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Article

Rationalising International Law Rules on Self-Defence: The Pin-Prick Doctrine

Abhimanyu George Jain*

Abstract

The pin-prick doctrine permits defensive uses of force in response to a continuing pattern of attacks providing objective proof of a future threat. It provides a necessary, possible and appropriate means of rationalising international law rules regulating the use of military force in self-defence. Recognition of the pin-prick doctrine in international law is necessary as a part of a broader exercise to rationalise international law rules on self-defence. The collective security system envisaged under the UN Charter has failed, leading to jus ad bellum rules that are unduly restrictive in the face of real and severe threats to the security of states. Thus, rationalisation is necessary to maintain the integrity of the system. Further, recognition of the pin-prick doctrine in international law is possible because it already enjoys widespread support in state and judicial practice. Moreover, recognition of the pin-prick doctrine in international law is appropriate because unlike other doctrines designed to rationalise Charter rules on self-defence (such as pre-emptive self-defence), the pin-prick doctrine does not unduly compromise the effectiveness of the Charter regime.

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RATIONALISING INTERNATIONAL LAW RULES ON SELF-DEFENCE: THE PIN- PRICK DOCTRINE

Abhimanyu George Jain

Introduction

In the first major national security speech of his second term in office, President Obama referred to the need to “dismantle networks that pose a direct danger, and make it less likely for new groups to gain a foothold.”¹ Referring to the pattern of terrorist attacks leading up to 9/11, President Obama said, “left unchecked, these threats can grow.”² This was just one element of a broader counter-terrorism strategy enunciated by President Obama, but these explicit references to checking and eliminating terrorist threats before they develop resonates with the pre-emptive self-defence doctrines expressed by former President Bush. Both President Obama and President Bush have in common the character of a response to future threats, as well as that of presenting issues of compatibility with strict interpretations of the international law rules on use of force. This paper argues that there is a space for, indeed even a need for such doctrines. The argument presented in this paper is not geared towards sacrificing international law rules on use of force at the altar of national security, but instead at rationalising these rules to appropriately balance national and international security.

Consider the following hypothetical. A state, Fornjot, is the victim of a suicide bombing by Janus, a terrorist organisation operating from the territory of Telesto, another state.³ Janus has previously undertaken such attacks against Fornjot and has declared its intent to continue doing so. Fornjot knows of the location of Janus’ camps in Telesto.

¹ *President Barack Obama’s Speech at National Defense University-full text*, THE GUARDIAN, May 23, 2013, <http://www.guardian.co.uk/world/2013/may/23/obama-drones-guantanamo-speech-text>.

² *Id.*

³ *About Saturn & Its Moons*, NASA, <http://saturn.ipl.nasa.gov/science/moons> (last visited Feb. 18, 2014) (Fornjot, Telesto and Janus are fictional entities whose names are inspired by the names of the moons of Saturn).

Fornjot, and the international community at large, have repeatedly urged Telesto to take action against Janus' operations on its territory, but Telesto appears either unwilling or unable to cooperate. Fornjot executes an aerial attack against Janus' camps in Telesto. Is Fornjot's use of force a legal exercise of the right of self-defence under Art. 51 of the United Nations (UN) Charter (UN Charter)?

Fornjot's use of force in these circumstances would definitely appear to be reasonable. International law rules regulating a state's ability to resort to the 'military instrument'⁴ are not, after all, meant to be a 'suicide pact'.⁵ Nonetheless the legality of Fornjot's actions may be challenged on the grounds that a single suicide bombing does not meet the gravity threshold for defensive use of force, or on the grounds that as a delayed response Fornjot's actions constituted an illegal reprisal rather than legal self-defence. These challenges are based on a strict interpretation of international law rules relating to self-defence, but this interpretation and these challenges are not without support.⁶

⁴ W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 26, 29 (Lori Fisler Damrosch and David Scheffer eds., 1991) [hereinafter Reisman].

⁵ Louis R. Beres, *The Permissibility of State-Sponsored Assassination During Peace and War*, 5 *TEMP. INT'L & COMP. L.J.* 231, 231, n. 1 (1991) (quoting Jeane Kirkpatrick, former U.S. ambassador to the UN).

⁶ See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 194, ¶ 139 (Jul. 9) [hereinafter *Wall Opinion*] (dismissing arguments relating to self-defence because the impugned actions of Israel were directed against a non-state actor); Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 *EUR. J. INT'L L.* 993, 997 (2001) (arguing that widespread support for American use of force against Afghanistan after 9/11 may not imply an automatic deviation from the formerly strict interpretation of the right of self-defence. Several publicists note that states do sometimes use force in the manner described here, but express their reservations as to the effect of recognising this permissibility of such uses of force upon the effectiveness of *jus ad bellum*.); JUDITH GARDAM, *NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES* 146-7 (2004) [hereinafter *GARDAM*] (arguing that use of force in this situation would not be consistent with international law); Dino Kritsiotis, *The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law*, 45 *INT'L & COMP. L.Q.* 162, 174-7 (1996) [hereinafter *Kritsiotis*]; Tom Ruys, *Quo Vadit Jus Ad Bellum?: A Legal Analysis of Turkey's Military Operations Against the PKK in Northern Iraq*, 9 *MELB. J. INT'L L.* 334, 363-64 (2008);

Referring to precisely the kind of situation discussed in the example, Reisman suggested that states could not really be faulted for their defiance of Charter rules.⁷ That assessment is correct- uses of force in the circumstances outlined above, should be permissible.

The defensive use of force in this sort of situation may be justified by reference to the 'pin-prick' or 'accumulation of events' doctrine. This doctrine recognises the existence of a right of self-defence in response to a series of armed attacks, each possibly falling below the gravity threshold, but together, constituting a continuing armed attack which meets the gravity threshold, and supports exercise of the right of self-defence in anticipation of a future threat, in order to deter that threat. This paper argues in favour of the recognition of this 'pin-prick' doctrine because it provides a much needed rationalisation of *jus ad bellum* rules without leaving states free to use force at will.

The argument is presented in three parts. Section II discusses the need for rationalisation of international law rules relating to the use of force: strict limits on states' ability to use force are desirable but not at the cost of state security interests. Section III outlines how, in the face of situations similar to that faced by Fornjot above, states have relied on the pin-prick doctrine to use and justify defensive force, a doctrine which also finds support in the decisions of international courts. Finally, Section IV fleshes out the substance and details of the pin-prick doctrine and argues that it is capable of rationalising *jus ad bellum* rules without unduly weakening the Charter regime.

The pin-prick doctrine is not a panacea for all complaints about the rigidity of Charter rules on self-defence. Notwithstanding the potential recognition of the pin-prick doctrine, situations of the sort discussed here – where states are constrained in defending themselves by inflexible rules - will continue to arise. A powerful example of this is situations where pre-emptive rights of self-defence are invoked. This paper does not argue that pre-emptive self-defence should be recognised because to do so presents credible and insurmountable threats to the integrity of *jus ad bellum* rules. However, situations may well

Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359, 367-72, 390 (2002) [hereinafter Tams] (documenting authority for a strict interpretation of the right of self-defence prior to the 9/11 terrorist attacks).

⁷ Reisman, *supra* note 5, at 34.

arise where pre-emptive uses of self-defence would be both legitimate and reasonable, if illegal. Thus, the argument here does not pretend to provide an easy or complete fix for the problems facing the international law rules of self-defence. Instead it focuses on the pin-prick doctrine as a suitable and appropriate way to begin that exercise.

I. The Charter Right To Self-Defence and Its Flaws

This section argues that international law rules relating to self-defence are unduly restrictive in practice. First, the international law of self-defence is briefly outlined [Section II(A)] and then its restrictiveness in practice is considered. [Section II(B)].

A. The Right to Self-Defence

Article 2(4) of the UN Charter prohibits the use or threat of force.⁸ The UN Charter is the first international legal instrument to comprehensively prohibit recourse to armed force.⁹

⁸ U.N. Charter art. 2, para 4 (“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.”) *See generally*, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200 (Bruno Simma et al eds., 3rd ed., 2012) [hereinafter Simma] (providing an interpretive guide to art. 2 ¶ 4); NIKOLAS STÜRCHLER, THE THREAT OF FORCE IN INTERNATIONAL LAW (2007) (discussing the meaning of ‘threat of force’).

⁹ *See, e.g.*, Treaty Between the United States and Other Powers for the Renunciation of War as an Instrument of National Policy art. I, Aug. 27, 1928, 94 L.N.T.S. 57 (listing the signatory countries: the U.S.A., Australia, Dominion of Canada, Czechoslovakia, Germany, Great Britain, India, Free Irish State, Italy, New Zealand, and the Union of South Africa. Unfortunately, the treaty, though well intentioned, suffered from several flaws. For instance, though it outlawed ‘war’, it made no reference to uses of force short of war, thereby presumably leaving open the possibility of such uses of force.); J.L. Brierly, *Some Implications of the Pact of Paris*, 10 BRIT. Y.B. INT’L L. 208, 208 (1929); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 82-4 (5th ed., 2012) [hereinafter DINSTEIN] (arguing that the first ever such truly international attempt was the Covenant of the League of Nations. But that stopped short of being a comprehensive and effective prohibition of the use of force for various reasons, including the requirement of unanimity in the Council or majority in the Assembly to restrict states, exclusivity of state competence in matters within their individual jurisdiction, and restricted scope of application to disputes between members. Another such attempt was the

There are only two exceptions to this blanket prohibition: enforcement action under Chapter VII and self-defence under Art. 51.

Under Chapter VII of the UN Charter, if the UN Security Council (UNSC) finds a threat to international peace and security under Art. 39,¹⁰ it may authorise the use of military force pursuant to Art. 42.¹¹ The enforceability of UNSC-mandated uses of force is assured by the combined effort of Art. 25,¹² which requires states to cooperate with UNSC decisions, and Art. 103,¹³ which provides for the prevalence of obligations under the UN Charter over other international law obligations.¹⁴ The UNSC has

Kellogg-Briand Pact.); HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 43 (1st ed., 1952) (making no references to uses of force in self-defence, the treaty generated controversy as to whether self-defence was permitted); C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, in 81 *RECUEIL DES COURS* 455, 471-474 (1952).

¹⁰ U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”); *See generally*, Simma, *supra* note 9, at 1272.

¹¹ U.N. Charter art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations”); *See generally*, Simma, *supra* note 9, at 1330.

¹² U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”); *See generally*, Simma, *supra* note 9, at 787.

¹³ U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”); *See generally*, Simma, *supra* note 9, at 2110.

¹⁴ Joy Gordon, *The Sword of Damocles: Revisiting the Question of Whether the United Nations Is Bound by International Law*, 12 *CHI. J. INT'L L.* 605, 607-8 (2012) (regarding the binding effect of Chapter VII resolutions of the UNSC); Rain Livoja, *The Scope of the Supremacy Clause of the United Nations Charter*, 57 *INT'L & COMP. L.Q.* 583, 585 (2008); *See generally* Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 *HARV. J. INT'L L.* 1 (2010) (criticising the pluralist approach of the decision. This guaranteed enforceability suffered a setback in 2005 through the 2008 decision of the Court of Justice of the European Union (CJEU) in the Kadi case. The Kadi case involved a challenge to European Union measures implemented pursuant to UNSC Chapter VII resolution requiring, *inter alia*, the freezing of assets of suspected terrorists. The challenge was instituted by a

invoked its Chapter VII powers to set up international courts,¹⁵ enforce arms embargoes¹⁶ and no-fly zones,¹⁷ demand cessation of hostilities,¹⁸ authorise collective military action,¹⁹ and even invoke the jurisdiction of the International Criminal Court (ICC).²⁰

The right of self-defence under Art. 51²¹ of the UN Charter has several important aspects. A brief summary is provided below.

Saudi national whose assets had been frozen; he argued that he had been denied notice and judicial review. The CJEU, expressly ruling that it was considering a challenge to the EU measure, and not the UNSC resolutions, upheld the challenge under the European Convention of Human Rights. Though this decision does not judge the merits of the actions of the UNSC, it does effectively open the door to EU states being prevented from fulfilling their obligations under UNSC Chapter VII resolutions if those resolution contravene fundamental intra-EU obligations.); Juliane Kokott and Christoph Sobotta, *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?*, 23 EUR. J. INT'L L. 1015 (2012) (supporting the Kadi case decision).

¹⁵ S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993) (establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY)); S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the International Criminal Tribunal for Rwanda (ICTR)). *See* Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 28-40 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (challenging and upholding the authority of the UNSC to establish an international criminal tribunal, and consequently the validity of the jurisdiction exercised by the ICTY, was challenged and upheld in the very first case considered by that court).

¹⁶ S.C. Res. 713, ¶ 6, U.N. Doc. S/RES/713 (Sep. 25, 1991) (imposing an arms embargo upon the former Yugoslavia); S.C. Res. 418, ¶ 2, U.N. Doc. S/RES/418 (Nov. 4, 1977) (imposing an arms embargo upon South Africa).

¹⁷ S.C. Res. 1973, ¶ 6-12, U.N. Doc. S/RES/1973 (Feb. 26, 2011) (imposing a no-fly zone over Libya).

¹⁸ *Id.*, at ¶ 1-3.

¹⁹ S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990) (authorising use of force against Iraq during the first Gulf War); S.C. Res. 929, ¶ 3, U.N. Doc. S/RES/929 (Jun. 22, 1994) (authorising member states to participate in and cooperate with the UN Assistance Mission in Rwanda).

²⁰ S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (referring the situation in Sudan to the International Criminal Court).

²¹ U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken 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

First, the UN Charter does not create the right to use force in self-defence. It recognises a pre-existing right. This is indicated by the phrase: “*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs...*” There is heated debate about the meaning of the reference to “*inherent right.*” Some commentators have suggested that this supports a broader right of self-defence than that supported by the text of Art. 51.²² Others disagree. In practice, however, most states tend to justify the legality of their uses of force in self-defence by reference to the text of Art. 51.²³ By and large, however, the Charter right of self-defence is believed to be narrower than the customary international law right, that existed before 1945.²⁴

Second, the right of self-defence arises only in response to an armed attack. However, it is unclear what exactly constitutes an armed attack.²⁵ It is commonly accepted that not all uses of force constitute an armed attack. There is a certain gravity threshold below which uses of force are not armed attacks for the purpose of Art. 51.²⁶ It is unclear what exactly is the quantitative

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”); *See generally* Simma, *supra* note 9, at 1397.

²² *E.g.*, D. W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 185-6 (1958); Stephen M. Schwebel, *Aggression, Intervention and Self-Defense in Modern International Law*, 136 *RECUEIL DES COURS* 411, 463 (1972). Another interesting example of such an argument is IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 255-7 (1963) [hereinafter BROWNLIE] (arguing that Art. 51 refers to a pre-existing customary international law right, but unlike the other authors cited in this footnote, believes that the text of Art. 51 codifies the pre-Charter right, and does not thus support a broader right of self-defence than that supported by the text of Art. 51).

²³ CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 118 (Malcolm Evans et al. eds., 3rd ed. 2008) [hereinafter GRAY].

²⁴ HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 791-2 (1950); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 147-50 (1991) [hereinafter SCHACHTER]; DINSTEIN, *supra* note 10, at 191-3.

²⁵ *See generally*, TOM RUYS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE (2010) (discussing the various aspects of the concept of ‘armed attack’)

²⁶ *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 101, ¶ 191 (June 27) [hereinafter *Nicaragua*] (“[i]t will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms”); *Case Concerning Oil Platforms* (Iran v. U.S.), Judgment, 2003 I.C.J. 161, 187, ¶ 51 (Nov. 6)

dividing line provided by the gravity threshold.²⁷ Whether a particular use of force meets this requirement is usually a determination based on facts guided by a few bright line examples. For instance, an invasion by a regular army is an armed attack,²⁸ as is invasion by irregular forces equivalent to an invasion by regular forces,²⁹ but mere support of rebel forces in the form of finance or logistics or arms, is not,³⁰ and nor are mere 'frontier incidents'.³¹

Third, and related to the question of armed attack, is the temporal aspect of self-defence. A strict textual interpretation of Art. 51 would indicate that the right of self-defence is only available in response to an on-going attack or in response to a declaration of intent to attack even though the attack has not started.³² Indeed, many commentators restrict the scope of Art. 51 to this responsive or interceptive right of self-defence.³³ A more

(Judgment) [hereinafter Iranian Oil Platforms] (quoting and approving the above statement from Nicaragua. This requirement predates the ICJ's judgment in Nicaragua, even though that is the most famous expression of the rule); *E.g.*, BROWNLIE, *supra* note 23, at 366 ("[T]he use of force must attain a certain gravity"); G.A. Res. 3314 (XXIX), Annex art. 2, U.N. Doc. A/RES/3314 (Dec. 14, 1974) ("The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity").

²⁷ BROWNLIE, *supra* note 23, at 366.

²⁸ GRAY, *supra* note 24, at 128.

²⁹ Nicaragua, *supra* note 27, at 103, ¶ 195.

³⁰ *Id.*

³¹ BROWNLIE, *supra* note 23, at 366.

³² Examples of the latter would include an army massed on the other side of a border waiting to attack, or the approach of a hostile naval fleet or aerial squadron.

³³ GRAY, *supra* note 24, at 160: "The majority of states reject anticipatory self-defence."; BROWNLIE, *supra* note 23, at 367-8 ("In all probability the question which should be posed is not when is anticipatory action justified but, when has an attack occurred?...Preparations for attack can only be countered by preparations to resist effectively, and, in general, activities which do not affect the territorial domain of a state, including its airspace and territorial waters, do not justify forcible measures of defence. Thus, if an unexplained force of warships or aircraft approached a state via the high seas and the superjacent airspace, this will constitute a threat to the peace but, it is submitted, does not of itself justify forcible measures of self-defence since there is no resort to force by the putative aggressor and there is no unequivocal intention to attack .

controversial question is that of anticipatory self-defence, that is, the use of defensive force in response to an attack that is certain but has not been initiated.³⁴ Even more controversial is the question of pre-emptive self-defence - defensive use of force based on a fear of future attack.³⁵ Pre-emptive self-defence is

. . . a naval force of a state which had stated its intention to attack, approaching territorial waters, might be regarded as offensive and intercepted on the high seas. The dangers of permitting defensive action outside the territorial domain—even in exceptional cases such as the approach of rockets—may be minimized if the proportionality principle is observed and some distinction made between interception and defence on the one hand and retaliation on the other. The whole problem is rendered incredibly delicate by the existence of long-range missiles ready for use: the difference between attack and imminent attack may now be negligible." (citation omitted)

³⁴ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. (June 27), 14, 337, ¶ 173 (dissenting opinion by Judge Schwebel) [hereinafter Nicaragua – Schwebel] (“I do not agree with a construction of the United Nations Charter which would read Article 51 as if it were worded: ‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if, and only if, an armed attack occurs.’”); U.N. Secretary-General, *A More Secure World: Our Shared Responsibility-Report of the High-Level Panel on Threats, Challenges and Change*, ¶ 188, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *UNSG’s Panel Report*] (“[A] threatened state, according to long established international law, can take military action so long as the threatened attack is imminent, no other means would deflect it and the action is proportionate.”); Rosalyn Higgins, *The Legal Limits to the Use of Force by Sovereign States: United Nations Practice*, 37 BRIT. Y.B. INT’L L. 269, 302 (1961); David A. Sadoff, *A Question of Determinacy: The Legal Status of Anticipatory Self-Defense*, 40 GEO. J. INT’L L. 523 (2009) (arguing that anticipatory self-defence is increasingly finding recognition in state practice); Oscar Schachter, *The Right of States to Use Armed Force*, 82, MICH. L.R. 1620, 1634 (1984) (“[T]here may be situations in which the imminence of an attack is so clear and the danger so great that defensive action is essential for self-preservation.”).

³⁵ THE PRESIDENT OF THE UNITED STATES OF AMERICA, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002) (“We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.”); Anthony Clark Arend, *International Law and the Preemptive Use of Force*, 26 WASH. Q. 89 (2003) [hereinafter Arend] (arguing that though international law doesn’t recognise pre-emptive self-defence, it should); W. Michael Reisman and Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT’L L. 525 (2006) [hereinafter

distinct from anticipatory self-defence in three ways: first, it is temporally more distant; second, and consequently, it involves a lower probability of actual attack because of the possibility of intervening events;³⁶ third, anticipatory self-defence enjoys more support in state practice and the writings of eminent publicists.

Armstrong and Reisman] (relating primarily to terrorist threats); Abraham D. Sofaer, *On the Necessity of Pre-Emption*, 14 EUR. J. INT'L L. 209 (2003); William H. Taft, IV, *The Legal Basis of Preemption*, COUNCIL ON FOREIGN RELATIONS (2002), <http://www.cfr.org/international-law/legal-basis-preemption/p5250>.

³⁶ The difference between anticipatory and pre-emptive self-defence is well illustrated by comparing the 1987 USS Vincennes and the 1981 Israeli attack on the Iraqi Osirak reactor. The USS Vincennes was an unfortunate incident in which an Iranian civil aircraft drifted over an American naval vessel engaged in hostilities with Iranian naval vessels and was shot down. The then American Vice-President George H.W. Bush made the following statement to the UNSC, U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 1985-8 - Chapter XI, at 432, <http://www.un.org/en/sc/repertoire/actions.shtml>. (

"One thing is clear - that the USS Vincennes acted in self-defence. This tragic accident occurred against a backdrop of repeated, unjustified, unprovoked and unlawful Iranian attacks against United States merchant shipping and armed forces, beginning with the mine attack on the USS Bridgeton in July 1987. It occurred in the midst of a naval attack initiated by Iranian vessels against a neutral vessel and subsequently against the Vincennes when she came to the aid of the innocent ship in distress. Despite these hostilities, Iranian authorities failed to divert Iran Air 655 from the combat area. They allowed a civilian aircraft loaded with passengers to proceed on a path over a warship engaged in active battle. That was irresponsible and a tragic error...The information available to Captain Rogers, the captain of the Vincennes, indicated that an Iranian military aircraft was approaching his ship with hostile intentions. After seven - I want the Council to be sure to understand this - seven unanswered warnings, the captain did what he did what he had to do to protect his ship and the lives of the crew. As a military commander, his first duty and responsibility is to protect his men and his ship, and he did so. The wild allegation by the Iran side that the attack on the airliner was premeditated is offensive and absurd." This is an example of anticipatory self-defence, where use of force was exercised in anticipation of an imminent threat. Consider in contrast the justification offered by Israel for its strike against the Osirak nuclear reactor in Iraq, 1981 U.N.Y.B. 275-7 ("Israel, on 8 June, transmitted to the Council President and to the Secretary-General a special announcement of the same date by its Government, stating that a raid by the Israel air Force had destroyed the "Osirak" (Tamuz-1) reactor and that all aircraft had returned safely to base. Israel had learnt that

Fourth, there is a requirement that any defensive use of force be necessary and proportionate.³⁷ This requirement is not stated in the text of Art. 51 but has been recognised as a part of the pre-existing customary international law right of self-defence³⁸ and has continued to be read into Art. 51.³⁹ As with the gravity requirement, these standards are not very precise and are often subject to determination, depending upon the factual context. It seems clear, however, that the necessity requirement refers, at the very least, to the availability of alternative effective responses, and incorporates practical elements such as futility of non-forceful responses or approaching the UNSC, immediacy of response, etc.⁴⁰ In particular, the requirement of immediacy as an element of necessity of defensive use of force, draws a line between uses of force in self-defence, which have a protective character and armed reprisals which are motivated by vengeance or deterrence.⁴¹ Proportionality relates to the quantity and manner of force used in relation to the provocative use of force.⁴²

the reactor was designed to produce atomic bombs whose target would have been Israel, as the ruler of Iraq had announced after an Iranian raid which had slightly damaged the reactor. Under no circumstances would Israel allow an enemy to develop weapons of mass destruction against it . . . in removing a nuclear threat to its existence, Israel had exercised its legitimate right of self-defence...in destroying the "Osirak" nuclear reactor, it had performed an act of self-preservation and exercised its inherent right of self-defence. A threat of nuclear obliteration was being developed against Israel by Iraq, which had declared itself in a state of war with Israel since 1948 and had rejected all United Nations efforts for peaceful settlement of the Arab-Israel dispute . . . Within weeks "Osirak" would have gone "hot", after which time any attack on it would have blanketed Baghdad with lethal radioactive fall-out.")

³⁷ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 245, ¶ 41 (July 8); Iranian Oil Platforms, *supra* note 27, at 161, ¶ 43; Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 147 (Dec. 19) [hereinafter Armed Activities].

³⁸ Robert Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 86 (1938) (deriving from the famous Caroline standard which conditioned the use of force in self-defence upon the "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation").

³⁹ GRAY, *supra* note 24, at 148.

⁴⁰ GARDAM, *supra* note 7, at 147-55.

⁴¹ Oscar Schachter, *The Lawful Resort to Unilateral Use of Force*, 10 YALE J. INT'L L. 291, 292 (1985); GARDAM, *supra* note 7, at 150.

⁴² GARDAM, *supra* note 7, at 155-86.

Finally, Art. 51 also refers to the requirement of reporting defensive uses of force to the UNSC,⁴³ to the lapse of the right to self-defence under Art. 51 upon action by the UNSC,⁴⁴ and to the possibility of collective self-defence.⁴⁵ But these need not be discussed in greater detail here.

⁴³ Nicaragua, *supra* note 27, at 105, ¶ 200 (using failure to report defensive uses of force as an indication that the U.S.A. (the state which claimed to be using force in self-defence) did not believe that it was acting in self-defence); GRAY, *supra* note 23, at 121 (arguing that since then states have been much more regular in reporting defensive uses of force); *See generally* D.W. Greig, *Self-Defence and the Security Council: What Does Article 51 Require?*, 40 INT'L & COMP. L.Q. 366 (1991).

⁴⁴ Richard N. Gardner, *Commentary on the Law of Self-Defense*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 49, 50 (Lori Fisler Damrosch and David Scheffer eds., 1991); Malvina Halberstam, *The Right to Self-Defence once the Security Council Takes Action*, 17 MICH. J. INT'L L. 229 (1996); Eugene Rostow, *Until What? Enforcement Action or Collective Self-Defence?*, 85 AM. J. INT'L L. 506 (1991) (Given the political nature of the UNSC, this question has obviously generated a large amount of controversy. Does the fact that the matter has been reported to the UNSC satisfy this requirement? Or should the UNSC be discussing the issue? Or should it have taken some action? Or should that action have had some effect? Or should that action satisfy the concerns of the potentially defending state? The prevailing view is that so long as there continues to be an armed attack that would justify use of force in self-defence, irrespective of the UNSC having taken cognisance of the issue, the right of self-defence continues).

⁴⁵ Here again there are at least two different points of view. One position is that the right to collective self-defence can only be invoked by states that are simultaneous victims of the same armed attack or series of armed attacks. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Dissenting Opinion by Judge Sir Robert Jennings, 1986 I.C.J. 14, 545 (June 27) [hereinafter Nicaragua – Jennings]. The opposite position is that any state that is the victim of an armed attack may request a third state for assistance and that third state would be able to invoke the right to collective self-defence. This is the prevailing opinion and was endorsed in Nicaragua, *supra* note 27, 103-4, ¶ 195. It was also one of the justifications invoked by the U.S.A. and other states in the first Gulf War. Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 457-61 (1991). Within this prevailing opinion there arises the question of when the assistance of a third state may be said to have been invoked. In Nicaragua, the ICJ required an explicit request for assistance to invoke this right. Nicaragua, *supra* note 27, at 105, ¶ 199. The court's imposition of a high threshold for the invocation of this right was motivated by the fear of its misuse. Indeed history demonstrates several colourable instances of collective self-defence claims. For instance, American and British military assistance to Lebanon and Jordan in response to threats and uses of force by the United Arab Republic, allegedly under the right of collective self-defence elicited suspicion from the Soviet and Arab blocs. *See*, U.N. Dep't of Pol. & Security Council Affairs, *Repertoire of the Practice of the*

B. Self-Defence in Practice

In practice the Charter rules on self-defence have proven excessively restrictive. Four aspects stand out in particular: (1) the use of force by non-state actors (“NSAs”); (2) the gravity requirement; (3) the necessity requirement; and (4) the temporal aspect of self-defence.

First is the use of force by NSAs. In practice, the bulk of armed attacks force have originated from NSAs, operating from the territories of states unwilling or unable to prevent them. The problem of indirect aggression, which was acknowledged as a serious concern in the *Nicaragua* judgment,⁴⁶ has been challenging the Charter regime since its inception.⁴⁷ For example, in 1958, NSAs allegedly supported by the United Arab Republic undertook an organised campaign to destabilise and overthrow the governments of Lebanon and Jordan.⁴⁸ Another such example is the Israeli Entebbe raid,⁴⁹ where Israeli use of force against

Security Council 1956-8 - Chapter XI, at 175, <http://www.un.org/en/sc/repertoire/actions.shtml>.

⁴⁶ *Nicaragua*, *supra* note 27, at 103, ¶ 195; *Nicaragua* – Schwebel, *supra* note 35, at 349; *Nicaragua* – Jennings, *supra* note 46, at 543-44; John Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43, 60 (1986); Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901, 919 (1985-1986).

⁴⁷ The Chinese delegate in the course of the UNSC debate on the situation in Lebanon in 1958 remarked that in the present period of world history, “*indirect aggression is as dangerous as direct aggression.*” U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 1956-58 – Ch. XI, at 176, <http://www.un.org/en/sc/repertoire/actions.shtml> (emphasis added).

⁴⁸ At the request of the threatened governments, American and British forces intervened militarily. For an overview of the UNSC debate on this situation, see U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 1956-58 – Ch. XI, at 175-76, <http://www.un.org/en/sc/repertoire/actions.shtml>. The debate in the UNSC revolved heavily around the strict requirement of direct aggression and armed attack and several states condemned the British and American actions as contrary to the UN Charter. See, e.g., the statements of USSR and Sweden, *ibid.*

⁴⁹ In 1976, terrorists attacked a French civilian aircraft and forced it to land in Entebbe, in Uganda. The terrorists demanded the release of certain Palestinian terrorists in exchange for the safe release of the aircraft and its passengers. It was suspected that the Ugandan government and its then leader – President Idi Amin – were complicit in the actions of the terrorists. The Israeli armed forces undertook a daring military operation, landing in Entebbe, overpowering the terrorists and Ugandan armed forces present on the scene and liberating the

terrorists was criticised for violating Ugandan territorial integrity.⁵⁰ Israel and the U.S.A. have regularly been conducting military strikes against NSAs on the territories of other states and have been criticised heavily.⁵¹ This situation also featured prominently in a series of International Court of Justice ("ICJ") cases between the Democratic Republic of Congo and its neighbours in the early 2000s.⁵² The most significant, most contemporary example of this is that of modern terrorist organisations.

The use of force against NSAs is in itself relatively uncontroversial, but very often the use of force against NSAs entails use of force against the state from whose territory the NSA operates. Until recently, force could be non-controversially used against the host state only if the conduct of the NSA could be attributed to the host state.⁵³ This is complicated by the evidentiary difficulties of defining the relationship between the host state and the NSA.⁵⁴ Post-9/11 there seems to be greater

hostages. For an overview of the UNSC debate regarding this incident, see 1976 U.N.Y.B., Part 1, Sec. 1, Ch. XV, at 317-19.

⁵⁰ See statements from Kenya, Qatar, the Arab Group, Benin, China, Cuba, Guinea, Mauritius, Romania, USSR, Tanzania and Guyana in 1976 U.N.Y.B., Part 1, Sec. 1, Ch. XV, at 317-19. Israel argued that the Ugandan government was cooperating with the terrorists. Letter Dated 4 July 1976 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General, U.N. Doc. S/12123, at 2-3 (Jul. 5, 1976); 1976 U.N.Y.B., Part 1, Sec. 1, Ch. XV, at 317 ("[W]hen the airbus landed at Entebbe airport on 28 June, in accordance with a previously prepared plan, the hijackers had been met by a reinforcement of heavily armed terrorists who were awaiting them at the terminal. President Amin arrived at the airport shortly before the hijacked aeroplane landed; when it did, he embraced the hijackers in a gesture of welcome and a promise of support and assistance. Ugandan soldiers were then positioned with their guns trained not on the hijackers but on the innocent civilians - men, women and children.").

⁵¹ *Infra* notes 76-82, 85-91 and accompanying text.

⁵² Those cases involved uses of force by Congo's neighbours in violation of its territorial sovereignty. The respondent states alleged that their uses of force were directed against NSAs which were attacking them from bases located on Congolese territory. Armed Activities, *supra* note 37.

⁵³ Nicaragua, *supra* note 26, at 103, ¶ 195; Tams, *supra* note 7, at 368.

⁵⁴ The question of proof has derailed many cases relating to the use of force at the ICJ. In several cases before the ICJ relating to use of force, claims of self-defence have failed on the grounds of evidentiary inadequacies. *E.g.*, Iranian Oil Platforms, *supra* note 26, at 194-96, ¶¶ 71-72. These concerns are especially significant in relation to attributing the conduct of NSAs to state. *E.g.*, Armed Activities, *supra* note 37, at 223, ¶ 146.

acceptance of the need for strong defensive rights against NSAs notwithstanding their connection to a state,⁵⁵ and the unwillingness or inability of the territorial state to act against the NSA justifies defensive use of force.⁵⁶

However, the threshold for legitimate use of force against states is much higher than that for NSAs. There is no threshold for use of force against NSAs if no other state is affected.⁵⁷ But for use of force against states, the use of force must be 'necessary' and that requires, *inter alia*, enhanced requirements regarding immediacy of response and exhaustion of peaceful remedies.⁵⁸ Thus, the rules of *jus ad bellum* inadvertently shield and protect NSAs.

Second is the gravity requirement. While there is a very strong justification for its existence, the gravity requirement operates as a legal loophole that allows states and NSAs to use force with impunity. As a result several states have justified defensive uses of force as responses to series of attacks and repeated provocation. This characterisation is the crux of the pin-prick doctrine and shall be discussed in greater detail *infra*.⁵⁹

⁵⁵ Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Separate Opinion of Judge Kooijmans, 2005 I.C. J. Reports 2005, at 313-14, ¶¶ 26-29 (Dec. 19) ("[I]f the attacks by the irregulars would . . . have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its *inherent* right of self-defence"); Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Separate Opinion of Judge Simma, 2005 I.C. J. Reports 2005, at 337, ¶ 11 (Dec. 19) ("[L]arge-scale attacks by non-State actors can qualify as 'armed attacks' within the meaning of Article 51."); Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT'L L. 62, 63-70 (2005).

⁵⁶ Ashley S. Deeks, "*Unwilling or Unable*": *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VIR. J. INT'L L. 483 (2012) (defining parameters for invocation of this framework). This 'unable or unwilling' language was also used in the American support for the Israeli raid on Entebbe during the UNSC debate: "[T]here was a well-established right to use limited force for the protection of one's own nationals from an imminent threat of injury or death in a situation where the State in whose territory they were located was either unwilling or unable to protect them." 1976 U.N.Y.B., Part I, Sec. I, Ch. XV, at 319 (emphasis added).

⁵⁷ At most, rules of international humanitarian law and international human rights law would be implicated but these would affect the manner of use of force, not the right to use force itself.

⁵⁸ *Supra* notes 40-41 and accompanying text.

⁵⁹ *Infra* notes 76-98 and accompanying text.

Third is the necessity requirement – in particular the requirement of immediacy of response. Conventional armed conflict between military forces is now the exception rather than the norm. For the most part, threats to security today take the form of isolated incidents. Strict interpretation of the immediacy requirement would render the right to self-defence a hollow shell. This would be even truer in the case of terrorist attacks where identifying the responsible organisation and people might take time. Strict interpretation of the immediacy requirement has the effect of leaving states with two options: (1) prevention; or, (2) reliance on the collective security system. This obviously makes states uncomfortable.⁶⁰

A fourth problem relates to the temporal aspect of self-defence. There is a justifiable apprehension on the part of states to strictly observe the temporal requirements of Art. 51 when doing so would involve preventable losses on their part. The USS Vincennes incident discussed above provides an excellent example of this limitation.⁶¹

⁶⁰ An interesting example of an immediacy-based challenge to an allegedly defensive use of force is provided by the American use of force against Iraqi intelligence agencies following a failed attempt by the Iraqi government to assassinate then ex-President George H.W. Bush. The American government invoked the pin-prick doctrine to defend its actions and referred to the time required to exhaust peaceful alternatives and to conclusively establish responsibility. State opinion on the legality of the strike was divided. U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 1993-95 – Ch. XI, at 1148, <http://www.un.org/en/sc/repertoire/actions.shtml>. On the 1993 strike, see generally Dino Kritsiotis, *supra* note 7; Similarly, Israeli strikes against terrorist training facilities in neighbouring countries have often been criticised on the basis of the immediacy requirement. *Infra* notes 85-91 and accompanying text. The UNSG's High-Level Panel has endorsed a strict interpretation of the immediacy requirement. UNSG's Panel Report, *supra* note 34, at 63.

⁶¹ *Supra* note 36. The American action came under heavy criticism from several states. U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 1985-88 – Ch. XI, at 432, <http://www.un.org/en/sc/repertoire/actions.shtml>. Another example of this limitation is the 1989 'incident involving the downing of Libyan reconnaissance aircraft'. The U.S.A. described the incident as follows:

"The facts in the case are clear. The incident took place on 4 January. The aircraft carrier Kennedy was on an easterly transit through the Mediterranean Sea 170 miles north of the border between Libya and Egypt. The United States Navy aircraft were operating on a training

Thus, in practice, strict interpretation of the Art. 51 right has the potential to tie the hands of states in the face of legitimate security threats. But that does not mean that restraints on the right to self-defence should be discarded. Necessity, immediacy, gravity and temporal connection are essential to prevent recourse to coercive force as an element of state policy. But just as *jus ad bellum* should not leave states able to use force at will, it should not leave states unable to use force to protect themselves when necessary. The interpretation of these doctrines must be relaxed in light of contemporary international relations to allow states to adequately defend themselves. The need for such relaxation is particularly acute because the original strict interpretation of

mission in international airspace, over international waters, some 70 miles off the coast of Libya, north of Tobruk. Operations of this nature have been conducted in the same area many times in the past - in fact, 12 times over the Past year. These operations past and present pose no threat to Libya or other countries. During these operations armed Libyan fighter aircraft were detected by the United States forces as the Libyan aircraft left their home base at the Al Bumbah airfield in eastern Libya. The Libyan aircraft were tracked for 10 minutes as they closed rapidly on the two American F-14 planes. Our pilots did not react precipitately rather they exercised restraint under very tense circumstances. They did not fire immediately. Instead they repeatedly attempted to avoid the Libyan aircraft which were closing on them. In order to determine the intent of the Libyan fighters and to demonstrate lack of hostile intent on their part, the United States pilots on five separate occasions altered their direction. They also changed their speed and their altitude. Still the Libyan aircraft continued to close and to track our aircraft in a hostile manner markedly different from previous sorties by Libyan aircraft to monitor our training operations. In the face of this repeated hostile behaviour by the Libyan planes, the United States section leader was faced with a growing and imminent threat of being shot down by the intercepting Libyan aircraft. We have photographic evidence that clearly shows the Libyan aircraft were carrying air-to-air missiles. At a distance of approximately 14 miles, with only a few seconds to take a decision, as the Libyan planes closed at a very high rate of speed, the United States section leader determined that his aircraft were in jeopardy. The United States aircraft then fired on the Libyan planes, shooting down two Libyan aircraft in a clear and unambiguous act of self-defence."

U.N. SCOR, 44th Sess., 2835th mtg. at 14-16, U.N. Doc. S/PV.2835 (Jan. 5, 1989).

these doctrines was motivated by reliance on a UNSC-led collective security system, which has failed to materialise.⁶²

The push for doctrinal development in the Charter rules on self-defence is evident in the emergence of the 'unwilling or unable' test discussed above,⁶³ as also efforts to develop a doctrine of pre-emptive self-defence.⁶⁴ Another such doctrine is the pin-prick doctrine.⁶⁵

⁶² Nicaragua – Jennings, *supra* note 45, at 544 (“[A]n essential element in the Charter design is totally missing. In this situation it seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent.”). The UNSG’s high-level panel urged continued reliance on the UNSC, but this seems more like a prescription *lex feranda* than a statement *de lege lata*.). UNSG Panel’s Report, *supra* note 34, at 55, ¶¶ 190-91 (“[I]f there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment - and to visit again the military option. For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.”).

⁶³ *Supra* notes 55-56 and accompanying text.

⁶⁴ *Supra* note 35 and accompanying text.

⁶⁵ These developments are not restricted to *jus ad bellum* alone. Similar debates are taking place in the context of *jus in bello* as well as traditional rules of international humanitarian law (IHL) designed to cater to inter-state conflict are being challenged in the course of the global war on terror. A particularly interesting example is that of civilian manufacturers of improvised explosive devices (IEDs). Under IHL generally, civilians may be targeted only insofar as and for so long as they directly participate in hostilities. Under the IHL rules relating to international armed conflicts civilians working in ammunition factories to manufacture ammunition are not considered to be directly participating in hostilities and are therefore not targetable. By analogy, civilian manufacturers of IEDs should not be legitimate military targets either. But the proximity of such civilians to the scene of battle and the fluid functional distinction between civilians manufacturing and deploying IEDs makes this a difficult rule to enforce in practice. For further discussion of this particular example compare Nils Melzer, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009); Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 831, 868 (2010); with Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements*,

Thus, there are two objectives here which are in tension with each other. One is the need to rationalise Charter rules on self-defence to allow states to protect their interests. The other is the need to prevent obliteration of the Charter regime on use of force at the hands of unbridled, allegedly defensive uses of force. Both of these objectives must be balanced in assessing any such doctrine. A number of publicists who have recognised the pin-prick doctrine in state practice and academic literature have stopped short of endorsing it because of the fear that it might diminish the effectiveness of *jus ad bellum*.⁶⁶ The validity of this concern will be discussed later,⁶⁷ but for now it is sufficient to note that the rationale for recognising the pin-prick doctrine in *jus ad bellum de lege feranda* lies in rationalising *jus ad bellum de lege lata* and the primary criterion for integration is that the effectiveness of *jus ad bellum* as a stringent restriction be maintained.

It is possible to argue against the rationalisation of international law rules relating to use of force. Three arguments may be made in support of this proposition. First, that reform attempts may weaken the Charter regime⁶⁸ or lead to its collapse. Second, that given the difficulties of building consensus around new rules and the risk of loss of restrictiveness it is preferable to retain the current rules notwithstanding their imperfections, and to assess exceptions and violations on a case by case basis. Proponents of this argument point to the fact that when the need to use force is particularly acute, the Charter regime and the international community have proved sympathetic.⁶⁹ Third,

42 N.Y.U. J. INT'L L. & POL. 697 (2010); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: a Critical Analysis*, 1 HARV. NAT'L SEC. J. 5 (2010). For discussion of challenges to IHL, see generally ANDREA BIANCHI AND YASMIN NAQVI, INTERNATIONAL HUMANITARIAN LAW AND TERRORISM (2011).

⁶⁶ Kritsiotis, *supra* note 7, at 174-7; Tams, *supra* note 7, at 390; Ruys, *supra* note 6, at 363-64.

⁶⁷ *Infra* note 139 and accompanying text.

⁶⁸ Some reform proposals explicitly envisage a more restricted role for the UN in collective security. John C. Yoo and Will Trachman, *Less Than Bargained for: The Use of Force and the Declining Relevance of the United Nations*, 5 CHI. J. INT'L L. 379 (2005).

⁶⁹ Thomas M. Franck, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 184 (2002) ("The preceding chapters have sought to demonstrate that international law is gradually emulating national legal systems in developing, around its codex of strict rules, a penumbra of reasonableness." Franck makes a wonderfully persuasive argument drawing

notwithstanding vociferous complaints and abuses regarding the inadequacies of the Charter regime, that regime survives⁷⁰ and seems to retain its relevance in the assessment and justification by states of uses of force⁷¹ - their own as well as those of others.⁷²

These are sound arguments, but ultimately unsatisfactory, for the following reasons. First, and in response to the first argument above, fear of deterioration is never a good reason for rejecting the possibility of reform. More importantly, with regard to the second reason above, rule of law cannot be *ad hoc*. It must be based in clear rules; we must be reluctant to “leave such defense to a decision *contra legem*”.⁷³ Finally, with regard to the third reason above, the divergence between doctrine and practice reasonably evokes questions as to the integrity and legitimacy of *jus ad bellum*.⁷⁴ International law, more so than municipal law, is

particularly on the humanitarian intervention in Kosovo which was by and large recognised as illegal but legitimate. With regard to the NATO intervention in Kosovo, several other publicists have concluded that the intervention in the absence of UNSC authorisation was a positive one-time event, but an undesirable normative shift. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999). Similarly, the American military response to 9/11 was uniformly endorsed by states despite being at odds with the UN Charter rules. *Infra* note 82 and accompanying text.

⁷⁰ Rosalyn Higgins, *International Trade Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law*, 230 RECUEIL DES COURS 9, 315 (1991) (“[T]here have been countless abusive claims of the right to self-defence. That does not lead us to say that there should be no right of self-defence today . . . We delude ourselves if we think that the role of norms is to remove the possibility of abusive claims ever being made.”)

⁷¹ GRAY, *supra* note 24, at 118 (noting that states try to defend their uses of force by reference to the least controversial aspects of Art. 51).

⁷² Sean D. Murphy, *The Intervention in Kosovo: A Law-Shaping Incident*, 94 AM. SOC'Y INT'L L. PROCEEDINGS 302, 304 (2000) (“[W]hen NATO states consider whether to threaten or undertake a bombing attack in Kosovo, they must be prepared for a horizontal discourse among themselves and for a vertical discourse with their countries and their people. The ability . . . to make a persuasive case . . . turns . . . on whether a rational argument may be made that the intervention is either permissible or, at least, is not prohibited by international law.”).

⁷³ SCHACHTER, *supra* note 25, at 151; Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 770, 773 (2012) [hereinafter Bethlehem] (“[I]t is important that principle is sensitive to the practical realities of the circumstances that it addresses, even as it endeavors to prohibit excess and the egregious pursuit of national interest.”).

⁷⁴ Critics of the efficacy and legitimacy of international law, including those who allege that it lacks the basic characteristics of law, point most often to its

uniquely vulnerable to alteration at the hands of practice, and it is important to seize the opportunity to push international law principles in the right direction, rather than have them borne away on currents of deviant state practice. To the extent that practice that is inconsistent with *jus ad bellum de lege lata* can be accommodated in law without diminishing the efficacy of law, there is no reason to shy away. From this perspective, the pin-prick doctrine is a valuable candidate.

II. State and Judicial Practice

The previous section argued that there is a need to rationalise international law rules relating to self-defence to bring them in conformity with the reality of the threats facing states. The introduction to this paper argued that the pin-prick doctrine is a viable candidate for this rationalisation process. There, the pin-prick doctrine was defined in the following terms: this doctrine recognises the existence of a right of self-defence in response to a series of armed attacks (each possibly falling below the gravity threshold, but together constituting a continuing armed attack which meets the gravity threshold) and supports exercise of that right in order to deter a future threat. In brief, there must be a continuing armed attack giving rise to a threat of future attack that motivates the use of force in self-defence to deter or prevent that future threat.

This doctrine finds significant recognition and support amongst the ‘most highly qualified publicists’.⁷⁵ This section will

failure to regulate the use of force by states. Such critics argue that international law rules on the use of force respond to state practice on use of force rather than shaping it. For discussions of this sort of reasoning and responses thereto, see generally Andrew T. Guxman, *Rethinking International Law as Law*, 103 AM. SOC'Y INT'L L. PROCEEDINGS 155 (2009); Anthony D'Amato, *Is International Law Really 'Law'?*, 79 NW. U. L. REV. 1293 (1985); MALCOLM N. SHAW, *INTERNATIONAL LAW* 2-4 (6th ed., 2008).

⁷⁵ Christopher Greenwood, *International Law and the United States' Air Operation Against Libya*, 89 W. VA. L. REV. 933, 955 (1987) (“Faced with a series of terrorist attacks, organized and directed by another state, which cannot be met incident by incident, any state which has the capacity to do so is likely to employ force if it believes that by doing so it can put a stop to these attacks.”); Douglas Guilfoyle, *The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction*, 29 MELB. U. L. REV. 733, 762 (2005); Mary Ellen O’Connell, *The Myth of Pre-Emptive Self-Defence*, ASIL TASK FORCE ON

TERRORISM PAPERS 9-10 (2002), <http://www.asil.org/taskforce/oconnell.pdf> (“[I]t is also the case that a victim of an attack may use force based on clear and convincing evidence that the enemy is preparing to attack again. In other words, the victim need not wait for new attacks to be mounted. The defense must be carried out within a reasonable time from the initial attack in order to fit the characterization of defense during ongoing armed attacks. If terrorists are planning a series of attacks in a terror campaign, the state may respond to prevent future attacks about which it has evidence. In the absence of convincing evidence of future attacks, however, responsive force could amount to unlawful reprisals or punishment. But the enemy’s intention to continue means that even armed force in self-defense is lawful. The world response to September 11 confirms this.”); David A. Sadoff, *Striking a Sensible Balance on the Legality of Defensive First Strikes*, 42 VAND. J. TRANSAT’L L. 441 (2009); Jane E. Stromseth, *Commentary on the Use of Force Against Terrorism and Drug Trafficking*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 236, 236 (Lori Fisler Damrosch and David Scheffer eds., 1991) (“[I]t is at least possible to envision a series of violent attacks against a state originating from a terrorist training camp in another state that may arguably constitute an ‘armed attack giving rise to a right of self-defense.’”); Higgins, *supra* note 34, at 301 (“[I]f a State has been subjected, over a period of time, to border raids by nationals of another State, which are openly supported by the Government of that State; to threats of a future, and possibly imminent, large-scale attack, and to harassing restrictions to her trade under alleged belligerent rights, may it use force in self-defence, in anticipation of the continuation of such action? The present writer is of the opinion that this question, thus phrased, must be answered affirmatively.”); SCHACHTER, *supra* note 25, at 154 (in response to states: “‘defensive retaliation’ may be justified when a State has good reason to expect a series of attacks from the same source and such retaliation serves as a deterrent or protective action. However, a reprisal for revenge or as a penalty (or ‘lesson’) would not be defensive.”); SCHACHTER, *supra* note 25, at 167 (in response to NSAs: “A series of attacks accompanied by bellicose statements by those associated with the terrorists are convincing indications that future attacks may be expected.”); DINSTEIN, *supra* note 9, at 206; Arend, *supra* note 35, at 99 (“If there is a group such as Al Qaeda that has been committing a series of attacks against the United States, preemption is not really at issue. Rather, the United States and its allies are simply engaging in standard self-defense against an ongoing, armed attack.”); Bethlehem, *supra* note 73, at 775.

A number of other publicists document the support for the pin-prick doctrine in state and judicial practice. THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 53-68, 101-05 (2002); Dominic Raab, *‘Armed Attack’ After the Oil Platforms Case*, 17 LEIDEN J. INT’L L. 719, 732 (2004) [hereinafter Raab]; Iain Scobbie, *Words My Mother Never Taught Me – “In Defense of the International Court,”* 99 AM. J. INT’L L. 76, 77-79 (2005); Kimberley N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors*, 56 INT’L & COMP. L.Q. 141, 154-55 (2007); Tams, *supra* note 7, at

survey the practice of states [Section III(A)] and international courts [Section III(B)] for support for defensive uses of force in response to continuing armed attacks motivated by deterrence of future threats.

A. Support for the Pin-Prick Doctrine in State Practice

A survey of UNSC practice over the last 60 years demonstrates a significant body of state practice in support of the pin-prick doctrine as defined above.

In the Tonkin Gulf incident in 1964, the U.S.A. justified its use of force against North Vietnamese naval facilities and infrastructure on the grounds that the facilities had been used to target American naval vessels and such force was required to “prevent the recurrence of attacks on its ships”.⁷⁶ In 1986, the U.S.A. bombed selected sites in Libya. These attacks were executed in response to the bombing of a discotheque in West Germany which was targeted against American military personnel present there. The American statement in the UNSC indicated that it could attribute the attack to the Libyan government, that it had information that further attacks were being planned, that diplomatic efforts to secure the cooperation had failed and that the targets were terrorist training camps and were chosen to prevent future attacks.⁷⁷ The American

388; Kritsiotis, *supra* note 7, at 166-71; Ruys, *supra* note 6. This practice should be weighed against contrary authority outlined *supra* note 6.

⁷⁶ Statement by UK: “[T]he United States had a right in accordance with the principle of self-defence in international law to take action directed to prevent the recurrence of attacks on its ships.” For UNSC discussion on this issue, including the U.S. justification and condemnations from the USSR and Czechoslovakia, see U.N. Dep’t of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 1964-65 – Ch. XI, at 195-96, <http://www.un.org/en/sc/repertoire/actions.shtml>.

⁷⁷ Statement by U.S.A.:

“The United States had acted in self-defence only after other protracted efforts to deter the Libyan Arab Jamahiriya from ongoing attacks against the United States in violation of the Charter had failed. Citing “direct, precise and irrefutable evidence” which demonstrated Libyan responsibility for a bombing in West Berlin on 5 April 1986 and alluding to “clear evidence” that the Libyan Arab Jamahiriya was planning multiple attacks in the future, the United States was compelled to exercise its right of self-defence.”

intervention in Central America between 1980 and 1986 was justified in similar terms.⁷⁸ In 1987, the U.S.A. justified military actions against Iranian naval vessels and oil rigs in the Persian Gulf as a necessary response to a continued pattern of hostile acts by the Iranian navy against U.S.-flagged vessels.⁷⁹

For the UNSC debate on this issue, including support from the U.K., and condemnation by Algeria, Qatar, Madagascar, Vietnam, Afghanistan, Czechoslovakia, Iran, Sudan, Bangladesh, Congo, Ghana, Nicaragua and Uganda, see U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 1985-88 - Chapter XI, at 431-32, <http://www.un.org/en/sc/repertoire/actions.shtml>. See also SCHACHTER, *supra* note 25, at 167-68; Greenwood, *supra* note 75.

⁷⁸ Franck, *supra* note 66, at 60-63.

⁷⁹ Iranian Oil Platforms, *supra* note 26, at 193-94, ¶ 67 (statement by U.S.A.):

"In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that United States forces have exercised their inherent right of self-defence under international law by taking defensive action in response to an attack by the Islamic Republic of Iran against a United States naval vessel in international waters of the Persian Gulf. The actions taken are necessary and are proportionate to the threat posed by such hostile Iranian actions. At approximately 1010 Eastern Daylight Time on 14 April the USS *Samuel B. Roberts* was struck by a mine approximately 60 miles east of Bahrain, in international waters. Ten US sailors were injured, one seriously, and the ship was damaged. The mine which struck the *Roberts* was one of at least four mines laid in this area. The United States has subsequently identified the mines by type, and we have conclusive evidence that these mines were manufactured recently in Iran. The mines were laid in shipping lanes known by Iran to be used by US vessels, and intended by them to damage or sink such vessels. This is but the latest in a series of offensive attacks and provocations Iranian naval forces have taken against neutral shipping in the international waters of the Persian Gulf. Through diplomatic channels, the United States has informed the Government of the Islamic Republic of Iran on four separate occasions, most recently 19 October 1987, that the United States would not accept Iran's minelaying in international waters or in the waters of neutral States. In October, my Government indicated that the United States did not seek a military confrontation with Iran, but that it would take appropriate defensive measures against such hostile actions. Starting at approximately 0100 Eastern Daylight Time 18 April US forces attacked military targets in the Persian Gulf which have been used for attacks against non-belligerent shipping in international waterways of the Gulf. The US actions have been against legitimate military targets. All feasible measures have been taken to minimize the risk of civilian damage or casualties . . ."

Similarly, in 1998, the U.S.A. bombed selected sites in Afghanistan and Sudan in response to the bombings of American embassies in Kenya and Tanzania.⁸⁰ Again the use of force was defended as being targeted against known sources of prior attacks which were expected to continue.⁸¹ In 2001, Operation Enduring Freedom against the Taliban and Al-Qaida in Afghanistan, which

⁸⁰ For the UNSC discussion of this issue and condemnation by the Arab League, see 1998 U.N.Y.B. 185; Letter Dated 25 September 1998 from the Permanent Representative of Lebanon to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/894, at 2 (Sep. 25, 1998).

⁸¹ Letter Dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/780, at 1 (Aug. 20, 1998):

"My Government has obtained convincing information from a variety of reliable sources that the organization of Usama Bin Ladin is responsible for the devastating bombings on 7 August 1998 of the United States embassies in Nairobi and Dar Es Salaam. Those attacks resulted in the deaths of 12 American nationals and over 250 other persons, as well as numerous serious injuries and heavy property damage. The Bin Ladin organization maintains an extensive network of camps, arsenals and training and supply facilities in Afghanistan, and support facilities in Sudan, which have been and are being used to mount terrorist attacks against American targets. These facilities include an installation at which chemical weapons have been produced. In response to these terrorist attacks, and to prevent and deter their continuation, United States armed forces today struck at a series of camps and installations used by the Bin Ladin organization to support terrorist actions against the United States and other countries. In particular, United States forces struck a facility being used to produce chemical weapons in the Sudan and terrorist training and basing camps in Afghanistan. These attacks were carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Ladin organization. That organization has issued a series of blatant warnings that "strikes will continue from everywhere" against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing. In doing so, the United States has acted pursuant to the right of selfdefence confirmed by Article 51 of the Charter of the United Nations."

was in response to the terrorist strikes against the U.S.A. on September 11, 2001, was justified in similar terms.⁸²

In 1964, the U.K. attacked Yemen and destroyed the Fort at Harib in response to a series of aggressive actions directed by Yemen against South Arabia, and designed to prevent the recurrence of such attacks.⁸³ In response to continuing Algerian attacks upon its territory and armed forces in the UNSC in 1979, Morocco reserved the right to defend itself in accordance with

⁸² Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946, at 1 (Oct. 7, 2001):

"Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad. In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan."

For UNSC discussion of this issue and universal endorsement, see U.N. Dep't of Pol. & Security Council Affairs, *Repertoire of the Practice of the Security Council* 2000-03 - Chapter XI, at 1005-06, 1013, <http://www.un.org/en/sc/repertoire/actions.shtml>.

⁸³ Statement by UK:

"[L]egitimate action of a defensive nature [] might sometimes have to take the form of a counter-attack. The territory of the Federation had been subjected to a series of acts of aggression over a considerable period of time and against which its people had asked to be defended. In that connexion the destruction of the fort at Harib with the minimum use of force, was therefore a defensive measure proportionate and confined to the necessities of the case, and lacked the essential element of vengeance or retribution. It was the latter use of force which was condemned by the Charter "and not the use force for defensive purposes such as warding off future attacks" (internal quotation marks omitted).

For UNSC discussion on this issue, including condemnation by the Ivory Coast, Morocco, United Arab Republic and Iraq, see U.N. Dep't of Pol. & Security Council Affairs, *Repertoire of the Practice of the Security Council* 1964-65 - Ch. XI, at 194-95, <http://www.un.org/en/sc/repertoire/actions.shtml>.

Art. 51.⁸⁴ In 1985, Israel bombed terrorist camps in Tunisia which were sources of attacks against Israel and which Tunisia had been unable to shut down.⁸⁵ This was repeated in 1982,⁸⁶ 1988,⁸⁷ 1996,⁸⁸ and 2006⁸⁹ in Lebanon and in 2003 in Syria.⁹⁰ A

⁸⁴ U.N. SCOR, 34th Sess., 2151st mtg. at 2-4, U.N. Doc. S/PV.2151 (Jun. 20, 1979).

⁸⁵ Statement by Israel:

"The representative of Israel responded to the assertion that his country's raid was an unprovoked attack on a country not at war [Tunisia] with Israel by saying that every State had the responsibility to prevent armed attacks from occurring on its territory. Israel could never accept the notion that the bases and headquarters of "terrorist killers" should enjoy immunity anywhere, and at all times. Sovereignty could not be separated from its responsibilities, the chief of which was preventing a sovereign territory from being used as a launching ground for acts of aggression against another country. When a country abdicated that fundamental responsibility, either deliberately or through neglect, it risked taking upon itself the consequences of such a dereliction of duty. The representative explicitly argued that "the interest of a State in exercising protection over its nationals may take precedence over territorial sovereignty."

For the UNSC discussion of this issue see U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 1985-8 - Chapter XI, at 429, <http://www.un.org/en/sc/repertoire/actions.shtml>.

⁸⁶ Franck, *supra* note 66, at 57-60.

⁸⁷ Statement by Israel:

"Israel claimed that its duty to protect the lives and security of its citizens, coupled with the inability of the Government of Lebanon to prevent the use of its territory for attacks against Israel, had led to Israeli retaliatory attacks against concentrations of PLO terrorists in Lebanon in the exercise of the inherent right of self-defence. Israel further claimed that continued terrorist activity had hindered a permanent Israeli withdrawal from Lebanon."

For UNSC discussion of this issue, including condemnation by Yugoslavia, the League of Arab States, UAE, PLO, Indonesia and Syria, see U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 1985-8 - Chapter XI, at 427, <http://www.un.org/en/sc/repertoire/actions.shtml>. See also SCHACHTER, *supra* note 25, at 167.

⁸⁸ Statement by Israel:

"During the debate, the delegation of Lebanon requested the Council, inter alia, to order Israel to stop its aggression against Lebanon and to withdraw all of its reinforcements, and to condemn the Israeli aggression against Lebanon. The representative of Israel stated that

similar argument was made by Israel with regard to its use of force against Egypt during the Six Day War in 1967.⁹¹

South Africa justified its uses of force against Angola and Namibia on the grounds that it was responding to attacks from NSAs operating from the territory of those states which constituted a continuing threat and which the governments of

after a long period of restraint and the exhaustion of all political and diplomatic means, the Israel Defense Forces were exercising the right of self-defence by hitting back at Hizbullah strongholds. He further stated that if Lebanon did not have the ability or the will to control Hizbullah activities, Israel had to defend its security by all necessary measures."

For UNSC discussion of this issue including support from U.S.A. and Germany condemnation by Indonesia, Egypt, UAE, Saudi Arabia, Syria, Kuwait, Libya, Algeria, Afghanistan, Morocco, Iran, Tunisia, Malaysia, Jordan, Turkey, Pakistan and Botswana, see U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 1996-9 - Chapter XI, at 1172, <http://www.un.org/en/sc/repertoire/actions.shtml>.

⁸⁹ In response to Hezbollah attacks mounted from the territory of Lebanon, Israel reserved the right to act in self-defence under Art. 51 and informed the UNSC that it would "take the appropriate actions to secure the release of the kidnapped soldiers and bring an end to the shelling that terrorizes our citizens." For UNSC discussion of this issue including partial endorsement from the UN Secretary-General, Slovakia, Peru, Denmark, France, Brazil, Canada, Australia and Guatemala, see U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 2004-07 - Ch. XI, at 171, <http://www.un.org/en/sc/repertoire/actions.shtml>.

⁹⁰ Statement by Israel:

"At its 4836th meeting, on 5 October 2003, the Council discussed two letters dated 5 October 2003 from the representatives of the Syrian Arab Republic and Lebanon, respectively. By the two letters, the aforementioned representatives requested the Council to convene an emergency meeting to consider Israel's military action targeting a site situated inside the territory of the Syrian Arab Republic. During the debate, the representative of Israel insisted that Israel's response to the suicide bombings against a terrorist training facility in the Syrian Arab Republic was "a clear act of self-defence in accordance with Article 51 of the Charter."

For UNSC discussion of this issue including condemnation by Egypt, Sudan, Libya and the Arab League, see U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 2000-03 - Chapter XI, at 1013, <http://www.un.org/en/sc/repertoire/actions.shtml>.

⁹¹ Franck, *supra* note 66, at 55-6; DINSTEIN, *supra* note 6, at 206-7.

Angola and Namibia were unable to control or prevent.⁹² Portugal justified use of force over the 1960s and 1970s against several African states on the grounds that it was responding to terrorists operating from the territories of those countries.⁹³ In 1993, Iran bombed bases of a terrorist group located in Iraq. Iran informed the UNSC that the group in question had been responsible for attacks against Iran and the use of force was undertaken to prevent and suppress such attacks.⁹⁴ This was repeated in 1999⁹⁵ and again in 2000.⁹⁶

⁹² For the UNSC discussion of this issue and the near universal condemnation of the South African invocation of the right of self-defence, see U.N. Dep't of Pol. & Security Council Affairs, *Repertoire of the Practice of the Security Council 1985-88 – Ch. XI*, at 428-31, <http://www.un.org/en/sc/repertoire/actions.shtml>; GRAY, *supra* note 24, at 137.

⁹³ GRAY, *supra* note 24, at 136-7.

⁹⁴ Statement by Iran:

"By a letter dated 25 May 1993 addressed to the Secretary-General, the representative of the Islamic Republic of Iran reported that, in accordance with Article 51, the Islamic Republic Air Force had carried out an operation against the military bases located in Iraq of a terrorist group, where armed attacks against and incursions into Iranian territory had originated."

For UNSC discussion of this issue, see U.N. Dep't of Pol. & Security Council Affairs, *Repertoire of the Practice of the Security Council 1993-95 – Ch. XI*, at 1150, <http://www.un.org/en/sc/repertoire/actions.shtml>.

⁹⁵ Statement by Iran:

"[T]he representative of the Islamic Republic of Iran reported that terrorist groups from the territory of Iraq were operating along the Iranian border. He noted that, in response to those activities, and in accordance with its inherent right of self-defence enshrined in Article 51 of the Charter, his country took immediate and proportional measures, which were necessary for curbing and suppressing such aggressive activities. He further reported that the Iranian defence forces pursued the retreating armed groups that had attacked civilian targets in the border towns of Piranshahr, Mahabad and Oroumiyeh, and targeted their training camps in Iraq. He emphasized that while reserving its inherent right to self-defence in accordance with Article 51 of the Charter, Iran respected the territorial integrity of Iraq."

For the UNSC discussion of this issue, see U.N. Dep't of Pol. & Security Council Affairs, *Repertoire of the Practice of the Security Council 1996-99 – Ch. XI*, at 1178, <http://www.un.org/en/sc/repertoire/actions.shtml>.

⁹⁶ Statement by Iran:

Turkey has used force against Iraq in 1995 on similar grounds.⁹⁷ In 2008, Azerbaijan, in response to the continued Armenian occupation of Nagorny Karabakh, and the continued mounting of armed attacks by Armenians from within that territory reserved its right of to use force in self-defence against the Armenian terrorists⁹⁸ as well as against the illegal Armenian occupation.

"By a letter dated 15 February 2000 addressed to the Secretary-General, the representative of the Islamic Republic of Iran reported that terrorist groups from the Iraqi territory were operating along the Iranian border. He noted that Iran reserved its legitimate right to self-defence and would respond to such hostile acts if they continued. In a series of letters addressed to the Secretary-General, the representative of the Islamic Republic of Iran reported that members of the terrorist Mojahedin Khalq Organization, authorized by the Government of Iraq to be based on Iraqi soil, engaged in acts of sabotage against Iran. He stated that Iran considered intolerable the continuation of such hostile acts and reserved its right to legitimate self-defence and removal of any threats. By a letter dated 18 April 2001 addressed to the President of the Security Council, the representative of the Islamic Republic of Iran informed the Council that in response to the acts of terrorism committed by members of the terrorist Mojahedin Khalq Organization based in Iraq, the armed forces of Iran, in accordance with Article 51, took a "limited and proportionate defensive measure" against a number of that entity's bases in Iraq."

For the UNSC discussion of this issue, see U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 2000-03 – Ch. XI, at 1016, <http://www.un.org/en/sc/repertoire/actions.shtml>.

⁹⁷ Franck, *supra* note 69, at 63-4; GRAY, *supra* note 24, at 140-3.

⁹⁸ Letter dated 22 December 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, U.N. Doc. S/2008/812, at 10 (Dec. 24, 2008):

"Immediacy has not been recognized by the ICJ as a condition to the exercise of the right of self-defence. By contrast, some scholars believe that it is. All the same, immediacy does not present any real difficulty to the Republic of Azerbaijan in the present case, taking the view that, "although immediacy serves as a core element of self-defence, it must be interpreted reasonably". More specifically, the main factors here are: (i) Time consumed by negotiations (designed to satisfy the condition of necessity) does not count. (ii) The Republic of Azerbaijan actually commenced to exercise its right of self-defence as early as the summer of 1992 (shortly after the onset of the armed attack by the Republic of Armenia and without any undue time-lag). The fact that fighting was later suspended through acceptance of a cease-fire means that what is at balance today is not an initial invocation but a resumption of the exercise of the right of self-defence. (iii) In any event, when an armed attack produces continuous

It is thus clear that there is a significant amount of state practice in support of the pin-prick doctrine. At least nine states have invoked this doctrine in over twenty different instances dating over a period from the beginning of the Charter regime to the present day, and at least nineteen other states have endorsed these invocations. Nonetheless this practice may be found wanting on two grounds: it applies primarily to the use of force against NSAs, and all these cases also involve significant opposition to the use of force.

With regard to the question of NSAs, it might be argued that much of this practice involves the use of force against NSAs and therefore, to the extent that it is useful, it is useful only with regard to defensive uses of force against NSAs. This is untrue because in all of these cases, though force has been used against NSAs, the territorial integrity of the host state has been impugned, and the defence and criticism of the use of force has revolved primarily around the question of use of force against states.

With regard to the question of opposition of states, it may be argued that many states have criticised these instances of use of force as inconsistent with the legal limits of the right of self-defence. With the notable exception of the American invasion of Afghanistan in 2001, all of the cited instances have been criticised by several states and explicitly referred to as illegal. A more optimistic assessment of this state practice discussed should be preferred, for the following three reasons.

First, critical statements of states should be treated with caution. The reason for this is that the critical states do not

effects (through occupation) – and in the time that lapsed since the start of the armed attack the victim does not sleep on its rights, but keeps pressing ahead with (barren) attempts to resolve the conflict amicably – the right of self-defence is kept intact, despite the long period intervening between the genesis of the use of (unlawful) force and the ultimate (lawful) stage of recourse to counter-force. The Republic of Azerbaijan – as the victim of an armed attack – retains its right of self-defence, and can resume exercising it as soon as it becomes readily apparent that prolonging the negotiations is an exercise in futility. The duration of the right of self-defence is determined by the armed attack. “As long as the attack lasts, the victim State is entitled to react”. By responding to the continued armed attack by Armenia, Azerbaijan will not be responding to an event that occurred in the early 1990s. It will be responding to a present reality.”

necessarily possess the *opinio juris* required to transform their practice into accurate statements of customary international law.⁹⁹

To begin with, many of the critical states have themselves resorted to defensive uses of force in accordance with the pin-prick doctrine. For instance, Morocco condemned the UK action against Yemen, but itself reserved the right to use force against continuing threats from Algerian territory.¹⁰⁰ Similarly, Iran has regularly condemned Israeli uses of force against terrorist training camps in neighbouring countries,¹⁰¹ but carried out similar strikes in Iraq.¹⁰² The U.S.A.¹⁰³ and U.K.¹⁰⁴ have regularly engaged in uses of force justified in this manner, but still criticised similarly justified uses of force by South Africa.¹⁰⁵

Moreover, in many cases the opposition of states has been based on failure to comply with requirements of necessity and proportionality or other legal requirements of valid uses of defensive force.¹⁰⁶ This is largely because there are significant evidentiary difficulties associated with defending uses of force¹⁰⁷ and debates on particular uses of force are characterised by both sides claiming the right of self-defence and characterising the other as the unlawful aggressor.¹⁰⁸

⁹⁹ The possibility that all state practice does not necessarily reflect *opinio juris* is eloquently expressed by the ICJ in its judgment in Nicaragua, *supra* note 26, at ¶ 207:

"The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law."

¹⁰⁰ *Supra* notes 83-84 and accompanying text.

¹⁰¹ *Supra* note 88 and accompanying text.

¹⁰² *Supra* notes 94-96 and accompanying text.

¹⁰³ *Supra* notes 76-82 and accompanying text.

¹⁰⁴ *Supra* note 83 and accompanying text.

¹⁰⁵ *Supra* note 92 and accompanying text.

¹⁰⁶ GRAY, *supra* note 24, at 155: suggesting that evidence of condemnation "be interpreted as based strictly on the special facts of these cases."

¹⁰⁷ *Supra* note 54 and accompanying text.

¹⁰⁸ See, e.g., the UNSC discussion on the 1948 use of force between India and Pakistan in U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 1946-51 – Ch. XI, at 448-49, <http://www.un.org/en/sc/repertoire/actions.shtml>; the UNSC discussion of the 1958 French bombing of Sakiet-Sidi-Youssef in Tunisia in U.N. Dep't of Pol.

Finally, these condemnations are often motivated by ideological differences with the state using force. For instance, the universal condemnation of uses of force by Portugal and South Africa under the pin-prick doctrine were motivated by opposition to the colonial policies of Portugal and the racist regime in South Africa.¹⁰⁹ Similarly, the condemnation of Israeli action was largely by Arab states based on ideological differences.¹¹⁰

Second, the fact that so many states explicitly rely on the pin-prick doctrine (or its elements) should be granted extra significance. The reason for this is that states try and justify their uses of force by reference to the strongest, least controversial arguments, and their reliance on the pin-prick doctrine strongly indicates belief in the legality of their actions.¹¹¹

Third, most of this practice is from the pre-9/11 period. Arguably, the universal support for Operation Enduring Freedom

& Security Council Affairs, Repertoire of the Practice of the Security Council 1956-8 – Ch. XI, at 174, <http://www.un.org/en/sc/repertoire/actions.shtml>; Chadian allegations of aggression from Sudan in Letter dated 15 January 2008 from the Permanent Representative of Chad to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2008/21, at 1 (Jan. 15, 2008); Compare Letter dated 15 October 2008 from the Permanent Representative of Cambodia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2008/653, at 1-2 (Oct. 15, 2008) and Letter dated 16 October 2008 from the Permanent Representative of Thailand to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2008/657, at 2 (Oct. 17, 2008) for competing assessments of a use of force between Cambodia and Thailand in 2008; the UNSC discussion of the situation between Rwanda and the Democratic Republic of Congo in 2004 in U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 2004-07 – Ch. XI, at 173, <http://www.un.org/en/sc/repertoire/actions.shtml>; the UNSC discussion of the situation between Uganda and the Democratic Republic of Congo in U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 2004-07 – Ch. XI, at 174, <http://www.un.org/en/sc/repertoire/actions.shtml>; the UNSC discussion of the Russian invasion of Georgia in U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 2008-09 – Ch. XI, at 216, <http://www.un.org/en/sc/repertoire/actions.shtml>; the UNSC discussion of the situation in Cyprus in U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council 1985-8 – Ch. XI, at 428, <http://www.un.org/en/sc/repertoire/actions.shtml>.

¹⁰⁹ GRAY, *supra* note 24, at 139-40.

¹¹⁰ Many of the protesting states explicitly argued that Israel was the first aggressor and could not therefore rely on self-defence.

¹¹¹ GRAY, *supra* note 24, at 118.

demonstrates the beginning of a shift in state attitudes towards the pin-prick doctrine. This conclusion is reinforced by Reisman and Armstrong's 2006 survey of state practice finding that several states, including Taiwan, Russia, North Korea, Israel, India, Iran, France, China, U.K., Japan and Australia, recognised broad rights of pre-emptive self-defence against NSAs.¹¹² Pre-emptive self-defence is significantly broader than the pin-prick doctrine and support for the former may safely be assumed to imply support for the latter. The pin-prick doctrine clearly does not enjoy universal support. But it does enjoy considerable and credible support.

B. Support for the Pin-Prick Doctrine in Judicial Decisions

Four significant ICJ decisions which have discussed *jus ad bellum* question have implicitly recognised the pin-prick doctrine.

In the *Nicaragua* case, in reference to the attacks on Honduras and Costa Rica the ICJ remarked that the lack of information available to the court "renders it difficult to decide whether they may be treated for legal purposes as amounting, singly, or collectively, to an armed attack by Nicaragua on either or both states."¹¹³ Arguably the court implicitly allowed for the possibility of the pin-prick doctrine. In fact, Judge Schwebel's dissenting opinion specifically recognised the validity of the pin-prick doctrine.¹¹⁴

¹¹² Armstrong and Reisman, *supra* note 36.

¹¹³ Nicaragua, *supra* note 26, at ¶ 231.

¹¹⁴ Nicaragua – Schwebel, *supra* note 34, at 368-69, ¶ 213 (quoting Robert Ago):

"There remains the third requirement, namely that armed resistance to armed attack should take place immediately, i.e., while the attack is still going on, and not after it has ended. A State can no longer claim to be acting in self-defence if, for example, it drops bombs on a country which has made an armed raid into its territory after the raid has ended and the troops have withdrawn beyond the frontier. If, however, the attack in question consisted of a number of successive acts, the requirement of the immediacy of the self-defensive action would have to be looked at in the light of those acts as a whole. At all events, practice and doctrine seem to endorse this requirement fully, which is not surprising in view of its plainly logical link with the whole concept of self-defence."

Similarly, in the *Iranian Oil Platforms* case, the court was confronted with a claim by the U.S.A. that its use of force against Iranian naval vessels and oil rigs was justified as a response to a continuing pattern of attacks by Iran against U.S. flagged vessels.¹¹⁵ The court, assuming that the attacks could be attributed to Iran, posed the question of “whether that attack, either in itself or in combination with the rest of the “series of . . . attacks” cited by the United States can be categorized as an “armed attack” on the United States justifying self-defence.”¹¹⁶ The court concluded, however, that given the context of the alleged attacks (war between Iran and Iraq) it could not be conclusively established that the attacks, even if carried out by Iran, were targeted against the U.S.A.¹¹⁷ Thus, the court framed the question in terms of the pin-prick doctrine but avoided answering it by reference to evidentiary concerns.¹¹⁸ The court went on to state that it “does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the ‘inherent right of self-defence’,” but nonetheless rejected American claims of self-defence owing to lack of evidence. Admittedly, the court did not explicitly endorse the pin-prick doctrine.¹¹⁹ But the fact that the court framed the operative question in terms of the pin-prick doctrine (whether a series of attacks can constitute an armed attack) and conceded that a single attack could justify defensive use of force (seemingly at odds with the Nicaragua gravity requirement) at the very least tilts the balance towards acknowledgement of the pin-prick doctrine.¹²⁰

¹¹⁵ *Supra* note 79 above and accompanying text.

¹¹⁶ *Iranian Oil Platforms*, *supra* note 26, at 191, ¶ 64.

¹¹⁷ *Id.*

¹¹⁸ Raab, *supra* note 75, at 732 (2004).

¹¹⁹ Esther Salamanca-Aguado and Natalia Ochoa-Ruiz, *Exploring the Limits of International Law Relating to the Use of Force in Self-Defence*, 16 EUR. J. INT'L L. 499, 522-23 (2005).

¹²⁰ The judgment of the court as it relates to the international law rules on self-defence should however be relied upon with caution. Many of the separate and dissenting opinions attached to the main judgment of the court criticised the court for unnecessarily delving into the self-defence question and for violating the *non ultra petita* rule. Case Concerning Oil Platforms (Iran v. U.S.), Separate Opinion of Judge Owada, 2003 I.C.J. 161, at 306 (Nov. 6); Case Concerning Oil Platforms (Iran v. U.S.), Separate Opinion of Judge Buergenthal, 2003 I.C.J. 161, at 270-1, ¶ 3 (Nov. 6); Case Concerning Oil Platforms (Iran v. U.S.), Separate Opinion of Judge Kooijmans, 2003 I.C.J. 161, at 247, ¶ 3 (Nov. 6); Case Concerning Oil Platforms (Iran v. U.S.),

In the case involving *Armed Activities on the Territory of the Congo*, the Court held that "[t]he Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the [Democratic Republic of the Congo]."¹²¹ "Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces."¹²² Thus, once again, the Court acknowledged the possibility of the pin-prick doctrine, but stopped just short of explicitly recognising it based on evidentiary concerns. Judge Kooijmans, however, in his separate opinion, explicitly recognised the pin-prick doctrine.¹²³

In the dispute between Cameroon and Nigeria, Cameroon argued for a series of attacks by Nigeria to be considered cumulatively. The court didn't rule on the issue on the ground that the attacks hadn't been adequately imputed to Nigeria.¹²⁴

As with state practice judicial recognition of the pin-prick doctrine falls short of clear recognition of the pin-prick doctrine. This is primarily a result of the strict application of the court's *non ultra petita* rule.¹²⁵ But it does nevertheless provide strong support for the recognition of the doctrine.

Separate Opinion of Judge Parra-Aranguren, 2003 I.C.J. 161, at 244, ¶ 14 (Nov. 6); Case Concerning Oil Platforms (Iran v. U.S.), Separate Opinion of Judge Higgins, 2003 I.C.J. 161, at 239, ¶ 50 (Nov. 6). See also Raab, *supra* note 75, at 719 (2004).

¹²¹ Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C. J. 223, ¶ 146 (Dec. 19).

¹²² *Id.* at ¶ 147.

¹²³ *Id.* at ¶ 32 ("I am of the view that the series of attacks which were carried out from June till the beginning of August 1998, and which are enumerated in paragraph 132 of the Judgment, can be said to have amounted to an armed attack in the sense of Article 51, thus entitling Uganda to the exercise of self-defence. Although Uganda, during the proceedings, persistently claimed that the DRC was directly or indirectly involved in these attacks, the finding that this allegation cannot be substantiated and that these attacks are therefore not attributable to the DRC has no direct legal relevance for the question whether Uganda is entitled to exercise its right of self-defence.")

¹²⁴ ICJ Reports, 2002, e.g. land and maritime boundaries between Cameroon and Nigeria (Cameroon v. Nigeria), Judgment, 2002 I.C.J. 303, ¶ 323.

¹²⁵ See generally Alexander Orakhelashvili, *The International Court and 'its Freedom to Select the Ground Upon Which it Will Base Its Judgment*, 56 INT'L & COMP. L.Q. 171 (2007); H.E. Judge Peter Kooijmans, *The ICJ in the 21st*

III. The Pin-Prick Doctrine

The previous two sections have demonstrated the need for rationalisation of the Charter regime rules relating to self-defence, and the acceptance of the pin-prick doctrine in state and judicial practice. This section defines the pin-prick doctrine and defends its ability to rationalise Charter rules without weakening them.

The pin-prick doctrine operates to allow use of force in self-defence in response to a series of armed attacks, each possibly failing below the gravity threshold, but together constituting a continuing armed attack which meets the gravity threshold, and supports anticipation of a future threat, in order to deter that threat. The fact that this doctrine allows the use of defensive force in response to a series of individually insignificant attacks - pin-pricks, and that it permits the cumulative consideration of a series of attacks – accumulation of events, accounts for its strange names. To reiterate, the pin-prick doctrine does not support many uses of force currently outside the ambit of the Charter rules, but which are nonetheless legitimate. For instance, there may well be cases where pre-emptive self-defence is justified. But those uses of force cannot be justified by reference to the pin-prick doctrine. The pin-prick doctrine acquires relevance where the presence of past attacks can be invoked to demonstrate an objective future threat.

This much with regard to the pin-prick doctrine can be reliably derived from the state, judicial and academic practice reviewed in the previous section. There is little discussion, however, of the intricacies of application of this doctrine.¹²⁶

The following list of principles represents the author's analysis as to the practical operation of this doctrine:

- 1) First, there must be an armed attack.¹²⁷ Under the pin-prick doctrine, this requirement can be satisfied by a series of attacks which can together constitute a continuing attack. This

Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy, 56 INT'L & COMP. L.Q. 741 (2007).

¹²⁶ Oscar Schachter provides the most comprehensive analysis available on this issue, but focusing on uses of force against NSAs. SCHACHTER, *supra* note 25, at 167-73.

¹²⁷ *Supra* note 25 and accompanying text.

begs the question of how many individual attacks constitute a continuing attack? No definite *ex ante* answer can be provided on this point. It is possible to imagine 10 attacks being inadvertent and not representative of a pattern of attacks, but it is also possible to infer a pattern from just two attacks. This will have to be determined on the basis of the facts of each situation. Some factors which might be useful to consider are: number of attacks, time between attacks, intensity of individual attacks and explanation (if any) for the attacks. If years elapse between attacks, it is unlikely that a continuing pattern can be established. Similarly, 'frontier incidents' no matter how frequent are unlikely to indicate a continuing pattern of armed attacks. Again, if individual attacks can be reasonably explained as accidents or localised to specific provocation, they are unlikely to be amenable to construction as a continuing attack.

- 2) Second, the continuing attack must meet the gravity requirement.¹²⁸ The gravity requirement under the pin-prick doctrine does not apply to individual attacks, but to the continuing pattern as a whole. The substantive content of the gravity analysis will remain the same as it is under the traditional self-defence right.
- 3) Third, there must be a temporal connection between the attack and self-defence.¹²⁹ Under the pin-prick doctrine this requirement is modified in that defensive use of force is permissible on the basis of anticipation of a future threat. Again, it is difficult to stipulate *ex ante* what exactly satisfies this requirement. It is clear that this is not the same standard as that applied for anticipatory self-defence: that standard applies with regard to imminent threats.¹³⁰ The standard sought here derives certainty regarding the possibility of occurrence of future events from the fact of occurrence of past events. Thus, this requirement should be linked to the continuing armed attack requirement. If the latter can be demonstrated, the former may be presumed, though the presumption should be subject to rebuttal and scrutiny if it is

¹²⁸ *Supra* notes 26-31 and accompanying text.

¹²⁹ *Supra* notes 32-36 and accompanying text.

¹³⁰ *Supra* note 34 and accompanying text.

at all likely that the attacking entity might have ceased its continuing attack.

- 4) Fourth, the use of force must be necessary.¹³¹ The necessity analysis under traditional self-defence has two elements: no alternative to the use of force, and immediacy. The immediacy requirement is relaxed in this case.¹³² The defensive use of force need not be initiated in response to the attack; it may be commenced afterwards. But this relaxation is not infinite. On the facts the defensive use of force must be capable of being characterised as a response to an armed attack, rather than retaliation. The objective must be response and deterrence rather than retaliation or retribution. This is a subjective standard, but one that may be inferred from the facts.

The other aspect of necessity is the absence of alternatives to the use of force. This analysis will remain the same as under the traditional self-defence right: have all options for peaceful resolution been exhausted? But its importance is magnified in the case of the pin-prick doctrine. The threshold is already higher because force is not being used as a response to an on-going attack but a continuing attack, and thus the avenues for peaceful resolution are greater. But the necessity analysis can be used to reinforce the determination of whether there is a continuing armed attack and whether there is a credible future threat. If all peaceful options have been exhausted without success, this will undoubtedly bolster the conclusion that there is a continuing armed attack and it can be expected to recur in the future. For instance, using the example of the U.S.A. and the Taliban government in Afghanistan, use of force was initiated against the Taliban and against Al-Qaida forces in Afghanistan after all peaceful

¹³¹ *Supra* notes 40-41 and accompanying text.

¹³² GARDAM, *supra* note 7, at 151 points out that even in traditional self-defence, use of force need not necessarily be immediate. She points out that in the British use of defensive force in the Falklands conflict, and in the collective use of force in the first Gulf war, defensive uses of force were initiated well after the offensive force had ceased. I would argue, however, that in both those cases there was a continuing illegality (illegal occupation of land – in itself a use of force against territorial integrity) which the defensive use of force was responding to and therefore the immediacy requirement was, in fact, adhered to in those cases.

measures had been exhausted, reinforcing the notion that the U.S.A. was under attack from Al-Qaida, and that future attacks could be expected.

- 5) Fifth, the use of force must be proportionate. The substantive content of this analysis will remain the same as it is under the traditional self-defence right – no more force should be used than is necessary.¹³³
- 6) Sixth, the pin-prick doctrine deviates from traditional self-defence in three ways: gravity, immediacy and temporal connection. The gravity requirement is different in that it can be satisfied by the attacks construed together, rather than by each attack individually. The fact that defensive force can be employed after an attack has been completed and in response to an anticipated future attack represents a deviation from the traditional requirements of immediacy and temporal connection.
- 7) Seventh, in other ways the pin-prick doctrine is similar to traditional self-defence. The necessity and proportionality analysis, as well as the gravity analysis remain the same. Even though the legal test will remain the same, the context of its application will differ. For instance, the gravity test will now be applied to a series of attacks rather than an individual attack, but the contents of that test will remain the same. Similarly, the contents of the necessity analysis will remain the same – whether there is any other plausible alternative to the use of force - but will be applied in the context of a series of past attacks rather than a single attack. Engagement with the details of the necessity and gravity analysis is necessarily fact-specific and is not amenable to codification in a simple test. It is thus not considered in greater detail here. In any case, given that the analysis remains the same in traditional self-defence and in pin-prick self-defence, it is unnecessary to delve into those details here.
- 8) Eighth, the pin-prick doctrine is distinct from pre-emptive self-defence. There are two versions of pre-emptive self-defence in practice – one which anticipates a future threat on

¹³³ GARDAM, *supra* note 7 and accompanying text.

the basis of prior animosity, and one which anticipates a future threat on the basis of prior attacks.¹³⁴ Insofar as the latter's characterisation of prior attacks satisfies the future threat analysis required by the third point above, it is the same as the pin-prick doctrine being discussed here. Insofar as the past attacks do not support an inference of future threat, the past attacks are equivalent to mere past animosity, and functionally similar to the first version. The pin-prick doctrine is distinct from this first version – the use of defensive force in response to a possible future threat from an inimical entity.

The difference lies, first, in the assessment of past conduct. Pre-emptive self-defence as defined here requires hostility. The pin-prick doctrine requires a continuing pattern of armed attacks. Pre-emptive self-defence is akin to harming an enemy because you don't like him, and don't want him to gain an edge that might shift or alter the balance of power.¹³⁵ The pin-prick doctrine supports attacking an enemy because he has harmed you in the past and will do so again in the future. This is, in effect, a stronger necessity requirement. The second difference, arising from the first, is the probability of a future threat. The probability is greater in the case of the pin-prick doctrine because it is based on precedent instead of fear.

¹³⁴ The former is the classical 'hard case' example of pre-emptive self-defence. But in practice, invocations of the right of pre-emptive self-defence tend to resemble invocations of the pin-prick doctrine. Both the American use of force against Iraq in 2003 and the Israeli use of force against Iraq's Osirak reactor in 1981, classical examples of pre-emptive self-defence, in fact relied more heavily on characterisation of pre-existing hostilities and clashes than on pre-emption of a possible future threat.

¹³⁵ MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 80 (2nd ed., 1992) [hereinafter WALZER]:

"... there is a great difference, nonetheless, between killing and being killed by soldiers who can plausibly be described as the present instruments of an aggressive intention, and killing and being killed by soldiers who may or may not represent a distant danger to our country. In the first case, we confront an army recognizably hostile, ready for war, fixed in a posture of attack. In the second, the hostility is prospective and imaginary, and it will always be a charge against us that we have made war upon soldiers who were themselves engaged in entirely legitimate (non-threatening) activities. Hence, the moral necessity of rejecting any attack that is merely preventive in character, that does not wait upon and respond to the willful acts of an adversary."

This is, in effect, a manifestation of a stronger necessity requirement.¹³⁶

- 9) Ninth, the pin-prick doctrine is distinct from armed reprisals. Armed reprisals are characterised by retribution or retaliation. The pin-prick doctrine is characterised by deterrence.

The foregoing analysis is guilty of a certain deliberate vagueness. It has not provided exact meaning to concepts such as gravity, necessity and proportionality; nor has it specified an exact definition of continuing armed attack or future threat. The reason for this is that these concepts are not easily reduced to concise legal tests.¹³⁷ These are concepts which are assessed on the facts of individual cases and only general guidelines are possible. For instance, even with regard to well-established components of the right of self-defence, such as necessity, after at least 50 years of post-Charter practice, the test that has emerged is 'exhaustion of peaceful measures'. This test does not specify a list of peaceful measures, or when a particular measure may be said to be exhausted. But this is a general characteristic shared by all aspects of the right of self-defence.

As noted above, any doctrinal amendment to the right of self-defence should not just be suited to protecting the interests of individual states but should also fit the interests of the community of states, i.e. it should not excessively weaken the Charter regime. The pin-prick doctrine satisfies both those interests.

It satisfies state security interests by relaxing restrictions on defensive uses of force. Under *lex lata* states are vulnerable to attacks which fall below the gravity threshold. Under the pin-prick doctrine if the attack is part of a series of continuing attacks, each below the gravity threshold, but all collectively inimical to state security and sovereignty, defensive uses of force would be permitted. Under *lex lata* defensive uses of force that are not immediate are questionable under the necessity requirement. Under the pin-prick doctrine a delayed response against a continuing threat would be permissible. Under *lex lata* defensive uses of force are temporally constrained to responses to

¹³⁶ It is in this regard that 2003 American use of force against Iraq and the 1981 Israeli use of force against Iraq differ from the pin-prick doctrine.

¹³⁷ *E.g.*, DINSTEIN 207 (referring to anticipation): "The invocation of the right to self-defence must be weighed on the ground of the reliable information available (and reasonably interpreted) at the moment of the action, without the benefit of *post factum* wisdom."

on-going, imminent, or at best definite future threats. Under the pin-prick doctrine an anticipatory or even pre-emptive response would be acceptable provided the two requirements of continuing armed attack and future threat are met.

It satisfies collective security interests by making those relaxations contingent on the ability to establish a continuing armed attack. First, unlike the intelligence and confidential information which forms the basis of pre-emptive self-defence, information regarding past attacks can be shared with other states, assuming it is not already in the public domain. Second, sharing this information with other states and allowing them to assess the evidence to their satisfaction introduces a measure of transparency and objectivity. Third, reliance on prior attacks as a basis for defensive uses of force provides scope for oversight that is at least equivalent to that which is available with regard to traditional exercises of self-defence. Even when force is used in accordance with the traditional or strict right of self-defence, states are rarely able to agree on whether it is legal or not. Differences as to who attacked and who defended, whether the force was necessary, etc., regularly feature in debates regarding such uses of force,¹³⁸ and are not a function of the lack of clarity regarding the norms which govern the law of self-defence, so much as they are a function of the political nature of discussions regarding uses of force.¹³⁹

The introduction to this paper discussed the example of Fornjot, Janus and Telesto. That is a classic example of invocation of the pin-prick doctrine. In concluding this section it would be useful to consider some variations on that factual scenario to emphasize some of the arguments set out here.

In the absence of prior attacks, if Fornjot responds to an on-going attack, or to a declaration of attack, or confirmed information of an imminent attack, irrespective of whether it is using force against a state or an NSA, it would be validly exercising its traditional right of self-defence, subject to satisfaction of the other requirements of Art. 51.

In the absence of prior attacks, if Fornjot responds not to confirmation of an imminent attack, but hostile rhetoric or a

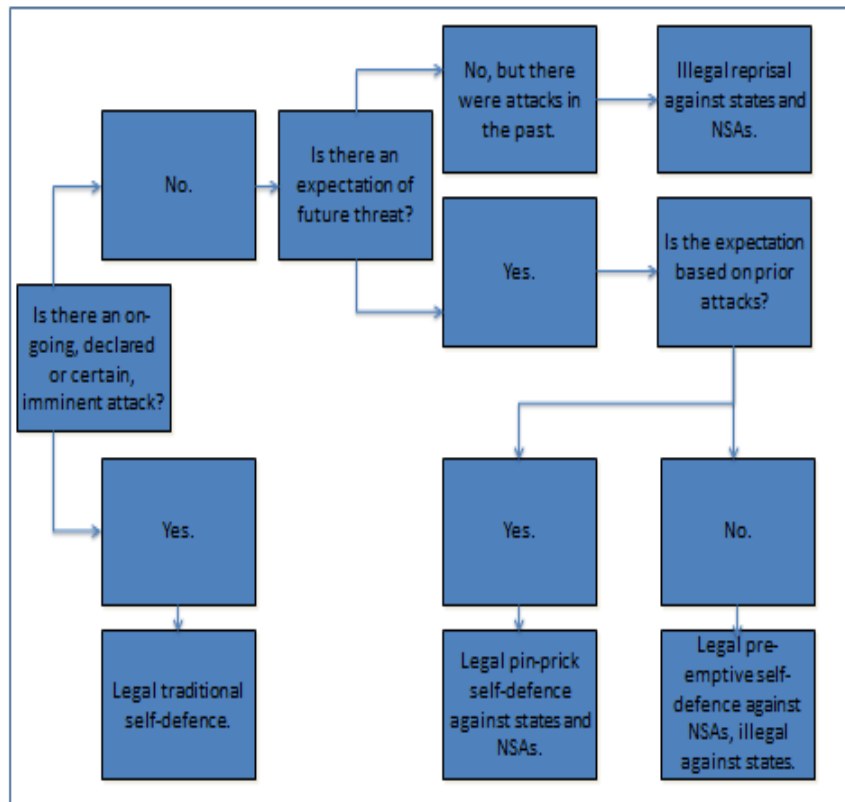
¹³⁸ *Supra* note 54 and accompanying text.

¹³⁹ WALZER, *supra* note 135, at 74: "These are questions of fact, not of judgment, and if the answers are disputed, it is only because of the lies that governments tell."

perception of threat, it would be engaging in lawful pre-emptive self-defence if it was responding to an NSA, and unlawful pre-emptive self-defence if it was responding to a state.¹⁴⁰

If there are prior attacks, but there is evidence to support the cessation of the threat, i.e., there is no future threat, irrespective of whether the target of the force was a state or an NSA, it would constitute an unlawful reprisal.¹⁴¹

The conclusions drawn from these examples can be summarised in the form of the following decision tree:



Decision Tree for Assessing Legality of Defensive Uses of Force, Assuming Fulfilment of Other Art. 51 Requirements

¹⁴⁰ Armstrong and Reisman, *supra* note 36, at 547-48.

¹⁴¹ In the absence of hostilities, even a hostile NSA cannot be the target of military action. It would instead have to be dealt with under a human rights and law enforcement framework. See generally David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Deference?*, 16 EUR. J. INT'L L. 171 (2005).

Conclusion

Regulating the ability of states to resort to the military instrument is simultaneously the primary function of international law and its greatest challenge. Regulating use of force is a primary function of international law because if states could freely resort to force the ideal of rule of law in international society would be impossible.¹⁴² At the same time, it is in this endeavour that international law is most frequently and justifiably criticised.¹⁴³ International law's failure to adequately regulate use of military force begs the question of the reason for this failure. Conceptually, there are two possibilities. One is that the rules are substantively inadequate: they are overly permissive and fail to adequately constrain states;¹⁴⁴ or they are overly restrictive and excessively constrain the ability of states to protect themselves.¹⁴⁵ The other is that problem lies not in the rules themselves but in their enforcement.¹⁴⁶

Both of these explanations play a role in the shortcomings of *jus ad bellum*. Historically, international law rules on the use of force have been challenged by a tension between the rights of states to safeguard their security and the interests of the international community in proscribing resort to the military instrument. The UN Charter regime on use of force balances this tension by maintaining strict control over the ability of states to use force, and protecting the security of states by creating a collective security mechanism. Unfortunately in practice the collective security mechanism – the UNSC – has been incapacitated by political considerations. At the same time, the strictness of rules regulating the ability of states to use military force has not been relaxed. This has created a situation where *jus ad bellum* rules are substantively flawed – because they are too restrictive and impair legitimate security interests, and

¹⁴² HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 64 (1933).

¹⁴³ *Supra* note 74 and accompanying text.

¹⁴⁴ One example of this is rules regulating use of force in the Covenant of the League of Nations. DINSTEIN, *supra* note 9, at 82-3.

¹⁴⁵ "International law is not a suicide pact." *Supra* note 5 and accompanying text.

¹⁴⁶ An example of this sort of issue is the difficulty associated with evidentiary issues relating to uses of force. *Supra* note 54 and accompanying text.

inadequately enforced – because of the failure of the UNSC, and dissatisfaction and proposals for reform are rampant.

In this context this paper suggested that given the obvious flaws in *jus ad bellum de lege lata*, there was a need for the rationalisation of international law rules relating to self-defence. But this rationalisation would have to first and foremost ensure that the use of force continued to be a last resort for states.

A possible candidate for a rationalising development in international law rules on self-defence is the pin-prick doctrine, which recognises the existence of a right of self-defence in response to a series of armed attacks, each possibly failing below the gravity threshold, but together constituting a continuing armed attack which meets the gravity threshold, and supports exercise of that right in anticipation of a future threat, in order to deter that threat.

An examination of state and judicial practice demonstrated that this doctrine enjoyed considerable, if not overwhelming and uncontested, support.

A closer examination of the pin-prick doctrine revealed that not only would it contribute to the rationalisation of *jus ad bellum* rules on self-defence, it would do so in a manner that was consistent with the restrictive approach to individual states' uses of force. It conformed to the interests of individual states by allowing them to use force in situations where necessity compelled military responses, but which are outside the scope of traditional self-defence. It conformed to the collective security interest by relying, as the basis for the permissibility of use on force, upon information that was easily shareable and could be used to objectively determine legality of use of force. At the very least, the pin-prick doctrine does not represent greater leeway for states to use force than available under *lex lata*.

There are other ways to rationalise self-defence rules, such as pre-emptive self-defence, but this paper focused on the pin-prick doctrine because it represents a clear and easy 'win': it enjoys a high degree of support and carries a low risk of misuse. The recognition and incorporation of the pin-prick doctrine in international law represents not the rationalisation of *jus ad bellum de lege lata*, but the beginning of that process.