot assure the detectability or measurability of every cyber strike. Nor can it do away with the anonymity-inducing hurdles to attribution in cyberspace, which, as is unravelled in Chapter Six, may be practically insurmountable under the current law on state responsibility.

But even in the face of these adversities, contextual imminence outperforms its temporal forerunner by bettering states’ odds of fending off aggression, regardless of the form it takes. At the same time, the present thesis, recognising that the contextual reading of imminence grants states wider manoeuvring room for justifying the resort to force, and mindful of the expediency of the *jus ad bellum*’s force-averse orientation, postulates that suitable precautions should be taken to abate the rule’s abusability. The first such safeguard, and one often emphasised by those who promote the flexibilisation of anticipatory self-defence, is insistence – at least to the extent feasible - on the public disclosure of evidence of an imminent attack. Since the declassification of certain sources could frustrate the procurability of crucial intelligence in the future, the defending party should not be expected to impart all the sensitive information it is privy to. But, when not ill-advised, going public enables the international community to hold the defending state accountable for any errors in its judgment and, just as importantly, elicits much-needed *opinio juris* on the technicalities of the *ex ante* armed attack framework.

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320 Chatham House (n45) 9; Leiden Policy Recommendations (n49) 543; O’Meara (n1) 41.
Secondly, given how little discretion it offers, having the Webster formula function as the default – rather than sole – test of imminence could help further curb bad-faith practice in the ex ante armed attack context. As per this suggestion, the contextual standard of imminence would kick in only if it were evident, based on (ideally) publicly demonstrable proof, that letting a looming offensive approach its launch would extinguish the prospect of effective self-defence. With the Webster formula applying only up to the point of infeasibility, and its contextual equivalent taking over therefrom, the law on the use of force would be capitalising on the stringency of the Caroline precedent without defeating the purpose of Article 51. When compared with conventional arms, cyber force and weapons of mass destruction – not just nuclear but also biological, chemical and radiological (e.g. a ‘dirty bomb’) armaments – are more predisposed to precipitating the contextualisation of imminence. That is not to exclude the possibility of any kind of threat, especially if large-scale, necessitating a case-specific measurement of imminence. Ultimately, even if lex ferenda, the contextual reimagining of anticipatory self-defence has heretofore won over only three states, which means that, for now, the customary notion of imminence carries on being strictly time-based. At any rate, seeing that the Webster formula has long been lagging behind the ever-so-rapid modernisation of warfare, this thesis reckons that, sooner or later, states will have to inject some contextuality into the way imminence is gauged, for the fate of the extant system of the law on the use of force could very well depend on it.

3.4. Concluding Remarks

Diving into the ex ante armed attack context, Chapter Three segregated the potentially lawful anticipatory self-defence from the UN Charter-defying doctrine of prevention, composed a comprehensive and meticulously referenced account of the positions of states – the creators of international law – on the use of force against imminent threats, and probed the 21st-century viability of the pre-eminent views of imminence. It was discovered that, contrary to the verdict of the majority of international organisations and expert bodies, state practice and opinio juris in support of anticipatory self-defence have yet to attain a custom-creating level of generality. Be that as it may, approval of the doctrine is clearly on the rise, a turn in the tide that, as chronicled in Chapters Five and Six, is unfolding in parallel to the expansionist transformation of self-defence in the ex post armed attack context. Notwithstanding that imminence, the fulcrum upon which hinges the doctrine’s exercise, continues to operate as an exclusively temporal requirement, this study concluded that the contextual alternatives thereto are better equipped to accommodate the most recalcitrant attributes of cutting-edge warfare. Preference was expressed for a five-criteria model, whose application would, in any given case, be conditional on the unworkability of the Webster formula. And unworkable it will be if – or more realistically, when – certain exceptional occurrences, like physically harmful cyber-attacks, come to permeate the armed conflicts of tomorrow.

In the grand scheme of things, Chapter Three’s findings are integral to distinguishing the ex ante and ex post armed attack frameworks, which, despite being purposely varied in rigour and context-dependence, are becoming increasingly mixed up, both in state circles and academia (see Chapter Six for the exemplification of this legal certainty-endangering proclivity). The intermixing of the ex-ante and ex-post norms makes the assessment of either’s adequacy contingent on knowing precisely where their differences lie. Thus, in order to complete the picture, and supply the groundwork for the
answering of the main research question, the next two chapters seek to figure out the limits of self-defence against ongoing and concluded attacks.
4. Looking to the Past to Understand the Present: The Origins and the Pre-1945 Development of the Doctrine of Armed Reprisals

With the intricacies of the *ex ante* armed attack framework untangled, we may finally step over to the *ex post* armed attack side of the temporal spectrum and begin studying the two doctrines that occupy it: self-defence and armed reprisals. But to understand what defines them today, we must take a trip back in time. This is so as the markers presently used to navigate the self-defence/reprisals divide all predate the birth of the UN – they are what they are because of pre-1945 developments. These distinguishing features were identified in Chapter One as temporality, intent (and the concomitant quality of purpose), necessity and proportionality. Having already established how the aforementioned facets relate to self-defence (refer back to Chapter Two), the next logical step is to do the same with regard to armed reprisals. With that in mind, Chapter Four puts under the microscope reprisals as they were before the UN took charge of the maintenance of international peace and security. It documents their evolution up to the year 1945 and contrasts their interwar traits with those of the right of self-defence, thereby revealing how the two doctrines diverged on the brink of the UN era. The conclusions reached pave the way for the exploration of the normative journey that armed reprisals have been on since being abolished by the UN Charter.

4.1. The Law of Reprisal Through the Ages

Our quest for the origins of the concept of reprisal takes us, once again, to the Middle Ages, the epoch of the just war theory. Unlike the just war canon, which regulated the permissibility of recourse to force by one empire against another, the medieval doctrine of reprisals governed the trans-jurisdictional relations of private individuals. It served as a self-help mechanism for those who, having suffered ill at the hands of an alien (e.g. theft), wished to rectify their losses, either by means of sequestration of property or, on rare occasions, hostage-taking. Rather than against the wrongdoers themselves, these remedial acts were undertaken against their compatriots, that is, anyone subject to the jurisdiction of the same prince. In the 9th century, the nascent practice of reprisals was, absent either international or domestic regulation, a cause of great economic and security upheaval. To keep it from spiralling out of control, European countries concluded countless treaties of friendship that


would, over the coming several hundred years, develop this mode of self-help into a tightly constrained and fairly sophisticated legal institution. As a result, the admissibility of reprisals became dependent on denial of justice by whichever foreign authority the perpetrator answered to, and the goods seized by the reprisal-taker had to be equivalent to the value of the assets of which he was deprived. Additionally, in the twilight of the 12th century, the execution of reprisals gradually began to be conditioned on authorisation from one’s sovereign (termed letters of reprisal, or, somewhat synonymously, letters of marque).

In taking a look back at the conceptual roots of inter-state self-defence, Chapter Two reported that the right currently enshrined in Article 51 of the UN Charter was, mutatis mutandis, initially vested in private persons. Aside from not needing to be officially authorised, self-defence differed from reprisals by its temporal dimension; whereas the former had to be exercised while the triggering attack was still in progress, the latter postdated the consummation of harm. Those licensed to carry out a reprisal could do so only once the offending nation had had ample opportunity to remedy the grievance. In fact, the sovereign-issued letters of reprisal usually stipulated a mandatory cooling-off period, sometimes as long as four months, whose expiration rendered the writ’s enforcement lawful. Thus, the four themes associated with current-day reprisals were, even if dissimilar in terms of specifics, observable already in the doctrine’s infancy: temporality (rectification of a prior injury), purpose (pecuniary recompense), necessity (absence of other legal avenues) and proportionality (monetary equivalence between the crime and the restorative seizures).

As explained in Chapter Two, by the time the 18th century came to a close, legal restrictions on war-waging had, by virtue of states’ political and territorial drives, outlived all usefulness. Now entirely discretionary, war was re-envisioned as a legal state whose instigation triggered rights and duties distinct from those applicable in peacetime. The war/peace duality bore special significance in relation to armed reprisals, which, though still functioning as an autonomous legal regime, had undergone significant changes since the Middle Ages. The custom of granting full power to private individuals would, slowly but surely, come to a halt in the second half of the 18th century, leading states to assume the exclusive role of reprisal-taking. In as much as they did not ordinarily activate

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4 Wampach (n1) 52-53; Colbert (n1) 12; Hindmarsh (n1) 316.
5 Scheuner (n3) 152; Maccoby (n1) 61-63; P.A. Seymour, ‘The Legitimacy of Peacetime Reprisal as a Tool Against State-Sponsored Terrorism’ (1990) 39 Naval Law Review 221, 225; Kelly (n2) 4; Neff (n1) 77-78; Wampach (n1) 53 & 68; Colbert (n1) 15, 36 & 49-50.
6 Maccoby (n1) 60-63; Wampach (n1) 55-56; Colbert (n1) 12; Scheuner (n3) 152; Oppenheim, Volume II (n1) 41-42; Kelly (n2) 4.
8 Neff (n1) 61, 123 & 129.
9 Oppenheim, Volume II (n1) 46; Neff (n1) 78.
11 Scheuner (n3) 153; Oppenheim, Volume II (n1) 41-42; B.P. Levenfeld, ‘Israel’s Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal under Modern International Law’ (1982) 21 Columbia Journal of Transnational Law 1, 36-38; J. Gardam, Necessity, Proportionality and the Use of Force by States (Cambridge University Press 2004) 46; Neff (n1) 216 & 226; Kelly (n2) 4-5; Maccoby (n1) 66-67; Wampach (n1) 81-82; Colbert (n1) 31-32; Hindmarsh (n1) 318.
the state of war, reprisals were conceived of as ‘measures short of war’. Non-belligerent forcible acts derived their utility from the imprudence, and even practical impossibility, of tackling every squabble with resource-heavy, and sometimes politically detrimental, full-scale hostilities. Consequently, it was not uncommon for states with friendly diplomatic ties to settle minor quarrels through the use of limited force. In contrast with the unbridled enterprise of war, which did not shy away from permitting conquest, reprisals kept on being bound by their medieval limitations, albeit with adjustments to the experiences of statehood. Besides being preconditioned on diplomacy proving unfruitful, reprisals could only go as far as to compel the transgressor, in a manner proportionate to the transgression, to make amends. However, at the end of the day, states could – and did - bypass these constraints by falling back on their absolute right to wage war.

Having said that, reprisals of the 19th century were relatively contained and restitution-oriented, with most occurring at sea under the moniker of a ‘pacific blockade’, which, in distinct to wartime obstruction of ports, was – at least on paper – unenforceable against third-party vessels. Among the most cited of these maritime operations are the 1840 Sulphur Crisis, the 1847-1850 Don Pacifico affair, and the 1908 Dutch-Venezuelan confrontation, each of which followed the same pattern. The reprisal-taker would, in reaction to the commission of an internationally wrongful act against it, impound the lawbreaker’s ships as a way of coercing it into providing reparation. Upon restoration of the status quo ante, the sequestered vessels would be swiftly returned to their rightful owners. A further commonality of these intimidatory measures was their antecedence by the injured parties’ (often) persistent attempts at mending their respective disputes. The Don Pacifico affair sticks out

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14 De Vattel and Ingraham (n12) 283-284; Twiss (n7) 20-21; Neff (n1) 231-232; Hindmarsh (n1) 321; Wampach (n1) 124-125 & 132-133; Colbnt (n1) 60; M.M. Whitman, Digest of International Law: Volume 12 (U.S. Department of State, 1971) 148.
15 Wampach (n1) 121-122 & 132; Twiss (n7) 20-22.
17 Twiss (n7) 33-34; Hall (n12) 367; Oppenheim, Volume II (n1) 39-40.
18 Salpetier and Waller (n1) 276; Whitman (n14) 148-149; Brownlie (n10) 291; Maccoby (n1) 69-70; Kelly (n2) 9; Oppenheim, Volume II (n1) 41; Neff (n1) 234-235.
19 Maccoby (n1) 67-68; Oppenheim, Volume II (n1) 40.
21 Hall (n12) 367; M. Šedivý, ‘Metternich and the Anglo-Neapolitan Sulphur Crisis of 1840’ (2011) 16 Journal of Modern Italian Studies 1, 4; Twiss (n7) 35; Maccoby (n1) 68; Oppenheim, Volume II (n1) 39-40.
22 Šedivý (n21) 2; A. Kroupa, International Trade Relations of Venezuela (Loyola University Chicago, 1942) 67.
as an exception to this tendency, inasmuch as the Briton on whose behalf the British government sought compensation from Greece had failed to avail himself of the latter’s domestic remedies. That is why the Greco-British row at hand is frequently adduced as the epitome of an unlawful reprisal.\textsuperscript{23} Still, it is worth noting that Great Britain, whilst acknowledging that afflicted nationals did normally have to work their way up the offending state’s judicial system, argued that the Greek courts offered no reasonable prospect of success, and for that reason, it was appropriate for redress-seeking to commence at the intergovernmental level.\textsuperscript{24}

The picture just painted bears little resemblance to how we presently perceive reprisals. Far from being a restrained, escalation-averse tool of restoring observance of international law, new-age reprisals are, as is showcased throughout Chapter Five, known to be punitive and/or retaliatory outbursts of excessive violence. How they evolved to embody that image is something we must comprehend if we are to make sense of their existing contours and, climactically, devise an original methodology for their identification. It would seem that the foregoing teleological shift started taking root in the years leading up to the First World War, a stretch of time that recorded a higher incidence of the more drastic forms of reprisal, such as territorial occupation and bombardment.\textsuperscript{25} The perversion of the doctrine at issue turned particularly tangible in 1914, when, in an unapologetically draconian fashion, the US lashed out at Mexico for its misunderstanding-induced arrest of American sailors.\textsuperscript{26} Even though, having apologised for the misconduct of his troops, the Mexican commander in charge released the detained men,\textsuperscript{27} the US government, unappeased by the said admission of fault, demanded that Mexico salute the American flag with twenty-one guns.\textsuperscript{28} When Mexico requested that the salute be reciprocated, US President Wilson ordered a retaliatory strike that would erupt into a half-a-year-long occupation of the coastal city of Veracruz.\textsuperscript{29}

That the US overstepped the bounds of the contemporary law of reprisal is manifest in three respects: first, the doctrine had heretofore mandated compulsion only insofar as there was a wrong yet to be righted, which, in the setting of modern states, meant that reprisals were to cease as soon as the offender resumed compliance with its international commitments. Once Mexico freed the detainees and, in a gesture of good will, tendered an apology, the traditional purpose of reprisals became inapplicable, \textit{ipso facto} converting the ensuing forcible response into a punitive expedition. Second, by extending to Mexico an ultimatum, the US came across as having adhered to the requirement to seek an amicable solution; nonetheless, the over-the-top stipulation for de-escalation, as compounded by intransigence to compromise, betrayed a substantial degree of bad faith on the part of the US government.\textsuperscript{30} Over and above that, President Wilson made no secret of his political ambitions in Mexico, chief among which was his aspiration to topple the country’s ruler, General Huerta.\textsuperscript{31} Third, one cannot help but notice the stark mismatch between the mostly harmless detainment of seamen and the excessively lengthy and violent blowback that ensued. Despite

\textsuperscript{23} Oppenheim, \textit{Volume II} (n1) 41; Brownlie (n10) 291; Whiteman (n14) 148-149; Maccoby (n1) 69-70.
\textsuperscript{24} Colbert (n1) 70-71; Wampach (n1) 122.
\textsuperscript{25} Wampach (n1) 190-192.
\textsuperscript{26} Gardam (n11) 48; Kelly (n2) 10; Brownlie (n10) 36.
\textsuperscript{27} Brownlie (n10) 36; Kelly (n2) 10.
\textsuperscript{28} M. Small, \textit{The Forgotten Peace: Mediation at Niagara Falls} (University of Ottawa Press, 2009) 32-34; Colbert (n1) 77.
\textsuperscript{29} Small (n28) 33-34; Brownlie (n10) 36-37; Kelly (n2) 10-11.
\textsuperscript{30} Small (n28) 32-33.
\textsuperscript{31} Small (n28) 14-15.
Mexico’s protestations to the contrary, the US maintained that it did not, nor did it intend to, engage in a war with its southern neighbour. As is seen further below, the parallels between what happened in Veracruz and the most infamous reprisal of the interwar period - the 1923 Italian occupation of Corfu Island – are astounding. Indeed, when considered in unison with the relevant state practice of its time, the invasion of Veracruz signalled a repudiation of the historically small-scale, coercive nature of acts presented as ‘short of war’.

Taking place just months after the US took control of Veracruz, the next transformative case of interest saw two colonial powers exchange blows in Southern Africa. On 19 October 1914, A German military column, accompanied by an interpreter, crossed illegally into Portuguese Southwest Africa (present-day Angola) in hopes of negotiating the lifting of an export embargo to the neighbouring German Southwest Africa (today’s Namibia). Having been detected by the Portuguese border patrol, the German delegation was escorted to the frontier town of Naulila. Once at Fort Naulila, the language barrier between the interlocutors, aggravated by the ineptitude of the interpreter, spurred a fatal miscommunication that left three of the German soldiers dead. In avenging itself against Portugal, Germany would, over the next two months, launch six assaults on Southwest African strongholds, causing exorbitant physical destruction and loss of life. These incursions were not of the belligerent variety, as, notwithstanding that the First World War was already raging on the European continent, Portugal was yet to relinquish its neutrality, and neither it nor Germany had hitherto indicated bellicose intent towards the other.

The 1914 German onslaught on Portuguese-controlled land would come to be the focus of the 1928-1933 Naulilaa (sic) Arbitration, an award many credit as the most authoritative statement on the customary parameters of reprisals. The ruling confirmed the three enduring conditions for the doctrine’s invocation: a prior infringement of an international obligation, an unsatisfied demand for redress, and proportionality of the corrective action. Insomuch as the slaying of the German officers was the consequence of a mistaken need for self-defence, the arbitrators declared that there was no wrongdoing to speak of, and, by extension, no right of reprisal. They further ruled that, because Germany made no use of diplomatic channels, the second of the forenamed requisites was likewise

32 Brownlie (n10) 36-37; Colbert (n1) 94.
33 J. Pfeil, ‘Naulilaa Arbitration (Portugal v Germany)’ in R. Wolfrum (ed), Max Planck Encyclopedia of Public International Law (Oxford University Press, online edn, 2007) para. 4; Gardam (n11) 46.
34 Naulilaa Arbitration (Portugal v Germany) (award) [1928] II RIAA 1011, 1024-1025.
35 Pfeil (n33) 5.
37 Naulilaa Arbitration (n34).
39 Naulilaa Arbitration (n34) 1026.
Last but not least, the Tribunal observed that the six German counterstrikes could not be regarded as proportionate vis-à-vis a single isolated mishap. All in all, the German military campaign was, much like the usurpation of Veracruz before it, a far cry from the limited restitutive character of the reprisals of the 19th century. The fact that Germany did not even attempt peaceful reconciliation implies that, rather than to obtain relief, its principal motivation was to punish.

As elucidated in Chapter Two, the beginning of the erosion of states’ war-waging capacity can be traced back to the year 1920. As momentous as it was for the jus ad bellum at large, the advent of the League of Nations, an organisation whose constitution – the Covenant of the League of Nations - vowed to shield the world from the horrors of war, had little to no effect on the institution of reprisals.

As clarified by the League’s Secretary-General and the Commission of Jurists, reprisals were, by dint of constituting a peacetime mechanism, capable of obviating the Covenant’s safeguards against war. This disconcerting loophole is best exemplified by the notorious 1923 Italian occupation of Corfu Island. The military adventure in question came as a break in the Greco-Italian standoff over the assassination of three Italians in Greece, an incident that arose on 27 August 1923. The victims were members of a mission of the Conference of Ambassadors - an intergovernmental body founded by the Allies of WWI – dispatched to Greece to oversee the demarcation of the Greco-Albanian border. While Greece – Italy’s prime suspect - vehemently denied responsibility for what looked to be politically motivated killings, its fact-finding efforts did not unearth any leads as to the identity of the assassins.

Suspecting a cover-up, Italy issued an exacting ultimatum, dictating that Greece agree, within twenty-four hours, to, *inter alia*, investigate the murders under the superintendence of an Italian colonel, inflict capital punishment on those responsible, and pay an indemnification in the sum of fifty million Italian lira. On 31 August, Greece’s partial rejection of the impositions prompted Italy to bombard the Greek island of Corfu, killing fifteen islanders in the process. The isle would remain under Italian control until 27 September. This dark episode of the island’s history came to an end when Greece, seeing no other way forward, succumbed to its adversary’s demands. It was Italy’s position that the

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41 Naulilaa Arbitration (n34) 1027-1028.
42 Naulilaa Arbitration (n34) 1028.
45 Darcy (n38) 886-887; Gardam (n11) 48; Maccoby (n1) 73; Kelly (n2) 10; Williamson (n12) 92-93; UNSC Verbatim Record (21 November 1966) UN Doc S/PV.1324, para. 67; Hindmarsh (n1) 320.
48 Barros (n47) 272; Wirantaprawira (n46) 130.
49 Barros (n47) 274-275; Neff (n1) 298.
50 The Cologne Post, ‘Italy’s Hasty Action at Corfu’ (2 September 1923) retrieved from: <https://www-proquest-com.ezproxy.is.ed.ac.uk/docview/1630340065?accountid=10673&pq-origsite=primo> on 24/07/2021; Papafloratos (n46) 265; Maccoby (n1) 73; Neff (n1) 298; Kelly (n2) 11.
51 Wirantaprawira (n46) 130; Papafloratos (n46) 265 & 271.
52 Wirantaprawira (n46) 131.
Corfu takeover was a reprisal, an assertion that, by all outward appearances, corresponded to the doctrine as it stood back then. The use of force was prefaced by a failed bid to resolve tensions amicably, and, once the Greek government assented to what was asked of it, Italy desisted from any further hostilities. Nevertheless, underneath that façade was a punitive undertaking laid bare by the unreasonable ultimatum that preceded it as well as its blatant disproportionality vis-à-vis any oversights that Greece’s handling of the crisis may have suffered from. On the whole, the international community’s *laissez-faire* attitude towards the capture of Corfu Island, as disposed by the relativity of the Covenant’s prohibition of the use of force, marked the first palpable sign of the League of Nations’ inevitable collapse.

Compared to the Covenant, the 1928 Kellogg-Briand Pact raised serious doubts as to the theretofore uncontroversial lawfulness of reprisals, with some authors going as far as to assert that Article II, in confining the resolution of inter-state friction to strictly ‘pacific’ means, imposed upon states an all-inclusive ban on the use of force. This was, unsurprisingly, a minority stance, given that there are no less than two compelling reasons as to why reprisals were unlikely to have been illegalised by the Pact. First, the said treaty did not, as part of its renouncement of war, make provision for either reprisals or self-defence. Notwithstanding its omission from the Pact’s text, the latter doctrine was, as demonstrated in Chapter Two, held to be lawful by the state parties. Therefore, there was a good possibility that reprisals, too, were excluded from the Pact’s non-exhaustive coverage of the law on the use of force. Second, the Kellogg-Briand Pact, or as it is formally known, the ‘General Treaty for Renunciation of War as an Instrument of National Policy’, was self-professedly about the abolishment of war, and since reprisals had, for the past two hundred years, been conceptualised as a mode of coercion that does not break peace (as emblematised by the aptly named *pacific* blockades), they could not be presumed to fall within the scope of the above-mentioned Article II.

Such may have been the rationale behind the 1934 report of the Institute of International Law, wherein reprisals were found to have survived the Pact’s clampdown on war. The Institute pronounced that, on top of being subject to the three requirements set out in the *Naulilaa* award, reprisals could not go beyond what was necessary to induce adherence to international law, and the use of force had to be discontinued the moment there was an offer of adequate redress. These additional specifications were essentially an encapsulation of the purpose of reprisals, at least as it was envisioned in the abstract. In any case, with WWII approaching, and the emergence of the customary proscription of the use of force being well underway, the fate of armed reprisals hung in the balance. Having catalogued the pre-1945 trajectories of reprisals and self-defence, we may now proceed to tease out the differences the two doctrines had on the cusp of the UN era and, in doing so, lay the groundwork for their examination under the extant structure of the *jus ad bellum*.

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53 Barros (n47) 262 & 285; Neff (n1) 298; Wirantaprawira (n46) 130-131.
54 Gardam (n11) 48.
55 Kellogg-Briand Pact (adopted on 27 August 1928, entered into force on 24 July 1929) 94 LNTS 57, Article II.
56 Brownlie (n10) 87-89, 93-95 & 108-109.
58 Kellogg-Briand Pact (n55) Article I.
59 Institute of International Law, ‘Régime des Représailles en Temps de Paix’ (1934) Session de Paris.
60 Institute of International Law, ‘Régime des Représailles en Temps de Paix’ (n59) Article 6.
4.2. The Disentanglement of the Interwar Concepts of Reprisals and Self-Defence

It was clear that, going into the interwar period, the practice of reprisals grew progressively detached from its conceptual origins. Yet, the reputable authorities of the 1920s and the 1930s did not falter in their affirmation of the three classical requisites for reprisals: a prior impingement on the reprisal-taker’s rights, prioritisation of non-forcible remedies, and proportionality of the response. The doctrine’s purpose also continued to be framed restrictively, in spite of how divorced such a construction had become from the reality. Though the above-listed conditions for the enactment of reprisals did, at first glance, seem to mimic those governing the exercise of self-defence, the present section illustrates that the two sets of precepts shared very little common ground. To begin with, there were material and temporal disparities between the sorts of misdeeds that precipitated the application of these doctrines. Whereas the exercisability of self-defence was thought to depend on the threat or use of armed force, such ratione materiae qualifications did not apply to reprisals, which could be set off by practically any internationally wrongful act.

Furthermore, in comparison with the interwar right of self-defence, whose temporality was, as detailed in Chapter Two, broad enough to sanction anticipatory action, reprisals had always had a backward-looking orientation. Seeing as they came after the fact, and were admissible only once the offending party had had sufficient opportunity to pay its dues, reprisals were necessarily premeditated. By contrast, self-defence was, as per the Caroline precedent, a spontaneous, on-the-spot measure that had to be exercised without ‘a moment for deliberation’ or a ‘choice of means.’ Accordingly, of the two doctrines, only self-defence could entail an identity of time and place between the transgressive action and the counteraction. The absence of this symmetry signified that, just like in their conception, reprisals targeted substitutes for the persons directly involved in the infliction of the original injury.

The imperative to prioritise non-violent dispute settlement is sometimes likened to the principle of necessity of self-defence. But any such analogy is unfounded in two regards: firstly, there is a variance in opinion on the requisite level of commitment to the pursuit of pacifism. According to one

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61 Hall (n12) 364; Oppenheim, *Volume II* (n1) 39; *Naulilaa Arbitration* (n34) 1026; Institute of International Law, ‘Régime des Représailles en Temps de Paix’ (n59) Article 1; Maccoby (n1) 68; Hershey (n16) 32; Levenfeld (n11) 36-37; R.A. Falk, ‘The Beirut Raid and the International Law of Retaliation’ (1969) 63 American Journal of International Law 415, 430-431; Seymour (n5) 226-227 & 237; Kelly (n2) 7-9.

62 *Naulilaa Arbitration* (n34) 1026; Institute of International Law, ‘Régime des Représailles en Temps de Paix’ (n59) Article 6; Wampach (n1) 276; Falk (n61) 430-431; Levenfeld (n11) 36-39; Seymour (n5) 226-227 & 238.

63 *Naulilaa Arbitration* (n34) 1026; Institute of International Law, ‘Régime des Représailles en Temps de Paix’ (n59) Article 6; Hall (n12) 364-365; Oppenheim, *Volume II* (n1) 44; Brownlie (n10) 28; Colbert (n1) 76; Falk (n61) 430-431; Seymour (n5) 226-227 & 238-239; Levenfeld (n11) 36-37 & 39-40.

64 Institute of International Law, ‘Régime des Représailles en Temps de Paix’ (n59) Article 6; Hall (n12) 364-365; Oppenheim, *Volume II* (n1) 38-39; Brownlie (n10) 28; Maccoby (n1) 68; Seymour (n5) 226-227 & 237-238.

65 Letter from the US Secretary of State Daniel Webster to Lord Ashburton (27 July 1842) extract of an earlier note of 24 April 1841, retrieved from: <https://avalon.law.yale.edu/19th_century/br-1842d.asp#intro> on 02/12/2019.

perspective, reprisals could only be resorted to if all peaceful avenues had been exhausted.\(^{67}\) Other commentators set the bar much lower, positing that the injured party had to merely make an attempt at procuring reparation through amicable methods.\(^{68}\) Even so, those that went on to qualify ‘attempt’ disagreed on what was constitutive of it; while Maccoby spoke of ‘patient diplomacy’,\(^{69}\) the *Nauilaa* arbitrators advanced the more forgiving standard of unsatisfied demand.\(^{70}\) Secondly, and more critically, the law of reprisal authorised the offensive use of force, which, by definition, is not necessary within the strict meaning of the word. As relayed in Chapter Two, the exigency contemplated by the principle of necessity is of an existential kind, in that it presupposes the non-preservability of the defender’s territorial integrity and political independence by means other than armed force. Needless to say, such a rigorous test is passable only by acts of a defensive nature, the quintessential example of which is resistance against an invading army. Reprisals, on the other hand, were concerned not with self-preservation but with the securing of reparation for comparatively trivial injuries, infractions that were, at any rate, firmly in the past. Hence, reprisals were endeavours of want rather than need.

The pair of doctrines under discussion is, admittedly, trickier to set apart with respect to the requirement of proportionality. Chapter Two related that, in the field of the law on the use of force, the said norm can be interpreted either in an equivalence or a means-end sense. Both conceptions have traditionally been – and still are – linked with self-defence. That being said, the means-end interpretation is generally deemed the sole arbiter of the right’s proportionality, not least because, as contended in Chapter Two, the equivalence formula is inconsistent with the *raison d’être* of Article 51 of the UN Charter. In reference to reprisals, proportionality historically connoted a quantitative balance between the triggering offence and the riposte, a notion that had since been reiterated by the *Nauilaa* Tribunal,\(^{71}\) the Institute of International Law\(^{72}\) as well as a number of illustrious jurists.\(^{73}\) Others conveyed a bifurcated understanding of proportionality, one gauged relative to both the mark left by the underlying transgression and the magnitude of force needed to set it right.\(^{74}\) In any event, most recognised that, whether as a facet of proportionality or a standalone element, the purpose of reprisals forbade the victim from exacting more pressure than necessary to bring the transgressor back into conformity with international law.

However, it would be remiss to view this goal-oriented foundation as an area of normative overlap between the two doctrines. After all, under the means-end model, the degree of force allowed is determined by the goal against which proportionality is measured, and, as established above, self-defence and reprisals seek to accomplish radically divergent ends. Having a defensive objective as a yardstick for proportionality forecloses the rule’s satisifiability by non-defensive acts, a class of measures that armed reprisals doubtless belonged to. Inversely, a wider array of forcible actions could be considered proportionate if judged against an offensive aim, such as the procurement of redress. *Ergo*, the ‘proportionality’ of reprisals was distinct in all but name from that which denotes the commensurateness of self-defence. Ultimately, the conditions for the taking of reprisals became

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\(^{67}\) Hershey (n16) 322.


\(^{69}\) Maccoby (n1) 68.

\(^{70}\) *Nauilaa Arbitration* (n34) 1026-1028.

\(^{71}\) *Nauilaa Arbitration* (n34) 1026-1028.

\(^{72}\) Institute of International Law, ‘Régime des Représailles en Temps de Paix’ (n59) Article 6.

\(^{73}\) Maccoby (n1) 68; Falk (n61) 431.

\(^{74}\) Oppenheim, *Volume II* (n1) 44; Hershey (n16) 322.
inoperative in 1945, when the adoption of the UN Charter wiped out all pre-existing grounds for unilateral force, save for self-defence, and ipso facto put to rest any lingering scepticism about the illegality of forcible countermeasures.

4.3. Concluding Remarks

To sum up, this brief but important chapter narrated the centuries-long process by which reprisals, an originally private right of restitution, transformed into a short-of-war vehicle for the resolution of inter-state disputes. It was shown that, by the time WWII broke out, the deepening disconnect between theory and praxis, as manifested by states’ growing disregard for the customary restrictions on reprisals, transmuted the once small-scale remedial measures into an apparatus of punishment and revenge. The increasingly disobeyed restrictions appeared to be analogous to the principles of necessity and proportionality of self-defence, when in fact they were anything but. In highlighting the points of divergence between interwar reprisals and self-defence, the present thesis noted that the former were, by reason of their offensive essence, incapable of satisfying standards designed around a defensive goal. It was further pointed out that, unlike self-defence, reprisals were solely past-focused, that is, preoccupied with wrongdoings whose perpetration had already been completed. Thus, emerging from the pre-1945 legal order were three signature traits of reprisals - ex post facto temporality, non-defensive purpose, and excessiveness (not only vis-à-vis own requisites but also in relation to the principles of necessity and proportionality) - that would go on to inspire the methodologies for the doctrine’s distinguishment from self-defence. In picking up right where Chapter Four leaves off, Chapter Five endeavours to scrutinise the post-1945 state practice and opinio juris in the ex post armed attack context and, thereby, set the scene for the answering of the main research question. To remind ourselves, this project undertook to discover the current makeup of the ex post armed attack framework and, with that knowledge, appraise the law’s treatment of select game-changing phenomena.
5. The Ex Post Armed Attack Framework in the Post-1945 Era

As intimated by the historical insights of Chapter Two, the installation of the UN system of collective security was what jurists call a ‘Grotian Moment’,¹ i.e. a turning point that sees a historic event – such as WWII - impel the global community to reweave, in an extraordinarily short span of time, the very fabric of international law. The resultant ethos of force-restrictiveness, as epitomised by the legal demise of war and offensive measures short thereof (except when authorised by the UNSC), elevated the importance of marking off the now unlawful armed reprisals from the still permissible self-defence. Although, as spelled out in Chapter Four, the two doctrines are distinguishable on the basis of the requirements for their exercise, the interwar criteria on what made reprisals lawful lost all pertinence once their forcible variant was outlawed. The early post-WWII decades witnessed the consolidation of objective (temporality), subjective (intent) and semi-objective (principles of necessity and proportionality) distinguishing factors. The foregoing considerations form the keystones of the three prevailing approaches to the categorisation of forcible acts under the ex post armed attack framework, each of which is picked apart in Sections 5.1.1.-5.1.3. Chapter Five strives to analyse the post-1945 state practice and opinio juris with a view to verifying which of the said approaches, if any, is reflective of the contemporary jus ad bellum.

To identify the relevant instances of reprisal-taking, this study singled out operations that were classed as reprisals by states and the UN, cross-checked them with the doctrine’s well-documented pre-1945 tenets and employed the overlapping features as a benchmark for pinpointing homogeneous cases. So that the normative influence of evolving warfare is adequately depicted, the review of the practice of reprisals is split into three temporal blocks: 1945-1980 (Section 5.1.), the 1980s (Section 5.2.), and 1990-current day (Section 5.3.). Whereas, in the first period, states and the UNSC were eager to hurl the label ‘reprisal’ at any action with a certain set of characteristics, tantamount conduct in the final time frame not only ceased to be classified as such but also garnered acceptance under the aegis of self-defence. The 1980s, though by and large consonant with the zeitgeist of the 1950s-1970s, delivered the first hints of an attitudinal change towards acts that bear the classic hallmarks of reprisals. For all intents and purposes, the eighties represent a buffer between the standard and the modern incarnations of reprisals and reactive self-defence.

5.1. State Practice and Opinio Juris in the 1945-1980 Period

In the years from 1945 until 1980, the great majority of measures designated as reprisals originated from the Arab-Israeli conflict. Inasmuch as, aside from being embedded within the same context, they

all unfolded in a near-identical manner, the UNSC, states\(^2\) and scholars\(^3\) perceived them not as isolated incidents but as manifestations of a relentless campaign of reprisals. Conducted by Israel as part of an avowed counterterrorist strategy, the impugned undertakings transpired in the neighbouring states of Egypt, Jordan, Lebanon and Syria, countries faulted for letting hostile groups - the various factions of the Palestinian freedom fighters – use their territories as a springboard for attacks on Israeli soil. Whilst most of its forcible responses were directed at the said non-state actors, Israel would occasionally take aim at the host states themselves, either in reaction to their involvement in the initiating incursions or as a means of pressuring their governments to suppress terrorism hailing from within their borders (more on this defender-host dynamic in Section 5.2.1.).

The following military ventures were explicitly categorised as reprisals, and condemned as such, by the entities specified in the adjacent parentheses: the strikes in Jordan from 1953 (the UNSC\(^4\) the Chief of the UN Truce Supervision Organization\(^5\) and states\(^6\)), 1966 (the UNSC\(^7\) and states\(^8\)), including

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\(^2\) UNSC Res 228 (25 November 1966) UN Doc S/RES/228.

\(^3\) UNSC Verbatim Record (8 December 1969) UN Doc S/PV.1518, para. 55; UNSC Verbatim Record (1 August 1966) UN Doc S/PV.1293, paras. 95-96; UNSC Verbatim Record (29 March 1955) UN Doc S/PV.695, paras. 20-23; UNSC Verbatim Record (28 March 1969) UN Doc S/PV.1468, paras. 43-45.


\(^6\) UNSC ‘Cablegram dated 53/05/08 from the Chief of Staff of the Truce Supervision Organization addressed to the Secretary-General transmitting a report to the Security Council’ (8 May 1953) UN Doc S/3007, para. 61; UNSC ‘Report Dated 15 December 1955 by the Chief of Staff of the United Nations Truce Supervision Organization to the Secretary-General of the United Nations on the Lake Tiberias Incident of the Night of 11-12 December 1955’ (20 December 1955) UN Doc S/3516, para. 30.

\(^7\) UNSC Verbatim Record (9 November 1953) UN Doc S/PV.635, para. 50 (the UK); UNSC Verbatim Record (25 November 1953) UN Doc S/PV.643, para. 94 (Denmark); UNSC Verbatim Record (16 November 1953) UN Doc S/PV.638, para. 62 (Jordan).

\(^8\) S/RES/228 (n2).

\(^9\) UNSC Verbatim Record (16 November 1966) UN Doc S/PV.1320, paras. 79 (the UK) & 90 (the US); UNSC Verbatim Record (16 November 1966) UN Doc S/PV.1321, paras. 4 (France) & 12-14 (the USSR); UNSC Verbatim Record (17 November 1966) UN Doc S/PV.1322, para. 5 (Argentina), 10 (Japan) & 19 (New Zealand); UNSC Verbatim Record (18 November 1966) UN Doc S/PV.1323, paras. 4-9 (the Netherlands) & 15-17 (China); UNSC Verbatim Record (21 November 1966) UN Doc S/PV.1324, para. 80 (Uruguay); UNSC Verbatim Record (21 November 1966) UN Doc S/PV.1325, para. 5 (Bulgaria); UNSC Verbatim Record (24 November 1966) UN Doc S/PV.1327, para. 4 (Nigeria); UNSC ‘Joint draft resolution / Mali and Nigeria’ (24 November 1966) UN Doc S/7598; *Oil Platforms (Iran v United States of America)* (Memorial submitted by the Islamic Republic of Iran) [1993], 103-104.
every member of the UNSC, with the exception of Uganda\textsuperscript{10}, March 1968 (the UNSC\textsuperscript{11} and states\textsuperscript{12}), August 1968 (the UNSC\textsuperscript{13} and states\textsuperscript{14} and 1969 (states\textsuperscript{15}); the 1955 charge into Egypt (the Chief of the UN Truce Supervision Organization\textsuperscript{16} and states\textsuperscript{17}); the raids in Syria from 1955 (the Chief of the UN Truce Supervision Organization\textsuperscript{18} and states\textsuperscript{19}), 1962 (states\textsuperscript{20}), and 1966 (states\textsuperscript{21}); as well as the interventions in Lebanon from 1968 (states\textsuperscript{22}), 1969 (the UNSC\textsuperscript{23} and states\textsuperscript{24}), 1970 (states\textsuperscript{25}),

\textsuperscript{10} But note that Uganda nonetheless considered it an offensive, rather than defensive, act: S/PV.1327 (n9) 14.
\textsuperscript{11} UNSC Res 248 (24 March 1968) UN Doc S/RES/248.
\textsuperscript{12} UNSC Verbatim Record (21 March 1968) UN Doc S/PV.1401, para. 11(Jordan); UNSC Verbatim Record (21 March 1968) UN Doc S/PV.1402, paras. 42(Pakistan), 49(France), 110-113(Ethiopia), 143(Morocco) & 154(Hungary); UNSC Verbatim Record (21 March 1968) UN Doc S/PV.1403, paras. 8(the UK), 31(Egypt), 60(Paraguay) & 68(China); UNSC Verbatim Record (22 March 1968) UN Doc S/PV.1404, para. 29(Syria); UNSC Verbatim Record (9 August 1968) UN Doc S/PV.1437, para. 32(India).
\textsuperscript{13} UNSC Res 256 (16 August 1968) UN Doc S/RES/256.
\textsuperscript{14} UNSC Verbatim Record (5 August 1968) UN Doc S/PV.1434, paras. 49(Jordan), 137-138(Iraq) & 192(the US); UNSC Verbatim Record (6 August 1968) UN Doc S/PV.1435, paras. 22(Egypt), 29(France), 36(Canada) & 73(Pakistan); S/PV.1437 (n12) 22(China) & 40(Brazil); UNSC Verbatim Record (15 August 1968) UN Doc S/PV.1439, para. 18(Ethiopia).
\textsuperscript{15} UNSC Verbatim Record (27 March 1969) UN Doc S/PV.1467, para. 44(Nepal); S/PV.1468 (n3) 18-19(Finland), 26(the UK), 37(France) & 43-45(Pakistan); UNSC Verbatim Record (28 March 1969) UN Doc S/PV.1469, paras. 62(Spain) & 73(Colombia); UNSC Verbatim Record (29 March 1969) UN Doc S/PV.1470, paras. 37-38(Paraguay); UNSC Verbatim Record (1 April 1969) UN Doc S/PV.1472, para. 110(the USSR).
\textsuperscript{16} S/3516 (n6) 30.
\textsuperscript{17} S/PV.695 (n3) 10-11(the UK), 20-23(France) & 68(Brazil); UNSC Verbatim Record (16 December 1955) UN Doc S/PV.707, para. 61(Syria); UNSC Verbatim Record (4 March 1955) UN Doc S/PV.692, para. 8(the US).
\textsuperscript{18} S/3516 (n6) 26 & 30.
\textsuperscript{19} S/PV.707 (n17) 16(the UK); UNSC Verbatim Record (12 January 1956) UN Doc S/PV.711, paras. 7-8(Yugoslavia) & 63-65(Belgium); UNSC Verbatim Record (13 January 1956) UN Doc S/PV.712, paras. 12-13(Australia), 23(Cuba) & 36(Peru); UNSC Verbatim Record (5 April 1962) UN Doc S/PV.1002, para. 7(France).
\textsuperscript{20} UNSC Verbatim Record (28 March 1962) UN Doc S/PV.999, paras. 100-101(the US); S/PV.1002 (n19) 8-9(France); UNSC Verbatim Record (5 April 1962) UN Doc S/PV.1003, paras. 32-33(the UK); UNSC Verbatim Record (6 April 1962) UN Doc S/PV.1004, para. 25(Chile).
\textsuperscript{21} UNSC Verbatim Record (25 July 1966) UN Doc S/PV.1288, paras. 92(Syria) & 198-200(the USSR); UNSC Verbatim Record (26 July 1966) UN Doc S/PV.1289, para. 42(Jordan); UNSC Verbatim Record (29 July 1966) UN Doc S/PV.1291, para. 37(France); UNSC Verbatim Record (29 July 1966) UN Doc S/PV.1292, paras. 5-8(Mali), 27-28(Bulgaria), 81(New Zealand) & 94(Argentina); S/PV.1293 (n3) 23(Nigeria), 38-47(Uruguay) & 61-63(China).
\textsuperscript{22} UNSC Verbatim Record (29 December 1968) UN Doc S/PV.1460, paras. 72-75(the US), 89(France), 137-138(Senegal) & 144(Brazil); UNSC Verbatim Record (30 December 1968) UN Doc S/PV.1461, paras. 23(Lebanon), 37(Canada), 62-63(China), 85-87(Paraguay) & 138-140(the USSR); \textit{Oil Platforms}, Memorial submitted by the Islamic Republic of Iran (n9) 105.
\textsuperscript{23} UNSC Res 270 (26 August 1969) UN Doc S/RES/270.
\textsuperscript{24} UNSC Verbatim Record (14 August 1969) UN Doc S/PV.1499, paras. 3(Algeria), 45(France) & 52-53(Pakistan); UNSC Verbatim Record (14 August 1969) UN Doc S/PV.1500, paras. 14(the US) & 22(Senegal); UNSC Verbatim Record (15 August 1969) UN Doc S/PV.1501, paras. 8(the UK) & 61(Zambia); UNSC Verbatim Record (18 August 1969) UN Doc S/PV.1502, paras. 5(Colombia) & 32(China).
\textsuperscript{25} UNSC Verbatim Record (12 May 1970) UN Doc S/PV.1537, para. 18(Lebanon); UNSC Verbatim Record (13 May 1970) UN Doc S/PV.1539, paras. 39(the USSR) & 62(Finland); UNSC Verbatim Record (14 May 1970) UN Doc S/PV.1540, para. 2(Zambia), 37(the US), 50(Burundi) & 53(Nepal); UNSC Verbatim Record (15 May 1970) UN Doc S/PV.1541, paras. 34-35(China) & 44(France); UNSC Verbatim Record (19 May 1970) UN Doc S/PV.1542, paras. 67(the UK) & 102(Poland).
February 1972 (states\textsuperscript{26}), June 1972 (the UNSC\textsuperscript{27} and states\textsuperscript{28}) September 1972 (states\textsuperscript{29}), 1973 (states\textsuperscript{30}), 1974 (states\textsuperscript{31}) and 1978 (states\textsuperscript{32}).

Israel’s way of justifying itself evolved in tune with the international community’s worsening perception of the doctrine of armed reprisals. As borne out in Chapter One, reprisals have, thanks to decades’ worth of condemnatory \textit{opinio juris}, come to be conceived as synonymous with unlawful force. That sentiment was not yet so pronounced at the dawn of the UN era, hence the initial reluctance of some states (China and the Netherlands)\textsuperscript{33} to disclaim the archaic right of reprisal. This could explain why, in the 1950s, Israel made no effort to refute that its counterstrikes were reprisals; quite the opposite, the Israeli government was, at the time, pursuing an official policy of retaliation.\textsuperscript{34} The 1953 foray into Jordan was somewhat anomalous in this regard, insomuch as, in branding it a reprisal, Israel insisted that the operation was executed by ordinary citizens,\textsuperscript{35} notwithstanding the overwhelming evidence to the contrary.\textsuperscript{36}

Once it became apparent that the doctrine’s standing had deteriorated beyond repair, and, as such, yielded no prospect of a successful legal defence, Israel began reframing its conduct as self-defence.\textsuperscript{37} The international community was, irrespective of the Cold War loyalties of its members, impeccably uniform in dismissing Israel’s appeals to Article 51 of the UN Charter. Quite a few states (Algeria,\textsuperscript{38}

\textsuperscript{26} UNSC Verbatim Record (26 February 1972) UN Doc S/PV.1643, paras. 120-121(France) & 142(Italy); UNSC Verbatim Record (27 February 1972) UN Doc S/PV.1644, paras. 43(Guinea), 105(Yugoslavia) & 134(the UK).
\textsuperscript{27} UNSC Res 316 (26 June 1972) UN Doc S/RES/316.
\textsuperscript{28} UNSC Verbatim Record (23 June 1972) UN Doc S/PV.1648, paras. 136-137(France) & 262(Lebanon); UNSC Verbatim Record (24 June 1972) UN Doc S/PV.1649, paras. 15-16(Egypt), 134(Belgium), 142(Japan), 158(Italy) & 179-181(the UK); \textit{Oil Platforms}, Memorial submitted by the Islamic Republic of Iran (n9) 105.
\textsuperscript{29} UNSC Verbatim Record (10 September 1972) UN Doc S/PV.1662, paras. 8(the UK), 26-27(India), 41(Panama), 56(Japan), 103-104(France), 137(Argentina) & 141(Italy).
\textsuperscript{30} UNSC Verbatim Record (16 April 1973) UN Doc S/PV.1706, para. 75(Lebanon); UNSC Verbatim Record (17 April 1973) UN Doc S/PV.1708, para. 107(Australia); UNSC Verbatim Record (18 April 1973) UN Doc S/PV.1709, paras. 60-61(Peru).
\textsuperscript{31} UNSC Verbatim Record (15 April 1974) UN Doc S/PV.1766, para. 24(Lebanon); UNSC Verbatim Record (16 April 1974) UN Doc S/PV.1767, paras. 41(Cameroon), 47(the UK), 51(France) & 110(Saudi Arabia); UNSC Verbatim Record (18 April 1974) UN Doc S/PV.1768, paras. 5(Peru), 20(Austria), 29(Belarus), 50(Australia) & 69(Iraq); UNSC Verbatim Record (24 April 1974) UN Doc S/PV.1769, paras. 21(Costa Rica) & 66(the US).
\textsuperscript{32} UNSC Verbatim Record (18 March 1978) UN Doc S/PV.2072, para. 47(France); UNSC Verbatim Record (19 March 1978) UN Doc S/PV.2074, para. 62(the UK).
\textsuperscript{33} UNGA Summary Record (19 November 1952) UN Doc A/C.6/SR.329, para. 6.
\textsuperscript{34} S/PV.707 (n17) 81; A. Eban, \textit{An Autobiography} (Weidenfeld and Nicolson, 1977) 199.
\textsuperscript{35} UNSC Verbatim Record (24 November 1953) UN Doc S/PV.642, paras. 53-54.
\textsuperscript{36} A. Shlaim, \textit{The Iron Wall - Israel and the Arab World} (Penguin Books, 2014) 97.
\textsuperscript{37} S/PV.999 (n20) 82; S/PV.1323 (n9) 34-36; S/PV.1401 (n12) 49; S/PV.1434 (n14) 106-107; S/PV.1460 (n22) 56; UNSC Verbatim Record (27 March 1969) UN Doc S/PV.1466, paras. 57-87; UNSC Verbatim Record (13 August 1969) UN Doc S/PV.1498, para. 67; S/PV.1643 (n26) 51; S/PV.1648 (n28) 51; S/PV.1708 (n30) 143; S/PV.1766 (n31) 40; UNSC Verbatim Record (17 March 1978) UN Doc S/PV.2071, paras. 52-53.
\textsuperscript{38} S/PV.1499 (n24) 3.
Bulgaria, China, France, Guinea, Indonesia, Italy, Kuwait, Lebanon, Pakistan, Panama, Paraguay and the Soviet Union reckoned that Israel kept on basing itself on the doctrine of armed reprisals, even if that was no longer being communicated officially. Perhaps the Israeli practice had grown so inextricably entwined with the concept of reprisal that, in the eye of the beholder (third states, the UNSC or academics), the justifications actually offered were devoid of significance. That is not to say that Israel had a monopoly on reprisal. Listed below are military expeditions that were labelled as reprisals on account of their similarities to the Israeli ones: the 1964 UK counteraction against Yemeni guerrillas, whose aspirations to liberate the Arabian Peninsula from British control (by the UNSC and states); the 1964 US airstrike on North Vietnam, allegedly in answer to attacks on US ships in the Gulf of Tonkin (by states); and the 1969 Portuguese crackdown on Senegalese partisans struggling to decolonise Guinea-Bissau (by states); Egypt and Guinea felt it was homologous to the Israeli reprisals). Having delineated the first sample of state practice and opinio juris, we may now begin perusing its entries with an eye to ascertaining the validity of what are, as indicated on the onset of this chapter, the three chief approaches to the discernment of reprisals from self-defence.

40 S/PV.1293 (n3) 61; S/PV.1461 (n22) 62.
41 S/PV.1402 (n12) 49.
42 S/PV.1644 (n26) 40.
43 S/PV.1767 (n31) 30.
44 S/PV.1643 (n26) 137.
45 S/PV.1766 (n31) 110.
46 S/PV.1498 (n37) 18.
47 S/PV.1402 (n12) 42.
48 S/PV.1709 (n30) 39.
49 S/PV.1461 (n22) 85.
50 S/PV.1402 (n12) 63; S/PV.1437 (n12) 53; S/PV.1461 (n22) 138-140; S/PV.1539 (n25) 39; S/PV.1644 (n26) 90-91; S/PV.1662 (n29) 48-49; S/PV.1767 (n31) 13.
52 UNSC Res 188 (9 Apr 1964) UN Doc S/RES/188.
53 UNSC Verbatim Record (2 April 1964) UN Doc S/PV.1106, paras. 64(Iraq) & 111(Egypt); UNSC Verbatim Record (6 April 1964) UN Doc S/PV.1108, paras. 7-13(Syria), 41-42(Morocco), 54(Ivory Coast) & 67(the US); UNSC Verbatim Record (8 April 1964) UN Doc S/PV.1110, paras. 21-27(Czechoslovakia); UNSC Verbatim Record (9 April 1964) UN Doc S/PV.1111, paras. 11-12(China); Oil Platforms, Memorial submitted by the Islamic Republic of Iran (n9) 103.
55 UNSC Verbatim Record (7 August 1964) UN Doc S/PV.1141, paras. 30-31(Czechoslovakia) & 78-83(the USSR).
56 Williamson (n4) 126-127.
57 UNSC Verbatim Record (5 December 1969) UN Doc S/PV.1517, para. 27(Sierra Leone); S/PV.1518 (n3) 27(Madagascar); UNSC Verbatim Record (8 December 1969) UN Doc S/PV.1519, paras. 16-17(Pakistan) & 54(Colombia); UNSC Verbatim Record (9 December 1969) UN Doc S/PV.1520, para. 47(the UK).
58 S/PV.1518 (n3) 55.
59 S/PV.1644 (n26) 43.
5.1.1. The Objective Approach – The Actus Reus of Armed Reprisals

With temporality at the helm, the first method of the delimitation of the two doctrines draws on the historically predominant restrictionist reading of Article 51, which, as concretised in Chapter Two, restricts self-defence to the halting and repelling of an active armed attack. At its core is the supposition that self-defence can only be necessary for as long as the underlying offensive is in progress, whereafter any counterblow inevitably qualifies as an unlawful reprisal, for no amount of force can mitigate that which had fully run its course. As made plain by Lobel: ‘[A] nation can respond to an ongoing attack...by using force. However, that nation may not forcibly retaliate against another in response to an unlawful act that the latter committed against the former in the past.’ An example adduced by Ago, the ILC’s special rapporteur on state responsibility, helps visualise the temporal boundary between the doctrines under consideration: ‘A State can no longer claim to be acting in self-defence if...it drops bombs on a country which has made an armed raid into its territory after the raid has ended and the troops have withdrawn beyond the frontier.’

Because a concluded assault cannot itself become the object of a forcible riposte, reprisals take place at a location distinct from that of the inaugural transgression, a disposition that often sees them accused of striking at targets of opportunity. Contrary to what is the case with self-defence, the persons who partake in the perpetration of the initiatory attack are, as a consequence of the aforesaid temporospatial asymmetry, not the ones to bear the brunt of the reprisal. That said, since long gone are the days of private individuals being the subjects of the law of reprisal, the foregoing distinction is more of a practical, rather than legal, differentiator of the ex post armed attack doctrines. Assuming that the relevant facts are sufficiently established, questions of time and place leave virtually no space for interpretation, which is why the methodology under discussion is henceforward denominated the ‘objective’ approach.


62 A/CN.4/318/Add.5-7 (n60) 122.

63 Dinstein (n60) 275-277; Badr (n60) 26.
The forcible operations enumerated in Section 5.1. all took the form of an after-the-fact counterattack on targets extraneous to the opening attack(s). In deliberating thereon, multiple states (China, Costa Rica, Japan, the Netherlands, Pakistan and Paraguay) observed that self-defence has to be exercised whilst an armed attack is still underway, lest the response transubstantiate into an unlawful reprisal. Uruguay underscored that reprisals are causally, not physically, linked with the instigating offensive. Belarus defined reprisals as the dispatch of soldiers to the ‘the territory of sovereign States by way of retribution for alleged prior breaches of international law.’ Perhaps the most comprehensive summary of the traditional construction of self-defence was provided by Senegal: ‘The victim of aggression may, in order to protect and defend himself, respond immediately, without delay and at the actual site of the aggression, to the aggressor’s attack by means proportionate to those used by the aggressor.’

What is more, in all but two cases (the 1955 Israeli sortie against Syrian emplacements and the 1964 US-North Vietnamese confrontation), premeditation was deemed a sign of the illegality of the forcible riposte (such was the standpoint of the UNSC, Algeria, Australia, Belgium, Brazil, Bulgaria, China, Czechoslovakia, Egypt, France, Ghana, Guinea, Hungary, India, Indonesia, Iraq, 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88

64 S/PV.1293 (n3) 61-64.
65 S/PV.1769 (n31) 21-24.
66 UNSC Verbatim Record (3 August 1966) UN Doc S/PV.1295, paras. 25-26; S/PV.1322 (n9) 13.
67 S/PV.1323 (n9) 9.
68 UNSC Verbatim Record (21 November 1953) UN Doc S/PV.640, para. 81.
69 S/PV.1470 (n15) 37-38.
70 S/PV.1293 (n3) 38.
71 S/PV.1768 (n31) 29.
72 UNSC Verbatim Record (7 August 1968) UN Doc S/PV.1436, para. 132.
74 UNSC Verbatim Record (24 March 1968) UN Doc S/PV.1407, para. 65; S/PV.1460 (n22) 124.
75 S/PV.1708 (n30) 112.
76 S/PV.695 (n3) 50; S/PV.692 (n17) 37-38.
77 S/PV.695 (n3) 67-68; S/PV.1439 (n14) 81; S/PV.1460 (n22) 143.
78 S/PV.1292 (n21) 23; S/PV.1325 (n9) 3.
79 S/PV.1003 (n20) 9; UNSC Verbatim Record (26 June 1972) UN Doc S/PV.1650, para. 59; UNSC Verbatim Record (16 April 1973) UN Doc S/PV.1707, para. 27.
80 S/PV.2074 (n32) 43.
81 UNSC ‘Letter dated 55/03/01 from the Representative of Egypt addressed to the President of the Security Council’ (1 March 1955) UN Doc S/3365; UNSC Verbatim Record (17 March 1955) UN Doc S/PV.693, para. 35; S/PV.1002 (n19) 40; S/PV.1321 (n9) 3; S/PV.1403 (n12) 16; S/PV.1435 (n14) 18; S/PV.1649 (n28) 18; S/PV.1707 (n79) 5; S/PV.2072 (n32) 9-11.
82 S/PV.695 (n3) 20; UNSC Verbatim Record (31 December 1968) UN Doc S/PV.1462, para. 29.
83 UNSC Verbatim Record (6 April 1962) UN Doc S/PV.1005, para. 10.
84 S/PV.1644 (n26) 37.
85 S/PV.1402 (n12) 150; S/PV.1460 (n22) 115; S/PV.1500 (n24) 30; S/PV.1517 (n57) 67.
86 S/PV.1460 (n22) 106; UNSC Verbatim Record (21 April 1973) UN Doc S/PV.1711, para. 6.
87 S/PV.1708 (n30) 18.
88 S/PV.1289 (n21) 6; UNSC Verbatim Record (22 March 1968) UN Doc S/PV.1405, para. 65; S/PV.1434 (n14) 135-136; S/PV.1769 (n31) 91.
Iran,99 Japan,100 Jordan,101 Kuwait,91 Lebanon,92 Liberia,97 Madagascar,95 Mali,96 Mauritania,97 Morocco,88 Nepal,99 New Zealand,100 Pakistan,101 Paraguay,102 Peru,103 Poland,104 Romania,105 Saudi Arabia,106 the Soviet Union,107 Spain,108 Sudan,109 Syria,110 the US,111 Yemen,112 Yugoslavia113 and Zambia114). The fixation on the pre-planned nature of the measures under scrutiny was, in all likelihood, a proxy for disapproval of their ex post facto temporality. As unpacked in Chapter Four’s retelling of the pre-1945 history, reprisals were ineluctably premeditated115 by virtue of having to be withheld – at least theoretically – until after peaceful initiatives had fallen through. By comparison, the restrictionist school of thought dictates that self-defence be temporally interlaced with an armed attack and, by extension, that it be an extemporaneous act of pushback. Notable along these lines was Iraq’s objection to the 1964 British bombing of Yemen: ‘Far from being a spontaneous act of self-defence, the attack on [Yemen] was clearly a premeditated attack of retaliation planned well in advance.’116 In 1968, Paraguay defined reprisals as ‘premeditated and planned military actions carried out on the territory of another sovereign State.’117 In much the same vein, Peru held that Israel’s 1973 targeted killings in Beirut had ‘no element which could enable us to characterize it as an act of self-defence...Israel itself has not tried to conceal that this was a carefully planned operation.’118 Similarly,
Argentina argued that self-defence cannot be premeditated: ‘[T]here must be no alternative and no time must pass in deliberating or reflecting on the desirability of a reaction.’

Particularly noteworthy is the UK’s viewpoint, which, as evidenced by its reproach for the temporality and premeditation of reprisals from the 1950s and early 1960s, initially accorded with the international consensus. Predictably, the UK was quick to shift gears once it itself engaged in the impugned conduct. On 28 March 1964, the UK government ordered the destruction of a stronghold in the Yemeni town of Harib, wherefrom violent acts of sabotage were being launched against the bordering British protectorate of the Federation of South Arabia. In answering to the UNSC for its decision to blow up Fort Harib, the UK submitted that self-defence comprises two modalities: termination of an unfinished offensive and ex post facto counterattacks. The latter is, as the UK representative averred, a functional deterrent to recurring violations of Article 2(4) of the UN Charter. Turning to the subject of the much-maligned premeditation, the UK delegation reasoned that advance planning was not only compatible with Article 51 but also desirable for the performance of a tailored and effective counteraction.

States were like-minded in rejecting the reconstruction of counterattacks as self-defence, maintaining that such operations fell exclusively within the scope of armed reprisals. As Morocco put it: ‘Self-defence excludes the right of counter-attack. In other circumstances, attempts to extend the right of self-defence to include the right to counter-attack have been condemned.’ Czechoslovakia underlined that self-defence must overlap, both temporally and geographically, with that which it seeks to fight off:

If the alleged violations and attacks from Yemen had been carried out by isolated aircraft and helicopters, the only immediate defence should have been directed against those machines. However, what was attacked by a superior air force was a land objective, which had nothing to do with the alleged raids...The attack against Harib thus assumed the character of a reprisal.

Iraq concurred that, by dint of occurring at a time and place removed from the original incident, all counterattacks were necessarily reprisals.

Four months later, the UK backed the US’s declaration of self-defence against North Vietnam, doubing down on the proposition that a state struck by repeated attacks is entitled to prevent their recurrence. But from this point onwards, the UK’s stance on the categorisation of counterattacks would remain inconsistent. The 1966 and 1970 Israeli strikes in Syria and Lebanon elicited the UK’s condemnation for having been preconceived, an attribute it had previously hailed as vital to the proper enforcement of self-defence operations. Even more contradictory was its treatment of the

119 S/PV.1644 (n26) 25.
120 S/PV.707 (n17) 16; S/PV.1003 (n20) 30-35.
121 S/PV.635 (n7) 49; S/PV.695 (n3) 7.
122 UNSC Verbatim Record (7 April 1964) UN Doc S/PV.1109, paras. 25-27.
123 S/PV.1109 (n122) 23-24.
124 S/PV.1109 (n122) 99.
125 S/PV.1110 (n53) 21-24.
126 S/PV.1106 (n53) 64; S/PV.1107 (n116) 17.
127 UNSC Verbatim Record (5 August 1964) UN Doc S/PV.1140, para. 78.
128 S/PV.1320 (n9) 80.
129 S/PV.1542 (n25) 67.
1973 and 1974 Israeli incursions into Lebanon, being as how its grievances therewith perfectly encapsulated the lawlessness of its own conduct from 1964:

But to deplore the acts of violence of the terrorist organizations is in no way to condone the action of the Israeli Government...That was a Government-organized operation into the territory of another sovereign State, an act of official violence which can, under no circumstances, be justified under the Charter.130

Much like the UK, the US was originally opposed to force being used as a medium for sorting out past wrongs. 131 This would change in 1964, when, in a follow-up on two putative attacks by North Vietnam, the US rationalised as self-defence the aerial bombardment of the former’s naval bases.132 With just one UNSC session dedicated to the insecurity in the Gulf of Tonkin, only a couple of states got to voice their thoughts on the US’s invocation of Article 51. Czechoslovakia133 and the Soviet Union134 were unhesitant in allotting the contested measure to the category of reprisals. China’s endorsement of the airstrike135 was rather unusual, considering that the Chinese Permanent Mission to the UN was otherwise consistent in denouncing similar actions as premeditated reprisals, just as it had done with the UK’s then-recent push for the reconceptualisation of self-defence.136 The one-time policy reversal was, in all probability, motivated by China’s then pro-Western UN delegation’s stake in the Vietnam War137 and, by that token, does not constitute an authentic third-party embracement of after-the-fact counterattacks.

The US itself displayed such dissonance when, in contradiction to the raised plea of self-defence, several high-ranking statesmen characterised their country’s assault on North Vietnam as an armed reprisal.138 Doctrinal ambivalence of this sort would continue to typify the US’s understanding of ex post facto counterattacks. A good case in point is the 1965 statement by the US Secretary of State, who proclaimed that reprisals are lawful so long as they stay within the confines of Article 51.139 As is further explored in Section 5.3.1., the idea of Article 51-compatible reprisals, or, as they would later be known, ‘defensive armed reprisals’, gained substantial scholarly traction in the 1970s. Other occasions saw the US government categorically renounce armed reprisals.140 The mixed messaging was, as the US Deputy Assistant Legal Adviser for European Affairs of the Department of State decoded

130 S/PV.1708 (n30) 10; S/PV.1767 (n31) 45.
131 S/PV.695 (n3) 41.
132 S/PV.1140 (n127) 44-46.
133 S/PV.1141 (n55) 30-31.
134 S/PV.1141 (n55) 78-83.
135 S/PV.1140 (n127) 83.
136 S/PV.1111 (n53) 11-12.
137 Both China and the US were major players in the Vietnam War, and the Chinese UN delegation, then represented by the exiled pre-communist government, was aligned with the US. For context, see C. Jian, ‘China's Involvement in the Vietnam War, 1964–69’ (2009) 142 The China Quarterly 356, 359-366.
in 1983, a by-product of the US accepting as self-defence what the rest of the international community conceived as reprisals.\footnote{Digest of United States Practice in International Law (n140) 1749-1752.} The US’s belief was that victims of a spree of attacks may, after the cessation of the latest instantiation thereof, and subject to the principles of necessity and proportionality, use force to forestall the resumption of hostilities. Though the position of the US was substantively identical to the one articulated by the UK in 1964, the former’s terminology was more fickle that that of the latter, whose government took greater pains to distance itself from the negatively charged term ‘reprisal’. As we shall soon gather from the subsequent state practice, the US has, in an effort to vindicate its military undertakings of 1986, 1987, 1988, 1993, 1998, 2001 and 2020, persisted in passing off as self-defence the \textit{actus reus} of reprisals, but in contrast with the 1945-1980 period, states have, over time, grown more receptive to the commingling of the two doctrines. This piece of the puzzle allows us to understand the makings of the present-day \textit{jus ad bellum} and, with that insight, construe thereunder a methodology for the taxonomy of \textit{ex post} armed attack measures (a key creative output of Chapter Six).


Because self-defence was, under the principle of necessity, traditionally limited to attacks in motion, the invocability of Article 51 was determined not so much by the passage of time as by the ongoingness of the triggering act. As elucidated by Badr:
In practice there may be some time-lag between the start of an attack and action taken in self-defense, but in all cases self-defense must be undertaken while the attack is still in progress. Once the attack is consummated...there can be no proper exercise of the right of self-defense since the possibility of preventing the attack from realizing its aims no longer exists.  

Seeing that the time lapse between an offensive’s conclusion and the response thereto had no bearing on the latter’s unlawfulness, the precept of immediacy, whether operating as a facet of the principle of necessity or not, was a largely redundant constraint. Nevertheless, as will be expounded in Sections 5.2. and 5.3., the evolving means and methods of warfare would, slowly but surely, work to prolong the exercisability of self-defence past the end of an armed attack, thereby giving immediacy a central role to play.

5.1.2. The Subjective Approach – The Mens Rea of Armed Reprisals

Taking a psychological angle on the self-defence/reprisal dichotomy, the second of the three methodologies hones in on the motivations of states that resolve to hit back at their attackers. Its advocates believe that the impetus for invoking Article 51 must completely correspond to the defensive purpose of self-defence, a maxim that envisages nothing more than protection, in the narrowest sense, against an armed attack. By this metric, actors driven by retaliation or punishment, the two impulses generally associated with the offensively disposed reprisals, are automatically disqualified from pleading self-defence.  

Green is of the opinion that ‘the intention or motive of the state responding to an attack against it’ is ‘the primary distinguishing feature of an armed reprisal’ in the academic discourse. Naturally, whether or not force is being leveraged as an instrument of punishment is not as readily verifiable as the temporospatial interlocking of two actions. Quite the contrary, intent is a quality notoriously difficult to make out. Whilst state officials can, through their words and actions, give us a peek into the ‘mind’ of the polities they represent, any attempt at deciphering the motivation of abstract entities is liable to be highly impressionistic. Hence, due to its

143 Badr (n60) 25-26.
preoccupation with the psyche of states, the present formula for the dichotomisation of ex post armed attack measures is hereinafter named the ‘subjective’ approach.

All of the operations enumerated in Section 5.1. were censured for exhibiting offensive intent, that is, for being either punitive (by Argentina,\(^{147}\) China,\(^{148}\) Colombia,\(^{149}\) Egypt,\(^{150}\) France,\(^{151}\) Hungary,\(^{152}\) India,\(^{153}\) Iran,\(^{154}\) Japan,\(^{155}\) Mauritania,\(^{156}\) Morocco,\(^{157}\) Nepal,\(^{158}\) Panama,\(^{159}\) Peru,\(^{160}\) the Soviet Union,\(^{161}\) Sudan,\(^{162}\) the UK,\(^{163}\) Yugoslavia\(^{164}\) and Zambia\(^{165}\) or retaliatory/retributive (by the UNSC,\(^{166}\) Chief of the UN Truce Supervision Organization,\(^{167}\) Australia,\(^{168}\) Belarus,\(^{169}\) Belgium,\(^{170}\) Brazil,\(^{171}\) Bulgaria,\(^{172}\) Canada,\(^{173}\) China,\(^{174}\) Czechoslovakia,\(^{175}\) Denmark,\(^{176}\) Egypt,\(^{177}\) Finland,\(^{178}\) France,\(^{179}\) India,\(^{180}\) Iraq,\(^{181}\)

\(^{147}\) S/PV.1649 (n28) 169.
\(^{148}\) S/PV.1469 (n15) 50-51.
\(^{149}\) S/PV.1519 (n57) 54.
\(^{150}\) S/PV.1435 (n14) 17; S/PV.1649 (n28) 15-17.
\(^{151}\) S/PV.1291 (n21) 37; S/PV.1321 (n9) 4.
\(^{152}\) S/PV.1407 (n74) 78.
\(^{153}\) S/PV.2073 (n107) 26.
\(^{154}\) Oil Platforms, Memorial submitted by the Islamic Republic of Iran (n9) 103-104.
\(^{155}\) S/PV.1295 (n66) 26.
\(^{156}\) S/PV.1767 (n31) 23.
\(^{157}\) S/PV.1108 (n53) 33; S/PV.1405 (n88) 113; S/PV.1651 (n98) 228.
\(^{158}\) S/PV.1518 (n3) 119; S/PV.1540 (n25) 53-54.
\(^{159}\) S/PV.1709 (n30) 44.
\(^{160}\) S/PV.1709 (n30) 60; S/PV.1768 (n31) 5.
\(^{161}\) S/PV.1405 (n88) 12.
\(^{162}\) S/PV.1644 (n26) 210.
\(^{163}\) S/PV.1291 (n21) 37.
\(^{164}\) S/PV.1649 (n28) 191.
\(^{165}\) S/PV.1540 (n25) 2.
\(^{166}\) S/RES/101 (n5); S/RES/316 (n27).
\(^{167}\) S/3007 (n6) 61; S/3516 (n6) 26 & 30.
\(^{168}\) S/PV.712 (n19) 12-13; S/PV.1768 (n31) 56.
\(^{169}\) S/PV.1768 (n31) 29.
\(^{170}\) S/PV.695 (n3) 63-64.
\(^{171}\) S/PV.1437 (n12) 40.
\(^{172}\) S/PV.1292 (n21) 27-28; UNSC Verbatim Record (25 November 1966) UN Doc S/PV.1328, para. 32.
\(^{173}\) UNSC Verbatim Record (16 August 1968) UN Doc S/PV.1440, para. 45; S/PV.1461 (n22) 34 & 37.
\(^{174}\) S/PV.1293 (n3) 61 & 63; S/PV.1323 (n9) 15-17; S/PV.1403 (n12) 66; S/PV.1437 (n12) 22; S/PV.1461 (n22) 62-63; S/PV.1541 (n25) 34-35.
\(^{175}\) S/PV.1141 (n55) 29-32.
\(^{176}\) S/PV.643 (n7) 94.
\(^{177}\) S/PV.1435 (n14) 22.
\(^{178}\) S/PV.1539 (n25) 62.
\(^{179}\) S/PV.695 (n3) 20-23.
\(^{180}\) S/PV.1662 (n29) 27.
\(^{181}\) S/PV.1404 (n12) 55; S/PV.1434 (n14) 246; S/PV.1768 (n31) 69.
Based Approach

Afghanistan

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to stop an active offensive in its tracks, harbour ulterior motives ranging from vengeance to

unadulterated objective.

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mindset) is that which makes a reprisal a reprisal. We are thus confronted with a causality dilemma:

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aftermath of the initiatory attacks, it encroached on the domain of ‘punitive’ and ‘retributive’

for comment on its 1964 inroad into Yemen, the UK conceded that, by exerting armed force in the

Soviet Union,

Italy,

Japan,

Jordan,

Mali,

New Zealand,

Nigeria,

Pakistan,

Paraguay,

Peru,

the

Syria,

the UK,

Uruguay,

the US and Yugoslavia

in nature. When pressed

for comment on its 1964 inroad into Yemen, the UK conceded that, by exerting armed force in the

aftermath of the initiatory attacks, it encroached on the domain of ‘punitive’ and ‘retributive’

reprisals. Nonetheless, in a bold challenge to the orthodox conception of defensiveness, the UK

protested that certain ex post facto operations are the product of a genuine exigency to deter

unremitting assaults and, as such, are defensively oriented. No state agreed with the UK on this

point, with some, like Iraq, asserting that counterattacks are inherently retaliatory.

The above-outlined opinio juris tells us that forcible countermeasures are infused with

retaliation/punishment, but what we do not learn therefrom is whether mens rea (non-defensive

mindset) is that which makes a reprisal a reprisal. We are thus confronted with a causality dilemma:

is an act a reprisal because of the offensive mentality of the actor, or is that mentality imputed thereto

as a result of the act’s failure to qualify as self-defence on another basis (e.g. temporality)? It is

advanced here that, as a classifier of ex post armed attack conduct, the subjective method suffers

from two major drawbacks, one being a practical failing (oversimplification of why states do what they

do) and the other a theoretical incompatibility with the tenets of self-defence (the non-existence of a

requisite of defensive intent). To begin with, it succumbs to the idealistic pitfalls of assigning a single

purpose to parties engaged in complex, multi-layered conflicts. Such a black-and-white grasp of states’
incentives is hardly reflective of the real world, wherein military ventures are unlikely to follow one

unadulterated objective. Even states evidently qualified for self-defence may, in addition to aiming

to stop an active offensive in its tracks, harbour ulterior motives ranging from vengeance to the pre-

emption of the assaulter’s immediate capacity to relaunch its onslaught. Yet, any purposive impurity

is, as Combacau points out, irreconcilable with the traditional conceptualisation of self-defence: ‘In

self-defence...there is no question of either preventing future delicts or of punishing present

182 S/PV.1650 (n79) 99.

183 S/PV.1322 (n9) 10 & 13; S/PV.1649 (n28) 142; S/PV.1662 (n29) 62.

184 S/PV.1289 (n21) 42; S/PV.638 (n7) 58; S/PV.1401 (n12) 11.

185 S/PV.1292 (n21) 5.

186 S/PV.695 (n3) 61-64; S/PV.707 (n17) 36; S/PV.1322 (n9) 19.

187 S/PV.1293 (n3) 23.

188 S/PV.1402 (n12) 37; S/PV.1468 (n3) 43-45; S/PV.1499 (n24) 52.

189 S/PV.1403 (n12) 60.

190 S/PV.712 (n19) 36; S/PV.1709 (n30) 60.

191 S/PV.1141 (n55) 82-83; S/PV.1293 (n3) 95-96; S/PV.1461 (n22) 138-140.

192 S/PV.1288 (n21) 92.

193 S/PV.695 (n3) 10-11; S/PV.1403 (n12) 8; S/PV.1501 (n24) 4 & 7; S/PV.1520 (n57) 47; S/PV.1542 (n25) 67;

S/PV.1649 (n28) 180; S/PV.1767 (n31) 47.

194 S/PV.1293 (n3) 38.

195 S/PV.695 (n3) 41; S/PV.999 (n20) 100-101; S/PV.1320 (n9) 97; S/PV.1440 (n173) 9 & 11; S/PV.1460 (n22) 72-

75; S/PV.1769 (n31) 71.

196 S/PV.711 (n19) 4 & 7-8.

197 S/PV.1109 (n122) 26.

198 S/PV.1109 (n122) 25-27.

199 S/PV.1106 (n53) 64.

200 Dinstein (n60) 282-284; Tucker (n60) 591; E. Cannizzaro and A. Rasi, ‘The US Strikes in Sudan and

Afghanistan – 1998’ in in T. Ruys, O. Corten, and A. Hofer (eds), The Use of Force in International Law: A Case-

Based Approach (Oxford University Press, 2018) 546; Kritsiotis (n142) 167-168; Bowett (n4) 3; Surchin (n4) 488.
offenders, but only of stopping them.\textsuperscript{201} Despite being excessive \textit{vis-à-vis} the aim of repelling an attack, a certain degree of prevention may at times be \textit{de facto} necessary, not least when dealing with a recidivist aggressor.

The teleological nuance that marks the exercise of self-defence is also found in the practice of reprisals. Even so, the subjective model portrays reprisal-takers as being solely concerned with getting back at their provocateurs, implying that whatever danger the former may have encountered had long since passed. This one-dimensional paradigm does not capture the complexity of Israel’s reprisals. In spite of their wholly punitive/retaliatory reputation, the Israeli counterstrikes appear to have been born of a protective imperative, which was to halt periodic raids from the territories of states unwilling or unable to prevent them. The described security predicament is, as the remainder of the present study demonstrates, representative of the evolution of warfare that propelled the \textit{ex post} armed attack framework toward expansionism and, resultantly, expanded what it means to be ‘defensive’. At the same time, any legitimacy the Israeli operations might have had was tarnished by what Sections 5.1.3. and 5.2.1. show to be their marked proclivity towards disproportionality, something that is, more often than not, indicative of ill-intent. Even at the surface level, the example just discussed suffices to discredit the thesis of the singularity of motivations behind the recourse to force.

The second flaw of the subjective approach is that, in distinction to the markers employed by its counterparts (i.e. necessity and proportionality, with the objective formula utilising specifically the restrictionist view of the former principle), intent is not itself a precondition for self-defence. Indeed, the authorities consulted in Chapter Two are in virtual agreement that reliance on Article 51 is not contingent on what either the defending or the offending party wishes to accomplish. The one glaring instance of dissent comes from \textit{Oil Platforms}, a case studied in Chapter Two, wherein the ICJ conditioned self-defence not only on the occurrence of an attributable armed attack but also on the attacker having had a ‘specific intention’ to harm the defender.\textsuperscript{202} Expectedly, this aspect of the judgment attracted strong criticism on account of its flimsy footing in customary law.\textsuperscript{203} As Green notes:

\begin{quote}
[I]t is evident that there is no basis in conventional or customary international law for a ‘specific intent’ criterion for establishing an armed attack. States do not refer to such a requirement when assessing claims of self-defence, and no treaty related to self-defence mentions the intent or motive of the attacking state.
\end{quote}

Meanwhile, as regards the intentions of the defending state, the ICJ was adamant, in its 1986 \textit{Nicaragua} judgment, that the ‘why’ question does not factor into the exercisability of self-defence. \textit{In casu}, the Nicaraguan government alleged that the US’s right to self-defence was vitiates by the

\textsuperscript{201} Combacau (n4) 28.
\textsuperscript{202} \textit{Oil Platforms} (\textit{Iran v the United States of America}) (merits) [2003] ICJ Rep 161, para. 64.
\textsuperscript{204} Green, ‘Self-Defence: A State of Mind for States?’ (n145) 205.
existence of a hidden agenda, i.e. the desire to project political influence over Nicaragua (for the full fact pattern, revisit Chapter Two). Unconvinced, the Court ruled:

[I]f Nicaragua has been giving support to the armed opposition in El Salvador, and if this constitutes an armed attack on El Salvador and the other appropriate conditions [necessity and proportionality] are met, collective self-defence could be legally invoked by the United States, even though there may be the possibility of an additional motive, one perhaps more decisive for the United States.

Still, inasmuch as it has to do with collective self-defence, the above-quoted pronouncement may or may not represent the Court’s standpoint on single-defender scenarios.

One such scenario did arise in the aforementioned Oil Platforms case, where the ICJ was called upon to interpret Article XX(1)(d) of the Treaty of Amity between the US and Iran, a provision which stipulates that the parties may deviate from their obligations if ‘necessary’ to safeguard ‘essential security interests’. Being as how the dispute before it was about the use of force, the Court figured that the interpretation of necessity under Article XX(1)(d) had to coincide with what is understood by the principle of necessity of self-defence. Having bridged the two concepts, the ICJ reckoned that ‘whether a given measure is “necessary” is “not purely a question for the subjective judgment of the party”’, whereby it suggested that, even if subjective factors do not themselves form a prerequisite under Article 51, the application of the principle of necessity does leave room for subjectivity. Here, we ought to separate the defending party’s motivation from its perception of the threat with which it is faced. When it comes to the former, the present thesis wagers that, albeit not preclusive of an objectively well-founded entitlement to self-defence, proof of malevolence (e.g. a promise of retaliation) may corroborate the factual lack of necessity (and/or proportionality) of the use of force. Although mainly confirmatory, such evidence could, in situations where the objective reality does not offer a conclusive answer, tip the scales toward illegality.

A potentially more influential subjective variable is the gap between what the defending state knows, or thinks it knows, and what is actually going on. Suppose that a victim of an armed attack concludes, in good faith, that only through self-defence can it hope to protect its territorial integrity and political independence. Whilst hindsight may reveal errors in its estimation, that state’s decision to resort to force may still have been sound under the circumstances, that is, with the limited information available at the point of decision-making. Correspondingly, the defender’s perception should carry some weight in the evaluation of the lawfulness of its conduct, lest the law risk placing an unfair burden of knowledge on states that, hard-pressed by an unfolding armed attack, might have mere minutes to make life-or-death choices. To put it in a nutshell, though not per se valid as a means of discerning reprisals from self-defence, subjective considerations may play a part in the appraisal of necessity and proportionality, the two principles upon which the third methodology of interest is founded.

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206 Nicaragua case (n205) 127.
208 Oil Platforms (n202) 43.
209 Oil Platforms (n202) 43.
5.1.3. The Necessity/Proportionality-Based Approach

The final methodology takes as its premise the incapability of offensive force to measure up to the principles of necessity and proportionality, standards which, as per Chapter Four’s comparative analysis, are stricter than those that governed forcible countermeasures in the pre-1945 period. This parametric approach conceives of reprisals as, in a manner of speaking, excesses in the exercise of self-defence. According to Green: ‘[M]ilitary actions taken in response to a prior breach of international law are not assessed with regard to some illusory notion of intent...the issue is whether the response taken met the criteria of necessity and proportionality.’ As indicators of a defensive disposition, necessity and proportionality are primarily objective properties, in that the realities that inform them, be it the availability of peaceful remedies or the amount of force needed to fend off a particular offensive, exist independently of the actor’s cognition thereof. Subjective input is relevant only insofar as it pertains to the aforesaid realities, which, as propounded in Section 5.1.2., may be so where the victim’s judgment is, through no fault of its own, impaired by an information deficit, or where the gratuitousness of the use of force is confirmed by official statements (e.g. disclosure of offensive intent). At any rate, whereas purely factual touchstones, such as the timing and the locale of events, make for a straightforward litmus test for the identification of reprisals, the verification of the necessity and proportionality of self-defence is not a matter of a simple fact-check. Questions of fact serve merely as a jumping-off point for a discretionary assessment that, as often happens, leads interpreters to disparate conclusions. Consequently, the method under discussion - henceforth dubbed the ‘necessity/proportionality-based’ approach - falls betwixt its objective and subjective counterparts.

A bevy of states criticised the disproportionate execution of some of the forcible operations enumerated in Section 5.1. (Argentina, Belgium, Burundi, Canada, Cuba, Czechoslovakia, Egypt, France, Guinea, India, Iran, Iraq, Italy, Ivory Coast, UN Doc S/PV.1322 (n9) 8; S/PV.1644 (n26) 239; S/PV.1662 (n29) 137. S/PV.695 (n3) 60; S/PV.1643 (n26) 166. S/PV.1540 (n25) 50. S/PV.1461 (n22) 36. S/PV.712 (n19) 23. S/PV.1110 (n53) 20, 23, 25 & 27. S/PV.2072 (n32) 9-12. S/PV.695 (n3) 22; S/PV.1321 (n9) 4; S/PV.1643 (n26) 118. UNSC Verbatim Record (10 September 1972) UN Doc S/PV.1661, para. 56. S/PV.1460 (n22) 106. Oil Platforms, Memorial submitted by the Islamic Republic of Iran (n9) 103-104. S/PV.1109 (n122) 58; S/PV.2072 (n32) 9-11. S/PV.1643 (n26) 142; S/PV.1649 (n28) 158. S/PV.1108 (n53) 48-50.}
Japan, Lebanon, Morocco, Nepal, the Netherlands, New Zealand, Pakistan, Peru, the Soviet Union, Spain, Sudan, Uganda, the UK, the US, Venezuela and Yugoslavia.

Upon careful analysis, however, it becomes apparent that the above-referenced remarks treat excessive force merely as an additional layer of illegality, not as that which transmogrifies an otherwise lawful act of self-defence into an unlawful reprisal. A handful of states were especially explicit in contending that reprisals are reprisals even when commensurate vis-à-vis the corresponding attack. Peru and Yugoslavia postulated that the doctrine’s illegalisation in 1945 deprived the stipulations for its exercise, namely the need for equivalence between the provocation and the blowback, of all legal significance. Coming from a slightly different perspective, Spain opined that, even if it cannot strip away their intrinsic illegality, proportionality has the potential to legitimise reprisals. Further substantiating the legal irrelevance of the scale of reprisals is the international community’s commentary on the plausibly balanced showings thereof. For example, the 1966 Israeli airstrike on Syria, which killed one civilian (three less than the initiating assaults), had no allegations of disproportionality made against it, and yet eleven states branded it a reprisal. Comparably, in the case of the 1969 Portuguese campaign in Senegal, both the opening transgression and the counteraction cost six lives, and while no state accused Portugal of reacting disproportionately, seven thought its reaction was a reprisal.

Even then, the necessity-proportionality-based model was not entirely bereft of supporters. Israel’s, the UK’s and the US’s championship thereof came as an expectable consequence of their

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226 S/PV.1662 (n29) 56.
227 UNSC Verbatim Record (12 November 1953) UN Doc S/PV.637, para. 214; S/PV.1643 (n26) 19-20.
228 S/PV.1108 (n53) 32 & 85.
229 S/PV.1501 (n24) 23.
230 S/PV.1323 (n9) 9.
231 S/PV.1322 (n9) 19.
232 S/PV.1461 (n22) 78.
233 S/PV.712 (n19) 36.
234 UNSC Verbatim Record (12 January 1956) UN Doc S/PV.710, para. 92.
235 S/PV.1469 (n15) 62.
236 S/PV.1644 (n26) 210; S/PV.1648 (n28) 120.
237 S/PV.1327 (n9) 15.
238 S/PV.710 (n234) 34; S/PV.1320 (n9) 79; S/PV.1460 (n22) 81; S/PV.1649 (n28) 181-182.
239 S/PV.695 (n3) 38; S/PV.1460 (n22) 73; S/PV.1542 (n25) 91.
240 S/PV.1004 (n20) 12.
242 S/PV.712 (n19) 36.
243 S/PV.714 (n241) 14.
244 S/PV.1469 (n15) 62.
245 UNSC ‘Report, as requested by the Security Council, with regard to item (a) of the agenda adopted by the Council on the 25 July 1966 / by the Secretary-General’ (26 July 1966) UN Doc S/7432, paras. 4-5.
246 M. Shemesh, ‘Prelude to the Six-Day War: The Arab-Israeli Struggle over Water Resources’ (2004) 9 Israel Studies 1; 33; UNSC ‘Report, as requested by the Security Council, with regard to item (b) of the agenda adopted by the Council on the 25 July 1966 / by the Secretary-General’ (27 July 1966) UN Doc S/7433, para. 4.
248 See, for instance: UNSC Verbatim Record (4 October 1985) UN Doc S/PV.2615, para. 194; the forecited statement was uttered in relation to an ex post facto counterattack justified as self-defence: UNSC Verbatim Record (2 October 1985) UN Doc S/PV.2611, paras. 59 & 68-69.
249 See, for instance: S/PV.1649 (n28) 181-182.
250 Digest of United States Practice in International Law (n140) 1749-1752.
inclusion of after-the-fact counterattacks under the umbrella of self-defence. Mexico, the only state
that, besides the reprisal-takers themselves, expressed preference for the necessity/proportionality-
based formula, did so during the deliberations on the UNGA Friendly Relations Declaration: ‘[F]orce
must... be immediately subsequent to and proportional to the armed attack to which it was an answer.
If excessively delayed or excessively severe, it ceased to be self-defence and became a reprisal.’\textsuperscript{251} On
top of not excluding the potentiality of a timely \textit{ex post facto} counterattack, the forecited statement
claims that the principle of proportionality is, on its own merit, determinative of whether self-defence
degenerates into an armed reprisal. By pegging reprisals as ‘excesses’ committed in the course of self-
defence,\textsuperscript{252} Argentina came across as having followed suit in allocating a critical function to the above-
mentioned principle. But a closer inspection unveils that Argentina’s legal beliefs are muddled by its
censure of premeditated force, as quoted in Section 5.1.1., as well as by the stance it had taken six
years prior, when it held that the 1966 Israeli operation in Jordan was an illegal reprisal irrespective
of excessive force being used.\textsuperscript{253}

Interestingly enough, a small minority of states - Algeria,\textsuperscript{254} Iran,\textsuperscript{255} the Soviet Union,\textsuperscript{256} Syria\textsuperscript{257} and
the US\textsuperscript{258} - viewed disproportionality not as a hallmark of reprisals but as proof of a measure’s
disqualification from the doctrine’s scope. While, as documented in Chapter Four, the pre-1945 \textit{jus ad bellum}
did command that reprisals be kept proportionate, gratuitous force had been a staple of measures short of war long before their interdiction by the UN Charter. And, as attested to by the bulk of \textit{opinio juris} adduced in this section, reprisals and incommensurateness continued to go hand in
hand in the post-1945 state practice. Moreover, it was not out of the ordinary for states to categorise
the same forcible act as both a reprisal and aggression,\textsuperscript{259} with the latter category being – as
elaborated in Chapter Two – reserved for the gravest violations of Article 2(4) of the UN Charter.

Even overlooking the shortage of state backing for the necessity/proportionality-based approach, its
cooplication with the objective method would have been, at best, superfluous and, at worst,
contradictory. As reflected in the words of its proponents, the necessity/proportionality-based model
is not constrained by the restrictionist conception of the two principles and, therefore, does not
preclude the prospect of \textit{ex post facto} counterattacks being both necessary and proportionate. Such
counterattacks are thus equated to self-defence in defiance of their blanket exclusion by the criterion
of temporality. On the flip side, an after-the-fact riposte that violates the principles of necessity and
proportionality would, in any event, amount to a reprisal under the objective method. As touched
upon in Section 5.1.2., the problem of mutual exclusivity also concerns the subjective viewpoint,
insomuch as there is nothing barring a vengeful state from satisfying the requisites for self-defence,
or, for that matter, a defensively minded one from using force after an armed attack has ended. That
being so, taking into consideration the varying state support for the three methodologies, as well as
their (in)consistency with the well-entrenched parameters of self-defence, the present study finds

\textsuperscript{251} A/C.6/SR.886 (n142) 42.
\textsuperscript{252} S/PV.1662 (n29) 137; S/PV.1644 (n26) 239.
\textsuperscript{253} S/PV.1322 (n9) 8.
\textsuperscript{254} S/PV.1402 (n12) 30.
\textsuperscript{255} S/PV.711 (n19) 37-39.
\textsuperscript{256} S/PV.695 (n3) 88-89; S/PV.710 (n234) 91-94; S/PV.1518 (n3) 105; S/PV.1662 (n29) 48-49; S/PV.1767 (n31)
13.
\textsuperscript{257} S/PV.1000 (n110) 27 & 67; S/PV.707 (n17) 60-61.
\textsuperscript{258} S/PV.710 (n234) 58.
\textsuperscript{259} S/PV.1324 (n9) 80; S/PV.999 (n20) 37; S/PV.1325 (n9) 5-7; S/PV.1648 (n28) 147.
that, at the crossroads of the 1970s and the 1980s, the objective approach stood as the sole viable distinguisher of *ex post* armed attack operations. How its supremacy began to fade, and what effect that had on the *ex post* armed attack framework going forward, are questions that feed into one of the pillars of this thesis’s contribution to the scholarship, that is, the discovery of the constitutive elements of current-day reprisals and self-defence.

5.2. The Winds of Change of the 1980s

The 1980s heralded a subtle change in the global community’s attitude towards the reprisal/self-defence bifurcation, one manifested in, most notably, the incipient downturn in states’ propensity to cry ‘reprisal’ over any act that possesses the characteristics thereof. The first signs of this perceptual shift sprang from the international reception of the 1982 South African strike in Lesotho. Akin to the reprisals before it, the forenamed military adventure saw a state (South Africa) try to stave off alleged incursions by non-state actors (refugees from the abhorrent apartheid regime) from a hideout in a neighbouring country (Lesotho). Like its antecedents, the South African raid was barraged with condemnation, but unlike them, it somehow managed to elude the label of reprisal. Granted, there was some befuddlement among the onlooking states as to the temporality of the South African intervention. Though South Africa did specify which prior assaults it was purportedly the victim of, the factuality of these infractions was disputed by Ireland and Sierra Leone, whose UN ambassadors surmised that the South African foray into Basotho territory was, in actuality, an *ex ante* armed attack action. Premeditation on the part of responding state, a feature of both reprisals and preventive self-defence, was chastised by Angola, Benin, Egypt, Guinea, Guyana, Kenya, the UK, Zimbabwe as well as the UNSC. Whatever the impressions of states, the parallels with the Israeli and Portuguese reprisals are unmissable, and whilst the academic coverage of the present incident has been close to non-existent, one author did make the case for its classification as an *ex post* armed attack measure. The aforementioned temporal ambivalence was, more likely than not,

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260 UNSC Verbatim Record (16 December 1982) UN Doc S/PV.2409, paras. 138-146.
262 S/PV.2409 (n260) 138.
263 UNSC Verbatim Record (14 December 1982) UN Doc S/PV.2407, paras. 88-91.
264 UNSC Verbatim Record (16 December 1982) UN Doc S/PV.2408, paras. 76-77.
265 S/PV.2408 (n264) 29.
266 S/PV.2409 (n260) 51.
267 S/PV.2408 (n264) 133.
268 S/PV.2408 (n264) 106.
269 S/PV.2408 (n264) 8.
270 S/PV.2409 (n260) 33.
271 S/PV.2407 (n263) 54.
272 S/PV.2409 (n260) 88.
273 S/RES/527 (n261).
275 Ruys (n60) 290-291 & 342-343.
a symptom of a grander tendency to confuse the reactive with the proactive, a blurring of the lines that, as unravelled in Chapter Six, can be traced back to the beginning of the eighties.

The next germane case took place on 1 October 1985, when the Israeli air force bombed the headquarters of the Palestinian Liberation Organisation (PLO), which had been relocated from Lebanon to Tunisia in 1982, in reaction to several attacks allegedly organised by the group, most particularly the murder of three Israelis in Cyprus. Paying no heed to Israel’s justification of self-defence, France, Greece, Morocco, the PLO, Senegal, Thailand and the UK designated the contested operation as a reprisal. Jordan and Madagascar drew attention to Israel’s long-standing habit of taking reprisals. The Arab League, Madagascar, Morocco and Pakistan lambasted the pre-planned character of the aerial offensive. In its address to the UNSC, the US—the only state to support Israel’s undertaking in Tunisia—remained true to the position it had championed since its 1964 military venture in North Vietnam, maintaining that deterrent counterattacks against unceasing terrorism are a modality of self-defence. Rather tellingly, however, President Reagan and the White House Press Secretary painted the Israeli air raid as both retaliation and self-defence, an oxymoronic compromise between the US’s official policy and the then-prevailing construction of the *jus ad bellum*.

Israel’s perceptibly retaliatory intent was reproved by Egypt, Greece, Jordan, Morocco, Peru, the UK and Thailand. Curiously, the Israeli government conceded that its retort had a punitive component but insisted that the targeting of the purported terrorist base in Tunis was primarily a deterrence-driven call. Disproportionate force was once again a cause of concern, with

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276 O’Brien (n4) 460; Williamson (n4) 132-133; S/PV.2611 (n248) 59-62.
278 S/PV.2611 (n248) 13.
279 UNSC Verbatim Record (3 October 1985) UN Doc S/PV.2613, para. 116.
280 S/PV.2613 (n279) 127-128.
281 S/PV.2615 (n248) 217.
282 S/PV.2611 (n248) 141.
283 S/PV.2611 (n248) 44.
284 S/PV.2611 (n248) 111-115.
285 S/PV.2613 (n279) 139-143.
286 S/PV.2613 (n279) 16.
287 S/PV.2613 (n279) 50.
288 S/PV.2613 (n279) 18.
289 S/PV.2613 (n279) 128.
290 S/PV.2611 (n248) 153.
291 S/PV.2615 (n248) 252.
293 UNSC Verbatim Record (2 October 1985) UN Doc S/PV.2610, para. 71.
294 S/PV.2613 (n279) 116.
295 S/PV.2613 (n279) 139.
296 S/PV.2613 (n279) 131.
297 S/PV.2611 (n248) 29-30.
298 S/PV.2611 (n248) 111.
299 S/PV.2611 (n248) 44.
300 S/PV.2615 (n248) 194.
Australia, Indonesia, Peru, Thailand and the UK deploring the exorbitant number of lives snuffed out by the Israeli counterstrike. Thailand’s statement, in particular, gives the impression that proportionate after-the-fact counterattacks may be lawful, provided that they do not impinge on the territorial integrity of a third party. Appearances aside, the foregoing interpretation is tough to square with Thailand’s comments on the about-to-be-examined US-Libyan confrontation, a purely inter-state affair (i.e. not involving a private actor), wherein the Thai government ostensibly rejected the lawfulness of any counterblow that comes after the initial wrongdoing.

On 14 April 1986, US fighter jets descended on Libya in retribution for the death of two US nationals - and the injuries of countless more - in the bombing of a Berlin discotheque, an establishment frequented by American soldiers. The US bombardment of Tripoli and Benghazi bore all of the distinctive facets of an armed reprisal, as one would expect from what is, quite possibly, the most cited exemplar of the doctrine in question. It was a meticulously thought-out counterattack, and, much like the antecedent reprisals, it was presented as self-defence in the deterrence of ‘an ongoing pattern of attacks by Libya’, the most recent of which – the explosion at the Berlin nightclub – happened nine days earlier. Although the UNGA reprimanded the US for breaching Article 2(4) of the UN Charter, of the over seventy states that spoke on the legality of the impugned action, only four expressly labelled it a reprisal (Argentina, France, Ghana and Madagascar). Having said that, Afghanistan, Belarus, Benin, Bulgaria, Czechoslovakia, Indonesia, Iran, Libya, Qatar, Syria and Yemen each disapproved of the preconceived nature of the US operation, a

301 S/PV.2611 (n248) 52.
302 S/PV.2615 (n248) 60.
303 S/PV.2611 (n248) 30.
304 S/PV.2611 (n248) 44.
305 S/PV.2611 (n248) 111-112.
306 UNSC Verbatim Record (21 April 1986) UN Doc S/PV.2682, 41.
311 UNSC Verbatim Record (20 November 1968) UN Doc A/41/PV.78, 66.
312 S/PV.2682 (n306) 43.
315 UNSC Verbatim Record (17 April 1986) UN Doc S/PV.2678, 6.
316 S/PV.2680 (n313) 7.
317 UNGA Verbatim Record (19 November 1968) UN Doc A/41/PV.77, 96.
318 UNSC Verbatim Record (15 April 1986) UN Doc S/PV.2675, 32.
319 S/PV.2678 (n315) 12.
320 A/41/PV.77 (n317) 41.
321 S/PV.2678 (n315) 22.
322 S/PV.2677 (n314) 48-50.
323 S/PV.2677 (n314) 7.
324 S/PV.2675 (n318) 13.
325 S/PV.2675 (n318) 43.
property that had heretofore been largely linked with reprisals. Analogously, the Sudanese delegation admonished the US for, *inter alia*, failing to abide by the standard of immediacy. In addition to admitting to having ‘carefully planned’ its strike against Libya, the US accentuated that force was used only after peaceful initiatives had fallen through, a sequence of events prescribed by the old law of reprisal.

The one respect in which this case diverges from the preceding reprisals is that a sovereign state, Libya, stood accused of a terrorist act – a clandestine blast in a crowded civilian venue – without any involvement of non-state groups. Even though the US released evidence tying the Libyan government to the said act of terror (Libya would, eventually, confess to having masterminded the attack), a large contingent of states were sceptical about the identity of the attacker. Obviously, these sceptics could hardly have classed the US riposte as a reprisal, given that, doctrinally speaking, no state can be subjected to countermeasures without there being a wrong imputable thereto. Using this exact logic, Qatar observed that neither self-defence, which must co-occur with aggression, nor reprisals, which postdate aggression, captured the essence of the US’s resort to force.

More noteworthy are the observations of the minority of states that were either convinced of Libya’s guilt or were prepared to countenance that contingency. Australia, France and Vanuatu postulated that the US counteroffensive was unlawful regardless of Libya’s hand in the Berlin bombing. Israel and the UK countries that - much like the US - aspired to widen the *ratione temporis* dimension of self-defence, avowed that their transatlantic ally acted in line with Article 51 of the UN Charter. Most importantly, not counting states that had previously taken reprisals, or China’s adversely affected UN delegation in the Gulf of Tonkin crisis, the US-Libyan face-off marked the first instance of third parties endorsing as self-defence a concrete *after-the-fact* counterattack (Denmark, New Zealand and, as part of a joint statement, Belgium, West Germany, Greece, Italy, Ireland, Luxembourg as well as the Netherlands), with the proviso that any such measure must adhere to the principle of proportionality.

As for intent, the US did not steer clear of offensive rhetoric, and its own Congressional Research Service gathered that President Reagan’s intentions towards Libya were purely retaliatory.

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326 S/PV.2678 (n315) 31.
327 S/PV.2674 (n309) 13-16.
330 S/PV.2677 (n314) 5-6.
332 S/PV.2682 (n306) 42.
333 A/41/PV.77 (n317) 78.
334 A/41/PV.78 (n311) 36.
335 UNSC Verbatim Record (17 April 1986) UN Doc S/PV.2679, 27.
336 S/PV.2682 (n306) 32.
337 A/41/PV.78 (n311) 64-65.
338 A/41/PV.77 (n317) 13.
Surprisingly, New Zealand regarded the US strike as self-defence in spite of also deeming it retaliation-driven, an attribute that other states (Poland\textsuperscript{341} and the Republic of the Congo\textsuperscript{342}) construed as proof of illegality. As bizarre as it seems to describe perceived acts of self-defence as retaliation and/or punishment, it would appear, in retrospect, that such counterintuitive language is the product of an unspoken transposition of the \textit{actus reus} of reprisals into Article 51. As may be remembered, Section 5.1.1. exposed that the US had, for many years, opposed reprisals while simultaneously embracing as self-defence conduct that fell within the bounds of the former doctrine. Though a fringe phenomenon back then, the surreptitious melding of the two concepts would gain great ground in the 21\textsuperscript{st} century, with the latest state practice still exhibiting the use of non-defensive descriptors for actions cognised as self-defence (see Section 5.3.2.). This discombobulating development holds the key to comprehending the legal \textit{status quo}, which is in turn instrumental to the construction of a methodology for the differentiation of self-defence and reprisals, i.e. one of the original outputs of the present research.

The 1987 and 1988 US shelling of the Iranian Reshadat, Nasr and Salman complexes, the focal point of the \textit{Oil Platforms case}, portended the end of an era for the \textit{ex post} armed attack framework. Notwithstanding that, under the principle of legality, the judicial proceedings were confined to the law in force at the time of the oil platforms’ destruction, the parties’ pleadings, which were concluded a little over a decade later, echoed the juxtaposition between, on the one hand, the waning categorical impermissibility of \textit{ex post factum} counterattacks and, on the other hand, the soon-to-be prominent expansionist vision for self-defence. In classifying the US operations as reprisals, Iran showed remarkable congruence with the state practice and \textit{opinio juris} that had hitherto unfolded. It pleaded that, far removed from the protectiveness of self-defence, reprisals are intended to punish and/or exact revenge, a malicious animus laid bare by their temporality, premeditation, target selection, and disproportionality.\textsuperscript{343} In spelling out the \textit{ratione temporis} difference between the two doctrines, Iran underlined that ‘self-defence is limited to an "on-the-spot reaction"...[and] the employment of counter-force must be temporally interlocked with the armed attack triggering it.’\textsuperscript{344} It went on to reason that ‘when the incident is over...the subsequent use of counter-force constitutes a reprisal and not an exercise of self-defence.’\textsuperscript{345} Further, Iran emphasised that there must also be a locational overlap with the provocative force:

\begin{quote}
When a countermeasure is directed against a target which has no direct connection with the armed attack against which measures of self-defence might legitimately have been taken, this is clear evidence that the countermeasures are in fact reprisals. Their objective cannot be protection against the particular attack, because the target chosen has nothing to do with that attack, and therefore the objective is punitive or retaliatory.\textsuperscript{346}
\end{quote}

The US, whilst granting that its conduct had the historical trappings of reprisals, asserted that the temporal stringency of Article 51 should not be preserved at the cost of nullifying the effectiveness of

\textsuperscript{341} S/PV.2677 (n314) 29-30.
\textsuperscript{342} S/PV.2680 (n313) 27.
\textsuperscript{343} \textit{Oil Platforms}, Memorial submitted by the Islamic Republic of Iran (n9) 100-105.
\textsuperscript{344} \textit{Oil Platforms (Iran v United States of America) (Reply and Defence to Counter-claim submitted by the Islamic Republic of Iran)} [1999], 149-150.
\textsuperscript{345} \textit{Oil Platforms, Reply and Defence to Counter-claim submitted by the Islamic Republic of Iran} (n344) 149-150.
\textsuperscript{346} \textit{Oil Platforms}, Memorial submitted by the Islamic Republic of Iran (n9) 100.
self-defence.\textsuperscript{347} In zeroing in on this axiom, the US stressed that efforts to restrict self-defence to underway attacks were woefully out of touch with the realities of warfare. The failure to derigidify Article 51 would, in the US's estimation, foreclose the possibility of self-defence against attacks that culminate in an instant, all the while leaving unmitigated the threat of further bloodshed against the victim state. Since the putatively Iran-perpetrated assaults lasted mere seconds, and considering that they formed part of a larger pattern of hostilities, the US proclaimed that, had force not been used after the fact, Iran's naval aggression would have gone on unimpeded. On the topic of premeditation, the US essentially restated the UK's sentiment from 1964: '[I]nternational law does not require that a State choose between resorting to armed force instantly and without reflection, or sacrificing its right to take prudent and considered defensive action.'\textsuperscript{348} The US submitted that, in order to execute such a well-considered response, one has to undergo several delay-inducing steps, which include, among other things, attribution of the armed attack, mobilisation of armed forces, and minimisation of loss of life.

Even assuming the validity of the above-detailed anxieties surrounding the law's practicability, the US's revision of the doctrine of self-defence had, as Iran noted,\textsuperscript{349} barely any traction in contemporary state practice and \textit{opinio juris}. Prior bids to transpose deterrence-oriented counterattacks into Article 51 were, as chronicled throughout Sections 5.1. and 5.2., consistently denounced as a self-serving stratagem to belie self-defence. Be that as it may, even if lacking the generality needed to dethrone the objective approach to the identification of reprisals, state practice of the 1980s succeeded in poking the first holes in the formerly impervious restrictionist conceptualisation of self-defence. Inasmuch as the acceptance of after-the-fact counterattacks as self-defence would, \textit{ipso facto}, repeal the criterion of temporal symmetry with an armed attack, expansionists found a workable alternative in a more flexible rendition of the principles of necessity and proportionality. Accordingly, as catalogued in Section 5.3., support for the necessity/proportionality-based formula would pick up steam commensurately with the rise of expansionism. But before fixing our gaze on what transpired after 1990, it is imperative that we first explore the 'why' behind states' increasing amenability to certain reprisals – the evolving means and methods of warfare. This is so as, apart from having brought the \textit{ex post} armed attack framework to its current shape, these forces help prognosticate the future trajectory of the \textit{jus ad bellum}.

5.2.1. Evolution Imminent: The Normative Influence of the Evolving Means and Methods of Warfare

Conceivably, an \textit{ex post facto} counterattack that seeks to dissuade unrelenting aggression is more defensively than offensively disposed and, on that account, could, in theory, be compatible with the UN Charter. The aforesaid supposition arose amidst the growing tension between, on the one side, the theoretical desirability of a strictly restrictionist law on the use of force and, on the other side, the legitimisation of select reprisals by the post-1945 evolution of the means and methods of warfare.

\textsuperscript{347} \textit{Oil Platforms (Iran v United States of America) (Counter-Memorial and Counter-claim submitted by the United States of America) [1997]}, 139-140.

\textsuperscript{348} \textit{Oil Platforms, Counter-Memorial and Counter-claim submitted by the United States of America (n347) 144-145.}

\textsuperscript{349} \textit{Oil Platforms, Memorial submitted by the Islamic Republic of Iran (n9) 103.}
Seeing as the post-1945 weaponry has already been extensively covered in Chapters One to Three, and insomuch as the methods of warfare have had a greater share in the shaping of the ex post armed attack framework, the present section concentrates on how the innovative modus operandi of non-state actors pushed the acceptable limits of self-defence.

As conveyed in Chapter One, the UN Charter was drafted around the then-prevalent symmetrical, state-to-state conflicts, wherein the armies of two or more adversaries would come into direct collision. The creation of the UN was itself motivated by one such conflict, WWII, and the organisation’s founders even made it their mission to prevent that history from repeating itself. The combat of those days chimed well with the restrictionist notion of Article 51, in that self-defence could feasibly be restricted to ongoing onslaughts without it trampling states’ ability to effectively defend themselves. But far from staying static, the methods of using force would, over the coming decades, take a turn towards the asymmetrical, with the more indirect forms of engagement, mainly terrorism and guerrilla warfare, overshadowing the once predominant inter-state battles. Chapter One reported that the 1960s-1970s recorded a precipitous surge in the incidence and deadliness of mayhem by private actors, a statistic circumstantiated by the fact that, of the thirty cases scrutinised in Sections 5.1.-5.3., almost all entailed extraterritorial attacks by mostly self-dependent groups. These attacks share three predilections that compromise the viability of the classical conception of self-defence: underhandedness, seriality, and origination from a safe haven.

Starting off with the first of the three facets, atrocities by non-state actors are notoriously covert and unpredictable, making them arduous to repel whilst in full swing, let alone detect them before they produce physical harm. Diving into the finer points of the surreptitiousness of terrorism, Schmitt cautions that

the potential target is usually only revealed by the attack itself, all of society represents a potential target thus rendering effective on-the-spot defense problematic, the actual violence may occur after the terrorists have left the scene...the terrorists may be willing to die in the attack, and the identity and location of the terrorists may not be uncovered until after the completion of a particular action.

By comparison, onslaughts by the armed forces of states are easier to spot and often yield tell-tale signs of imminence (e.g. the massing of troops outside the target territory), thereby affording the victim-to-be a chance to prepare its defences. That being said, the metamorphosis of warfare did inspire some states, such as Libya in the 1980s, to adopt the asymmetric techniques of non-state entities.

Secondly, armed attacks by private actors are inclined towards one modality in particular, typically comprising a succession of small-scale incursions designed to weaken their foes by attrition. Indeed, it is no coincidence that the reprisals examined in Sections 5.1. and 5.2. were all alleged to have been

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prompted by a streak of Article 2(4) violations. This element of periodicity, as compounded by the covertness and ubiquity of terrorism, coexists uneasily with the restrictionist view of self-defence, whereby the necessity of recourse to force is categorically extinguished by the conclusion of an armed attack.\(^{353}\) No matter how many raids the victim had recently endured or how likely they are to resume at a later point, restrictionism disallows self-defence unless shots are being actively fired at the moment of the decision to respond, and even then, any such violent activity must be grave enough to amount to an armed attack under Article 51. Now, as alluded to above, such a rigid reading of Article 51 is expedient vis-à-vis the conventional inter-state clashes that informed the Charter’s drafter’s, for not only are they intense enough to individually meet the threshold of gravity, but they are also unlikely to either cease quickly or recur at regular intervals. As such, they give the defender ample time and opportunity to resist them while in progress (a prime present-day example is the raging war in Ukraine).

An after-the-fact riposte is more likely to be necessary, at least in the de facto sense, if, instead of a single isolated strike, the victim state is confronted with a torrent of interrelated offensives. Periodic use of force increases the likelihood of further forays in the future and, more fundamentally, signals that the passing of any one of the said forays does not remove the overall threat to the victim’s territorial integrity and political independence. That is why the ILC’s Special Rapporteur Ago, despite discounting expansionism in single-incident scenarios, recognised that episodic breaches of Article 2(4) demand more versatile regulation: ‘If, however, the attack in question consisted of a number of successive acts, the requirement of the immediacy of the self-defensive action would have to be looked at in the light of those acts as a whole.’\(^{354}\) \textit{Ergo}, for all practical purposes, the aggressor’s track record serves as \textit{prima facie} evidence of its intent to re-offend.\(^{355}\) A presumption of this kind can hardly be engendered by a one-off offence, seeing that, in such circumstances, the transgressor’s objective conduct has not (yet) betrayed an intention to carry on attacking. Going a step further, the interest of maintaining international peace and security - the \textit{raison d’être} of the UN Charter – may dictate that we presume against the repetition of an isolated attack, except when there is specific and objectively verifiable intelligence to the contrary. Such an outlook is all the more crucial in the ex ante armed attack context, where the prospective attacker retains the option, however improbable, to refrain from ever using force against the target state. Hence, as is propounded in Chapter Six, the standard of imminence must necessarily be stricter than that of immediacy, especially when the defending party is faced with a repeat offender.

Cognizant of all of the above, the opponents of the restrictionist take on Article 51 tend to argue that, rather than a single uninterrupted stream of the use of force, the concept of armed attack should be conceived as a legal state, a stretch of time throughout which the victim may, subject to necessity and proportionality, exercise its right to self-defence.\(^{356}\) Under the proposed definition of armed attack,

\(^{353}\) Surfch (n4) 488-489; O’Brien (n4) 470; Seymour (n60) 230-231; Dinstein (n60) 282-284; Tucker (n60) 591-592; Ruys (n60) 106-107; Beer, ‘Regulating Armed Reprisals’ (n210) 123.

\(^{354}\) A/CN.4/318/Add.5-7 (n60) 122.


\(^{356}\) D. Bethlehem, ‘Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors’ (2012) 106 American Journal of International Law 770, 775; Schmitt, ‘Counter-Terrorism and the Use of Force in International Law’ (n351) 32; M.C. Alder, \textit{The Inherente Right of Self-Defence in International Law} (Springer Netherlands, 2013) 172; Seymour (n60) 231; Arend (n144) 99; Lobel (n61) 543; G.S. Corn and R.
intermittent lulls in military activity do not automatically rule out the invocation of Article 51, making it theoretically possible for ex post facto counterattacks to qualify as self-defence. From a technical standpoint, those subscribing to this rationale believe that such counterattacks are aimed at thwarting an unfolding offensive, one that has ended de facto but not de jure. The necessity of deterring the continuation of recurrent inroads formed the justification of most of the hitherto examined reprisals. 357 Some were defended on the basis of the accumulation of events theory, which, as explained in Chapter Two, states that an offensive short of armed attack may, if undertaken as part of a flurry of coordinated strikes, activate Article 51 through collective impact. In essence, the foregoing theory conceptualises armed attacks as aggregates of past affliction, whose implications stretch to the present and beyond.

But, leaving aside the few exceptions stemming from the 1986 US bombardment of Libya, states dismissed the idea that the duration of an armed attack, as understood in Article 51, could outlast active fighting, treating any such suggestion as a ploy to smuggle in unlawful reprisals under the guise of self-defence. 358 The refusal to contextualise cases of serial assaults circumscribes the frame of reference for the assessment of the response, predisposing it to findings of disproportionality. 359 Such was the verdict of states which, in appraising the proportionality of reprisals from the 1950s-1980s, limited their evaluation to only the latest in the series of attacks. 360 The Israeli government had, from as early as 1956, criticised its peers’ propensity to decontextualise:

> Some members of the Security Council have referred to an apparent disproportion between the effects of the Israeli response and the dimensions of the simple incident immediately preceding it. This...is not the true or the valid comparison. The dimensions of Israel’s occasional reactions are more than matched by the accumulated effect of repeated incidents, of a constant state of tension. 361

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357 S/PV.637 (n227) 65; UNSC Verbatim Record (23 March 1955) UN Doc S/PV.694, para. 69; UNSC ‘Letter dated 62/03/19 from the Permanent Representative of Israel addressed to the President of the Security Council’ (19 March 1962) UN Doc S/PV.5993; S/PV.1109 (n122) 25-27; S/PV.1110 (n127) 44; S/PV.1300 (n9) 59-65; UNSC ‘Letter dated 68/03/21 from the Permanent Representative of Israel addressed to the President of the Security Council’ (21 March 1968) UN Doc S/8486; S/PV.1434 (n14) 106-107; UNSC ‘Letter dated 68/12/29 from the Acting Permanent Representative of Israel addressed to the President of the Security Council’ (29 December 1968) UN Doc S/8946; S/PV.1466 (n37) 57-87; S/PV.1516 (n247) 102; S/PV.1537 (n25) 32-36; S/PV.1650 (n28) 155; S/PV.2071 (n37) 57-58; S/PV.2409 (n260) 138 & 146; S/PV.2611 (n248) 59-62; S/PV.2674 (n309) 13-18.

358 Lubell (n142) 41; O’Brien (n4) 424; Tucker (n60) 595; Falk (n4) 434; Bowett (n4) 2-10; Surchin (n4) 490; Starski, ‘The US Airstrike Against the Iraqi Intelligence Headquarters’ (n60) 522; Williamson (n4) 128; Oil Platforms, Memorial submitted by the Islamic Republic of Iran (n9) 103; UNSC Verbatim Record (17 October 1966) UN Doc S/PV.1308, para. 84; S/PV.1293 (n3) 38; S/PV.1002 (n19) 8-9 & 12-14; S/PV.1003 (n20) 31-33; S/PV.1141 (n55) 30-31.


360 For explicit examples, see: S/PV.710 (n234) 92; S/PV.640 (n68) 82.

361 UNSC Verbatim Record (17 January 1956) UN Doc S/PV.713, para. 91.
Similarly, in rebutting the charges of disproportionalitv levelled against its 1985 airstrike on Tunis, Israel rationalised that successful counterterror operations are inescapably more casualty-inducing, for the termination of an entire military campaign - as opposed to a single episode thereof – necessitates a more radical action than that contemplated by the traditional purpose of self-defence.\footnote{S/PV.2615 (n248) 194.} Given that its counterattack was geared towards disabling the aggressor’s means of re-offence, Israel contended that proportionality must be weighed not only against the damage it incurred but also against the harm that would have ensued had the putative hub of terrorism not been destroyed. Ultimately, whatever one’s understanding of proportionality, the majority of Israel’s reprisals come across as manifestly excessive, even when gauged against the totality of the hostilities they sought to halt. To give an example, it is hard to imagine how the scale of the 1955 Israeli sortie against Syrian positions, a bloodbath that left fifty-six Syrians dead,\footnote{S/3516 (n6) 9; D. Neff, ‘Israel-Syria: Conflict at the Jordan River, 1949-1967’ (1994) 23 Journal of Palestine Studies 26, 33-34.} was tailor-made to counteract the relatively minor skirmishes over the fishing rights on the Sea of Galilee (the immediate cause of the Israeli-Syrian enmity in the present case),\footnote{S/3516 (n6) 5.} which, over the period of a year and a half, inflicted only two fatalities.\footnote{S/3516 (n6) 14-15.} Either way, the 1945-1990 state practice offers little evidence of the application of the principles of necessity or proportionality being impacted by the modality of an armed attack.

The third hallmark of transnational terrorism and guerrilla warfare is the introduction of a game-changing \textit{ratione personae} dynamic. In distinction to state-to-state encounters, armed exchanges between a state and a private actor are unavoidably tripartite, affecting not just the victim and the aggressor but also the latter’s host state. The unique issue this presents is that, even if we were to ignore the scholarly consensus\footnote{C.J. Tams and J.G. Devaney, ‘Applying Necessity and Proportionality to Anti-Terrorist Self-Defence’ (2012) 45 Israel Law Review 91, 93; Pobjic, Declercq and van Steenberghe (n359) 399 & 401; Separate Opinion of Judge Kooijmans in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 219, para. 35; Tallinn Manual 2.0 (n203) 345.} and suppose that, prior to the 21st century, states enjoyed the right to self-defence against independent non-state entities, any unauthorised use of force in the host’s territory would have nevertheless violated Article 2(4). Historically, the solution to non-state aggression rested with the principle of due diligence, which commands that states forestall the commission of international wrongs by those under their jurisdiction. In relation to the \textit{jus ad bellum} specifically, this well-established duty behoves states to ensure, within reason, that their territories are not used as launch pads for cross-border attacks.\footnote{Conventions for the Definition of Aggression (signed 3-5 July 1933, entered into force 17 February 1934) 147 LNTS 67, 148 LNTS 79 & 211, Article 2; UNGA Res 40/61 (9 December 1985) UN Doc A/RES/40/61, para. 5; Corfu Channel (United Kingdom v Albania) (merits) [1949] ICJ Rep 4, 22; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (merits) [2005] ICJ Rep 168, paras. 300-301; UNGA ‘Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security’ (14 July 2021) UN Doc A/76/135, paras. 29-30; UNGA ‘Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security’ (third report) (22 July 2015) UN Doc A/70/174, paras. 13(c) & 28(e); Bethlehem (n356) 776; A/CN.4/318/Add.5-7 (n60) 56; M.N. Schmitt, ‘France’s Major Statement on International Law and Cyber: An Assessment’ (2019) Just Security, retrieved from <https://www.justsecurity.org/66194/frances-major-statement-on-international-law-and-cyber-an-assessment/> on 22/03/2020; H.-G. Dederer and T. Singer, ‘Adverse Cyber Operations: Causality, Attribution, Evidence, and Due Diligence’ (2019) 95 International Law Studies 430, 464.} Inevitably, the post-1945 intensification of the menace of non-state actors, as manifested in the attainment of state-like power by certain groups
(e.g. the below-examined PLO in Lebanon), would render the obligation of due diligence normatively deficient.

Since an infringement of the forenamed rule cannot justify the use of force in the territory of the uncooperative host state, the interplay between the law on the use of force and the law on state responsibility stacked the odds in the aggressor’s favour, enabling it to eschew counteraction by retreating to a safe haven beyond the target’s frontiers. The making of such an escape is, as indicated earlier, fostered by the furtive strategies of terrorism and guerrilla warfare. With self-defence being off the table, the *jus ad bellum* of the second half of the 20th century consigned the victim state to two unsatisfactory avenues: intervention pursuant to invitation from the host state and authorisation of the use of force by the UNSC. Insofar as, due to the political power play that pervades it, the Council rarely ever authorises forcible action, Article 42 of the UN Charter cannot constitute a panacea for a blight as omnipresent and persistent as the one under discussion. Free from the practically insurmountable hurdles of Article 42, consent is, by dint of being dependent solely on the concurrence of two states, a much more accessible means of combatting the everyday scourge of terrorism. Unfortunately, too often is its utility vitiates by the host’s indisposition to grant permission to intervene, which, as we shall delve into momentarily, is normally the product of either antipathy towards the requester or powerlessness against an occupying non-state actor. Like non-compliance with due diligence, the unobtainability of consent shields the non-state attacker from its just deserts, allowing it to chip away at its adversary from the safety of an exterritorial refuge. Using these systemic shortcomings as a bedrock for its expansionist reconstruction of self-defence, Israel asked:

> [H]ow could my Government acquiesce in a situation in which guerilla-type [sic] raids against our population could be carried out with impunity - in which the armistice demarcation line would afford automatic sanctuary to the raiders and they would be immune from counter-action either from the Government of the country attacked or from the Government of the country from which the attack was mounted?

It was precisely this hopeless predicament that birthed the contentious ‘unwilling or unable’ test, which, as its denomination implies, makes self-defence conditional on the host’s wilful or involuntary non-assistance to the recipient of trans-frontier attacks. To the extent that it contemplates the indispensability of self-defence in the absence of consent, the unwilling or unable formula is best envisioned as a component of the principle of necessity, one that comes into play only when the

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369 S/PV.1323 (n9) 34-38.

370 S/PV.1320 (n9) 66.

territory of a third party is involved. 372 The inability aspect denotes a lack of agency and is commonly the corollary of the host state losing effective control of its territory, either in part or in full, to the aggressive non-state actor. Such was the fate of Lebanon in the 1970s, when the PLO installed itself as the de facto governing body of the southern border region, converting it into a staging ground for transboundary attacks against Israel. 373 The most notable reprisal within this setting was the 1978 Operation Litani, a ten-day-long military expedition whose principal aim was to break the PLO’s stranglehold on southern Lebanon. 374 Far more common were assertions of voluntary disregard for due diligence, with the degree of the host’s alleged complicity ranging from sympathy with the aggressor’s cause 375 to the supply of matériel 376 and, most radically, co-perpetration of the underlying assaults. 377

The varying official input in non-state aggression raises the issue of its attribution to the host state, a nexus whose establishment was, absent Article 51’s applicability to autonomous groups, required for the exercise of self-defence. As relayed in Chapter Two, prior to the ICJ’s articulation of the effective control test in 1986, the rules on state responsibility for private conduct were strikingly underdeveloped. In any event, by virtue of eliciting no more than the host country’s condonation, the bulk of the reprisal-triggering acts would have fallen below the demanding threshold of the above-stated standard. There is likewise no effective control where, in going beyond mere approval, the host state provides material support for the execution of another actor’s armed attack. Chapter Two elucidated that, at most, such indirect uses of force breach Article 2(4) without engaging Article 51. Of course, the difficulty of attribution does not arise if the host state itself partakes in the perpetration of the transgressive acts. At any rate, first-hand state involvement was seldom claimed with regard to all of the provocations complained of; the main source of discontent was the law’s impotence against state-shielded aggressor groups.

As damning as the burden of attribution was for the legality of the forcible acts under study, ratione personae considerations were, throughout the 1950s-1970s, eclipsed by criticism of the said acts’ characteristic features, be it their premeditation, purpose or disproportionality. Aberrant in this respect were the statements uttered by the governments of Peru 378 and Senegal, 379 wherein they spurned the use of force in the territory of any state that did not directly harm the defending party. The question of attribution was, in all probability, neglected in view of its superfluity vis-à-vis the lex


374 S/PV.2071 (n37) 50-51.

375 Naor (n4) 412; S/PV.1323 (n9) 51; S/PV.1434 (n14) 106-107; S/PV.1498 (n37) 67; S/PV.1516 (n247) 102-103; S/PV.1537 (n25) 38-39; S/PV.1643 (n26) 51; S/PV.1648 (n28) 51; UNSC ‘Letter dated 73/04/11 from the Permanent Representative of Israel to the United Nations addressed to the President of the Security Council’ (11 April 1973) UN Doc S/10912, 3; S/PV.1766 (n31) 59; S/PV.2409 (n260) 138-143; S/PV.2611 (n248) 65-69.

376 S/PV.637 (n227) 101-102; UNSC ‘Letter dated 69/03/27 from the Permanent Representative of Israel addressed to the President of the Security Council’ (27 March 1969) UN Doc S/9114; S/PV.1466 (n37) 102.

377 S/PV.694 (n357) 64-69; S/PV.999 (n20) 65; S/PV.1107 (n116) 6-7; S/PV.1401 (n12) 42-44; UNSC ‘Letter dated 66/07/22 from the Permanent Representative of Israel addressed to the President of the Security Council’ (22 July 1966) UN Doc S/7423.

378 S/PV.1709 (n30) 64.

379 S/PV.1436 (n72) 134.
specialis law of self-defence, for there was no point in assigning responsibility for actions that, ab initio, excluded the possibility of a riposte under Article 51. As a matter of course, if a given territory becomes the object of an invasion, the sovereign holder of that territory is entitled to return fire regardless of who the aggressor might be. But, in the pertinent cases at issue, the invaders were assailed after making their exit from the victim's territory, which, when considered in conjunction with self-defence being restricted to offensives in motion, meant that the counterstrikes were illegal without attribution ever entering the equation.

Were self-defence exercisable at a time and place different from those of the original offensive, the problem of attribution would, on both practical and legal grounds, take centre stage. After all, once an incursion comes to a close, and the responsible actor successfully withdraws to the territory of a third state, the realisation of any counteroffensive would depend on the defender knowing who to strike, an added challenge not present in an on-the-spot resistance against an invading force.

Therefrom arise the dangers of misattribution, particularly the prospect of an innocent party getting dragged into a military quagmire, the avoidance of which would, in the grand scheme of things, give the law on state responsibility a pivotal role to play. Accordingly, when, in the 1980s, the global community's intransigence toward after-the-fact counterattacks began to waver, the subject of attribution moved to the forefront of discourse. Although the 1986 US retaliation for the Berlin bombing was not the first reprisal for terrorism committed outside the victim's borders (other such reprisal-prompting incidents were the 1968 Athens airport shooting and the 1972 murder of the Israeli Olympic athletes in Munich), the UN deliberations thereon were comparatively more focused on the legal significance of the identifiability of the perpetrator. Qatar, for one, conditioned self-defence on the aggressor being shown to have used 'its own forces against the territory or political independence of the State victim of aggression.' Albeit to a lesser degree, discussions on the identity of the provocateur were also sparked by Israel's 1985 swoop on Tunis. This was so as the PLO, the organisation blamed and targeted for the terror attack in Cyprus, denied having anything to do with it. Still, Greece, the UK, Thailand and Tunisia were quick to remind their fellow UN delegates that the PLO's culpability would not have exonerated the unsanctioned use of force in third-party territory.

To recapitulate, this study adds to the existing knowledge on asymmetrical warfare by designating three of its qualities, in particular, as the catalysts for what Section 5.3. demonstrates to be a normative shift towards expansionism. The said qualities are mutually reinforcing, in that taking one away would substantially reduce the potency of the threat of private actors. If terrorism and guerrilla warfare were less reliant on subterfuge, and, as a result, lost most of their surprise factor, the target state would find it easier to anticipate them and, with that foresight, fend them off within the restrictionist time frame for self-defence. Were it not for their proclivity to come in waves, raids by terrorist groups would generate far less impetus for ex post facto action, a hypothesis grounded in the

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380 S/PV.1460 (n22) 27-28.
381 Naor (n4) 415-416.
382 S/PV.2677 (n314) 5-6.
383 S/PV.2611 (n248) 111; S/PV.2613 (n279) 18; S/PV.2615 (n248) 87.
384 S/PV.2613 (n279) 115.
385 S/PV.2611 (n248) 111.
386 S/PV.2611 (n248) 44.
387 S/PV.2615 (n248) 185.
studied reprisals’ predication on the constancy of being under attack. And, finally, had either the UNSC or the host states been more cooperative with those who fall prey to non-state aggression, the imperative to depart from blanket restrictionism would be less acute. At the same time, addressing just one of the three variables would not restore the general effectiveness of the ex post armed attack framework. Whilst a temporal extension of the exercisability of self-defence may suffice to accommodate the underhandedness and seriality of terror acts, the victims thereof could, without the blessing of either the UNSC or the host state, still be barred from enforcing a valid Article 51 claim. Conversely, were the unwilling or unable test to be accepted as law, the states invoking it would nonetheless be prohibited from deploying troops to third-state territory, for any such after-the-fact move would run counter to the restrictionist temporality of self-defence.

Even though, in the ex post armed attack context, the preoccupation of states and scholars had, for most of the UN’s existence, lain with the evolving methods of warfare, one must not gloss over the restrictionism-defying capacities of modern weaponry. As set out in Chapter One, and touched upon in Section 5.2.’s commentary on Oil Platforms, the post-1945 advancements in military technology empowered states to exchange blows from a great distance and, thereby, dispensed with the historical unavoidability of face-to-face melee. Offensives utilising certain types of armaments, such as the progressively longer-range missile arsenals, can finish occurring near-instantaneously and, in doing so, preclude the reaction from coinciding, in time and in space, with the armed attack. The resultant misalignment may reduce the restrictionist conceptualisation of Article 51 to absurdity, seeing as it capacitates the aggressor to keep violating Article 2(4) without ever leaving a window for self-defence. Taken together, the above-analysed means and methods of warfare exposed a sustainability-threatening deficiency in the ex post armed attack framework, the correction of which was, as per Chapter One’s exploration of the jus ad bellum’s fluidity, contingent on states abandoning, in a sufficiently widespread and consistent manner, the absoluteness of their intolerance for after-the-fact counterattacks.

In the first period under review (1945-1980), only five states placed ex post facto counterattacks in the rubric of self-defence (Israel, Portugal, Mexico, the UK and the US), four of which had themselves participated in such conduct. Even so, numerous others observed that, albeit unlawful, these measures can be legitimate (France, Uruguay, Pakistan and Spain) or, at the very least, have valid security concerns underpinning them (Argentina, Australia, Belgium, China, France, France, France, France).

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388 S/PV.695 (n3) 23.
389 S/PV.1308 (n358) 84; S/PV.1324 (n9) 41.
390 S/PV.640 (n68) 81.
391 S/PV.1469 (n15) 62.
392 S/PV.1292 (n21) 94; S/PV.1662 (n29) 134-137.
393 S/PV.1711 (n86) 70.
394 S/PV.1649 (n28) 134-135.
395 S/PV.1003 (n20) 6-10.
396 S/PV.1002 (n19) 11-14.
Increasingly...a practice of injury by stealth is being followed. This tendency is not confined either to one continent or region or to one kind of power struggle or ideological conflict. Those so injured, if they cannot get redress [through the UN fora], will tend to reply as best they can...[T]his tendency favours the clandestine, the attack launched but publicly denied, and those nations [that] do not easily lend themselves to such surreptitious implementation of policy may find themselves condemned if they frankly acknowledge their own inevitable response. This...dual standard, of which there are signs already, is...a prescription for the comity of nations to become...a comity of reprisals...[E]ither we are going to develop our procedures and practices to apply the principles of the Charter to new forms of aggression which have been proclaimed and practised in recent years; or this Organization, and international law, will become less and less relevant to the realities of international life.403

West Germany404 and Italy405 were of the same mind, regretting that the *jus ad bellum*’s handling of terrorism was, to say the least, unsatisfactory.

The 1980s bore witness to ten more states endorsing *ex post facto* ventures as self-defence (Belgium, Denmark, West Germany, Greece, Italy, Ireland, Luxembourg, the Netherlands, New Zealand and South Africa), and while this figure may still have been small in its own right, the overall awareness of the adaptive shortcomings of the law on the use of force, and of the consequent legitimacy of select breaches of Article 2(4), kept on rising. Some states, like Madagascar, reckoned that certain attenuating circumstances may, even if only partly, abrogate the wrongfulness of an unlawful reprisal.406 In the opinion of Japan, after-the-fact counterattacks would continue to be *de facto* necessary for as long as the *jus ad bellum* remained ill-equipped to tackle the idiosyncrasies of terrorism. Such was also the impression of Thailand, whose UN delegation surmised that the impermissibility of armed reprisals was expedient but ‘perhaps overly optimistic’.407 As showcased throughout the present section, the fast-increasing alertness to the obsolescence of the law also spread through academia, leading many eminent pundits to second-guess the across-the-board inadmissibility of *ex post facto* counterattacks, not least where the recalcitrance of a third party blocks the path to the only remedy. Additionally, just like among states, there were those who, despite insisting on the unconditional interdiction of reprisals, conceded that, owing to the rift between the letter of the law and the modernisation of warfare, some such acts were born of unfortunate

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397 S/PV.1005 (n83) 13.
398 S/PV.1650 (n79) 99-100.
399 S/PV.1467 (n15) 44-45.
400 S/PV.1295 (n66) 86.
401 S/PV.1293 (n3) 9-13.
402 S/PV.1649 (n28) 147-148.
403 UNGA Verbatim Record (18 October 1966) UN Doc A/PV.1447, paras. 103 & 105.
404 UNSC Verbatim Record (12 July 1976) UN Doc S/PV.1941, paras. 51-60.
405 UNSC Verbatim Record (14 July 1976) UN Doc S/PV.1943, para. 61.
406 S/PV.2677 (n314) 11-12.
407 S/PV.2682 (n306) 41.
necessity.\textsuperscript{408} And though not everyone was convinced that, at the tail end of the 1980s, the above-mentioned rift was wide enough to warrant concern,\textsuperscript{409} the events of the ensuing decades would tell a different story.

5.3. State Practice and Opinio Juris from the 1990s Onwards

It would be an understatement to say that the post-1990 developments in the \textit{ex post} armed attack context are counterintuitive and difficult to grasp, for they are, as we shall learn shortly, downright antithetical to the once deep-rooted parameters of self-defence and armed reprisals. This sort of rapid, foundational overhaul does no favours to the already diminished legal certainty in the \textit{jus ad bellum}, the restoration of which is, as reasoned at the onset of Chapter One, an essential precondition for an effective and sustainable international law. Consequently, it is important that, instead of just passively reporting on the happenings of the last thirty years, the present chapter dissects the stimuli that put the law on the use of force on such a confusing trajectory and, so to speak, brings some method to the madness. Building on the insights from Section 5.2.1., Section 5.3.1. explores the potential avenues for the regularisation of after-the-fact counterattacks and illuminates why the 21\textsuperscript{st}-century transformation of self-defence could not have played out any other way. What must be borne in mind here is that, due to the reality-changing operation of evolutionary forces, the factual qualifications of defensiveness and offensiveness are, in today’s day and age, a world apart from what they were in 1945. Whatever qualified as offensive back then may have since developed into the only mode of defence against newfound threats. And whilst this has been the case with measures that postdate an armed attack, we must be extremely careful not to misconstrue the normative desirability of a specific class of \textit{ex post facto} counterattacks – those impelled by the exigency of terminating recurring assaults – as a \textit{carte blanche} for all reprisals, including the offensively disposed acts of retaliation and punishment. The lifting of the comprehensive ban on reprisals would reinstate the pre-1945 ‘might is right’ system of international relations and, \textit{ipso facto}, render the UN Charter null and void.

5.3.1. Resuscitating Reprisals in Spirit but Not in Name

Going into the 1990s, most expansionist commentators figured that, for the \textit{ex post} armed attack framework to be contemporised, certain reprisals would have to be recognised either as a standalone right under customary law or as operations compatible with Article 51. The first of these pathways, championed most prominently by Bowett,\textsuperscript{410} envisions the \textit{de jure} revival of ‘reasonable’ reprisals, the reasonableness of which is to be determined by a non-exhaustive checklist of legitimising factors: prior pursuit of a peaceful settlement, protective character of the response, proportionality \textit{vis-à-vis} the

\textsuperscript{408} Anderson and Taulbee (n4) 333; R. Barsotti, ‘Armed Reprisals’ in A. Cassese (ed), \textit{The Current Legal Regulation of the Use of Force} (Martinus Nijhoff Publishers, 1986) 90; A/CN.4/318/Add.5-7 (n60) 56.


\textsuperscript{410} Bowett (n4) 10-11.
goal of deterrence of further delicts, non-observance of due diligence by the harbourer of a non-state aggressor (if applicable), etc.\textsuperscript{411} But, by reason of being wholly independent of self-defence, the proposed legal basis for reprisals comes into conflict with Article 2(4), whereunder force not expressly sanctioned by the Charter is, as clarified in Chapter Two, proscribed by default. Having said that, the malleability of that prohibition hinges on the extent to which it overlaps with \textit{jus cogens}, that is, on whether the non-derogable peremptory dimension of Article 2(4), rather than being all-encompassing, covers only the most serious violations thereof (i.e. aggression). Thus, assuming that the peremptory aspect of Article 2(4) is narrowly delimited, and factoring in the Charter’s status as a living constitution, forcible conduct short of aggression could, through state practice and \textit{opinio juris}, evolve into an exception to the proscription of the use of force.

The present thesis finds it conceivable, as do several members of the ILC,\textsuperscript{412} that genuine counterterrorist actions, which seek only to stop extraterritorial groups from orchestrating frequent attacks, do not reach the severity of aggression. This is because, like rescue operations of nationals abroad, such undertakings do not take aim at the host state, nor do they prejudice its territorial integrity or political independence. On the flip side, reprisals directed against a state (e.g. the 1964 and 1986 US onslaughts on North Vietnam and Libya respectively) are bound to clash with \textit{jus cogens} and, by the same token, stand little to no chance of harmonisation with Article 2(4). The foregoing barrier is bypassed by the second approach to legalising reprisals, which transplants their deterrence-driven variant into Article 51, thereby turning them into Charter-sanctioned deviations from Article 2(4). Those partial to this workaround submit that, albeit conceptually and temporally distinct from self-defence, reprisals possess the capacity to fulfil the requirements under Article 51 (armed attack, necessity and proportionality).\textsuperscript{413} While, as unpacked in Chapter Three, the phrase ‘if an armed attack occurs’ is unfavourable to anticipatory self-defence, nothing in the provision’s text suggests that force cannot be used after the conclusion of the initiating offensive. When it comes to necessity and proportionality, Chapter Four revealed that offensive measures are incapable of satisfying the two principles, and though that axiom still holds true in the present day, some reprisals have, as a consequence of historically unforeseeable phenomena, acquired a defensive disposition. These repurposed counterattacks go by a variety of names, perhaps the most well-known being Dinstein’s ‘defensive armed reprisals’,\textsuperscript{414} a nomenclature that sharply juxtaposes the Article 51-compatible reprisals with their patently illegal offensive equivalents.

All of the above notwithstanding, it is argued here that, for one simple reason, the two scholarly blueprints for regularising reprisals were set to fail from the outset. Much like preventive self-defence in the \textit{ex ante} armed attack context, reprisals have, through decades’ worth of scathing condemnation, come to be equated with unlawful force. Therefore, the odds of states embracing \textit{en masse} the lawfulness of anything that carries the designation ‘reprisal’, defensive or not, are slim to none. This is exactly why, aside from Israel in the 1950s, reprisal-takers avoided describing their


\textsuperscript{413} Tucker (n60) 587 & 591-594; Schachter, ‘The Right of States to Use Armed Force’ (n143) 1637-1638; Arend (n143) 29-30.

\textsuperscript{414} Dinstein (n60) 276-277.
forcible behaviour as reprisals, asserting instead that they acted in self-defence. It was clear to them that reliance on the institution of armed reprisals, not just in spirit but also in name, would have dashed all hopes of a successful legal defence.\footnote{Kritsiotis (n142) 166.} From a purely legal perspective, the concept of a defensive reprisal is inherently paradoxical, insomuch as reprisals are, as per the objective and subjective elements of customary law, intrinsically offensive in nature.

The terminological barrier to the doctrine’s formalisation gives substance to the proposal of Anderson and Taulbee, who advance inaction as the preferable treatment of legitimate reprisals: ‘[T]he prudent course is to tolerate certain practices when necessity demands rather than investing them with the sanctity of a legal rule.’\footnote{Anderson and Taulbee (n4) 334.} Nevertheless, the suggestion that legitimacy should reside outside the law is dangerously subversive to the \textit{jus ad bellum’s} authority, which, if not re-legitimised through adaptation to the changing environment, could see the UN Charter devolve into a glorified instrument of lip service. Looking the other way may be the appropriate strategy for extraordinary affairs like, for example, the so-called ‘illegal but legitimate’ humanitarian interventions, the instances of which are few and far between (e.g. the 1999 NATO campaign in Kosovo),\footnote{Independent International Commission on Kosovo, ‘Kosovo Report: Conflict, International Response, Lessons Learned’ (2004) retrieved from: <https://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf> on 17/02/2021; A. Pellet, ‘Brief Remarks on the Unilateral Use of Force’ (2000) 11 European Journal of International Law 385, 386-387; L. Henkin, ‘Kosovo and the Law of “Humanitarian Intervention”’ (1999) 93 American Journal of International Law 824, 828; J. Vidmar, ‘Excusing Illegal Use of Force: From Illegal but Legitimate to Legal Because it is Legitimate?’ (2017) EJIL: Talk! blog, retrieved from: <https://www.ejiltalk.org/excusing-illegal-use-of-force-from-illegal-but-legitimate-to-legal-because-it-is-legitimate/> on 29/11/2019; M. Milanovic, ‘Illegal but Legitimate?’ (2017) EJIL: Talk!, retrieved from: <https://www.ejiltalk.org/illegal-but-legitimate/> on 31/01/2021.} but it does not represent an adequate answer to terrorist threats that affect the day-to-day functioning of the law on the use of force. \textit{Ergo}, the developmental arc of the \textit{ex post} armed attack framework hit a seemingly impassable roadblock: as a subset of otherwise normatively undesirable reprisals, deterrence-focused counterattacks - acts whose legalisation was vital to the long-term sustainability of the law – were, by virtue of the near-ineradicable negative connotation of the doctrine they belonged to, suppressed from crystallising into a customary norm.

As evidenced by Section 5.3.2.’s breakdown of the final stretch of state practice and \textit{opinio juris}, the only way to cut the proverbial Gordian knot was to do what the reprisal-taking states have done all along, that is, to take the prescriptively desirable properties of reprisals and discreetly rebrand them as attributes of self-defence. Put differently, in order to circumvent the negatively charged terminology, and facilitate the \textit{jus ad bellum’s} adjustment to the demands of the modern world, states had to join forces to bring select reprisals under the heading of self-defence. Since the veiled doctrinal blending comes at the price of greater legal uncertainty, the present study strives, as part of its contribution to the literature, to undo that damage by shedding light on the current configuration of the \textit{ex post} armed attack framework, a task aided by this section’s exposition of the law-shaping undercurrents.
5.3.2. When the Law Catches Up with Reality: The Transformation of the Ex Post Armed Attack Framework

The last three decades beheld a dramatic drop in states’ denouncement of the temporality and premeditation of after-the-fact counterattacks, with many such actions gaining acceptance under the auspices of the right to self-defence. Correspondent thereto is the reticence of states to use the word ‘reprisal’ in relation to that which, based on the findings of Sections 5.1., exhibits the classic hallmarks of thusly named measures. Hence, the ultimate sample of state practice and *opinio juris* was selected mainly on account of the individual operations’ parallels with the state-designated reprisals from before 1990. But it is worth mentioning that the academic community was, at least initially, reluctant to go along with the above-outlined trends and, as such, did classify some of the below-analysed acts as reprisals. The first military venture of interest, and one that the scholarship widely cites as an exemplar of a reprisal, is the 1993 US missile strike on the headquarters of the Iraqi secret service, a government agency accused of attempting to assassinate a former US president, G. H. W. Bush, during his visit of Kuwait.418 The unleashed barrage of cruise missiles took the lives of eight Iraqis.419

As a pre-planned, deterrence-driven payback for an (attempted) attack from two months prior, the present operation was cut from the same cloth as the other professedly self-defensive counterattacks.420 Yet, in deviation from the unequivocal reproach that befell its precursors, the airstrike on Iraq was cautiously welcomed by the international community. For one thing, the US government was fairly effectual in convincing its peers of Iraq’s guilt, even if the evidence thereof was less conclusive than that incriminating Libya in 1986.421 The optics of the attribution were, in all likelihood, enhanced by the US’s choice to withhold using force until after its two-month-long probe into the murder conspiracy. Even though, as made plain in Section 5.2.1., an attack’s attributability was immaterial to the illegality of *ex post facto* counterattacks, Russia423 and the UK424 believed that the US had exercised self-defence lawfully, a conviction France425 shared despite the fact that, seven years earlier, it categorised the analogous US-Libya episode as a reprisal. On top of that, France426 and the UK427 praised the US for observing the principle of proportionality, which, given that the stirring incident was a long-concluded, zero-casualty inchoate offence, signified that they must have judged the riposte against the aim of deterring future harm.

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419 Kritsiotis (n142) 162; Starski, ‘The US Airstrike Against the Iraqi Intelligence Headquarters’ (n60) 504.

420 UNSC ‘Letter dated 93/06/26 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council’ (26 June 1993) UN Doc S/26003.

421 UNSC Verbatim Record (27 June 1993) UN Doc S/PV.3245, 4-6.

422 Surchin (n4) 463.

423 S/PV.3245 (n421) 22.

424 S/PV.3245 (n421) 21.

425 S/PV.3245 (n421) 13.

426 S/PV.3245 (n421) 13.

427 S/PV.3245 (n421) 21.
Still, the measure’s supporters were, by and large, wary of couching their reflections in legal terms, choosing rather to underscore the propriety/necessity of striking back at Iraq (Belgium, Germany, Hungary, Japan, New Zealand and Spain) or to convey their solidarity with the US (Australia, Italy, Israel, Kuwait and Sweden). Other states (Brazil, Cape Verde, Djibouti, Morocco, Pakistan and Venezuela), albeit vocally indignant at the heinousness of the foiled murder plot, refrained from approving or disapproving of how the US followed up thereon. China, Iran, Malaysia and the Arab League - the only third parties to censure the bombardment of Iraq’s governmental premises - postulated that the US should have prioritised the UNSC over self-help. That said, none referred to the US counterstrike as a reprisal, nor was it after-the-fact temporality or premeditation objected to. Those that deemed it retaliation-driven were, ironically enough, either supportive thereof (Belgium) or situated within the US state apparatus (the Congressional Research Service). It should be noted, before moving on, that it is doubtful that a failed action, which produced no property damage or human casualties, could amount to force under the effects-based conception thereof, let alone meet the gravity threshold under Article 51. Whilst, as elaborated in Chapter Two, ongoing offensives are, by dint of the near-inevitability of confrontation, typically viewed as force even before the first shots are fired, the same logic does not apply to casualty-free attacks that have already come to pass, for their outcomes have a settled finality to them. Just as crucially, Chapter Four related that, in distinction to self-defence, there never was a de minimis constraint on what can trigger a reprisal, making the 1993 air raid’s classification as such all the more suitable.

The next milestone in the metamorphosis of the ex post armed attack framework is the 1998 US clampdown on Al-Qaeda, a pan-Islamic terrorist group, which, having declared jihad against the US, killed over two hundred people - twelve being US nationals - in the bombing of the American embassies in Kenya and Tanzania. The Clinton administration ordered precision strikes on two targets: the terrorists’ training camps in Afghanistan and a drug-manufacturing complex in Sudan, a facility that the Sudanese government allegedly repurposed into a chemical weapons factory,
supposedly to abet Al-Qaeda in its holy war against the West.448 Mounted thirteen days after the twin bomb blast in Dar Es Salaam and Nairobi, the US counterattack is yet another example of an armed reprisal,449 one that, too, was whitewashed as self-defence in deterrence of consecutive acts of hostility.450 Though, in the days that followed, the international community stood largely silent, the majority of the states that spoke out held the US in breach of Article 2(4) of the UN Charter (Afghanistan,451 China,452 Cuba,453 Indonesia,454 Iran,455 Iraq,456 Libya,457 Pakistan,458 Russia,459 Sudan460). The UN Secretary-General opined that unilateral acts are not, by themselves, an efficient means of combatting the menace of terrorism.461 A handful of states commended the US for its anti-terror resolve, but did not explicitly vouch for the lawfulness of the steps taken (Australia,462 France,463 Germany,464 Israel,465 Japan,466 Spain467 and the UK468).

The undertakings in question owe their somewhat negative reception - at least when compared with that of their 1993 counterpart - to profound evidentiary problems. In reversing the tack of official transparency it employed in 1986 and 1993, the US declined to disclose proof of either Al-Qaeda’s role

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449 Myjer and White (n142) 8; Alder (n356) 172; Lobel (n61) 549; Cannizzaro and Rasi (n200) 542; O’Connell, ‘The Popular but Unlawful Armed Reprisal’ (n308) 343-345; Williamson (n4) 240-242; Cohan (n60) 335-336; Quigley (n418) 163.
450 S/1998/780 (n448).
452 Lobel (n61) 538.
454 CNN, ‘Muslims, Yeltsin Denounce Attack’ (n453).
456 CNN, ‘Muslims, Yeltsin Denounce Attack’ (n453).
463 CNN, ‘Sudan Demands U.S. Apology for Missile Attack’ (n461); Cannizzaro and Rasi (n200) 544.
464 CNN, ‘Sudan Demands U.S. Apology for Missile Attack’ (n461); Cannizzaro and Rasi (n200) 544.
465 CNN, ‘Muslims, Yeltsin Denounce Attack’ (n452).
466 CNN, ‘Muslims, Yeltsin Denounce Attack’ (n452).
467 CNN, ‘Sudan Demands U.S. Apology for Missile Attack’ (n461); Cannizzaro and Rasi (n200) 544.
468 CNN, ‘Sudan Demands U.S. Apology for Missile Attack’ (n461); Cannizzaro and Rasi (n200) 544.
in the embassy attacks or the Sudanese government’s links to the group.\footnote{469} Furthermore, recourse to force was greenlit at a point when, even within the US government itself, serious doubts were being raised as to the identity of the perpetrator,\footnote{470} and an FBI investigation thereinto was still in the early stages.\footnote{471} But even then, most of the international outrage was provoked by the US’s decision to, absent any indication of nefarious activity, obliterate a pharmaceutical plant, a misstep whose illegitimacy galvanised Sudan to solicit, unsuccessfully,\footnote{472} an independent UN inquiry into the allegations of chemical weapons production.\footnote{473} That being so, the condemnatory resolutions adopted by the Arab League\footnote{474} and the Organization of the Islamic Conference\footnote{475} contained no allusion to what took place in Afghanistan. Ultimately, no state characterised what the US did as a reprisal, which, when considering that the specific criticism thereof had to do with attribution and target selection (not the measure’s temporality, purpose, or pre-planned course), indicated that the 1998 missile strikes were another stepping-stone in the growing indulgence of after-the-fact counterattacks.

Looking back at the entirety of the \textit{jus ad bellum}’s post-1945 practice, no other moment was as transformative as the 2001 US invasion of Afghanistan, or, as it is also known, Operation Enduring Freedom. It was a gargantuan counterblow for the Al-Qaeda-perpetrated massacre of 9/11, the deadliest act of terrorism in recorded history, which spanned across three US states and cost the lives of approximately three thousand individuals.\footnote{476} That magnitude notwithstanding, it is propounded here that the US counteraction against Al-Qaeda was, based on the law in force at the time, a clear-cut case of an armed reprisal. To begin with, the timing of Operation Enduring Freedom puts it squarely in the bracket of armed reprisals, seeing as it was not until 7 October - nearly a month after the fact - that the US and the UK (a respondent to the US’s request for collective action) invaded Al-Qaeda’s host state of Afghanistan.\footnote{477} As virtually all reprisals before it, the operation was justified as self-defence in reaction to a transgression that, albeit firmly in the past, had dangerous implications going forward.\footnote{478} By professing to have acted in deterrence of further assaults, the US self-admittedly transcended the traditional purpose of self-defence, for nothing that happened or could have happened in Afghanistan would have blunted the carnage of the long-completed 9/11 attacks.

\footnote{470} Williamson (n4) 140-142.
\footnote{472} The proposal failed due to opposition from the veto-wielding US, see M. Barletta, ‘Chemical Weapons in the Sudan: Allegations and Evidence’ (1998) 6 The Nonproliferation Review 115, 127-129.
\footnote{473} S/1998/786 (n460) 4 & 10.
\footnote{475} UNSC ‘Letter dated 98/10/12 from the Permanent Representative of Qatar to the United Nations addressed to the President of the Security Council’ (12 October 1998) UN Doc S/1998/942.
\footnote{476} Schmitt, ‘Counter-Terrorism and the Use of Force in International Law’ (n351) 10-13.
\footnote{478} S/2001/946 (n477).
What is more, force was exerted only after the Taliban, the de facto government of Afghanistan, snubbed the US’s demands for, inter alia, the extradition of persons implicated in 9/11. The US’s attempt at a pacific resolution, which, as illuminated in Chapter Four, would have been required under the pre-1945 law of reprisal, ran counter to the spontaneity ascribed to self-defence by the Caroline standard (and since co-opted by the restrictionist notion of Article 51). Simply being at a liberty to negotiate meant that, henceforth, any forcible response by the US would have necessarily been premeditated and, correspondingly, excluded from the bounds of contemporary self-defence. It would also seem that, beyond the evident defensive objectives, the US sought to punish the Taliban for refusing to hand over the terrorists. Particularly reminiscent of the reprisals of the 1950s-1980s was the US’s assertion that, by refusing to crack down on Al-Qaeda, the Taliban forfeited Afghanistan’s protection under Article 2(4).

Whilst prior articulations of the unwilling or unable test made no headway with the international community, Operation Enduring Freedom, and the corresponding invocation of Article 51, managed to win over states of all regions and backgrounds, thereby forever altering the argumentative landscape of the ratione temporis and personae dimensions of self-defence. It was the first after-the-fact counterattack to be certified by the UNSC as a self-defensive measure, that is, as lawful force not licensed under Article 42 of the UN Charter. Its placement in the category of self-defence was seconded by the EU, NATO, the Gulf Cooperation Council and the Organization of American States (OAS). The Organization of the Islamic Conference issued a near-unanimous censure of the 9/11 atrocities, and though it did not expressly back the US’s right to respond with force, the group’s Secretary-General did so indirectly by affirming the UNSC Resolution 1368.

Moreover, a plethora of states embraced the US’s self-defence in their individual capacities: Albania, Armenia, Australia, Azerbaijan, Bahrain, Bangladesh, Belgium, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Cambodia, Cameroon, Canada, Chile, China, Croatia, Cyprus, Czechia, Denmark, DRC, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Liberia, Libya, Lithuania, Luxembourg, Malawi, Mexico, Moldova, Morocco, the Netherlands, New Zealand, Nicaragua, Norway, Oman, Pakistan, the Philippines, Poland, Portugal, Qatar, Romania, Russia, Sao Tome and Principe, Saudi Arabia, Senegal, Sierra Leone, Singapore, Slovakia, Slovenia, South Korea, Spain, Sudan, Sweden,

481 S/2001/946 (n477).
487 Beard (n328) 571.
Syria, Tajikistan, Thailand, Turkey, Turkmenistan, UAE, Uganda, the UK, Ukraine, Uzbekistan, Vatican, Yemen and Zambia.\textsuperscript{488} Iran, the only notable dissenting state, ended up assisting the US by supplying it with helpful intelligence.\textsuperscript{489}

In addition to endorsing an \textit{ex post facto} counterattack as self-defence, a total of forty-five states took part in its execution, whether through direct military participation or the lending of territory and/or airspace to the US-led forces.\textsuperscript{490} This active endorsement bolstered the law-altering effects of Operation Enduring Freedom, providing for a strong foundation for the expansion of the \textit{ex post} armed attack framework under customary law. As a remarkably sudden shift in paradigm, and one precipitated by a cautionary demonstration of the state-rivaling power of non-state actors, the worldwide legal approval of the invasion of Afghanistan starkly contrasts the hitherto largely extra-legal validation of legitimate reprisals. It may be remembered that, even if indicative of states' increasing acquiescence to after-the-fact counterattacks, the acclamation of the above-discussed 1993 US missile raid, and, to a lesser extent, its 1998 successors, was mostly devoid of reference to the \textit{jus ad bellum} and, as such, was only faintly suggestive of a change in \textit{opinio juris}. However, even accepting Operation Enduring Freedom as self-defence, one should not close his/her eyes to the obvious problems in its realisation, namely the fact that, in targeting not just the aggressor but also the host state, the US went as far as to depose the de facto government of Afghanistan,\textsuperscript{491} an intemperance that is scarcely reconcilable with the principle of proportionality.

The 2006 Lebanon War, a thirty-four-day-long conflict between Israel and the Lebanon-based Islamist organisation Hezbollah, signalled a further erosion of the objective approach to the self-defence/reprisal dichotomy, smoothing the path for its supersession by the necessity/proportionality-based alternative. The \textit{casus belli}, and the final straw in years of attritional sabotage, was Hezbollah's descent on a settlement in northern Israel, where the Shia militants injured two and slayed three Israeli soldiers, before kidnapping two more to Lebanon.\textsuperscript{492} Although both the triggering act and the Israeli riposte date back to 12 July, the latter was subsequent to the former and unfolded in a different country (Lebanon). As an \textit{ex post facto} assault on a serial aggressor group operating from southern Lebanon, the present counterattack mirrored the Israeli military adventures of the 1970s and, like most of those, was rationalised as self-defence.\textsuperscript{493} As we shall see in the forthcoming analysis, these similarities help drive home just how much the attitudes of states had changed in three decades.

When looking at the 2006 counteroffensive, one is immediately struck by the immense destruction of Lebanese infrastructure\textsuperscript{494} and the death of approximately a thousand civilians,\textsuperscript{495} ramifications that

\textsuperscript{488} CRS, ‘Operation Enduring Freedom: Foreign Pledges of Military & Intelligence Support’ (n340); M. Rudner, ‘Hunters and Gatherers: The Intelligence Coalition Against Islamic Terrorism’ (2004) 17 International Journal of Intelligence and CounterIntelligence 193, 217; Schmitt, ‘Counter-Terrorism and the Use of Force in International Law’ (n351) 17-18; Beard (n328) 569-577.

\textsuperscript{489} S.M. Gohel, ‘Iran’s Ambiguous Role in Afghanistan’ (2010) 3 CTC Sentinel 13, 14.

\textsuperscript{490} Beard (n328) 571-572.

\textsuperscript{491} Myjer and White (n142) 8.


\textsuperscript{493} UNSC Verbatim Record (13 July 2006) UN Doc S/PV.5488, 8.

\textsuperscript{494} Tams and Brückner (n492) 686-687.

\textsuperscript{495} D.E. Johnson, \textit{Hard Fighting: Israel in Lebanon and Gaza} (RAND Corporation, 2011) 78.
dwarf the single-digit casualties caused by the terror attack of 12 July. This gross disparity is nigh-impossible to square with the principle of proportionality, however liberally it is interpreted and whatever goal it is judged against. Despite disagreeing with the foregoing conclusion, Australia,496 Canada497 and the US498 - the only states to dub the impugned measure as lawful self-defence - nevertheless felt compelled to exhort Israel to minimise collateral damage. Meanwhile, the UN Secretary-General,499 Argentina,500 Brazil,501 Ghana,502 Guatemala,503 Norway,504 Peru505 Switzerland506 and the joint EU position, which represented the consensus of the then twenty-five Member States as well as eleven non-members (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Iceland, Macedonia, Moldova, Romania, Serbia, Turkey and Ukraine),507 proclaimed that Israel’s exercise of self-defence, albeit well-founded in theory, was disproportionately executed. By lamenting that ‘diplomacy was hardly given a chance’,508 Ghana further intimated that, akin to the stipulations of the now defunct law of reprisal, self-defence ought to be preceded by a peaceful initiative. Not very dissimilar were the postulations of Chile,509 Greece,510 Indonesia,511 Mexico,512 New Zealand,513 Tanzania514 and Venezuela,515 in that they, too, thought that Israel disrespected the principle of proportionality, but, unlike the above-listed states, they did not comment on whether there was a valid self-defence claim to begin with. Japan, though sympathetic to the defending state’s security predicament, voiced its concerns over the tremendous proportions of the forcible reaction.516 China,517 Cuba,518 Iran,519 Pakistan520 and the Arab League521 took a harsher tone, castigating Israel for what they perceived to be an act of aggression. Still, Djibouti, a member of the Arab League, conceded that Israel’s self-defence would have been lawful had the principle of proportionality been respected.522

In conceiving of necessity and proportionality as the determinants of the lawfulness of after-the-fact counterattacks, several states averred that Israel’s heedlessness of the two principles transmuted its

496 UNSC Verbatim Record (21 July 2006) S/PV.5493 (Resumption 1), 27.
497 S/PV.5493 (Resumption 1) (n496) 39.
499 UNSC Verbatim Record (20 July 2006) UN Doc S/PV.5492, 3.
500 UNSC Verbatim Record (14 July 2006) UN Doc S/PV.5489, 9; S/PV.5493 (Resumption 1) (n496) 9.
501 S/PV.5493 (Resumption 1) (n496) 19.
502 S/PV.5493 (Resumption 1) (n496) 8.
503 S/PV.5493 (Resumption 1) (n496) 41.
504 S/PV.5493 (Resumption 1) (n496) 23.
505 S/PV.5489 (n500) 14.
506 S/PV.5493 (Resumption 1) (n496) 18.
507 S/PV.5493 (Resumption 1) (n496) 16.
508 S/PV.5489 (n500) 8.
509 S/PV.5493 (Resumption 1) (n496) 35.
510 S/PV.5489 (n500) 17.
511 S/PV.5493 (Resumption 1) (n496) 25.
512 S/PV.5493 (Resumption 1) (n496) 45.
513 S/PV.5493 (Resumption 1) (n496) 33.
514 S/PV.5489 (n500) 13.
515 S/PV.5493 (Resumption 1) (n496) 36.
516 S/PV.5489 (n500) 12.
517 S/PV.5489 (n500) 11.
518 S/PV.5493 (Resumption 1) (n496) 37.
519 S/PV.5493 (Resumption 1) (n496) 30.
520 S/PV.5493 (Resumption 1) (n496) 44.
521 S/PV.5493 (Resumption 1) (n496) 26-27.
522 S/PV.5493 (Resumption 1) (n496) 32.
operation into a reprisal. In this vein, Russia reasoned that the use of excessive force turned an otherwise lawful act of self-defence into an unlawful reprisal.\textsuperscript{523} Other states that branded it a reprisal also emphasised its disproportionality (the DRC,\textsuperscript{524} India\textsuperscript{525} and Lebanon\textsuperscript{526}). In contrast with the above-reviewed disputes involving the US, the Israel-Hezbollah crisis did offer a modicum of support for the objective method of discerning ex post armed attack measures. Iran\textsuperscript{527} and Saudi Arabia\textsuperscript{528} decried the premeditation of the Israeli war efforts, whereas Greece\textsuperscript{529} and Slovakia\textsuperscript{530} purported that self-defence cannot take the form of an \textit{ex post facto} counterattack. Nonetheless, the latter two countries moved to align themselves with the stance of the EU and, in follow-up statements, recognised Israel’s right to exercise self-defence within the limits of proportionality, thereby negating their earlier posture.\textsuperscript{531} In the final analysis, seeing that the bulk of third states adduced disproportionality, rather than the posteriority of the response, as grounds for finding Israel in violation of Article 2(4), the 2006 Lebanon War served to confirm the expansionist precedent set by Operation Enduring Freedom.

Of course, in order for the \textit{ex post} armed attack framework to regain its effectiveness, states would have to go beyond legalising select after-the-fact counterattacks, inasmuch as, as explained in Section 5.2.1., extending the temporality of self-defence would not, in and of itself, remove the territorial inviolability of states which, either willingly or unwillingly, repeatedly default on their duty of due diligence. As laid out in Chapter One, and attested to by the above-analysed cases, the 21\textsuperscript{st} century has witnessed a prodigious rise in pseudo-state groups, including the likes of the Taliban, Hezbollah, Boko Haram, Al-Shabaab and the Islamic State of Iraq and the Levant (ISIL). With state-like military capabilities and control over large tracts of state territory, these entities have amplified the intractability of extraterritorial safe havens and, by doing so, impelled the global community to re-evaluate its staunch aversion to the unwilling or unable test. The perception of the legality of Operation Enduring Freedom was, as shown earlier, unaffected by the US going after the antagonistic regime of the aggressor’s host state, and few challenged the theoretical underpinnings of Israel’s self-defence in Lebanon, even though the latter neither bore responsibility for the underlying armed attack (Israel retracted\textsuperscript{532} its initial attribution of Hezbollah’s conduct to the Lebanese government\textsuperscript{533}) nor consented to having its territorial integrity impinged upon. As the UN Secretary-General himself

\textsuperscript{523} S/PV.5493 (Resumption 1) (n496) 2; S/PV.5489 (n500) 7.
\textsuperscript{524} S/PV.5489 (n500) 13.
\textsuperscript{525} S/PV.5493 (Resumption 1) (n496) 34.
\textsuperscript{526} UNSC Verbatim Record (11 August 2006) UN Doc S/PV.5511, 18.
\textsuperscript{527} S/PV.5493 (Resumption 1) (n496) 30.
\textsuperscript{528} S/PV.5493 (Resumption 1) (n496) 20.
\textsuperscript{529} S/PV.5489 (n500) 17.
\textsuperscript{530} S/PV.5489 (n500) 16.
\textsuperscript{531} S/PV.5493 (Resumption 1) (n496) 3; S/PV.5493 (n498) 19.
remarked, the non-responsibility of Lebanon did not preclude Israel from defending itself within the former’s borders.\footnote{S/PV.5492 (n499) 3.}

Even so, the warming sentiment towards the unwilling or unable standard is best epitomised by the ongoing intervention in Syria, a concerted military drive to defeat ISIL, which began in 2014 at the instigation of Iraq’s collective self-defence against the Syria-based pseudo-state.\footnote{UNSC ‘Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council’ (20 September 2014) UN Doc S/2014/691.} While Iraq’s invitation provides a legal cover for the counter-ISIL coalition activities in the Iraqi territory, those undertaken in Syria lacked the authorisation of either the Syrian government or the UNSC. Only two states, Iran and Russia, intervened against ISIL at Syria’s behest.\footnote{International Business Times, ‘ISIS Update: Iran, Iraq Agree to Military Pact to Combat Islamic State Militants’ (31 December 2014) retrieved from: <https://www.ibtimes.com/isis-update-iran-iraq-agree-military-pact-combat-islamic-state-militants-1770732> on 03/02/2021.} That being said, by subsequently approving of the US-led airstrikes in Syria,\footnote{UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249, 2.} the UNSC acknowledged that the new face of terrorism may, under certain circumstances, necessitate action beyond the restrictionist imagination of the Charter’s drafters.

In an attempt to vindicate their use of force in Syria, some of the interveners invoked the unwilling or unable formula (Australia,\footnote{UNSC ‘Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council’ (9 September 2015) UN Doc S/2015/693.} Canada,\footnote{UNSC ‘Letter dated 31 March 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council’ (31 March 2015) UN Doc S/2015/221.} Turkey,\footnote{UNSC ‘Letter dated 24 July 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council’ (24 July 2015) UN Doc S/2015/563.} the UK\footnote{The Telegraph, ‘David Cameron’s Full Statement Calling for UK Involvement in Syria Air Strikes’ (26 November 2015) retrieved from: <https://www.telegraph.co.uk/news/politics/david-cameron/12018841/David-Camerons-full-statement-calling-for-UK-involvement-in-Syria-air-strikes.html> on 03/02/2021.} and the US\footnote{UNSC ‘Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General’ (23 September 2014) UN Doc S/2014/695.}), whereas others relied specifically on the inability aspect, postulating that the prerequisite of consent was rendered inapplicable by the host’s partial loss of territorial control (Belgium,\footnote{UNSC ‘Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council’ (9 June 2016) UN Doc S/2016/523.} Germany\footnote{Starski, ‘Silence Within the Process of Normative Change and Evolution of the Prohibition on the Use of Force’ (n371) 54; but note that, more recently, the Netherlands accepted the entirety of the unwilling or unable test: UNSC Arria-formula meeting on ‘Upholding the collective security system of the Charter of the United Nations: the use of force in international law, non-State actors and legitimate self-defence’ (24 February 2021) UN Doc S/2021/247, 54.} the Netherlands\footnote{Starski, ‘Silence Within the Process of Normative Change and Evolution of the Prohibition on the Use of Force’ (n371) 54; but note that, more recently, the Netherlands accepted the entirety of the unwilling or unable test: UNSC Arria-formula meeting on ‘Upholding the collective security system of the Charter of the United Nations: the use of force in international law, non-State actors and legitimate self-defence’ (24 February 2021) UN Doc S/2021/247, 54.}.

\footnote{S/PV.5492 (n499) 3.} 534
\footnote{UNSC ‘Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council’ (20 September 2014) UN Doc S/2014/691.} 535
\footnote{UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249, 2.} 537
\footnote{UNSC ‘Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council’ (9 September 2015) UN Doc S/2015/693.} 538
\footnote{UNSC ‘Letter dated 31 March 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council’ (31 March 2015) UN Doc S/2015/221.} 539
\footnote{The Telegraph, ‘David Cameron’s Full Statement Calling for UK Involvement in Syria Air Strikes’ (26 November 2015) retrieved from: <https://www.telegraph.co.uk/news/politics/david-cameron/12018841/David-Camerons-full-statement-calling-for-UK-involvement-in-Syria-air-strikes.html> on 03/02/2021.} 541
\footnote{UNSC ‘Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General’ (23 September 2014) UN Doc S/2014/695.} 542
\footnote{UNSC ‘Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council’ (9 June 2016) UN Doc S/2016/523.} 543
\footnote{Starski, ‘Silence Within the Process of Normative Change and Evolution of the Prohibition on the Use of Force’ (n371) 54; but note that, more recently, the Netherlands accepted the entirety of the unwilling or unable test: UNSC Arria-formula meeting on ‘Upholding the collective security system of the Charter of the United Nations: the use of force in international law, non-State actors and legitimate self-defence’ (24 February 2021) UN Doc S/2021/247, 54.} 544
\footnote{Starski, ‘Silence Within the Process of Normative Change and Evolution of the Prohibition on the Use of Force’ (n371) 54; but note that, more recently, the Netherlands accepted the entirety of the unwilling or unable test: UNSC Arria-formula meeting on ‘Upholding the collective security system of the Charter of the United Nations: the use of force in international law, non-State actors and legitimate self-defence’ (24 February 2021) UN Doc S/2021/247, 54.} 545
Denmark, France and Norway asserted that their presence in Syria was justifiable under the collective defence of Iraq, even when, as they themselves admitted, the Syrian government was neither the attacker nor the target. Similarly, Bahrain, Jordan, Saudi Arabia and UAE answered Iraq’s call for aid without proffering a separate legal basis for their forcible endeavours in Syria. Though the decision to take the fight to Syria was, by and large, unopposed by the international community, a small number of states (Cuba, Iran, Ecuador, Russia and Venezuela) protested that, by reason of being unauthorised by either the Syrian government or the UNSC, the US-led campaign ran afoul of Article 2(4). Instead of taking a legal slant on the operation at issue, Argentina and South Africa conveyed scepticism as to its efficiency against the scourge of ISIL.

Thanks to the reformatory impact of the counterterrorist crusade in Syria, more states than ever before now believe that the unwilling or unable rule is reflective of customary law, with Austria.

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550 UN Meetings Coverage, ‘Unparalleled Global Pressures Tempered in General Assembly Debate by Appeals to Forge Bonds with Neighbours, Mitigate Man-Made, Natural Disasters’ (27 September 2014) UN Doc GA/11564.


554 UNSC Verbatim Record (7 August 2015) UN Doc S/PV.7501, 6.


557 S/2021/247 (n545) 14-15.
Estonia,558 India,559 Russia560 and Turkey561 being the latest to take up this viewpoint. The same goes for academics562 and other experts; the Bethlehem Principles563 the Chatham House,564 the Institute of International Law,565 the Leiden Policy Recommendations566 and the Tallinn Manual567 all deem unwillingness and inability as grounds for dispensing with the requirement of consent. Be that as it may, apart from being chiefly concentrated in Europe, explicit recognition of the norm under scrutiny is, much like the championship of expansionism in the ex ante armed attack context, stymied by persistent dissent568 (see, besides the objections to foreign interference in Syria, the standpoints of Brazil,569 China,570 France571 and Mexico572). Therefore, normative desirability aside, it is difficult to conclude, with reasonable certainty, that the unwilling or unable test has ascended to customary law status. Naturally, this factors into Chapter Six’s assessment of the overall adequacy of the existing ex post armed attack framework.

Returning to the subject of temporality, it goes without saying that the intervention in Syria, a yet another UNSC-approved, after-the-fact measure presented as counterterror self-defence, lends further credence to the expansionist interpretation of the ex post armed attack framework. What drove Iraq to request collective self-defence was the very predicament that afflicted the reprisal-takers of the 20th century, that is, the exigency of deterring routine assaults from a cross-border sanctuary.573 Of particular note are those states that, having been directly targeted by ISIL in the past, claimed entitlement to self-defence irrespective of Iraq’s plea for collective assistance. On 20 and 23 July 2015, ISIL butchered a total of thirty-three civilians as part of its incursions into Turkey, which, on 24 July, declared itself individually qualified for self-defence and joined the Western coalition in Syria to expunge the threat radiating therefrom.574 Comparably, on 20 November 2015, France, acting with the EU’s full backing,575 invoked Article 51 in response to an ISIL-engineered attack that shook the country’s capital one week prior.576 Although the foregoing proclamation postdated France’s

558 S/2021/247 (n545) 32.
559 S/2021/247 (n545) 38-39.
560 S/2021/247 (n545) 66-67.
561 S/2021/247 (n545) 79-80.
562 Wedgewood (n328) 565; R. Kolb, ‘The Belgian Intervention in the Congo’ in T. Ruys, O. Corten and A. Hofer (eds), The Use of Force in International Law: A Case-Based Approach (Oxford University Press, 2018) 82; Murphy (n372) 66; Tams and Devaney (n366) 98-100.
563 Bethlehem (n356) 776 (principles 11-12).
564 Chatham House (n203) 11-12.
567 Tallinn Manual 2.0 (n203) 347.
569 American Society of International Law (n545) 51; S/2021/247 (n545) 20.
570 S/2021/247 (n545) 22-24.
572 S/2021/247 (n545) 49-50.
573 S/2014/691 (n535).
574 S/2015/563 (n540).
576 UNSC Verbatim Record (20 November 2015) UN Doc S/PV.7565, 2.
engagement in the US-led air raids in Syria, the French government stressed that the claim of individual self-defence stood independently of that of its collective counterpart.

While the above-examined operations each broke new ground in the development of the ex post armed attack framework, the concluding case study, the 2020 targeted killing of a high-ranking Iranian official, was selected on a different account, that is, as a topical illustration of how states approach what is, by both the restrictionist and the expansionist metric, a conspicuous armed reprisal. The date was 3 January 2020, when, on the outskirts of Baghdad, a US drone eliminated Iran’s top general, Qasem Soleimani, as well as five men belonging to Kata’ib Hezbollah, an Iraq-based, Iran-sponsored militia with a long-standing vendetta against the US. In appealing to Article 51, the US maintained that it acted in ‘direct response to an escalating series of armed attacks in recent months by Iran and Iranian-supported militias’, all the while emphasising the urgency of ‘deterring future Iranian attack plans’. In particular, the US complained of two offensives that were carried out by the Kata’ib Hezbollah fighters in Iraq, the first of which, a rocket attack on a US air base, happened on 27 December 2019, and the second one, a mob onslaught on the US embassy, occurred four days later.

Though the US government insisted that the two incidents, which inflicted only limited material damage and a single fatality, were masterminded by Soleimani himself, it produced no evidence to back up its accusations, nor did it substantiate the threat of further aggression by Iran. This, together with the temporal mismatch between the action and the reaction, as well as President Trump’s characterisation of the latter as ‘retaliation’, point towards a lack of necessity for self-defence. More critically, it is questionable that the two provocations were severe enough to activate Article 51, especially considering that the US had bombed Kata’ib Hezbollah’s headquarters on 29 December 2019, which meant that the subsequent storming of the US embassy in Baghdad, a zero-casualty riot, was the only attack to have not been met with force before 3 January 2020.

In spite of its glaring incompatibility with the jus ad bellum, Soleimani’s assassination elicited surprisingly mixed opinions. The tenor of the majority of states’ press releases was neutral and de-

577 Reuters, ‘France Launches Air Strikes against Islamic State in Syria’ (n547).
579 UNSC Verbatim Record (9 January 2020) UN Doc S/PV.8699, 23.
581 Official statement by the US Department of Defense (n580).
583 Official statement by the US Department of Defense (n580).
584 Corn and VanLandingham (n356).
escalatory, as was the language opted for by the EU, NATO and the UN Secretary-General. Despite taking a dim view of all external meddling in the Middle Eastern states, the Arab League refrained from admonishing the US. Those rallying behind the US were quick to rubber-stamp its right to self-defence (Georgia, Israel, Kosovo, Latvia, Lithuania and the UK), even if some did so less explicitly than others (Albania, Brazil and Romania). The disagreeing voices were twofold, in that they either condemned the US for violating Article 2(4) (China, Iraq, Lebanon, ...
Malaysia, Nicaragua, Russia, Syria and Venezuela) or, less pointedly, chastised it for further aggravating the security environment in the Middle East (Cuba and Turkey). Incredibly, none used the word ‘reprisal’ to connote the US drone strike.

Much to the world’s dismay, Soleimani’s demise was not the closing chapter in the US-Iran saga. On 8 January 2020, Iran fired a volley of missiles at the military bases of the anti-ISIL coalition in Iraq, wounding eleven US soldiers in the process. Syria was the only state to receive the move positively. Even though the greater part of the global community was, once again, intent on calming the situation without apportioning blame, a sizeable faction did rebuke Iran for violating Article 2(4) (Bulgaria, Canada, Estonia, the EU, Finland, France, Germany, Guatemala, Hong Kong, India, Indonesia, Iran, Jordan, Japan, Jordan, Kuwait, Lebanon, Lithuania, Luxembourg, Malaysia, Mali, Mexico, Mozambique, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russia, Romania, Saudi Arabia, Singapore, South Africa, Spain, Switzerland, Syria, the United Arab Emirates, Ukraine, the United Kingdom, the United States, Venezuela, and Turkey) or, less pointedly, chastised it for

604 S/PV.8699 (n579) 27.
606 S/PV.8699 (n579) 36.
608 Official statement by the Cuban Foreign Minister Rodriguez (3 January 2020) retrieved from: <https://twitter.com/BrunoRguezP/status/1213246491780886529> on 16/01/2021.
611 Anssari and Nüßberger (n590).
Greece, 620 Iraq, 621 Ireland, 622 Italy, 623 Latvia, 624 Lithuania, 625 NATO, 626 the Netherlands, 627 Norway, 628 Saudi Arabia, 629 Slovenia 630 and the UK 631. Whatever semblance of legitimacy the airstrike may have had was marred by Iran’s double standard for ex post facto counterattacks. As we may recollect, the Iranian government took a categorical stand against such acts in 1993 (in its submissions to the ICJ) and 2006 (with respect to Israel’s battle against Hezbollah), which it doubled down on three weeks after hitting back at the US, 632 that is, after it itself participated in what it has continually rebuked as the practice of unlawful reprisals. Iran, too, cloaked its conduct in the jargon of self-defence, when, in a letter to the UNSC, it established a causal link between its appeal to Article 51 and the murder of General Soleimani, 633 and, by impressing upon the Council the continuing antagonism by the US, 634 it alluded to the necessity of deterring further bloodshed. But, by all accounts, self-defence was no more than a pretence to, as President Rouhani and other Iranian officials put it, ‘take revenge’ for Soleimani’s death. 635

625 Official statement by the Lithuanian Foreign Minister Linkevičius (n594).
626 NATO, official statement by Secretary General Stoltenberg (8 January 2020) retrieved from: <https://twitter.com/jensstoltenberg/status/1214877059958398976?s=20> on 18/01/2021.
629 UNSC Verbatim Record (10 January 2020) UN Doc S/PV.8699 (Resumption 1), 8.
631 Official statement by the UK Foreign Secretary Raab (n596).
Even by expansionist standards, the Iranian riposte—much like the operation that provoked it—comes across as a fairly uncontroversial example of a reprisal, making it all the more surprising that Norway\textsuperscript{636} was the only state to designate it as such. Less direct was Austria’s insinuation that Iran took to arms for vengeance.\textsuperscript{637} When viewed as a whole, the reactions to the two vengeful counterattacks exemplify states’ reluctance to tag as ‘reprisal’ any action that merits it. This reservedness is antithetical to the indiscriminate eagerness that, in the 1950s-1980s, pigeonholed such acts as reprisals and, in effect, enthroned temporality - and the corresponding objective methodology - as the identifier of the \textit{ex post} armed attack doctrines. Bearing in mind that the objective approach equates \textit{after-the-fact} counterattacks to reprisals, and paying heed to their ever-growing embrace as self-defence, the present thesis surmises that states began avoiding the term ‘reprisal’ for fear of it being misconstrued as a sweeping denial of \textit{ex post facto} invocability of Article 51.

Certainly, no fewer than ninety-four states have, from 1990 onwards, accepted the capacity of \textit{after-the-fact} counterattacks to constitute self-defence, with nearly half of them also having partaken in such acts. Although support therefor has, through the normative pull of evolving warfare, started building momentum in the 1980s, it was really the 9/11 tragedy that, as an unprecedented display of the military might of non-state actors, set off a multidimensional breakaway from the restrictionist orthodoxy. The preclusive value of Operation Enduring Freedom, the first \textit{ex post facto} counterattack to be universally upheld under Article 51, has henceforth been followed with remarkable consistency, something that cannot be said for the global community’s treatment of anticipatory self-defence. Whilst, as recorded in Chapter Three, a total of fourteen states have, in the last two decades alone, rejected the use of force against imminent threats, blanket opposition to \textit{ex post facto} self-defence has all but dissipated, marking a radical departure from the state practice and \textit{opinio juris} of the 1950s-1980s. The only two outliers, Iran and Saudi Arabia, have themselves had a hand in the very conduct they denounced.

The relative one-mindedness of the international community was seemingly disrupted in 2021, when, in a communiqué to the UNSC, Azerbaijan proclaimed that ‘[a]s long as the [armed] attack lasts, the victim State is entitled to react.’\textsuperscript{638} Still, it would be rash to treat the quoted remark as an affirmation of the objective methodology, insomuch as, under the currently predominant understanding of self-defence, the end of an armed attack in the legal sense need not coincide with the suspension of the use of force. A case in point is a statement the Netherlands made on the same occasion, wherein, in holding that the exercisability of self-defence lapses with the consummation of an armed attack, the Dutch government accentuated that the victim ought to be accorded a margin of appreciation in deciding if that ‘armed attack has really ended, or whether there is merely a temporary lull.’\textsuperscript{639} In similar fashion, the EU’s Independent International Fact-Finding Mission on the Conflict in Georgia observed that the restrictionist philosophy, which sees any interruption in fighting as preclusive of self-defence, has become the ‘minority view’, with most authorities now allowing for a reasonable

\textsuperscript{636} The Herald (n628).
\textsuperscript{638} S/2021/247 (n545) 16.
\textsuperscript{639} S/2021/247 (n545) 54.
The switch to expansionism has also reverberated through academia, which, though by no means dissent-free, now largely conceives of select after-the-fact counterattacks as self-defence, an actuality reflected in the Bethlehem Principles, the Leiden Policy Recommendations and the Tallinn Manual. Not lagging behind, the ILA remarked: ‘[W]hile self-defence cannot justify ‘all-out’ war to destroy the enemy, the forcible measures can include the need to defend the State from the continuation of attacks, and not only repel the attack of the moment.’ That the ICJ is on the same wavelength is evident by its pronouncements in the 2003 Oil Platforms judgment. Therein, it indicated that, had the assaults on US ships been attributable to Iran, and had appropriate objects been struck in a manner commensurate with the said assaults, the US riposte would have been in line with Article 51. The Court was, furthermore, open to the possibility of low-grade attacks triggering self-defence through their collective imprint, a theory that had proved controversial in the 1945-1980 period, when it was consistently spurned for sanctioning the actus reus of reprisals (for a reminder, refer back to Section 5.2.1.). Ergo, despite finding against the US’s right to self-defence, the ICJ clearly rebuffed Iran’s suggestion that every ex post facto counterattack must perforce be an armed reprisal. The takeaway from Oil Platforms, and from the totality of the data examined, is that the measures under discussion are lawful if compliant with the principles of necessity and proportionality. Indeed, once the objective methodology ceased being the infallible taxonomer of ex post armed attack operations, the resultant lacuna was expectedly filled by the necessity/proportionality-based approach.

All in all, having surveyed the relevant evidence of customary law, as corroborated by the subsidiary sources of international law, the present study arrives at the conclusion that a defensively disposed variant of ex post facto counterattacks, measures historically classed as reprisals, has come to be redefined as self-defence. The law on the use of force has, through the relaxation of the ex post factum armed attack framework, finally caught up with some of the realities that obsolesced the traditional conceptualisation of self-defence, notwithstanding that, as we shall discover in Chapter Six, the legal status quo still leaves a great deal to be desired.

643 Bethlehem (n356) 775-777.
644 Leiden Policy Recommendations (n372) 541-542.
645 Tallinn Manual 2.0 (n203) 353-354.
646 ILA (n371) 11.
647 Oil Platforms (n202) 58-64, 71-72 & 77.
648 Oil Platforms (n202) 64; Armed Activities on the Territory of the Congo (n367) 146.
5.4. Concluding Remarks

Chapter Five swept through three temporal blocks (1945-1980, 1980-1990 and 1990-present) with an eye to mapping out the evolution of the relationship between self-defence and armed reprisals, paying particular attention to the distinguishing features of temporality, intent, necessity and proportionality. It was found that, in the first period under review, the temporality-based objective approach, one of the three methodologies utilising the forenamed distinguishers, was the only valid formula for identifying reprisals. That being the case, all reprisals were preconceived countermeasures against past transgressions, whereas all self-defence was extemporaneous resistance against attacks in progress. The dawn of disillusionment with the ex post armed attack framework was traced back to the 1980s, when states became more conscious of how the metamorphosing warfare, namely the peril of forays by private actors from a safe haven, often worked to preclude legitimate self-defence. These pent-up frustrations reached a boiling point with the overwhelmingly positive reception of Operation Enduring Freedom. It, like WWII before it, was a Grotian Moment in the history of the jus ad bellum, a defining milestone that put into motion the underhanded rebranding of deterrence-oriented reprisals as self-defence and, climactically, caused temporality to lose its standing as a foolproof differentiator of the two doctrines. But how has this reshaped the specific parameters of the ex post armed attack framework, and how effective is the consequent configuration at managing 21st-century phenomena? These are the issues that make up the main research question of the present thesis and, as such, are tackled head-on in the final substantive chapter.
6. The Status Quo in the Ex Post Armed Attack Context: The Good, the Bad and the Ugly

Albeit a step forward in terms of adaptation to modern warfare, the injection of reprisal-exclusive qualities into Article 51 of the UN Charter has come at the cost of doctrinal fog, a setback that, as underlined in Chapter One, hinders the functionality of the law on the use of force. Bent on reinstating some of that lost legal certainty, Chapter Six endeavours to rediscover the elusive line between lawful self-defence and unlawful reprisals. Additionally, since the two doctrines are conflated not only with each other but also with *ex ante* armed attack measures, the present chapter takes care to mark off reactive self-defence/reprisals from anticipatory/preventive action. Doing so aids the formulation of an original methodology for the delineation of self-defence and reprisals, a tool subsequently used to pinpoint areas where the law has not kept up with the changes on the battlefield.

6.1. The Supplantation of the Objective Approach by the Necessity/Proportionality-Based Method

Chapter Five revealed that, in its rapid decline, the restrictionist-inspired objective approach to the self-defence/reprisal duality has, as a matter of logical progression, been superseded by the expansionism-compatible necessity/proportionality-based method. With that in mind, the present section sheds light on how the expansionist renditions of the principles of necessity and proportionality, the two cornerstones of self-defence, set the inherent right apart from armed reprisals. Their demarcation is of added significance now that the former has intruded on what was the exclusive temporal domain of the latter. As a result of the expansionist arc chronicled in Chapter Five, the principle of necessity has quit restricting self-defence to the active phase of an attack and, by the same token, moved to the forefront the formerly insignificant standard of immediacy. Generally conceptualised as a facet of necessity, immediacy is the requirement of temporal closeness between the forcible riposte and the initiating offensive, which, as enunciated in the previous chapter, is premised on the idea of the indispensability of self-defence gradually decreasing with time. Accordingly, the current *ex post* armed attack framework forbids the defender from enacting any unduly delayed counteraction.¹

The refocus from the activeness of an attack to the timeliness of the reaction should not, in any case, be interpreted as a blank check for *ex post facto* counterattacks. This is because the principle of necessity is, as expounded in Chapter Two, also influenced by non-temporal considerations. The availability of non-forcible alternatives may foreclose even the speediest of responses, and, more fundamentally, not every armed attack warrants self-defence, nor was the contrary ever argued by the pioneers of expansionism. In fact, as documented throughout Chapter Five, those engaged in after-the-fact operations have, from as early as the 1950s, conditioned their recourse to force on the necessity of deterring a continuing threat of aggression. Today, there is general agreement, among states and scholars, that the permissibility of *ex post facto* self-defence is contingent on further raids being reasonably expected to occur in the future. This condition, despite seeming straightforward on the surface, has been quite difficult to pin down in practice, with different authorities advancing distinct, potentially conflicting, perspectives on what makes re-offence likely. By sorting through the outward disparities, the present thesis is able to tease out two indicators that appear to carry the most weight: the modality of an armed attack and definite intelligence on follow-up offensives.

The view most consistent with state practice is that the occurrence of a string of interrelated strikes, something once dismissed as legally irrelevant (for a refresher, review Chapter Five’s Section 5.2.1.), is itself a sufficient foundation for after-the-fact self-defence. As per the argument unpacked in Chapter Five, a state that repeatedly breaches Article 2(4) is, *ipsa facta*, presumed to re-offend again, an inference that cannot be drawn from a one-time infraction – at least not without tangible proof of more assaults being plotted. Obviously, any such presumption must be rebuttable, insofar as the attacker may, at any time, choose to change course and signal the discontinuation of attacks. When dealing with serial aggression, it is imperative to differentiate between, on the one hand, offensives that each amount to an armed attack and, on the other hand, those that can only do so cumulatively. Chapter Five conveyed that, for most of the second half of the 20th century, the latter permutation, also known as the accumulation of events theory, was widely repudiated as a sneaky proxy for the doctrine of armed reprisals. Predictably, that disapproval has faded now that certain reprisals have, even if only vicariously through self-defence, been integrated into the *jus ad bellum*. That is not to say that the legality of the accumulation of events theory is a settled matter; whilst, as evinced by the

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Bethlehem Principles, 4 Leiden Policy Recommendations, 4 and the Tallinn Manual, 5 academic approval of the contested norm has never been higher, 6 few states have expressly come out in its support.

Some pundits take a more rigorous stance, positing that every ex post facto defender must, notwithstanding the modality of the armed attack, furnish precise evidence of another offensive being in the works. 7 But, as well-conceived as the proposed qualifiers may be, it should be recognised that Operation Enduring Freedom, the best-received deterrent counterattack of our time, was sparked by a single attack – the Al-Qaeda-perpetrated 9/11 massacre - absent solid proof of future terror plots. Although orchestrated by the same organisation, the 1998 onslaught on US embassies was, temporally speaking, too distant to be grouped together with the 9/11 attacks. 8 Regardless, one can hardly deny that similar assaults would have been likely had the US not dismantled Al-Qaeda’s operational capacity. Ultimately, even though the admissibility of ex post facto counterattacks is no exact science, best predisposed to lawfulness are claims that, on top of being precipitated by recurrent offensives, provide concrete evidence of a looming resumption of hostilities. If either of the two elements is missing, the claimant could, depending on the context, find itself deprived of reliance on Article 51.

As outlined in Chapter Two, an armed attack can also take the shape of a territorial occupation, an indefinite violation of Article 2(4), whose termination is, in contrast with one-off offensives (e.g. a momentary rain of missiles), theoretically conditional on the target state (or the UNSC) taking a positive action (recovery of annexed territory). That conquest never sheds its wrongfulness was affirmed by the UNGA Resolution 2625 (XXV), which, in order to impede the conqueror from reaping the fruits of aggression, instructs third states not to invest such corollaries with de jure recognition. 9 That being so, the time frame for self-defence by a (partially) conquered state is thought to match the

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5 Tallinn Manual 2.0 (n2) 342.
8 But note that it was already in the 1990s that the US considered itself to be in an armed conflict with Al-Qaeda, see C.A. Bradley and J.L. Goldsmith, ‘Congressional Authorization and the War on Terrorism’ (2005) 118 Harvard Law Review 2047, 2068.
length of the occupation.\textsuperscript{10} This is, to be sure, subject to the caveat that the necessity of the use of force is unlikely to persist indefinitely, a point we shall return to further below. In theory, counteroffensives to oust the occupying force are coincident, in time and place, with the opening armed attack and, as such, are in accord with both the restrictionist and the expansionist reading of Article 51.

This actuality is best illustrated by the international community's appraisal of the Falklands War, a two-month-long crisis that erupted when, on 2 April 1982, Argentinian forces successfully stormed and overtook the British-governed Falkland Islands, South Georgia and the South Sandwich Islands.\textsuperscript{11} While the British troops stationed thereon did not resist the initial takeover,\textsuperscript{12} both Argentina\textsuperscript{13} and the UK\textsuperscript{14} claimed title to the above-named archipelagos and, with that mindset, each invoked Article 51 against the perceived invader. Though it was already on 13 April that the UK notified the UNSC of its recovery operation, the main phase thereof did not kick off until 22 April,\textsuperscript{15} i.e. more than two weeks after Argentina's capture of the islands in question. Knowing that the UK had been in charge of the Falklands since 1833, that is, since long before forceful acquisition of territory was outlawed, the proponents of Argentina's proprietorship of the islands were, by and large, opposed to the non-peaceful repossession thereof (Algeria,\textsuperscript{16} Bolivia,\textsuperscript{17} Brazil,\textsuperscript{18} China,\textsuperscript{19} Colombia,\textsuperscript{20} Costa Rica,\textsuperscript{21} Czechoslovakia,\textsuperscript{22} Dominican Republic,\textsuperscript{23} the DRC,\textsuperscript{24} Equatorial Guinea,\textsuperscript{25} East Germany,\textsuperscript{26} Guatemala,\textsuperscript{27}

\begin{footnotes}
\item[11] Henry (n10) 363.
\item[13] S/PV.2346 (n12) 12.
\item[15] Green (n1) 109.
\item[16] UNGA Verbatim Record (4 November 1982) UN Doc A/37/PV.54, paras. 17-20.
\item[17] UNSC Verbatim Record (22 May 1982) UN Doc S/PV.2362, para. 154.
\item[18] UNSC Verbatim Record (3 April 1982) UN Doc S/PV.2350, paras. 51-52.
\item[19] UNSC Verbatim Record (2 April 1982) UN Doc S/PV.2349, paras. 270-272.
\item[20] UNSC Verbatim Record (23 May 1982) UN Doc S/PV.2363, paras. 93-98.
\item[21] UNGA Verbatim Record (3 November 1982) UN Doc A/37/PV.52, para. 67-68.
\item[22] A/37/PV.54 (n16) 29.
\item[23] UNGA Verbatim Record (3 November 1982) UN Doc A/37/PV.53, paras. 135-137.
\item[24] A/37/PV.54 (n16) 60-69.
\item[25] S/PV.2363 (n20) 64-66.
\item[26] A/37/PV.52 (n21) 145-146.
\item[27] S/PV.2362 (n17) 243-248.
\end{footnotes}
Guyana,\textsuperscript{28} Haiti,\textsuperscript{29} Honduras,\textsuperscript{30} Hungary,\textsuperscript{31} Jordan,\textsuperscript{32} Madagascar,\textsuperscript{33} Mexico,\textsuperscript{34} Mongolia,\textsuperscript{35} Poland,\textsuperscript{36} Republic of the Congo,\textsuperscript{37} Spain,\textsuperscript{38} Suriname,\textsuperscript{39} Uganda,\textsuperscript{40} Uruguay,\textsuperscript{41} Yugoslavia\textsuperscript{42} and Zaire\textsuperscript{43}).

Meanwhile, Afghanistan,\textsuperscript{44} Albania,\textsuperscript{45} Belarus,\textsuperscript{46} Cuba,\textsuperscript{47} El Salvador,\textsuperscript{48} Laos,\textsuperscript{49} Nicaragua,\textsuperscript{50} Panama,\textsuperscript{51} Peru,\textsuperscript{52} the Soviet Union,\textsuperscript{53} Ukraine\textsuperscript{54} and Vietnam\textsuperscript{55} avowed that Argentina was within its right to exert force on 2 April 1982, inasmuch as the ramifications of the original armed attack by the UK - the 1833 expulsion of Argentinian colonists - were still being felt. On the other side of the coin, those sympathising with the UK (Antigua and Barbuda,\textsuperscript{56} Australia,\textsuperscript{57} Germany,\textsuperscript{58} New Zealand,\textsuperscript{59} Sierra Leone,\textsuperscript{60} the US\textsuperscript{61} and Zaire\textsuperscript{62}) held it qualified to retake any territories that had been wrested from its control. Thus, the stalwarts of either party all believed that the rightful sovereign could exercise self-defence for as long as the islands stayed in the clutches of a foreign power. This would explain why, at a time when temporality still reigned supreme as the classifier of \textit{ex post} armed attack conduct, none of the eighty-seven UN speakers deemed it fit to depict the UK measure as a reprisal. Correspondingly, neither premeditation nor the passage of two weeks was offered as grounds for the unlawfulness of the reclamation of the Falklands.

\textsuperscript{28} S/PV.2349 (n19) 261-262.
\textsuperscript{29} A/37/PV.53 (n23) 144-147.
\textsuperscript{30} S/PV.2363 (n20) 21-24.
\textsuperscript{31} A/37/PV.53 (n23) 6-7.
\textsuperscript{32} S/PV.2350 (n18) 62.
\textsuperscript{33} UNGA Verbatim Record (4 November 1982) UN Doc A/37/PV.55, paras. 2-5 & 14-15.
\textsuperscript{34} S/PV.2362 (n17) 125.
\textsuperscript{35} A/37/PV.54 (n16) 95-99.
\textsuperscript{36} S/PV.2349 (n19) 263.
\textsuperscript{37} A/37/PV.54 (n16) 60-62 & 68-69.
\textsuperscript{38} S/PV.2350 (n18) 206-207.
\textsuperscript{39} A/37/PV.52 (n21) 121-129.
\textsuperscript{40} S/PV.2350 (n18) 213-215.
\textsuperscript{41} S/PV.2362 (n17) 26-31.
\textsuperscript{42} UNSC Verbatim Record (26 May 1982) UN Doc S/PV.2368, paras. 24-26.
\textsuperscript{43} UNSC Verbatim Record (24 May 1982) UN Doc S/PV.2364, para. 52.
\textsuperscript{44} A/37/PV.55 (n33) 232.
\textsuperscript{45} A/37/PV.53 (n23) 173-175.
\textsuperscript{46} A/37/PV.53 (n23) 197-199.
\textsuperscript{47} S/PV.2362 (n17) 139-141.
\textsuperscript{48} S/PV.2363 (n20) 109-111.
\textsuperscript{49} S/PV.2364 (n43) 79.
\textsuperscript{50} A/37/PV.52 (n21) 86.
\textsuperscript{51} UNSC Verbatim Record (2 June 1982) UN Doc S/PV.2371, paras. 22-24.
\textsuperscript{52} S/PV.2363 (n20) 158-160.
\textsuperscript{54} A/37/PV.54 (n16) 101-105.
\textsuperscript{55} UNSC ‘Letter dated 12 May 1982 from the Charge d’affaires a.i. of the Permanent Mission of Viet Nam to the United Nations addressed to the Secretary-General’ (12 May 1982) UN Doc S/15076.
\textsuperscript{56} UNSC Verbatim Record (21 May 1982) UN Doc S/PV.2360, para. 232.
\textsuperscript{57} S/PV.2360 (n56) 220-221.
\textsuperscript{58} S/PV.2368 (n42) 11.
\textsuperscript{59} S/PV.2363 (n20) 52.
\textsuperscript{60} A/37/PV.55 (n33) 197.
\textsuperscript{61} S/PV.2362 (n17) 225.
\textsuperscript{62} S/PV.2364 (n43) 35 & 46.
To briefly recapitulate, the justifiability of self-defence in the (temporary) aftermath of hostilities hinges on various circumstances, including but perhaps not limited to, the modality of the armed attack, evidence of upcoming offensives, and the viability of non-violent avenues. Should an ex post facto action be judged necessary, its permissible timing would then be worked out by reference to the standard of immediacy. Unlike its ex ante counterpart, which, as illuminated in Chapter Three, imposes a one-size-fits-all yardstick for anticipatory action (i.e. nearness to the impending strike’s launch), the ex post armed attack framework does not prescribe a universal deadline for the exercise of self-defence, at least not anymore. Because the said right is no longer categorically extinguished by the conclusion of the triggering attack, immediacy has developed into a highly context-dependent metric.

Several logistical factors are, according to states and jurists, capable of offsetting what would otherwise count as undue delay on the part of the defender: attribution of the armed attack (intelligence-gathering processes, evaluation of forensic evidence, witness interviews, etc.), calibration of a proportionate counteraction (mobilisation of forces, strategising, minimisation of collateral damage, etc.), geographical distance from the target destination (remote locations take longer to reach, and military adventures conducted therein are logistically harder to coordinate). Essentially, the assessment of immediacy is a balancing act between, on the one side, the requisite of temporal proximity to the original attack and, on the other side, the above-listed logistical factors (i.e. the case-specific particulars).

Not helping matters is the fact that, rather unfortunately, the academic literature offers antipodal viewpoints on which variable ought to outweigh the other. Taking as an example the 1993 US missile raid on Baghdad, numerous authors asserted that the two-month gap from the provocation - the attempt on President Bush’s life – was, in its own right, enough to debar the said raid from the realm of self-defence. At the end of the day, the botched murder plot was not followed up by additional assaults, nor was there any publicly disclosed information on such assaults being prepared by Iraq.

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63 Starski (n7) 521; Ruys (n2) 99; Y. Beer, ‘When Should a Lawful War of Self-Defence End?’ (2022) 33 European Journal of International Law 889, 910.
65 European Union, Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (September 2009) Volume II, 247; Tallinn Manual 2.0 (n2) 353; N. Lubell, Extraterritorial Use of Force Against Non-State Actors (Oxford University Press, 2010) 44; Grimal and Sundaram (n1) 328; Beer, ‘When Should a Lawful War of Self-Defence End?’ (n63) 910; Dahal (n64) 1113; Starski (n7) 521; Surchin (n64) 474-475; O’Meara (n10) 93; Oil Platforms, Counter-Memorial and Counter-claim submitted by the United States of America (n64) 144; T.D. Gill, ‘The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy’ (2006) 11 Journal of Conflict and Security Law 361, 746; Ruys (n2) 100-102; UNSC Verbatim Record (7 April 1964) UN Doc S/PV.1109, paras. 23-24.
66 Gill, ‘The Temporal Dimension of Self-Defence’ (n65) 746; Ruys (n2) 101-102; Lubell (n65) 44-45; Green (n1) 110-111; O’Meara (n10) 93.
Yet, cognizant that self-defence presupposes the elimination of reasonable doubt regarding the perpetrator’s identity, others felt the US was right to restrain itself until the denouement of its investigation into the instigating crime.\(^6\) Going even further, Lobel opines that the US was premature in its resorting to force, considering that it neglected to await the Kuwaiti courts’ holdings on Iraq’s responsibility.\(^6\) On that note, it may be recalled that the preponderance of criticism of the succeeding US operation, the 1998 counterblow for the embassy blasts in Africa, had to do with weak evidential support for, *inter alia*, the manufacture of chemical weapons in Sudan. What was not objected to was the nearly two-week interval between the provocative acts and the forcible riposte.

There is, admittedly, some merit to sacrificing the sternness of immediacy in favour of a stricter evidentiary standard, given that the reverse would increase the odds of self-defence being misdirected against an innocent state. Just as worryingly, overly stringent temporality is conducive to hasty, ill-judged and disproportionate actions, which, by inciting equally imprudent reactions, contribute to the perpetuation of the cycle of violence. Nevertheless, it is for good reason that unilateral force is prohibited by default, that is, permitted only when a state’s territorial integrity and/or political independence cannot be secured through any other means. The existence of such a defensive necessity is, as elucidated above, determined by the lack of pacific solutions to an ongoing threat, not by the amount of time needed to attribute an armed attack or come up with an adequate plan of action. It would be absurd to suggest that self-defence remains admissible for as long as the victim is investigating the inaugural transgression, irrespective of whether that inquiry takes weeks, months or years to complete. Inevitably, the tide will turn when, in the absence of further breaches of Article 2(4), a military solution stops being the only option, whereafter any counterattack would take on an offensive disposition.

Working with that assumption, one has to wonder whether the decision to prioritise peaceful remedies estops the attacked party from falling back on self-defence, should the said remedies prove unfruitful. Some academics reply in the affirmative, insisting that, by using force after the breakdown of negotiations, the victim state would, in effect, be punishing the offender for refusing to give in to the peace demands.\(^7\) Other commentators reckon that, *a contrario*, the prioritisation of pacifism does not automatically vitiate the defensiveness of fallback on force.\(^7\) For the longest of time, a precursory attempt at an amicable settlement was, as relayed in Chapters Four and Five, indicative of the voluntariness – as opposed to spontaneous impulsiveness – of any subsequent use of force and, as such, could not be reconciled with the classical conception of self-defence. Nonetheless, since the law-shaping realities of yore are poles apart from those in place today, some of what passed as offensive in 1945 has, by dint of the ensuing transformation of warfare, been requalified as defensive.

At present, the reality-law configuration is such that, in certain situations, a would-be defender is obliged to open a dialogue before being allowed to take to arms. Nowhere is this more palpable than in scenarios involving an exterritorial safe haven, wherein the principles of due diligence and state sovereignty accord priority to action by the host state, failing which the recipient of non-state aggression must, if it is to fight back, attempt to procure the host’s consent to intervention. Doing so is not, at least not necessarily, a sign of the threat of force subsiding. Quite the contrary, owing to both

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\(^6\) Kritsiotis (n1) 168-170; Surchin (n64) 474-475.

\(^6\) Lobel (n2) 548.

\(^7\) Williamson (n1) 117.

\(^7\) Starski (n7) 521; Ruys (n2) 100 & 181-182; UNSC Verbatim Record (14 July 2006) UN Doc S/PV.5489, 8.
the pervasive impotence of the UNSC and the ambiguous legality of the unwilling or unable test, diplomacy may be the only lawful route to protection against otherwise untouchable aggressors. It follows that the failure to obtain the host’s invitation would leave the target state remediless and, in consequence, amplify the de facto necessity of leveraging force. Where an armed clash is purely inter-state, the collapse of peace talks could incentivise the wrongdoer to resume periodic attacks and, by extension, revive the need for ex post facto self-defence. Hence, for one reason or another, the pursuit of diplomatic channels cannot, as a rule, forfeit the victim’s ability to plead Article 51 at a later date. It is also worth reminding ourselves that Operation Enduring Freedom, the most well-received after-the-fact counterattack of the UN era, was embarked on only after the Taliban - the de facto government of the host state - had repudiated the US’s ultimatum. Still, the requirement of immediacy must – and this cannot be stressed enough – be construed as restrictively as feasible, lest states be able to disguise aggression as self-defence.

Whereas estimations of necessity, and the concomitant standard of immediacy, answer the questions of ‘if’ and ‘when’ to respond with force, the actual enforcement of self-defence operations is, as pointed out in Chapter Two, governed by the principle of proportionality. Traditionally, the attacked state’s eligibility for Article 51 expired with the cessation of violent activity, and with that being the case, the commensurateness of self-defensive measures was gauged against one goal and one goal only: the halting and repelling of an ongoing offensive. Now that self-defence is exercisable after the fact, the purpose of deterrence functions as an alternative touchstone against which to measure proportionality, if merited by the specifics of a particular dispute (i.e. the modality of the armed attack and evidentiary aspects). Resultantly, disproportionality has gone from being a superfluous feature of armed reprisals – an aggravating circumstance of acts that were anyway illegal due to their temporality/premeditation - to what is, together with the principle of necessity, the key determinant of the lawfulness of ex post facto counterattacks. Indeed, looking back at Chapter Five’s post-1990 case studies, excessive force was the most commonly adduced basis for classifying after-the-fact counterattacks as unlawful reprisals.

Finally, we must not forget to account for subjective dynamics, mainly those of intent and knowledge, which, as reasoned in the previous chapter, are oftentimes a reflection of the (non)fulfilment of the principles of necessity and proportionality. For instance, during the US-Iran confrontation of January 2020, the swearing of revenge in the parties’ official statements helped verify the offensive nature of their counterstrikes. It is no coincidence that, in the aforementioned case studies, those states that deplored the retaliatory/punitive intentions of self-proclaimed defenders did so whilst calling out the employment of disproportionate force (e.g. China, India, Japan, Lebanon and Russia in connection with the 2006 Israel-Hezbollah War). Having approximated the cut-off point between self-defence and reprisals, we may now zoom out and focus on demarcating the easily mixed-up ex ante and ex post armed attack frameworks.

72 S/PV.5489 (n71) 11.
73 UNSC Verbatim Record (21 July 2006) S/PV.5493 (Resumption 1), 34.
74 S/PV.5489 (n71) 12.
75 UNSC Verbatim Record (11 August 2006) UN Doc S/PV.5511, 18.
76 S/PV.5489 (n71) 7.
6.2. A Note on the Importance of a Strict Separation Between the Ex Ante and Ex Post Armed Attack Frameworks

As evidenced throughout the present thesis, the stages in an attack’s life cycle—imminence, continuity and completion—dictate the direction, rigour and context-dependence of the principles of necessity and proportionality, thereby critically influencing the outcome of their interpretation. That is why, when assessing the lawfulness of a forcible response, it is of utmost importance that the applicable temporal framework is correctly identified. Ever since its conception in the Middle Ages, the concept of reprisal has always, both etymologically and legally, stood for a reaction to prior wrongdoing. Seeing that a measure’s qualification as a reprisal rests on the law having already been broken, the aforesaid doctrine is *ipsa facto* excluded from the *ex ante* armed attack context, wherein the aim is to prevent Article 2(4) from being violated in the first place. **Ergo**, when an act’s reactivity/proactiveness is not obvious *prima facie*, one may discern reprisals/reactive self-defence from anticipatory/preventive action using the following *sine qua non* test: can it be concluded, with reasonable certainty, that the said act would have occurred notwithstanding an ostensibly connected past attack?

This interpretive exercise demands that the interpreter dig deep into the context-specific details of each conflict, looking closely at its historical background as well as the timeline of hostile encounters (the lengthier the hiatus between the events of interest, the weaker the chain of causation). Although an operation’s temporality is often too self-evident to mention, states have, on countless occasions, used causation to assign conduct to either the *ex ante* or the *ex post* armed attack category (e.g. Argentina, Ireland, Pakistan, Sierra Leone, the UK and Uruguay). Where there is substantial ambiguity, deference should be paid to the responding state’s own judgment, provided that the standpoint it takes has at least a whiff of plausibility. For an illustration of a factually inconceivable self-classification, we may refer back to Chapter Three’s coverage of the 1967 Six-Day War, the Arab-Israeli face-off that saw Israel invent an initiatory incursion by Egypt, presumably so as to avoid having to depend on the controversy-ridden anticipatory self-defence.

With the ground rules established, we may now concentrate on how, despite once being invariably conceived as reactive (as reprisals, to be specific), *ex post facto* counterattacks are increasingly commingled with doctrines belonging to the *ex ante* armed attack context. The foregoing vicissitude manifests itself in two ways: first, the use of *ex ante* armed attack terminology by states whose military ventures were, even by their own admission, prompted by preceding assaults, and second, the onlookers’ tendency to miscategorise the said ventures as anticipatory/preventive self-defence. The former phenomenon comprises, to name a few instances, South Africa and the US characterising as

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77 UNSC Verbatim Record (10 September 1972) UN Doc S/PV.1662, paras. 134-137.
78 UNSC Verbatim Record (14 December 1982) UN Doc S/PV.2407, paras. 88-91.
79 UNSC Verbatim Record (25 November 1953) UN Doc S/PV.643, para. 87.
80 UNSC Verbatim Record (16 December 1982) UN Doc S/PV.2408, paras. 76-77.
81 S/PV.2362 (n17) 257.
82 UNSC Verbatim Record (1 August 1966) UN Doc S/PV.1293, para. 38.
‘pre-emptive’ their 1982 and 1986 uses of force against Lesotho\textsuperscript{84} and Libya,\textsuperscript{85} the US describing as imminent the threats it sought to root out in 1998 (in Afghanistan and Sudan)\textsuperscript{86} and 2020 (in Iraq),\textsuperscript{87} and Turkey leaning on the same descriptor for what it aimed to avert with the 2015 airstrikes in Syria.\textsuperscript{88} Looking past the unhelpful semantics, Chapter Five showed that the above-named operations were, as per the actors themselves, each predicated on the necessity of forestalling a pattern of interconnected attacks. Because, theoretically speaking, the non-occurrence of the said attacks would have removed the exigency of deterring re-offence, the counterattacks under review were inherently reactive in character.

Weighing in on the delimitation of the \textit{ratione temporis} spectrum of self-defence, the ILA underscored that deterrence

\begin{quote}
\textit{is separate from the debate over anticipatory action when there has not previously been an actual armed attack...[I]t is a question of whether the risk of further attacks can be seen as a continuation of the initial armed attack and prevention of these being a part of the same self-defence action.}\textsuperscript{89}
\end{quote}

Such is also the understanding of a sizeable sect of academics, who caution that while deterrent counterattacks and anticipatory self-defence are both oriented toward the future, the former’s preventative dimension is simply a by-product of antecedent aggression.\textsuperscript{90} The International Group of Experts was just as careful in distinguishing between the two,\textsuperscript{91} and so was the ILC, even if only implicitly. Chapters Three and Five reported that the ILC declined to address self-defence against imminent threats, fearing it too thorny a topic, but had no qualms about clarifying what constitutes an immediate after-the-fact counterattack.\textsuperscript{92} The Commission’s willingness to tackle one but not the other betrayed a purposeful differentiation between the \textit{ex ante} and \textit{ex post} armed attack contexts. Much the same can be inferred from the jurisprudence of the ICJ, which, having also dodged the

\begin{footnotes}
\item[84] UNSC Verbatim Record (16 December 1982) UN Doc S/PV.2409, para. 146.
\item[91] Tallinn Manual 2.0 (n2) 353.
\item[92] ILC, Eighth Report of Special Rapporteur Ago on State Responsibility (29 February, 10 & 19 June 1980) UN Doc A/CN.4/318/Add.5-7, paras. 115-116 & 122.
\end{footnotes}
subject of anticipatory action,93 was forthcoming in specifying the conditions that the US, the defending state in the Oil Platforms case, had to have met for its ex post facto self-defence to have been lawful.94 More explicit was the parties’ concurrence on the unbending separation of the ex ante and ex post armed attack frameworks. In reciting the Webster formula, the foremost precedent on anticipatory self-defence, the US averred:

Whether or not these ringing words accurately express contemporary international law with respect to action taken in anticipation of a future attack, they do not apply where an attack has already taken place. Such an attack creates a need and justification for considered, proportional action as necessary to restore the security of the victim.95

Iran was no less emphatic:

The distinction between self-defence on the one hand and reprisals and punitive action on the other must be upheld…Similarly, the distinction between self-defence and preemptive self-help must be upheld. Only such anticipatory self-defence as is legitimised under the Caroline formula can be considered lawful…A strictly limited right of anticipatory self-defence in the sense of the Caroline formula must not be confused with deterrence and retaliation.96

Even so, the misuse of ex ante armed attack jargon has caused a lot of confusion as to the temporal classification of thusly skewed acts. A recent case in point is the 2020 US counteraction against Iran, which some states took to be the exercise of anticipatory self-defence (Lithuania97 and the UK98), whilst others figured it was a blowback for previous inroads by Iran-backed fighters (Austria99 and Latvia100). Also in the latter camp was Japan, whose foreign minister correctly deduced that the impugned measure ‘was conducted as a response to attacks already staged by Iran and was not a preemptive assault, which is often regarded as a violation of international law.’101 In a similar vein, the 1982 South African charge into Lesotho was labelled by Sierra Leone as an ‘anticipatory or preventive’ undertaking,102 though, as communicated in Chapter Five, factual inaccuracies may have been to

94 Oil Platforms (Iran v the United States of America) (merits) [2003] ICJ Rep 161, paras. 58-64, 71-72 & 77.
95 Oil Platforms, Counter-Memorial and Counter-claim submitted by the United States of America (n64) 147.
96 Oil Platforms, Reply and Defence to Counter-claim submitted by the Islamic Republic of Iran (n10) 153-155.
97 Official statement by the Lithuanian Minister of Foreign Affairs Linkevičius (3 January 2020) retrieved from: <https://twitter.com/LinkeviciusL/status/1213125016465891328> on 03/07/2020.
100 Official statement by the Latvian Foreign Minister Rinkēvičs (3 January 2020) retrieved from: <https://twitter.com/edgarsrinkevics/status/1213161574061551626> on 16/01/2021.
102 S/PV.2408 (n80) 76-77.
blame. More puzzlingly, Madagascar was under the impression that the 1986 US retaliation against Libya was both a reprisal and preventive self-defence, a suggestion Jordan raised in relation to the 1985 Israeli bombing of the PLO headquarters.

It would seem, based on the above-reviewed data, that it was not until the 1980s that the articulation of the objective of deterrence, a common denominator of well-nigh every state-designated reprisal, began to blend in with assertions under the ex ante armed attack framework. But what was it in the eighties that fomented the erosion of the reactive/proactive dichotomy? Without engaging in too much speculation, the present thesis surmises that once preventive self-defence made its debut in the post-1945 state practice, taking the form of the 1981 obliteration of the Osirak reactor (an Iraqi-Israeli affair covered in Chapter Three), it became easier to mistake the forward-looking orientation of reprisals for an appeal to the ex ante armed attack framework. This is perhaps why, in the scholarly discourse, the 1986, 1993 and 1998 US counterstrikes against Libya, Iraq, Afghanistan and Sudan are sometimes cited as exemplars of anticipatory/preventive self-defence, whereas analytically analogous cases, such as the 1964 UK destruction of a Yemeni stronghold, are unanimously viewed as reprisals.

Useful as it might be for comprehending the perceptions of third parties, the above-stated revelation tells us little about what drives states to mislabel their own behaviour. Supposing that the advancement of temporally mixed claims is deliberate, and not merely the product of thoughtless verbiage, how does such an obfuscating strategy benefit the claimant? One apparent advantage is that, by shrouding a reactive action in the parlance of anticipatory self-defence, the actor appears to gain an additional ground on which to seek exoneration. Doing so may optically bolster a shaky legal position and, correspondingly, boost the chances of a favourable international reception. It is a simple matter of hedging one’s bets, inasmuch as, should the global community refute the applicability of either temporal standard, the claimant can still double down on the other. A fail-safe mechanism of this sort is absent where, in taking an all-or-nothing gamble, the defender decides to rely on one temporal framework to the exclusion of the other.

One might rightly ask, what harm is there in straddling the proverbial fence between the ex ante and the ex post armed attack contexts? Here we come back full circle to Chapter One, specifically to the significance of legal certainty in the securing of the jus ad bellum’s effectiveness. As shall be demonstrated shortly, the norms of imminence and immediacy are purposefully fitted to the realities of their respective contexts, meaning the law on the use of force must, if it is to adequately acclimatise to the evolving warfare, preserve the distinctiveness of the two standards. By mixing that which should be kept apart, temporality-distorting trends threaten to derail customary law from the normatively desirable path. It is by design, not by chance, that the two temporal frameworks differ in rigidity, with imminence prescribing the same exacting test for every anticipatory action and immediacy being a

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103 UNSC Verbatim Record (16 April 1986) UN Doc S/PV.2677, 12-15.
104 UNSC Verbatim Record (3 October 1985) UN Doc S/PV.2613, paras. 139 & 142-143.
more forgiving cluster of malleable criteria. While Chapter Three did make the case for the contextualisation of imminence, any workable rendition thereof would, by virtue of the below-outlined inherencies in the *ex ante* armed attack context, have to be more demanding than immediacy.

First of all, there is a methodological contrast between the *ex ante facto* and the *ex post facto* invocability of self-defence. The latter is validated by a retrospective calculation of the total damage sustained by the defender, requiring that the force already used be severe enough to trigger Article 51, whether through a single strike or, more controversially, a series of coordinated blows. Once again, we may think back to *Oil Platforms*, and how, in evaluating the existence of an armed attack, the ICJ factored in only those assaults that had actually happened,\(^{106}\) paying no regard to whatever injury might have eventuated had the US not hit back. That is, of course, without prejudice to the role such hypothetical wrongs, and the corresponding imperative of deterrence, play in the operation of the principles of necessity and proportionality. Where the pertinent incidents are well-documented, the element of hindsight dispels any doubt as to the scale and effects of the transgressive force, thereby all but guaranteeing the identifiability of an armed attack. Such a degree of certainty is not attainable in the *ex ante* armed attack context, wherein intelligence on the proportions of a prospective offensive, no matter how specific or credible, is only ever a fallible prediction. Secondly, given that the UN’s *raison d’être* is to keep inter-state rows from spiralling into armed conflicts, the stakes are at their highest before any shots are fired. Once there has been a breach of peace, the impetus shifts from the prevention of rupture to the suspension of hostilities, and, to this end, a deterrence-driven counterattack may, if the aggressor is relentless and alternatives unavailable, be the only way to bring the fighting to a standstill. Thus, there is a stronger incentive to suppress the use of force in the first instance, including by restricting legal access to anticipatory self-defence, than there is to stifle states that, having already suffered aggression, wish to pre-empt the lawbreaker’s capacity to re-offend.

Thirdly, being as how imminence is an attack-centric metric, there is a hard limit – the point of commencement of the threatened assault – to when anticipatory self-defence can be enacted, and that is so regardless of whether we follow the classical temporal interpretation or the more modern contextual reappraisals. By comparison, immediacy is a response-focused formula, which gives it, on paper at least, an indefinite time to work with. Fourthly, onslaughts regulated by the standard of imminence are all reversible, for even the most determined aggressor may find itself forced, by any number of supervening events, to call off its armed attack. It is due to these four facets that imminence must be more rigorous than immediacy, or else it cannot ensure that anticipatory self-defence will be viable against all manner of threats, and that it will be such without leaving too much room for malpractice. This is consistent with the findings from Chapters Three and Five, which made plain that, in general, states and scholars countenance only the briefest of windows for anticipatory action (as evinced by constant references to the Webster formula, and its application to the Six-Day War), all the while tolerating month-long time-lags in the *ex post* armed attack context (as with, most prominently, Operation Enduring Freedom). Some rationalise that the definitiveness of past deeds, and the accompanying likelihood of their reoccurrence, induces higher tolerance for the temporal distance between an offensive and the response.\(^{107}\) As Schmitt puts it: ‘Once the first of the related attacks has

\(^{106}\) *Oil Platforms* (n94) 62-64.

\(^{107}\) Schachter, ‘The Right of States to Use Armed Force’ (n90) 1638; Green (n1) 97; Beard (n2) 585-586; Y. Beer, ‘Regulating Armed Reprisals: Revisiting the Scope of Lawful Self-Defense’ (2020) 59 Columbia Journal of
been launched, the question becomes whether the victim state has sufficient reliable evidence to conclude that further attacks are likely, not whether those further attacks are themselves imminent.¹⁰⁸

To paint the worst-case scenario, by associating ‘imminence’ with recurring disrespect for Article 2(4), rather than the nearing of the opening act of aggression, the international community risks transposing the leniency of the *ex post* armed attack framework into its purposively sterner *ex ante* counterpart. The erasure of the difference in strictness would, in essence, be tantamount to replacing anticipatory self-defence with the preventive modality, which, as expounded in Chapter Three, is not only dangerously exploitable but also fundamentally at odds with the UN Charter. At a more rudimentary level, the normative muddying at play impairs the *jus ad bellum’s* adaptability to tactical and technological innovation. As spelled out in the introductory chapter, an optimal modification of the law is one that is tailored to the inadequacies in need of correction, a fine-tuning achievable only with accurate knowledge of the framework under revision. The greater the legal uncertainty, the more arduous and error-prone the work of the lawmaker will be. Having delimited the internal and external boundaries of the *ex post* armed attack framework, the stage is set for us to translate that information into a comprehensive methodology and, climactically, give insight on any particularities that are yet to be harmonised with the metamorphosing face of war.

6.3. Understanding the Present to Help Shape the Future

6.3.1. An Original Methodology for the Discernment of Self-Defence from Reprisals

The different pieces of the puzzle, as studied in Chapters Two to Six, all come together in the shape of a unique three-step methodology, one that systematically separates reactive self-defence from the deceptively interchangeable reprisals. Being the ultimate arbiter of the taxonomy of *ex post* armed attack measures, the necessity/proportionality-based method must be front and centre of any faithful representation of the current state of affairs. But this centrepiece, as important as it is, does not provide for every contingency. Provision must also be made for certain well-established markers, which, albeit not as decisive as in the past, may still, to the extent compatible with the necessity/proportionality-based model, aid the disentanglement of the *ex post* armed attack doctrines. Even though reprisals and self-defence now co-occupy the *ex post facto* sphere, temporality has retained some of its utility as a distinguishing feature. Since reprisals have only ever denoted premeditated reactions to consummated infractions, any act that displays temporospatial symmetry with the stirring attack is, by definition, disqualified from the said doctrine’s scope.

Serving a more ancillary function is the responding state’s intent, variations of which have, from long before the birth of the UN, been consistently ascribed to self-defence and reprisals, with the former being conceptualised as protection-driven and the latter as punishment/revenge-fuelled. Although proof of motivation cannot, by itself, negate an objectively (in)valid claim of self-defence, it may be

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¹⁰⁸ Schmitt, ‘Counter-Terrorism and the Use of Force in International Law’ (n64) 32.

Transnational Law 117, 148-149; Lubell (n65) 44-45; O’Connell, ‘Lawful Self-Defense to Terrorism’ (n2) 894-895.
valuable in corroborating the (lack of) necessity of recourse to force. As regards other subjective parameters, one must take care, when interpreting the fact-based principles of necessity and proportionality, not to impose unfair expectations on defenders that are, by circumstances beyond their control, operating under an information deficit. What looks evidently unnecessary/disproportionate in retrospect might not have been so from the perspective of the decision-maker. At the same time, seeing as strict rules may act as a deterrent, the interest of conflict prevention demands that the defending state be presumed fully informed, unless the contrary can be proven. Without further ado, let us outline the four steps of the proposed original methodology, using ‘X’ to refer to the action whose doctrinal categorisation we are to figure out.

1) Is X governed by the ex post armed attack framework?

The logical place to start, when discerning the two reactive doctrines, is to ascertain whether X is an ex post armed attack measure, which can only be so if, one, it was enacted in response to a preceding offensive, and, two, the said offensive was of a certain level of gravity. The _ratione temporis_ and _materiae_ qualifiers are each unpacked in the sub-steps below.

1a) Is there a causal link between X and a prior attack (or a series thereof)?

- To determine the applicability of the ex post armed attack framework, one must take a deep dive into the material particulars of the dispute under review and, in applying the *sine qua non* test, establish whether X would have occurred absent any potential triggering assault(s). If the foregoing test proves less than conclusive, the interpreter should defer to how the responding state portrays X’s temporality, so long, of course, as there are no grounds to suspect bad faith.
- In the event of a negative answer, X would fall outside the ex post armed attack context, but it would not, by that reason alone, take the form of anticipatory or preventive self-defence, for a state may use force against another without having been threatened with violence (e.g. as part of a humanitarian intervention or pursuant to authorisation by the UNSC).
- Conversely, an affirmative answer would place X within the purview of either reactive self-defence or armed reprisals and, in consequence, lead us to sub-step 1b.

1b) Is the transgressive force grave enough to activate Article 51 of the UN Charter?

- The designation of the ex post armed attack framework betrays that, for X to be subject thereto, the underlying onslaught must have already reached the severity of an armed attack, which, as per the predominant effects-based concept of force, is assessed solely by reference to physical effects (i.e. human casualties and property damage; the problem of the exclusion of non-destructive cyber-attacks is addressed in Section 6.3.2.). The threshold of intensity is not particularly difficult to cross, and it has been suggested, in the case law of the ICJ, that the destruction of a single vessel would pass muster. By contrast, there are no, nor have there ever been, _de minimis_ limitations on reprisal-triggering events.
• Only those acts that are sufficiently serious can constitute either self-defence or reprisals. Whether X is one or the other comes down to how it fares under the scrutiny of the subsequent steps.

2) Does X coincide, in time and in space, with the armed attack?

• Step 2 hones in on what is, at present, the only temporal distinguisher of the ex post armed attack doctrines.
• Because reprisals can never entail a temporospatial identity with the armed attack, the prospect of X attaining such a symmetry would put it in the domain of self-defence. Even so, it would not predetermine X’s lawfulness, inasmuch as self-defence must, as we shall consider in step 3, be both necessary (force having to be the only means of protection) and proportionate (commensurateness with the aim of halting and repelling the armed attack).
• If X postdates the end of the initiating raid(s), and thereby enters the historical sphere of reprisals, it may, owing to the expansionist evolution of the ex post armed attack framework, still pass as self-defence (or, as some pundits term it, a defensive armed reprisal). Whether or not it does is decided by the third and final step of this methodology.

3) Does X, an ex post facto counterattack, measure up to the principles of necessity and proportionality?

To qualify as self-defence, an ex post facto counterattack must fulfil the principles of necessity and proportionality, the assessment of which, though primarily objective in nature, may include subjective considerations (the actor’s intent and knowledge gaps). Should an after-the-fact venture turn out to be unnecessary and/or disproportionate, it would, ipso facto, assume the character of an unlawful reprisal. X’s compliance with the two principles is evaluated via three sub-steps.

3a) Has the conclusion of the provocative attack(s) extinguished the exercisability of self-defence?

• Ex post facto self-defence is permissible if, and only if, there is a need to deter future violations of Article 2(4) of the UN Charter, an exigency whose existence boils down to three variables: modality of the armed attack, specific intelligence on attack plans, and availability of non-forcible avenues. The threat of re-offence is generally presumed where, instead of an isolated strike, the victim suffers a string of interrelated incursions. A one-time infraction is unlikely to warrant an after-the-fact riposte, save for when there is concrete evidence of further aggression being planned. Having said that, under no circumstances can the resort to force be prioritised over an effective pacific alternative.
• The finding of X’s admissibility would raise the question of its immediacy and, in doing so, bring us to sub-step 3b.

3b) Was X mounted within a reasonable temporal proximity to the attack(s)?
• The necessity of self-defence cannot last indefinitely – the longer the responding party takes to launch X, the higher the likelihood of it turning into a reprisal. Insomuch as immediacy is a context-dependent metric, its notion of undue delay varies by the case-specific logistical factors, foremost among which are information gathering, attribution of responsibility, response calibration and the target’s geographical location. At any rate, self-defence ceases to be lawful the moment a viable peaceful solution presents itself.

• Even if X were initiated in an immediate fashion, its actual implementation would still have to stand the test of proportionality.

3c) Is X commensurate vis-à-vis the goal of deterrence of prospective attacks?

• In order for X to amount to self-defence, the force used must not exceed what is needed to deter the recurrence of aggression.

• While some authorities insist that the scale of the counterattack must be equivalent to that of the armed attack, the present thesis postulates that, as a vestige of the old law of reprisal, the tit-for-tat model of proportionality runs counter to the defensive purpose of Article 51. What is more, there may be situations where a deterrent counterattack must, if it is to prevent the aggressor from re-offending, surpass the harm caused by the opening foray(s).

With the above-outlined methodology as our frame of reference, we shall now ponder the last point of inquiry: has the modernisation of the ex post armed attack framework gone far enough to accommodate the whole gamut of warfare?

6.3.2. The Adequacy of the Ex Post Armed Attack Framework: A Long Way Ahead

The jus ad bellum has, as attested to by this research, come a long way in adjusting to its fluctuating environment. But its developmental journey is not a finite one, for ground-breaking technologies and innovative tactics are always on the horizon, and even those of today are, as we shall unravel below, more than a match for the figurative world legislature. Though our preoccupation here is with temporality, specifically that of the ex post armed attack framework, it is worth, at the outset, recounting one general adaptive shortcoming, a budding deficiency situated in sub-step 1b of Section 6.3.1.’s methodology. In exploring the meaning behind ‘force’, Chapter Two contended that, albeit far more practical than the outmoded instrument-based approach, the effects-based theory is prone to underappreciating the gravity of certain infrastructure-paralysing acts, i.e. cyber operations that may, without damaging any property or injuring any person, adversely affect an untold number of lives. Despite being so far-flung in effect, such cyber sabotage is, owing to its non-destructiveness, presently not constitutive of force. And insofar as comparatively contained kinetic strikes, like the mining of a single ship, are capable of setting off Article 51, it is not unreasonable to question the soundness of the jus ad bellum’s computation of severity. Then again, even if relatively commonplace, cyber assaults on vital public services have yet to be as detrimental as to compel states to revise, in a sufficiently concerted manner, their conceptualisation of force. Only time will tell how, if at all, to incorporate non-violent offensives into Article 2(4).
Putting the spotlight back on the ex post armed attack framework, we are immediately alerted to several defects in the law’s handling of evolving warfare. It should be recalled, when appraising the methods of war-waging, that the present study highlighted three dynamics that undermine the restrictionist take on reactive self-defence: subterfuge, episodicity of the use of force, and impunity-fostering sanctuaries. In dissecting each of these intractabilities, Chapter Five proclaimed that the legalisation of after-the-fact self-defence would not, in and of itself, bring the ex post armed attack framework to full effectiveness. For one thing, there still remain scenarios where a victim of non-state aggression is precluded, by dint of the host state’s indisposition to cooperate, from exercising its right to self-defence. As ruinous as it is, the impasse at hand has a known fix in the form of the unwilling or unable test, a contentious norm that, once dismissed as nothing more than excuse for illegal reprisals, now boasts of fast-growing support among states. Nevertheless, the international community’s change of heart has, in the view of this thesis, yet to reach the custom-forming tier of consistency and geographic prevalence.

Also unaccounted for is the weaponisation of the quantitative disparity between the notion of force, as enshrined in Article 2(4), and the self-defence-triggering construct of armed attack, as codified in Article 51. Even conceding that the gap at issue is quite narrow, the jurisprudence of international tribunals suggests that some casualty-inducing skirmishes fall short of Article 51, thereby creating a loophole where the offender may, through low-intensity attrition, wear its target down without exposing itself to self-defence. The above-mentioned drawback is fixable through the regularisation of the accumulation of events theory, which, much like the unwilling or unable rule, has yet to verifiably ascend to customary law status. When it comes to the means of warfare, what the present thesis advocates for the ex ante armed attack framework – malleability of the time frame for self-defence – is already the gold standard in the ex post armed attack context. Resultantly, in contrast with imminence, the requisite of immediacy is flexible enough to cater for the distinctive attributes of arms of mass destruction. Yet, there is one weapon whose one-of-a-kind qualities make it nigh-impossible to mount an immediate riposte. That weapon is none other than cyber force.

Of the seven cyber peculiarities that, as per Chapter One, compromise the general application of the jus ad bellum, four are so delay-inducing that they predispose responses to cyber-attacks to turn into unlawful reprisals. These are impaired detectability (computer viruses and worms are far less conspicuous than kinetic armaments), unparalleled unpredictability, remoteness of physical consequences (it may take weeks, or even months, for a cyber disruption to manifest itself in the material world), and the problem of attribution (the demandingness of the burden of proof, as stipulated by the law on state responsibility, is tough to square with the anonymising design of cyberspace). The unmasking of the perpetrators is, in all probability, the single greatest challenge to self-defence against cyber-attacks, and the first three of the forenamed predicaments, whilst not per se irreconcilable with immediacy, each magnify the near-impossibility of a punctual allocation of responsibility. Without the complete picture, the attacked party is hard-pressed to ascertain, in an acceptably timely fashion, whether the provocation is grave enough to be an armed attack, which in turn impedes the calculability of a proportionate counterblow. As driven home by Grosswald: ‘A response strategy is predicated on the premise that a state can know, or quickly determine, what kind of attack it was subject to and what is needed to neutralize the attackers.’

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To eliminate needless repetition of Chapter Three, the focus shall henceforth be on the attributability of cyber-attacks. As laid out in Chapter One, the identity-shrouding tools at the attackers’ disposal, chief among which are spoofing and Dark Web browsers, work to inhibit the piercing of the veil of anonymity. Consequently, as sensible as it is to hold a state liable, by operation of the law, for kinetic attacks hailing from its military bases, the same cannot be said for operations originating from its cyber infrastructures. In this respect, version 1.0 of the Tallinn Manual was rather uncompromising: ‘The mere fact that a cyber operation has been launched or otherwise originates from a governmental cyber infrastructure is not sufficient evidence for attributing the operation to that State.’ However, perhaps so as not to exclude the possibility of successful attribution, the International Group of Experts tempered their conviction in version 2.0, holding that an operation’s origination from a state-owned network is ‘usually’ not confirmative of the aggressor’s identity.

Chapter Two conveyed that, in the absence of a universal benchmark, the evidentiary stringency of attribution is thought to vary by the seriousness of the transgression, with jus cogens violations necessitating ‘fully conclusive’ evidence. Notwithstanding that the proscription of aggression is a peremptory norm, the ICJ has, in its case law on the jus ad bellum, opted for a standard that, albeit still calling for determinative proof, is less absolute. Even allowing that the less rigorous one is reflective of international law, its satisfaction is hard to envisage in the setting of cyberspace, not least because of the global community’s experience with the 2007, 2008 and 2010 attacks against Estonia, Georgia and Iran respectively. The Russian government was only circumstantially linked to the denial-of-service attacks on Estonian and Georgian institutions. The instructions for the said attacks’ execution were posted on a Russian-speaking forum, and both cyber campaigns occurred in the context of heightened tensions - and, in the case of Georgia, in parallel to armed hostilities - with Russia. And although botnets were used to conceal the source of these digital intrusions (those of 2007 were camouflaged as having sprung from as many as 177 countries), most of the illicit activity was found to have emanated from Russian territory. Still, even with Russia being the place of origin, the evidence implicating Kremlin – instead of independently acting hacktivists – was arguably

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112 Tallinn Manual 2.0 (n2) 91.


116 Couzigou (n113) 4; Stahl (n113) 257.

117 Todd (n113) 91.

118 Stahl (n113) 257-259.
insufficient on the balance of probabilities, a level of proof below that set for infringements of Article 2(4).

Be that as it may, the quandary of attribution is best epitomised by the 2010 cyber subversion of the Iranian nuclear programme, the first of its kind to come within the purview of the *jus ad bellum*. Dubbed the world’s ‘first operational cyber weapon’, Stuxnet bypassed all security safeguards at the Natanz nuclear facility and, once in charge of the network, drove the centrifuges to spin out of control and explode. The newness of the destructiveness of cyber technology caught the international community by surprise, insomuch as no state designated the attack as a breach of Article 2(4), despite it qualifying as such under the effects-based theory. Nonetheless, the International Group of Experts were in unanimous agreement that the Stuxnet spectacle was an unlawful use of force, and some jurists even went as far as to call it an armed attack. Intrigued by the events at Natanz, Symantec, the then-leading corporation on cybersecurity, subjected Stuxnet’s intricate code to a three-month-long examination, all in hopes of discovering its shadowy creator. In spite of being the best of the best, the Symantec experts were unable to decode who wreaked havoc on the Iranian nuclear plant. By a sheer stroke of luck, the attack would eventually, thanks to the testimonies of whistle-blowers involved in the malware’s making, be attributed to the US and Israel.

Assuming that the Stuxnet operation amounted to an armed attack, the interval between it and a potential forcible response would have been close to two years. *Ergo*, on the off chance that a cyber-attack can be attributed, doing so fast enough may, even under the laxest interpretation of immediacy, teeter on the edge of impossibility. As if it were not problematic in its own right, anonymisation is not the only speed bump along the way. A further curveball to consider is that cyber-attacks, like most digitally transmitted communications, typically pass through a number of cyber infrastructures before entering their destination. To successfully trace the origins of an attack, the defending party may have to liaise with states overseeing the said infrastructures and, as often happens, embroil itself in lengthy bureaucratic processes. In the expert opinion of Grimal and Sundaram, ‘a response in self-defence to a cyber-attack after a lapse of, say, 12 to 18 months cannot be ruled out categorically due to difficulties in detection and the attribution of the attack to a particular state.’

Realistic as that estimate may be, the *ex post* armed attack framework does not, as it currently stands, contemplate such an abundance of time for self-defence. While attribution-related downtime does factor into the assessment of immediacy, the said temporal norm kicks in only once self-defence is

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121 Tallinn Manual 2.0 (n2) 342.
122 Fidler (n120) 57-59; Couzigou (n113) 8; Nguyen (n110) 1083; Tallinn Manual 2.0 (n2) 342.
123 S. Weinberger, ‘Is This the Start of Cyberwarfare? Last Year’s Stuxnet Virus Attack Represented a New Kind of Threat to Critical Infrastructure’ (2011) 474 Nature 142, 143-144.
124 Weinberger (n123) 143-144.
126 Todd (n113) 99.
127 Grimal and Sundaram (n1) 330.
judged necessary, for even the swiftest counteraction will, if not taken as a last resort, contravene the defensive purpose of Article 51. Only for as long as necessity persists does the responding party get leeway in choosing when to strike back, a grace period calculated with reference to, among other things, the contextual complexity of attribution. If the counterstrike comes a year after the original armed attack, with no follow-up offensives in the meantime, the long-lived patch of inactivity is confirmation enough that the victim’s territorial integrity/political independence was securable without force. Certainly, looking at the timing of the after-the-fact counterattacks scrutinised in Chapter Five, the longest tolerated hold-up was roughly two months and two weeks, which is how long it took the US to respond to the 1993 foiled assassination of President Bush. But even then, the statements of the supportive states were largely couched in extra-legal language, and academia was understandably sceptical of the US’s observance of immediacy. Bearing all that in mind, the present thesis argues that fixing the same attributional standard for all types of force is, in actuality, as good as imposing a probatio diabolica on the recipients of cyber aggression.

If the above-discussed hurdles are indeed preclusive of immediate self-defence, should special concessions be made to states that fall prey to cyber-attacks, as opposed to any other means of warfare? Such a selective flexibilisation of the law would, as the dissenters warn, stimulate the commission of aggression in the guise of self-defence and, just as dauntingly, heighten the prospect of genuine misattribution. Moreover, seeing that there is, at best, only one recorded example, cyber armed attacks are not rampant enough to challenge the day-to-day functioning of the relevant rules. That said, few would contest that the incessant advancements in military technology, the same forces that are behind the ever-expanding presence of drones on the battlefield, portend the eventual normalcy of destructive cyber-attacks. Should this prognosis come to pass, international law would have to adapt to the idiosyncrasies of cyber-attacks, lest it degenerate into an anachronistic vestige with little to no real-world application.

The forewarned being forearmed, many have proposed reforms to prevent such bleak projections from taking root. The Tallinn Manual, for instance, renders the validation of an attack’s attribution conditional on whether a reasonably prudent actor, knowing only what the target state did, would have come to the same conclusion. Being a highly contextualised indicator, the present proposition eschews the pitfalls of treating all force the same and, by that token, is neither impractically stringent for cyber operations nor exceedingly permissive vis-à-vis non-cyber offensives. There is also a push for enhanced inter-state cooperation and information sharing, a strategy which, by reducing delays in the aforementioned bureaucratic processes, facilitate the enactment of more immediate response. As beneficial as such efforts may be, they are scarcely a silver bullet for the attributional obstacles in

129 Tallinn Manual 2.0 (n2) 81-82.
cyberspace, for it is often the suspected attacker whose assistance is needed to overcome them (e.g. Russia in connection with the 2007 and 2008 cyber interference in Estonia and Georgia). Others have recommended, *inter alia*, that the claimant’s burden of proof be lowered, the requirement of immediacy be further loosened, and attribution be conditioned on acquiescence to the internationally wrongful act (i.e. not on direct perpetration but on a wilful disregard of the duty of due diligence – something that would have sufficed to hold Russia accountable for the above-named cyber-attacks). These bids, though effective at increasing the attributability of cyber operations, do little to minimise the potential for abuse by bad-faith actors or, for that matter, for honest mistakes by legitimate defenders. This thesis is especially wary of attempts to stretch out immediacy in a way that suits around the attributional ability of states. Such an adjustment goes against the very idea of the principle of necessity, inasmuch as it would, if new evidence comes to light, enable the victim state to reignite dormant conflicts and, by extension, do away with the obligation of timeliness. Ultimately, *a priori* judgments can only take us so far; we must allow future state practice to reveal the necessary extent of the reconstruction of the *status quo*. Either way, the present research project did not set out to correct the law’s mishandling of cyber operations, the solution to which would, in any event, appear to lie with the law on state responsibility, not the already liberalised ex post armed attack framework. Instead, by illuminating the present-day contours of the ex post armed attack doctrines, and flagging areas where the legal and practical realities come into conflict, this study provides a foundation for solution-seeking researchers to build upon.

### 6.4. Concluding Remarks

In this final substantive chapter, the present thesis tied up all the loose ends from the previous sections and, thereby, rounded off its two-fold addition to the body of knowledge. The first strand of original output, the elucidation of the nebulous relationship between self-defence and reprisals, brought to notice the supplantation of the objective model, a temporality-centric classifier of reactive measures, by its necessity/proportionality-based counterpart. With the foregoing overhaul as its guiding compass, this study devised a three-step methodology that tells the two doctrines apart, not only from one another but also from anticipatory/preventive self-defence. The latter dividing line was arrived at through deconstruction of what is, as illustrated in Section 6.2., a dangerous tendency to conflate the norms of imminence and immediacy. Leaning into the second thread of creative contribution, Chapter Six pinpointed those parameters of the ex post armed attack framework that, having gone through expansionist reinterpretation, are still trailing behind the evolution of the means and methods of warfare. Besides calling attention to the expected flaws in the effects-based conception of force, the present project identified three major barriers to the *jus ad bellum*’s sustainability in the ex post armed attack context: the non-existence of an efficient bypass of the unwillingness/inability of hosts to non-state aggressors, the exploitability of the threshold of intensity under Article 51, and the

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131 Stahl (n113) 258-259.
133 Grimal and Sundaram (n1) 330.
134 Todd (n113) 93-94.
unmanageable traits of cyber operations. As a thoroughgoing portrait of the *ex post* armed attack framework, this thesis makes for a useful benchmark for the law’s attunement to the world whose perplexities it is to address.
7. Conclusion

Time is an eternal foil to the continued relevance of the law, and the *jus ad bellum* is not exempt from its erosive touch. Much of what presently governs the resort to force, be it the 1945 UN Charter or the 1837 Caroline precedent, antedates revolutionary leaps in war-waging equipment and techniques. That being the case, what the present thesis undertook to find out, over the course of five substantive chapters, is whether the *ratione temporis* dimension of the law on the use of force, specifically the *ex post* armed attack framework, has succeeded in attuning to the changes in its operational milieu. This concluding section takes the reader through the individual stages of that undertaking, underscoring what they sought to accomplish and how they enrich the scholarly literature. Following afterwards are reflections on the lessons learnt and the avenues they open up for further research.

Likened to a primer on the *jus ad bellum*, Chapter Two elucidated the fundamental assumptions upon which the present project is founded, that is, the well-entrenched tenets of the prohibition of the use of force and the right to self-defence. Despite serving primarily as a jumping-off point for the exploration of the main research question, the second chapter did offer fresh perspectives on a couple of vexed issues. It took an evolutionary angle on the interpretation of Article 2(4) of the UN Charter, positing that, in comparison with the instrument-based theory, the effects-based understanding of force is, by virtue of seamless adaptation to pioneering weaponry, more propitious to the longevity of the UN system of collective security. In ruminating on whether the concept of effects should extend to non-destructive harm, namely affliction actuated by infrastructure-crippling cyber-attacks, Chapter Two furnished an up-to-date overview of where states stand on the matter. Since states are the makers of international law, and being as how courts and experts rarely give exhaustive accounts of concrete affirmations of customary norms, one constant throughout this study is its sweeping coverage of states’ beliefs on rules of interest. Those subjects that have already received such a treatment were, as concretised below, supplemented with additional data. In keeping with the theme of Article 2(4)’s fluidity, Chapter Two carved out a space for the provision’s scope to evolve, noting that there are two hard limits on the modification of the interdiction contained therein: textual boundaries and *jus cogens*. By reasoning that the peremptory aspect of Article 2(4) is, in all likelihood, confined to acts of aggression, the present thesis was able to work out, in the subsequent chapters, which of the disputed grounds for the use of force - armed reprisals, anticipatory and preventive self-defence - can theoretically crystallise into customary law. Also unpacked therein was their (in)congruence with the *lex specialis* Article 51, whereunder recourse to force is, as enunciated in Chapter Two, subject to the occurrence of an armed attack.

Whilst, at first glance, Chapter Three comes across as being disconnected from the rest of the project, its inclusion was in fact crucial to understanding what constitutes an *ex post* armed attack measure. This is so due to a pervasive habit, both in state practice and in academic circles, to converge the *ex ante* and *ex-post* sides of the temporal spectrum, a normative obfuscation that makes our comprehension of the latter contingent on accurate acquaintance with the former. As a treatise on the *ex ante* armed attack framework, Chapter Three refined the discourse thereon in a two-pronged manner. First of all, it devoted itself to producing the most extensive profile of states’ dealing with anticipatory self-defence, documenting no fewer than 130 national stances from within two time frames: the restrictionism-permeated second half of the 20th century and the expansionism-burgeoning 21st century. As alluded to earlier, while several international organisations and expert
bodies did take it upon themselves to examine the legality of anticipatory action (the EU, NATO, the UN High-Level Panel, the UN Secretary-General, the Bethlehem Principles, the Chatham House, the International Group of Experts, the ILA, the Institute of International Law and the Leiden Policy Recommendations), they neglected to deliver an in-depth breakdown of specific instances of state practice and opinio juris. Although a survey of that sort is present in the 2010 works of Corten (The Law Against War: The Prohibition on the Use of Force in Contemporary International Law) and Ruys ('Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice), these monographs could not have reported on the game-changing developments that postdate their publication. Indeed, Chapter Three showcased that, in the new millennium, most of states’ endorsements of the expansionist view are from the last decade, a stretch of time that has seen acceptance of the restrictionist take plummet to its historic lowest. In expanding upon the above-stated books, this study investigated a greater sample of state practice and opinio juris from before 2010, and, even more importantly, it picked up the mantle by chronicling what happened after 2010. Preventive self-defence was put through much the same scrutiny, but unlike with the anticipatory modality, there is hardly any case, under either treaty or customary law, for the lawfulness of the use of force against non-imminent threats.

The second novelty of Chapter Three is its feasibility-focused evaluation of the condition of imminence, which, as per the Webster formula, behoves the defending state to hold off its response until the threatened strike is ready for launch. On top of exposing the failings in the Webster Formula’s regulation of cyber and nuclear force, the third chapter endeavoured to establish whether the 21st-century alternatives, the so-called contextual renditions of imminence, are well-suited to replace the one-size-fits-all temporal test. The present thesis conducted a meta-analysis of the above-mentioned contextual standards, extracting therefrom the most pragmatic imminence-determining criteria, which were then pitted against the unwieldy properties of the evolving means of warfare. The result of that compatibility check was that, albeit better at accounting for intractable instruments of war, the flexibility of contextual imminence comes at the expense of weaker protection against the rule’s exploitation by ill-meaning states. Accordingly, Chapter Three’s enrichment of the existing scholarship culminated in a simple suggestion: the Webster formula should function as the principal determinant of imminence, and only when it proves prima facie infeasible would it be disapplied in favour of its contextual equivalent.

Venturing into the ex post armed attack context, Chapter Four embarked on the challenging mission to disentangle self-defence from armed reprisals. Its first course of action was to take a trip through the ages, going as far back as the Middle Ages, so as to catalogue the genesis of the characteristic marks that, mutatis mutandis, still define armed reprisals today. The overarching aspiration was to pin down what separated the two doctrines in the now bygone epochs, a line of inquiry that put under the microscope their temporality, purposes and intents attached thereto, as well as their versions of necessity and proportionality. It soon became apparent that, in distinction to the right to self-defence, reprisals did not, at any point in history, entail the forcible repulsion of ongoing or looming assaults. Au contraire, they were only ever embodied in pre-planned ripostes to past delicts, and it was quite common, encouraged even, for reprisal-takers to act long after the dust had settled on the triggering offence. The fourth chapter further showed that, teleologically, reprisals metamorphosed from having a strictly restitutive character to being a vehicle for retaliation and punishment, agendas completely at odds with the protectiveness of self-defence.
As regards originality, the most noteworthy portion of Chapter Four is its comparative analysis of the requisites for the exercise of self-defence (armed attack, principle of necessity, and principle of proportionality) and those guiding the enforcement of reprisals (prior injury, prioritisation of pacific remedies, and proportionality). Even though the pre-1945 incarnations of the *jus ad bellum* are well-documented, few academics have compared and contrasted the two sets of requirements. What is more, they are sometimes deemed analogous in nature, an assertion this research project resolutely refuted. For one thing, the necessity of self-defence denotes an actual indispensability of using force, a pressing emergency in the ‘do-or-die’ sense, wherein the attacked state’s territorial integrity and/or political independence cannot be secured through non-forcible means. Reprisals were necessary only relative to the aim they strived to achieve, the pursuit of which was very much optional, in that no immediate harm would befall the aggrieved state as a consequence of its inaction. Furthermore, the means-end element of reprisals’ purpose was gauged against an offensive goal (be it restitution or vengeance), and, correspondingly, the said measures were incapable of satisfying the defensively construed principle of proportionality. This once absolute truth would, as we shall remind ourselves shortly, be relativised by the transmuting landscape of the post-1945 *jus ad bellum*, whereby certain offensive conduct would be reconfigured as defensive.

Chapter Five supplied the information needed to answer the main research question, doing with respect to the *ex post* armed attack framework what Chapter Three did with regard to anticipatory and preventive self-defence. It compiled an encyclopaedic record of states’ positions on the self-defence/reprisal dichotomy, an endeavour that, to the best of the knowledge of this study’s author, has not been previously attempted on such a scale. The post-1945 state practice and *opinio juris* were surveyed with the view of verifying which scholarly approach to the taxonomy of reactive operations – objective, subjective, or necessity/proportionality-based – is constitutive of the law on the use of force. An important point was made of the mutual exclusivity of these methods, and how they cannot all be in force at the same time. The one that emerged superior in the 1950s-1970s was the temporality-centric objective approach, whereunder self-defence always coincides, not just temporally but also spatially, with the opening armed attack, and reprisals are, without exception, premeditated after-the-fact counterattacks. Whilst pundits have taken note of states’ propensity to associate premeditation with reprisals (and spontaneity with self-defence), Chapter Five aimed to present a more detailed documentation of examples to that effect.

Moving ahead to the 1980s, the present thesis recorded a nascent decline in the willingness of states to label *ex post facto* counterattacks as reprisals, a hesitancy mirrored by the incipient recognition of some such acts as self-defence, i.e. those capable of abiding by the principles of necessity and proportionality. A connection was drawn between the brewing disenchantment with the objective methodology and the obsolescence of the restrictionist construct of self-defence by the post-1945 transformation of warfare, more concretely the improved speed and distance capabilities of conventional armaments as well as the intensifying prominence and severity of asymmetric violence. Highlighted were three tactics, in particular, that amplify the difficulty of not only synchronising self-defence with the duration of an incursion, but also of mounting a counterstrike that does not impinge on the territorial integrity of a third party. These are underhandedness, seriality, and retreat to extraterritorial refuge. It was also submitted that, insofar as the forenamed three proclivities are mutually reinforcing, the fixing of the *ex post* armed attack framework required that they each be resolved. As respects the potential fixes, this study discussed the extension of the exercisability of self-defence past underlying offensive, the regularisation of the accumulation of events theory (the
hypothesis that an armed attack can comprise of multiple low-grade violations of Article 2(4)), and the incorporation of the unwilling or unable test into the principle of necessity (obviating the need for the host state’s consent in the event of its non-assistance, voluntary or involuntary, to the victim of a non-state invader), all of which were initially spurned on account of their inherent links to the practice of reprisals.

Given that every after-the-fact counterattack, whether offensive or defensive, fell exclusively within the category of armed reprisals, it was imperative to explore the possible routes for the legalisation of their normatively desirable variant, that is, last-ditch ventures designed to dissuade re-offence. Chapter Five relayed that the two most commonly advanced pathways, which envisioned the integration of a discrete doctrine of reprisals into either Article 2(4) or 51, were doomed to failure right from the start. States are, at the end of the day, averse to embracing conduct under a designation as negatively charged as ‘reprisals’, and that being so, the only workaround was to transfer to self-defence the expedient facets of reprisals. That is precisely what ended up unfolding in the last three decades. Close to a hundred states have, in the 21st century alone, affirmed the capacity of *ex post facto* counterattacks to pass as self-defence, and the few dissident voices that remain are tainted by hypocrisy. The encroachment of the right to self-defence on the temporal domain of reprisals is, according to the present thesis, responsible for states’ deepening reluctance to brand after-the-fact counterattacks as reprisals, irrespective of whether such a characterisation is appropriate or not. After all, doing so could give the unintended impression of blanket opposition to *ex post facto* action. Then again, the word ‘retaliatory’ - the historical qualifier of the motivations of reprisal-takers - is still being employed as a descriptor for after-the-fact counterattacks, even when the act described as such is conceived of as self-defence. This study surmised that the contradictory messaging is, in all probability, the by-product of the surreptitious fashion in which self-defence appropriated the temporality of reprisals.

All in all, Chapter Five’s review of the post-1990 state practice and *opinio juris* unveiled that, under the current state of affairs, the legality of *ex post facto* counterattacks boils down to the principles of necessity (exigency of forestalling further hostilities) and proportionality (the force exerted must not overshoot the objective of deterrence), from which it follows that the necessity/proportionality/based method has superseded the objective formula for the identification of reprisals. Before assuming that decisive role, the use of excessive force was, as demonstrated in the first third of Chapter Five, perceived as an exacerbating circumstance of measures that were, at any rate, illegal by reason of their posteriority. Chapter Five also entertained the question of what part, if any, subjective factors play in the extant structure of the *jus ad bellum*, thereby complementing Green’s trailblazing article on the aforesaid topic (*Self-Defence: A State of Mind for States?*). It was propounded that, even if not *per se* valid as a taxonomer of reactive operations, the responding state’s intent does have a place in the application of the principles of necessity and proportionality.

So as to make sense of all of the above, Chapter Six proceeded to map out the lay of the land in the *ex post* armed attack context, marking out any obsolete norms wanting in modernisation. The accomplishment of that task was, owing to the above-noted blurring of the temporal frameworks, dependent on demarcating the *ex post* armed attack doctrines not only from each other but also from their *ex-ante* counterparts. Homing in on the first bifurcation, the sixth chapter spelled out the specifics of how the two gold standards, the principles of necessity and proportionality, set apart lawful self-defence from unlawful reprisals. Mindful of the haziness of the particulars, this thesis...
averred that the necessity of deterring the attacker - and, by the same token, the after-the-fact permissibility of self-defence - is more likely to exist where at least one of the following holds: the modality of the armed attack is of the serial variety (the offender’s track record creates a presumption of the resumption of the use of force), or the defending party is in possession of tangible proof of upcoming raids. But should there arise a viable opportunity for amicable settlement, the target state would find itself barred from resorting to force, regardless of whether it managed to tick both boxes.

The present study then unravelled the ins and outs of immediacy, the context-dependent temporal yardstick for reactive self-defence, which balances the lapse of time since the attack against the logistics of each case (e.g. establishment of responsibility, calibration of a proportional counterblow, geographical considerations, etc.). Thought-provoking insights were shed on a number of pertinent conundrums, chiefly the degree to which the onus of attribution offsets delay on the part of the defender, as well as the admissibility of self-defence after a failed shot at a peaceful resolution.

Zooming out on the partition between the ex ante and ex post armed attack frameworks, this research project accentuated the decisiveness of the sine qua non test, and made clear that, since reprisals have only ever come after the fact, they are ipso facto disqualified from the ambit of anticipatory/preventive self-defence. Though many authorities have taken care to differentiate the reactive from the proactive, the conjoining of the two, and of their respective standards, is a surprisingly unexplored problem. Taking a deep dive therein, Chapter Six exhibited how this phenomenon manifests itself, put forth a probable explanation for its emergence, laid out the purposeful differences between imminence and immediacy, and raised the alarm about the undesirable corollaries of the normative conflation at play. In order to connect all of the dots, Chapter Six composed a unique three-step methodology for the discernment of self-defence from reprisals, which, despite being centred around the principles of necessity and proportionality, also incorporates other distinguishers (sine qua non test, temporospatial identity between an action and a reaction, as well as intent and knowledge of the defending state), some with a more limited charge than others.

With the parameters of the ex post armed attack framework demystified, the present thesis spotlighted the weaknesses in the law’s handling of the transforming means and methods of warfare, mainly the oftentimes remediless scenarios involving safe havens for non-state actors as well as the aggressor-favouring gap between the notions of ‘force’ and ‘armed attack’. This study also contended that the foregoing shortfalls are addressable by the unwilling or unable test and the accumulation of events theory, whose levels of state support, albeit currently at an all-time high, still seem to be below what is expected from fully crystallised customary norms. Therefore, it is critical that, over the next few years, more research is done to monitor the relentlessness and geographic spread of the supporters of the rules in question. Undoubtedly, such monitoring is also called for in relation to anticipatory self-defence. Less straightforward, in terms of solution-seeking, are the intractabilities of cyber-attacks, not least of them the nigh-impossibility of a timely attribution of cyber operations. The present thesis concluded that, because there has thus far been only one destructive cyber-attack, we are unlikely to know, until further state practice transpires, exactly how to bring international law into harmony with this new-age peril. In the meanwhile, scholars trying to do so preemptively may harness Chapter Six’s observations as a reference frame for policy recommendations.

In the grand scheme of things, the significance of the present project is that it helps dispel much of the legal uncertainty that permeates the jus ad bellum, a blight distinctly prevalent in the ratione temporis sphere of the right to self-defence. As a result, this thesis makes for a helpful tool in the
hands of those who research the finer points of the law on the use of force. More crucially, seeing as
the law must change with the times if it is to stay effective, the present study’s findings, foremost
among them being the exposition of the various adaptive shortcomings, are instrumental to the *jus
ad bellum*’s ability to discharge its functions effectively. On that final note, it is worth remembering a
quote from the 1948 speech of Omar Bradley, the then-soon-to-be general of the US army: ‘If we
continue to develop our technology without wisdom or prudence, our servant may prove to be our
executioner.’ As we stand on the precipice of a revolution in artificial intelligence, the above-quoted
words ring truer today than ever before, for the lawmakers’ neglect to accommodate technological
breakthroughs could render unachievable the maintenance of international peace and security.
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