
Self-Defence as a Justification for War: The Geo-Political and War on Terror Models

4.1 Introduction

Article 2 (4) of the United Nations Charter prohibits the threat or use of force in international relations, a prohibition that is accepted as customary international law.¹ However, at the San Francisco Conference (1945) middle-level states were unwilling to give up their 'inherent' right to use force in self-defence. Article 51 of the Charter therefore allows a short-term limitation² to article 2 (4) whereby a state may have recourse to individual or collective self-defence 'if an armed attack occurs . . . until the Security Council has taken measures necessary to maintain international peace and security'. The affirmation of a right to self-defence undermines the absolute nature of the prohibition against unauthorised use of force in article 2 (4). Unsurprisingly, therefore, states have sought to bring almost any unilateral use of force within the legal ambit of self-defence, so much so that as early as 1970 Professor Franck famously asked: 'Who killed article 2 (4)?'³ In the twenty-first century, article 2(4) is widely understood as being in a state of 'grave weakness', even 'on the brink of clinical death or in intensive care'.⁴

¹ In the *Nicaragua* case neither party challenged the customary international law status of UN Charter, article 2(4); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, (Merits) 1986 ICJ Reports 14, judgment of 27 June 1986, para. 188 ('*Nicaragua*'). For an overview of contemporary international law relating to the use of force see Crawford, James 2012. *Brownlie's Principles of Public International Law*, Oxford University Press, 8th ed., chapter 33.

² Jean D'Aspremont notes that UN Charter, article 51 does not derogate from article 2(4) but imposes a temporary limitation upon it; D'Aspremont, Jean 2014. Mapping the Concepts behind the Contemporary Liberalization of the Use of Force in International Law, *University of Pennsylvania Journal of International Law* 31: 1089–1149.

³ Franck, Thomas 1970. 'Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States', *American Journal of International Law* 64: 809–837. For a reply to this question see Henkin, Louis 1971. 'Editorial Comment, The Reports of the Death of Article 2(4) Are Greatly Exaggerated', *American Journal of International Law* 65: 544–547.

⁴ D'Aspremont, *op. cit.*

The self-defence exception has taken on a new significance by its use to justify the unilateral use of force by states, notably by the United States in the 'War on Terror' and by Russia in its military operations in Georgia, Crimea and Ukraine. The former embodies a war of global reach. While President Obama dropped the terminology of War on Terror and embraced collective action more than his predecessor, he continued a 'global campaign to degrade and ultimately defeat [IS] in Iraq and Syria, including by working to disrupt the flow of foreign fighters to those countries, while keeping pressure on Al Qaeda,⁵ through military (and other) means. The latter reverts to claims relating to territorial spheres of influence, that is, military actions in the territories of the defunct Soviet Union.

To justify this deterritorialised war 'of global reach' and the reversion to claims of self-defence common throughout the Cold War, the notion of self-defence has been increasingly stretched and adapted through broad interpretations about what counts as an armed attack by and against whom, and what is meant by imminence, necessity and proportionality. Through such interpretations, the concept of self-defence has been used, on the one hand, to justify the US-led wars in Afghanistan and Iraq as well as the continuing drone campaign and, on the other, Russian military operations in Georgia and the Ukraine. In addition, armed conflicts in Syria since 2012⁶ and Iraq since 2014 have raised other questions around the meaning and scope of the right to self-defence, which remain unresolved.

The legal status of such claimed exceptions to the prohibition of the use of force remains uncertain as state practice is often inconclusive and continues to be driven by political as well as legal considerations. What is striking is that claims made by the liberal democracies for a more elastic interpretation of the permissibility of the use of force are echoed by powerful, non-liberal states.⁷ The same is true of theorists from both realist and liberal traditions who make an intellectual case for the liberalisation of the use of force and its implications.⁸ This chapter discusses these tensions in the contemporary law of self-defence. It examines how the traditional realist-based model of self-defence (defence of the state against armed attack by other states) has shifted through new or revised

⁵ US National Security Strategy, 2015.

⁶ For different views as to when armed conflict in Syria commenced see Chapter 6.

⁷ Krisch, Nico 2014. 'Crimea and the Limits of International Law', *EJIL Talk*, 10 March 2014, www.ejiltalk.org/crimea-and-the-limits-of-international-law/.

⁸ D'Aspremont, *op. cit.*

claimed legal justifications for the use of force, including both the War on Terror model of security and the Geo-Political model.⁹ President Obama has assumed the methods of war in continuing what he describes as '[o]ur systematic effort to dismantle terrorist organizations'.¹⁰ Simultaneously with extended – 'perverted'¹¹ – claims for self-defence both in the case of Russian actions in neighbouring states and in the War on Terror, other justifications for the use of force are put forward, in particular those relying on humanitarian arguments, thereby causing the blurring of the models. Nevertheless we discuss arguments arising from the realist Geo-Political and War on Terror models in this chapter, and those more explicitly relating to the humanitarian model in the following chapter.

This chapter starts with a brief overview of the evolution of the concept of self-defence. We then analyse the conditions for self-defence and how they have been stretched as a justification for recent wars.¹² In the final section, drawing on the work of David Rodin,¹³ we discuss how self-defence might be reinterpreted so as to strengthen the prohibition on war and enhance human security. Self-defence is premised on the idea that the state is a subject analogous to the individual human being. We suggest that such an analogy is misleading, especially in the context of transnational inter-connection and communication, and that it is better to interpret the state as a collectivity of individual human beings. If this is the case, an armed attack can be reconceptualised as a massive violation of human rights – the response to such an attack then raises similar questions as in the case of humanitarian intervention.

4.2 Background: From Just War to the UN Charter

Before the UN Charter made the *jus ad bellum* universally applicable, justifications for going to war were more developed in the Western tradition than in other traditions.¹⁴ Richard Sorabji says that in most

⁹ Crook, John R. (ed.) 2013. 'President Obama Outlines Shifts in U.S. Counterterrorism Policy', *American Journal of International Law* 107: 674–679.

¹⁰ *Ibid.* ¹¹ D'Aspremont, *op. cit.*, 1116.

¹² The chapter does not address the application of self-defence to incidents of cyber warfare, although we recognise that such forms of warfare may entail violent consequences for populations. On the principles of the *jus ad bellum* relating to cyber warfare see Schmitt, Michael 2013. *Tallinn Manual on the International Law Applicable to Cyber Warfare*. Cambridge University Press.

¹³ Rodin, David 2002. *War and Self-Defense*. Clarendon Press.

¹⁴ In his dissenting opinion in the *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ Reports 226, advisory opinion of 8 July 1996 ('*Nuclear Weapons*'), Judge

other traditions, much more emphasis is placed on the *jus in bello*, the means used to fight wars, although, as discussed in Chapter 2, right authority is critical in all traditions.¹⁵ Saint Augustine of Hippo¹⁶ is generally considered the father of the institution of just war in the Western tradition.¹⁷ He believed a just war was about redressing harm or avenging an injury. It was a reactive doctrine with the goals of peace, law enforcement and the restoration of order. There was, however, an important difference between a punitive approach, which was adopted by many medieval and later Western scholars, for instance, Grotius, and a defensive approach, which was more common in the Byzantine Empire. The latter was more limited and excluded the eradication of the enemy.¹⁸ Drawing on the Western tradition, contemporary scholars typically point to five *ad bellum* criteria for a war to be considered just: just cause, last resort, right authority, proportionality (that the war does not cause more harms than the good achieved by victory) and reasonable prospect of success. Some authors also add right intention and the goal of peace.¹⁹

The notion of going to war to bring about religious conversion, which was prevalent in the early period of Islam and in the medieval period in Western Europe, was largely dismissed once authority passed from religious to secular authorities. In the eighteenth and nineteenth centuries, the influence of just war thinking lessened and war as an institution was

Weeramantry considered the example of Buddhism: ‘According to Buddhism there is nothing that can be called a “just war” – which is only a false term coined and put into circulation to justify and excuse hatred, cruelty, violence and massacre. Who decides what is just and unjust? The mighty and the victorious are “just”, and the weak and the defeated are “unjust”. Our war is always “just” and your war is always “unjust”. Buddhism does not accept this position’; *Nuclear Weapons* case (per dissenting opinion of Judge Weeramantry, para. 481), citing Rahula, Walpola 1959. *What the Buddha Taught*. One World Publications, 84.

¹⁵ Sorabji, Richard 2006. ‘Just War from Its Ancient Origins to the Conquistadors Debate and Its Modern Relevance’, in Sorabji, Richard and Rodin, David (eds.) *The Ethics of War: Shared Problems in Different Traditions*. Ashgate Publishing, chapter 1.

¹⁶ Prior to the conversion of the Emperor Constantine to Christianity, Christians were pacifist. It was St. Augustine, who lived during that period, who originated the justifications for war in Christianity.

¹⁷ For a defence of ‘just war’ as a long-standing Christian tradition made by a contemporary ‘Augustinian Christian’ see Biggar, Nigel 2013. *In Defence of War*. Oxford University Press.

¹⁸ See Laiou, Angeliki 2006. ‘The Just War of Eastern Christians and the Holy War of the Crusaders’, in Sorabji and Rodin (eds.) *op. cit.*, 30–43.

¹⁹ Johnson, James Turner 1981. *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*. Princeton University Press.

'largely cut off from its natural-law roots'.²⁰ Just cause was increasingly reduced to *raison d'état* in Europe; war came to be regarded 'as a means – and a highly imperfect one at that – of settling disputes between two [or more] sovereigns who recognised no common judge'²¹ and recourse to force was seen as a tool in the political rivalries of nineteenth-century Europe.²² But by the mid-twentieth century, as the physical and human costs of wars mounted, the dominant justifications came to be focussed on defensive wars against aggression, even though there was always a significant stream of thought concerned with what we call nowadays humanitarian intervention, as discussed in Chapter 5.

While war was recognised as a legal instrument of state politics, self-defence was of little legal significance: in the nineteenth century it had only 'a shadowy and peripheral role'.²³ However, in order to avoid the constraints of the legal state of (declared) 'war', such as rules appertaining to neutrality, states claimed their coercive actions to fall within other legal categories, for instance, a reprisal ('an act of war taking place in time of peace' and thus law enforcement)²⁴ or actions taken of necessity. In this regard the incident that became the classic exposition of the criteria for legally justified self-defence was not perceived as occurring during a war and was thus technically irrelevant to the laws of war. The facts of the *Caroline* case²⁵ arose during a rebellion in Canada in 1837. Rebels (i.e., non-state actors) attacked British ships as they sailed through Canadian waters. The *Caroline* was an American ship carrying supplies for the rebels. The British responded by seizing the *Caroline* from American waters and sending her over Niagara Falls, with loss of life. In determining the legality of the British actions, diplomatic correspondence followed between the Americans and British. For the former, Secretary of State Webster asserted that 'to show a necessity of self-defence, [action must be] instant, overwhelming, leaving no choice of means, and no moment for deliberation'. The British concurred with this formulation and necessity and instantaneous action

²⁰ Neff, Stephen C. 2005. *War and the Law of Nations: A General History*. Cambridge University Press, 167.

²¹ Bugnion, François 2002. 'Just Wars, Wars of Aggression and International Humanitarian Law', *International Review of the Red Cross* 84 (847): 523–546.

²² Neff, *op. cit.* ²³ *Ibid.*, 241. ²⁴ *Ibid.*

²⁵ Exchange of letters between US Secretary of State Daniel Webster and Lord Ashburton, Foreign Secretary of Great Britain, relating to the case of the *SS Caroline*, 1837 ('*Caroline*').

subsequently became accepted as the defining customary international law criteria for self-defence.

Although some states had reserved the right to self-defence under the Kellogg-Briand Pact,²⁶ self-defence took on a greater legal significance when, as previously discussed, the founders of the United Nations, who aimed ‘to save succeeding generations from the scourge of war’,²⁷ agreed on the self-defence limitation. Although there is some resonance with the earlier concept of just war, the legality of the use of force in contemporary international law does not depend upon the justness of the cause, but on whether it is a purely defensive response to aggression.

As self-defence is the only exception to the prohibition of the use of force other than UN Security Council (SC) authorisation under UN Charter, chapter VII, it is unsurprising that states argue that particular exercises of force fall within the exception, thereby seeking to expand the meaning of the wording of article 51 and the scope of legal coercive action. It is equally unsurprising that such claims are resisted by other states. Thus there are a number of controversies and a lack of clarity over the scope of both article 2 (4) and the self-defence exception. Claims and counter-claims are bolstered through differing theoretical approaches to international law. Some prefer a positivist approach, arguing that states are bound only by what they have agreed to – to the precise wording of the UN Charter or by what can be proved to constitute a principle of customary international law.²⁸ This approach warrants a restrictive interpretation of both articles. Others favour a purposive, policy-oriented interpretation of the Charter. In their view the Charter was drafted in a different era, and the changed

²⁶ *Treaty between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy*, Paris, 27 August 1928, (‘Kellogg-Briand Pact’). Secretary Kellogg proclaimed that ‘It seemed to [him] incomprehensible that anybody could say that any nation would sign a treaty which could be construed as taking away the right of self-defense if a country was attacked. That is an inherent right of every sovereign, as it is of every individual, and it is implicit in every treaty’. Hearings Before the Committee on Foreign Relations United States Senate Seventieth Congress on The General Pact for the Renunciation of War signed at Paris August 27, 1928, 7 and 11 December, 1928. See Crawford, James 2012. *Brownlie’s Principles of Public International Law*. Oxford University Press, 8th ed.

²⁷ UN Charter, preamble.

²⁸ The ICJ has held that there is a ‘natural’ or ‘inherent’ right of self-defence of a customary nature, ‘even if its present content has been confirmed and influenced by the Charter’. This customary right exists independently of the UN Charter and the substantive rules are not identical in content. *Nicaragua, op. cit.*, paras. 175–177.

nature of conflict (notably the threat of nuclear confrontation and contemporary threats of terrorist attacks) and development of other rules of international law mean that its provisions should not be understood literally. A constitutional instrument, such as the UN Charter, was never intended to be a 'suicide pact'.²⁹ They argue that an expansive interpretation, coupled with a generous assumption of evolving custom, would allow force to be legally used in response to modern challenges and threats to security.

In the absence of any compulsory, authoritative arbiter of the situation, whether particular incidents of the use of force can be understood as coming within the self-defence limitation – and thus potentially contributing to changing meanings of the concept – largely rests upon the response of other states, including as recorded in (political) resolutions of the SC or General Assembly (GA). In addition, the International Court of Justice (ICJ) has given some guidance on how the right of self-defence should be construed. However, the scope of the right to self-defence, while evolving, remains contested. Some of the controversial aspects are discussed below.³⁰

4.3 Conditions for Self-Defence

UN Charter, article 51 sets out the conditions for a claim of self-defence:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

²⁹ Reisman, Michael 2000. 'Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention', *European Journal of International Law* 11: 3–18; Reisman, Michael 1993. 'The Constitutional Crisis in the United Nations', *American Journal of International Law* 87: 83–100, 89. For a critical view of Reisman's argument see Hathaway, James C. 2000. 'America, Defender of Democratic Legitimacy?' *European Journal of International Law* 11: 121–134, 126–127.

³⁰ For a full discussion see Gray, Christine 2008. *International Law and the Use of Force*. Oxford University Press, 3rd ed., chapter 4.

Article 51 shifts the decision to use force from the collectivity (the SC) to the individual state; by so doing, in line with many writers from Grotius onwards, it ‘embeds a model of sovereignty drawn from the interpersonal self-defence rights’.³¹ This analogy with domestic law is seen as fundamental to the international legal order of sovereign states. In the words of Michael Walzer:

Our primary perceptions and judgments of aggression are the products of analogical reasoning. When the analogy is made explicit, as it is among lawyers, the world of states takes the shape of a political society the characterisation of which is entirely accessible through such notions as crime and punishment, self-defense, enforcement and so on.³²

It is worth noting that common law notions of self-defence have generated connotations. Making the analogy of the state with the individual and of self-defence as expressed in article 51 of the Charter with common law notions of self-defence reproduces the way in which the latter is biased towards the male subject of law.³³ The focus on a single act of aggression (armed attack) ‘replicates the public, one-off and aggressive nature of attacks envisaged in inter-personal relations’ to which violence in self-defence is a justifiable response. Accordingly, ‘through the explicit linkage with the legal features of interpersonal self-defence, Article 51 is given a sexed meaning that draws on Western canons of masculinity to define danger, violence and aggression’.³⁴

4.3.1 ‘If an Armed Attack Occurs . . .’

At the time of the adoption of the Charter, in light of the experience of World War II, the main threat to international peace and security was envisaged as a threat of armed attack by one state against another state. Accordingly, self-defence is provided for ‘if an armed attack occurs’.³⁵ This does not correlate precisely with article 2(4), which prohibits ‘the threat or use of force’, indicating that some such

³¹ Heathcote, Gina 2012. *The Law on the Use of Force: A Feminist Analysis*. Routledge, 79.

³² Walzer, Michael 2006. *Just and Unjust Wars*. Basic Books, 4th ed., 58, cited in Heathcote, *op. cit.*, 80.

³³ Charlesworth, Hilary and Chinkin, Christine 2000. *The Boundaries of International Law: A Feminist Analysis*. Manchester University Press, chapter 5.

³⁴ Heathcote, *op. cit.*, 79.

³⁵ This is provided for under UN Charter, article 51 and customary international law; see *Oil Platforms (Islamic Republic of Iran v. United States of America)*, 2003 ICJ Reports, judgment of 6 November 2003, para. 51 (‘*Oil Platforms*’).

incidents may not justify force in self-defence. Nor is it configured in the same terms as the trigger for SC response under chapter VII of the Charter: 'breach of the peace, threat to the peace or act of aggression'.³⁶ Nevertheless armed force that cannot be justified as self-defence may constitute aggression.³⁷ The first question is therefore what constitutes an armed attack. Unlike aggression, there has been no negotiated definition. Authorities suggest that 'to be deemed an armed attack, an operation must have a minimum "scale and effects"'.³⁸ In the *Oil Platforms* case the ICJ stated the need to distinguish 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'.³⁹ While there must be cross-border forcible action to constitute an armed attack, minor localised border skirmishes are unlikely to be accepted as such, even if they involve loss of life,⁴⁰ although 'a cumulative series of minor attacks may constitute an armed attack'.⁴¹ A consequence of excluding small-scale violence from the concept of 'armed attack' is to rule out the right to self-defence and to minimise the threat of escalation of violence; contrariwise it has been argued that so doing is 'conceptually confused, inconsistent with customary practice and undesirable as a matter of policy. . . . The better view is that any deliberate projection of lethal force onto the territory of another state . . . will normally trigger the application of Article 2(4)'.⁴²

Events in the Crimea in 2014 raise the question whether of an armed attack has occurred where there is an undoubted military presence but no use of direct force. Russian troops were legally present in the Crimea in accordance with the terms of a 1997 Treaty (extended

³⁶ UN Charter, article 39.

³⁷ UN GA Resolution 3314 (XXIX), Definition of Aggression; International Criminal Court, Review Conference, RC/Res.6; The crime of aggression, adopted at the 13th plenary meeting, Kampala, 11 June 2010. An 'understanding' adopted at the Kampala Conference confirmed the definition of aggression adopted there was 'for the purpose of the [Rome] Statute only'. This was intended to ensure that the crime of aggression and aggression under the *jus ad bellum* remained distinct.

³⁸ Council of the EU, Report of the Independent International Fact-Finding Mission on the Conflict in Georgia ('Report on Georgia'), 30 September 2009, vol. 2, 245, www.ceiig.ch/Report.html.

³⁹ *Oil Platforms*, *op. cit.*, para. 51.

⁴⁰ Eritrea-Ethiopia Claims Commission, Partial Award on the *Jus ad Bellum*: Ethiopia's Claims 1-8, 19 December 2005, paras. 11-12.

⁴¹ *Oil Platforms*, *op. cit.*, para. 62.

⁴² Tom, Ruys 2014. 'The Meaning of "Force" and the Boundaries of the Jus ad Bellum: Are "Minimal" Uses of Force excluded from UN Charter Article 2(4)?' *American Journal of International Law* 108: 159-210.

in 2010) agreed between Russia and Ukraine.⁴³ But the Treaty imposed restrictions on those foreign troops; major troop movements required prior consultation, and numbers could not be unilaterally increased. Russia did not comply with these terms. The 1974 GA definition of aggression provides that '[t]he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement' qualifies as an act of aggression. But, as stated earlier, not every act of aggression constitutes an armed attack, triggering the right to self-defence; is it an armed attack when no shot has been fired? The indisputable show of considerable force made possible the referendum providing for Crimea's secession from Ukraine,⁴⁴ which ensured that the 'scale and effects' of the action were grave: annexation of the territory of a sovereign state.⁴⁵ As has been pertinently pointed out, the implications for the UN Charter if these events did not constitute an armed attack would be that 'Ukraine could not lawfully use force against Russian troops to protect territory that undisputedly is part of Ukraine'⁴⁶ The affair seemed rife with Cold War assumptions about the use of force by a regional hegemon in its own backyard.⁴⁷ On the other hand, the presence of the Russian military did involve violations of human rights on a considerable scale: this included holding a referendum without proper procedures and under military pressure; discrimination against ethnic Ukrainians and Crimean Tartars; infringement of property rights; and control over

⁴³ *Partition Treaty on the Status and Conditions of the Black Sea Fleet*, 28 May 1997. The Treaty was denounced by the State Duma in March 2014 during the Crimean crisis: 'Putin Submits Proposals on Denouncing Some Russia-Ukraine Agreements on Black Sea Fleet', *ITAR-TASS News*, 28 March 2014, <http://tass.ru/en/russia/725725>.

⁴⁴ On the issue of the secession of Crimea from Ukraine see Kress, Claus 2014. 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force', *Journal on the Use of Force and International Law* 1: 11–54, 38; Marxsen, Christian, 'Crimea's Declaration of Independence', *EJIL Talk*, 18 March 2014, www.ejiltalk.org/crimeas-declaration-of-independence/.

⁴⁵ UN GA Resolution 25/2625, 24 October 1970, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, provides that 'No territorial acquisition resulting from the threat or use of force shall be recognized as legal'. It is argued that the hastily conducted referendum does not change this situation.

⁴⁶ Deeks, Ashley. 'Here's What International Law Says about Russia's Intervention in Ukraine', *New Republic*, 2 March 2014, www.newrepublic.com/article/116819/international-law-russias-ukraine-intervention.

⁴⁷ Krisch, *op. cit.*

media and information.⁴⁸ Indeed, it could be argued that the debate about whether the annexation of Crimea constituted an armed attack obscured the more important practical debate about how to respond to violations of human rights.

In other scenarios the ICJ has been reluctant to recognise all forms of even coercive intervention by a state into another state as an armed attack. In the *Nicaragua* case the Court found that sending armed bands into the territory of another state could constitute an armed attack if it was of sufficient scale and effects. Assisting rebel forces (e.g., through the provision of weapons or logistical support) is not in the opinion of the Court an armed attack,⁴⁹ although it may constitute a threat or use of force, or illegal intervention. In the Court's view the appropriate legal response to wrongful intervention is not military force in self-defence but the imposition of non-forcible counter-measures. However, these may be practically impossible for a weaker state to impose against a more powerful one⁵⁰ in the same way as power disparities in gender relations may make it impossible for the weaker party (usually the woman) to seek sanctions against perpetrators of violence. This approach allows for instability and insecurity in the target state and the wider region, as experienced in the conflicts in Central America in the 1980s and demonstrated by the *Nicaragua* case.

4.3.2 *Collective Self-Defence, Consent and Invitation*

A further complexity is added where the armed attack is against a state other than the one responding, that is, where states A and B seek to react in self-defence to an attack on C, even though they have neither suffered nor anticipate any attack against themselves. The attacked state, C, has the right to collective self-defence, to seek assistance from

⁴⁸ See, for example, 'Rights in Retreat: Abuses in Crimea', *Human Rights Watch*, 17 November 2014, www.hrw.org/report/2014/11/17/rights-retreat/abuses-crimea; 'Report on the Human Rights Situation in Ukraine', *UN Office of the High Commissioner for Human Rights*, 14 May 2015, www.ohchr.org/Documents/Countries/UA/10thOHCHRreportUkraine.pdf.

⁴⁹ On the legality of providing arms to rebels against oppressive regimes see 'Aggression and the Use of Force in International Law', Proceedings of the Annual Meeting of the American Society of International Law, vol. 108 (2014).

⁵⁰ *Nicaragua*, *op. cit.*, para. 195; on non-forcible counter-measures see International Law Commission, *op. cit.*, articles 49–54 ('Responsibility of States for Internationally Wrongful Acts').

other states, as Kuwait did following the invasion by Iraq in 1990. In Resolution 678 (29 November 1990) the SC authorised 'States cooperating with the Government of Kuwait . . . to use all necessary means' against Iraq.⁵¹ Kuwait's right of collective self-defence meant that this authorisation was not strictly necessary. Nevertheless, SC approval added legitimacy to the collective military action against Iraq and provided the opportunity for the invocation of Council powers under UN Charter, chapter VII in the changed political environment of 1990, giving rise to the optimism of a New (post-Cold War) World Order.

Defensive alliances have long been part of the European landscape and were instrumental in the advance to war in 1914⁵² and 1939. Part of the Cold War landscape was the conclusion of collective self-defence arrangements committing states to respond to an attack on one of their members, such as NATO,⁵³ SEATO⁵⁴ and ANZUS⁵⁵ (all protecting the security of US allies against possible communist attack) and the Warsaw Pact,⁵⁶ with membership of the Eastern European states. The Gulf Cooperation Council Peninsula Shield Force was formed towards the end of the Cold War in 1984 in light of the regional instability engendered by the Iran-Iraq war, which broke out in 1980. Some collective self-defence institutions have disappeared (Warsaw Pact), while others have changed their role (NATO acting in the name of humanitarianism in 1999 with the concerns for human security expressed in Chapter 5).

Despite this network of alliances, the right of collective self-defence has been little used in practice, as states tend to avoid military participation in conflicts between other states.⁵⁷ This hesitation is perhaps indicative of some unease with the concept of collective self-defence, which moves away from the domestic law analogy and is thus less readily embraced. Only in exceptional circumstances under domestic law can a person justify the use of force in response to an attack on another person, and the recognised collective response is through law enforcement agencies. However, the concept of collective institutional action (or 'solidarity') has re-emerged in the context of counter-terrorism. NATO invoked article 5

⁵¹ UN SC Resolution 678, 29 November 1990 (on Iraq-Kuwait).

⁵² MacMillan, Margaret 2013. *The War That Ended Peace: The Road to 1914*. Profile Books.

⁵³ *North Atlantic Treaty*, Washington, D.C., 4 April 1949.

⁵⁴ *Southeast Asia Collective Defense Treaty*, Manila, 8 September 1954.

⁵⁵ *Australia, New Zealand, United States Security Treaty*, San Francisco, 1 September 1951.

⁵⁶ *Treaty of Friendship, Co-operation, and Mutual Assistance*, Warsaw, 14 May 1955.

⁵⁷ Gray, *op. cit.*, 167.

of the North Atlantic Treaty⁵⁸ for the only time in the wake of the terrorist attacks of 11 September 2001;⁵⁹ article 222 of the Treaty on the Functioning of the European Union (2010) provides for joint action if a Member State is the object of a terrorist attack;⁶⁰ and during the so-called 'Arab Spring' the Peninsula Shield force was invoked by Bahrain in response to internal riots and protests. Formal collective defence institutions have been supplemented by more informal coalitions, such as the coalition of the willing against Afghanistan in 2001⁶¹ and the coalition of states fighting against IS since 2014. The *ad hoc* formation of a coalition of willing states has been described as the 'antithesis of the maintenance of order by the international community'.⁶² It dispenses with the need for SC authorisation while claiming the legitimacy associated with multilateralism.

There are also concerns about the potential misuse of the right to collective self-defence. A state might launch an attack against another, purporting to be acting in collective self-defence of that state against an anticipated attack by another state. The case brought by Nicaragua in 1984 against the United States in the ICJ arose out of the widespread violence in Central America in the 1980s, in the Cold War context. The United States claimed that its military actions against Nicaragua were in

⁵⁸ *The North Atlantic Treaty, op. cit.*, article 5: 'The Parties agree that an armed attack against one or more of them ... shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area'.

⁵⁹ UN SC Resolution 1368, 12 September 2001 and UN SC Resolution 1373, 28 September 2001 adopted in response to the 9/11 terrorist attacks reaffirmed the 'inherent right of individual or collective self-defence' but did not explicitly authorise the use of force as had been the case with UN SC Resolution 678, 29 November 1990, with respect to Kuwait.

⁶⁰ Article 222 provides that 'The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to: (a) prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack'.

⁶¹ The United States did not draw upon NATO's invocation of article 5 and the ensuing attack on Afghanistan was not carried out under NATO's auspices but by a 'coalition of the willing' brought together by the United States.

⁶² D'Aspremont, *op. cit.*, 1147.

collective self-defence of El Salvador, which was subject to armed attack by the Sandanista (left-wing) government in Nicaragua. The ICJ took a restrictive approach, which it reaffirmed in the *Oil Platforms* case, and determined that there are two conditions to the exercise of the right to collective self-defence: the victim state must declare that it has been attacked and must request assistance.⁶³ While this provides protection against wrongful claims of self-defence, especially for weaker states, it may delay assistance in an appropriate case until too late.

In 2014 the ‘newly formed’ Government of Iraq⁶⁴ sought the assistance of the United States in resisting violent armed attacks by the forces of IS.⁶⁵ IS forces had come from Syria⁶⁶ and had succeeded in occupying considerable areas across Iraq and Syria, thereby effectively dismantling the border between the two states. Iraq’s request to the United States ‘to lead international efforts to strike IS sites . . . with our express consent’⁶⁷ is a widely accepted example of collective self-defence, which accords with the conditions stipulated by the ICJ (even though the issue of whether self-defence can be claimed against non-state actors as discussed below has hardly been raised). At an International Conference on Peace and Security in Iraq in September 2014, participants⁶⁸ determined that IS constitutes a threat to the international community and underscored the need to remove it from

⁶³ *Nicaragua, op. cit.*, paras. 195–196; *Oil Platforms, op. cit.*, para. 51.

⁶⁴ Statement by the President of the Security Council, UN Doc. S/PRST/2014/20, 19 September 2014. Marc Weller argues that it is the fact of the recently held elections in Iraq that gave the government the legitimacy to seek such assistance against armed forces taking over part of its territory; Weller, Marc 2015. ‘Striking ISIL: Aspects of the Law on the Use of Force’, *American Society of International Law Insights* 19(5).

⁶⁵ For a full analysis of the legal issues involved see Deeks, Ashley 2012. “‘Unwilling or Unable’”: Toward a Normative Framework for Extra-Territorial Self-Defense’, *Virginia Journal of International Law* 52: 483–550; as they are applied in Syria, Arimatsu, Louise and Schmitt, Michael 2014. ‘Attacking “Islamic State” and the Khorasan Group: Surveying the International Law Landscape’, *Columbia Journal of Transnational Law Bulletin* 54: 1–29.

⁶⁶ As Samantha Power stated: ‘Iraq has made clear that it is facing a serious threat of continuing attacks from IS coming out of safe havens in Syria’. See Letter from Samantha Power, US Ambassador to the UN, to the UN Secretary-General, Ban Ki-moon, 23 September 2014.

⁶⁷ Letter from the Permanent Representative of Iraq to the UN, 20 September 2014; UN Doc. S/2014/691, 22 September 2014.

⁶⁸ Bahrain, Belgium, Canada, China, the Czech Republic, Denmark, Egypt, France, Germany, Iraq, Italy, Japan, Jordan, Kuwait, Lebanon, the Netherlands, Norway, Oman, Qatar, Russia, Saudi Arabia, Spain, Turkey, United Arab Emirates, United Kingdom, United States of America, Arab League, EU and UN.

the regions where it had established control 'by any means necessary, including appropriate military assistance, in line with the needs expressed by the Iraqi authorities, in accordance with international law'.⁶⁹ The SC's welcoming of this Conference⁷⁰ implicitly approved the military assistance that has been provided by a number of states to Iraqi forces. In June 2015 at a ministerial meeting a 'small group of the coalition to counter Da'esh [IS]' reiterated this resolve.⁷¹

The United States (and some other states) have also carried out air-strikes in Syria, which had not requested such assistance. Use of force in Syria violates that state's territorial integrity and is therefore contrary to UN Charter article 2 (4), unless it can be justified. In a letter to the SC, the US ambassador to the UN, Samantha Power, asserted the inherent right of the United States to both individual and collective self-defence, since 'IS and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond'.⁷² Neither IS nor 'other terrorist groups' (notably Khorasan, said by the Americans to be an 'al-Qaeda affiliated terrorist group') has launched an armed attack against the United States (although individual terror attacks may be claimed by IS), so the claim of individual self-defence must rest on questions of imminence, as discussed below. With respect to collective self-defence, the question is whether a request for assistance in self-defence by one state (Iraq) can justify the use of force in another state (Syria). Ambassador Power asserted that this was the case because the governing regime in Syria was 'unwilling or unable to prevent the use of its territory for such attacks'.⁷³

The language of 'unwilling or unable' is used elsewhere in international law, for instance in the Rome Statute of the International Criminal Court (ICC) to make a case admissible although it is being investigated or prosecuted by a state with jurisdiction.⁷⁴ Although it is

⁶⁹ International Conference on Peace and Security in Iraq, Paris, 15 September 2014.

⁷⁰ Statement by the President of the Security Council, UN Doc. 2014/20, 19 September 2014. The SC also urged 'the international community, in accordance with international law to further strengthen and expand support for the Government of Iraq as it fights IS and associated armed groups'.

⁷¹ Ministerial Meeting of the Small Group of the Global Coalition to Counter Da'esh - Declaration of the Co-Chairs, Paris, 2 June 2015 ('Ministerial Meeting').

⁷² Letter from Samantha Power, *op. cit.* ⁷³ *Ibid.*

⁷⁴ *Rome Statute of the International Criminal Court*, adopted 17 July 1998, article 17.

not self-evidently applicable to the use of force in self-defence, it appears to have been accepted by UN Secretary-General Ban Ki-moon:

I am aware that today's strikes were not carried out at the direct request of the Syrian Government, but I note that the Government was informed beforehand. I also note that the strikes took place in areas no longer under the effective control of that Government. I think it is undeniable – and the subject of broad international consensus – that these extremist groups pose an immediate threat to international peace and security.⁷⁵

Of course, the language of a 'threat to international peace and security' is that of SC competence to authorize force under UN Charter, chapter VII, not that for triggering self-defence under article 51. No SC action has been authorised. Marc Weller argued that it is the attack that triggers the right to self-defence against the perpetrators of the attack, but that if 'there is no actual or imminent use of force amounting to an armed attack, the doctrine of "unwilling or unable" cannot furnish a legal justification for the use of force in self-defence'. Self-defence is applicable only where an immediate armed response is needed, which 'implies that the territorial state would not forestall or terminate the imminent threat or attack – if it did, the criterion of necessity would not be met. Hence, there is no additional need to prove that the territorial state is unwilling or unable to act'. He concluded that 'the infrastructure of IS in Syria is sufficiently closely intertwined with its ongoing operations in Iraq to justify extending the application of the right to self-defence to Syria'.⁷⁶ However, this position accepts the collapse of the border between Iraq and Syria, (an illustration of the way that the 'new wars' paradigm muddies legal interpretation).⁷⁷ Further, the transference of the language of 'unwilling or unable' to justifications for the use of force in collective self-defence 'shields the state using force against terrorists from responsibility for forceful incursions on the territory of another state',⁷⁸ and this argument thus constitutes yet another reinterpretation and thus extension of the right to self-defence in the War on Terror.

Following the spate of terrorist attacks by IS, including those 'in Sousse, on 10 October 2015, in Ankara, on 31 October 2015, over Sinai, on 12 November 2015, in Beirut and on 13 November 2015 in Paris',⁷⁹

⁷⁵ UN Secretary General Ban Ki-moon. 'Remarks at the Climate Summit Press Conference' (including comments on Syria), *UN News Centre*, 23 September 2014, www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=2356#.VoAe8oeJndk.

⁷⁶ Weller, *op. cit.* ⁷⁷ See Chapter 1. ⁷⁸ Heathcote, *op. cit.*, 100.

⁷⁹ UN SC Resolution 2249, 20 November 2015.

the arguments in favour of military strikes in Syria as self-defence became stronger. For instance, James Stavridis, the former commander of NATO in Europe, argued that NATO should invoke article 5;⁸⁰ retaliatory airstrikes by France were described by the foreign minister, Laurent Fabius, as an act of 'self-defence';⁸¹ David Cameron told the United Kingdom Parliament that the violence meant 'working with our allies to strike against those who pose a direct threat to the safety of British people around the world'.⁸² The then prime minister argued the case for airstrikes against IS in Syria to be 'founded on the right of self-defence as it is recognised in Article 51 of the UN Charter'.⁸³ He asserted this to be supported by UN SC Resolution 2249 of 20 November 2015, which calls upon 'Member States that have the capacity to do so to take all necessary measures, in compliance with international law, ... on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL'. Military action was to be carried out in conjunction with political and diplomatic efforts at settlement and humanitarian assistance. While Resolution 2249 neither directly upholds self-defence nor unequivocally authorises military action, the case for self-defence has not apparently been questioned.

Whether a request for intervention has been genuinely made and, if so, whether it has emanated from a legitimate authority within the state in question must always be context-specific. Another factor is whether the alleged attack derives from another state, or from within (but often with suggestions of external support), merging claims of self-defence with those for internal self-determination or democratic choice. During the Cold War both the United States and the Soviet Union made geo-political claims of such requests from governments seeking to shore up their power against ideologically opposed

⁸⁰ 'NATO's Turn to Attack', *Foreign Policy*, 14 November 2015.

⁸¹ 'France launches 'massive' airstrike on Isis stronghold of Raqqa', *The Guardian*, 16 November 2015. www.theguardian.com/world/2015/nov/16/france-launches-massive-airstrike-on-isis-stronghold-in-syria-after-paris-attack.

⁸² Prime Minister's statement on Paris attacks and G20 Summit, www.gov.uk/government/speeches/prime-ministers-statement-on-paris-attacks-and-g20-summit.

⁸³ Memorandum to the Foreign Affairs Select Committee. Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015–16: The Extension of Offensive British Military Operations to Syria, November 2015 at www.parliament.uk/documents/commons-committees/foreign-affairs/PM-Response-to-FAC-Report-Extension-of-Offensive-British-Military-Operations-to-Syria.pdf.

challenge: for instance, with respect to the Dominican Republic (1965) and Granada (1983) in the case of the United States and Hungary (1956), Czechoslovakia (1968) and Afghanistan (1979) in the case of the Soviet Union. In similar terms, in 2014 President Putin claimed that Ukrainian President Viktor Yanukovich had requested military assistance; however, it was doubtful whether he remained in a position to give a valid request.⁸⁴ Nor does international law allow a sub-state entity, such as Crimea, to seek external intervention. Putin's actions with respect to Ukraine have been made subject to sanctions by the United States and EU.⁸⁵

The legal basis for Russia's intervention in Syria is also said to be 'intervention by invitation', even though the Russian government has not made a formal statement to this effect. However, two questions arise that militate the validity of this claim. First, can the government of Syria that is being supported by Russia be considered the legitimate authority; even though it is still the government, large parts of the country are no longer under its authority or control. Further, can a government that is committing gross violations of human rights against its own people request assistance from another government, even though the objective is ostensibly to defeat an extremist group, IS, in opposition to that government? Second, related and perhaps more importantly, Russia is violating the principle of distinction, an 'intransgressible principle'⁸⁶ of International Humanitarian Law as discussed in Chapter 6, in particular, through air strikes on hospitals and other civilian targets. The commission of war crimes falls under the *ius in bello*, but it seems that consent to intervention must be vitiated by such

⁸⁴ The United States responded that '[a]fter Yanukovich fled Ukraine, even his own Party of Regions turned against him, voting to confirm his withdrawal from office and to support the new government. Ukraine's new government was approved by the democratically elected Ukrainian Parliament, . . . which will shepherd the country toward democratic elections on May 25th – elections that will allow all Ukrainians to have a voice in the future of their country'. See US Department of State, 'President Putin's Fiction: 10 False Claims about Ukraine', 5 March 2014, www.state.gov/t/pa/prs/ps/2014/03/222988.htm.

⁸⁵ As reported by the EU newsroom, 'The Council of the European Union on 3 March 2014 condemned the clear violation of Ukrainian sovereignty and territorial integrity by acts of aggression by the Russian armed forces as well as the authorisation given by the Federation Council of Russia on 1 March for the use of the armed forces on the territory of Ukraine'. Sanctions followed on 17 March 2014. See 'EU Sanctions against Russia over Ukraine Crisis', *European Union Newsroom*, 12 December 2014. http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm.

⁸⁶ *Nuclear Weapons*, *op. cit.*, Advisory Opinion, para. 79.

acts. This raises similar issues of consent to those discussed with respect to targeted killing later in this chapter.

Despite reports of heavy civilian casualties and a humanitarian catastrophe, the military intervention by Saudi Arabia in Yemen has not been subject to sanctions by the United States or EU.⁸⁷ Saudi Arabia's actions are in response to a request from the deposed President Abd Rabbuh Mansur Hadi for external assistance in self-defence against internal uprising.⁸⁸ President Hadi acceded to power following Arab Spring uprisings in 2012 and an election where he was the only candidate; his term of office was due to expire in February 2014 but had been extended for a year without further polling.⁸⁹ His authority as the legitimate head of state and thus as able to seek assistance against internal rebellion is seen by some as debateable, although supported by the SC.⁹⁰ Saudi Arabia's military action appears to be in support of protecting its borders and maintaining a regional hegemony against Shi'ite rebels backed by Iran, echoing those Cold War interventions described above. It is backed in its military action by the Gulf Cooperation Council, thus giving it the venter of collective action.

4.3.3 Imminence: Anticipatory Self-Defence

The risk of escalating violence under the cover of self-defence is theoretically limited by the legal requirements that such action be imminent, necessary and proportionate. However, determining any precise and

⁸⁷ The White House issued a statement of support for Saudi Arabia and condemned 'ongoing military actions taken by the Houthis against the elected government of Yemen'; Statement by NSC Spokesperson Bernadette Meehan on the Situation in Yemen, *White House Briefing Room*, 25 March 2015, www.whitehouse.gov/the-press-office/2015/03/25/statement-nsc-spokesperson-bernadette-meehan-situation-yemen.

⁸⁸ In a letter transmitted to the SC, President Hadi stated that he had 'requested from the Cooperation Council for the Arab States of the Gulf and the League of Arab States to immediately provide support, by all necessary means and measures, including military intervention, to protect Yemen and its people from the continuing aggression by the Houthis'; UN SC Resolution 2216, 14 April 2015.

⁸⁹ Dyke, Joe, 'Is the Saudi War on Yemen Legal?' *IRIN Middle East*, 3 April 2015, www.irinnews.org/report/101320/is-the-saudi-war-on-yemen-legal; see also Weizmann, Nathalie, 'International Law on the Saudi-Led Military Operations in Yemen', *Just Security*, 27 March 2015, www.justsecurity.org/21524/international-law-saudi-operation-storm-resolve-yemen.

⁹⁰ The SC reaffirmed 'the legitimacy of the President of Yemen, Abdo Rabbo Mansour Hadi' and condemned 'the ongoing unilateral actions taken by the Houthis'; UN SC Resolution 2201, 15 February 2015; UN SC Resolution 2216, 14 April 2015.

agreed content to these conditions is problematic. The issue of imminence arises in relation to the notion of anticipatory self-defence. The wording of article 51 is clear: the right to self-defence arises 'if an armed attack occurs'. A restrictive approach would therefore prohibit any defensive action until this has taken place. But this interpretation is 'hotly contested by writers and in state practice'.⁹¹ It is argued that it would punish the victim and favour the aggressor, supporting a strong argument that a state cannot be expected to wait until an anticipated attack eventuates. This position carries further weight in the context of nuclear weapons and other weapons of mass destruction (WMDs) or fears of terrorist activity. In addition to the interpretive issue is the practical question of what evidence is required to justify such a first strike and who is to make that evaluation. The state that fears that it may become subject to an attack may not be able to make an objective assessment and may act prematurely out of fear, suspicion, on the basis of unreliable intelligence or in bad faith.

In 2002 the unresolved debate with respect to anticipatory self-defence took on a further twist. In that year the US National Security Strategy addressed the threats of WMD and terrorism. It asserted that international law had long 'recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack', but that the concept of imminence must be adapted to address contemporary threats.⁹² It set the stage for the 2003 invasion of Iraq by setting out a claimed right to act unilaterally 'to exercise our right of self-defence by acting pre-emptively against such terrorists, to prevent them from doing harm' to the United States – the people and the country.⁹³ The core difference between this claim and that to take anticipatory action in self-defence is one of degree: what may be termed pre-emptive self-defence⁹⁴ applies to the military response to some potential future attack, even if the timing and place of such an attack are uncertain, rather than to one that is imminently

⁹¹ Harris, David and Sivakumaran, Sandesh 2015. *Cases and Materials on International Law*. Sweet and Maxwell, 8th ed., 760.

⁹² 'National Security Strategy', *The White House*, 17 September 2002, 15, www.state.gov/documents/organization/63562.pdf.

⁹³ *Ibid.*, 6.

⁹⁴ In this chapter we use anticipatory self-defence to indicate awareness of some imminence of attack and pre-emptive where there is no apparent immediate threat. Walzer and others use 'anticipatory' to signify pre-emptive action, while 'pre-emptive' refers to preventive action. See Walzer, *op. cit.*

anticipated. 'Imminence' in the terms of the *Caroline* case means 'instant, overwhelming, leaving no choice of means and no moment for deliberation'.⁹⁵ In her 2002 Wriston Lecture at the Manhattan Institute, Condoleezza Rice commented on the 2002 National Security Strategy's call for a new concept of imminence: 'some threats are so potentially catastrophic – and can arrive with so little warning, by means that are untraceable – that they cannot be contained . . . new technology requires new thinking about when a threat actually becomes 'imminent'.⁹⁶

Thus the argument for pre-emptive self-defence in the case of the 2003 invasion of Iraq is based on a subjective determination that there is a latent threat caused by the nature of the target state as a 'rogue state', as seeking to develop a nuclear capacity, or as possessing (and thus potentially using) WMDs.⁹⁷ The failure to locate any WMDs in Iraq following the 2003 invasion highlighted the dangers of such claims. A broad interpretation of article 51 allowing for pre-emptive self-defence was not supported by other states, with the United Kingdom, for instance, preferring to base its claim for the legality of the invasion of Iraq on the interpretation of earlier SC resolutions.⁹⁸ Nor has it since gained ground with states, commentators or the ICJ. In his report *In Larger Freedom* the UN Secretary-General considered that 'Imminent threats are fully covered by article 51' and that '[l]awyers have long recognized that this covers an imminent attack as well as one that has already happened'. Beyond that, however, only the SC has the responsibility to authorize the use of preventive force.⁹⁹ The GA in its 2005 Millennium Outcome Document also failed to endorse any notion of pre-emptive self-defence, instead reaffirming 'that the relevant provisions of the Charter are

⁹⁵ *Caroline*, *op. cit.*

⁹⁶ Rice, Condoleezza. 'A Balance of Power that Favours Freedom', 2002 *Manhattan Institute Wriston Lecture*, 1 October 2002, www.manhattan-institute.org/html/wl2002.htm.

⁹⁷ Lee Feinstein and Anne-Marie Slaughter argued that the Bush administration did not go far enough and that there should be a 'duty to prevent 'rogue' states acquiring such weapons'. See Feinstein, Lee and Slaughter, Anne-Marie. 'A Duty to Prevent', *Foreign Affairs*, January/February 2004, www.foreignaffairs.com/articles/59540/lee-feinstein-and-anne-marie-slaughter/a-duty-to-prevent.

⁹⁸ Legal advice given by the Attorney General, Lord Goldsmith, to the prime minister on 17 March 2003 and published on 28 April 2005. See 'Full Text: Written Answer on Iraq Advice', *BBC News*, 28 April 2005, http://news.bbc.co.uk/1/hi/uk_politics/vote_2005/frontpage/4492195.stm.

⁹⁹ Report of the Secretary-General of the United Nations for decision by Heads of State and Government in September 2005, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005, 21 March 2005, paras. 124–125.

sufficient to address the full range of threats to international peace and security'.¹⁰⁰ However, in rejecting the notion of pre-emptive self-defence, these statements appear to accept the less radical concept of anticipatory self-defence. The ICJ has not clarified the question. In a case brought by the Democratic Republic of the Congo against Uganda, the Court asserted that the use of force in self-defence applies only 'within the strict confines' of article 51, which 'does not allow the use of force by a State to protect perceived security interests beyond these parameters'.¹⁰¹ The Court noted that there are other means to protect security interests 'including, in particular, recourse to the Security Council',¹⁰² a view that is weakened by the political and practical limitations on effective SC response as discussed in Chapter 2.

Despite this first overwhelming rejection of pre-emptive self-defence, in 2006 President George W. Bush reiterated that the doctrine of self-defence needs to be revised and rewritten, including that the requirement that a threat needs to be imminent should be revisited. While this too has not achieved widespread acceptance, a first stage in law-making is articulating what may be perceived as a problem to be addressed. In the decentralised international legal system, lacking a legislative body and compulsory adjudication, the claims of the powerful to change law in accordance with their wishes may carry significant weight, and their practice prove hard to resist. On the other hand, divisions between powerful players may inhibit any movement for legal change.¹⁰³ As discussed above, the United States has raised individual self-defence as a basis for their airstrikes in Syria despite there having been no armed attack against it. President Obama stated that IS will 'ultimately' pose a threat outside the Middle East, to the United States, Europe and 'far-flung countries like Australia'.¹⁰⁴ Former Prime Minister Cameron made a similar assessment that IS 'represents a major threat to us, here at home',¹⁰⁵ and that we should not 'wait until an attack takes place here: we should act in advance, recognising that there are inherent risks in any course'.¹⁰⁶ In a further extension of the concept of 'armed attack' the

¹⁰⁰ UN GA Res. 60/1, 24 October 2005 (2005 World Summit Outcome), para. 79.

¹⁰¹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 ICJ Reports 168, judgment of 19 December 2005 ('Uganda'), para. 148.

¹⁰² *Ibid.* ¹⁰³ Boyle and Chinkin. *op. cit.* ¹⁰⁴ Arimatsu and Schmitt, *op. cit.*

¹⁰⁵ *Ibid.*

¹⁰⁶ Memorandum to the Foreign Affairs Select Committee. Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015–16: The Extension of Offensive British Military Operations to Syria, November 2015, www.parliament.uk/

threat is also seen as coming from radicalised fighters returning home to the United Kingdom. What is factually uncertain at the time of writing is whether an armed attack is 'imminent' such that a right to anticipatory self-defence has arisen, or whether military action against IS in Syria represents acceptance in practice of earlier – pre-emptive – action. Or, as discussed above, there is a growing preference for the rationale that the host state is 'unwilling or unable' to take effective action against non-state actors on its territory.

While former President Bush may have considered that taking action in Iraq in 2003 in advance of any anticipated imminent attack would enhance security, it must be asked 'whose security'? There is an argument for considering that it would increase the security of Israel and that of other states in the region who might have been under threat from Saddam Hussein, but it is harder to see how it enhanced the security of the United States or United Kingdom. In the event, regional security has been undermined by the violence in Iraq and the subsequent emergence of IS.¹⁰⁷ It must also be remembered that if pre-emptive self-defence is accepted, other states (including those with nuclear capabilities) would be able to act similarly. This would generate instability and uncertainty: who would have the right to determine the existence of a potential threat? What would be the protection against exaggerated claims for pre-emptive self-defence?¹⁰⁸

4.3.4 *Necessity and Proportionality*

It is equally difficult to give a precise content to the two other conditions for self-defence – the concepts of necessity and proportionality.¹⁰⁹ Necessity presupposes that all other possibilities have been exhausted before recourse to force. The threshold is high: the International Law Commission Articles on State Responsibility allow necessity to preclude wrongfulness only if the

documents/commons-committees/foreign-affairs/PM-Response-to-FAC-Report-Extension-of-Offensive-British-Military-Operations-to-Syria.pdf.

¹⁰⁷ While the emergence of IS cannot be solely attributed to the invasion of Iraq in 2003, the Report of the Independent International Commission of Inquiry on the Syrian Arab Republic states that its 'origins lie in the establishment of Al-Qaeda in Iraq (AQI) by Abu Musab Al-Zarqawi in 2004'. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *Rule of Terror: Living under ISIS in Syria*, 14 November 2014, para. 6.

¹⁰⁸ Byers, Michael 2005. *War Law (New World Order)*. Atlantic Books, 75–81.

¹⁰⁹ 'The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law'. *Nuclear Weapons, op. cit.*, para. 41; reiterated in *Oil Platforms, op. cit.*, 76.

act (a) 'is the only way for the State to safeguard an essential interest against a grave and imminent peril and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole'.¹¹⁰ Article 21 of the Articles reiterates the right of self-defence,¹¹¹ but does not elaborate any further the meaning of necessity as a condition for self-defence. It could be argued that recourse to force in the name of self-defence of itself impairs an essential interest of the international community as a whole, the right to security, an argument that has greater strength if 'international community'¹¹² is understood as including individuals.

Necessity also has a temporal element. States may be unwilling to undertake time-consuming steps and to wait to see if a forceful response is in fact necessary. For example, in August 1990 the SC imposed economic and other sanctions on Iraq in response to its military action against Kuwait.¹¹³ In November 1990, before there had been time to see if they would be effective, 'Member States cooperating with the Government of Kuwait' were authorised by the Council 'to use all necessary means' (i.e., military force) in January 1991 if Iraq had not withdrawn from Kuwait before that date.¹¹⁴ Similarly, the United States determined that Al Qaeda, which was being sheltered by the unrecognised Taliban regime in Afghanistan, was responsible for the attacks on 11 September 2001. The United States demanded that Osama Bin Laden be handed over. When this did not happen it led the coalition of the willing to take military action against Afghanistan, claiming the action to be a lawful exercise of self-defence. This action commenced on 7 October 2001 before the United States had had time to determine whether the hand-over of Bin Laden could be negotiated.¹¹⁵ The military response could be

¹¹⁰ International Law Commission *op. cit.*, article 25 ('Responsibility of States for Internationally Wrongful Acts').

¹¹¹ Article 21 stipulates: 'The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations'.

¹¹² The 'international community' is a much used but undefined concept; it may apply to the community of states, the international institutional community such as the UN, or be a broader concept encompassing civil society and individuals. There is a large literature, e.g., Mosler, Hermann 1974. 'The International Society as a Legal Community', *RCADI* 140 IV, 17; Kolb, Robert 2002. 'Quelques réflexions sur la communauté internationale', *African Yearbook of International Law* 10: 431–451.

¹¹³ UN SC Resolution 661, 6 August 1990. ¹¹⁴ UN SC Resolution 678, *op. cit.*

¹¹⁵ Thomas Barfield reports that an assembly of three hundred clergy called by Mullah Omar after 9/11, to ask whether he should protect his guest (Al Qaeda), concluded that

understood as a reprisal (prohibited under the GA Declaration on the Principles of Friendly Relations)¹¹⁶ or as pre-emptive action against further attacks. However, the international community widely accepted the US action against Afghanistan as legal self-defence.

Proportionality in the *jus ad bellum* is another slippery concept. Vaughan Lowe has asked whether ‘the degree of force [is] to be calibrated against the scale of violence that would – might – occur if the threat against which the state is defending itself were to be realised? Or is proportionality to be measured against the force necessary to prevent – or to respond – to the attack?’¹¹⁷ In the *Nicaragua* case the ICJ favoured the second approach, thereby limiting forceful action in self-defence to what is needed to reply to an attack.¹¹⁸ This is consistent with the approach of Professor Ago in the International Law Commission, who determined that the concept of proportionality ‘was that which was proportionate to repelling the attack, and not a requirement of symmetry between the mode of the initial attack and the mode of response’.¹¹⁹

It is evident that a determination of legality would differ according to which approach to proportionality is preferred. This has particular application in the context of terrorist attacks. For example, at the outset of Operation Cast Lead – Israel’s military action against the Gaza Strip in December 2008 through January 2009 – the state’s permanent representative at the UN, Gabriela Shalev, sent identical letters to the UN Secretary-General and the President of the SC stating:

I am writing this urgent letter in order to inform you that after a long period of utmost restraint, the Government of Israel has decided to exercise, as of this morning, its right to self-defence. Israel is taking the necessary military action in order to protect its citizens from the ongoing terrorist attacks originating from the Gaza Strip and carried out by Hamas and other terrorist organizations.¹²⁰

‘because a guest should not cause his host problems Bin Laden should be asked to leave Afghanistan voluntarily as soon as possible’; Barfield, Thomas 2010. *Afghanistan: A Cultural and Political History*. Princeton University Press, 269. Nevertheless the air attacks began two days later.

¹¹⁶ UN GA Resolution 2625, *op. cit.*, ‘States have a duty to refrain from acts of reprisal involving the use of force’.

¹¹⁷ Lowe, Vaughan 2007. *International Law*. Clarendon Press. ¹¹⁸ *Nicaragua, op. cit.*

¹¹⁹ Cited in *Nuclear Weapons, op. cit.* (per dissenting opinion Judge Higgins, para. 5).

¹²⁰ UNSC, *Identical Letters Dated 27 December 2008 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and to the President of the Security Council*, U.N. Doc. S/2008/816, 27 December 2008.

The military operation involved a week-long air attack, a ground invasion (with continuing air cover) and shelling of the coast by the Israeli navy. Statistical data of casualties differ as does determination of the proportion of civilian casualties, not least because of the problems of definition and identification of individuals as civilians.¹²¹ In September 2009, the UN Fact-Finding Mission to Gaza (Goldstone Report) reported that NGOs estimated the overall number of Palestinian deaths as between 1,387 and 1,417; the Gaza authorities put the number at 1,444 and the Israeli Government at 1,166. There was also extensive damage to civilian and social infrastructure. The Government of Israel also stated that three Israeli civilians and one soldier were killed in southern Israel by rocket and mortar attacks launched by Palestinian armed groups, and nine Israeli soldiers were killed during the fighting inside the Gaza strip, four as a result of friendly fire.¹²²

As is apparent from the letters submitted by the Israeli permanent representative to the UN, Israel justified this military action as legal self-defence against ongoing terrorist attacks from Gaza. The Goldstone Report found that more than 8,000 rockets and mortars had been launched from Gaza into southern Israel since April 2001, that they had caused relatively few fatalities and physical injuries among the residents of southern Israel and that property damage was also not extensive.¹²³ As well as rockets failing to strike persons and property, casualties are reduced by the warning systems and protective bomb shelters within Israel. What, of course, must not be underestimated is the deep insecurity and fear that these attacks cause to the affected populations, as well as psychological trauma. Israel unarguably has the right to defend itself against armed attacks, but was Operation Cast Lead a proportionate exercise of this right? The Goldstone Report does not address this question as its mandate referred only to the conduct of the military operation (*jus in bello* and human rights), not its initial lawfulness (*jus ad bellum*). The answer may depend on the basis for determining proportionality; if the criterion is quantitative assessment of harm, it appears disproportionate, if, however, it is the intensity of action necessary to prevent further attacks, then it may appear proportionate.

¹²¹ See Chapter 6.

¹²² UN Fact-Finding Mission to Gaza, UN Doc. A/HRC/12/48, 25 September 2009, paras. 29–31.

¹²³ *Ibid.*, paras. 1597–1598.

That the latter is not necessarily borne out by the facts is suggested by the reality that the ceasefire negotiated in June 2008 was more successful in lowering the level of violence than the military action. In any event the assessment cannot be made in these simplistic and militaristic terms but should also factor in the context, including the occupation, the economic blockade of Gaza, Hamas control in Gaza and the stalled peace process.

It could also take into account the broader impact of the conflict on both populations, but 'assessment of overall civilian harm and deaths . . . do[es] not form part of the proportionality *jus ad bellum* equation . . . because to a degree, these are the expected consequences of the use of force'.¹²⁴ Certain harms are excluded from any determination of proportionality, such as 'long term civilian casualties resulting from starvation or disease', displacement, refugee flows¹²⁵ and disruption to children's education contributing to continued poverty and unemployment. The particular impact of such harms on women 'represents an unacknowledged gendered consequence of force', even force in self-defence.¹²⁶ Heathcote uses feminist analysis to argue for the reconfiguration of the requirements of proportionality and necessity to take account of women's experiences of conflict in a way that would contribute to de-gendering article 51.¹²⁷ She points to Judith Gardam's suggestion that the principles of necessity and proportionality could offer real constraints to the use of force by states if they were 'refined and developed to produce the outcomes ostensibly claimed by their presence'.¹²⁸ These outcomes should include the impact of military force on the populations of both the targeted state and of the state purportedly acting in self-defence. Such an understanding would move the principles beyond an assessment that takes into account solely the contingencies of the conflict and the state's military capabilities.

4.4 Armed Attack by or against Whom?

4.4.1 *Self-Defence in Response to Attacks against Nationals*

The use of force in defence of nationals is a version of both self-defence (attacks on the nationals of a state constitutes an armed attack

¹²⁴ Heathcote, *op. cit.*, 90.

¹²⁵ Gardam, Judith 1992. 'Proportionality as a Restraint on the Use of Force', *Australian Yearbook of International Law* 20: 161–174.

¹²⁶ Heathcote, *op. cit.*, 91. ¹²⁷ *Ibid.*, 92. ¹²⁸ *Ibid.*, 93.

on the state) and of humanitarian intervention, as discussed in Chapter 5. There has been a long history of powerful states intervening in weaker ones on this basis, although only on a few occasions since World War II.¹²⁹ Incidents during the Cold War, for instance, by Belgium in the Congo (1960), the United States in Grenada (1983) and Panama (1989) and Israel at Entebbe (1976) have all been extensively discussed.¹³⁰

The claim has become another example of the stretching of self-defence in the twenty-first century as President Putin has claimed that Russia's actions in Georgia in 2008 and in the Crimea in 2014 were for the protection of Russian nationals against armed attacks. In both cases, Russian troops were already deployed in the area, as peacekeepers in Georgia and as military deployment in Crimea. Putin's legal justification with respect to the Crimea was expressed in a letter to the Federal Council, the upper house of Parliament that has the constitutional right to approve deployment of Russian armed forces outside the territory of the Federation. He noted 'the extraordinary situation in Ukraine, the threat to the lives of citizens of the Russian Federation. Our compatriots, the personnel of the military contingent of the Armed Forces of the Russian Federation deployed on the territory of Ukraine'.¹³¹ Putin has argued that the Federal Council's authorisation also covers the deployment of Russian troops in Eastern Ukraine, although he has said 'I hope very much I do not have to take advantage of this right'.¹³² Nevertheless, despite denials, the evidence that Russian soldiers and special forces are operating in the region is rather compelling.¹³³ In explaining to the Duma Russia's actions with respect to the Crimea, President Putin emphasised that attempts had been made in Ukraine 'to deprive Russians of their historical memory, even of their language and to subject them to forced assimilation' and that the rights of ethnic minorities – Russians – had been violated. He continued that when 'residents of Crimea and Sevastopol turned to Russia for help in defending their rights and lives', Russia could not ignore their plea: 'we could not abandon Crimea and its residents in distress. This

¹²⁹ Gray, *op. cit.* ¹³⁰ *Ibid.*

¹³¹ Quoted in International Crisis Group, 'Ukraine: Running Out of Time', *International Crisis Group Europe*, Report No. 231, 14 May 2014, 20.

¹³² *Ibid.*

¹³³ See, for example, 'Ukraine: Mounting Evidence of War Crimes and Russian Involvement', *Amnesty International*, 7 September 2014, www.amnesty.org/en/news/ukraine-mounting-evidence-war-crimes-and-russian-involvement-2014-09-05.

would have been betrayal on our part'.¹³⁴ On 27 March 2014 the GA called upon states not to recognise any change in the status of the Autonomous Republic of Crimea and to refrain from actions or dealings that might be interpreted as such.¹³⁵

A further twist is the process of 'passportisation'¹³⁶ in both Georgia and Ukraine. The issuance of Russian passports designated people as Russian who were therefore to be defended by Russia.¹³⁷ Leaving aside whether Russian nationality for these people is 'real and effective'¹³⁸ and even if it is accepted that an attack on nationals validates intervention for their defence,¹³⁹ there must be evidence of such attacks and the requirement of proportionality must be fulfilled. However, there has been no credible evidence of such violence against ethnic Russians in Ukraine (including Crimea) or of any such attacks being imminent.¹⁴⁰

4.4.2 *Armed Attack by Non-State Actors*

In contemporary political violence, neither the attackers nor the defenders are necessarily states. The classic case is the terrorist attacks on New York and Washington, D.C., on 11 September 2001; similarly, the 'public brutality and indoctrination'¹⁴¹ committed by IS in Syria and Iraq demonstrate the ongoing capabilities of non-state actors for extreme violence.

¹³⁴ 'Address by President of the Russian Federation', *The Kremlin*, Moscow, 18 March 2014, <http://en.kremlin.ru/events/president/news/20603>.

¹³⁵ UN GA Resolution 262/68, 27 March 2014 (Territorial integrity of Ukraine).

¹³⁶ Green, James 2014. 'The Annexation of Crimea: Russia, Passportisation and the Protection of Nationals Revisited', *Journal on the Use of Force and International Law* 1: 3–10.

¹³⁷ An estimated 143,000 Russian passports were issued to Ukrainians in the last two weeks of February 2014. *Ibid.*, 3, 8.

¹³⁸ *Nottebohm Case* (second phase) (*Liechtenstein v. Guatemala*), 1995 ICJ Reports 4, judgment of 6 April 1955, para. 22.

¹³⁹ Christine Gray notes that there are few adherents to the doctrine but that claims for intervention on behalf of nationals are rarely the sole asserted basis for legality; this renders it difficult to ascertain the level of acceptance or rejection of this ground. Gray, *op. cit.*

¹⁴⁰ According to the US Department of State: 'Outside of Russian press and Russian state television, there are no credible reports of any ethnic Russians being under threat. . . . Ethnic Russians and Russian speakers have filed petitions attesting that their communities have not experienced threats'. US Department of State, *op. cit.* ('President Putin's Fiction').

¹⁴¹ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *op. cit.*, para. 1.

While flying civilian planes into the World Trade Center and the Pentagon indisputably constituted attacks of a high threshold of violence, they were carried out by non-state actors. Article 51 does not explicitly say that the armed attack must emanate from a state, although the UN Charter regulates relations between sovereign states and is predicated upon that basis. This starting point is also explicit in the GA's 1974 definition of aggression, which states that 'aggression is the use of armed force by a State'.¹⁴² The definition of the crime of aggression by the Review Conference of the ICC similarly states that 'an "act of aggression" means the use of armed force by a State against another State'.¹⁴³ However, the African Union has adopted a definition that encompasses the use of armed force 'by a State, a group of States, an organization of States or non-State actor(s) . . . against the sovereignty, political independence, territorial integrity and human security of the population of a State Party to this Pact'.¹⁴⁴ The inclusion of aggression as a crime subject to the jurisdiction of the ICC constitutes the criminalisation of war.¹⁴⁵ This approach assumes that aggression can be committed by an individual responsible for its 'planning, preparation, initiation or execution'.¹⁴⁶ However, the individual must be linked to the state, for it applies to a person 'in a position effectively to exercise control over or to direct the political or military action of a State',¹⁴⁷ not apparently to the same acts of a non-state military or terrorist group.

The ICJ has not directly considered whether there is a right of self-defence against the acts of non-state actors, but by indicating that the inherent right of self-defence arises in the case of armed attack by one state against another state has apparently adopted a restrictive, state-based approach.¹⁴⁸ The majority in the case of *Armed Activities on the Territory of the Congo* (involving claims by the DRC against Uganda) did not determine 'whether and under what conditions contemporary international law provides for a right of self-defence against attacks by irregular forces'. Judges Simma and Kooijmans, however, directly addressed the

¹⁴² UN GA Resolution 3314 (XXIX), 14 December 1974, Annex: Definition of Aggression.

¹⁴³ The Crime of Aggression, RC/Res. 6, 11 June 2010, Annex I, article 8 (2) *bis*.

¹⁴⁴ African Union Non-Aggression and Common Defence Pact, Abuja, 31 January 2005.

¹⁴⁵ Simpson, Gerry 2008. "Stop Calling It Aggression": War as Crime', *Current Legal Problems* 61: 191–228.

¹⁴⁶ The Crime of Aggression, RC/Res. 6, 11 June 2010, Annex I, article 8(1) *bis*.

¹⁴⁷ *Ibid.*, Annex II, article 8, Elements, (2).

¹⁴⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ Reports, advisory opinion of 9 July 2004 ('Wall'), para. 139.

issue; Judge Simma considered that SC Resolutions 1368 and 1373 (adopted in the aftermath of 11 September 2001) ‘cannot but be read as affirmations . . . that large scale attacks can qualify as “armed attacks” within the terms of article 51, and both he and Judge Kooijmans considered that armed attacks by non-state actors should be subject to the same tests as those committed by states.’¹⁴⁹ Judge Buergenthal in the *Wall* case thought likewise, noting that

In its resolution 1368 (2001), adopted only one day after the 11 September 2001 attacks on the United States, the SC invokes the right of self-defence in calling on the international community to combat terrorism. In neither of these resolutions did the SC limit their application to terrorist attacks by State actors only, nor was an assumption to that effect implicit in these resolutions.¹⁵⁰

The ICJ’s majority position has not been uncritically accepted, not least through concern about its consequences. For instance, the unwillingness of the majority in the ICJ to affirm a right to self-defence against an attack by non-state actors might encourage states to use non-uniformed armed rebels who are indistinguishable from the local population to carry out their illegal aggressive plans.¹⁵¹ Jensen argues that in this way states could ‘orchestrate large scale armed violence without creating a right to self-defence for their victims and simultaneously increasing the survivability of their attackers by clothing them in the protection of civilians’.¹⁵² However, it can be countered that states would remain responsible for any illegal act attributable to them in accordance with the International Law Commission’s Articles on State Responsibility, giving rise at least to non-forcible counter-measures in response. In the *Wall* case Judge Buergenthal considered that the Court had failed to address not only the question of a right to self-defence against the acts of non-state actors, but more broadly that of Israel’s right to self-defence from continuous terrorist attacks, or the extent to which the wall ‘is a necessary and proportionate response to these attacks’.¹⁵³ Such an analysis would seek to weigh the impact of the wall on the Palestinians’ right to self-determination and human rights against Israel’s right to security, and of Israelis to human security. On the one hand, the construction of a wall is less harmful to human security than a

¹⁴⁹ *Uganda*, *op. cit.* ¹⁵⁰ *Wall*, *op. cit.*, declaration of Judge Buergenthal.

¹⁵¹ Jensen, Eric Talbot 2007. ‘The ICJ’s “Uganda Wall”: A Barrier to the Principle of Distinction and an Entry Point for Lawfare’, *Denver Journal of International Law and Policy* 35(2): 241–274, 267.

¹⁵² *Ibid.* ¹⁵³ *Wall*, *op. cit.*, declaration of Judge Buergenthal.

military assault such as took place in Operation Cast Lead in 2008–2009, Operation Pillar of Defense in November 2012 or Operation Protective Edge in the summer of 2014; on the other hand, the wall has divided communities, cut Palestinians off from their sources of livelihood and limited their freedom of movement in harmful ways.

An international body that has taken a different approach from that of the ICJ is the International Fact-Finding Mission into the conflict in Georgia that was constituted by the EU after the Russian intervention in South Ossetia in August 2008. In an extremely detailed report it directly addressed the issue of non-state actors and asserted that UN Charter articles 2(4) and 51 both apply to the acts of non-state entities (in this instance South Ossetia and Abkhazia).¹⁵⁴ The consequence of this conclusion is that the actions of such entities may both constitute a wrongful use of force or an armed attack and that they may act legally in self-defence. Consequentially other actors (in this instance Russia) may claim to be acting in collective self-defence of those entities, an expansive interpretation with the potential for escalation of violence.¹⁵⁵

Other states as well as the United States have used force in response to armed attacks by non-state actors, including Israel in Lebanon in 2006 and Turkey's incursions into northern Iraq in 2008 against Kurdistan Worker's Party (PKK) bases situated there. Kress notes that the lack of international criticism of Turkey 'cannot be ignored'.¹⁵⁶ After careful consideration of the relevant state practice and commentaries, he concludes that despite the ICJ's contrary position, since 11 September 2011 there exists a right of self-defence against armed attacks committed by non-state actors.¹⁵⁷ However, the parameters of this have not been determined; any such use of force must be subject to the requirements of necessity and proportionality, which, as discussed above, are especially difficult to apply in the context of terrorism.

If self-defence against an armed attack by a non-state actor is accepted as justifiable, the next question is: who is the legitimate target of such coercive response? In Afghanistan, the military action of the coalition of the willing was not directed solely at Al Qaeda but also at the Taliban, the then (unrecognised) government in Afghanistan, justified on the grounds that it had harboured the terrorists. In international law terms, providing a safe place for terrorist activity initiated from its territory amounts to a direct internationally wrongful act, attributable

¹⁵⁴ Report on Georgia, *op. cit.*

¹⁵⁵ *Ibid.*

¹⁵⁶ Kress, *op. cit.*

¹⁵⁷ *Ibid.*

to the state. But it is not clear whether there is a right to self-defence against a state simply for the harbouring of terrorists. In the *Nicaragua* case the ICJ required a state to exercise 'effective control' over non-state groups in order for their acts to be attributable to the state.¹⁵⁸ President Bashar al-Assad in Syria cannot be said to be 'harbouring' IS, but nor, of course, is he in 'effective control' of the territories captured by their forces. He has been engaged in civil war in Syria since 2012. Nevertheless, as discussed above, the United States claims that its actions in bombing IS bases in Syria are in individual and collective self-defence that is justified by Syria's inability or unwillingness to control IS. This claim conflates internal conflict, consent, individual and collective self-defence, and collapses state boundaries to justify widespread military action in the war on terror. Crawford has suggested that a nuanced approach would be to accept that the right to self-defence applies only with respect to the acts of states, but to seek relaxation of this 'effective control' test, thereby making the acts of non-state actors more readily attributable to the state.¹⁵⁹ However, he also suggests that 'it may be better to leave the use of force against non-state actors to the Security Council'.¹⁶⁰ The claim of self-defence may be stronger against a 'failed' state that is unable or unwilling to control the acts of non-state bodies on its territory, as indicated by Judges Kooijmans and Simma in the *Armed Activities* case, discussed above. It is unclear whether the Taliban in 2001 were able to exercise 'effective control' over the use of their territory for these ends, or to respond to the United States' demands to surrender Osama Bin Laden. Following the defeat of the Taliban, continued strikes against Al Qaeda were justified by the consent of the newly elected government and the presence of a multilateral force (ISAF) mandated by SC resolution.¹⁶¹

¹⁵⁸ The ICJ affirmed this principle in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 ICJ Reports, judgment of 26 February 2007, paras. 399–407.

¹⁵⁹ It has been remarked that this involves the fiction that the harbouring state has launched an 'armed attack' against the target state; Comments by Dr. Michal Kowalski at a Conference in honour of Krzysztof Skubiszewski (Minister, Judge, Professor, Embassy of the Republic of Poland) in London, 14 November 2013.

¹⁶⁰ See Crawford, *op. cit.* 773.

¹⁶¹ UN SC Resolution 1386, 20 December 2001: 'Authorizes, as envisaged in Annex 1 to the Bonn Agreement, the establishment for 6 months of an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas'.

4.4.3 Targeted Killings

The other aspect of the use of force in counter-terror operations is the use of ‘targeted killings’ that have come into prominence since the beginning of the twenty-first century. They can take many forms, although particular publicity has been given to killing by unmanned aerial vehicles, or drones. Philip Alston, the former special rapporteur on extrajudicial, summary or arbitrary executions, a special procedure of the UN Human Rights Council, has identified the following distinguishing features of targeted killings:¹⁶² they involve premeditated lethal force, intentionally directed at an identified individual by a state agent or an organised armed group. There is a possibility (often a high possibility) that other non-targeted people, including undoubtedly civilians, will be also killed. Targeted killings may take place outside the targeting state’s own territory, as, for example, with the killing by Israeli agents of a Hamas leader in a hotel in Dubai, United States drone attacks in Pakistan, Yemen and Afghanistan and, of course, the killing of Osama Bin Laden in Pakistan. Unmanned aerial attacks are favoured by those states with the requisite technology: they are relatively cheap and safe from the perspective of the attacking state, certainly in comparison with interventions by ground forces. As well as the high casualty rate, living under the threat of drone attacks is debilitating, can be destructive of traditional ways of life and undermine community coherence;¹⁶³ it can also promote radicalisation and the desire for revenge attacks.

The drone campaign greatly intensified during President Obama’s administration. Such attacks are shrouded in secrecy, giving rise to a lack of detailed knowledge about the incidence, location, targets of individual attacks and civilian deaths and casualties.¹⁶⁴ The legality of drone attacks is contested and has been the subject of a number of UN

¹⁶² ‘The [current] Special Rapporteur does not use the expression “targeted killing” herein because its meaning and significance differ according to the legal regime applicable in specific factual circumstances’. Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/68/389, 18 September 2013, para. 24 (‘Report of the Special Rapporteur’).

¹⁶³ Tribal Malikis from North Waziristan in Pakistan have asserted that drone strikes ‘had fractured their existing tribal structures, and destroyed their way of life’. Further the strikes had ‘given rise to a desire, particularly among young men, to seek revenge for the drone strikes, thus radicalizing a new generation’. Reported in UN OHCHR, ‘Statement of the Special Rapporteur following Meetings in Pakistan’, 14 March 2013, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=13146.

¹⁶⁴ ‘The single greatest obstacle to an evaluation of the civilian impact of drone strikes is lack of transparency, which makes it extremely difficult to assess claims of precision targeting objectively’; Report of the Special Rapporteur, *op. cit.*, para. 41.

reports from different perspectives; different conclusions are reached according to analysis under the *jus in bello*, human rights law or refugee law, contributing to the lack of legal certainty and human insecurity.

The use of targeted killings also raises questions under the *jus ad bellum*.¹⁶⁵ In justification of targeted killing in the territory of another state, the US State Department has asserted that since the United States 'is in an armed conflict with Al-Qaeda, as well as with the Taliban and associated forces, in response to the horrific 9/11 attacks, [. . . it] may use force consistent with its inherent right to self-defence'.¹⁶⁶ As discussed above, claims of self-defence in response to terrorist acts highlight legal uncertainties with respect to when the right arises, against whom and the application of the principles of proportionality and necessity. For instance, bearing in mind that there is no international legal definition of terrorism, what acts constitute an armed attack giving rise to self-defence, and what is the threshold of violence to constitute an armed attack for the purpose of self-defence? The asserted right of self-defence in the ongoing war against Al Qaeda (and associated suspected terrorist armed groups) extends it spatially and territorially. Former Prime Minister Cameron's use of the self-defence justification for the killing of two UK citizens, Reyaad Khan and Ruhul Amin, by drones in Syria in August 2015¹⁶⁷ puts international law as interpreted within the framework of the War on Terror above the claims of UK criminal law – bringing the 'outside' 'inside'.¹⁶⁸ This is a one-sided application of the War on Terror since those who commit terrorist acts within the United Kingdom are rightly subjected to criminal procedures.

In a 2013 statement President Obama averred that US counter-terrorism was no longer to be defined by a 'boundless "global war on terror," but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America'.¹⁶⁹

¹⁶⁵ Aronsson, Marie 2014. 'Remote Law-Making? American Drone Strikes and the Development of *Jus Ad Bellum*', *Journal on the Use of Force and International Law* 1: 273–298 discusses the precedent setting effect of US use of drone strikes for the development of international law.

¹⁶⁶ Koh, Harold. 'The Obama Administration and International Law', *Speech at the American Society of International Law (ASIL) Proceedings*, 25 March 2010, www.state.gov/s/l/releases/remarks/139119.htm.

¹⁶⁷ MacAskill, Ewan. 'Drone Killing of British Citizens in Syria Marks Major Departure for the UK', *The Guardian*, 7 September 2015, www.theguardian.com/world/2015/sep/07/drone-british-citizens-syria-uk-david-cameron.

¹⁶⁸ See Chapter 2. ¹⁶⁹ Crook, *op. cit.*, 674.

Although he reaffirmed the US right to self-defence in what he termed ‘a just war, – war waged proportionately, in last resort and in self-defence’, Obama also asserted that drone attacks would not be undertaken where there is the ability to capture and detain individuals: ‘our preference is always to detain, interrogate and prosecute’.¹⁷⁰ But strikes will be undertaken against ‘terrorists who pose a continuing and imminent threat to the American people, and where there are no other governments capable of effectively addressing the threats’.¹⁷¹ While the objective of constraining drone attacks is welcomed, the speech lacks precision and specificity as to what constitutes ‘a continuing and imminent threat’ and how the capability of other governments to address effectively threats is to be judged. Nor did President Obama indicate any deference to the requirement of reporting to the SC.

Justifications based on self-defence are not necessary where the state in which the attack takes place has consented, thus precluding the wrongfulness of the intervention.¹⁷² This is said to be the case with respect to states such as Pakistan, Yemen and Somalia. But as with ‘invitation’ what does consent mean? There has been little debate about the validity of ‘consent’¹⁷³ in the context of what are described as ‘weak’ or ‘failing’ states and many uncertainties. Is tacit or implied consent sufficient? What does ‘consent’ mean where states do not have effective control over all their territory? Consultation is not the same as consent; Pakistan is said to have been ‘consulted’ when a US commando operation killed Osama Bin Laden in a suburban house near Abbottsville, but, apparently, the government was not actually informed of the details for fear that the information would leak and the attack would be foiled. Even if consent has been given for the killing of an identified person on the territory of another state, that state remains bound by its own human rights obligations, unless it has formally derogated from them to the extent that it is legally able to do so.¹⁷⁴ A state cannot abdicate its own responsibilities to

¹⁷⁰ *Ibid.*, 676. ¹⁷¹ *Ibid.*

¹⁷² Article 20 of the ILC Articles on State Responsibility states: ‘Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent’. International Law Commission, *op. cit.*, Annex, article 20.

¹⁷³ But see Ashley, Deeks 2013. ‘Consent to the Use of Force and International Law Supremacy’, *Harvard International Law Journal* 54: 1–60.

¹⁷⁴ ICCPR, *op. cit.*, article 4; *European Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, as amended) (ECHR), art. 15.

those within its territory by allowing another state to attack them or otherwise violate their human rights, for instance, through wrongful arrest or rendition.¹⁷⁵

4.4.4 *Recasting Self-Defence: The 'Bethlehem Principles'*

In light of the uncertainties surrounding the scope of self-defence, in particular its applicability in response to terrorist attacks by non-state actors, the desirability of a draft 'Declaratory Resolution on Self-defence' has been raised.¹⁷⁶ While no such instrument has been forthcoming, the former advisor to the UK Foreign and Commonwealth Office, Daniel Bethlehem, has put forward a set of what he has called 'Principles Governing Self-defence against Non-State Actors'.¹⁷⁷ They have been formulated after discussions with foreign ministries, defence ministries and legal military advisors. Drawing upon these discussions, Bethlehem maintains that his objective is to bridge the gap between academic discourse and the operational needs of states and to bring some clarity and precision to when states may use force in the territory of another state against an armed attack by a non-state entity. Among the sixteen principles articulated by Bethlehem are the following:

that armed attack includes 'a series of attacks that indicate a concerted pattern of continuing armed activity';

that those acting 'in concert' with perpetrators of an armed attack include those providing material support essential to the attacks;

that imminence is to be determined by reference to all relevant circumstances, including the nature and immediacy of the attack, the probability of the attack, whether the anticipated attack is part of a pattern of armed activity and its likely scale and the likelihood of other opportunities to take effective action in self-defence that may cause less collateral harm;

that action against a non-state actor in the territory of another state must be with the consent of that state, but that such consent is not required if

¹⁷⁵ The European Court of Human Rights has found violations of the ECHR with respect to illegal detention and acts of rendition; *El-Masri v. The Former Yugoslav Republic of Macedonia*, ECtHR GC Appl. No. 39630/09; *Al Nashiri v. Poland and Husayn (Abu Zubaydah) v. Poland*, 24 July 2014, ECtHR, application no. 7511/13, 13 December 2012.

¹⁷⁶ Ronzitti, Natalino 2006. 'The Expanding Law of Self-Defence', *Journal of Conflict and Security Law* 11(3): 343–359.

¹⁷⁷ Bethlehem, Daniel 2012. 'Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors', *American Journal of International Law* 106: 770–777.

that state is 'colluding' with the non-state actor, or is otherwise unwilling to restrain its activities;

that consent is further dispensed with where there is 'a strong, reasonable and objective basis for concluding that the seeking of consent would be likely to materially undermine the effectiveness of action in self-defence... or would increase the risk of armed attack, vulnerability to future attacks';

that seeking consent provides the third state with an opportunity to agree 'a reasonable and effective plan of action', and failure to do so 'may support a conclusion' of collusion with the non-state actors[.] That consent may be 'strategic or operational, generic, *ad hoc*, express or implied'.

Finally, the Principles are said to be without prejudice to the UN Charter, and also to the right of self-defence 'that may operate in other circumstances in which a state or its imperative interests may be the target of imminent or actual attack'.¹⁷⁸

The Principles warrant – and have received – careful analysis. They have been subject to some considerable and wide-ranging criticism. They appear to conflate the *jus ad bellum* and *jus in bello* (when force may be used and against whom).¹⁷⁹ In fact, they express the inter-relation between all the different ways in which the concept of self-defence has been reinterpreted and stretched since the end of the Cold War, and more particularly since the onset of the War on Terror. Throughout, Bethlehem claims that legitimate action depends upon there being a 'reasonable and objective basis', but there is, of course, no independent authoritative body able to make such a determination. In reality it depends upon the subjective interpretation by the state concerned, which is likely to be biased and may be misleading. For instance, before the military action against Iraq in 2003 Secretary of State Powell purported to present 'reasonable and objective' evidence of Iraq's possession of WMDs, which turned out to be false. What is the basis for deciding that a state is 'unwilling' to curtail terrorist activities on its territory? Many of the criteria lack precision. What constitutes 'vulnerability to future attack'? Who has the final word as to whether some other course of action is 'reasonable and effective'? Some statements are excessively

¹⁷⁸ *Ibid.*

¹⁷⁹ Rona, Gabor and Wala, Raha 2013. 'No Thank You to a Radical Rewrite of the Jus Ad Bellum', *American Journal of International Law* 107: 386–390.

'terse': 'The term 'armed attack' includes both discrete attacks and a series of attacks that indicate a pattern of continuing armed activity';¹⁸⁰ 'self-defence must be proportionate to the threat that is faced'. The assertion that they are without prejudice to the UN Charter presents them as within the framework of existing international law, and as such legitimate. However, the suggestion of a right to self-defence 'in other circumstances', including that a state's 'imperative interests' may be the target of imminent or actual attack go well beyond the wording of UN Charter, article 51 –'if an armed attack occurs'. Defining state consent as encompassing 'strategic or operational, generic, *ad hoc*, express or implied' consent expands the concept of 'valid' consent as understood in other areas of international law (for instance, treaty law) and as such could contribute to the fragmentation of international law.¹⁸¹ In sum, the Principles seek to legitimate an extensive interpretation of self-defence in order to address 'the realities of contemporary threats'. They reinforce the political stance of the United States and other Western powers; indeed, they seem to 'uniquely benefit' the US practice of targeted killings.¹⁸² The Principles do not, of course, constitute international law, but once articulated such ideas tend to develop a life of their own. In terms of security, they seem likely to escalate violence by allowing for subjective determination of the imminence of an armed attack by the state using force. They assume military action and enable, rather than constrain, violence.

4.5 Reinterpreting the Right to Self-Defence

The lack of clarity about the legal parameters of article 51 and the customary right of self-defence undermines the prohibition on the use of force, allowing claims and counter-claims to be made in an ever growing range of scenarios, to the detriment of those whose security is undermined by the violence and denied the protection of legal certainty. Extending the scope of legitimate coercive action by states and non-state

¹⁸⁰ This does not clarify what the proportionality and necessity tests must be assessed against, that is, whether it is against the series of attacks or just the last attack; Wilmshurst, Elizabeth and Wood, Michael 2013. 'Self-Defence against Nonstate Actors: Reflections on the "Bethlehem Principles"', *American Journal of International Law* 107: 390–395, 394.

¹⁸¹ O'Connell, Mary Ellen 2013. 'Dangerous Departures from the Law of Self-Defense', *American Journal of International Law* 107: 380–387, 383.

¹⁸² *Ibid.*, 384.

actors puts more people at risk. Labelling coercive action ‘aggression’ or an ‘armed attack’ allows supposedly defensive violence in response, thereby legitimating further violence.¹⁸³ This has particular resonance in the context of the War on Terror and also has wider implications. The normalisation of the use of military force has laid the ground for a resurgence of its use within the Geo-Political and War on Terror models. Nevertheless, there are also clear indications that the dangers of such expansionism are recognised by states, the ICJ and commentators, who seek to promote the ‘de-escalation of tension and probably the use of non-forcible countermeasures and criminal law processes, rather than employment of the inter-state framework on the use of force’.¹⁸⁴

Alongside the legal complexities of article 51, David Rodin has drawn attention to the conceptual difficulties associated with the notion of a state’s right to self-defence.¹⁸⁵ There is general agreement about the existence of an individual right to self-defence within domestic criminal laws: it is generally agreed that killing can be justified, to use the words of Grotius, ‘if a man were attacked in the night, or in a secret place, where no assistance can be procured’.¹⁸⁶ Of course, the defender should try to avoid killing the aggressor, but the life of the defender has greater weight because of the culpability of the attacker. The right of a state, however, to life – existence – and thus to self-defence is much more ambiguous. The ICJ opined in 1996 that it could not definitively conclude ‘whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence in which the very survival of a State would be at stake’.¹⁸⁷ This conclusion was adopted by the President’s casting vote. But what do these chilling words really mean? What constitutes the ‘survival of a state’?

According to Rodin, the right of a state to self-defence is generally justified in one of two ways. It is either treated as a scaling up of individual self-defence, that is to say, self-defence of a collectivity of individuals, or as an analogy whereby the state rather than the individual human being is the subject. The problem with the first approach, says Rodin, is the moral asymmetry between individual

¹⁸³ Megret, Frederic 2002. ‘War? Legal Semantics and the Move to Violence’, *European Journal of International Law* 13(2): 361–399

¹⁸⁴ Brunnée and Toope, *op. cit.*, 308. ¹⁸⁵ Rodin, *op. cit.*

¹⁸⁶ Grotius, Hugo (2003; 1625). *The Rights of War and Peace*. Campbell, Archibald Colin (trans.). Bel Air, CA: Elibron Classics, 56.

¹⁸⁷ *Nuclear Weapons, op. cit.*, para. 105.

soldiers and civilians. If the individual right of self-defence rests on the culpability of the attacker, can it be right to kill soldiers and civilians on the attacker's side who are not actually responsible for the attack? 'There is a gap in the moral explanation between a right to act against an aggressive state and the right to act against the persons who are its soldiery – a conceptual lacuna between the two levels of war'.¹⁸⁸ In just war theory, 'the enemy soldier though his war may well be criminal, is nevertheless as blameless as oneself'.¹⁸⁹

Of course, if a group of people are brutally attacked, they must have a right to be protected or to protect themselves, something that is germane to the concerns of this book. But how is that different from a crime against humanity – genocide or massive violations of human rights? Does it have to be defined in terms of a state's right to self-defence?

The war in Bosnia-Herzegovina (1992–1995) well illustrates this dilemma. The war was fought by a combination of remnants of the Yugoslav army and territorial defence forces and paramilitary groups composed of local and foreign volunteers, those protecting their homes, criminals and fanatics. Those who favoured international intervention claimed that this was a war of aggression by Serbia and Croatia against Bosnia-Herzegovina, in which case the Bosnian government had a right to self-defence and there was a collective case for third party intervention (collective self-defence). Those who were against intervention claimed that this was a civil war among Bosnian Serbs, Croats and Muslims, not an attack by a foreign state, in which case the right of self-defence did not apply.¹⁹⁰ Yet the moral case for intervention derived surely not from notions of self-defence but from the rights of the victims. This was a war involving genocide¹⁹¹ and ethnic cleansing, massacres, large-scale population displacement, siege and starvation, detention camps and widespread atrocities, including mass rape and other forms of torture. Did it matter whether these crimes and violations of human rights were inflicted by Serbs from Serbia or Bosnian Serbs, by regular forces or paramilitary groups, or whether Bosnia-Herzegovina was an independent state or part of Yugoslavia?

¹⁸⁸ Rodin, *op. cit.*, 164. ¹⁸⁹ *Ibid.*, 166.

¹⁹⁰ But as discussed above in the context of Yemen (2015) in some instances claims of self-defence are made by a government in response to internal attack.

¹⁹¹ The International Court of Justice and the International Criminal Tribunal for the former Yugoslavia (ICTY) have determined that genocide was committed in Srebrenica; *Bosnia and Herzegovina v. Serbia and Montenegro*, *op. cit.*, para. 278ff; *Prosecutor v. Radovan Karadžić* (IT-95-5/18), judgment of 24 March 2016.

The problem with the second approach is what constitutes the subject of the state. What, for instance, constitutes the United Kingdom or the United States or the Bosnian state as in the case of the war in Bosnia-Herzegovina? There are several possible answers. The state could represent a common way of life, a community, a set of shared values, a social contract or vehicle for self-determination; it could represent a state apparatus necessary to keep everyday life functioning; or it might be the entity that is legally recognised as sovereign on a specific territory. Each of these ideas is problematic in different ways. First of all, they imply an exclusive and constructed conception of what constitutes the state. If the state constitutes a community or set of shared values, does this exclude other communities, and does it presuppose that other communities do not share the same values? Does the recourse to war to defend community or shared values involve an attack on other communities and shared values? If the state is conceived as an expression of a social contract and the ability of individuals to determine their own futures, does this mean that undemocratic states such as Saudi Arabia, China or North Korea do not have a right to self-defence? If by the state, we mean the state apparatus, does this justify the destruction of the state apparatuses of other countries as was the case in Iraq and Afghanistan? And if it is a legally recognised entity, what about competing claims as was the case in the Bosnian war?

Secondly, in a global era, the state is no longer the unique repository of any of these conceptions. Why is the community of the state privileged over the town, or region, or even horizontal communities of shared belief, for example, that cross state boundaries? Is it just an accident of history – the Peace of Westphalia? Nowadays, the social contract at national levels is increasingly supplemented by social contracts at regional and global levels, presenting the argument that regional and global institutions such as the UN or the EU could also claim the right of self-defence. To argue that international institutions can claim a right of self-defence would open up even more possibilities for expansive interpretations. The same problem applies to the idea that the state represents an apparatus within a given territory necessary for securing everyday life. In today's world, the state apparatus is so linked into numerous agreements, networks and other apparatuses of governance, that it is difficult to argue that the state has a unique right to self-defence. Likewise, if a state is the legally recognised repository of sovereignty, how do we deal with conflicts over legal recognition? But if the uniqueness of the state is abandoned, does this not open up a kind

of free for all? In the contemporary context where authority is fragmented, where the national social contract is increasingly supplemented by other agreements at local, regional and international levels, and where cultural communities are often horizontal and transnational, it is increasingly difficult to define the subject to be defended. As Rodin puts it: 'Our lives are embedded within an indefinite number of common lives, many of which criss-cross national boundaries, each of which possess an ongoing character and each of which constitutes a value for those who participate in it'.¹⁹²

A further problem is whether the recourse to war actually defends the subject – the state – or rather also undermines ideas of community, self-determination and even the state apparatus. In rejecting the UK Government's derogation from article 5 of the ECHR following the 9/11 attacks,¹⁹³ Lord Hoffman in the House of Lords rejected the notion that there was a 'public emergency threatening the life of the nation':

This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community. . . .

The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.¹⁹⁴

What is required is a reinterpretation of the right to self-defence that strengthens the prohibition against any use of force. One way would be to define the right to self-defence conservatively along the lines that were originally assumed at the time of the signing of UN Charter. Accordingly, self-defence should apply only to an attack by a foreign state, and the

¹⁹² Rodin, *op. cit.*, 159

¹⁹³ Derogation (within limits) is permitted under the ECHR, article 15 'in time of war or other public emergency threatening the life of the nation'. See ECHR, *op. cit.*, article 15.

¹⁹⁴ *A (FC) and Others (FC) v. Secretary of State for the Home Department*, [2004] UKHL 56, paras. 96–97 (per Lord Hoffmann).

requirements of imminence, necessity and proportionality should also be conservatively defined and applied. Proportionality should be understood in a way that minimises the harms suffered by the population and thus as imposing real constraints upon the use of force. This conservative approach could be modified by taking into account the gendered nature of self-defence. Because the principles of self-defence, like the concept of self-defence itself, have entered international law through the domestic law analogy, they fail to take account of their gendered nature. Gina Heathcote argues in her excellent feminist critique of the use of force that they should be re-scripted, possibly 'through empirical accounts of the impact of military behaviour on civilian communities'. This would be a minimalist approach that takes account of the political importance to states of the right to self-defence and the 'difficulty . . . of conceiving of an international legal order that is not predicated on the human subject of domestic legal systems'.¹⁹⁵

Another, bolder, approach would be, in line with Rodin's argument, to suggest that to base self-defence on the notion of the state as individual subject is anachronistic in a world where old wars, between states, are rare, and where the character of states and state sovereignty is changing. The implication is that the very term 'armed attack' needs to be reconceptualised as a crime against humanity. If this were the case, the relevant approach would be rights-based law enforcement as in domestic situations. The individual right of self-defence would still apply as would the right of a third party to defend another person but in the same way as it applies within the domestic context. A large-scale attack constitutes a scaling up of self-defence and might require robust forms of law enforcement, but as we argue in subsequent chapters this is very different from recourse to war.

A similar argument can be made from a feminist perspective. Heathcote also suggests a rejection of the analogy between international and domestic law and the need to challenge the continued viability of states' right to self-defence: 'This strategy would accommodate the consideration that the armed attack requirement, on the one hand, is too narrow in that it is not inclusive of threats to women's security while, on the other hand, acknowledging the broader claim that any move towards increased forms of justified force ultimately undermine women's security'.¹⁹⁶

¹⁹⁵ Heathcote, *op. cit.*, 106.

¹⁹⁶ *Ibid.*, 107.

4.6 Conclusion

The only exception to the prohibition against the use of force in international relations contained in the Charter of the United Nations was the right to self-defence, although, of course, force could be authorised by the SC under chapter VII as long as it is in keeping with the principles of the Charter. At the time, this referred to the defence of a state against an attack by another state. In the twenty-first century setting, the interpretation of the right to self-defence has been stretched to cover responses to attacks by non-state actors (9/11, IS) defence of non-state entities (South Ossetia), protection of nationals abroad (Georgia, Ukraine), protection against internal attacks (Yemen) as well as in anticipation (pre-emption) of external attacks (Iraq and Afghanistan). Indeed, the way that Western air strikes on IS targets in Iraq and from 2014 onwards in Syria have been justified seem to suggest that stretched notions of imminence, necessity and proportionality and the assumption that self-defence can be claimed against non-state actors are being regularly assimilated into and normalised within legal discourse.

At the same time, the very concept of a state's right to self-defence has been called into question in the context of a blurring of the difference between what is external ('outside') and what is internal ('inside'), as well as the increasing consciousness of belonging to a single human community. If a state is defined as a subject in the same way as an individual is a subject, it is unclear what constitutes the subject in a world of overlapping jurisdictions and cultures. If a state is defined as a collective group of people, then it is difficult to understand why the right of self-defence is any different from a right of defence against genocide or massive violations of human rights, or, in the case of third-party support, humanitarian intervention. When the state is defined as the subject it preserves the sharp distinction between outside (international law) and inside (domestic law). But where the distinction is blurred it allows for the application of outside methods – military force – to problems that might be better addressed as 'inside' problems.

War is ultimately about the security of a collective group of people versus another collective group, even when cast in other terms. In contrast, human security is about the security of individuals (men, women and children). In protecting individuals, the lives of other individuals must be taken into account. This is the case in domestic policing, which is constrained by the demands of human rights law. Had the

bombers of 9/11 been American citizens sheltered by other American citizens, could the Bush Administration have attacked an American city where they lived or were trained? And could it have killed or sanctioned their associates and presumed associates¹⁹⁷ rather than trying first to arrest them and bring them before a court of law? At the time perhaps not, but the normalisation of the War on Terror has meant that even American and British citizens have now become targets of drone attacks. Of course, if a group of people is attacked with the weapons of war, it may well be necessary to use physical force. There should surely have been more robust protection of the men and boys of Srebrenica or the Tutsis and moderate Hutus of Rwanda. But how that force is used and whether there can be a difference between a war approach and a human rights approach are critical questions. These are the subject of the following chapters.

¹⁹⁷ UN SC Resolution 1267, 15 October 1999, that first imposed sanctions on Osama Bin Laden and the Taliban refers to 'his associates', an imprecise term for the imposition of sanctions.