

A Radical Interpretation of Individual Self-Defence in War

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Abstract

The general prohibition on the use of force as expounded by the UN Charter identifies individual self-defence as one of the exceptions to this proscribed rule. Yet self-defence has developed ideologically in the past 60 years in a manner that has arguably undermined the spirit of the UN Charter. Notions of pre-emptive and anticipatory self-defence have been formulated to justify a reading of article 51 which allows for the use of force before any armed attack has occurred. The objective of this article is to observe the legal, moral and strategic underpinnings of the varying schools of thought and address their shortcomings. In doing so, I shall look in detail at the applied ethics of killing in self-defence. This analysis will involve the so-called 'domestic-analogy' which compares self-defence between states to self-defence between persons. Having looked at the various theories, I shall explain my own interpretation on the law of self-defence by using a radically different methodology. This will be premised on the notion of how our perceptions of violence alter when we receive new information about the incident in question. I shall also apply these theoretical interpretations to some case studies. It shall then become clear that the current law is symptomatic of iniquities with respect to international relations which observe hegemonic states regularly abusing the doctrine of self-defence. The conclusion shall then illustrate how the new interpretation aims to question the distortion of these bedrock principles upon which more powerful states rely, and to re-evaluate the legality and morality (or lack thereof) of their actions in the international arena.

I. Introduction

Manifestations of self-defence invoke the antiquated 'chicken and egg' conundrum - which came first? Quarrelling states either apportion blame to one another or rationalise their conduct. Whether it is contextualising the attack as pre-emptive or condemning this initial attack as aggression, it is easy to become immersed in a quagmire.

Antediluvian conceptions, derived from the canonical texts and the classical literature often imbue the purist *lex taliones* inclination, more commonly known as the eye-for-an-eye paradigm. Question, does not the aggressor no matter how brutal his actions are, have an ‘inalienable right to life’¹ or is that forfeited once he has struck the first blow? Indeed one may ask, need he strike a blow? Surely a ‘threat’ of a blow is sufficient. So why is it necessary we worry ourselves with questions of moral reasoning on issues pertaining to law?²

The law of self-defence, specifically individual self-defence in the laws of war shall be the focus of discussion. The primary document, the United Nations Charter³, codifies the law (albeit in frustrating generality as we shall later discover) to restrict the use of force between nations. It came after the horrors of two World Wars and the atrocities of the Nazi holocaust; perhaps one of the most horrific acts ever to blemish the tapestry of time. Political decolonization swept the world with varying degrees of success and a new Pan-European Belle Epoque promoting diplomacy, liberal democracy and human rights set the agenda for international relations. Whereas war had previously been commonplace, cited in various literary works on the *bellum justum*, the UN Charter appeared to adopt a more ‘restrictionist approach’, making war the exception rather than the rule. Indeed self defence, whether individual or collective, were the only caveats within the general prohibition on the threat or use of force against the territorial integrity and political independence of any state⁴. However, this premature optimism is quelled when one historically considers the number of wars and hostilities – since the inception of the

1 David Rodin, *War and Self-Defence* (OUP 2002) 50.

2 Indeed the nexus between law and morality (or lack thereof) forms the basis for much jurisprudence literature- see also Ian McLeod, *Legal Theory* (5th edn. Palgrave 2010) and Brian Bix, *Jurisprudence: Theory and Context* (6th edn. Carolina Academic Press 2012).

3 The Charter of the United Nations adopted 26 June 1945 articles 2(4) & 51.

4 *ibid.*

Charter. Weltman puts it well when he cynically says war has been present three times more frequently than it has been absent.⁵ Schachter echoes similar sentiments when he states that reality seems to mock them [UN Charter].⁶ Yet a contrasting discourse, a caveat, emerges and it seems to present war with the peaceful use of military⁷ (force) (referring to the inherent right as enshrined in customary international law) as a conception that is far more dynamic.⁸ Something seems askew here; the literature often treats invocations of self-defence with contempt yet as much scholarship cites its instrumental use as a means to apparently thwart belligerent states. Diversity of views is one thing, but polarity is quite another. Are we in danger of retreating into the Pre-Grotian era in which war was a state's prerogative power? Or are we already there?

Why is there such a diversity of interpretation of the infamous self-defence enshrined in article 51? Surely law is law? Indeed, such is the uncomfoting realisation of many students new to public international law that quashes their undeveloped 'Austinian' conception of law as rigid legal rules issued by a sovereign and backed by a threat. These questions create a *lacuna* in the law; a demand for the elusive virtue of clarity in this area. The impetus therefore is driven by the inadequacy of the status quo and a need to prevent abuse of this inadequacy.

The paper will begin by critically assessing the various approaches and applications of article 51. This includes a brief look at the history, impetus and ideology behind the notion of individual self-defence and explaining

5 John Weltman, *World Politics and the Evolution of War* (The John Higgins University Press 1995) 1.

6 Oscar Schachter, 'The Right of States to use Armed Force' (1984) 82 Michigan L Rev 1620.

7 Robert J Art and Kenneth N Waltz, *The Use of Force: Military Power and International Politics* (6th edn Rowman and Littlefield Publishing Group 2004) 3.

8 Tarcisio Gazzini, *The Changing rules on the use of force in International Law* (Manchester University Press 2005) 123.

why the popular notions of anticipatory and pre-emptive self-defence (terms which I will use interchangeably) garnered much support as time progressed. Two heterodox schools of thought exist, each with varying opinions within them⁹ that discuss the meaning of the provision in very different terms. Analysis and criticism will therefore be the concern. The focus shall be on the imminence of threats as this is often the most contentious issue; therefore there will be little discussion on the intrinsic requirements of necessity, proportionality or the deliberation over distinguishing between reprisals and armed attacks.

Following on from this descriptive and diachronic analysis, I shall turn my focus abruptly from a critical mode to a creative one. I will attempt to cultivate a radically new interpretation of self-defence using history as a basis for this concept. In much the same way anticipatory and pre-emptive self-defence determine the imminence of a threat by previous acts of the belligerent, I will use historical events as an excusatory and justificatory basis: firstly, for understanding the use of violence; and secondly for apportioning charges of aggression elsewhere. This focuses on a very different methodology to that employed by many of the contemporary scholarships based on how our perceptions of violence radically alter, when we are exposed to new information concerning certain events. This requires a thorough critique of different approaches to killing in self-defence before moving-on to elaborate my own position.

Having formulated this interpretation (in addition to acknowledging some of its potential misgivings) I will apply it to a few sample cases. Observations as to whether or not strong and weak states can successfully use this defence will determine its success and I shall account for any potential extra-interferences with my results.

The conclusion discusses how this new doctrine would affect current knowledge concerning international

⁹Christine Gray, *International Law and the Use of Force* (3rd edn Oxford University Press 2008) 117.

relations. This considers questions of how certain states fighting for self-determination or against external aggression maybe able to use this form of defence, not exclusively to correct past injustice, but rather a way to help us understand their conduct in the wider framework of international relations. It will also provide some insight about state hegemony in the context of international law.

II. Counter-restrictionist vs. Restrictionist

Let us recall article 2 (4) and article 51 of the United Nations Charter respectively:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

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.¹⁰

Clemmons and Brown believe self-defence is a powerful and necessary concept.¹¹ Indeed, the interest stimulated scholars from Plato to Cicero and continues to form the topics of heated debate in contemporary international relations. Its importance however, has been temporally relative. During the development of the just war doctrine, the resort to war was still unlimited and remained a state prerogative. Self-defence was of little consideration as states were the final arbiters in determining their right to engage in war.¹² These ideas were symptomatic of a realist

10 UN Charter (n 4).

11 Commander Byard Q Clemmons and Major Gary D Brown, 'Rethinking International Self-Defence: The UN emerging role' (1988) 45 *Naval L Rev* 217.

12 Gazzini (n 8) 123.

conception of international anarchy¹³ in which order was established through demonstration of power. The first noteworthy discussion of self-defence was the Caroline Incident in 1837. During the Mackenzie Rebellion against British rule in Canada, a steamboat from the sympathetic US, provided men and materials to a rebel-held island. The colonial rulers therefore set fire to the boat killing several American seamen.¹⁴ Britain pleaded self-defence but US Secretary of State Daniel Webster proposed that such an invocation would only be realistic if necessity is instant, overwhelming, leaving no choice of means, and no moment for deliberation. Webster's now canonised analysis earmarked a new appreciation for a concept once considered as peripheral. It also laid the basis for the ensuing law of self-defence in customary international law which, as we shall see, would be the envy of the textual literalists. Some endorsed Webster's view whilst others question its academic merit and practical application.¹⁵

Various charters such as the Chapultepec Treaty and the Kellogg-Briand Pact had been created to renounce war as a measure of national policy and a means to solve inter-state conflicts.¹⁶ However, neither had the far-reaching applicability, nor the controversy such as that in the UN Charter. The Charter appeared to adopt a near-ban on the use of force¹⁷ with an effort to substitute law for force¹⁸ placing great emphasis on the notion of sovereignty and sovereign equality. However, several issues of indeterminacy emerged from the rules; the standards of necessity and

13 Leo Van Den Hole, 'Anticipatory Self-defence under International Law' (2003) 19 American University International L Rev 70.

14 Malcolm Shaw, *International Law* (6th edn Cambridge University Press 2008) 1131.

15 Yoram Dinstein, *War, Aggression and Self-defence* (4th edn Cambridge University Press 2005) 249.

16 Van Den Hole (n 13) 71.

17 UN Charter (n 3).

18 China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Pluto Press 2006) 286.

proportionality, interpretations of key words in the text; not to mention differing perceptions of events.¹⁹ It is here that our two diverging schools of thought emanate.

To use Arend and Beck's terminology, we have the restrictionists and the counter-restrictionists.²⁰ Unfortunately, even within these differing schools of thought, we have neither a holistic nor a homogenous opinion. The former assumes the position that article 51 is absolute, from which there is no derogation. Indeed, it has been likened to a *jus cogens* principle²¹ and signatory states may only invoke the defence in response to an actual armed attack. The latter consists of a hybrid argument which looks at the article in the backdrop of the political and military realities that have developed since 1945 and, most importantly, the influence of customary international law. I shall firstly focus on the restrictionists.

A focus on this school of thought requires reference to the counter-school of thought; an exercise of endorsement through critique in that the restrictionist school is partially given legitimacy through abrogating the counter-restrictionists - arguably a lesser of two evils. Brownlie condemns the classical law and its anachronistic custom, that being the pillar of strength in the counter-restrictionists.²² He suggested that treaty law aimed to clarify and tidy-up developments in international law between 1920 and 1930²³ with the later UN Charter being the apotheosis of such law.

In addition to this, adherents would say that any case of anticipatory self-defence would require a *lex scripta* more

19 Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers 1991) 141.

20 Anthony Clark Arend and Robert J Beck, *International Law and the Use of Force* (Routledge 1993) 73.

21 Gazzini (n 8) 122.

22 Ian Brownlie, 'The Use of Force in Self-Defence' (1961) 37 *British Year Book of International Law* 184.

23 *ibid* 197.

vividly worded that just armed attack.²⁴ One of the fallacies, and perhaps why Brownlie is so faithful to this perspective, is that applications of this defence were entirely subjective and as a result, he contested it could lead to absurd results. If we are to take Brownlie's conception of article 51, then identifying an armed attack would be easily and objectively determinable.

Dinstein, although affirming these views, placed himself as a conduit between the two opposing schools. His rejection of the naturalists approach (more akin to the counter-restrictionists) and adoption of a positivist mode dispels the right of self-defence as inherent. This he attributes as an anachronistic residue when international law was dominated by ecclesiastical doctrines.²⁵ But his view does not dismiss the customary right altogether. In contrast to Brownlie, he addresses both items of customary international law and the UN Charter distinctly. In this way he adopts a very strict approach to the text, but he acknowledges a very complex qualification of the customary international law right. Dinstein accepts that self-defence maybe invoked if an aggressor state embarks upon a course of irreversible action.²⁶

This restrictionist method was acquiesced by the majority judgments in *The Republic of Nicaragua v. United States*.²⁷ Although the case was very critical of US conduct in providing logistical support for the Contras, the judges were reluctant to affirm any particular position²⁸ stating that 'attributions and assertions of self-defence is a political question which no court, including the ICJ should judge.'²⁹ However, dissenting Judge Schwebel did provide vociferous

24 Van Den Hole (n 13) 84.

25 Dinstein (n 15) 180.

26 *ibid* 191.

27 1984 ICJ Reports.

28 Gray (n 9) 130.

29 Dinstein (n 15) 212.

judicial opposition. He sympathised with the counter-restrictionists examining the potential for incongruous results should a state have to wait for an actual armed attack to respond. He denied that treaty law abrogated the 'inherent right' under customary international law.

The judges perhaps did provide a ray of scholarly light on an otherwise dark and unclear rule (on the scope of armed attacks and their gravity). The judgement focussed on the scale and effects of an attack³⁰ by distinguishing between the gravest forms of the use of force and other less grave forms.³¹ The Iranian Oil Platforms³² case echoed similar views when expanding the interpretation of pre-emptive strikes. In considering whether the aggressor had to be a state or whether blame could be apportioned to non-state actors, the court held the latter as amendable provided that the state's involvement was clear.³³ This was subject to some criticism by scholars suggesting that the threshold had been set too low, but this was affirmed by the ICJ and their reliance upon article 3 (g) General Assembly Resolution on the definition of aggression.³⁴

The Nicaragua case³⁵ suggests an exhaustive approach to article 51. However, this is far from convincing given the lack of a clear and pronounced judgement. The silence rather tacitly ratifies the literal approach. One of the interesting points is that the judges did consider article 51 as part of customary international law. The problem is that this blurs the lines between the naturalist law conception of self-defence and the positivist approach. On the one hand their opinion about whether an armed attack needs be actual is unclear and, yet they seem to endorse its heritage in

30 Rodin (n 1) 114.

31 Shaw (n 14) 1133.

32 *Islamic Republic of Iran vs United States of America* ICJ Reports 2003.

33 Gray (n 9) 130.

34 Definition of Aggression annexed to General Assembly Resolution 3314 <<http://jurist.law.pitt.edu/3314.htm>> accessed 15 May 2010.

35 Nicaragua (n 27).

customary international law. These contrasting positions create a 'legal oxymoron' by entrenching the ideas portrayed firmly in opposing fields of thought. Perhaps the case law is not the best source of clarity.

Amongst many others, one of the main reasons adherents like Brownlie thought it was important to have a strict approach rather than a lithe interpretation, was to prevent mistake and fraudulent claims. How could states determine if an attack was imminent? The presupposition was that states were purely altruistic. The worry therefore also came from a fear that states could use self-defence as a 'carte blanche' for aggression.³⁶ There was also a very realistic consequence of more powerful states subjugating weaker ones. Indeed, 'in a world hard pressed to stop aggressive war, it makes little sense to open a loophole large enough to accommodate a tank division.'³⁷

The arguments are valid and the intentions are noble. One would certainly endorse this perspective but history appears to also demonstrate some evidence to the contrary. The figurative thorn in the side of the rose is the inherent right established under customary international law. This needs to be discussed for us to understand advocates of the liberal school; one which sees the UN Charter as supplementary rather than superior to the classical law.

Franck, an advocate of the 'preventive self-defence doctrine' (which found its most devout supporters in the Bush administration), stated that 'common sense rather than textual literalism is often the best guide to interpretation'.³⁸ The arguments committed to the counter-restrictionist theory appear far more compelling and seem to incorporate an element which is more sensitive to developments in the manner in which wars are fought. The position seems to garner substantial strength from its reliance on the customary

36 Van Den Hole (n 13) 87.

37 Byard and Brown (n 11) 229.

38 Thomas Franck, *Recourse to Force: State Actions Against Threats and Armed Attacks* (Cambridge University Press 2002) 98.

international law right which maintains the inherent right of self-defence. Indeed some scholars even challenge the idea that self-preservation should even be subject to law.³⁹

The *travaux préparatoires* seems to suggest that article 51 was not meant to limit the broader notions of self-defence as imbued by state practice⁴⁰ including the Chapultepec Treaty.⁴¹ In addition, case law judgements have re-enforced the criteria of necessity and proportionality as principles of self-defence. These criteria are nowhere referred to in the UN Charter, but rather traditional legal norms from customary international law detailed through the annals of history. The following arguments are two-fold; one is lexical and the other is based on ‘strategic concerns’.

The lexical position looks at the wording and approaches the text in a common sense manner. The focus on the word ‘inherent’ is an explicit reference to a pre-existing right which the treaty was not meant to circumvent.⁴² Additionally, armed attack is deliberately vague in order to encourage reference to the customary law; a trigger-word if you will. Van Den Hole uses a logic which renders a literal reading *reductio ad absurdum*.

If A then B is not equivalent to if A, *and* only if A, then B.

In other words, the logic that ‘if one is subjected to an armed attack, one can invoke self-defence’ is not necessarily the same as the logic that ‘if one is subjected to armed attack, and only to an armed attack, then one can invoke self-defence’.⁴³ However, this gap-filling exercise is perhaps a secondary rather than a primary claim to this

39 Oscar Schachter, ‘Self-Defence and the Rule of Law’ (1989) 83 *The American J Int L* 259.

40 Van Den Hole (n 13) 75.

41 Schachter (n 6) 1633.

42 Arend and Beck (n 20) 73.

43 Van Den Hole (n 13) 85.

avenue of thought. One of Van Den Hole's most compelling arguments however, is the reference to article 2 (4) UN Charter. This refers to a prohibition of a threat of force. Read in conjunction with article 51 and the 'inherent right,' the meaning seems to ring truer with the notion of pre-emption.

Another alternative argument is that the UN Charter provision only refers to self-defence in response to an armed attack and that its vagueness is deliberate. The Charter assumes that pre-emption of armed attacks are dealt with by the customary law.⁴⁴

The 'strategic' argument takes into consideration other determining factors such as the development of military technology and tactics. It recognises that if such a strict reading were upheld, it could impede a state's ability to avert the attack in question. McDougall's sitting duck analogy provides the rationale for the customary international law right.⁴⁵ It illustrates that such a rule would be senseless. So to wait for an attack you know is coming would be an intolerable doctrine.⁴⁶ It is only when you have suffered an attack that you may respond: particularly absurd if there is an impending attack and you have the resources to avert it. Indeed this argument is compelling even for Dinstein who typically holds a fairly conservative approach. He acknowledges that when a state has committed itself to the deployment of an attack from which it cannot backtrack, then the state may use 'interceptive self-defence'.⁴⁷ Indeed, to wait for an attack may allow more time for 'the aggressor state' to formulate a greater attack or not pre-emptively attacking may destroy possibilities to attenuate the harm.

One of the key contributions of this school of thought is the development of anticipatory self-defence.

44 Shaw (n 14) 1132.

45 Myres S MacDougal, 'The Soviet-Cuban Quarantine and Self-Defence' (1963) 57 *American J Int L* 597.

46 Rodin (n 1) 113.

47 Dinstein (n 15) 191.

Doctrines of pre-emptive and preventive self-defence have also been created and are sometimes used as interchangeable terms. I will refer to the anticipatory self-defence notion and may, from time to time, refer to it as pre-emption.

Anticipatory self-defence was developed as a theory by Micheal Walzer and it does offer very compelling arguments for the doctrine. He asserts that the moral theory underlying UN Charter, or 'the legalist paradigm'⁴⁸, is that the international society is made of independent states and the society has laws which determine territorial integrity and political sovereignty as embodied by article 2 (4) of UN Charter. In addition, any force or threat of force equals a crime of aggression in which case the circumstance may in turn justify self-defence and be justly punishable. Contrasted with Webster's test, Walzer announced that to invoke self-defence, 'there must be a manifest intent to injure, actual preparation for an attack and if one was to wait, it would greatly magnify the risk.'⁴⁹ In other words, a state may use force in the face of a threat of attack, in situations when not doing so would impinge the notions set out in article 2 (4). A textbook example of this was the 1967 Arab-Israeli war.⁵⁰ According to a still-disputed testimony, surrounding Arab armies lined their troops on their borders. Egypt expelled UN peacekeeping forces and their charismatic President Nasser made threats to interfere with shipping in the Straits of Tiran, at the entrance to the Gulf of Aqaba which was part of an overall plan of aggression against Israel.⁵¹ Finally, and perhaps more crucially, the Egyptian forces purposefully delayed their attack, knowing that this would inevitably place Israel in a state of readiness. Such a state of uncertainty would ultimately sap Israel's ability to fight, and would

48 Micheal Walzer, *Just and Unjust* (4th edn Basic Books 2006) 61.

49 *ibid.*

50 Gray (n 9) 161.

51 Stanimir A Alexandrov, *Self-Defence Against the Use of Force in International Law* (1996) Kluwer Law International 153.

paralyse the state in fear. Subsequently Israel fired the first attack (this is assuming we accept these facts).

Walzer makes strong consequentialist calculations about the rigour of his theory and its rationale in averting the untold sorrow of war. In consequentialist moral reasoning, you place the good before the right. Generally speaking, you weigh out all the evils that you would avoid if you take a certain action against the evils – were that action not taken. What I find even more interesting is Luban's criticism of these ideas. Apart from the general criticism ascribed to all utilitarians in that their theories require calculations which are messy at best⁵² and ignore the opaqueness of war,⁵³ Luban looks at the morality of Walzer's proposal. It is apparent that such interpretations and their wide acceptance and disapproval often swing on questions of moral and strategic implications. This is why it is important to look at the ethical underpinnings of such a theory and acknowledge that international legal norms do not exist in isolation.

There are certain aspects of Walzer's doctrine and Luban's criticism which are of interest to me. Even though Walzer's theory is forward looking, he makes considerations of past facts to determine the imminence of a threat. Such was the case in the 1967 war. This distinction between an imminent threat rather than a general one is deduced with reference to previous facts; it looks backward. Luban also makes the distinction between determining the 'rapaciousness',⁵⁴ (to use Vattel's terminology) of a state in probabilistic rather than temporal terms.⁵⁵ He cleverly uses

52 David Luban, 'Preventive War' (2003) 32 *Philosophy and Public Affairs* 225.

53 David Rodin, 'The Ethics of Asymmetric War' in Richard Sorabji and David Rodin (eds) *The Ethics of War: Shared Problems in Different Traditions* (Ashgate Publishing Limited 2006) 172.

54 Emer de Vattel, 'Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains' (translated: *Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*) (J Robinson London 1797) 445.

55 Luban (n 52) 230; I would suggest that probability exists within a temporal framework.

this probability aspect to separate the moral basis between pre-emptive wars and preventive wars (the latter responding to general threats). More importantly, he identifies certain characteristics which would increase the probability of an attack. This he does by defining what is a rogue state; one which favours a violent and militarist ideology. In order to ascertain whether such a state is rogue, he refers to their 'track record'⁵⁶. This is of particular interest because I feel the literature lacks texture and sophisticated consideration of past events in determining one's claim to self-defence. Some scholars do to a certain extent but I contend that this is insufficient and I shall elaborate, on why, later.

The controversy over interpretation of this article can be summed up in this sporting mantra: 'the best defence is a good offence.' This supports the view that self-defence can be launched prior to an actual armed attack and with good reason; in essence, the basis of anticipatory and pre-emptive self-defence. A lack of affirmative declarations throws the question of relationships between the treaty law and the pre-existing right into disrepute. Had there been an express repudiation of the 'inherent right' in the treaty, then a strict interpretation of it would have been legally and morally sound (but I hasten to affirm the simplicity of such a task). However, the retorts are scathing; that the pre-existing right does still exist and that military technology is such that it would be dangerous to assert such reasoning. What needs to therefore be established is an alternative interpretation; one which respects the pre-existing right but also the well-willed intentions of the UN Charter in restricting force and preventing abuse. It also needs to follow the spirit of Van Den Hole that should a state invoke self-defence, they are subject to rigorous procedures to determine the claim of their right to invoke self-defence. I acknowledge that claims to anticipatory self-defence are often gratuitous and abused, not surprisingly by the regional and world hegemonic-powers for

⁵⁶ *ibid* 232.

non-altruistic ends. The counter-restrictionist position tells us something quite clear about the nature of international relations. On the one hand they aim to justify their actions within the framework of the law; yet by the same token 'they are quick to interpret every legal restraint upon building power potential as an inhibition of their self-protection.'⁵⁷ But given what we have, we need to develop a theory which is encompassing of these traditional legal norms but which redresses an unfair imbalance in the abuse of this doctrine.

III. Re-thinking the ethics of killing in self-defence

We need a theory which respects the spirit of the UN Charter as embraced by article 2 (4) and a theory which recognises the customary international law right. But perhaps most importantly, we need a theory which is not open to abuse and considers very strongly the concerns that Brownlie makes with reference to the 'carte blanche for aggression'. It needs to be a rule which paradoxically is both proscribing and prescribing and which is not susceptible to mistake or fraud. To begin this experiment, I need to take the law of self-defence and strip it down to its fundamental unit. Walzer refers to the 'domestic analogy' which compares international self-defence to personal self-defence: what we would understand as self-defence in criminal law. Walzer makes the point that the two are isomorphic.⁵⁸

All things considered (when looking at other theories and piecing together my own), I will talk about the law of self-defence between individual units/persons and the assumption is that these can refer to individual states. Identifying problems with the 'domestic analogy' shall be dealt with later.

Self-defence poses questions of 'morality in extremis.'⁵⁹ It quite literally requires us to make life and death assessments of situations and offers one of the few

57 Werner Levi, *Law and Politics in the International Society* (Sage Publication 1976) 55.

58 Rodin (n 1) 108.

59 *ibid* 1.

instances in which killing is morally and legally permissible. My strong feeling is therefore, that when analysing the ethical basis for self-defence, the paramount mode of moral reasoning has to be intuitionism. If we have a situation which seems to have favourable consequentialist outcomes but feels counter-intuitive, it will be difficult to assume this as morally acceptable (a process of ad hoc reflective equilibrium).

We are dealing with a moral asymmetry in which a situation is created wherein one of the actors has a right to kill another. There are several approaches which I shall go through and critique. However, the ultimate aim is not necessarily to develop and improve these ideas. To the contrary, it will be to identify what I perceive as a weakness in their methodology. Note, all the following examples work on the presumption that the only way for a victim to save himself is by killing his aggressor.

Thomson's approach is widely accepted as having ignited the debate of killing in self-defence. Her argument is incrementally built up using several examples trying to force a universal moral conclusion on each scenario. She begins with the 'villainous aggressor'⁶⁰ which illustrates the textbook case of morally justified self-defence. You are approached by x who wants to kill you and the only way to prevent x from doing so is killing him. We then move on to the 'innocent aggressor'⁶¹ who, like the villainous aggressor wants to kill you, and to stop him from doing so would require you to kill him. Yet his aggression has come from an ephemeral lapse of sanity. The final scenario identifies the 'innocent threat'⁶² wherein a fat man is perniciously pushed off a cliff in your direction and the only way to save yourself is through deflecting him (and as a result killing him). Controversially, Thomson sees no moral difference between the three and

60 Judith Jarvis Thomson, 'Self Defence' (1991) 20 *Philosophy and Public Affairs* 283.

61 *ibid* 284.

62 *ibid* 287.

thinks that it would not only be morally excusable but justifiable to kill.

This rights-based account⁶³ makes no demarcation between fault or moral agency; so even though the innocent threat has no autonomy of his act, Thomson asserts that it is still morally acceptable to kill in self-defence – a position that David Rodin, as we shall soon see, disagrees with.⁶⁴ Her formulation rests on the premise that we have rights against one another not to be killed. Upon aggression by x, x forfeits his right not to be killed and therefore the victim may kill him without violating x's rights.⁶⁵ This means that x's right to life includes a claim against others that they not kill him. When he aggresses, he forfeits this right and loses his claim against the victim. McMahan rightly acknowledges that something, particularly with the innocent threat, is not quite right here. It seems counter-intuitive that a falling fat man, with no fault or moral agency could therefore lose his right to not be killed. This forfeiture framework doesn't seem adequate to explain certain problem cases; indeed, it leads us into a philosophical quagmire.⁶⁶ Rodin correctly identifies that forfeiture of rights can turn on facts 'about status, condition, actions and intentions of both parties.'⁶⁷

If we are to elevate this latest scenario to the situation between states in the context of *jus in bello*, soldiers in conflict maybe entirely innocent (even going as far as opposing their presence in a particular country) despite the illegality of the *jus ad bellum*. However, because their default position is that of being under orders to kill, in spite of the fact they have no fault, it would expose them to being justifiably killed (arguably they have agency). Quong raises equally valid concerns regarding the lack of moral agency of

63 Jeff McMahan, 'The Basis of Moral Liability to Defensive Killing' (2005) 15 *Philosophical Issues* 387.

64 Rodin (n 1) 79.

65 Thomson (n 60) 302.

66 Rodin (n 1) 70.

67 *ibid* 76.

the ‘innocent threat’, who therefore should not be subject to moral duties.⁶⁸ The main principle here is that it seems counter-intuitive to subject someone who has no intention to kill to these moral burdens. Whilst we can excuse an individual from killing the falling fat man, it seems against our intuition that such an act is even morally permissible.

One of the aspects that I find appealing about this theory is the notion of loosing a right not to be killed. Many of the problem cases, when elevated to the level of states, would unlikely occur. A state will never commit aggression in a lapse of sanity in the conventional sense. But it seems plausible that a state, through some type of aggression it commits in the present, or in the past (in respect of a series of attacks) may forfeit its right to defend itself.

Another account refers to culpable liability.⁶⁹ This works on the premise that when an individual puts himself in a situation, such as pointing a gun towards your head, he makes himself liable to be killed. Depending on the victim’s epistemic limitations it will therefore be determined whether the act is morally permissible or morally excusable. For example, assume the gun was not actually loaded but for some reason, neither individual knew this. If we couple culpable liability with an objective account of facts it would only make it morally excusable. However if we couple it with a subjective account then it becomes morally permissible.⁷⁰ The latter seems far more attractive but it seems peculiar to make an act morally different based on a lack of knowledge.

Culpable liability is perhaps the basis of article 51 of the UN Charter. It says that should a nation state commit an aggression, it is liable to attack based on the principle of self-defence (under the parameters of necessity and proportionality). This is all good and well but we can’t celebrate too prematurely for we are forcibly pulled back into

68 Jonathan Quong, ‘Killing in Self-Defence’ (2009) 119 *Ethics* 515.

69 McMahan (n 63) 397.

70 *ibid* 398.

our original *harmatia*: determining the difference between aggression and pre-emptive attack.

McMahan also puts forward his most favourable account which is the justice-based account⁷¹. Here, distribution of harm is attributed to those most responsible for the harm, other things being equal. It does not necessarily require harm but does require agency. Therefore what it advocates is very similar to the tort law of negligence in terms of causal proximity between breach and harm suffered. A person's liability increases when one's action is more fault-inclined. For example, when driving a car you account for all the consequences of potential accidents regardless of how remote they maybe to your actual driving the car.

This at first seems attractive but is open to many objections. For example, how can we determine who is the initial moral agent responsible? McMahan suggests the extreme possibility that potentially the mother of the villain could be liable.⁷² One of the things I feel a lot of these theories lack is a focus on the rights of the victim; instead they look at the rights, fault or agency of the aggressor. Quong however, switches the focus and asserts that 'each person is understood to have a powerful agent-relative permission to avoid sacrificing or significantly risking their own life for the sake of others (in the absence of any obligations voluntarily incurred)'.⁷³ I find this particularly convincing, as it seems to appeal to our intuition. The following example will illustrate this idea.

Suppose Tanveer is slowly being engulfed by quicksand. I can rescue him but I know that in all likelihood I will loose my watch. Many would conclude that I am required to rescue Tanveer. Suppose however, a lion is embedded in the quicksand and will most likely devour my

71 *ibid* 403.

72 *ibid* 405.

73 Quong (n 68) 51.

legs if I try to rescue Tanveer. If we focus on the rights of Tanveer, they far outweigh my legs being eaten. But it seems difficult to morally compel me. One way is to firstly look at the agent-relative value which changes the moral outcomes. If I translate this to the level of nation states, one could interpret it as states thinking that their life is important to them. In situations where this is being threatened, they can take certain measures (albeit necessary and proportional) to prevent such outcomes. This fits in neatly with the aforementioned point in terms of a realist's conception of international anarchy.

The theories I have briefly discussed are by no means comprehensive and they all offer some interesting commentary on the philosophy of self-defence. I have highlighted the view that when a state aggresses against another, then it violates and infringes a right to life and integrity of the other state, in such a way that makes them morally susceptible to attack. This seems accordant with what we understand as an inherent right of self-defence. I also see that in a world of sovereign nation-states, it is understandable that they would be self-interested before looking out for others. This idea is in line with Quong's 'agent-relative value'. After all, it is the nature of wars in self-defence in that they are different to general wars; they are special-interest wars.⁷⁴

One final point; Rodin makes very good criticisms of why the 'domestic analogy' is philosophically misleading. To understand why, he makes reference to what is known as the 'Hohfeldian correlate'.⁷⁵ He says that the domestic analogy refers to a normative relationship in which the following elements are present; a subject (defender), object (aggressor), act (homicide) and the end (to protect yourself). The aggressor, as he is morally at fault, loses his right upon this aggression and can be killed (circumventing the so called

⁷⁴ Luban (n 52) 221.

⁷⁵ Rodin (n 1) 75.

inalienable right of life paradox).⁷⁶ My right not to kill you is the logical correlate of your duty not to kill me. Therefore my right to kill you in self-defence is the logical correlate of your failure to possess the right that I not kill you.⁷⁷ He elaborates further saying that rights not to be killed are interpersonal and require reciprocity, as the Hohfeldian liberty illustrates. When we consider this in the realm of national self-defence, we must consider its relationships in times of war and acknowledge that they expose very different elements in war. He cites that there are two levels of war;⁷⁸ between peoples and states, and it is a moot point whether national self-defence is conceived as a right against people or states. Zohar refers to this as moral vertigo.⁷⁹

My response to this is subtle. This analogy does make a lot of assumptions about the content of relationships between peoples and states and their apparent similarities. Because these theories work on a rights-based approach, they are exposed to this criticism. However my approach doesn't consider rights per se. Rodin's analysis only falters your domestic analogy if one assumes the normative relationship in the Hohfeldian sense described. I acknowledge that they can be surmised in this way but I would refute that this has a monopoly on the framework of explanation.

IV. History and the Notion of Pre-Emption

Many may have always held the normative conception of international law and enforcement as having the potential to ensure real justice. Such perceptions work on the notion that we right every wrong regardless of its time or place in history.

76 Cheyney C Ryan, 'Self-defence, Pacifism and the Possibility of Killing' (1982) 38 *Ethics* 510.

77 Rodin (n 1) 64.

78 *ibid* 65.

79 Noam J Zohar, 'Collective War and Individualistic Ethics: Against the Conception of "Self-Defense"' (1993) 21 *Political Theory* 615.

History itself is a very important concept in law. We, as lawyers, must determine facts which happened in history from an objective viewpoint. The problem with adjudication is that we always assume that cases exist in isolation; in a vacuum in which time and space cannot enter. This legal black hole as it were, hinders the real effectiveness of law in restorative justice. One thing that all these theories tend to lack is a consideration of historical elements. Whilst I appreciate that history is itself elusive,⁸⁰ a veneration of what has happened rather than what will happen I think is infinitely more useful in our determination and application of self-defence. I explain how my interpretation works and how it alters the differing restrictionist and counter-restrictionist schools of thought.

In every second of our lives, our minds subconsciously make decisions about the behaviours of others, marking them with a moral tick or cross; not desirable perhaps but perfectly understandable. I observe a woman helping an old man with his shopping and assess this as a good thing. When we observe certain actions in isolation, we arrive at certain conclusions. Take the following for example:

Ashley is walking down the street minding her own business when her attention is accosted by an incident across the road. She sees Willard, a neighbour, being hit, with some rigour, in the stomach by the school's head boy, Carleton. Like most of us, she makes a fairly uncontroversial moral assessment of that particular act, in isolation, as being wrong. The two are quickly reprimanded by the local officer, PC Phil.

Ashley, much to her chagrin, visits the police station to go through some formalities as a witness. Later she learns some interesting information about Willard, in that he was the school bully and had a long history of picking on Carleton. This included stealing his money, yelling

⁸⁰ See also Friedrich Nietzsche, *On the Advantage and Disadvantage of History for Life* (Hackett Publishing 1980).

profanities at Carleton and sometimes even hitting him. Upon the revelation of this new information, her earlier moral assessment of Carleton's action changes and although she does not necessarily think it was morally justifiable, she begins to think his action maybe excusable. Something happened when she received new information. It would seem history changed her evaluation of the facts-past temporality has normative value.⁸¹

With this interpretation, rather than looking at either agent individually, the approach is radically a holistic approach and so it observes them all - in their entirety. Entirety here entails not just the present facts, but the past facts. It determines, regardless of how far back in time, who the initial aggressor was. This appears a very difficult task and indeed I will address the problems with this analysis. But if it becomes possible, and that we may answer this question with unanimity, then we extinguish all of the criticisms afforded to both schools of thought.

I shall explore, a little further, the importance of history and context before I explain how such a law should be worded. My interpretation emanates from disillusionment with liberal theories of justice which isolate people's choices from their cultural and temporal context. This type of thinking is essential in determining behaviours of other people. For example the morality (and therefore temporality) of a terrorist is different from the morality of a pacifist. It would be seemingly absurd to afford the moral standards of the former to the latter. Much like philosophers that say culture is the context of choice,⁸² I consider circumstances. I also make the proposition that states can behave in very similar ways where their choices are subject to a veritable wealth of external influences; including history. Indeed, to accept this choice (in this case of self-defence) 'at face value, one has to take into account that their current

81 This forms one of the basis of my doctoral research.

82 Jan Van Der Stoep, 'Towards a Sociological Turn in Contextualist Moral Philosophy' (2004) 7 *Ethical Theory and Moral Practice* 134.

convictions and behaviour are shaped by circumstances of domination.’⁸³ History acknowledges the complexity of situations and is crucial in the ‘intellectual task of generating or discovering principles which require choices to be made.’⁸⁴

What I have briefly argued is that when we are revealed past facts about certain situations, we change our moral perspectives. I think this is fairly uncontroversial as we tend to look favourably on things put into context and unfavourably on things put out of context. I have also looked at how this is important in determining the choices people make relative to their circumstances.

The key premise we have is history. This does two important things; it helps to identify the initial aggressor but also helps to evaluate the severity of a threat. Let us assume that the UN Charter is absolute (like an act of legislation in English law); a peremptory norm that codified rules of customary international law. This means we embrace the spirit of article 2 (4) UN Charter which respects sovereignty and tries to eliminate the use of force. But what it also means is that we take on the Caroline Incidents idea of pre-emption. However, with this we add a few adjustments; a provision clarifying circumstances when pre-emptive self-defence maybe used. This will introduce the element of history and what Luban brilliantly considers as rogue states. To take Luban’s militarism definition that is ‘ideology favouring violence [with] a track record of violence and a build up in capacity to pose a genuine threat.’⁸⁵ He says that if we are to justify a preventive war, it can only be based on determining the character of whom our attack is aimed at. One way to establish such a character is by looking at history.

By looking at history, we can piece together whether or not a state poses a genuine threat. But herein lies a

83 *ibid* 137.

84 Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (2nd edn OUP 2002) 35.

85 Luban (n 51) 231.

hurdle; the very job of a historian is to establish one universally accepted narrative of history. How can we therefore determine which history is attributable to the 'rogue-ness' of a state and which is in fact a response or consequence of repression by another rogue state. To illustrate this problem clearly, let us make some assumptions that it maybe suggested that guerrilla groups are inherently militaristic. However, often guerrilla groups are responses or reactions of a people, under repression, vying for political and economic emancipation. Their rogue-quality is not instinctive but manufactured: they have been coerced into violence. To put it simply they are a product of their circumstances. However, violence of other state/non-state actors show a propensity for violence that is innate, rather than a product of circumstances and indeed, such propensities can be evidenced with historical records. Admittedly this is over simplified, but the role of this thought experiment is to highlight the merit and importance of looking backwards.

One pressing question therefore, is how far back do we have to go to determine the 'rogue-state'? This brings us back to the very problem with all self-defence theories; identifying the initial aggressor. Assuming that the requirement for a rogue character had been satisfied, could for example the Americans try to justify self-defence against Britain citing British imperialism and colonial aggression as the initial aggression? If one can objectively verify that Britain was a belligerent state and had been since, then it is difficult not to arrive at a conclusion that self-defence would be justified. To clarify, I shall illustrate using the following example:

Let us assume the worst; that Nazism was an enduring ideology and succeeded to this day. As part of its policy, it continues to commit pogroms against Jewish, black and disabled people. There is a state neighbouring Germany which is home to these groups. Germany, in its unremitting commitment to its fascist ideology, occupied or militarily intervened in this country. Over time, this fictional state

grows more incensed and irate as death and casualties accrue. They begin to mobilise a guerrilla resistance and fire missiles into Nazi Germany. Now we can *prima facie* observe that Nazi Germany is a rogue state. What is also apparent is that they were the initial aggressors. This is verifiable through historical accounts of these pogroms. If the guerrilla army were therefore to conduct operations in self-defence, their violence would be excused because it is as a response to the rogue state. History therefore, has determined the initial aggressor and the severity of the threat. This argument perhaps reduces complex state relationships to a rather simplistic formulation but complexity is not an argument against producing authoritative rulings.

We can take some inspiration from McMahan's analysis of preventive war. It is fairly uncontroversial that preventive war is illegal under article 51 of UN Charter (as it responds to general threats which could be far back in time) but McMahan puts forward moral arguments for it albeit inside a lattice of very strict moral constraints. Consider the battered woman case; her husband has a history of violence against her and she has a reasonable belief that her husband will attack (although the threat is not imminent). The problem emanates from insufficient evidence to establish the probability of the attack.⁸⁶ Luban picks up on this by saying that 'we re-characterise imminence in probabilistic rather than temporal terms.'⁸⁷ Whilst I would suggest probability and temporality share some common ground, it naturally follows that determination of this can be based on evidence in history. McMahan says that intuitively we would accept a war of prevention if compelling evidence that the state would unjustly attack us, that waiting would lessen effective response and that peaceful means have been exhausted.⁸⁸ I think this

86 Jeff McMahan 'Preventive War and the Killing of the Innocent' in Richard Sorabji and David Rodin (eds) *The Ethics of War: Shared Problems in Different Traditions* (Ashgate Publishing 2006) 172.

87 Luban (n 52) 231.

88 McMahan (n 86) 172.

is true. However, I would not necessarily endorse the theory because it would be prone to abuse (but discussion of these ideas means that history has some relevance).

We shall establish ‘imminence’ by introducing the ‘probabilistic/temporal’ element. This will be evidenced by the history of the aggressor to whom the self-defence is being invoked against. If the threat is ongoing, it will make the probability of the attack more likely. This is often referred to as the accumulation theory⁸⁹ and rightly identifies the difficulty distinguishing between self-defence, reprisals and so-called pinprick attacks.

This is an all-encompassing interpretation of the self-defence law as embedded in the treaty provisions, customary international law and (taking into consideration) moral and ethical considerations.

Let us call it historical self-defence.

‘A state may invoke its inherent right before an armed attack if it is imminent and the state in which it is invoked is considered rogue. The state in question’s historical record of aggression against the state wishing to invoke self-defence will determine whether a state is rogue and if the attack is imminent.’

To clarify the last sentence; this follows a circular reasoning. The historical record of events informs us of whether a state is rogue and whether a state is rogue informs us whether an attack is imminent. Imminence is measured in probabilistic terms; which is in turn, determined by the historical record.⁹⁰ All areas of the hypothetical provision are intimately linked.

⁸⁹ Alexandrov (n 51) 166.

⁹⁰ Note, it would also be subject to high evidential standards and would require an impartial and objective mechanism for determining⁹⁰ the facts and historical record. My proposal shall offer two levels of exculpation; when the attack is imminent (one of the requirements of anticipatory self-defence), then it will be justifiable; if the threat is more remote, it is only excusable.

The best way to demonstrate this new interpretation and indeed to identify its weaknesses is by looking at a few short examples.

V. Application: Teasing Out the Problems

To really put this theory to the test, it would be most useful to use a case study whose history is most disputed. The question concerning Palestine indulges us into two separate narratives of history; one which saw 1948 as the triumphant declaration of Israeli statehood and the other which the Palestinians mourn as their 'Al-Nakba' or 'catastrophe'. The events I will use are going to be as all encompassing of both accounts of history as possible. The aim is not necessarily to condemn or condone the other; rather it is to demonstrate the theory.

Let us consider the war in the Gaza Strip in 2008. The charge often levelled at the government in Gaza's military wing is the constant rocket fire into the southern Israeli cities of Ashkelon and S'derot.⁹¹ The Israeli Ministry of Foreign Affairs states that 1750 Qassam rockets and 1528 mortar bombs were deployed in 2008. This has become the propaganda discourse for Israel's war with Gaza. When Israeli forces executed its Operation Cast Lead on December 27th 2008, self-defence was cited as the basis for its use of force.⁹² Prior to the war there had been a four-month ceasefire in which the number of rocket attacks dropped to virtually zero yet the Israeli Defence Forces committed targeted assassinations on Gazan government leaders.⁹³ Let us assume the facts to be true (in all likelihood they are; the

91 Intelligence and Terrorism Information Centre at the Israel Intelligence Heritage & Commemoration Centre 'Anti-Israel Terrorism in 2007 and its trends in 2008' (2008) 26 available at <http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/terror_07e.pdf>.

92 Rose Mishaan, 'Introduction- Recent Events in Gaza' (2009) 32 *Hastings Int L Rev* 639.

93 Victor Kattan 'Gaza: Not a War of Self-Defence' January 15 2009 *Jurist: Legal News and Research* <<http://jurist.law.pitt.edu/forumy/2009/01/gaza-not-war-of-self-defense.php>> accessed 15 May 2010.

dispute is the selection of relevant facts rather than convenient ones⁹⁴).

The Qassam rocket attacks, like the example we used above regarding Ashley, Willard and Carleton, is an intrinsically wrong act. However, if we reverse back into history, maybe our perceptions of this violence will change. To quote Kattan, 'one cannot ignore the conduct of Israel's armed forces in the occupied territories and examine the rocket attacks in isolation.'⁹⁵

History will determine the severity and imminence of a threat. So if the government in Gaza wants to justify the rocket attacks (rather than excuse them), it has to prove that an attack is imminent, much like Walzer's anticipatory self-defence. And it has to prove that the attack to which the state is directed, is rogue. Rogue, as mentioned before, is ascertained by a forensic analysis of historical documentation. This is where we potentially hit our first snag in the theory. What facts are relevant? Which are merely convenient? What is objective and what is subjective? I have acknowledged this problem before; but I do think it is important and achievable. Recall my conceptualisation of justice as righting every wrong regardless of time. History is required to do such a thing. If we can create an exercise which is able to determine objective history (or at least a historical account of the facts which has popular consensus) then this formula will surely work.

The most recent UN Security Council resolution 1860⁹⁶ re-affirms the infamous Resolution 242⁹⁷ (and

94 Zohar (n 79) 612 Zohar refers to HLA Hart's terminology citing casual attributions as 'ascriptive' rather than descriptive in that they ascribe responsibility to the agent rather than reporting the objective sequence of events.

95 *ibid.*

96 UN General Assembly Resolution supporting the immediate ceasefire according to Security Council Resolution 1860 23 January 2009 A/RES/ES-10/18 available at: <<http://www.unhcr.org/refworld/docid/49917ee92.html>>.

97 UN Security Council Resolution 242 (9 November 1967 S/RES/242 (1967) available at: <<http://daccess-dds->

subsequent Resolutions 338⁹⁸, 1397⁹⁹, 1515¹⁰⁰ and 1850¹⁰¹) that Palestine continues to be occupied by Israel. Also international law, even after the disengagement of 2004, recognises that Israel continues to occupy Gaza.¹⁰² Furthermore, we have Resolution 799¹⁰³ condemning the deportation of hundreds of Palestinian civilians in contravention to Israel's obligations as an occupying power under the Fourth Geneva Convention; Resolution 904¹⁰⁴ expressing shock at the appalling massacre committed against Palestinian worshippers in Hebron; Resolution 673¹⁰⁵ adopted unanimously with reference to Israel refusing to receive the mission of the then UN Secretary-General¹⁰⁶; Resolution 106 admonishing Israel's pre-arranged and planned attacks inside the Gaza Strip.¹⁰⁷ All in all, Israel has accumulated 223 UN Security Council Resolutions

ny.un.org/doc/RESOLUTION/GEN/NR0/240/94/IMG/NR024094.pdf?OpenElement>.

98 <UN Security Council, Resolution 338 October 1973 S/RES/338 (1973) available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/288/65/IMG/NR028865.pdf?OpenElement>>.

99 UN Security Council Resolution 1397 S/RES/1397 (2002) available at: <<http://www.un.org/News/Press/docs/2002/sc7326.doc.htm>>.

100 UN Security Council, Resolution 1515 S/RES/1515 (2003) available at: <<http://unispal.un.org/unispal.nsf/0/71B2C135FCA9D78A85256DE400530107>>.

101 UN Security Council, Resolution 1850 S/RES/1850 (2008) available at: <<http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?page=publisher&publisher=UNSC&type=&coi=PSE&docid=4950d67c2&skip=0>>.

102 UN Human Rights Council, UN Human Rights Council : Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967 available at <<http://www.unhcr.org/refworld/docid/461e52b12.html>>.

103 UN Security Council Resolution 799 S/RES/799 (1992) available at: <<http://www.unhcr.org/refworld/docid/3b00f15f4f.html>>.

104 UN Security Council Resolution 904 S/RES/904 (1994) available at: <<http://www.unhcr.org/refworld/docid/3b00f15f4f.html>>.

105 *ibid*.

106 UN Security Council Resolution 673 S/RES/673 (1990) available at: <<http://www.unhcr.org/refworld/docid/3b00f13844.html>>.

107 UN Security Council Resolution 106 S/RES/106 (1955) available at: <<http://www.unhcr.org/refworld/docid/3b00f13934.html>>.

condemning its use of aggression against Palestine and other Arab states; more so than any other state in the world. It continues to defy humanitarian law and has not resolved any of the resolutions which are annually re-affirmed. This seems enough to determine the severity of the threat. It is apparent that the state has a propensity for aggression, but determining the initial aggressor is not something which has been ratified by law. This is where we run into a potential *cul-de-sac*. Now we must rely purely upon history to determine the origins of the conflict. I think history can, and indeed does, healthily inform law. But it all depends on whose arguments we find more compelling. But is this not the job of a litigant? If jurists could objectively determine the origins of the conflict, coupled with the affirmation of the history as it represents violence by Israel, it gives more credence to the imminence of a threat. So let's put this back into our case study and relate it to our very first hypothesis.

If we recall the example we used earlier of Willard and Carelton and contextualised violence; if Qassam rocket attacks were fired in response to what they gauged, and can be objectively verifiable by an independent and neutral body, as an imminent threat, based on Israel's history, these would be justified. However, if the threat were far more remote the rocket attacks would only be excusable.

If my theory were to stand true, how could a weak state ever commit an act of aggression and use unlawful force? Surely they would always justify every use of force using this theory, in essence exercising the very type of arbitrary force that powerful states use. This accentuates the need for an enforcement body which can create a system that subjects all states to the rigour of due process, unlike the United Nations Security Council.

The questions for deliberation in the light of the Falklands war are very interesting. The claim from Argentina is that they were exercising their right of self-defence since they had territorial claims pursuant to article 2 (4) of the UN Charter. They said that Britain had usurped the island 149 years ago and used continuous force. Alexandrov worried

that if the Argentine claim was tenable, it would allow the very thing which my interpretation permits: 'claims for restoration of the status quo ante.'¹⁰⁸ What of the Osirak case where Israel destroyed a nuclear reactor in the Tuwaitha Nuclear Facility?⁹ This is a fascinating case as the situation is not clear-cut. Although condemned by the international community under Resolution 487,¹⁰⁹ this was an example of a far remoter threat. Had for example, Iraq had a history of violence against Israel, Israel's action would have only been excusable. If the Iraqis had developed their nuclear facility to a level capable of manufacturing nuclear weapons, it maybe argued that Israel's actions were then justified, but this is conjecture and subject to empirical evidence to suggest the counter. This also raises the broader question of nuclear weapons; would a state be able to use this in historical self-defence? I shall not go into this here but it is safe to say that I would have affirmed Judge Schwebel's remarks that nuclear weapon is an exception and under no circumstances should it be used by anyone in self-defence.¹¹⁰

VI. Conclusion: Implications and the Real Need For a Radical Interpretation

'We must...recognise that by this temporary submission of the Vanquished[...]a new political order is initiated, which, although without moral basis, may in time acquire such a basis, from a change in the sentiments of the inhabitants of the territory transferred, since it is always possible that through the effects of time and habit and mild government...the majority of the transferred population may cease to desire union - when this

108 Alexandrov (n 51) 132.

109 UN Security Council Resolution 487 S/RES/487 (1981) available at <[http://www.undemocracy.com/S-RES-486\(1981\).pdf](http://www.undemocracy.com/S-RES-486(1981).pdf)>.

110 Legality of the Threat or Use of Nuclear Weapons - Advisory Opinion of 8 July 1996 - General List No 95 (1995-1998) <<http://www.icj-cij.org/docket/files/95/7515.pdf?PHPSESSID=dc8e14d6e87c61e15b4d964715510a0a>>.

change has taken place, the moral effect of the unjust transfer must be regarded as obliterated; so that any attempt to recover the transferred territory becomes itself an aggression.¹¹¹

The implication by Sidgwick's quote is that it is acceptable to let past injustices go unanswered; that time is the great healer. The assumption is that past transgression, etched in the consciousness of a people can be all too easily forgotten. History demonstrates to the contrary. This mode of thought is precarious and it once again sucks us back into the vacuum of our legal black hole.

What international law in general tells us is descriptive of the distribution of power in international relations. One very simple example of this revolves around whether the definition of armed attack includes economic sanctions; favoured by the hegemonic states like the US as exemplified in Iraq, and disfavoured by the smaller ones.¹¹² The fact that it politicises the law should be no surprise. International society is shaped by the very interests of states.¹¹³ The creation of law, whether crystallised in treaties or developed through customary international law, is determined by those states for they are the de facto lawmakers. Indeed there exists the notion of sovereign equality, but without an independent arbiter with wide reaching jurisdiction (indeed even the history of the UN has revealed 'a very high degree of complicity with the politics of power and imperialism'¹¹⁴), it is difficult not to see this as anymore than a legal fiction. The legal institution in international relations could be a force to reckon with but 'its influence is diluted, however, and sometimes outweighed, by other forces in a developing international society.'¹¹⁵

111 Henry Sidgwick, *The Element of Politics* (Cambridge Library Collection 2012) 268.

112 *ibid* 111.

113 Levi (n 57) 152.

114 Miéville (n 18) 290.

115 Rein Müllerson, *International Law, Rights and Politics* (Routledge 1994) 6.

By illustrating the implications and their effects, I think it will demonstrate the need for such an interpretation as posited, or at least one which is historically reflective. The beauty of international law is that it is wonderfully abstract and prosaic; and herein lies its enigma, in that it is wonderfully abstract and prosaic: it allows a whole spectrum of different interpretations. My position perhaps emanates from a favourable view of secessionism or redress for weaker states that are subject to annexation, or occupation in contravention of international law; or who are regularly subjected to human rights violations. The claims of self-determination for example, are all too easily quashed because they aim to address and alleviate the grievances of the weaker party. For example, in January 1978, Australian Minister for Foreign Affairs, Mr Peacock, deplored the use of force by the Suharto government against East Timor but accepted its integration into Indonesia. Inaction and accepting something *de facto*, or out of reality is effective complicity in these types of crimes.¹¹⁶ It is interesting to note, had the East Timorese mobilised a national liberation army, under my interpretation, they would have been justified in using historical self-defence. Under the restrictionist approach, they would have to wait for an armed attack from a much more powerful state which could have bombed it to oblivion (and most likely diminished its ability to respond). On the other hand the counter-restrictionist school, whilst they may have been able to pre-emptly attack, the moral justification would have been far less. But it is hardly surprising that the literature has developed in this way; it is politically and economically in the interests of states to be able to use violence with few constraints and thus legitimise such action.¹¹⁷ Flagrant use of violence is not a result of super-power politics, it is constitutive of it. Given that the nature of law is that which is created by states, it is unlikely

116 Tanzil Chowdhury, Nothing is Something Dangerous <<http://www.e-ir.info/2012/09/06/nothing-is-something-dangerous/>> accessed on 15 March 2013.

117 Miéville (n 18) 287.

that they will create or affirm laws which are a hindrance to their exponential power growth.¹¹⁸

This theory bores out of an inadequacy of the respective restrictionist and counter-restrictionist camps. Breaking away from orthodoxy, which suggest that only the latter benefits the more powerful states, I suggest that both do. The former, although a small hurdle, is counteracted by the stronger state's ability to quickly and efficiently respond to an actual armed attack. The latter, as we have discussed in detail, is prone to far reaching exploitation. An anomaly one could identify with my interpretation, is its bifurcation - the effective creation of two different laws: one for strong states, and one for weaker ones. This is not evident in the wording of the text but perhaps in the way the interpretation manifests itself. The very idea of having different laws or rather different standards was formulated and developed by Rodin when he refers to the 'ethics of asymmetric war.'¹¹⁹ In it he talks about the trials and tribulations of *jus in bello* where we often have strong versus weak with a common aim to make war as less bloody and short as possible. The weak cannot fight using the conventional methods that the strong does. They do not have the smart-weapons or laser-guided missiles which target only combatants. Should they be subject to the same humanitarian laws as the strong? Rodin suggests no when detailing his argument and I think this has some resonance in the *jus ad bellum*. The law as it exists is inherently unfair towards weaker states. It makes assumptions, through its distorted lens of so-called sovereign equality, that states have equal military capabilities.

This interpretation aims to contextualise all conflicts. International law, more than anything, presents agglutination between the disciplines of law and politics. Both have an intimate relationship which informs one another. In addition to just being a legal rule, the most important thing it is meant

118 Levi (n 57) 53.

119 Rodin (n 1) 161.

to do is stimulate a serious reflection within the international arena. It is meant to provide small groups of people, weaker or repressed states the means for greater legal recourse. This is based on an acknowledgment that the origins of their suffering are often etched in history and embedded within the positive (and natural) law. If these types of entities are able to use this new interpretation to justify seemingly violent acts (what some may even refer to as terrorism) it may make us all begin to think critically about the parameters of such conduct. Why are such acts of violence being committed and yet they are accepted as morally and legally permissible? Inevitably, many of the questions will be as a result of their past transgressions.

This more general approach to the question illustrates the main objective; not necessarily to convince people that this is good law and that it should be law. But rather to encourage a critical reflexive attitude when it comes to claims of self-defence. There is a lot at stake here, not just national pride, but national integrity and, most importantly, lives. Thus the motivation is not one compelled by historical revisionism but historical affirmation. It is a process which informs the law and that ensures historically legal justice. But before international law can be serious about self-defence, states, particularly the powerful ones, need to be serious about international law.

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