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The Self-Defence contemporary struggle

Is modern action changing the Proportionality Principle?

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Abstract

The process of development of Customary International Law is one that feels somewhat senseless. Contrary to the laws that require a written process, a signature and a ratification, the process of evolution of Customary Law requires a different amount of willingness and repetition in order to gradually change. Most of all, it requires a retrospective study to acknowledge its evolution, which makes a real-time analysis difficult to evaluate. The XXI century revealed a World in fast progression, with the advances of technology and the affordability of access to the Internet. Law is not isolated from this evolution and this reflection attempts to verify that, in fact, the social developments of the century have a direct impact on the way international law is also fast-evolving.

The struggle international jurists have is how to interpret the legal tools available in light of the particular circumstances they face. With Customary Law in particular, some of the rules date back to times that no longer have parallel to the circumstances lived in the XXI century. Yet, they are still valid and are still basing the decision-making of the modern problems.

With a focus on International Self-Defence in general, and in the Proportionality Principle in particular, the present research was done in order to understand the length that International Relations, State action and Jurisprudence are affecting the direction of Customary International Law's evolution. The focus is not on the causes of the changes, but rather how much influence do international actions are having in International Law.

Acknowledgements

Before I endorse all the personal acknowledgements to everyone that helped me throughout this process, I shall alert to the fact that, due to my attention deficit, I was not able to follow OSCOLA rules to the fullest. The use of short references would most likely induce my work in error, so I made the conscious choice of keeping most of the references in complete form, as if it was the first time citing a work. This was the best way I found to not misreference some of the works I consulted.

My thesis idea erupted from a long time of philosophical inquiries about the roots of Law. Throughout my journey as a Law student and a Law professional, I was always interested in the reasonings for a legal rule. The will to study and protect Human Rights comes from my teenage years and I take the completion of the European Master's Programme in Human Rights and Democratisation as a personal achievement and a step forward in my list of dreams.

The intensity of the Programme reminded me that when you are doing something you appreciate, the long hours, the mental exhaustion, the things you abdicate, are all worth at the end.

On completing my thesis, I would like to first and foremost thank my family for their support, without whom I would not be able to suspend my professional path and go back to learning and do what I like most: inquire. *Obrigada por aturarem este nano intenso e à distância, que é uma regalia e eu bem sei disso. Obrigada por me incentivarem e por me terem permitido viver esta experiência. A vida é mesmo melhor em família.*

Secondly, I would like to thank all EMA Professors, my colleagues and friends, for inspiring me and debating with me on all aspects on a daily basis: both the academic and the trivial. The friends I made this year were one of the reasons why I kept going and actually finished everything on time. True companionship keeps the world running and this is one of the most beautiful lessons I take from this Programme.

Thirdly, I have to thank my supervisor, Peter, for the patience, for the advice and for the company. Copenhagen will forever remind me of you and of Eva, and for that I am forever grateful.

Finally, I would like to thank my younger self, for never losing hope, for being strong and for always having a kind look on life. I hope I made you proud.

Table of Abbreviations

AI	– Artificial Intelligence
CIL	– Customary International Law
DRC	– Democratic Republic of the Congo
ECHR	– European Convention on Human Rights
ICC	– International Criminal Court
ICJ	– International Court of Justice
Iran	– Islamic Republic of Iran
JAB	– <i>Jus ad bellum</i>
JIB	– <i>Jus in bello</i>
P5	– The five Permanent Members of the United Nations Security Council
PoW	– Prisoners of War
UK	– United Kingdom
UN	– United Nations
UNC	– Charter of the United Nations
UNGA	– United Nations General Assembly
UNSC	– United Nations Security Council
USA	– United States of America
USSR	– Union of Soviet Socialist Republics

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CHAPTER I – INTRODUCTION

1. Research question and relevance to the topic

Humanity has been organised in society moulds of controlled systems since agriculture transformed groups of nomadic-hunters into settled agriculture communities.¹ There is a natural instinct for human beings to congregate and naturally form social bounds with each other. First, these societies were formed for survival reasons: the congregation of multiple people would help the production of food, the survival in hunts and the protection of the species. These small societies paved the way to bigger, more complex forms of organisations that, depending on who you ask, are created due to the danger of the rotten nature of human kind, or due to the benefits organisation brings to its good nature.²

“The distinction between agreements enforced by the state and those enforced by other third parties, such as firms or religious institutions, determines the scope of the state”³ and so, throughout the advancement of global societies, the presence and importance of States as the main detainers of the responsibilities on the human race’s organisation started becoming more significant.

The notion of a nation-state that came out of *Westphalia* (1648)⁴ is followed until this moment, nearly five centuries later, for a reason. Societies seek balance, a security that allows populations to follow their path while being ruled by an invisible entity towards which they abdicate some of their liberties for the greater good of all. This transfer of liberty and responsibility to a State translates in a set of rules that dictate the way human beings interact with each other, the State and with every other element that composes their surroundings called *Rule of Law*.⁵

¹ As a captivating read, David Graeber and David Wengrow, *The Dawn of Everything: A New History of Humanity*, Allen Lane, 2021.

² As a mere example, in *Leviathan* (1651), Thomas Hobbes argues that humans live in a state of nature that is marked by unsafety, greed and conflict and deliver their liberties to a society in order to live in peace and security. On the other side of the coin, Aristotle defended that the natural state of human kind would be living in the *Polis* (a city-state), a necessary political decision for human kind to thrive. A further discussion on this topic could happen in another forum.

³ Yoram Barzel, *A Theory of the State, Economic Rights, Legal Rights, and the Scope of the State*, Cambridge University Press, 2009, pg. 2.

⁴ Pärtel Piirimäe, *Sovereignty in Fragments, The Past, Present and Future of a Contested Concept*, Cambridge University Press, 2011, pg. 64.

⁵ Friedrich Kratochwil, *The Status of Law in World Society, Meditations on the Status and Rule of Law*, Cambridge University Press, 2014, pg. 58-63.

The creation and development of Law, when talking about state matters in modern day, is often visible, published, established, heavily discussed, written and re-written in more or less a transparent way. This does not apply to Customary International Law.⁶

According to Bradley, “CIL [Customary International Law] arises from the consistent practices of states that are followed out of a sense of legal obligation”,⁷ creating a certain amount of acceptability over the rule. It is, nonetheless, a two-element definition composed by (1) state practice (objective element) and (2) acceptance of the law (subjective element).⁸ The law we are about to explore is the result of a long construction process, influenced by the attention to state behaviour, sometimes by impactful events, other times by the recognition of a pattern in state action that is later on confirmed by the judiciary power.⁹

Even though we can easily find literature on the evolution of CIL over the past century and even before, it was increasingly hard to find literature on the significant possible evolution of the concept of self-defence. In most of the literature, the cases used as reference or burden of proof were virtually always the same and what originated my reasoning for choosing this topic was precisely that: why is there a scarcity of exploitation of the evolution of the principles that govern self-defence?

Self-defence has long been established as customary law and, as a consequence, its legal grounds are well preserved by jurisprudence. Regardless of the problems arising from the enforcement of international law,¹⁰ state-practice seems to influence the transformations of the long process of solidifying custom. This is ever more important to note when judicial production is not capable to produce effective answers to each problem raised in International Courts. However, the conclusions these courts are able to reach, do have an influence in the ways of developing international law and principles. As such, this thesis examines not only state practice but also relevant jurisprudence to sustain its theory.

Following this train of thought, I eventually arrived to my main research question: is modern action changing the Proportionality Principle and, if so, is self-defence changing

⁶ Curtis A. Bradley (Ed.), *Custom's Future: International Law in a Changing World*, Cambridge University Press, 2016.

⁷ Ibid, pg. 34.

⁸ Ibid, pg. 35.

⁹ For a more philosophical, yet pertinent view of the evolution of ICL, see John Tasioulas, 'Custom, *Jus Cogens*, and Human Rights' in Curtis A Bradley (ed), *Custom's Future: International Law in a Changing World*, Cambridge University Press, 2016, pgs. 95-116.

¹⁰ See, e.g., Andrew T Guzman, *How International Law Works: A Rational Choice Theory*, Oxford University Press, 2008, pgs. 183-210.

itself? And as secondary questions, does this evolution seem to rely on an interpretation process or have we not yet arrived in the temporal space to acknowledge this changes?

This study will hopefully allow us to develop and understand some of the progress happening in the rule of law in the XXI century, with a constant retrospective look to allow us to understand how it happens and a short look into the future in order to create a safer pathway for what is going to happen.

2. Methodology

This thesis was based on multidisciplinary research with an intricate connection between the fields of International Law, Philosophy of Law, International Relations and interpretation of jurisprudence. The research relied mostly on doctrinal work, that goes from a range of experimented academics to some more recent verified thesis.

The doctrinal ponderation is heavily impacted by analysis of international treaties. Academic opinion was taken in a high account for their work in the thoughts behind the evidence, which is of most interest for a proposition that is very challenging to prove in real time. The jurisprudence was selected for being the most influential to Proportionality and self-defence, in a purely subjective assessment in that matter, with a special emphasis on the work of the ICJ. The UN legal production was also relevant to the criticism. The approach is focused on state-action with an evaluation of the influence of non-state actors.

It should be noted that this approach is notoriously influenced by a Western point of view on the subject, having ignored other perspectives on the matter for the time being, which inclined the outcome of the analysis. The time period of this study is centred mainly in the XX and XXI centuries, with eventual look into other periods when it seemed pertinent to explain context and evolution.

Sources were mostly found through the University of Southern Denmark's database, with some others found in public libraries in Copenhagen. There was also research made through *mainstream* database such as *google academic* and *google*, for which the influence of Artificial Intelligence (hereinafter, "AI") in the process is difficult to disregard, as the influence of A.I. is impossible to avoid in the tools that are currently accessible to the students.

3. Outline

This thesis is composed of five chapters, including introduction and conclusion. The idea is to create a tunnel system, from a very wide perspective, to a very specific one. After the introduction, chapter II explores Self-Defence in a broad sense, how it came to be, which historical events collaborated to its creation. Chapter III explains in depth the Proportionality Principle, trying to distinguish it from the necessity principle in the matters that make them uniquely separated and understand their common elements. Finally, the IV chapter centres specifically on which events and jurisprudence we believe are changing and adapting in the

Proportionality Principle in particular and in Self-Defence in general, concluding with what we believe are our main lessons from this research exercise.

CHAPTER II – LEGAL FRAMEWORK

A legal thesis that aims to question the evolution of a legal concept will necessarily need to start with the creation of a legal framework of the main aspects that will be approached by the study. Self-defence is a very broad concept in International Law, composed by multiple parts that are gradually detailed in different fields of interest, depending on the context of your approach.¹¹ This framework is important to create a context in which our legal analysis does not get lost in the midst of the amalgam of concepts relevant in international law, but not pertinent to our analysis of the proportionality principle in particular. Nonetheless, it is still relevant to clarify and reflect on the broader context of self-defence, as an umbrella to the Proportionality Principle. Article 51 of the UN Charter¹² (hereinafter, “UNC”) does not explicitly mention neither necessity, nor proportionality. These principles come from the legal interpretations that arise from a mixture of customary law and *opinion juris* and we can find the first reference to the principle of proportionality in the UN Charter Supplement No 3, volume 2, of the article.¹³ As such, this clarification will be done in scale, starting with the general prohibition of the use of force, and then exploring its two main exceptions: authorisation by the United Nations Security Council (hereinafter, “UNSC”) and self-defence. This chapter will also include a long reflection on the matters how international organisms such as the UN operate and how they interact with the development of International Law, in order to make our subsequent reflections clear and logical.

1. The prohibition of the use of force – A context

Throughout centuries, the Christian values that guided the western powers viewed war as an evil use of force that was against the values awarded by God to the terrain representatives

¹¹ Robin Geiß e Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security*, Cambridge University Press, 2021, pg. 263, 638, 824-830

¹² Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 51.

¹³ United Nations, *Repertory of Practice of United Nations Organs, Supplement No 3 (1959–1966), volume 2*, on art 51, pg. 265.

(mainly monarchs in western empires). This eventually led to the rise of a philosophical movement called “Contractualism” that commanded several political philosophers to defend that States should shy away from war and, in more recent History, to plead in favour of Republican States as an alternative to the monarchies in place in the European Empires.¹⁴ *Contractualism* philosophers could not, however, set completely aside the possibilities of war and war was also considered as the only solution to moral deadlocks, becoming justified for those same reasons.¹⁵

The evolution of international geopolitics affected the development of political and philosophical legal thinking. The Peace of Westphalia,¹⁶ its recognition of State’s sovereignty as an absolute right, as well as a State’s exclusive ownership over the duty of protection of its population, paved the way to the rise of political views more based in Law concepts and less sustained by religious believes.¹⁷

In a more secular approach to International Law, Max Webber defended the “Theory of the Modern State”.¹⁸ In this literary work, Webber laid the terms for modern perception of the duties of a State, including its monopoly in the use of force/violence.¹⁹

In most ways, this theory of the beginning of the XX century by the German author is still wildly accepted as valid. States are perceived as the granters of stability, protection, rights and responsibilities. For this same reason, the UNC has the preservation of State’s integrity as one of its core principles, in article 2(4).

Having clarified the growth of the self-defence principle in international law from its primordial Greek and Roman political and legal philosophers until the contemporary concept of the XXI century, this chapter will allow us to create a framework that will prepare us to a deeper discussion of Proportionality in the next chapter. The *Caroline Incident* set both

¹⁴ E.g., Immanuel Kant, *Perpetual Peace, a Philosophical Essay*, pg. 1795; Desiderius Erasmus, *A Complaint for Peace*, pg. 1521.

¹⁵ Andrew Sangster, *From Plato to Putin: A Short Guide to the Question of War*, Ethics International Press Limited (Ed.), 2023, pg. 36.

¹⁶ Peace of Westphalia (Treaties of Münster and Osnabrück, signed 24 October 1648) 1 CTS 119 and 271.

¹⁷ E.g. Thomas Hobbes (1588–1679) and his theory of the Social Contract, in *Leviathan* (1651), where he defends the human being is intrinsically violent in the state of nature and needs a supreme ruler to manage its nature (giving up on freedom) in order to guarantee a society based on order, security and well-being of the majority; John Locke (1632-1704) and his *Second Treatise of Government* (1689), defends human beings are free and equal in their State of Nature and they voluntarily give up their liberties to a government in order to secure the governance and maintenance of said values.

¹⁸ Andreas Anter, *Max Weber's Theory of the Modern State Origins, Structure and Significance*, 2014, pg. 1

¹⁹ Ibid, pg. 173.

proportionality and necessity as limits to an act of aggression when acting in self-defence. However, these are not limits that translate into codification, so their discussion has to be thoroughly dissected.²⁰

The concept of self-defence has long been an implied practice of International Law between States. It finally got established in International written Law as one of the two exceptions to the prohibition of the use of force between States, a rule agreed-upon on article 51 of the UNC.²¹

After the end of the Second World War, nations gathered to establish a set of rules that would help prevent the repetition of yet another global war. Between the 25th of April and 26th of June 1945, 50 States met in San Francisco, United States of America (hereinafter, “USA”), to debate and write the guidelines for a new global order that would be set on International Law and cooperation, in order to maintain a lasting world peace.²²

In the San Francisco Conference, States adopted the UNC that would hopefully prevent a third World War from happening. Up until 2026, 81 years later, the United Nations has been successful on that aspect.

Article 2 of the UNC sets down the principles under which all member-states must guide their behaviour. Particularly relevant for this thesis is point 4 of the article: “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.”²³

The prohibition of the use of force is now very well defined in International Law, primarily by the UN, but as well in multiple other regional legislation.²⁴ The prohibition is a

²⁰ See, e.g., *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, The International and Comparative Law Quarterly, Vol. 55, No. 4, pg. 969.

²¹ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art. 51.

²² United Nations Conference on International Organization, Documents of the United Nations Conference on International Organization, San Francisco, 1945 (15 vols, United Nations 1945–1955).

²³ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 2(4).

²⁴ As mere examples, in Treaty on European Union (signed 7 February 1992, entered into force 1 November 1993) [2016] OJ C202/13, art. 21(1); Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3, art. 4(f); Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3, arts. 21–22.

core principle basing the foundation of the UN. After the failure of the League of Nations²⁵, States agreed on settling this prohibition into a new treaty-based law. The prohibition, however, had already long been and continues to be developing through Customary Law, becoming even stronger in recent history.²⁶ This evidence of an international legal consensus about the necessity of maintaining sovereignty is a result of centuries of organization of legal entities turned into States since the Westphalia Peace Treaties in 1648, and its impact on the importance of maintaining long-lasting borders to assert dominance and claim power, on one hand. On the other hand, it has also showed that political interests tend to prevail over peaceful interests and, at times, the Rule of Law.

The establishment of the prohibition of the threat and use of force as an international rule was, however, essential to create bonds between polarized international relations, specifically after the end of the II World War. The intricate multilateral relations fabric in 1945 was marked by mistrust and scepticism²⁷ after seven years of violent global and regional conflicts.

of the Modern State”.²⁸ In this literary work, Webber laid the terms for modern perception of the duties of a State, including its monopoly in the use of force/violence.²⁹

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Having clarified the growth of the self-defence principle in international law from its primordial Greek and Roman political and legal philosophers until the contemporary concept of the XXI century, this chapter will allow us to create a framework that will prepare us to a deeper discussion of Proportionality in the next chapter. The *Caroline Incident* set both proportionality and necessity as limits to an act of aggression when acting in self-defence.

²⁵ Agata Bar, *The League of Nations mandate system – success or failure?*, Institute of Political Science and International Relations of the Jagiellonian University Cracow, 2019, pg. 156-160.

²⁶ Olivier Corten, *The Controversies over the customary prohibition of the use of force: a methodological debate*, The European Journal of International Law Vol. 16 no. 5, 2005, pg. 805.

²⁷ In the discussion over the wording of article 2, see e.g. the Brazil discussion in *United Nations Conference on International Organization, Documents of the United Nations Conference on International Organization, San Francisco, 1945* (15 vols, United Nations 1945–1955), vol VI, pg. 178-180; XIII, pg. 191-192; XI, pg. 352, 473.

²⁸ Andreas Anter, *Max Weber's Theory of the Modern State Origins, Structure and Significance*, 2014, pg. 1

²⁹ Ibid, pg. 173.

However, these are not limits that translate into codification, so their discussion has to be thoroughly dissected.³⁰

Continuing our flow of thought with ICJ's contributions to the evolution of Proportionality, in 1964, the Republic of Yemen made military incursions in British-protected land. The British responded by launching retaliatory strikes against a Yemeni fort in the town of Harib, known as the Raf attack during the Aden emergency. The British Prime-Minister at the time, Sir Alec-Douglas Home, declared that "we again addressed a strong protest to the Yemeni Republican authorities. In addition, we formally notified them that, in the event of any renewed attack, we reserved full liberty to react in whatever manner might seem to us appropriate, without further warning. At the same time, we addressed a letter to the President of the Security Council, informing him of the latest attacks and of the warning we had given."

During the months of the dispute from early to middle 1964, the discussion was taken to the UNSC by the representative of Morocco on the stance that the United Kingdom's (hereinafter, "UK") action was illegal. Morocco requested the UNSC to condemn the UK, in that case and in other British military incursions in the region. The British defended their action at the UNSC arguing their responsibilities over the territory and that they acted proportionately and confined to the necessities of the case. The debate on the letter of the text of article 51 kept being developed within the United Nations, where states argued throughout the XX century the implications of state practice over the reach of the article. Meaningful debates took place in the UNGA on this matter.

Particularly relevant is the article 51 discussion in the years of 1970-1978. In the repertory, the discussion starts with the association between article 51 and article 2, paragraph 4 of the UNC, concluding that at the end of the analysis period, the Assembly was not able to reach a decision over a final interpretation of the principle. The supplement references several proposals of interpretation of the article in order to make it of more clear guidance: a draft proposal by the USSR, a draft proposal by thirteen states ("thirteen-Power" draft proposal) and a draft proposal by six states ("six-Power" draft proposal).

The USSR's draft proposal stated that "nothing in the draft definition should prevent the use of armed force in accordance with the Charter of the United Nations including its use by dependent peoples in order to exercise their inherent right of self-determination". The

³⁰ See, e.g., *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, *The International and Comparative Law Quarterly*, Vol. 55, No. 4, pg. 969.

thirteen-Power draft proposal “stipulated that the inherent right of individual or collective self-defence of a State can be exercised only in case of the occurrence of armed attack (armed aggression) by another State in accordance with article 51” and that “nothing (...) shall be construed as entitling the State exercising a right of individual or collective self-defence, in accordance with Article 51 of the Charter, to take any measures not reasonably proportionate to the armed attack against it” . It adds that “when a State is a victim in its own territory of subversive and/or terrorist acts by irregular, volunteer or armed bands organized or supported by another State, it may take all reasonable and adequate steps to safeguard its existence and its institutions, without having recourse to the right of individual or collective self-defence against the other State under Article 51 of the Charter”.

All these positions over the same article show us there was a deeper debate over its letter and the spirit of the law on itself. One of the difficulties arose from the lack of agreement on the definition of “aggression”, a definition agreed upon on the UNGA resolution 3314 that lasts until this day. The adoption of a definition of aggression was of growing importance of the ICJ started to reference the provision in its investigations. The definition is also given by the yearbook of the UN in 1951:

“Aggression is the threat or use of force by a State or Government against another State, in any manner, whatever the weapons employed and whether openly or otherwise, for any reason or for any purpose other than individual or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.”

Once again, a definition is given based on states’ actions, not considering, at least at the time, the influence of non-state influence in the acts of aggression. This decision comes mainly from a certain reluctance in incorporating yet another element to an already difficult definition by the States involved in the discussions within the UNGA.

This struggle, however, does not impede the identification of a number of elements that constitute the concept of “armed attack” as previewed in article 51: the scale of the force; the target of the attack; the identity of the attacker; the military nature of the attack; and the attribution of the attack to the state against which force in self-defence is to be employed.

Despite the efforts in defining the concept, the broad acceptance of a definition is important to achieve general consensus in international fora. This is especially relevant when bringing a case to international courts expecting certain actions to be ruled as valid actions in preventing or reaction to threats to sovereignty. At this point, the unlawful action has already

taken place and, as such, any of the court's rulings will be of reparation, instead of prevention (which would, in theory, have taken place at the UN or other international fora)

Defining aggression is, as such, important to be able to distinguish between what is perceived as a threat by one and what constitutes a real threat in general terms. This becomes essential to an adequate response to be considered as proportional and hence why it has not been ruled as such in judicial instances.

It was, as such, important to adapt the Law to the reality of International Relations. Countries have and will continue to interfere in other State's sovereignty. The UNC has opened two main exceptions to the prohibition of the use of force: self-defence and the UNSC's authorisation. We will not explore this last exception in depth, but we have to understand its meaning in order to create a clear legal picture of the international instruments available in case of violation of article 2(4) of the UNC.

2. The prohibition of the use of force – An evolution

When the UN was created, a Security Council was thought and established to guarantee order and decision-making in the event of the biggest threats to the new World Order, acting as policemen of Nations' behaviour and relationships.³¹ The five Permanent Members of the UNSC (P5) have a veto power in UN substantive matters and the fact that the UNSC is composed by States that emerged victors from Second World War influences the way International Relations have designed since 1945.³²

Article 2(4) is crucial to establish a supreme respect of States' integrity, but *real politics* is marked by a constant search for power and imposition of will that forced the law of treaties to adapt and absorb that aspect in order to reflect all major situations in which it can be applied.³³ Hence, in order to be realistic about States' actions, the prohibition would include exceptions to this prohibition, namely the use of force when acting in self-defence and the use

³¹ Council on Foreign Relations, The UN Security Council, Backgrounder, 9 September 2024, available on <https://www.cfr.org/backgrounders/un-security-council>, accessed on 16th of April 2026.

³² Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 27(3).

³³ Olivier Corten, *The Controversies over the customary prohibition of the use of force: a methodological debate*, The European Journal of International Law Vol. 16 no. 5, 2005, pg. 813.

of force³⁴ in cases authorised by the UNSC when acting under Chapter VII³⁵ of the UN Charter.

Self-defence is, as we will demonstrate, a legal concept of constant evolution, guarded by customary law but heavily influenced by jurisprudence and the state practice. Its adaption to geopolitics is a matter of substantial analysis that is and should be constantly put in question, as we intend to do with this study.

A. The use of force through authorisation by the Security Council under Chapter VII

Chapter VII of the UNC addresses threats to and breaches of peace and acts of aggression. It is under this chapter's that one of the exceptions to the prohibition of the use of force operates. In the letter of article 39 of the UNC: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." Article 41 establishes non-belligerent measures to deterrent potential threats, as economic sanctions that are often implemented by the UNSC.³⁶ When these measures prove to be inadequate or insufficient, the UNSC can apply article 42, which allows the passing of military intervention by the UNSC to restore peace and security.

This mechanism of Chapter VII has proven to be of difficult application, as it requires large consensus and prolonged discussions that are not always time-efficient when facing an attack or threat of attack. Adding to the consensus constrains, there is also the fact that the UN does not have the necessary means to intervene militarily in all grounds that is confronted with, particularly in what refers to logistical questions³⁷. Like most other international legal texts, the procedures laid out by articles 42 and 43³⁸ are not explicit on the meanings to

³⁴ UN Charter, art 51.

³⁵ UN Charter, art 39-42.

³⁶ Among many examples, UN Security Council Res 1970 (2011), UN Doc S/RES/1970 (26 February 2011), imposing an arms embargo, a travel ban and an asset freeze in connection with the situation in the Libyan Arab Jamahiriya.

³⁷ Martina Šmuclerová, "UN-led" or "UN-authorized" operation?: discerning among the UN Security Council's mandated operations, *The Lawyer Quarterly* 4/2012, pg. 321-326.

³⁸ UN Charter, arts. 42 and 43.

implement the authorisation of the use of force by the UNSC. The contribution to the maintenance of peace and security in these terms should be decided through agreements and member-states are to make available armed forces, assistance and facilities for the purpose, in accordance to their readiness and general location. This, of course, inputs a big responsibility and affordability in countries neighbouring a conflict that may not or will not be able to assist UN missions.³⁹

The evolution of international geopolitics has had a big influence on the way this exception has been perceived. Traditionally, the text of article 39 of the UNC “existence of any threat to the peace, breach of the peace, or act of aggression”⁴⁰ was interpreted as pertaining only to aggressions between States.

However, the cold war played a major role in reshaping international politics and reshaping international law, expanding article 39 outside from belligerence between states to include humanitarian law, terrorism, etc.⁴¹

Aside from the logistical constraints, there is also the struggle of deciding which matters are significant enough to take towards the UNSC and suggest an action under chapter VII.⁴² After the attacks on the World Trade Centre in the USA in 2001, the international perception of the interaction between the rule of law and the international community, specifically of the United Nations, started being put under challenge in order to interfere in matters of grave danger for civilian populations.⁴³

The discussion can be brought to the source of the UNSC permanent members vetoes. Throughout the Cold War the UNSC was in a constant state of deadlock due to successive vetoes from the US and the Union of Soviet Socialist Republics (hereinafter, “USSR”).⁴⁴ This

³⁹ Center on International Operation, *UN Peace Operations Gone Broke: How the United Nations' Financial Crisis is Dismantling Peace Operations*, available at <https://cic.nyu.edu/resources/un-peace-operations-gone-broke-how-the-united-nations-financial-crisis-is-dismantling-peace-operations/>, last accessed June 2026.

⁴⁰ UN Charter, art. 39.

⁴¹ Sakai Hironobu, “As if” acting under chapter VII of the UN Charter? Rigidity of the threshold between chapter VII and non-chapter VII, *Asian Yearbook of International Law*, Volume 13 (2007), 2009, pg. 105

⁴² David Schweigman, The authority of the Security Council under Chapter VII of the UN Charter: legal limits and the role of the International Court of Justice, 2001, pg. 205-286.

⁴³ Krzysztof Feliks Śliwiński, *From Securitization to Securitism. Analyzing the Evolution of the Securitization Theorem. Part I*, *Polish Journal of Political Science*, 2025, pg. 6.

⁴⁴ Peter Wallensteen and Patrik Johansson, *Security Council Decisions in Perspective* in David M. Malone (Ed), *The UN Security Council: From the Cold War to the 21st Century*, Lynne Rienner Publishers, 2004, pg. 18.

enabled many famous humanitarian disasters to happen. The prolonged occupation of Timor-Leste by Indonesia is just an example of international inability to act in due time, despite the UN's knowledge and warnings over potential threats to Human Rights in the country.⁴⁵ Despite the presence of an UN representation in the region since Indonesia's invasion in 1975,⁴⁶ it was not possible to prevent the Massacre of Santa Cruz⁴⁷ that took place on the 12th Novembre 1991, famously recorded by journalist Max Stahl that would eventually lead to a change on the international look over the situation on the country. This forced shift of focus toward a humanitarian disaster is usually taken as a "solution after the event", given the caution to act, due to respect for sovereignty.

This international community's (and international institutions) failure to prevent mass atrocities, like in the cases of Rwanda, Srebrenica and Kosovo, led to the creation of a new doctrine called Responsibility to Protect⁴⁸, initially brought into the UN General Assembly (hereinafter, "UNGA")⁴⁹ and to the 2005 World Summit⁵⁰ by Secretary-General Kofi Annan and established by Secretary General Ban Ki-Moon in 2009.⁵¹

The XX century showed us multiple examples where countries or the international community have claimed for the UNSC's action but where said action was never successfully translated into resolutions. It also showed us examples of cases where the UNSC's resolutions were simply insufficient or inefficient in upholding the goal they were voted for.⁵² The XXI century has not been different. It is the case of Syria, where the UNSC showed a great

⁴⁵ UN Economic and Social Council, Commission on Human Rights, E/CN.4/1995/61/Add.1, Report by the Special Rapporteur on his mission to Indonesia and East Timor from 3 to 13 July 1994, *Question of the violation of human rights and fundamental freedoms in any part of the world, with particular reference to colonial and other dependent countries and territories, Extrajudicial, summary or arbitrary executions*, 1 November 1994.

⁴⁶ The Special Representative of the Secretary-General (SRSG) for East Timor, through United Nations Security Council Resolution 384 (1975).

⁴⁷ Amnesty International, *East Timor: The Santa Cruz Massacre*, 14 November 1991, ASA 21/23/91, pg. 5-6.

⁴⁸ Presented in 2005 by the then-Secretary-General Kofi Annan, a report named "In Larger Freedom: towards development, security and human rights for all", Report A/59/2005 at the 96th session of the UNGA.

⁴⁹ Report A/59/2005 at the 96th session of the General Assembly of the United Nations, 9th May 2005

⁵⁰ Resolution A/60/L.1, *2005 World Summit Outcome*, 24th October 2005.

⁵¹ Report A /63/677, Report of the Secretary General, *Implementing the responsibility to protect*, 12 January 2009.

⁵² As an example, Resolution S/RES/819 (16 April 1993), *Demanding that Srebrenica and the surrounding areas, Bosnia and Herzegovina, be treated as a safe area*, where the UN was still unable to enforce the Resolution and avoid the Srebrenica's Massacre in July 1995.

reluctance to act under chapter VII, after the failure of the intervention in Libya in 2011.⁵³ Scholars have attributed the lack of international intervention in Syria to the damages and consequences of Resolution 1973 that allowed the intervention in Libya in March 2011.⁵⁴ This led to successive vetoes to another international intervention in sovereign questions in what regarded Syria, which was in a very similar situation as Libya was, later that same year. The vetoes⁵⁵ by Russia and China showed the reluctance of major powers to interfere in domestic affairs, to the risk of creating legal precedents that would disrupt the balance of the principles of sovereignty of States and non-interference.⁵⁶

One can claim political interests and strategic positions largely influence the capabilities of authorising the use of force through a UNSC Resolution under Chapter VII,⁵⁷ instead of the interests protected by the text of the UNC. However, the prohibition of the use of force is a *ius cogens* law that also binds the UNSC members.⁵⁸ This means any authorisation of the infringement of this law becomes an extreme measure and its use should only take place as a last case solution.⁵⁹

These struggles with action under chapter VII are also tied to the difficulties of enforcement of the UNSC resolutions. Article 39 of the UNC is the article that guarantees the enforcement of the UNSC resolutions,⁶⁰ together with article 43, that demands all State-members to comply with the decisions by the UNSC. This means states have to be prepared to change their course of action and invest in measures to address resolutions properly. Economic sanctions and travel bans are very common, under article 41, serving as warning signs and dissuading measures to correct States actions when violation of Chapter VII occur.

⁵³ Robert S Ford, *The Syrian Civil War: A New Stage, but Is It the Final One?*, Middle East Institute Policy Paper 2019, 8 April 2019, 3; Mediel Hove and Darlington Mutanda, *The Syrian Conflict 2011 to the Present: Challenges and Prospects* (2015) 50(5) *Journal of Asian and African Studies*, 559, 560–561.

⁵⁴ Sarah Brockmeier, Oliver Stuenkel & Marcos Tourinho, *The Impact of the Libya Intervention Debates on Norms of Protection*, 5 of November 2015, pg. 113-133.

⁵⁵ UN Security Council Draft Resolution, UN Doc S/2011/612 (4 October 2011).

⁵⁶ UN Doc S/PV.6627 (4 October 2011); UN Doc S/PV.6711 (4 February 2012); UN Doc S/PV.6810 (19 July 2012).

⁵⁷ Sufyan Droubi, *Resisting United Nations Security Council Resolutions*, Routledge, 2014, 7-9.

⁵⁸ H. Kelsen, *The Law of the United Nations. A Critical Analysis of its Fundamental Problems* (London Institute of World Affairs 1951), 294; Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, pg. 318– 320.

⁵⁹ T.D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its enforcement Powers under Chapter VII of the Charter*, 2009, pg. 64– 68.

⁶⁰ Hans Helsen, *The Law of the United Nations A Critical analysis of its Fundamental Problems*, The London Institute of World Affairs, The Law Book Exchange, 2000, pg. 294.

Having clarified how the exception of the authorisation of the use of force by the UNSC, the other main exception to the prohibition, the self-defence, should now be explored.

B. The use of force in Self-Defence

The other exception to the prohibition of the use of force is the aggression in acts of self-defence. This exception is covered in modern international law by article 51 of the UNC but is also strongly established on customary international law. Self-defence actions have happened throughout History based on state practice and are traceable to ancient Greece and Rome, where philosophers like Cicero and Augustine were already referencing legitimate reasons for a *Just War*, based on the rights of states of retribution or punishment against an enemy state⁶¹. Wars, at this time, were intrinsically connected to divine law, also being the attribution of power to the sovereigns, so its violation (hence, waging war), would have to be based on clear “violation of treaty, withdrawal from alliance, offence committed against state or an ally, breach of neutrality, offence against envoys and so on”.⁶² For centuries, this idea of *Just War* was defended by jurists and philosophers, where self-defence served as a justification for aggression, owing to refer, among others, Hugo Grotius and *his belli ac pacis libri tres* (“On the Laws of War and Peace”, 1625)⁶³ as one of the builders of modern International Law on Self-defence, showing the stabilization of the right in Customary International Law. Even at that time, Grotius already defended the legitimacy of war would only come from reacting directly to the aggressor.⁶⁴

The contemporary concept of self-defence includes the concept of anticipatory self-defence introduced by the infamous *Caroline Affair* (1837-1842).⁶⁵ In 1837, Canada was witnessing their first independence movements against the British Empire, having failed their initial uprising. The movement persevered with the help of USA and, in that year, the US

⁶¹ Cicero, *De Officiis*, Book I, Chapter 12, Walter Miller, Harvard University Press, Loeb Classical Library No. 30, Cambridge, 1968.

⁶² Gayathri. U, *A Doctrinal Study on the Evolution of Self-Defence in International Law*, International Journal of Research Publication and Reviews, Vol 6, Issue 5, pp 5692-5696 May 2025, pg. 5693.

⁶³ Hugo Grotius, *On the Law of War and Peace* (Francis W Kelsey tr, Clarendon Press 1925) vol 2, bk II, ch I, s III.

⁶⁴ Ibid.

⁶⁵ *The Caroline* (1837) 30 British and Foreign State Papers 195–196, available at <https://babel.hathitrust.org/>, last accessed June 2026

steamboat *Caroline* was intended to deliver military supplies to Canadian rebels but was burnt and sunk at the Niagara River by the USA forces. The attack led to a diplomatic dispute between the US Secretary of State Daniel Webster and Lord Ashburton that lasted for some years. The correspondence between the two diplomats, eventually culminating in a treaty known as the Webster-Ashburton Treaty, lays down the elements of lawful, pre-emptive actions in anticipatory self-defence: 1) necessity of self-defence towards an imminent threat that is “instant, overwhelming, leaving no choice of means and no moment for deliberation” and 2) a response that is proportional to the threat.⁶⁶

The *Caroline Affair* extended the limits of self-defence to accommodate imminent threats, instead of a strict reaction to an armed attack, stabilizing the element of proportionality as a *conditio sine qua non* to consider the action as legitimate. The anticipatory self-defence possibility element differs from the modern codification of self-defence in the UNC that was traditionally interpreted as a strict reaction to armed attacks.

Ultimately, self-defence was codified by article 51 of the UNC:

*“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.”*⁶⁷

Taking the letter of the article, the idea of the legislators was to connect the right to self-defence to a response to an armed attack. Until the XX century, state-practice was to only exercise force against other states in case of self-preservation, necessity and self-defence.⁶⁸ States held the monopoly of war-making and the legitimacy of action, which translated into self-defence being intertwined with armed attacks between States.⁶⁹ Article 2(4) had already

⁶⁶ T.R.Harrison (printer), *Correspondence between Great Britain and the United States relative to the treaty lately concluded at Washington, including instructions from the Earl of Aberdeen to Lord Ashburton, 1842-43. Presented to the House of Commons by Her Majesty's command, April 1843.*

⁶⁷ UN Charter, art. 51.

⁶⁸ J. Westlake, *International law Vol. I* (Cambridge University Press, 1904), p. 299.

⁶⁹ I. Brownlie, *The use of force in self-defence*, (1961) 37 BYBIL 183–268, p. 184.

explicitly referred to State's integrity in its prohibition of the use of force adding the reference to "in any other manner inconsistent with the Purposes of the United Nations", in order to cover all other aspects of threat or use of force that were not explicit.⁷⁰ This has been one of the biggest reasons for calls of reform of article 51, as it does not appear to cover the reality of current international warfare.⁷¹

The aftermath of the 9/11 attacks and the 'War on Terrorism'⁷² helped expand the concept of warfare. I also forced the expansion of the concept of protection of civilians that can ultimately lead to an armed conflict, except now, this threats no longer need to be foreseen, or even physically present: the remote warfare is now reaching great development through the use of drones and other technologic weaponry.⁷³

The evolution of modern warfare to include terrorism, economic aggressions or cyber-attacks, just to mention some examples, forces a broader interpretation of "armed attack" when examining article 51. States have to react to a wider number of threats in the XXI century, specially with the development of precision weapons that were not even invented when the Charter was created, but their reaction mechanisms are not often. Both written law and customary law are important in identifying and adapting to changes in the environment that surrounds them, customary law being necessarily harder to define as there is not a mathematical equation to point the moment when a repetition of events results in a equivalent law or not.⁷⁴

The distinction between armed attack and use of force had already been discussed in the International Court of Justice (hereinafter, "ICJ") in 1986 in the case of *Nicaragua vs United States of America*.⁷⁵ In 1984, Nicaragua took the USA to the ICJ due to its support to the *Contras*, rebel groups operating in the country, providing them with logistical and financial

⁷⁰ T. M. Franck, *Recourse to force: State action against threats and armed attacks*, Cambridge University Press 2002, p. 12.

⁷¹ Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, Cambridge University Press 2010, pg. 114.

⁷² Wesley W. Widmaier, *Constructing Foreign Policy Crises: Interpretive Leadership in the Cold War and War on Terrorism*, *International Studies Quarterly*, Vol. 51, No. 4 (Dec., 2007), p. 790.

⁷³ James Patton Rogers and James Wesley Hutto (Ed.), *Rethinking Remote Warfare: AI, Drones and Future War*, Palgrave Macmillan, 2026, pg. 26.

⁷⁴ Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, Cambridge University Press 2010, pg. 511.

⁷⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits (1986), ICJ Rep 14.

assistance and planting mines on Nicaragua's ports. Nicaragua alleged the USA violated the prohibition of the use of force, the principle of non-intervention and, ultimately, Nicaragua's sovereignty. On their hand, the US argued to act in collective self-defence of neighbouring countries. The ICJ ruled that the US had violated both the prohibition of the use of force and the principle of non-intervention and that the planting mines on its harbours was illegal. Finally, the US requirements for collective self-defence were not fulfilled.

The findings of the *Nicaragua v USA*⁷⁶ were of great significance to Self-defence: the Court recognized the presence of the right to self-defence both in article 51 of the UNC and in Customary Law;⁷⁷ it distinguished between mere uses of force and armed attacks (where self-defence is lawful), which became pivoting to analysis of *jus ad bellum* and solidified the principles of Necessity and Proportionality as *conditio sine qua non* of lawfully acting in self-defence.⁷⁸

C. The XXI century's impact

The concept of *Just War* defended since Cicero has now been replaced in its integrity, including by the Catholic Church, by the scrutiny of International Law. In his Encyclic on the 25th of May of 2026, Pope Leo XIV claimed: "Today, more than ever, without prejudice to the right to self-defence in the strictest sense, it is important to reaffirm that the "just war" theory, which has all too often been used to justify any kind of war, is now outdated. Humanity possesses far more effective and capable tools for promoting human life and resolving conflicts, such as dialogue, diplomacy and forgiveness. The use of force, violence and weapons reflects a relational poverty that always has disastrous consequences for civilian populations."⁷⁹

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ian Brownlie, *International Law and the Use of Force by States*, Oxford at the Clarendon Press 1963, pg. 251-280.

⁷⁹ In The Holy See, Leo VI, *Encyclical Letter, Magnifica Humanitas of His Holiness Pope Leo XIV in safeguarding the Human Person in the time of Artificial Intelligence*, available on <https://www.vatican.va/content/leo-xiv/en/encyclicals/documents/20260515-magnifica-humanitas.html>.

This affirmation on itself, given by the highest representative of the Catholic Church,⁸⁰ marks the end of an era of centuries where the Western law development was heavily influenced by the values of roman-catholic philosophy (including *Just War*).⁸¹ The official cut with this doctrine is unprecedented and, most of all, a clear message to World Powers that something is changing (or needs to be changed) in the current international state of affairs.⁸²

Having simplified most of the historical context that led us to the legal framework we currently have, we will now approach another scale of our analysis: the two principles that are now the core of the Self-Defence legitimacy. They limit one's claim to self-defence through the legitimacy of their reaction. For the purpose of this reflection, the principle of Proportionality will be the focus of the next chapter, trying to untangle its evolution, stabilization and relevance throughout History and, more in detail, the challenges it now faces.

⁸⁰ The Pope is in the highest hierarchy position within the Catholic Church. Through his encyclicals, the Pope leads the Church in the ways not only his sacerdotaly, but also all the followers should be facing challenges. For a deeper dive into the importance of an encyclic, see, s.e. Richard A. Spinello, *The Encyclicals of John Paul II: An Introduction and Commentary*, Rowman & Littlefield, 2012.

⁸¹ On the influence of Roman-Catholic doctrine in the development of the western legal system see, e.g. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, Harvard University Press, 1983, pg. 85-164.

⁸² Tobias Winright, *Is the Ethic Behind Just War Outdated?*, available at <https://www.catholicmoraltheology.com/p/is-the-ethic-behind-just-war-outdated>.

CHAPTER III – Disentangling the Proportionality Principle

This chapter will mainly help delineate our analysis and clarify the relevant legal framework of our study, with a stronger focus on the principles that guide international self-defence. As a preparation to the discussion chapter, the research will continue to examine different historical incidents and legal decisions that marked the construction of what is the modern concept of the Proportionality and Necessity Principles and their modern influence on Self-defence. It will serve as a way to examine the multiple nuances of proportionality and, in less depth, necessity, to a certain amount of detail. The aim is not to submerge into the complexities of each singular particularity of the parts that compose proportionality, depending on the version accepted by different doctrines, as that is not the purpose of this reflexion nor would there be enough space to do so. Instead, the chapter intends to show there are several layers to a juridical definition which add to the struggle of its interpretation in practice and eventually help to explain the reflection on this thesis research question: is the proportionality principle changing under international law? And our possible secondary question: if the answer is affirmative, will self-defence change with it?

1. The differences between Proportionality in *Jus ad bellum* and Proportionality in *Jus in bello*

For students of public international law, the distinction between *Jus ad bellum* (hereinafter, JAB) and *Jus in bello* (hereinafter, JIB) laws is put simply as: the first one, regulates the use of force between states, the second one establishes that regulate the action of participants in armed conflicts or, in other designation, International Humanitarian Law.⁸³

The laws that guide both JAB and JIB are different, as the nature of both instances is objectively distinct, as well. The laws that forbid the use of force have to be pragmatically adapted to scenarios of ongoing conflicts. Instead of the *erga omnes* prohibition of the use of force⁸⁴, the focus has to shift into minimizing of the effects of said use of force and the

⁸³ Gal Cohen, *Mixing oil and water? The interaction between jus ad bellum and jus in bello during armed conflicts*, 2022.

⁸⁴ On the prohibition of the use of force being considered as an obligation *erga omnes* by the ICJ in its *Barcelona Traction* ruling, see e.g. Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, 2019, pg. 118.

protection of the vulnerable in the circumstance.⁸⁵ The prohibition of use of force remains an absolute prohibition in times of armed conflict, however, adapted to the circumstances and hence directed to protect civilians and combatants that are no longer involved in the conflict, like Prisoners of War (hereinafter, “PoW”). Some academics have alerted to erosion of this difference in modern international law, as wars are no longer necessarily declared and armed conflicts might last interruptedly for decades.⁸⁶ However, a big distinction between the JAB and JIB can be made by the international law directly applicable to JIB.

After centuries of international armed conflicts, in 1864, states agreed on limiting their impact, by adopting the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, birthing the foundations of the modern International Humanitarian Law.⁸⁷ It is not the purpose of this reflexion to deeply explore the multiple nuances of JIB, but only to make the distinction clear enough to help explore the principle of Proportionality in both scenarios. Sassòli⁸⁸ develops four consequences of the absolute separation between the two laws: first, the equality of belligerents under IHL, regardless of their grounds; second, the determination of whether or not JIB applies depends on the circumstances *in casu*, meaning the justification that underlines the resort to the use of force is not relevant, only the fact that there is a conflict and said conflict is international does (or a non-international armed conflict if it has reached a certain level of violence); third, the determinations of JAB do not apply when interpreting JIB laws; fourth, whenever there is a possibility of lawful use of force (e.g. self-defence), JIB cannot prevent that option. In summary, the rules for “the law of peace” and “the law of war” are different, and this also reflects on the way proportionality is interpreted in self-defence in both scenarios.

The absolute prohibition of the use of force is in a way more flexible in the context of an ongoing armed conflict, the proportionality principle still needs to be respected in order for the action to be taken as lawful.⁸⁹ The considerations of self-defence as a whole adapt, including the context of a military target, but under JIB, there are four main conditions for a

⁸⁵ Marco Sassòli, *International Humanitarian Law, Rules, Controversies, and Solutions to Problems Arising from Warfare*, Edward Elgar Publishing, 2019, pg. 1.

⁸⁶ Carsten Stahn, ‘*Jus ad bellum*’, ‘*Jus in bello*’... ‘*Jus post bellum*’? – Rethinking the Conception of the Law of Armed Force, *The European Journal of International Law* Vol. 17 no. 5, EJIL (Ed.), 2007, pg. 922.

⁸⁷ *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field* (adopted 22 August 1864, entered into force 22 June 1865) 129 Consol TS 361.

⁸⁸ Sassòli (n83) pg. 19.

⁸⁹ Sassòli (n83) pg. 29.

lawful self-defence: (a) the respect for the prohibited means and methods of conflict (e.g. prohibition of chemical weapons); (b) the offences can only target legitimate targets (e.g. protection of civilians and civilian structures); (c) regardless of the legitimacy of the target, proportionality shall be respected; and (d) all precautions must be taken to protect civilians from harm.⁹⁰

Regardless of these limits and installed precautions introduced by the Geneva Conventions and its additional protocols (GV I, II, III and IV) that succeeded, the casualty of civilians is not considered as unlawful as long as all criterion (a to d) are fulfilled in the self-defence action.⁹¹ In short, the definition of proportionality in self-defence in the JAB context translates to the evaluation of the action considering the amount of force necessary to halt the armed attack and prevent further ones while proportionality in JIB context tries to control the consequences of the self-defence action, in order to prevent the eventual use of excessive force.⁹² The distinction relies very vividly on the proportionality principle in specific matters. According to Gardam, “a State must not only ensure that any forceful action it takes satisfies the requirements of IHL relating to disproportionate attacks and legitimate means and methods of warfare, but also that the forceful response is a proportionate measure in relation to the legitimate ends of force. (...) meticulous compliance with the proportionality requirements of IHL will not prevent an action being disproportionate under *ius ad bellum*. Conversely, a disproportionate action under IHL will be illegitimate even if it satisfies the requirements of proportionality under *ius ad bellum*”.⁹³ In other words, proportionality in LAB relies more on a prevention of harm whilst proportionality in LIB is more focused on the minimization of the impact that the use of force will inevitably have on protected persons.

All the effort put into the explaining of these complex definitions will inevitably feel scarce to the detailing needed to precisely clarify each and every one of them and their correlations with each other. Not only is that not the goal of this reflection, the sole attempt to do so will maybe never be more than that: an attempt. As such, our paper will proceed with the reflective and critical discussion of this thesis: is the Proportionality principle in Self-Defence being transformed in International Law without us even noticing it?

⁹⁰ Ibid.

⁹¹ Sassòli (n83) pg. 30.

⁹² See, e.g., Yoram Dinstein (n12) pg. 247.

⁹³ Judith Gardam (n60) pg. 11.

2. Necessity as one of the core principles of self-defence

Self-defence became stabilized as a legal tool for preserving state's integrity through the use of force when sovereignty is threatened or violated.⁹⁴ This lawful use of force, however, has two recognized limits that have been defined in the *Caroline Incident*: necessity and proportionality.⁹⁵ It is important to clarify the distinction between these two limits, even though their presence needs to be simultaneously in order to verify the lawfulness of a response.⁹⁶

Both limits have to be pondered case by case, as their application depends on the context.⁹⁷ This gives some margin of appreciation to the state alleging self-defence, as the principle of necessity will vary depending on who is perceiving the threat.⁹⁸ In the *Caroline Incident*, the outcome was a legal test that survived until this day called “the Webster formula” that requires certain aspects to be present in order for the action in self-defence to be considered lawful. The *Webster Formula* presents necessity in a self-defence context as “instant, overwhelming, leaving no choice of means and no moment for deliberation”.⁹⁹

The wording “overwhelming” led to a literal interpretation of the principle, which meant that self-defence should only be alleged in cases of severe threat to a state's integrity.¹⁰⁰ The use of force in this context is perceived as a last resource, when all other diplomatic tools have not been fruitful or able to prevent a conflict.¹⁰¹ This interpretation has been put to the test of time and, as any other legal definition, adapted to the new international order. As an

⁹⁴ Murray Colin Adler, *The Inherent Right of Self-Defence in International Law*, Springer, 2013, pg. 67.

⁹⁵ T.R.Harrison (printer), *Correspondence between Great Britain and the United States relative to the treaty lately concluded at Washington, including instructions from the Earl of Aberdeen to Lord Ashburton, 1842-43. Presented to the House of Commons by Her Majesty's command*, April 1843.

⁹⁶ Sophie Charlotte Pank, *What is the scope of legal self-defense in International Law? Jus ad bellum with a special view to new frontiers for self-defense*, Juridisk Institut, pg. 26.

⁹⁷ James A. Green, *The International Court of Justice and self-defence in international law*, Oxford and Portland, Oregon, 2009, pg. 64.

⁹⁸ Ibid, pg. 77.

⁹⁹ See, e.g., Tom Ruys and Olivier Corten with Alexandra Hofer (Eds.), *The Use of Force in International Law, a Case-based Approach*, Oxford University Press, 2018, pg. 5-14; R. Y. Jennings, *The Caroline and McLeod Cases* (1938) 32, *American Journal of International Law*, 82, 85.

¹⁰⁰ Robert Ago, the Special Rapporteur on State Responsibility for the UN, once said about the Gulf Conflict of 1990-1991: “[t]he reason for stressing that action taken in self-defence must be necessary is that the State attacked ... must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. In other words, had it been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of force”, Addendum to the Eighth Report on State Responsibility, by Mr. Roberto Ago, Agenda Item 2, A/CN.4/Ser.A/1980/Add.1 (Part 1), A/CN.4/318/Add.5--7 (1980) II (1) YBILC 69.

¹⁰¹ James A. Green, *The International Court of Justice and self-defence in international law*, Oxford and Portland, Oregon, 2009, pg. 76.

example, the concept had to be adapted to the growing involvement of non-state actors in conflict scenarios, including conflicts between states and non-state actors.¹⁰²

This evolution has benefited from the contribution of the ICJ, which has issued several sentences that would later help to clarify the wideness of self-defence in general and the principles of necessity and proportionality in particular. The case of *Oil Platforms (Islamic Republic of Iran v. United States of America)*¹⁰³ is a key decision by the ICJ in solidifying the importance of self-defence. In 1992, the Islamic Republic of Iran (hereinafter, “Iran”) filled a case with the ICJ against the USA for the illegal destruction of Iranian oil platforms along the shore of the Persian Gulf. This area had been the stage of several commercial disputes between the two powers.¹⁰⁴

In its application to the ICJ, Iran alleged the destruction of the oil platforms by three US warships between the years of 1987 and 1988 violated the Treaty of Amity, Economic Relations and Consular Rights between Iran and the US (signed in 1955). In their counter-action, the US claimed Iran had first breached the Treaty by conducting military actions in the Gulf, thus endangering commerce and navigation. The Court “accept the generic claim by the United States that the actions of Iran had made the Persian Gulf unsafe for shipping, concluding that, according to the evidence before it, there was not, at the relevant time, any actual impediment to commerce or navigation between the territories of Iran and the United States. The Court accordingly rejected the United States counter-claim for reparation.”¹⁰⁵

The case became a paradigm of self-defence as the Court also ruled out the self-defence claim by the US, ruling that “there is no evidence that the United States complained to Iran of the military activities of the platforms, (...) which does not suggest that the targeting of the platforms was seen as a necessary act”¹⁰⁶. Aside from the dispute on itself, the ICJ explicitly referenced the lack of the necessity element of the case to claim and lawfully prove self-defence.

¹⁰² Kimberley N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors*, Cambridge University Press, 2008, pg. 145.

¹⁰³ International Court of Justice, *Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep 161.

¹⁰⁴ Ali Omid, *Analyzing the Persian Gulf Naming Dispute from International Law Perspective*, *The Chinese Journal of Comparative Law*, Volume 12, 2024.

¹⁰⁵ International Court of Justice, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, overview of the case, available at <https://www.icj-cij.org/case/90>.

¹⁰⁶ International Court of Justice, *Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep 161, para. 76.

The court rules that for a lawful self-defence action, there needs to be a complete exhaustion of other alternatives to prevent any use of force. State practice and jurisprudence also show that the two principles justify each other more often than not.¹⁰⁷ In both *Nicaragua*¹⁰⁸ and the *Oil Platforms* cases against the US, the Court ruled there was no evidence of the necessity principle in the US defences, resulting in a clearer path to understand which situations and contexts can figure a necessity element.

Having clarified the broader concept of the necessity principle, it is easier to understand the proper principle of proportionality as, in general, one cannot subsist without the other and the understanding of the latter becomes easier to disentangle once this distinction is made.

3. Proportionality as one of the main principles of Self-defence

At this point, what does proportionality mean? How can one determine if an action was proportionate to the attack? A few requirements can help surpass the legal difficulties that arise from an abstract conception. The first one being the defensive purpose.¹⁰⁹

The case of *Armed Activities on the Territory of the Congo*¹¹⁰ is another crucial case in the definition of proportionality and self-defence in International Law. In 1999, the Democratic Republic of Congo (hereinafter, “DRC”), filled a complaint against Uganda, Burundi and Rwanda, over “acts of armed aggression committed against the DRC”, in which Uganda invaded and occupied parts of the DRC’s territory, claiming acts of aggression allegedly committed by the DRC against Uganda and attacks on Ugandan diplomatic premises and personnel in Kinshasa and on Ugandan nationals for which the DRC is alleged to be responsible.¹¹¹ The Court found that, the DRC had not consented to the presence of Ugandan troops on its territory¹¹² and rejected Uganda’s claim that its use of force, where not covered

¹⁰⁷ Yoram Dinstein, *War, Aggression and Self-defence*, Cambridge University Press, 2017, pg. 175.

¹⁰⁸ *Military and Paramilitary Activities in and against Nicaragua* (n. 62)

¹⁰⁹ David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, European Journal of International Law, Volume 24, Issue 1, pg. 253.

¹¹⁰ International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168.

¹¹¹ International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, overview.

¹¹² The case has some nuances. The DRC had consented for some Ugandan military presence in parts of its border with Uganda (as the DRC did not have enough logistic power to secure the border) in a protocol signed in April 1998 that contained the terms of the authorization of the Ugandan military in the country. In July 1998, the

by consent, was an exercise of self-defence, finding that the preconditions for self-defence did not exist¹¹³.

On the specific argument of self-defence presented by Uganda, the Court rejected the claim, alleging there were no evidences Uganda was ever under attack by the DRC, hence not fulfilling the requirements of self-defence.¹¹⁴ The Court did pronounce on the hypothesis that if an operation in self-defence would have taken place, the taking of airports and towns many hundreds of kilometres outside Uganda's border would not be considered as proportionate to the series of transborder attacks Uganda claimed had given rise to the right of self-defence, nor to be necessary to that end.¹¹⁵

The defensive purpose is connected with the existence of an armed attack¹¹⁶, the absence of which will deem the action as unlawful. There are also a few nuances in this case. The considerations over the concept of "armed attack" and its perception by the international *fora* are of use in this case. The attack might not be considered as such due to its minor impact in the State, or it can be a succession of small interferences that at some point triggers a belligerent reaction but, at the eyes of the UNSC, can still be considered as insufficient to fulfil the requirements.

Another requirement is that the action must have the sole purpose of stopping the aggression and not enlarge its scope to the point of becoming punitive, and considered as reprisals instead of self-defence.¹¹⁷ Reprisals are considered unlawful in international law and the UNC is explicit on the matter,¹¹⁸ This, of course, is a fine line that is easier to distinguish in *jus ad bellum* than in *jus in bello*, a distinction to be made further ahead. During *jus in bello*, reprisals are not banned as it would be impossible to even control all of these actions.

President of the DRC issued a decree calling for the withdrawal of troops in the DRC, which the DRC contended also constituted a formal end to consent to the Ugandan troop presence.

¹¹³ International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, overview.

¹¹⁴ International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Merits)* [2005] ICJ Rep 168, 201, para. 146-147.

¹¹⁵ Ibid, para. 147.

¹¹⁶ Ibid.

¹¹⁷ Ibid; see also Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, Cambridge University Press 2010, pg. 95.

¹¹⁸ Preamble, UN GA/RES/2625 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/5217 at 121, 24 October 1970.

Nonetheless, they still have limits. They are limited by the laws of armed conflicts expressed in the Geneva Convention and its additional protocols.¹¹⁹

Finally, the timing of the action. This element is also connected to the danger of the punitive action that is forbidden under international law. In a perfect scenario, the self-defence action will happen when the state is being attacked. This element is also called immediacy.¹²⁰ However, sometimes the response is delayed, e.g. due to lack of means to stop the attack, political struggles. In these cases, the defensive action will have the purpose of stopping the attack and prevent future attacks, but when enough time has passed, it can be taken as reprisal.¹²¹

There were disagreements on the definition of proportionality as one of the limits to self-defence: not as much to the existence of the principle on itself, as it has already been established by customary law, but on the terms the principle would exist as part of self-defence.¹²² The objection was raised by the USSR, claiming that having proportionality as a precondition to self-defence would only benefit the aggressor and strangle the victim-state's response to an attack.¹²³ However, the inclusion had gathered consensus due to its customary origin.¹²⁴

4. Proportionality as having limits on itself: geographic reach and scope, force used, duration and military targets

In any case, the answer to “proportional to what?” can still be further explored. The purpose of self-defence is to halt, repel or prevent an armed attack.¹²⁵ But how does one arrive to a proportional response? State practice has shown us there are other elements in

¹¹⁹ David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, *European Journal of International Law*, Volume 24, Issue 1, February 2013, Pages 235–282.

¹²⁰ Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, Cambridge University Press 2010, pg. 99.

¹²¹ Jackson Nyamuya Maogoto, *Walking an International Law Tightrope: Use of Military Force to Counter Terrorism - Willing the Ends*, 31 *Brook. J. Int'l L.*, 2006, pg. 53.

¹²² Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, Cambridge University Press 2010, pg. 93.

¹²³ USSR, *'Summary Record of the 67th Meeting'* (19 October 1970) UN Doc A/AC.134/SR.67, 85, USSR: 'It seemed unreasonable to try to limit the victim's choice of weapons and scale of defensive response, when it was the aggressor who should be bound hand and foot.'

¹²⁴ UN Special Committee on the *Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, 'Summary Records of the 67th to 78th Meetings' (19 October 1970) UN Doc A/AC.134/SR.67–78.

¹²⁵ Christopher O'Meara, *Necessity and Proportionality and the Right of Self-Defence in International Law*, Faculty of Laws, University College London, 2018, pg. 32.

proportionality, namely the effect on third states,¹²⁶ geographical limitation scope¹²⁷, intensity and duration of the response¹²⁸ and targets of military nature¹²⁹.¹³⁰

The element of effects to third states owes to limit collateral consequences for those neighbouring states that will, inevitably, already suffer some consequences from cohabiting with a belligerence in their vicinities. This element does not intend to eliminate this consequence, yet it does advise caution in actions in order to prevent major implications to third parties.

The geographical limitation scope element refers to another source of constraints in the reaction, should the target be limited to the cause of the attack or threat and not expand the targets for other purposes.

The intensity and duration of the response is an element used in order to prevent the expansion of the response that could rapidly transform into an act of war or a reprisal, instead of a self-defence action in order to halt hostilities.

Finally, the nature of the targets is directly linked to the basic rules of Human Rights and Dignity, as the consequences of halting and prevention actions should not affect civilians (including civilian infrastructure).

These elements add to the already discussed elements of necessity and immediacy, constituting another layer of legal control over the authorized use of force. When acting in self-defence, it is important the reaction is not taken as a reprisal.¹³¹

The logic is relatively easy to dismantle. First of all, we have to consider the duration the use of force in self-defence: if it is not circumscribed to stop the attack suffered and preventing it to continue, it can rapidly be assessed as a reprisal. If the response does not content to halt, repel or prevent an armed attack, then its goal can be measured as an unlawful

¹²⁶ Sina Etezazian, *The Nature of the Self-defence Proportionality Requirement*, Journal on the use of force and International Law, Vol. 3, 2016, pg. 275-279.

¹²⁷ Ibid, pg. 279-283.

¹²⁸ Ibid, pg. 283-287.

¹²⁹ Ibid, pg. 275-279.

¹³⁰ See, e.g., Judith Graham, *Necessity, proportionality and the unilateral use of force in the era of the United Nations Charter*, in *Necessity, proportionality and the use of force by States*, 2009, pg. 138-187.

¹³¹ Ibid, pg. 141.

action of punishment to the attacking state, as reprisals are only considered lawful in specific circumstances of International Humanitarian Law.¹³²

Then, it is important to guarantee that the target choice is mainly military and that civilians (including civilian infrastructures) are not targeted in the self-defence actions. This criterion was part of the discussion of the case *Oil Platforms (Islamic Republic of Iran v. United States of America)*, as the attacks on the platforms were considered as attacks on civilian infrastructures as a response to military actions in a gulf with plenty of commercial traffic.¹³³ To this is also important to prevent effects on third states which, again, includes civilian infrastructures such as roads and other means of access to the country, basic survival infrastructures like electricity and water plants, or agriculture crops, that would be considered unlawful targets and, eventually, crimes of war.¹³⁴

Finally, the geographical scope of self-defence is also of crucial importance, as the choice of the target will impact not only the attacking state, but third countries and populations as well.¹³⁵

In general, all these elements are found and defined together as there is a natural interdependence among each other. There cannot be a target selection without the geographical limitation, as well as the concern on the effects on civilians and third states. The target selection concern and military accuracy will always take into consideration the intensity and duration of the attack, as these choices naturally affect the latter.

Proportionality is, hence, shielded by a series of limits on itself that impact the way one considers a response as such. These inner limits are also influenced by the purposes alleged by the defending state when reacting in self-defence: strictly halting the attack, preventing renewed attacks, or acting with security objectives.¹³⁶ This distinction is important

¹³² Lindsay Moir, *Belligerent Reprisals and their Progressive Limitation*, in *Reappraising Reprisals Against Enemy Civilians in Customary International Humanitarian Law*, in Journal of International Humanitarian Legal Studies, 2024.

¹³³ In the case, the US claimed to have acted in self-defence as the military actions taken by Iran in the Gulf were endangering the freedom of commerce in the region. The ICJ ruled there was no evidence of damages in any commercial ship, nor was there evidence of disturbance of free commercial navigation, hence the claim of self-defence lacked several of its conditions. See the overview of the case, available at <https://www.icj-cij.org/case/90>.

¹³⁴ Rome Statute of the International Criminal Court (adopted 17th July 1998, entered into force 1st July 2002), 2187 UNTS 90, art. 8 (2)(a)(iv).

¹³⁵ Judith Graham, *Necessity, proportionality and the unilateral use of force in the era of the United Nations Charter*, in *Necessity, proportionality and the use of force by States*, 2009, pg. 162.

¹³⁶ Yoram Dinstein, *War, Aggression and Self-defence*, Cambridge University Press, 2012, pg. 262-267.

as a matter of understanding the origin of the self-defence action. An action that strictly aims to halt the attack will be more circumscribed to the source of the attack, hence, at least in theory, not spreading or inflicting repercussions on a broader scale (including civilians and third countries, e.g.).¹³⁷ An action that foresees the prevention of renewed attacks will, in theory, have a broader range of military targets. In this case, the aim is mostly to neutralize the ability of the attacking entity to repeat belligerent actions. In most cases, the defending State will opt to use both objectives to achieve its goal of preserving its integrity and sovereignty.¹³⁸ Finally, there are cases where a State alleges self-defence in actions meant for security purposes¹³⁹. There is a certain reluctance not only in arguing “security purposes” in a self-defence action, but also in even considering it as such. These actions are of wider and longer military intervention, causing difficulties in assessing them as strict self-defence operations or verging interference in violations of art. 2(4).

Having thoroughly explored the nuances of the principle of Proportionality and painted the picture of self-defence in general terms, there is still some reflections to be made in terms of the relationship between necessity and proportionality.

5. The relationship between the Necessity and the Proportionality Principles

Necessity and proportionality are the two main principles that guide and limit self-defence.¹⁴⁰ Immediacy is often considered the third main principle of self-defence, being however, integrated in the principle of necessity by many scholars.¹⁴¹ The element of acting in response to an armed attack (the temporal element), has to be taken in account also to distinguish isolated attacks from self-defence, and it is implicit on article 51 of the UNC itself.¹⁴² The article refers the right to self-defence maintains legality from the point of the

¹³⁷ Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge University Press, 2004, pg. 160-161.

¹³⁸ See e.g. Yoram Dinstein, *War, Aggression and Self-defence*, Cambridge University Press, 2012, pg. 262-267.

¹³⁹ See Ibid, pg. 254, when referring to the constant claim of defensive armed reprisals by the state of Israel verging the limits of legality. The author points out that he does not agree with the claims of lawfulness in these actions. Instead, he makes the claim there is a general lack of ponderation to whether each action under this presumption is individually analysed to the criteria of proportionality or not.

¹⁴⁰ Murray Colin Alder, *The Inherent Right of Self-Defence in International Law*, IUSGENT, vol. 19, pg. 18.

¹⁴¹ See e.g. Christine Gray, *International Law and the Use of Force*, (4th Ed.), Oxford University Press, 2018, pg. 146-159; Judith Gardam, *Necessity, proportionality and the unilateral use of force in the era of the United Nations Charter*, in *Necessity, proportionality and the use of force by States*, 2009, pg. 141-151.

¹⁴² Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, Yale University Press 1961, pg. 231-240.

first harmful action, “until the Security Council has taken measures necessary to maintain international peace and security”. The letter of the article already gives a sense of urgency in the timing of a response. It will be considered lawful between the aftermath of the armed attack suffered and the solution found by the UNSC, but the article also mentions that the “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” [of the UNSC].

The action would not be considered lawful if there was no use (or threat of use) of armed attack and, in response, the attacked state would not react in a reasonable temporal frame, risking the response being considered a reprisal or an isolated illegal attack on itself. The belligerent response is often admitted as the only way of halting hostilities but one has to consider that, as already discussed in the prohibition of the use of force, it should only be used as a last resource, after exhaustion of all the peaceful alternatives.¹⁴³

The connection between the two concepts has been deeply explored ever since its definition by the *Caroline Incident* but, as one cannot go without the other, it is sometimes difficult to draw a line between the two. There are other layers to the entanglement of the principles and how they relate to a State’s action when one explores the legal constraints of international law, especially when the distinction between armed conflict and mere threat of armed conflict.¹⁴⁴ This was the instance of the pronouncement of the ICJ in the case of the *Nuclear Weapons*.¹⁴⁵ In 1995, the UNSC filled a request to the ICJ, following the adoption of the UNGA Resolution 49/75K¹⁴⁶, aiming to inquiring the Court over the advisory opinion on the question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?”

The Court rendered its advisory opinion remarking that the prohibition of the use of force was applicable regardless of the weapons in question but also “it stated that the principle of proportionality might not in itself exclude the use of nuclear weapons in self-defence in all circumstances”.¹⁴⁷ In fact, the Court stated: “certain States asserted that the use of nuclear

¹⁴³ Judith Gardam, *Necessity, proportionality and the unilateral use of force in the era of the United Nations Charter*, in *Necessity, proportionality and the use of force by States*, 2009, pg. 140.

¹⁴⁴ James A. Green, *The International Court of Justice and Self-Defence in International Law*, Studies in International Law, 2009, pg. 91.

¹⁴⁵ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, overview of the case, available at <https://www.icj-cij.org/case/95>.

¹⁴⁶ United Nations General Assembly (UNGA) Res 49/75 K (15 December 1994) UN Doc A/RES/49/75K.

¹⁴⁷ Ibid.

weapons in the conduct of reprisals would be lawful. The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful. Nor does it have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality”.¹⁴⁸

The reasonable outcome is that the threat or the use of force is forbidden by international law, but the mere possession of nuclear weapons did not constitute a violation of the law on itself. This was the advisory opinion concerning *jus ad bellum*, where the ICJ based its opinion in customary law and conventional law. The simple threat of use of force would be considered illegal regardless of the circumstances, not because of the nuclear weapons themselves.¹⁴⁹

When considering a self-defence action in the context of armed conflict, the ICJ then looked into international humanitarian law. In its investigations, the ICJ found that, both *opinio juris* and state practice through 50 years pointed to the funding of a customary law that prohibited the use of nuclear weapons, even though it only originated through the continuous adherence to non-proliferation practice¹⁵⁰. In the words of the ICJ: “the emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such was hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the doctrine of deterrence on the other.”¹⁵¹

The definition of *opinio juris* is “the belief by States that a particular practice is carried out because it is required, permitted, or otherwise authorized by international law, rather than merely out of habit, courtesy, or political convenience. Together with general and consistent State practice, it constitutes one of the two essential elements of customary international law”.^{152 153}

¹⁴⁸ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, [1996] ICJ Rep. 226, pg. 246.

¹⁴⁹ United Nations General Assembly (UNGA) Res 49/75 K (n71).

¹⁵⁰ Ibid.

¹⁵¹ International Court of Justice, *Legality of the Threat and Use of Nuclear Weapons* (Advisory Opinion), 1996, ICJ Rep 226, para. 73.

¹⁵² James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) 23–31; Hugh Thirlway, *The Sources of International Law* (2nd edn, Oxford University Press 2019) 53–75.

¹⁵³ The Draft Conclusions on Identification of Customary International Law, with Commentaries, UN Doc A/73/10 (2018), Draft Conclusion 9, The International Law Commission defines *Opinio Juris* as “1. “The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.” 2. “A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.”

On its hand, the definition of State Practice is “the requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law”¹⁵⁴

This meant there was a customary law being formed, in the absence of a general consensus to convey in Treaty or any International agreement of such. This debate over the proliferation and use of nuclear weapons culminated in the Treaty on the Prohibition of Nuclear Weapons (TPNW),¹⁵⁵ in 2017, after decades of resolutions calling for the elimination of the acquisition or possession of mass destruction weapons.¹⁵⁶ The TPNW is an example of customary law translated into treaty law, due to the international pressure on codifying an important piece of legislation as nuclear weapons are consensually considered of great threat to humanity.¹⁵⁷

The TPNW shows the power that political deadlocks have on consensus-seeking and the eventual will to translate said consensus into international treaty law. In international law, the recognition of formation of customary law might take decades of a consistent acceptance of a certain consensus over a certain unspoken rule, as it happened with the evolution of the prohibition of nuclear weapons. Treaty law can also take the same path as resistance of a certain group of countries or the political disagreements in general, might affect the agreement over a topic.¹⁵⁸

¹⁵⁴ International Law Commission, *Draft Conclusions on Identification of Customary International Law, with Commentaries*, UN Doc A/73/10 (2018) Draft Conclusion 4.

¹⁵⁵ Treaty on the Prohibition of Nuclear Weapons (adopted 7 July 2017, opened for signature 20 September 2017, entered into force 22 January 2021), 3370 UNTS 187.

¹⁵⁶ Ibid, in preamble.

¹⁵⁷ Throughout decades, the debate over the ban of nuclear weapons has taken place not only at the UN, at a political level, but also through pressure of members (and organizations) of the civil society. See e.g., the work of the International Campaign to Abolish Nuclear Weapons (ICAN), available at <https://www.icanw.org/>; see also the UN Comprehensive Nuclear-Test-Ban Treaty (CTBT), adopted in 1996, which failed to have a global adherence, specifically from main global players, like the USA or Russia.

¹⁵⁸ This is the case of, e.g. the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (opened for signature 13 January 1993, entered into force 29 April 1997) 1974 UNTS 45 (CWC). The early discussions over the substance that culminated in this convention started after WWI and the consequences of the use of these weapons not only on the survival soldiers but also on the civilian populations affected by the conflict. It culminated on the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. This Protocol outlived the League of Nations and its importance kept on being debated under the umbrella of the UN, gaining a renewed concern after the Vietnam War, where the widespread use of chemical weapons left its mark in the country until this day. The CWC was eventually adopted in 1992 and entered into force in 1997, reaching nearly a century of negotiations over the same topic.

The understanding of how state practice, international customary law and treaty law influence the evolution of the concept of self-defence is important to create analytical tools that will later help evaluate the modern lawful use of force, which will be the scope of this thesis. For this purpose, however, we need to do a last disentanglement of proportionality.

6. A brief summary

After a long analysis of all the components pertinent to the assessment of the Proportionality Principle, my findings are that, even though there is no strict agreement on the components of Proportionality¹⁵⁹, the analysis will be made in regards to the elements the ICJ has already cemented over the years.

Defensive purpose: in *Military and Paramilitary Activities in and against Nicaragua* (1986), the ICJ reinforced that both Proportionality and Necessity are requirements of self-defence¹⁶⁰. This establishes the defensive purpose against an armed attack as the first element of proportionality we decide to define, considering the defensive purpose as an umbrella of the indicators of said purpose: scale, intensity, objectives and collateral consequences.

Proportional relationship between the attack and the response: in the *Legality of the Threat or Use of Nuclear Weapons* (1996), the ICJ defined that the use of force must be necessary and proportionate to the initial attack. In other words, the force used has to be strictly used in amount necessary to halt and repel the armed attack.¹⁶¹ This element directly links necessity to proportionality in order to consider the defence proportional to the armed attack, that settles the objective of the response (to halt the threat or attack). This is also the element we can closely approach with the immediacy element that we have previously connected to the principle of necessity.

¹⁵⁹ Na analysis of this last chapter as a whole and a dive into the sources included will demonstrate that there is a certain level of disagreement in doctrine over which elements of the proportionality principle should be identified as such. I.e. S. Etezanian highlights the ‘effects on civilians’ and ‘choice of targets’ as two of the criterion (considering, however, they could also just be part of the more general umbrella of “repelling an attack”); the effect on third states; geographical limitation; intensity and duration of the response; and targets of military nature. Etezanian developed a very comprehensive analysis of the Proportionality principle, whilst author like Dinstein, Gray, Ruys and Gardam choose to break the principle into their main factors: halting and repelling an attack (defensive purpose); the legitimate defensive objective; the scale and intensity of force.

¹⁶⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits (1986), ICJ Rep 14, para. 176, 194.

¹⁶¹ ICJ, *Legality of the Threat and Use of Nuclear Weapons* (Advisory Opinion), 1996, ICJ Rep 226, para. 41.

Scale and effects of the response: In *Oil Platforms* (2003), the ICJ linked the armed attack to the scale and effects of the response, that shall not exceed the justified reaction to the attack, in order to fulfil the defensive purpose.¹⁶²

Means employed: additionally, in *Oil Platforms* (2003), the ICJ reflects on the nature of the target (if military or not) when determining the legitimacy of a proportionate response.¹⁶³ This judgement found that the use of force in self-defence, in order to be considered a proportional response, has to target the origin of the attack with legitimate means¹⁶⁴, otherwise it will not be considered as intending to halt hostilities.

Having now reached the four criterion we establish as pertinent to our study, the study of an eventual evolution of the Proportionality Principle will focus primarily on contemporary state action and legal evolution.

¹⁶² ICJ, *Oil Platforms* (Merits), 2003, ICJ Rep 161, para. 77.

¹⁶³ ICJ, *Oil Platforms* (Merits), 2003, ICJ Rep 161, para. 74.

¹⁶⁴ Gregory M. Reichberg and Henrik Syse, *Threats and Coercive Diplomacy: An Ethical Analysis*, Cambridge University Press, 2018, pg. 189

Chapter IV – Is Proportionality changing without us noticing it?

Arriving at this point, we have already explored most of the aspects of International Law relevant to our discussion, starting from a broad perspective, and evolving to a more concrete dive into the nuances of the proportionality principle and its relevance in different contexts. We established some of the key aspects of self-defence as a legal tool for the lawful use of force in an international context and in the relationship between States. Proportionality is also taken in consideration in diplomatic contexts, in which the employment of the threat of the use of force might be necessary.¹⁶⁵

We learned that proportionality has cemented itself as one of the fundamental elements of self-defence, both through state practice and international case law¹⁶⁶. This chapter, the discussion chapter, will try to explore and develop the main question of this thesis: is the proportionality principle in international self-defence changing without our active acknowledgement? And a possible secondary question: if affirmative, is the concept of self-defence also changing because of it?

We will primarily rely on the contemporary evolution of self-defence (with a final focus on the XXI century and how the Twin Towers terrorist attack impacted the perception of the importance of international law and security) and whether state-practice and the international court's rulings sustain the hypothesis of a change in the parameters of proportionality. The chapter will also explore some examples in which the premise seems to verify an affirmative answer to the question. However, the focus will not be on substantiating violations of international law, but rather if state practice and legal argument (or its absence) might be gradually reshaping the content of the law. Moreover, the analysis is focused on proportionality within a *jus ad bellum* perspective, reason why actions in International Humanitarian Law will be disregarded in the developed evaluation.

In essence, even though the particularities of Proportionality have remained relatively stable in doctrine over the past century, this chapter will analyse whether contemporary state

¹⁶⁵ Reichberg and Syse (n 97) pg. 190: “In general, not only are threats permitted whenever the corresponding initiation of war would be permitted but, even more strongly, the issuance of a threat may be obligatory. This comports with the just war criterion of last resort (often termed “necessity” by lawyers), which holds that less damaging alternatives should be exhausted before waging war”.

¹⁶⁶ Raphaël van Steenberghe, *Proportionality under Jus ad Bellum and Jus in Bello: Clarifying their Relationship*, in *Israel Law Review*, Cambridge University Press, 2012, pg. 109.

practice is evolving. This chapter examines whether these developments amount to a reinterpretation of the proportionality principle, an expansion of accepted state practice, or merely inconsistent application of an unchanged rule.

A. What would Proportionality evolution look like

The Proportionality Principle is a result of Customary International Law. As such, the evidence of its evolution is difficult to assess in real time, as the formation of this Law takes time and a look backwards to assess. The formation of international customary law depends on general convergence in practice among states; that convergence of practice being necessary; that said convergence is of deliberate practice, not provoked by force, fraud, or mistake; and that the deliberate practice shall be based on a certain degree of *opinio juris*.¹⁶⁷¹⁶⁸ As mentioned previously, Proportionality is not explicitly mentioned as a part of the right to self-defence in article 51 of the UNC. As such, its evolution or modification is not assessed through Treaty Law. So how can we verify such theory? Through ICJ jurisprudence?

The establishment of proportionality as a central principle of self-defence did not originate from an international judicial decision. Instead, it became internationally recognized as a relevant criterion under the conclusions made in the *Caroline Incident* as the '*locus classicus*' of *jus ad bellum* self-defence.¹⁶⁹ This case shows us that some events are of enough significant impact to birth international norms that get accepted by most. Even though, in this case, we can pin the exact point where proportionality and necessity became recognized as quintessential, the cementation of their presence as *conditio sine qua non* in the verification of a lawful action had to be attested by the judicial power, as previously shown by the case law examples presented.¹⁷⁰

¹⁶⁷ John Finnis, *Natural Law and Natural Right*, Oxford University Press, 2011, pg. 238.

¹⁶⁸ John Perry and Grant, *Enciclopedia of International Law*, Oxford University Press, 2009: "This phrase (in full, *opinio juris sive necessitates*) connotes an element in the formation of international custom, expressed in art. 38(1)(b) of the I.C.J. Statute as 'a general practice accepted as law'. 'It is not sufficient to show that States follow habitually a certain course of conduct, either doing or not doing something. To prove the existence of a rule of international customary law, it is necessary to establish that States act in this way because they recognize a legal obligation to this effect': Schwarzenberger and Brown, *A Manual of International Law* (6th ed.), 26."

¹⁶⁹ Tadashi Mori (R Scott Adams), *Origins of the Right of Self-Defence in International Law: From the Caroline Incident to the United Nations Charter*, in *The Australian Year Book of International Law Online*, 2019, pg. 245.

¹⁷⁰ *Ibid*, pg. 246.

As part of this thesis research, aside from the doctrinal study that evidences the adaption of the ICL, we also analyse the implications that certain judicial decisions by international courts have in the confirmation of those evidences. As such, until this point of this chapter, we have mostly relied on ICJ's decisions due to its broader jurisdiction comparing to other international Courts. In fact, article 36 of the ICJ Statute, defines the Court's jurisdiction to "(...) all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. 2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal dispute(...)".¹⁷¹ Moreover, article 93 of the UN Charter states that "all Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice." Adding on article 94 that "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."¹⁷²

Article 93 of the UN Charter binds all UN members to the Statute of the ICJ and article 94 reiterates said binding nature into explicitly demanding that all states to comply with the decisions emanated by the Court. The binding nature of any case brought to Court, however, depends on the acceptance of the jurisdiction by the States involved. The same applies to the jurisdiction of the ICC¹⁷³ as its jurisdiction also depends on the signature and ratification of the Rome Statute, adding another layer to the difficulties to jurisdiction of international judicial powers.^{174 175}

Therefore, even if the judicial system does not change the Laws by itself, it does influence the nuances of the Law and its development, through the interpretation in each occasion¹⁷⁶. In the words of former ICJ Judge and President José María Ruda: "the word

¹⁷¹ 'Statute of the International Court of Justice' (1945) 33 UNTS 993, art. 36.

¹⁷² Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, arts 93 and 94.

¹⁷³ *Rome Statute of the International Criminal Court* (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 art [25].

¹⁷⁴ On the struggles of the ICJ's jurisdiction see, e.g. Malcolm N Shaw, *International Law* (9th ed, CUP), 2021, pg. 901–915.

¹⁷⁵ On the ICC's jurisdiction problematic, see, e.g. Broomhall B, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford University Press, 2003, pg. 54.

¹⁷⁶ Christian J. Tams, *The Development of International Law by the International Court of Justice*, Gaetano Morelli Lectures Series, Vol 2, 2018, pg. 67.

‘development’ stands for the Court’s contribution to the interpretation and application of existing rules of international law and not to the establishment of new rules. The work of any court, be it national or international, consists of the interpretation and application of existing law and not the creation of new law”.¹⁷⁷ Judges are not law makers and the separation of powers in modern international legal framework is well established in that sense.¹⁷⁸

If it doesn’t exclusively rely on jurisprudence, does Proportionality evolve through State Practice and *opinio juris*? Or through a gradual reinterpretation of the Law? Does silence have an influence on the development of a principle?¹⁷⁹ These are questions of difficult conclusion and of even greater generation of consensus, unless we look at them from a temporal distance. The attempt is to understand which signals do we have at this point that can approach us to an answer.

B. The XXI Century development

The XX century was of great development to International Law. It was also the century that further pushed agendas of Human Rights protections into legal binding texts, both on a national and regional sphere, as in an international perspective.¹⁸⁰ The XXI century brought with it the acceleration of globalization and, with it, new threats to States’ security. This reflects on the way States react in self-defence and, as a consequence, in the way proportionality is perceived.

B.1. The post 9/11 *Securitisation*

The terrorist attacks on the twin towers in 2001 brought to surface a strong geopolitical perception of the need of the use of force against non-state threats. The USA reaction to the *Al Qaeda*’s terrorist attack initiated a new policy in the international relations of the country¹⁸¹,

¹⁷⁷ José María Ruda, *Some of the Contributions of the International Court of Justice to the Development of International Law*, New York University Journal of International Law and Politics, 1991, pg. 35.

¹⁷⁸ C. J. Tams (n12) pg. 67-69.

¹⁷⁹ Helen Quane, *Silence in International Law*, British Yearbook of International Law 84, 2014. Quane argues the silence by ICJ in several of its cases towards certain aspects of the case, although a consequence of the circumstances, influence future interpretations of International Law and, as a result, also influences the outcome of future cases.

¹⁸⁰ As mere examples, aside from the United Nations Charter (1945) and the Universal Declaration of Human Rights (1948), there are many other examples of a broad reach of regional legal texts, e.g. the Constitutive Act of the African Union (2001) or the European Convention on Human Rights (hereinafter, “ECHR”).

¹⁸¹ Starting with the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub L No 107–56, 115 Stat 272 (2001), that established

that eventually led the USA to justify the invasion of Iraq and Afghanistan. These invasions were politically linked as a reaction to the terrorist attack, as part of the USA anti-terrorism policy that followed it, as it was believed the Iraqi regime of Saddam Hussein was sympathetic (or at least negligent) to the proliferation of terrorist organizations.¹⁸² Politically, the USA also used the argument that Iraq was part of the new era of States' threats, claiming the country was close to start the producing of nuclear weapons and weapons of mass destruction.¹⁸³ The invasion of Iraq and Afghanistan and their political justifications to the USA population and the global society is very different from the legal terms the USA used when facing the international legal scrutiny. In fact, the invasion did not have a UNSC authorisation for the purpose on the grounds of chapter VII *per se*, nor did they notify the UN over article 51 justifications, despite public claims of such. Instead, the US-led coalition based their right to the use of force on the grounds of previous UN resolutions that were passed under the criterion of collective self-defence and that were considered by the coalition as still applicable to the case.¹⁸⁴ This was part of an attempt of a new interpretation of international law that would eventually extend the application of an authorisation of the use of force by the UNSC to subsequent situations where the authorisation versed the same country (in the case, Iraq). The problem resides in the fact that even though Resolution 678 authorised the use of force by the member states in co-operation with the government of Kuwait, "to restore peace and security in the region",¹⁸⁵ Resolution 687¹⁸⁶ suspended that authorisation through a ceasefire deal.¹⁸⁷ Later, it was claimed Iraq violated the terms of that ceasefire, which resulted in the adoption of Resolution 1441¹⁸⁸, that confirmed the Iraq's breach of the terms of the ceasefire.¹⁸⁹

several policies to combat and prevent terrorist acts in the country following the attacks on the 9th September 2001.

¹⁸² USA President at the time, George W. Bush, addressed the question very explicitly in his State of the Union speech on the 28th of January of 2003: "Evidence from intelligence sources, secret communications, and statements by people now in custody reveal that Saddam Hussein aids and protects terrorists, including members of al Qaeda."

¹⁸³ On the 17th of March 2003 (two days prior to the invasion of Iraq), G.W. Bush stated: "The danger is clear: using chemical, biological or, one day, nuclear weapons, obtained with the help of Iraq, the terrorists could fulfill their stated ambitions and kill thousands or hundreds of thousands of innocent people."

¹⁸⁴ In the case, the Resolutions were SC Res 678 (29 November 1990) UN Doc S/RES/678 and SC Res 687 (3 April 1991) UN Doc S/RES/687.

¹⁸⁵ SC Res 678 (29 November 1990) UN Doc S/RES/678, point 2.

¹⁸⁶ UN Security Council, Resolution 687 (1991), UN Doc S/RES/687 (3 April 1991).

¹⁸⁷ SC Res 687 (3 April 1991) UN Doc S/RES/687, point 33.

¹⁸⁸ UN Security Council, Resolution 1441 (2002), UN Doc S/RES/1441 (8 November 2002)

¹⁸⁹ SC Res 1441 (8 November 2002) UN Doc S/RES/1441.

The decision of intervention in Iraq was faced with some strong disagreement by some members of the UNSC¹⁹⁰, and suffered allegations of illegality ever since.¹⁹¹ It also had a great impact on the global perception of the importance of Security policies over the acquired or stabilized requirements of the proportionality principle in self-defence and the protection of the *ius cogens* rules of non-interference and sovereignty.

Now, our discussion over the invasion of Iraq, that was based on the re-use of old authorisations might seem odd in the elaboration of our theory. However, alongside its use of the Chapter VII, all the subsequent and external exposure were linked to the strengthening of the *securitisation* arguments of international law and, as a consequence, impacting the way self-defence language is perceived and used in the progressing of the XXI century, as we will see in parts. It has also greatly influenced the stage of collective self-defence and its dominance in state action in international conflicts, leading the way to successive uses of the importance of collective self-defence in protecting sovereignty.

In practical terms, in the post 9/11, the USA did not act directly under the legal pretext of self-defence.¹⁹² However, it forever changed the parameters of the Proportionality Principle in particular and the Self-defence context as a whole, creating a broader interpretation of what may constitute the grounds for it. In fact, the “armed attack” requirement present on article 51 of the UNC was then replaced by a broader interpretation that is based on perceptions of threats of armed attack.¹⁹³ But why is this discussion of the relevance of the collective self-defence to our topic? As we hope to show further, it will impact the next decades of state-action in the argument of self-defence.

Most of all, the big turn the international policies that followed the Iraqi invasion created in International Law of self-defence was the focus in the solidification of legitimization of pre-emptive self-defence, that will not be the focus of this discussion.¹⁹⁴ However, it also generated the fight against terrorism policy of the USA that enabled the

¹⁹⁰ UN Security Council, *4744th meeting* (8 November 2002) UN Doc S/PV.4644: the Russian Federation voiced its reservations, noting that the Resolution “contains no provisions for the automatic use of force”, together with the concurring opinions of France and China, meaning any authorisation for the use of force would have to go through the approval of the UNSC.

¹⁹¹ See, e.g. Marc Weller, *Iraq and the Use of Force in International Law* (OUP 2010), pg. 132–188; Robin Zoiß and Nils Melzer (Eds.), *The Oxford Handbook of International Law of Global Security*, 2021, pg. 825.

¹⁹² Christine Gray, *From Unity to Polarization: International Law and the Use of Force Against Iraq*, in *European journal of international law*, 13(1), 2002, pg. 11.

¹⁹³ Nsama Jonathan Simuziyya, *The (il)legality of the Iraq War of 2003: An Analytical Review of the Causes and Justifications for the US-led invasion*, Cogens Social Sciences, 2023, pg. 14-15.

¹⁹⁴ This was not new to the USA’s actions, as the reactions to the Gulf War were

invasion in 2003 (in coalition with the UK) and subsequent strikes all over the region, enforcing a dangerous legal precedent: the legitimization of a self-defence action that has no concrete original armed attack to halt.¹⁹⁵ In fact, the policy of war against terrorism that dilated the elements of state sovereignty abroad, distorts the main objective criterion of self-defence since there is no way to measure the proportionality of an action when there is no initial aggression to compare it with.¹⁹⁶ There could also be a discussion over what some scholars have defined as an illegal authorisation to act in this case of Iraq (even though, in this case, not under self-defence, but under renewal of authorisation),¹⁹⁷ since there was no specific authorisation by the UNSC to begin with.¹⁹⁸ To this thesis, the relevant reflexion to be made relies on the fact that International Law does evolve over time and context and the post 9/11 developments are of such evidence.

The years following the attacks on the twin towers marked an era of war against non-state actors abroad, where the self-defence pretext of “halting an attack” was replaced with “eliminating the source of the threat”, even though both the USA and the UK remained very reluctant to ever justify their actions as pre-emptive self-defence.¹⁹⁹

From an analytical point of view, considering the temporal component of the Necessity principle, it seems to be taken over the distinction made with the proportionality principle, meaning the separation between both principles becomes progressively harder and, as a consequence, the lawfulness of actions in self-defence more difficult to assess.²⁰⁰ Kretzmer argues “proportionality in *jus ad bellum* boils down to assessing whether the forcible means used were necessary in light of the legitimate ends of self-defence in the particular case”.²⁰¹ Traditionally, proportionality in self-defence referred to the reaction to the attack, that should

¹⁹⁵ Mark A. Drumbl, *Self-Defense, Preemption, Fear: Iraq and Beyond* Washington and Lee Public Law Research Paper No. 03-04, 2003, pg. 231.

¹⁹⁶ Ibid, pg. 223.

¹⁹⁷ See also, Michael Buyers, *The shifting Foundations of International Law: A Decade of Forceful Measures Against Iraq* in *From Unity to Polarization: International Law and the Use of Force against Iraq*, The European Journal of International Law, 2005, pg. 31.

¹⁹⁸ Nsama Jonathan Simuziya, *The (il)legality of the Iraq War of 2003: An Analytical Review of the Causes and Justifications for the US-led invasion*, Cogens Social Sciences, 2023, pg. 12-13

¹⁹⁹ Christine Gray, *From Unity to Polarization: International Law and the Use of Force Against Iraq*, in *European journal of international law*, 13(1), 2002, pg. 17.

²⁰⁰ David Kretzmer, *The Inherent Right to Self-defence and Proportionality in Jus ad Bellum*, in *The European Journal of International Law*, Vol. 24, no. 1, 2013, pg. 235-282.

²⁰¹ Ibid, pg. 240.

not override the amount of force needed to halt said attack.²⁰² But the growing wages of use of force against non-state actors brought a very different legal organization to the States involved in it. As an example, different justifications of self-defence were used to validate the use of force in Syria when fighting ISIL (the Islamic State of Iraq and Levante), in 2014.²⁰³ In fact, the decision to intervene in Syria was not approved by the UNSC. Instead, a coalition was formed²⁰⁴ in order to act against the local growth of the terrorist group relying on article 51 of the UNC.²⁰⁵ For that purpose, the USA formally notified the UNSC in a letter that reads:

“Iraq has made clear that it is facing a serious threat of continuing attacks from ISIL coming out of safe havens in Syria... States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter...”²⁰⁶

The strikes by the USA were made after the plead for intervention by the Iraqi government, in a letter sent to the UN, addressing the global community to “...strike ISIL sites and military strongholds, with our express consent.”²⁰⁷ At the time, the threat of ISIL was rapidly expanding, leading the UK to join the airstrikes, expanding the fight to Syria,²⁰⁸ also under pretext of collective self-defence under article 51.

²⁰² Ibid, pg. 239.

²⁰³ Nicholas Tsagourias, *Self-Defence against Non-state Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule*, Cambridge University Press, 2016, pg. 808

²⁰⁴ Paris Conference on Peace and Security in Iraq, 'Joint Communiqué' (15 September 2014) <https://www.diplomatie.gouv.fr/en/country-files/iraq/events/article/15-september-2014-conference-on-peace-and-security-in-iraq-joint> accessed 7 June 2026.

²⁰⁵ Nicholas Tsagourias, *Self-Defence against Non-state Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule*, Cambridge University Press, 2016, pg. 802

²⁰⁶ Letter dated 23rd of September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc S/2014/695.

²⁰⁷ Letter dated 20th of September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc S/2014/691.

²⁰⁸ Letter dated 7th of September 2015 from the Permanent Representative of the United Kingdom to the United Nations addressed to the President of the Security Council, UN Doc S/2015/688. The UK was then joined by Germany (UN Security Council, *Letter dated 10 December 2015 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council*, UN Doc S/2015/946 (10 December 2015); Belgium (UN Security Council, *Letter dated 7 June 2016 from the Chargé d'affaires a.i. of the Permanent Mission of Belgium to the United Nations addressed to the President of the Security Council*, UN Doc S/2016/523 (7 June 2016); Australia (UN Security Council, *Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council*, UN Doc S/2015/693 (9 September 2015); Denmark (UN Security Council, *Letter dated 11 January 2016 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council*, UN Doc S/2016/34 (13 January 2016); the Netherlands and Canada, which did not submit any formal letter to the UNSC before joining the air strike actions.

Once again, in the fight against non-state actors (in the case, terrorist groups) that operate in other sovereign countries cause the expansion of the proportionality principle (and, in limit, the concept of self-defence) in order to accommodate the necessary measures to assure the halt of the attack (in this case, in collective action) and “foreseeable threats in the future”.²⁰⁹

Traditionally, necessity and proportionality were treated as distinct cumulative requirements governing the exercise of self-defence. However, several scholars have observed that contemporary state practice increasingly defines proportionality by reference to what is considered necessary to achieve the legitimate defensive objective. As the conception of necessity expands (from repelling an attack to neutralizing an ongoing threat) the practical content of proportionality may also expand.²¹⁰ raising the question whether proportionality retains an independent constraining function. Now, this action of taking self-defence to other countries (even if authorised by the Syrian government),²¹¹ shows us an extension of the necessity principle and, eventually, its absorption of the proportionality principle.²¹² One might argue the necessity of the air strikes in the region as the only solution to the problem, but were the effects of the action proportional to the threats²¹³, or even preventable?

²⁰⁹ Ashley S Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense* (2012) 52 Virginia Journal of International Law 483, 2012, pg. 494.

²¹⁰ On the expansion of the principle of necessity over the principle of Proportionality, see e.g. Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge University Press, 2004, pg. 238-287;

²¹¹ SC Res 2249 (20 November 2015) UN Doc S/RES/2249, that condemns ISIS, calls upon the take of “all necessary measures” to stop ISIL but insists said actions should be taken “in compliance with international law, in particular with the United Nations Charter”. The Resolution is not an authorization of intervention. Fearing the repetition of the intervention in Libya, following the adoption of Resolution 1973 (2011), that worded the decision under chapter VII of the UNC and resulted in a catastrophic intervention in the country, later criticized by several UN members, including those serving in the UNSC.

²¹² This debate is of relative adherence by scholars. See, e.g. Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, pg. 138-229; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, pg. 310-367; Christian J Tams, 'The Necessity and Proportionality of Anti-Terrorist Self-Defence' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges*, Cambridge University Press, 2013, pg. 373-422.

²¹³ The continuous air strikes in Syria were of such great impact to the civilian population that one can only find as disproportional consequences to the goal intended. See, e.g., the discussions UN Security Council, 30 May 2017 (7955th meeting) – The Emergency Relief Coordinator reported that more than 100 civilians had recently been killed in counter-ISIS air strikes in Deir ez-Zor and Raqqa. Council members debated the humanitarian consequences of anti-ISIS operations while recognizing the need to combat ISIS; UN Security Council, 14 April 2018 (8233rd meeting) – Convened immediately after the US, UK and French missile strikes against Syrian chemical weapons facilities. Secretary-General António Guterres urged restraint, reminded members of their responsibility to maintain international peace and security, and warned against further escalation.

Setting aside the fulfilment of the Principle of Necessity in the fight against non-state actors²¹⁴, the decision made about Syria created a big precedent in the usage of the “collective self-defence”, creating several debates in the UN around the topic, claiming its usage was misplaced and, most of all, creating disproportional consequences.²¹⁵ The alleged abuse of collective self-defence in disregard of proportionality principle has not yet produced significant jurisprudence that can verify the claim that the proportionality principle has less concrete independence from the necessity principle, as the initial assessment we made about the correlation between the two appears to be getting stronger. At least our findings appoint in this direction.²¹⁶

We should give one more example before presenting our final findings.

B.2. Israel’s actions in self-defence

The case of Israel is of relevance to our study as Israel has justified the use of force claiming self-defence against non-state actors and states, in instances where the topic of violation of the proportionality principle has been raised.²¹⁷ Israel has first formally claimed acting in self-defence (with an article 51 letter addressed to the UNSC) in the six-day war

²¹⁴ Robin Zoiß and Nils Melzer (Eds.), *The Oxford Handbook of International Law of Global Security*, 2021, pg. 705

²¹⁵ Letter dated 8 March 2021 from the Permanent Representative of Mexico to the United Nations addressed to the President of the Security Council, UN Doc S/2021/247 (16 March 2021). Note specifically Russia’s statement on annex II, pg. 66: “The issue of the use of article 51 against non-state actors is a difficult one, because this article was not intended for this purpose. We must recognize that. It was drafted in order to describe the right of self-defence against armed attacks of States. However the language of this article allows for a broader interpretation. This broader interpretation became practical after 9/11, which demonstrated that an attack of terrorists may rise to the level of an armed attack of a State. It was confirmed in SC resolution 1368 (2001). However, it does not mean that any terrorist attack in a cross border context gives rise to the right of self-defence. Firstly, the criteria applicable to the definition of an armed attack must be fulfilled, in particular in terms of the magnitude of the event. Secondly, the position of the government of a State from whose territory terrorists strike must be carefully assessed. It is one thing when a government directs and supports such an attack and another if it uses all available means to fight such terrorists and is open for cooperation with other States. In the latter case it is obvious that cooperation and consent of the government must be requested. The level of bilateral relations or lack thereof may not be the ground for avoiding this requirement”.

²¹⁶ Adil Ahmad Haque, *The use of force against non-state actors: all over the map*, *Journal on the Use of Force and International Law*, 2021, Vol. 8, No. 2, pg. 282.

²¹⁷ Robin Zoiß and Nils Melzer (Eds.), *The Oxford Handbook of International Law of Global Security*, 2021, pg. 827

against Egypt in 1967²¹⁸, with some scholars and international lawyers questioning the legitimacy of such an argument.²¹⁹ Our focus is the XXI century and, in it, Israel's claims of self-defence have created a lot of relevant doctrinal discussion and judicial decisions relevant for our findings.

The major pronouncement regarding the use of the self-defence argument being dismissed by the ICJ was the Advisory Opinion by the Court in 2004, on the building of the separation wall in the Occupied Palestinian Territory.²²⁰ In its Advisory Opinion, "the Court concluded that Israel could not rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall, and that such construction and its associated régime were accordingly contrary to international law."²²¹ It also declares, about the limitations of liberty in name of security, "it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends. As the ICJ put it, they "must conform to the principle of proportionality" and "must be the least intrusive instrument amongst those which might achieve the desired result".²²²

An advisory opinion by the ICJ is not legally binding.²²³ However, they do, at least, indicate a pathway and a concrete legal evaluation to a specific situation.

This specific Advisory Opinion had the significance of dismantling a growing movement that, as shown, prioritized security policies over a proportional reasoning that balances actions between states (and non-state actors).

²¹⁸ UN Security Council, *1347th meeting*, UN Doc S/PV.1347 (6 June 1967); UN Security Council, *1348th meeting*, UN Doc S/PV.1348 (7 June 1967); UN Security Council, *1349th meeting*, UN Doc S/PV.1349 (8 June 1967).

²¹⁹ See, e.g., Ersun N. Kurtulus, *The Notion of a "Pre-Emptive War:" the Six Day War Revisited*, Middle East Journal, Vol. 61, No. 2 (Spring, 2007), pg. 220-238

²²⁰ ICJ: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

²²¹ ICJ: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para. 162.

²²² ICJ: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para. 136.

²²³ International Court of Justice, *Advisory Jurisdiction*, <https://www.icj-cij.org/advisory-jurisdiction> accessed 27 June 2026: "Contrary to judgments, and except in rare cases where it is expressly provided that they shall have binding force ... the Court's advisory opinions are not binding."

After the Hamas attacks on the 7th of October 2023, Israel launched a self-defence campaign on Gaza²²⁴ that lasted until the ceasefire in October 2025.²²⁵ This action in self-defence created numerous criticisms for its disproportionality, starting an application of the Convention on the Prevention and Punishment on the Crime of Genocide²²⁶ with the ICJ by request of South Africa.²²⁷

Recalling the four adopted components of self-defence determined in this reflection, dilated the terms of most of interpretations: the defensive purpose (that was present due to the Hamas action on a Israeli-controlled region); the relationship between necessity and proportionality (the concrete necessity requirement cannot be conjugated with the proportionality principle in what would be analysed as an “adequate reaction” due to the extreme violence that followed the initial attack)²²⁸; the scale and effects of the invasion were severely disproportional to any threat or use of force; as well as per the means employed, where the damaged caused was considered superior to the threat being halted.²²⁹

The consideration to the evaluation on how Israel’s actions in self-defence may infringe the proportionality principle due to multiple factors, highlighting the factors of the means used.²³⁰ This strengthens the concept that, even though the concept of self-defence and its integral principles keep evolving, the states still remain the ultimate factor to regulate the legitimate use of self-defence in the international sphere.²³¹

²²⁴ Hamas is known to be established in the Gaza strip since 2007, as you can read a detailed description of the matters in which the establishment was made in ICC: *Prosecution Request pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine*, ICC-01/18, Office of the Prosecutor, 22 January 2020, para. 80.

²²⁵ UN SC Resolution 2803 (2025) / adopted by the Security Council at its 10046th meeting, on 17 November 2025, UN Security Council, *Resolution 2803 (2025)*, UN Doc S/RES/2803 (17 November 2025).

²²⁶ *Convention on the Prevention and Punishment of the Crime of Genocide* (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art II

²²⁷ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) (Request for the Indication of Provisional Measures) Order of 26 January 2024.

²²⁸ Ahmet Davutoğlu and Richard Falk, *Genocide in Gaza: voices of global conscience*, Clarity Press Inc., 2025, pg. 41.

²²⁹ Human Rights Watch, *Israeli Forces’ Conduct in Gaza*, 19 of March 2024, available at <https://www.hrw.org/news/2024>, last accessed on 29/06/2026.

²³⁰ Vania Lutfi Safira Erlangga, *The Legality of Israel’s Self-Defense Claim of the Strikes on Hamas*, Universitas Islam Indonesia, 2022, pg. 9

²³¹ Nicholas Tsagourias, *Self-Defence and Non-State Actors: An Inquiry into the Morphology of the Right of Self-Defence in International Law*, Cambridge University Press, 2025, pg. 242

This is mostly noticeable in the way we analyse the evolution of the broader perception that the Necessity principle has taken in the Country's security policies, overtaking the principle of proportionality in the meantime. This might also be creating a more muscular emphasis on the *jus contra bellum* that is adopted by states when fighting non-state actors (in the case, Israel).²³² But the expansion or limitation of the concept within the metrics of self-defence is due to be assessed on the last part of the discussion.

B.3. Final considerations

After our analysis, my findings show me that it is possible that the Proportionality Principle is evolving. In fact, despite our restricted state-practice analysis, we can notice the way Proportionality is transforming from a limited perception of the use of the means necessary to achieve the goal of halting an attack into something much broader. Proportionality seems to have adapted to several different contexts that would be of interest to explore in a subsequent forum: to the growth relevance of collective self-defence in *real politics*, to the proportionality principle in itself and the self-defence in general adapting to the new, digitalised relations between states, to the influence of new threats related to A.I. or even to the simple dependency on constant connectivity to the Internet to assure a states' survival.

In my view, the interpretation of limits initially imposed to self-defence keep on enlarging their legal constraints: the vehement requirement of an "armed attack" has now been dilated into so many other sources of aggression, such as cyber warfare and drone usage.²³³ The defensive purpose is at times enlarged to a regional perspective instead of a classic maintenance of state-boarders integrity.²³⁴ The scale and effects are at times disregarded in

²³² Claus Kreß, *At the Outer Limits of the Right of Self-Defence and Beyond: Israel's Use of Force in the Gaza Strip since 7 October 2023 and the Jus contra Bellum*, Cambridge University Press, 2025, pg. 133: "(...) the *jus contra bellum* is not even mentioned, and under the rubric 'Israel's right and obligation to defend itself', it is only said that 'in relative terms, taking into account the size of Israel's population, the scope of the attack launched on October 7 is equivalent to the 9/11 attacks many multiple times over', that the 'threat is both grave and immediate', and that '(i)n these circumstances, Israel is both entitled and compelled to act so as to deny Hamas and other terrorist groups in Gaza the capacity to continue attacking its citizens and territory'(...)"

²³³ Michael N. Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, 2017, pg 20.

²³⁴ Yoram Dinstein, *War, Aggression and Self-defence*, Cambridge University Press, 2012, pg. 281.

order to fulfil the ultimate goal of maintaining the states' security policies.²³⁵ Finally, the means employed are often of disproportional scale, as the discrepancy between the powers often leads to that result.²³⁶

With this short analysis it is difficult to assess and establish if the required state practice and *opinio juris* have been established to assess whether CIL has evolved, however, some recent examples from USA and Israel might be taken as indications of such an evolution of CIL. It is important to note that both the USA and Israeli understanding of the proportionality principle might not be shared by many other states, which again proves the importance that power has in politics and politics has in International Law.

It is also true that the Law is not changing in the formal sense of it, as there has not been any amendments to chapter 51 or 2(4) of the UN Charter, their interpretation has definitively evolved (or metamorphosed) into different complexities.²³⁷ In this point of our analysis we can confidently confirm the changes in the Proportionality Principle that primarily rely on the way Proportionality is assessed by states when acting in self-defence.

²³⁵ Ibid, pg. 279.

²³⁶ Ibid, pg. 323.

²³⁷ Tom Ruys, '*Armed Attack*' and the Article 51 of the UN Charter, *Evolutions in Customary Law and Practice*, Cambridge University Press, pg. 518.

CHAPTER V – CONCLUSION

In this academic development, I was able to remark a degree of evolution primarily based on State-practice, mostly sustained by the agreement of several leading scholars, for a concrete international judicial recognition is still pending. From my analysis' findings, one cannot ensure this change will ever effectively translate into a significant modification of the principle in legal establishment, or if it will just continue through legal doctrine. The effects on *opinio juris* were shown at times, but not with the certainty required for a definite assessment. In fact, it was not possible to assess the effective turn in *opinio juris* in this matter, without which one cannot guarantee an evolution of CIL. The assessment of law evolution takes time and, once again, the evolution on customary law will require a retrospective perception, but a deeper, longer analysis would possibly allow further, more concrete conclusions that a thesis of this size did not leave room for.

It is important to recognise the shortcomings of this analysis, in particular in what relates to a further examination of relevant state-practice and *opinio juris* that would enable any reader to come closer to our inquiry views. It is probable that this thesis can serve as a future deeper investigation of this issue, weather it is taken by myself or any other interested person.

BIBLIOGRAPHY

Prepared in OSCOLA format (Oxford University Standard for the Citation of Legal Authorities, 4th edn). Entries are ordered alphabetically within each section; author names are inverted (surname first). Titles retain the citation details used in the thesis footnotes.

Table of Cases

International Court of Justice

- . *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226
- . *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Request for the Indication of Provisional Measures) Order of 26 January 2024
- . *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168
- . *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136
- . *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14
- . *Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep 161

International Criminal Court

- . *Prosecution Request pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine* (ICC-01/18, Office of the Prosecutor, 22 January 2020)

Other

- . *The Caroline* (1837) 30 British and Foreign State Papers 195

Table of Legislation and Treaties

- . Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI
- . Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3

- . Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (adopted 22 August 1864, entered into force 22 June 1865) 129 Consol TS 361
- . Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277
- . Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (opened for signature 13 January 1993, entered into force 29 April 1997) 1974 UNTS 45
- . Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3
- . Peace of Westphalia (Treaties of Münster and Osnabrück, signed 24 October 1648) 1 CTS 119, 271
- . Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90
- . Statute of the International Court of Justice (1945) 33 UNTS 993
- . Treaty on European Union (signed 7 February 1992, entered into force 1 November 1993) [2016] OJ C202/13
- . Treaty on the Prohibition of Nuclear Weapons (adopted 7 July 2017, opened for signature 20 September 2017, entered into force 22 January 2021) 3370 UNTS 187
- . *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub L No 107-56, 115 Stat 272 (2001)

UN and Other Official Documents

- . UN Security Council Resolutions
- . UNSC Res 384 (22 December 1975) UN Doc S/RES/384
- . UNSC Res 678 (29 November 1990) UN Doc S/RES/678
- . UNSC Res 687 (3 April 1991) UN Doc S/RES/687
- . UNSC Res 819 (16 April 1993) UN Doc S/RES/819
- . UNSC Res 1441 (8 November 2002) UN Doc S/RES/1441
- . UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970
- . UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249
- . UNSC Res 2803 (17 November 2025) UN Doc S/RES/2803

UN Security Council Meeting Records

- . UNSC, *1347th Meeting* (6 June 1967) UN Doc S/PV.1347
- . UNSC, *1348th Meeting* (7 June 1967) UN Doc S/PV.1348
- . UNSC, *1349th Meeting* (8 June 1967) UN Doc S/PV.1349
- . UNSC, *4644th Meeting* (8 November 2002) UN Doc S/PV.4644
- . UNSC, *6627th Meeting* (4 October 2011) UN Doc S/PV.6627
- . UNSC, *6711th Meeting* (4 February 2012) UN Doc S/PV.6711
- . UNSC, *6810th Meeting* (19 July 2012) UN Doc S/PV.6810
- . UNSC, *7955th Meeting* (30 May 2017) UN Doc S/PV.7955
- . UNSC, *8233rd Meeting* (14 April 2018) UN Doc S/PV.8233
- . UNSC, *Draft Resolution* (4 October 2011) UN Doc S/2011/612

UN General Assembly Documents

- . UNGA Res 2625 (XXV), *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (24 October 1970) UN Doc A/RES/2625
- . UNGA Res 49/75 K (15 December 1994) UN Doc A/RES/49/75K
- . UNGA Res 60/1, *2005 World Summit Outcome* (24 October 2005) UN Doc A/RES/60/1 (A/60/L.1)
- . UNGA, *In Larger Freedom: Towards Development, Security and Human Rights for All* (Report of the Secretary-General, 9 May 2005) UN Doc A/59/2005
- . UNGA, *Implementing the Responsibility to Protect* (Report of the Secretary-General, 12 January 2009) UN Doc A/63/677
- . Letters to the UN Security Council
- . Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc S/2014/695
- . Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc S/2014/691
- . Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom to the United Nations addressed to the President of the Security Council, UN Doc S/2015/688
- . Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, UN Doc S/2015/693

- . Letter dated 10 December 2015 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council, UN Doc S/2015/946
- . Letter dated 11 January 2016 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council, UN Doc S/2016/34
- . Letter dated 7 June 2016 from the Chargé d'affaires a.i. of the Permanent Mission of Belgium to the United Nations addressed to the President of the Security Council, UN Doc S/2016/523
- . Letter dated 8 March 2021 from the Permanent Representative of Mexico to the United Nations addressed to the President of the Security Council, UN Doc S/2021/247

Other UN and International Documents

- . International Law Commission, *Draft Conclusions on Identification of Customary International Law, with Commentaries*, UN Doc A/73/10 (2018)
- . International Law Commission, *Addendum to the Eighth Report on State Responsibility* by Roberto Ago, UN Doc A/CN.4/318/Add.5-7 (1980) II(1) YBILC 69
- . UN Economic and Social Council, Commission on Human Rights, *Report by the Special Rapporteur on his Mission to Indonesia and East Timor from 3 to 13 July 1994* (1 November 1994) UN Doc E/CN.4/1995/61/Add.1
- . UN Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *Summary Records of the 67th to 78th Meetings* (19 October 1970) UN Doc A/AC.134/SR.67-78
- . USSR, *Summary Record of the 67th Meeting* (19 October 1970) UN Doc A/AC.134/SR.67
- . United Nations Conference on International Organization, *Documents of the United Nations Conference on International Organization, San Francisco, 1945* (15 vols, United Nations 1945-1955)
- . United Nations, *Repertory of Practice of United Nations Organs, Supplement No 3 (1959-1966)*, vol 2

Diverse

- . Paris Conference on Peace and Security in Iraq, *Joint Communiqué* (15 September 2014) <https://www.diplomatie.gouv.fr/en/country-files/iraq/events/article/15-september-2014-conference-on-peace-and-security-in-iraq-joint> accessed 7 June 2026

- . T R Harrison (printer), *Correspondence between Great Britain and the United States relative to the Treaty lately concluded at Washington, including Instructions from the Earl of Aberdeen to Lord Ashburton, 1842-43* (Presented to the House of Commons by Her Majesty's Command, April 1843)
- . The Holy See, Leo XIV, *Magnifica Humanitas* (Encyclical Letter on Safeguarding the Human Person in the Time of Artificial Intelligence, 15 May 2026)
<https://www.vatican.va/content/leo-xiv/en/encyclicals/documents/20260515-magnifica-humanitas.html>

Secondary Sources

Books

- . Adler MC, *The Inherent Right of Self-Defence in International Law* (Springer 2013)
- . Anter A, *Max Weber's Theory of the Modern State: Origins, Structure and Significance* (Palgrave Macmillan 2014)
- . Barzel Y, *A Theory of the State: Economic Rights, Legal Rights, and the Scope of the State* (Cambridge University Press 2009)
- . Berman HJ, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983)
- . Bradley CA (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016)
- . Broomhall B, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press 2003)
- . Brownlie I, *International Law and the Use of Force by States* (Clarendon Press 1963)
- . Cicero, *De Officiis* (Walter Miller tr, Harvard University Press, Loeb Classical Library No 30, 1968)
- . Crawford J, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019)
- . Davutoğlu A and Falk R, *Genocide in Gaza: Voices of Global Conscience* (Clarity Press 2025)
- . Dinstein Y, *War, Aggression and Self-Defence* (Cambridge University Press 2012)
- . Dinstein Y, *War, Aggression and Self-Defence* (Cambridge University Press 2017)
- . Droubi S, *Resisting United Nations Security Council Resolutions* (Routledge 2014)

- . Erasmus D, *A Complaint for Peace* (1521)
- . Finnis J, *Natural Law and Natural Rights* (Oxford University Press 2011)
- . Franck TM, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge University Press 2002)
- . Gardam J, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004)
- . Graeber D and Wengrow D, *The Dawn of Everything: A New History of Humanity* (Allen Lane 2021)
- . Gray C, *International Law and the Use of Force* (4th edn, Oxford University Press 2018)
- . Green JA, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing 2009)
- . Grotius H, *On the Law of War and Peace* (Francis W Kelsey tr, Clarendon Press 1925) vol 2
- . Guzman AT, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008)
- . Hobbes T, *Leviathan* (1651)
- . Kant I, *Perpetual Peace: A Philosophical Essay* (1795)
- . Kelsen H, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (London Institute of World Affairs 1951; The Lawbook Exchange 2000)
- . Kratochwil F, *The Status of Law in World Society: Meditations on the Status and Rule of Law* (Cambridge University Press 2014)
- . Locke J, *Second Treatise of Government* (1689)
- . McDougal MS and Feliciano FP, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (Yale University Press 1961)
- . Perry J and Grant J, *Encyclopaedic Dictionary of International Law* (Oxford University Press 2009)
- . Piirimäe P, *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge University Press 2011)
- . Rogers JP and Hutto JW (eds), *Rethinking Remote Warfare: AI, Drones and Future War* (Palgrave Macmillan 2026)
- . Ruys T, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010)

- . Ruys T, Corten O and Hofer A (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018)
- . Sangster A, *From Plato to Putin: A Short Guide to the Question of War* (Ethics International Press 2023)
- . Sassòli M, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising from Warfare* (Edward Elgar Publishing 2019)
- . Schmitt MN (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press 2017)
- . Schweigman D, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (Kluwer Law International 2001)
- . Shaw MN, *International Law* (9th edn, Cambridge University Press 2021)
- . Spinello RA, *The Encyclicals of John Paul II: An Introduction and Commentary* (Rowman & Littlefield 2012)
- . Thirlway H, *The Sources of International Law* (2nd edn, Oxford University Press 2019)
- . Tsagourias N, *Self-Defence and Non-State Actors: An Inquiry into the Morphology of the Right of Self-Defence in International Law* (Cambridge University Press 2025)
- . Weller M, *Iraq and the Use of Force in International Law* (Oxford University Press 2010)
- . Westlake J, *International Law, Vol I* (Cambridge University Press 1904)

Contributions to Edited Books

- . Buyers M, 'The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq' in *From Unity to Polarization: International Law and the Use of Force against Iraq* (2005) 16 *European Journal of International Law* 31
- . Gardam J, 'Necessity, Proportionality and the Unilateral Use of Force in the Era of the United Nations Charter' in *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2009)
- . Tams CJ, 'The Necessity and Proportionality of Anti-Terrorist Self-Defence' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013)
- . Tasioulas J, 'Custom, *Jus Cogens*, and Human Rights' in Curtis A Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016)

. Wallenstein P and Johansson P, 'Security Council Decisions in Perspective' in David M Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner Publishers 2004)

Journal Articles

. Bar A, 'The League of Nations Mandate System - Success or Failure?' (2019) Institute of Political Science and International Relations of the Jagiellonian University, Cracow 156

. Brockmeier S, Stuenkel O and Tourinho M, 'The Impact of the Libya Intervention Debates on Norms of Protection' (2015) 5 November 113

. Brownlie I, 'The Use of Force in Self-Defence' (1961) 37 British Yearbook of International Law 183

. Cohen G, 'Mixing Oil and Water? The Interaction between *Jus ad Bellum* and *Jus in Bello* during Armed Conflicts' (2022)

. Corten O, 'The Controversies over the Customary Prohibition of the Use of Force: A Methodological Debate' (2005) 16(5) European Journal of International Law 803

. Deeks AS, "'Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 Virginia Journal of International Law 483

. Drumbl MA, 'Self-Defense, Preemption, Fear: Iraq and Beyond' (2003) Washington and Lee Public Law Research Paper No 03-04, 231

. Etezazian S, 'The Nature of the Self-Defence Proportionality Requirement' (2016) 3 Journal on the Use of Force and International Law 260

. Ford RS, 'The Syrian Civil War: A New Stage, but Is It the Final One?' (Middle East Institute Policy Paper 2019, 8 April 2019)

. Gayathri U, 'A Doctrinal Study on the Evolution of Self-Defence in International Law' (2025) 6(5) International Journal of Research Publication and Reviews 5692

. Gray C, 'From Unity to Polarization: International Law and the Use of Force against Iraq' (2002) 13(1) European Journal of International Law 1

. Haque AA, 'The Use of Force against Non-State Actors: All over the Map' (2021) 8(2) Journal on the Use of Force and International Law 278

. Hironobu S, "'As If' Acting under Chapter VII of the UN Charter? Rigidity of the Threshold between Chapter VII and Non-Chapter VII' (2009) 13 Asian Yearbook of International Law (2007) 105

- . Hove M and Mutanda D, 'The Syrian Conflict 2011 to the Present: Challenges and Prospects' (2015) 50(5) *Journal of Asian and African Studies* 559
- . Jennings RY, 'The Caroline and McLeod Cases' (1938) 32 *American Journal of International Law* 82
- . Kreß C, 'At the Outer Limits of the Right of Self-Defence and Beyond: Israel's Use of Force in the Gaza Strip since 7 October 2023 and the *Jus contra Bellum*' (Cambridge University Press 2025) 133
- . Kretzmer D, 'The Inherent Right to Self-Defence and Proportionality in *Jus ad Bellum*' (2013) 24(1) *European Journal of International Law* 235
- . Kurtulus EN, 'The Notion of a "Pre-Emptive War": The Six Day War Revisited' (2007) 61(2) *Middle East Journal* 220
- . Maogoto JN, 'Walking an International Law Tightrope: Use of Military Force to Counter Terrorism - Willing the Ends' (2006) 31 *Brooklyn Journal of International Law* 53
- . Moir L, 'Belligerent Reprisals and their Progressive Limitation' in *Reappraising Reprisals Against Enemy Civilians in Customary International Humanitarian Law* (2024) *Journal of International Humanitarian Legal Studies*
- . Mori T, 'Origins of the Right of Self-Defence in International Law: From the Caroline Incident to the United Nations Charter' (R Scott Adams tr) (2019) *Australian Year Book of International Law Online* 245
- . Omid A, 'Analyzing the Persian Gulf Naming Dispute from International Law Perspective' (2024) 12 *Chinese Journal of Comparative Law*
- . Quane H, 'Silence in International Law' (2014) 84 *British Yearbook of International Law*
- . Reichberg GM and Syse H, *Threats and Coercive Diplomacy: An Ethical Analysis* (Cambridge University Press 2018)
- . Ruda JM, 'Some of the Contributions of the International Court of Justice to the Development of International Law' (1991) *New York University Journal of International Law and Politics* 35
- . Simuziya NJ, 'The (Il)legality of the Iraq War of 2003: An Analytical Review of the Causes and Justifications for the US-Led Invasion' (2023) *Cogent Social Sciences*
- . Śliwiński KF, 'From Securitization to Securitism: Analyzing the Evolution of the Securitization Theorem, Part I' (2025) *Polish Journal of Political Science*

- . Šmuclerová M, ““UN-Led” or “UN-Authorized” Operation?: Discerning among the UN Security Council’s Mandated Operations’ (2012) 4 *The Lawyer Quarterly* 321
- . Stahn C, ““Jus ad Bellum’, ‘Jus in Bello’... ‘Jus post Bellum’? - Rethinking the Conception of the Law of Armed Force” (2007) 17(5) *European Journal of International Law* 921
- . Tams CJ, *The Development of International Law by the International Court of Justice* (Gaetano Morelli Lectures Series, vol 2, 2018)
- . Trapp KN, ‘Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors’ (2007) 56(1) *International and Comparative Law Quarterly* 141
- . Tsagourias N, ‘Self-Defence against Non-State Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule’ (2016) 29 *Leiden Journal of International Law* 801
- . ‘The Chatham House Principles of International Law on the Use of Force in Self-Defence’ (2006) 55(4) *International and Comparative Law Quarterly* 963
- . van Steenberghe R, ‘Proportionality under *Jus ad Bellum* and *Jus in Bello*: Clarifying their Relationship’ (2012) 45 *Israel Law Review* 107
- . Widmaier WW, ‘Constructing Foreign Policy Crises: Interpretive Leadership in the Cold War and War on Terrorism’ (2007) 51(4) *International Studies Quarterly* 779

Theses and Working Papers

- . Cohen G, *Mixing Oil and Water? The Interaction between Jus ad Bellum and Jus in Bello during Armed Conflicts* (2022)
- . Erlangga VLS, *The Legality of Israel’s Self-Defense Claim of the Strikes on Hamas* (Universitas Islam Indonesia 2022)
- . O’Meara C, *Necessity and Proportionality and the Right of Self-Defence in International Law* (PhD thesis, University College London, Faculty of Laws 2018)
- . Pank SC, *What Is the Scope of Legal Self-Defence in International Law? Jus ad Bellum with a Special View to New Frontiers for Self-Defence* (Juridisk Institut)

Reports and Online Sources

- . Amnesty International, *East Timor: The Santa Cruz Massacre* (14 November 1991) ASA 21/23/91

- . Center on International Cooperation, *UN Peace Operations Gone Broke: How the United Nations' Financial Crisis is Dismantling Peace Operations* <https://cic.nyu.edu/resources/un-peace-operations-gone-broke-how-the-united-nations-financial-crisis-is-dismantling-peace-operations/> accessed June 2026
- . Council on Foreign Relations, *The UN Security Council* (Backgrounder, 9 September 2024) <https://www.cfr.org/backgrounders/un-security-council> accessed 16 April 2026
- . Human Rights Watch, *Israeli Forces' Conduct in Gaza* (19 March 2024) <https://www.hrw.org/news/2024> accessed 29 June 2026
- . International Court of Justice, *Advisory Jurisdiction* <https://www.icj-cij.org/advisory-jurisdiction> accessed 27 June 2026
- . International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons - Overview of the Case* <https://www.icj-cij.org/case/95>
- . International Court of Justice, *Oil Platforms (Islamic Republic of Iran v United States of America) - Overview of the Case* <https://www.icj-cij.org/case/90>
- . Winright T, *Is the Ethic Behind Just War Outdated?* <https://www.catholicmoraltheology.com/p/is-the-ethic-behind-just-war-outdated>

Notes on cross-references resolved

The following footnotes were shortened cross-references (“Ibid” / “n XX” / “(n ...)”) that point back to earlier full citations already included above:

- **Ibid** references: nn 7-8, 19, 29, 64, 76-77, 90, 98, 108, 115-116, 127-129, 131, 147, 149-150, 156, 170, 196, 201-202, 235-236 (each repeats the immediately preceding source).
- **Short-form “n” references:** n 88-89, 91 (Sassòli); n 92 (Dinstein); n 93 (Gardam); n 165 (Reichberg and Syse); n 178 (Tams); n 149 (UNGA Res 49/75 K); n 108 (Nicaragua).
- **Duplicated full citations:** Anter (nn 18/28), Chatham House Principles (nn 20/30), Corten (nn 26/33), Harrison Correspondence (nn 66/95), Kelsen (nn 58/60), Kretzmer (nn 109/119/200), Ruys (nn 71/74/117/120/122/205/217/237), Dinstein (nn 107/136/138/234), Gardam (nn 130/135/143), Gray (nn 192/199), Simuziya (nn 193/198), Green (nn 97/101/144), and Tsagourias (nn 203/205). These are consolidated into single bibliography entries.